In reference to a Inquiry into a charitable trust commissioned by the Attorney General of Western Australia under section 20 of the Charitable Trusts Act 1962 (WA)

REPORT ON
NJAMAL PEOPLE'S TRUST

Inquirer: Mr Alan Sefton, Deputy State Counsel

December 2018
FOREWORD – REPORT INTO THE NJAMAL PEOPLE’S TRUST

As Attorney General, I am responsible for the protection of charitable trusts. This is reflected in the supervisory powers conferred on me by law, including my power to conduct an inquiry under the Charitable Trusts Act 1962 (WA).

Charitable trusts can be established for purposes such as the relief of poverty, the advancement of education, the advancement of religion or for other purposes beneficial to the community. Funds held in charitable trusts may only be spent on the charitable purposes of the trust.

Soon after taking office in March 2017, I became concerned by the reports I received from the State Solicitor’s Office and others of allegations that some charitable trusts established for the purpose of assisting Aboriginal communities were affected by serious governance issues.

While Native Title has brought many positives for Aboriginal people, I am concerned that some of the communities which these charitable trusts were designed to assist are still blighted by poverty and disadvantage.

In May 2017, I decided to appoint, under section 20 of the Charitable Trusts Act, Deputy State Counsel for Western Australia, Mr Alan Sefton, to examine and inquire into, on my behalf, one of the Trusts about which I had concerns, the Njamal People’s Trust. This was the first inquiry of its type and it took longer than anyone, including Mr Sefton and those who assisted him, had expected. Mr Sefton’s report into the Njamal People’s Trust is a detailed analysis of one Trust and will be of assistance to the trustees of other charitable trusts who are grappling with similar governance issues.

The Charitable Trusts Act was enacted by State Parliament in 1962. Apart from some minor amendments, the supervisory powers of the Attorney General and the Supreme Court contained in Parts III and IV of the Charitable Trusts Act remain as originally enacted and have not been the subject of legislative review since their enactment.

In the same month that I ordered the Inquiry into the Njamal People’s Trust, I also commenced a review of the supervisory powers of the Attorney General and the Supreme Court with respect to charitable trusts.

Mr Sefton’s report into the Njamal People’s Trust highlighted some of the problems previously identified in the review and can be used to inform amendments to the Charitable Trusts Act. Mr Sefton’s recommendations for legislative change are directed towards modernising the Act and ensuring more rigorous oversight of those entrusted with the management of charitable trusts. My officers’ work on the proposed amendments is already at an advanced stage.

My authority under the Charitable Trusts Act is obviously limited to charitable trusts. However, it is important to recognise that other regulatory bodies such as the Australian Security and Investments Commission, the Commonwealth Office of the Registrar of Indigenous Corporations, and the Australian Charities and Not-for-Profit Commission, may have a role to play in relation to those charitable trusts or the persons involved in their management.
I would like to thank Mr Sefton for conducting this important Inquiry. I believe his report and recommendations will not only address specific matters concerning the Njamal People's Trust but will also make a valuable contribution to public policy development in the wider area of native title agreement-making and governance. Within days of receiving the final report in my office, I received a letter from Mr Sefton, a redacted version of which is published in the following pages.

The allegations contained in the letter are of very serious concern to me.

I have referred these allegations to the Australian Securities and Investments Commission for appropriate action as a matter of priority, and my correspondence has been acknowledged.

Once I am in receipt of further information, I will consider what further action I need to take in the exercise of my supervisory powers to ensure the best possible outcome for the Njamal People's Trust.

[Signature]
Hon. John Quigley MLA
ATTORNEY GENERAL
HON ATTORNEY GENERAL

INQUIRY INTO NJAMAL PEOPLE'S TRUST

Dear Attorney

Further to my report to you in respect of my inquiry into the Njamal People's Trust I write to draw the following recent developments to your attention as they may be relevant to your consideration of the matter.

I understand that ISPL, following severing of its links with Mr Carter, has quite recently terminated the services of several persons who had been contracted to perform services in connection with the Trust. I understand that this was further to the general review that ISPL was conducting, in part in response to foreshadowed possible recommendations in my report to you. It seems also that due to actual or perceived links between a number of those persons and Mr Carter, this may have influenced ISPL's decision to terminate their services as part of the organisational restructure.

It appears that this has generated considerable disquiet and, in turn, that there is a degree of misinformation or misunderstanding about the events leading to and associated with the termination of those contractors. [Redacted] contacted your office seeking an urgent meeting with you about events that had occurred. It seems they were under a misapprehension as to what steps had been taken and why, by ISPL. The Inquiry attempted to contact [Redacted] to invite [Redacted] to meet the Inquiry to discuss their concerns however were not successful and left a message for [Redacted] inviting him to contact the Inquiry. No further contact was received.

I note that [Redacted] also wrote to you on 24 October 2018 saying that he had been made aware that there is an "Aboriginal Elder led revolt against Director Andrew White for his handing (sic) of business and sacking of the Manager and staff at both Njamal Trust and ISPL".

Five days later, the Inquiry received a call from Mr Carter who mentioned the termination of various contractors and said, among other things, that he had been asked by the Njamal people to come back, that he didn't, but that he was "not going to abandon them".

Late last week [Redacted] contacted the Inquiry to express concerns about events that had occurred, including the termination of contractors, and questioning the actions of current management.
On the afternoon of Tuesday, 6 November 2018, Mr Beetham, a solicitor assisting the Inquiry, received a call from [redacted], requesting the solicitor meet with [redacted], to discuss matters relating to the Njamal People's Trust.

Mr Beetham met with [redacted] yesterday morning.

In essence, [redacted] expressed grave misgivings about recent events including steps apparently being taken to remove ISPL as Trustee of the Trust and instate a new trustee. In particular they are concerned about the involvement of Mr Carter in that process, the appropriateness of the process which has been followed by Mr Carter and those associated with him, and the potential consequences for the Trust, including in respect of solvency, if that occurs.

In essence they are concerned that:

- Mr Carter has recently been agitating for the replacement of ISPL (in relation to the Njamal People’s Trust) and ISPL-YN (in relation to the Yugunga-Nya People’s Trust) with companies called Empowered Njamal Pty Ltd and Empowered Yugunga-Nya Pty Ltd.

  I enclose company searches for those companies, and for Empowered Njamal Pty Ltd’s holding company, Empowered Communities Pty Ltd.

  You will note from the enclosures that Ms Jing Guo, who has generally been described to the Inquiry as Mr Carter’s assistant, has been appointed the sole director and secretary of each company. You will also note that Mr Richard Green, who also has connections with Mr Carter as discussed in my report to you, is the sole shareholder of Empowered Communities Pty Ltd (though potentially as trustee for some undisclosed entity or person), and that Ms Guo and Mr Matt Taylor are the shareholders, each to 50%, of Empowered Yugunga-Nya Pty Ltd.

- Inappropriate behaviour is taking place in relation to attempts to replace ISPL with Empowered Njamal Pty Ltd including:
  - sums of money and other incentives having allegedly been provided to members of the Trustee Advisory Committee in exchange for those members voting to replace ISPL with Empowered Njamal Pty Ltd;
  - members of the Trustee Advisory Committee being approached at home, rather than by way of circular resolution or at a properly convened meeting of the committee, for approval of a resolution to replace ISPL with Empowered Njamal Pty Ltd;
  - members of the Trustee Advisory Committee being told to sign a document which is explained to be a document for "sitting fees" but which is in fact a document purporting to record a resolution to replace ISPL (or ISPL-YN in the case of the Yugunga-Nya People’s Trust) as trustee.

- [redacted] are also concerned that, if Empowered Njamal Pty Ltd is appointed trustee of the Njamal People’s Trust, this would have a deleterious impact on the trust’s solvency. [redacted] in particular expressed the view that if this happened the Trust is likely to have "an insolvency event" by March 2019. In this respect, [redacted] suggests that if Empowered Njamal Pty Ltd
replaces ISPL as trustee then an audit of the accounts of the Trust should take place with a view to identifying the "reimbursement" of monies expended by Empowered Njamal Pty Ltd (and connected people/entities) on incentive payments and gifts made in pursuit of its attempts to removal ISPL.

I bring these matters to your attention as they may impact your consideration of the Report. It would appear that there are distinct parallels between these events and those involving the removal of AET which is considered at length in my report to you.

As I have reported to you, I do not intend to inquire into these allegations (absent a request to do so by you and steps being taken to ensure that I have continuing authority to so inquire given that I have reported to you). I do however draw them to your attention and note that Mr Beetham has also taken steps to inform ASIC and invite it to contact [REDACTED] in relation to their concerns.

Yours sincerely

ALAN SEFTON
INQUIRER
8 November 2018

Enc.
Report into the
Njamal People's Trust

Inquiry
under section 20 of the *Charitable Trusts Act 1962*

1 November 2018
Acknowledgements

I would like to extend my sincere gratitude to the Njamal People, including in particular the Njamal Elders, the members of the Trustee Advisory Committee, the Applicants, and other witnesses for their time, assistance and candour, as well as their considerable patience while the Inquiry has conducted its work. I would also like to thank the current and former Trustees, Abbott Native Title Trustees, formerly Abbott Trustee Services Pty Ltd (Abbott), Australian Executor Trustees Limited (AET) and Indigenous Services Pty Ltd (ISPL) for their assistance given over the course of the Inquiry.

It is my sincere hope that the delivery of this report to the Attorney General, and the recommendations contained within, will be of some assistance to the future management and administration of the Njamal People’s Trust, and to the Njamal People as they move forward in pursuit of their collective aspirations for their community.

Finally, I would also like to extend my sincere gratitude to the staff of the Inquiry, including Cheyne Beetham, Kathryn Cobbett, Fiona Cohen, Daniel Goncalves, Eugene Ashe and the numerous others who have assisted, together with Dr. Eric Heenan, for their tireless efforts and significant contributions, under often challenging circumstances, without whom the conduct of the Inquiry and the preparation of this report would not have been possible.

A. J. SEFTON
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Appendix B: Chronology of events in relation to requests by AET for information in relation to Njamal Mining Pty Ltd

Appendix C: The ASIC Delegate's Reasons for the Issue of the Disqualification Notice
EXECUTIVE SUMMARY

The Inquiry into the Njamal People's Trust (Trust) commenced in May 2017 and concluded in October 2018. Throughout that period the Inquiry considered thousands of pages of documents, met with dozens of individuals, and issued many requests for assistance both of a compulsory and voluntary nature, in order to obtain as best an understanding of the Trust as possible for an outsider.

In reviewing those documents, meeting with those people, and issuing those requests, the Inquiry has been guided by the terms of the Inquirer's instrument of appointment (a copy of which is attached at Appendix A), by the provisions of the relevant governing legislation, by the terms of the Trust Deed, and by the allegations made to the Inquiry by various people connected (to varying degrees) to the Trust.

Before turning to the key themes identified by the Inquiry it is worth noting that numerous different areas were considered during the course of the Inquiry, often in great detail. That was necessary in order to gain a true appreciation of the real issues and facts. While many topics received considerable focus, as the Report content reveals, it is convenient to note a few specific focus points. The Trust has been on foot since 2003. As a result, early in its work the Inquiry decided to focus its attention on the most recent years of the Trust's operation - generally speaking, from 2014-2018, the period of the transition from Abbott to AET to ISPL, with particular focus on the recent trusteeship of ISPL.

A second aspect that the Inquiry has focused on is the financial performance and position of the Trust and its internal governance and procedures over the course of the trusteeships of Abbott, AET and ISPL, again with a focus on ISPL. Particular attention was given to this during the latter part of the Inquiry as it was discovered, in piecemeal fashion, that the internal governance of the Trust, and the fluctuating nature of its cash flow, has not always been as robustly considered as one might expect of a charitable trust. It is of course, also important to recognise that in circumstances where one is concerned with an entity controlling funds on behalf of another – and in this case, that other is an entire community – issues of governance, prudence, cash flow and liquidity naturally loom large.

An additional matter upon which the Inquiry has spent some considerable time is the role of some of the key personalities involved in the Trust, including most significantly Ms Westerman and Mr Carter. Ms Westerman was a catalyst for the Inquiry and is someone about whom it seems views in the Njamal community are sharply divided, and Mr Carter has, for reasons expressed in detail in Chapter 6, not only been a central figure in the life of the Trust since early 2016 but is also the subject of a notice issued from the Australian Securities and Investments Commission (ASIC) disqualifying him from managing corporations.
EXECUTIVE SUMMARY

Thematic Overview

A number of themes emerged from the Inquiry’s work.

While it is difficult, perhaps impossible, to ascribe to those themes any hierarchy of primacy, five were returned to again and again, admittedly with some overlap.

The first is control: control by the Njamal People of their own destiny and control by certain people both Njamal and non Njamal of the Trust Fund. In both respects the desire for control – of the Trust Fund and of the direction of the Trust – has manifested most obviously in the changes to the trustee that have occurred throughout the life of the Trust. Notably, both the change from Abbott to AET and the change from AET to ISPL are characterised by issues of control. A brief history of these matters is set out in Chapter 2, with further detail coming in Chapter 3.

However, this is not the only way in which the theme of control has, in the Inquiry’s view, been manifested throughout the life of the Trust. Another way, equally striking, is the very strong views held by certain people – Njamal and non-Njamal alike – as to who should occupy positions of authority within the Trust, and what governance structures should apply. Ms Westerman presents as the most obvious personification of this theme, as is reflected in her role in relation to the replacement of Abbott and then AET (discussed in Chapter 3), her role in relation to Njamal Mining Pty Ltd (also discussed in Chapter 3) and her falling out with Mr Carter and ISPL (discussed in Chapters 4 and 5). Mr Carter is another obvious example of the personification of the theme of control, as is discussed in detail in Chapter 5, which is dedicated to Mr Carter, and somewhat more obliquely in Chapter 9 where the topic of conflicts is canvassed.

The second theme to which the Inquiry has returned again and again is tension: the tension between the desire of the Njamal People, and the current trustee ISPL, to use the Trust Fund to improve the economic position of the Njamal community through the development of commercial enterprise, and the strictures of the Trust Deed, the rules of equity and the proscriptions of statute, that restrict the ways in which the Trust Fund can be used.

That tension, which existed during the tenure of Abbott and AET (see Chapters 3 and 11), has increased with ISPL as the current trustee has a very different ideological approach to the management of the Trust when compared to its predecessors (see Chapters 6, 8, 9, 11 and 13). But that approach, and the tension brought with it, has understandably led to significant challenges for the current trustee, not only in respect of how it manages distributions or other applications from and of the Trust Fund, but also in respect of how it goes about ensuring that appropriate checks and balances – in effect, corporate and trustee governance – are maintained.

In the Inquiry’s view the fundamental difficulty facing ISPL in this respect is that, in effect, it has sought to operate in many respects like a commercial business and seek to support a
EXECUTIVE SUMMARY

wide range of commercial enterprise for the Njamal People, but is currently confined by the terms of the Trust Deed to operating a charitable trust for public benefit. That is no doubt one of the reasons why ISPL has, as of about February this year, been investigating ways in which the Njamal People can establish a Direct Benefits Trust, about which more is said in Chapter 9.

Also under the umbrella of this theme of tension is the corporate and other governance that has significantly suffered in many concerning respects. This has in part resulted from ISPL attempting to do many things at once; some might say too much. Its cause however seems to be more fundamental, including arising from a lack of insight and rigour from key personnel within ISPL to ensure that proper process is followed and not sacrificed in a bid to be seen to be making progress. These matters are addressed throughout the Report and in particular in some detail in Chapters 8 and 9, but include ISPL failing to:

- keep proper records of the minutes of meetings of directors as required by the Corporations Act 2001;
- properly document certain contractual arrangements;
- give, alternatively record, proper disclosures in relation to actual and potential conflicts of interest;
- coherently report to ASIC about corporate changes;
- at least until Mr White's engagement in August 2017, though even then it took some time to improve, ensure and document clear delineation of roles, organisational structure and lines of reporting and decision making; and
- fulsomely document the decision to make and the actual making of loans.

Lest it be said that oversights of this type can be excused as administrative sloppiness, the Inquiry notes that it is a requirement of both the law of corporations and the law of trusts, including specifically as set out in the Trust Deed, that accurate and complete records of the business of the Trust be maintained at all times. In the context of a charitable trust this assumes, in the Inquiry's view, heightened significance. Proper record keeping is vital for accountability and transparency and for any review – like the review undertaken by the Inquiry – to be carried out efficiently and with confidence in the underlying records and data.

ISPL's failures in this regard are significant, and though largely sought to be explained away by ISPL as the result of the tension alluded to above, the failure runs deeper and is far more concerning. The failures, including in the at times inadequate, inconsistent and unsatisfactory way ISPL has responded to the Inquiry, has been of considerable concern and delay to the work of the Inquiry. Aspects of the approach of the Trustee has also caused considerable disquiet amongst some members of the Njamal community and some of its own current or former directors and staff.

The third theme is change: change in how the business of the Trust has been done since 2003 to date, and change in how that business might best be effected in the future, including by way of amendments to the Trust Deed and the legislation which governs this area.
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As to the former, the most obvious change – and one which overlaps most clearly with the themes of control and tension discussed above – is the change in the way ISPL does business when compared to the previous trustees. Whereas Abbott and AET are sought to be characterised by ISPL as essentially passive funds managers, ISPL portrays itself as having a more active, commercially driven approach with a key aim to put the Trust Fund to work in an attempt to advance the economic position of the Njamal People and encourage intergenerational wealth. In principle, such an approach has much appeal. The energy, passion and commitment that ISPL, including its current and former directors and staff, many of whom are proudly Njamal, have brought to the work that it has done is to be commended. Some of the potential benefits of this approach are set out in some detail in Chapters 8 and 12.

However, there is no reward without risk, and a countervailing feature of ISPL’s approach is that it risks ISPL falling afoul of the strictures of the Trust Deed, and of putting significant strain on the cash flow position of the Trust. As discussed in Chapter 8, there have been periods in the history of ISPL’s tenure as trustee that the cash flow position of the Trust has been particularly tight. ISPL has also at times been less than candid in its acknowledgement of such issues. ISPL justifies its position on the basis that its expenditure and cash flow position has been carefully managed so as to ensure as much of the money of the Trust Fund is put to work generating returns as is prudent. The Inquiry does not accept that this has consistently been the case. As pointed out in Chapter 8 of the Report, amongst other things, there are material unexplained inconsistencies in certain cash flow information figures provided to the Inquiry when compared to underlying bank records. Also, ISPL has failed to provide certain relevant further information or documentation where requested. Given therefore the substantial sums expended by way of loan or distribution to Njamal Services Pty Ltd, in particular, the failure to provide detailed information in relation to the authorisation of those transactions, the Inquiry considers it important that ISPL cause a financial audit to be conducted of the financial statements of least Njamal Services Pty Ltd and Njamal Security Pty Ltd. The Inquiry, as set out below, strongly recommends that ISPL carefully review its aggressive approach to cash flow management and consider the introduction of a minimum liquidity level so as to ensure both that the Trust’s ability to meet the essential needs of the Njamal People via its usual distribution categories is not adversely delayed or otherwise affected. That is, after all, one of its primary purposes.

A further issue connected with this change is that it has come at a cost. While it is true that under ISPL the revenue flowing to the Trust has increased when compared to the revenue generated under previous trustees, so too have the costs of administering the Trust, dramatically. While many apparent reasons exist for the increased costs, and the increase does not of itself demonstrate financial mismanagement, the Inquiry is concerned that there be a careful review by ISPL of the costs being incurred and their sustainability with a view to ensuring that they are warranted and appropriately controlled.
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The fourth theme that emerges is outcomes – how they are defined, measured and achieved. The outcomes that ISPL seeks to achieve reflect a series of broad principles endorsed by the Njamal People. They are aspirational and targeted to identified areas of importance for addressing pressing needs and disadvantages and achieving future inter-generational success. They are largely representative of the outcomes sought to be achieved by many indigenous communities. However, the means by which those outcomes are sought to be achieved vary considerably. Trustees of the Njamal People's Trust have a broad discretion, allowing a wide range of approaches to be adopted in seeking to achieve the objects of the Trust. ISPL seeks to do so in a more proactive and engaged way than some trustees. That, of itself, should not be criticised, provided that funds are being invested and expended prudently and in compliance with the strictures of the Trust. Innovative approaches to address the far reaching disadvantage suffered by indigenous people should also not be discouraged. More financially conservative approaches also have their place however, including in ensuring that there is capital available to be distributed to and amongst the members of the Trust in pursuit of the Trust's charitable objects, and in ensuring that the capital is not put at risk of being diminished through risky or speculative investment.

Whichever approach is adopted it is important that the specific financial and non-financial outcomes sought to be achieved be identified and, where possible, measured. In purely financial terms that might be fairly straightforward. However, there are a wide range of social outcomes which might also be measured and, in some circumstances, that might be as, if not more, useful, than measures purely of financial performance. It has been suggested that reporting social outcomes should generally occur for trusts of this type and ideally be the subject of routine compulsory reporting along with the compulsory financial reporting that already exists. That is an area which warrants further consideration.

It is also important that if outcomes (financial and social) are set that they be realistic, and not create false expectations or set the Trust up to potentially fail or run into significant difficulties in continuing to fulfil its primary objectives. The outcomes also need to be measured fairly and consistently. In that respect, in the case of ISPL, the Inquiry notes that when questions of financial measurements of success were raised by the Inquiry, a common response was to the effect that much financial success was expected to be achieved subject to a question of timing and that initial high expenditure and losses during the ramp up phase was to be expected. That may well be the case but it does cause the Inquiry to pause before rushing to accept such statements, particularly given the extent of expenditure incurred to date. Indeed, the Inquiry notes that in a meeting with the Inquiry Mr Carter commented that on occasions he had painted too blue a sky to some people and it had not paid off and that had been his mistake which he would admit to. This comment from Mr Carter exemplifies the balance that must be struck, and which must always be borne in mind by trustees, between seeking successful financial and social outcomes, not overstating potential outcomes and risking...
expectations being created but not met and adopting appropriately prudent and conservative financial outlooks.

A final theme is self-interest; an ever-present risk to guard against in this area. Whether the self-interest of those who may operate trusts and seek to profit, the self-interest of persons with whom they might contract, or the self-interest of individuals and families who may understandably seek to encourage decisions that will serve their own, rather than collective, self-interest. Trustees, in particular, need to be vigilant, as do their advisory bodies, to avoid self-interest and ensure that they at all times act without conflict.

In the Inquiry's view a valuable outcome of the Inquiry has been the apparent recognition, particularly by ISPL, that it could, and in the Inquiry's view should, have done things better and its apparent commitment to now seeking to do so. In this respect its solicitor has informed the Inquiry that change is happening and further change is on the horizon.

As to change that is happening, ISPL informs the Inquiry that it has restructured its business, that Mr Carter's role has been terminated, and that an independent Chief Executive Officer has been engaged to run the trust side of the business, with one of ISPL's directors (Mr White) running the "commercial" side. As to change which is on the horizon, the Inquiry has been informed that ISPL are taking advice about and discussing with the Njamal community the prospect of amending the Trust Deed to remedy some of the issues raised by the Inquiry and to remove ambiguity in its current drafting. In this the Inquiry supports that initiative: the Trust Deed is an old document now – it was drafted at latest in 2003 – and it has not aged well. Change is needed, to clarify roles and responsibilities, and to ensure the Trust is properly and transparently managed.

The Inquiry too has views on change, though predominantly of a legislative kind. One suggestion, of the introduction of regulatory criteria and powers in relation to persons involved in the affairs of a charitable trust, including possibly suitability criteria such as a "fit and proper person" test, is addressed in part in the chapter on Mr Carter, Chapter 5 and primarily in a discrete chapter on the topic of legislative reform, Chapter 13. In a legislative sense the theme of change extends beyond simply the direct regulation of charitable trusts; the Inquiry also suggests changes to how future inquiries of this nature might be better empowered, and rights and interests protected, to provide a more efficient and effective inquiry process. The Inquiry identifies legislative mechanisms that could be used to facilitate such an approach. In this respect the Inquiry notes that unlike other inquiries – for example, Royal Commissions under the Royal Commissions Act 1902 and inquiries under the Public Sector Management Act 1994 – the legislative regime for inquiries under the Charitable Trusts Act 1962 is relatively sparse. This too has led to delays to the Inquiry's work.

Having set out a thematic overview of the issues with which the Inquiry has had to grapple, the balance of this Executive Summary comprises summaries of each Chapter of the Report, before concluding by setting out all of the Inquiry's recommendations.
Chapter Summaries

This Report comprises 13 Chapters.

The first two Chapters of this Report are introductory in nature.

Chapter One provides the reader with background to the Inquiry, including the appointment of the Inquirer, the nature of the Njamal People's Trust, the role of the Attorney General in connection with charitable trusts and his powers under the Charitable Trusts Act 1962. It then sets out an overview of the Inquiry including the approach it has adopted to its work, the nature and role of charitable trusts, some of the relevant governing law and the duties of trustees.

Chapter Two provides the reader with background to the Njamal People, the role and influence of native title, a general overview of the four trustees that have had custody of the Trust Fund and an introduction to Sharon Westerman, whose complaints to the Attorney General in late 2016 and early 2017 were a catalyst for the Inquiry.

Chapters Three to Twelve are substantive Chapters, dealing with the range of issues that arose during the course of the Inquiry.

Chapter Three details the history of the appointment and removal of the former trustees of the Trust, being Mr Byers, Abbott, AET and, most recently, ISPL. Of particular note, in Chapter Four the Inquiry considers the role of Ms Westerman in the appointment and removal of Abbott, AET and ISPL, and the involvement of Mr Carter in the removal of AET and the appointment of ISPL. The Inquiry ultimately finds that Ms Westerman was a central figure in the removal of both Abbott and AET and was strongly driven by a motivation to effect changes which would result in Njamal People achieving self-governance and primary control over their own financial future and activities, with herself having a significant role.

Chapter Three also contains a narrative and analysis of Ms Westerman's involvement in Njamal Mining Pty Ltd, a company wholly owned by the Trust, her removal from the Board of that company, and the concerns raised by AET, ISPL, Mr Coad (a former independent director of Njamal Mining Pty Ltd appointed by AET) and Messrs Parker and Eaton (the current directors of Njamal Mining Pty Ltd) about alleged mismanagement of that company under Ms Westerman's watch and her refusal to supply documents to them when requested to do so.

The narrative about Njamal Mining Pty Ltd is connected to, and largely dovetails with, the narrative about AET's removal, as at about the same time as AET was seeking to obtain information from Ms Westerman in relation to Njamal Mining Pty Ltd, Ms Westerman agitated for the removal of AET as trustee of the Trust. Ultimately, the Inquiry concludes that AET had a proper basis for seeking the material it sought, and for removing the Board of Njamal Mining Pty Ltd when it did, and that Ms Westerman was in part influenced in her calls to remove AET as trustee of the Trust by the steps AET was itself taking. Ms Westerman had a significant
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financial interest in remaining as Managing Director of Njamal Mining Pty Ltd. She has since pursued claims for alleged losses against not only that company but also Njamal Services Pty Ltd, Mr Carter and Mr Parker. The failure to resolve her initial claim was one of the factors that contributed to their later parting of ways. While Ms Westerman had a number of legitimately held concerns about aspects of the operations of Abbott and AET, some were largely philosophical differences about appropriate approach and many were not considered by the Inquiry to be made out or to be matters involving any question of breach of duties or responsibilities as trustee.

As to the concerns raised by ISPL and the current directors of Njamal Mining Pty Ltd in relation to alleged mismanagement of the company by Ms Westerman, the Inquiry broadly considered those concerns but did not separately investigate them. It concludes on the face of the materials before it that Njamal Mining Pty Ltd has previously been poorly managed and that legitimate concerns were held and pursued in relation to aspects of the expenditure that had been incurred. For reasons including matters currently the subject of both criminal and civil proceedings in the courts of Western Australia, the Inquiry does not make any specific findings in respect of Ms Westerman's actions in connection with Njamal Mining Pty Ltd. It is apparent that ISPL has been contemplating pursuing proceedings against AET in connection it would seem with an allegation that they should have acted earlier on alleged issues in relation to Njamal Mining Pty Ltd. Insofar as it might propose to take such action, the Inquiry recommends that to avoid any perception that any such action is motivated by any reason other than the proper discharge of its duties as Trustee, consideration be given by ISPL to seeking directions from the Supreme Court in relation to whether it would be justified in pursuing that course, prior to any such proceedings being commenced.

This Chapter also examines the early involvement of Mr Carter with the Trust after he was introduced to Ms Westerman in about early 2016. The Inquiry finds that he initially became involved in an advisory role in connection with Ms Westerman's disputes with AET and her and other persons' attempts to remove AET as Trustee. It also examines the funding arrangements entered into through which Mr Carter, via Esplanade Holdings Pty Ltd, a company associated with him, substantially funded a range of activities, including for community and other meetings and other expenditure associated with the removal of AET, the appointment of a new trustee and transition activities. Aspects of both Mr Carter's and Ms Westerman's involvement in steps taken to remove AET and appoint a new trustee, originally proposed to be Perpetual Limited and later ISPL, are also considered, as is the eventual formal appointment of ISPL as Trustee on 12 May 2016.

In Chapter Four the Inquiry tracks the broad outline of ISPL's trusteeship, particularly during its first 6 months, during which time it engaged in substantial activities, initially in conjunction with Ms Westerman, to implement a new direction for the Trust and Njamal People. It examines the events and reasons leading to the acrimonious separating of ways during that period between Ms Westerman and some of her supporters and Mr Carter, ISPL and the
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majority of Trustee Advisory Committee (TAC) members. This triggered Ms Westerman lodging a series of complaints with the then Attorney General in relation to the management and administration of the Trust. Those events and the fallout from them provide important context to understanding allegations that have been made and subsequent events and ongoing acrimony.

While difficult to determine the precise reasons for the schism, the Inquiry finds that they included:

- the decision by ISPL (which effectively occurred following a focus group meeting on 7 September 2016 and was then endorsed by the TAC) to establish a structure fundamentally at odds with the structure that had been supported by the community and ISPL when it was first appointed (involving Njamal Nation Pty Ltd) and which was central to the vision of Ms Westerman for Njamal for self-governance and control of its own destiny, leading to a deep and enduring sense of betrayal;

- the manner in which that change of direction occurred did not involve full and open communication with all TAC members and involved at times inappropriate exclusion of Ms Westerman and others from aspects of the discussions including her purported suspension from the TAC meeting in October 2016;

- growing loss of support for Ms Westerman from the majority of the TAC;

- growing reservations in relation to Ms Westerman's involvement including concerns in relation to the level of control she appeared to some to want and increasing divisiveness associated with the Njamal Nation branding;

- concerns about approaches by Ms Westerman to mining companies creating confusion about who represented the Trust and Njamal People and concerns given past negative involvement between Ms Westerman and certain mining companies;

- an increasing awareness of concerns in relation to Ms Westerman's actions in relation to Njamal Mining Pty Ltd and use of its funds;

- the pursuit by Ms Westerman of claims against Njamal Mining Pty Ltd which were not settled and other claims for recompense; and

- Ms Westerman's involvement in establishing competing corporate structures after ISPL moved away from the originally agreed vision involving the structure associated with Njamal Nation Pty Ltd.

- In this Chapter the Inquiry first notes what is to become a common theme of its consideration of ISPL; that many documents created by ISPL and provided to the Inquiry were deficient including, for example, a failure to create and maintain finalised, signed minutes of all meetings of directors and to document all decisions or resolutions of the Board.
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Other significant events considered in Chapter 4 include that:

- at the first meeting of the directors of ISPL it was agreed that:
  - the directors would oversee certain discrete aspects of the business (e.g.: Mr Parker would oversee financial matters, Mr Aird would oversee native title and heritage, Mr Cullity would oversee contracts and legal, and Mr Carter would manage the Distribution Policy and the day to day management of the business);
  - the directors would be engaged through their corporate vehicles (i.e.: Mr Carter through Esplanade Holdings Pty Ltd, later Esplanade Consultancy Pty Ltd, Mr Parker through Northpoint Nominees Pty Ltd (later Parkers BCA Pty Ltd), Mr Aird through Geographe Strategies Pty Ltd, and Mr Cullity through RMOB Pty Ltd);
  - administrative and support staff could be engaged through Mr Carter's corporate vehicles (Esplanade Holdings Pty Ltd, later Esplanade Consultancy Pty Ltd);
  - the Trust would establish an Office in Hedland (initially South Hedland, before a move to Port Hedland);

- very shortly after ISPL's appointment, on 24 May 2016, the retainer of YMAC as solicitors for the Applicants in the Njamal Federal Court Native Title proceedings was terminated, leading ISPL to take responsibility for funding those proceedings, at significant cost to the Trust;

- terms of remuneration were signed on behalf of ISPL and the TAC in about May 2016 and November 2016, although there are certain issues about the signing of those documents and their legal effectiveness; and

- a number of attempts to remove ISPL as Trustee were instigated by Ms Westerman in 2017 and at least one attempt to do the same was instigated by Mr Mitchell in early 2018, though none of those attempts was successful.

The Inquiry also makes a recommendation in relation to possible amendment to the Trust Deed and TAC Rules to address identified issues in relation to when and how one or more TAC members may cause a meeting to be convened to consider the removal of a Trustee.

Chapter Five is about Mr Carter, a central figure in the recent history of the Trust. Chapter Five begins by setting out the initial engagement of Mr Carter by ISPL, before moving to address the background to, and the reasons given for, the issue by ASIC of a notice to Mr Carter disqualifying him, with effect from 31 July 2017, from managing corporations for a period of 4 out of a maximum possible 5 year period. That material is of significance to the Inquiry's consideration of the appropriateness of Mr Carter having continued involvement in
the affairs of the Njamal People’s Trust, or any other charitable trust. It also feeds into later recommendations in Chapter 13 about statutory reform of the Charitable Trusts Act 1962 to empower the Supreme Court to preclude the employment or engagement of a person in the affairs of a charitable trust for reasons including if it there has been any misconduct or mismanagement in the administration of the charitable trust or it is necessary or desirable for the purpose of protecting existing or future trust property or securing a proper application, for the purpose of the charitable trust, of existing or future trust property.\(^1\) The possibility of wider regulation and incorporation of a suitability or “fit and proper person” test akin to the test in other regulatory frameworks is also considered.

The Inquiry also finds that Mr Carter did not, prior to ISPL’s appointment on 12 May 2016, tell the TAC and all his co-directors about the ASIC show cause notice issued to him on 19 February 2016 in relation to whether he should be disqualified from managing corporations. It concludes that it would have been highly desirable for him to have done so prior to the TAC resolving to appoint ISPL in May 2016. That would have ensured that the TAC and Mr Carter’s co-directors were fully informed and avoided any sense of them having been misled by omission. The Inquiry also concludes that not all TAC members were made aware by Mr Carter of the subsequent disqualification notice (Disqualification Notice) having been issued by ASIC (which occurred on 20 July 2017) until sometime in 2018.

The Inquiry then goes on to consider Mr Carter’s role at ISPL following the issue of the Disqualification Notice, and sets out in some detail a number of chains of correspondence and matters in which Mr Carter had involvement.

Further, the Inquiry makes findings in relation to Mr Carter’s role including, significantly, that while certain steps were taken by ISPL to limit the role, responsibilities and authority of Mr Carter, in practice, irrespective of the title that may have been conferred on him from time to time, and despite having been issued the Disqualification Notice, Mr Carter continued to be conferred by ISPL with significant and influential roles, responsibilities and authorities in relation to the management and administration of ISPL as Trustee of the Trust, for the period from 1 August 2017 until April 2018, and at least until September/October 2017 exercised those roles, responsibilities and authorities. The Inquiry also makes findings that ISPL failed to carefully assess whether, in the circumstances of the issue of the Disqualification Notice, and matters such as the serious concerns expressed by Mr Aird and Mr Parker in relation to Mr Carter’s involvement, and other issues identified elsewhere in the report in relation to Mr Carter’s conduct and approach, it was appropriate for Mr Carter to have any ongoing role, and, if so, what role, in relation to the Trust.

\(^1\) See for example the power of the Supreme Court of New South Wales set out in section 7(2) of the Charitable Trusts Act 1993 (NSW).
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It finds that ISPL also failed to ensure that if any agreement was entered into in relation to Mr Carter having any ongoing role in relation to the Trust:

- the agreement was clear, transparent, documented and limited the roles, responsibilities and authorities of Mr Carter to ensure that they were consistent with the legal effect of the Disqualification Notice; and

- clear controls were put in place to monitor and control Mr Carter's activities including by way of regular records being maintained of his activities, such as time sheets; regular direct supervision of his activities by a designated person above him in the organisational hierarchy; ensuring all decisions in relation to the Trust's management and operation and the person who authorised them were clearly and routinely documented.

The Inquiry also finds that ISPL's director, Mr White, prior to April 2018 ought to have, but was not prepared to, and did not, make sufficiently significant changes to the corporation structure diagrams or authorisation matrixes to limit the roles, responsibilities and authorities conferred by ISPL on Mr Carter.

The Inquiry then considers certain aspects of Mr Carter's interpersonal style and also considers a number of varying allegations concerning Mr Carter's conduct at various points throughout his time with ISPL. In respect of those matters, the Inquiry ultimately finds that most of the discrete allegations made against Mr Carter are not, on the materials available to the Inquiry, substantiated. It nonetheless expresses concern about the sometimes aggressive, combative or hostile tone or approach of Mr Carter in communications when a person with whom Mr Carter is communicating adopts contrary positions or questions his or ISPL's actions. It also raises concerns in relation to Mr Carter's apparent lack of insight and reflection in relation to various concerns of the Inquiry.

The Inquiry also considers the reasons for Mr Aird's resignation as a director of ISPL in October 2017, and finds that the reasons given to the Inquiry by Mr White for ISPL, in January 2018, for Mr Aird's resignation were misleading, principally by omission, in that they did not disclose issues such as Mr Aird's concerns about Mr Carter's actions, inadequate governance, potential exposure to liability as a director (in the context of concerns as to whether the proposed role of Mr Carter would be inconsistent with limitations on his ability to manage corporations, in respect of which legal advice had been obtained) and Mr White's disinclination to agree to further changes including to the authorisation matrix and corporate structure diagrams, which were central to his decision to resign.

The Inquiry further finds that a tension existed within the management team of ISPL between certain members who had an apparently greater appetite for risk in respect of expenditure on projects and investments and more optimistic views of potential returns (Mr Carter in particular and, to a lesser extent, Mr White) than other members such as Mr Parker, Mr Aird...
and Mr Mack. This led at times to some robust communications and internal disharmony and underpinned some of the governance issues.

Ultimately, having regard to the following, and from a protective not a punitive point of view, in the Inquiry's view there is sufficiently strong cause for concern if Mr Carter, at least during the term of the Disqualification Notice, were to resume or otherwise assume any material role in relation to the affairs of the Njamal People's Trust or any other charitable trust, that he should not be permitted to do so. That conclusion is reached having regard to matters including:

- the consequences of the Disqualification Notice in terms of Mr Carter being prohibited from managing corporations and being a responsible person in relation to charitable trusts for a four year period out of a maximum possible 5 year period of disqualification;

- the immediately preceding findings, and other findings made in the Report, in relation to the conferral on Mr Carter by ISPL of significant and influential roles, responsibilities and authorities in relation to the management and administration of ISPL as Trustee and the Njamal People's Trust, for the period from 1 August 2017 to April 2018, and his exercise of those roles, responsibilities and authorities until at least September/October 2017 (including the examples itemised and, for example, his attendance at the Review Workshop and role on the management committee and his instructing of Mr Green in relation to the removal of Mr McPhee as a director of Njamal Services Pty Ltd, as discussed in Chapter 8 below); and

- the serious concerns raised by Mr Aird and Mr Parker in mid to late 2017 regarding Mr Carter's conduct, and the fact that those concerns contributed to or caused Messrs Aird and Parker to resign as directors of ISPL.

The Inquiry also points to various other matters which in its view support this conclusion. In addition, if the reasons given by the ASIC Delegate for the issue of the Disqualification Notice themselves are then taken into account, and absent that decision having been set aside (and recognising that the decision and the reasons for it are disputed by Mr Carter and have not been subject to separate review and findings by the Inquiry), the above causes for lack of confidence are, in the Inquiry's view, only strengthened.

Having considered the major personalities involved in the recent history of the Trust, Chapter Six returns to more routine matters, and is largely expository as it tracks the corporate structures adopted by the various Trustees. However, while expository, this Chapter remains important for at least two main reasons. First, it is relevant to understanding the sometimes complicated structures and corporate histories, included activities, directorships and shareholdings, of many entities discussed later in the Report. Second, it clearly highlights the divergent approaches to the administration and management of the Trust adopted by Abbott, AET and ISPL. In particular, it highlights the commercial focus of the latter in comparison to
the more "traditional" approach followed by Abbott and AET, exemplified by the establishment and funding of a number of related entities, including perhaps most importantly Njamal Services Pty Ltd. That is the vehicle through which commercial opportunities have been pursued, including as part of a joint venture, called the Njamal People's Joint Venture or NPJV, and into which significant Trust Funds have been transferred. Observations are also made in relation to challenges for indigenous communities in establishing appropriate structures to best assist them achieve their future ambitions.

In Chapter Seven the Inquiry sets out an overview of the terms of appointment and remuneration of Abbott, AET and ISPL. Three matters of particular significance are canvassed in this Chapter. The first is the restriction in the Corporations Act 2001 as to the fees that can be charged by a licensed trustee company (which AET is, and was at the relevant time) and whether an unincorporated body like the TAC, which has no legal status, can sanction fees beyond those set out in the Corporations Act 2001. In that respect the Inquiry makes no findings but recommends that if AET is trustee of any similarly worded trust instruments it obtain legal advice, if it has not already done so, as to whether the TAC or any similar group of persons actually have authority to deal with the trustee on matters relating to the provision of the service such that it may agree to charge fees outside of those provided for under Part 5D of the Corporations Act 2001.

The second significant matter addressed in Chapter Seven is the unsatisfactory position in relation to the documentation of the engagement/fee agreements entered into between the TAC and ISPL. Recommendations are made in relation to improving practices.

The third significant matter raised concerns the engagement/fee agreements and whether the TAC has the capacity to execute agreements binding on and enforceable by the TAC and the Trustee. Ultimately the Inquiry finds that as the TAC has no independent legal status, it cannot as a matter of law contract in the way it has purported to do so. Notwithstanding this matter, the Inquiry is supportive of documents like the November letter agreement, insofar as they act as fee disclosures provided to the TAC so as to inform any TAC's decision to appoint or replace a trustee, provided it is made clear that they are not binding contracts. That is subject to the relevant trustee – including, in particular, ISPL - clearly drafting and explaining the documents as fee disclosures rather than contracts, as the latter carry notions of enforcement which can have a chilling effect on a TAC which might otherwise wish to consider replacing an incumbent trustee. Recommendations are made in relation to reviewing existing arrangements in relation to charging fees and possible amendments to the Trust Deed.

Chapter Eight is the largest Chapter in the Report and is concerned with the Trust's financial position, performance and management. Some of the key issues considered in Chapter Eight include:

- the Trust's historical and current overall financial position;
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- the income generated and expenses incurred by each of Abbott, AET and ISPL;

- the payment by ISPL of over $250,000 to Esplanade Holdings Pty Ltd as reimbursement for expenses incurred by Esplanade Holdings Pty Ltd prior to ISPL's formal appointment on 12 May 2016 in relation to the assistance provided by that company to Ms Westerman and others, principally in connection with the convening of meetings, removal of AET and the eventual appointment of ISPL as Trustee, and transitional costs;

- the issues raised by the auditor in audit reports, and ISPL's response or lack thereof to those issues;

- ISPL's power to loan funds by way of distribution, including to its related entities and in particular to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust;

- the circumstances and appropriateness of the payment of sitting and signing fees, including in particular signing fees in relation to the Pilgangoora agreements executed by the Applicants and Pilbara Minerals Limited, and the Applicants and Altura Mining Limited and Altura Exploration Limited;

- ISPL's failures in respect of documentation, process, governance and controls, in relation to a wide range of matters including:
  - ASIC notifications;
  - the keeping of signed and endorsed minutes of the meetings of directors;
  - a range of contracts; and
  - changes in the directorship of Njamal Services Pty Ltd in September 2017;

- ISPL's decision, including the prudence and commerciality of that decision, to invest $1 million, comprising the purchase of a 51% shareholding in Indigenous Carbon Group Pty Ltd for $500,000 and a $500,000 loan to Goldfields Carbon Group Pty Ltd, in carbon farming projects that as yet have not for various reasons materialised.

Having considered these issues, amongst others, the Inquiry reaches a number of findings, including that:

- it is open to ISPL, as Trustee, to adopt a significantly different approach to expenditure of Trust Funds than commonly occurs under more traditional trustee models which use a more conservative passive investment approach;

- ISPL adopted an at times overly ambitious program of expenditure and 'making Trust money work' without sufficiently strong controls to manage expenditure and accommodate the uncertainty of future cash flow projections; the approach of ISPL...
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had limited flexibility to accommodate the risk of cash flows not occurring as predicted;

- ISPL was reticent to acknowledge to the Inquiry what, self-evidently was, for a not insignificant period in 2017 moving into 2018, a tight cash flow position;

- while there was a significant increase in gross income earned by the Trust in 2016/17 (e.g.: under ISPL), it was accompanied by a large corresponding increase in expenses, such that the net income earned was lower than the previous year and approximately the same as for the 2014/15 financial year;

- in respect of signing fees:
  - while the payment of signing fees is generally known and spoken about in sections of the mining industry and community and certainly are not secret, it is unclear to the Inquiry whether the Njamal community specifically endorsed by way of fully informed resolution the payment of signing fees to Applicants and others in respect of the Pilangoora agreements; and
  - the Inquiry has significant difficulty in accepting that the Trustee is in any event permitted, under the terms of the Trust Deed, to make payments of this type whether by way of expense purportedly incurred or distribution purportedly made in pursuit of the objects of the Trust;

- it is questionable whether ISPL acted within power in reimbursing the entire amount of $256,357.25 to Esplanade Holdings Pty Ltd by way of reimbursement of expenses it incurred prior to ISPL's formal appointment as Trustee;

- in relation to ISPL's power to loan funds:
  - there is real doubt as to whether a Trustee may lend funds under the Trust Deed by way of distribution and other than in accordance with the power in clause 6.2(g) of the Trust Deed to invest on prudent and commercial terms with security;
  - it is also subject to some uncertainty as to whether a Trustee may distribute funds by way of grant to a corporate entity in reliance on clause 4.2(c)(viii) of the Trust Deed where the objects of the entity are not limited by its constituting documents to similar objects to those of the Trust; and
  - ISPL has not fully complied with its obligations to consult in relation to the significant sums that have been lent or distributed to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust and Njamal Heritage Pty Ltd;

- in relation to internal governance, while the Inquiry recognises that significant progress has been made, it nevertheless finds that ISPL in many respects lacked
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clear and effective internal governance policies, practices and procedures in relation to the management and administration of the Trust and its related entities, particularly prior to late 2017. Issues of particular concern identified by the Inquiry include:

- a lack of clear formal delineation of roles, responsibilities, authorities and lines of reporting as between various officers, employees and contractors/consultants of ISPL;

- at times poor communication and inconsistent decision making between the South/Port Hedland and Perth offices;

- decisions made in South/Port Hedland to refuse or limit distributions being overridden at the Perth office, generally by or on the instructions of Mr Carter as part of his delegated authority to make such decision, without the decision always being consistently and clearly documented and communicated back to the original decision maker;

- difficulty experienced with some decisions made by the former general manager at the South/Port Hedland office lacking flexibility from time to time, where circumstances may have warranted the exercise of the Trustee's discretion to exceed usual distribution policy limits, hence leading to decisions being overridden at the Perth office;

- at times poor management culture, particularly involving strong negativity by Mr Carter towards questioning by staff, contractors or TAC members of the adequacy of practices, procedures and decisions, particularly if Mr Carter perceived those persons to be questioning him or the Trustee;

- comparatively poorer level of documentation of distribution and expenditure decisions at the Perth office (in respect of which Mr Carter, at least prior to his disqualification from managing corporations, had delegated authority in relation to making decisions) than the Port Hedland office (which was generally of a good standard), particularly in relation to loans/advances to Njamal people and either not documented, poorly documented or poorly collated such that the documentation provided to the Inquiry was incomplete;

- general non-compliance with ISPL's own draft Inter Organisation Loan Policy endorsed by the Board at its meeting on 11 July 2016; and

- the issues of concern or 'exception' identified by the auditor in correspondence to ISPL dated 25 January 2017, 17 July 2017 and 30 May 2018;
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- ISPL has on many occasions failed to appropriately and adequately document important agreements and Trustee decisions and maintain controls over key documents;

- in respect of meetings of directors, ISPL:
  - generally failed to create and maintain finalised, signed minutes of meetings of directors;
  - failed to ensure minutes were prepared of all directors’ meetings; and
  - failed to document all decisions or resolutions of the Board and significant decisions or recommendations of the management committee;

- in relation to the removal of Travis McPhee as a director of Njamal Services Pty Ltd in September 2017, the Inquiry finds (amongst other findings set out at length in the body of the Report) that:
  - a review workshop meeting on 30 August 2017 did not constitute a meeting of directors of ISPL or the directors or shareholder of Njamal Services Pty Ltd and no resolutions were made or purportedly made by those directors, in their capacity as directors or as representatives of the shareholder of Njamal Services Pty Ltd, at that meeting in relation to changes to the directorships of Njamal Services Pty Ltd or Njamal Security Pty Ltd;
  - it is highly unlikely that a meeting of directors of ISPL as shareholder of Njamal Services Pty Ltd was held by telephone between Mr Aird and Mr White on the morning of 31 August 2017, or at all, by which it was resolved to remove Mr McPhee from being a director of Njamal Services Pty Ltd with effect from that or any other date;
  - minutes of the alleged meeting of ISPL as shareholder of Njamal Services Pty Ltd on 31 August 2017 were prepared on 21 or 22 September 2017;
  - Mr White, in circumstances in which, without Mr White's authority, a notice had already been filed with ASIC notifying ASIC that Mr McPhee had been removed as a director of Njamal Services Pty Ltd on 31 August 2018, signed the minutes that purported to record a meeting by telephone between Mr White and Mr Aird on that date, and forwarded them to Mr McPhee, asserting that Mr McPhee had been removed at a meeting on 31 August 2017;
  - ISPL had extremely poor control over its corporate governance in September 2017. ASIC notices were filed in relation to the directorships of Njamal Security Pty Ltd and Njamal Services Pty Ltd that were inaccurate and without the knowledge or consent of Mr White, Mr Aird, Mr McPhee, ISPL, Njamal Services Pty Ltd or Njamal Security Pty Ltd.
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- Having regard to the *Briginshaw* standard of proof, the Inquiry is not prepared to find on the evidence available to it that Mr White or others knowingly participated in the creation, execution and dissemination of a false document. In that respect, the Inquiry notes, amongst other things, that while Mr Aird doubts any meeting occurred having regard, to factors including his absence of any recollection of such a telephone meeting, his travel schedule that day and absence of any record of the meeting, he cannot explicitly and unequivocally state that it did not. The Inquiry also notes the explanations proffered by Mr Aird in relation to the minute that was circulated by Mr Parker and signed by Mr White (he does not recall the document and had by this point in time accepted his time with ISPL was drawing to a close), Mr Mack (he does not recall the document), ISPL and Mr Parker (that, in effect, the minute appears to have been poorly drafted and incorrectly dated).

In Chapter Nine the Inquiry considers the regimes in place for the identification, disclosure and recording of conflicts of interest, and whether those regimes have been effectively utilised by the Trustees to manage those issues. In respect of Abbott the Inquiry makes no findings. The situation is much the same in respect of AET, other than the Inquiry notes that AET did not have a documented process in place for the identification, disclosure and recording of conflicts of interest, and recommends that AET review that position. However, no actual conflicts of interest in the administration of the Trust by Abbott and AET are identified.

The position is somewhat different for ISPL, though, which is perhaps not surprising given ISPL's greater engagement in the commercial sphere. In this respect the Inquiry identifies a number of areas of concern, which are set out in detail in the Chapter, and which span the gamut from transactions involving motor vehicles, related companies and projects, the remuneration of directors, ISPL's involvement in the Njamal Native Title proceedings and ISPL's role as trustee of the Njamal Charitable and Benevolent Trust and its proposed role as trustee of a yet to be established Direct Benefits Trust. In respect of these matters the Inquiry makes a range of findings to the effect that a number of potential conflicts of interest were either not disclosed or were inadequately disclosed and recorded, or not adequately considered, with the result that an outsider looking in – including the Inquiry - could reasonably have concerns about some of the transactions into which ISPL entered and the roles it has undertaken and proposes to undertake. Following those findings the Inquiry makes a number of recommendations about steps ISPL should take to prevent issues of this nature recurring, and by which it might seek absolution for past lapses. Most significantly, the Inquiry recommends that ISPL take immediate steps to implement a conflicts register that records not only conflicts that ISPL itself might have, but also the conflicts, potential or actual, of its officers, agents, contractors, employees and consultants; which register should, in the Inquiry's view, clearly set out the nature of the conflict (potential or real), the date on which the conflict was identified and disclosed, and the way in which the conflict was or will be managed.
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(for example, by a fully informed resolution of the directors or the approval of the Supreme Court of Western Australia, as the case requires).

In Chapter Ten the Inquiry turns to consider the nature and function of the TAC. Of particular note the Inquiry finds that:

- the purported suspension of Ms Westerman in October 2016 was beyond the power of the TAC (and the Trustee);
- to the extent that there are rules governing the conduct of the TAC – the so-called TAC Rules – those rules are invalid insofar as they are inconsistent with the Trust Deed;
- the widespread use of proxies throughout the history of the Trust is problematic in that:
  - the Trust Deed does not provide for such a regime;
  - the use of proxies can undermine the provisions of the Trust Deed requiring the Trustee to consult with the TAC in respect of distributions and investments; and
  - permitting proxies to vote on matters including the replacement of the trustee can lead, effectively, to views of actual TAC members being circumvented and the possibility of the vote outcome being directly or indirectly influenced either in support of the retention or removal of a trustee;
- if proxies are going to continue to be used, the Trust Deed and Trust Rules should be amended to specifically provide for such a regime, with appropriate controls in place;
- the remuneration of members of the TAC is problematic for a number of reasons including:
  - the Trust Deed provides only that a TAC member may have his or her reasonable out of pocket expenses incurred in connection with Trust Activities paid from the Trust Fund;
  - at present members of the TAC are paid a flat annual fee of $10,000, split across four quarterly payments of $2,500, which is inconsistent with the provisions of the Trust Deed providing only for out of pocket expenses;
  - it leads to the perception if not the reality of favouritism and nepotism; and
  - a system by which a trustee pays TAC members a sum that is not controlled by the terms of the Trust Deed can lead to least a perception that TAC members may be influenced to support that trustee;
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• in respect of the employment of TAC members:
  o the Trust Deed does not prohibit the Trustee or its subsidiaries employing or otherwise engaging TAC members;
  o however, the employment or engagement of TAC members by the Trustee or its related entities raises a number of issues including that:
    ▪ the provision of benefits may influence the TAC member in making or abstaining from making recommendations to the trustee for fear of "biting the hand that feeds";
    ▪ it leads to the perception of certain members of the Njamal community being favoured and rewarded by the Trustee ahead of other members; and
    ▪ a Trustee could strategically use the provision of benefits, including employment and similar benefits, as a means of influencing the members of the TAC, particularly in connection with the TAC’s power to remove and replace trustees;
  o these risks are accentuated where a Trustee’s representatives, including in respect of ISPL Mr Carter, at times adopt a forceful position that is, or is perceived to be, adverse to persons not seen to be supportive of the incumbent Trustee;
  o ISPL failed to clearly distinguish in its records between payments made to TAC members, employees or contractors in respect of entitlements earned in performing those roles and payments made or purportedly made on some other basis, for example by way of distribution or "loan";
  o the Trust Deed does not permit the Trustee to make loans or advances to TAC members, employees or contractors outside of the limited circumstances in which the Trustee may lend Trust moneys, regardless of whether those loans or advances are treated as advance payments of wages or other benefits (e.g.: TAC payments);
  o the process of authorisation of such payments was in many cases either inadequately documented, not documented at all and/or not properly disclosed to the Inquiry despite request; and
  o while the Trustee has a discretion in relation to whom it employs or with whom it contracts, it is particularly important that it ensures that its decision making process is documented, robust and impartial and can withstand scrutiny particularly in circumstances like the present where all except one
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TAC member have been employed or engaged directly or indirectly by the Trustee or its related entities;

• in respect of consultation with the members of the TAC:
  o the Trustee has obligations, in clauses 10.3 and 10.4 of the Trust Deed, to consult with the TAC in relation to proposed investments and distributions;
  o the Trustee’s obligation to consult carries with it an obligation to provide sufficient information to the TAC in relation to the proposed investment or distribution so that genuine advice and recommendations can be given;
  o the Trustees, and in particular ISPL, generally engaged in consultation with the TAC about contemplated decisions in relation to the investment and significant distributions not otherwise covered by the Trust’s distribution policy;
  o however, in many instances under ISPL it has been difficult to ascertain the nature and extent of the consultation that has occurred in relation to a proposed investment or distribution, the amount/limit of the investment or distribution and the means by which it was proposed to be effected, including whether it was via a direct investment or distribution to a related entity;
  o ISPL either failed to adequately consult with the TAC prior to investing $1 million of Trust Funds in relation to the carbon farming project or failed to keep adequate records of that consultation, and given the sums involved either premise is highly unsatisfactory; and
  o in respect of funds loaned or advanced to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust and Njamal Heritage Pty Ltd, ISPL did not fully comply with its consultation obligations under the Trust Deed. Neither the TAC minutes nor other documents provided to the Inquiry appear to record, nor is the Inquiry satisfied based on its other enquiries, that ISPL consistently consulted with or obtained the recommendations of the TAC in respect of particular decisions to loan or advance particular amounts of funds, particularly to the significant extent to which that has occurred and continues to occur, to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust and Njamal Heritage Pty Ltd; and

• in respect of allegations that the TAC has been improperly influenced:
  o most such allegations were insufficiently precise to enable them to be effectively inquired into and were often unsupported by direct evidence; and
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- ultimately, because of these deficiencies and bearing in mind the serious nature of the allegations made, the allegations have not been substantiated by the Inquiry.

Chapter Eleven deals with distributions made from the Trust Fund to individual members of the Njamal community, and addresses concerns about whether the Trust Fund has been applied for non-charitable purposes of private gain, whether the Trustees have favoured some applicants for distribution over others, whether excessive amounts have been distributed from time to time, whether the "bucket system" of distributions which was present during the tenure of Abbott and for a brief period with AET was appropriate, distributions said to be made by way of loan, whether cash or vouchers have been provided to the community, and the adequacy of documentation and TAC consultation.

The major findings which flow from Chapter Eleven are:

- it has been challenging for all of the Trustees to distribute the Trust Fund strictly in accordance with the Trust Deed given the pressures on the Trustees from the community and the TAC;

- notwithstanding these challenges, it is a primary obligation of the Trustees to ensure that distributions are made in pursuit of the objects of the Trust Deed;

- historically, there have been particular flaws in the approach to distributions, including:
  - where Trustees have distributed directly to members of the community in cash; and
  - where certain Trustees have either set up or continued the use of the "family buckets" system of distributions whereby "buckets" of money are allocated to each of the Njamal families with significant responsibility in the decision making process in respect of distributions from those buckets being assumed by family representatives on the TAC;

- in respect of ISPL in particular:
  - there have been issues, particularly in the previous years, with the consistency of approach to distributions within ISPL, particularly as between the approach adopted by the Hedland Offices (which, generally speaking, has strictly applied the Distribution Policy) and the Perth Office (which has been substantially more flexible);
  - based on materials reviewed by the Inquiry, standards of documentation in respect of a number of distribution decisions, including in respect of the making of loans, was comparatively lower in Perth then Hedland (which was generally of a good standard); and
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- contrary to that approach, it is important that there be full and clear documentation in relation to applications for, and decisions relating to, distributions, particularly if decisions are made to depart from the Trustee’s published Distribution Policy, so as to avoid allegations or perceptions of favouritism and to encourage transparency and accountability.

Chapter Twelve narrates ISPL’s extensive involvement in the broader Njamal community and various of its achievements and considers the various projects that ISPL has established and maintains for the benefit of that community, and the employment opportunities that have arisen since ISPL took on the role of Trustee. Generally speaking, the employment opportunities have to date arisen either directly with ISPL (e.g.: project liaison officers, administrative staff within the Port Hedland office), indirectly via family businesses that ISPL have supported or via employment with the NPJV or in a number of other capacities. In addition, the programs and projects which have been commenced and progressed by ISPL have been to the benefit of the community – including for example the office in Port Hedland, the office in South Perth, the Hedland Harbour Café, security training and the engagement of the community through sport.

This Chapter also deals with some of the concerns raised in connection with those projects and programs. For example, one project which was raised with the Inquiry on several occasions and by several people is the development of Pippingarra, which is a positive initiative intended to provide a safe place for children and adults from substance abuse; to maintain cultural orientation and preservation on the country; provide self-determination and self-empowerment and for individuals to be a positive bridge between both societies Western/Aboriginal Communities.

In respect of that project the Inquiry considers that while a number of positive outcomes have been achieved to date, and the significant contribution of the Eaton family to the project should be recognised and commended, the project was not well project managed by ISPL. It proceeded and evolved over time without clear accountability, governance structure, or management controls being established over it. In recent correspondence from ISPL issues with the development of Pippingarra have been recognised, the development has been placed on hold pending further review, and ISPL has expressed the view that the purpose and use of the facility overall has had a positive outcome and ISPL wishes to deliver the final vision at an agreed budget.

In Chapter Thirteen the Inquiry considers the two areas for legislative reform. The first area is the regime in section 20 of the Charitable Trusts Act 1962 by which inquiries of this nature are conducted. A number of recommendations are made as to how that regime can be improved. The second area concerns the establishment of mechanisms by which the Attorney General or the Supreme Court can regulate persons involved in the management or administration of charitable trusts to overcome lacunae in current legislation.
Recommendations

The Inquiry makes the following recommendations:

**Recommendation 1 (Chapter 1)**

1. If any issues remain in relation to the completeness of ISPL's documentary records in relation to the terms of the Trust Deed and appointment of Trustees, that ISPL take steps to address those issues and, if requested by ISPL, Abbott provide ISPL with a certified copy of the 2012 Deed of Variation of the Trust Deed dated 2012 and AET of its instrument of appointment.

2. If future inquiries of this nature are conducted, specific consideration be given whether to notify the trustee and relevant community members, such as the TAC, prior to any public announcement of the establishment of the Inquiry.

**Recommendation 2 (Chapter 3)**

If ISPL ultimately concludes, after taking appropriate advice, that a cause of action against AET is available and warrants being pursued, consideration be given by ISPL to seeking directions from the Supreme Court of Western Australia in relation to whether it would be justified in pursuing that course, prior to any such proceedings being commenced.

**Recommendation 3 (Chapter 3)**

ISPL and the TAC review existing arrangements in relation to its appointment and the relevant terms of the Trust Deed. If it is considered desirable that the Trustee should be required to retire after a fixed term (unless extended by agreement with the TAC), or that the requirements for the appointment, removal or cessation of a Trustee's role should be altered, consideration be given to whether and, if so, what amendments to the Trust Deed may be appropriate to make.

**Recommendation 4 (Chapter 4)**

ISPL and/or Njamal Mining Pty Ltd or the entity that owns a trailer and any other equipment that is believed to be in the possession of a TAC member give consideration to requesting and taking steps to effect the return of the equipment.
**Recommendation 5 (Chapter 4)**

ISPL and the TAC give consideration to whether and, if so, how the Trust Deed and TAC Rules be amended to make it clear how and when one or more TAC members may cause a meeting to be convened to consider the removal of a Trustee. Consideration be given to avoiding a Trustee being able to unreasonably delay or prevent such a meeting from being held whilst ensuring that reasonable restrictions apply as to the timing and frequency and necessary support for such a meeting before it must be convened and financial assistance provided by the Trustee.

**Recommendation 6 (Chapter 5)**

Mr Carter not be engaged, employed or otherwise materially involved in the affairs of the Njamal People’s Trust or any other charitable trust at least during the term of the Disqualification Order.

**Recommendation 7 (Chapter 6)**

AET take steps to review and, if appropriate, amend existing powers of attorney relating to its duties as trustee of any trusts, including with similar terms to the Trust Deed under consideration in this case, to ensure that they properly confer authority on persons purporting to act on behalf of AET in relation to such matters.

**Recommendation 8 (Chapter 7)**

If AET is trustee of any similarly worded trust instruments it obtain legal advice, if it has not already done so, as to whether the TAC or any similar group of persons actually have authority to deal with the trustee on matters relating to the provision of the service such that it may agree to charge fees outside of those provided for under Part 5D of the *Corporations Act 2001*.

**Recommendation 9 (Chapter 7)**

1. The TAC and ISPL (and any future Trustee of the Trust) ensure that any significant documentation signed on behalf of the TAC in relation to the proposed terms and conditions of the engagement of the trustee be provided to all TAC members and clear records be created and maintained of when this occurred.
2. The TAC and ISPL (and any future trustee of the Trust) take steps to ensure that documents are accurately dated and, where possible, witnessed to avoid uncertainty about whether and, if so, when documents have been signed.

3. The TAC and ISPL review existing practices and procedures and ensure that a clear procedure is put in place for invoices in relation to the remuneration of the trustee to be drawn to the attention of all TAC members and to ensure that they are routinely reviewed and endorsed on behalf of the TAC and that TAC members understand the ability to cause an audit of, and to dispute, invoices in relation to ISPL fees.

Recommendation 10 (Chapter 7)
ISPL and the TAC review the existing arrangements for ISPL charging fees. If it considered that the TAC ought to be able to agree with a Trustee to limit the fees that may be charged by the Trustee (over and above the existing limitation under the Trust Deed) or otherwise enter into agreements with a Trustee of the Trust in relation to fees, consideration be given to whether and, if so, what amendments be effected to the Trust Deed.

Recommendation 11 (Chapter 8)
ISPL review its internal chart of account classifications for consistency with their classification in financial statements produced for external reporting purposes.

Recommendation 12 (Chapter 8)
1. ISPL review and monitor practices in relation to travel in an endeavour to reduce the extent of travel not being adequately planned and booked at short notice.

2. ISPL review and continue implementing a previously foreshadowed approach under which more meetings are held via teleconference or videoconference. While face to face meetings may be ideal, and in some cases such as TAC meetings, should be the norm, the holding of meetings in person ought to be balanced against the considerable costs associated with convening all meetings in person.

Recommendation 13 (Chapter 8)
ISPL review its expense account classifications and account for expenditure by way of TAC member remuneration and other entitlements separately to other expenditure such as meeting fees paid to Njamal people other than as part of TAC entitlements.
Recommendation 14 (Chapter 8)

ISPL continue to review at regular intervals its existing practices and procedures in relation to the payment of fees in the nature of sitting fees to ensure they are applied consistently and not selectively and in compliance with the Trust Deed.

Recommendation 15 (Chapter 8)

If signing fees are contemplated being paid by ISPL or a future trustee out of the Trust Fund in respect of any future agreements to be entered into by Applicants on behalf of the Njamal community:

- proposed payment of those fees, including how much and to whom, be brought explicitly to the attention of the community at the community meeting at which the relevant agreement is to be endorsed;
- a resolution specifically endorsing the proposed payment of signing fees be moved;
- if the resolution is passed, it be recorded in the minutes of the meeting; and
- ISPL first seek directions from the Supreme Court of Western Australia as to whether the Trust Deed permits payment of those sums or for the Court's sanction to the making of such gratuitous payments.

Recommendation 16 (Chapter 8)

1. ISPL review existing fee charges including whether:

- in light of the Esplanade companies and Mr Carter ceasing to be involved in the affairs of the Trust, and in light of the other sums charged to the Trust Fund (as discussed below), it remains reasonable to charge the Trust $20,000 per month for trustee services;
- it remains reasonable to charge, in addition to the fee of $20,000 per month, a fee of 1% on revenue; and

2. The TAC also review the reasonableness of ISPL fee charges going forward and be provided with reasonable funds to enable it to obtain further independent advice if required.

Recommendation 17 (Chapter 8)

ISPL review its processes and procedures in relation to the procurement and allocation of vehicles and management of vehicle expenses to ensure that such decisions are transparent,
documented, reasonably based, avoid undue expenditure and preferential treatment and are in furtherance of the Trust objectives and not private gain.

**Recommendation 18 (Chapter 8)**

ISPL either reinstate the sum of $256,357.25 paid out of the Fund to Esplanade Holdings Pty Ltd and such of Ms Westerman's further claim of $38,000 that pre-dated 6 May 2016 as was paid by ISPL from the Trust Fund, and/or seek relief from the Supreme Court including, if considered appropriate, exoneration in respect of payments that have been made.

**Recommendation 19 (Chapter 8)**

1. ISPL seek appropriate directions from the Supreme Court in relation to the scope of its power to lend or advance moneys and to distribute moneys to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust, and to Njamal Heritage Pty Ltd, and, if necessary and appropriate, to absolve it in respect of any breaches of trust that may have arisen in relation to the loans and grants that have already been made by it.

2. ISPL consider whether to obtain advice as to whether it is open to, and if considered appropriate, to amend the Trust Deed to clarify the scope of its powers in relation to lending or advancing money, and distributing money to wholly owned related entities.

3. ISPL and its related entities review and document in writing the terms and conditions on whose authority from both ISPL and the related entity funds may be provided to or expended on behalf of the related entities, by ISPL as Trustee of the Trust.

4. ISPL ensure that any such transactions are correctly and accurately recorded and classified in its accounts to reflect the true legal character of the transactions.

5. ISPL review previous decisions where any loans have not been fully repaid or were effectively waived or recharacterised despite having originally been characterised as loans, to ensure that the decisions are properly documented and defensible and, if not, take such remedial action as may be warranted.

**Recommendation 20 (Chapter 8)**

1. ISPL continue to implement the actions it has proposed undertaking including a more rigorous approach to expenditure generally, particularly in relation to travel, sitting fees, motor vehicles and consultants and employees.
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2. ISPL adopt a more rigorous approach in relation to approving projects and investments involving significant expenditure to ensure that they have been properly assessed, budgeted for, documented and routinely reviewed.

3. ISPL complete development of a detailed organisational strategic plan to guide its activities and regularly review its activities and performance against defined criteria.

4. ISPL immediately review and monitor on a regular basis its investment, distribution and expenditure of funds to ensure that it operates in a sustainable manner having regard to the objects of the Trust and both present and future beneficiaries of the Trust.

Recommendation 21 (Chapter 8)

1. ISPL and/or its related entities immediately cause financial statements to be prepared and audited for at least Njamal Services Pty Ltd and Njamal Security Pty Ltd and Njamal Heritage Pty Ltd for the 2017/2018 financial year.

2. ISPL and/or its related entities cause financial statements to be prepared and audited routinely thereafter.

3. ISPL and/or its related entities disclose the audited financial statements to at least the TAC, Njamal community, Attorney General and Australian Charities and Not-for-profits Commission.

4. ISPL, the TAC and ISPL's related entities review and give further serious consideration to the auditors' recommendation, which is endorsed by the Inquiry, of preparing financial statements on a consolidated basis.

Recommendation 22 (Chapter 8)

1. ISPL continue to routinely review its internal governance policies, practices and procedures and update and revise them as appropriate.

2. ISPL consistently apply and enforce those policies, practices and procedures once reviewed.

Recommendation 23 (Chapter 8)

ISPL review its existing practices and procedures in relation to the use of banking security tokens/toggles and authorisation of bank transactions to ensure that only appropriately authorised persons have custody of the token/toggles and enter or authorise transactions.
Recommendation 24 (Chapter 9)

1. Declarations of interest be made and recorded in the minutes of the TAC, on each occasion where a TAC member is required to do so, irrespective of whether other TAC members present or representatives of the Trustee might already be aware of the interest of the TAC member or a person closely related or associated with the TAC member.

2. The Trustee be conscious of identifying where such conflicts exist, whether they have been declared or not, and in ensuring that if the TAC member concerned does participate in the discussion or vote of the TAC, that in making the ultimate decision the Trustee is satisfied as to the merits of the decision and that it accords with the objects of the Trust.

Recommendation 25 (Chapter 9)

AET review its existing policies and procedures and ensure that it has a documented process in place for the identification, disclosure and recording of conflicts of interest in relation to any charitable trusts of which it is trustee.

Recommendation 26 (Chapter 9)

ISPL:

- at its expense (not from the Trust Fund) cause an independent forensic audit and review of the nature, quantum and circumstances of all the motor vehicle related transactions with Greenco Holdings Pty Ltd (whether trading as Economical Car Hire or otherwise), Bluenergy Engineering (Australia) Pty Ltd and Esplanade Holdings Pty Ltd (if any), and who approved the entry into each transaction, and provide a copy of that report to the Attorney General within three months of this recommendation being brought to the attention of ISPL;

- cease entering transactions of this nature absent clear and documented declarations of any conflict, and clear, documented and executed agreements for the provision of vehicles; and

- consider whether, after receipt of the audit report referred to above, it is necessary or appropriate to approach the Supreme Court for directions in respect of the motor vehicle transactions already entered.
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Recommendation 27 (Chapter 9)
ISPL and Njamal Services Pty Ltd review the circumstances of all previous, current or proposed transactions in relation to Pilbara Indigenous Marine Services Pty Ltd to ensure that there are and have been no conflicts or if there are, or have been conflicts, those conflicts are disclosed, considered, clearly documented and subject to any further action that may be warranted.

Recommendation 28 (Chapter 9)
ISPL review its current or future proposed transactions with Redimed to ensure there are and have been no conflicts or if there are, or have been conflicts, those conflicts are disclosed, considered, clearly documented and subject to any further action that may be warranted.

Recommendation 29 (Chapter 9)
1. Either the following steps be promptly taken or Mr White resign as a director of ISPL.
2. Mr Wolf or another person be appointed as a director or alternative director of ISPL with full authority to act in relation to matters in relation to carbon farming.
3. Mr White fully discloses his interests to Mr Wolf (or any other directors that may be appointed) and absents himself from any discussion, debate or decision making concerning ISPL’s relationship with Indigenous Carbon Group Pty Ltd, Goldfields Carbon Group Pty Ltd and Pilbara Carbon Group Pty Ltd and carbon farming interests and ensures that his interest is properly and adequately recorded in a corporate record (for example, the minutes of a relevant directors’ meeting and a conflicts register).
4. ISPL ensures that Mr White discloses his interests to Mr Wolf (or any other directors that may be appointed) and absents himself from any discussion, debate or decision making concerning ISPL’s relationship with Indigenous Carbon Group Pty Ltd, Goldfields Carbon Group Pty Ltd and Pilbara Carbon Group Pty Ltd and carbon farming interests, and that the interest is registered in a conflicts register to be maintained by ISPL.
5. ISPL actively consider whether, when and what directions might or should be obtained from the Supreme Court of Western Australia in relation to Mr White’s potential or actual conflicts of interest.
Recommendation 30 (Chapter 9)

1. ISPL take steps to satisfy itself that none of the Trust Funds expended on the Studio Homes unit at South Perth benefitted Mr Carter or entities or persons associated with him (e.g.: Esplanade Holdings Pty Ltd, or the family trust(s) controlled by that company).

2. ISPL ensure that future transactions of this nature not be entered in circumstances where there is a real or potential possibility for a director of ISPL to benefit from the transaction, unless the potential for conflict is properly disclosed, considered, debated and recorded in the minutes of the Trustee in accordance with the provisions of ISPL’s constitution and the Corporations Act 2001.

Recommendation 31 (Chapter 9)

ISPL resign as either Trustee of the Trust or trustee of the Njamal People’s Benevolent Trust, or take steps, if they may properly be taken, to amend the terms of the deeds constituting those trusts to remove the possibility of conflict, and refrain from taking on the role of trustee of any Direct Benefits Trust, or seek directions from the Supreme Court of Western Australia pursuant to the provisions of the Trustees Act 1962 as to how it ought to act in respect of the Trust, the Njamal People’s Benevolent Trust and the proposed Direct Benefits Trust.

Recommendation 32 (Chapter 9)

1. ISPL and its directors:
   o actively adhere to its constitution and ensure that directors’ interests are:
   o fully and adequately disclosed in accordance with the requirements of the company’s constitution and the Corporations Act 2001;
   o minuted in detail in minutes which are formally endorsed by the directors at a subsequent meeting.

2. take immediate steps to implement a conflicts register that records not only conflicts that ISPL itself might have, but also the conflicts, potential or actual, of its officers, agents, contractors, employees and consultants; which register should, in the Inquiry’s view, clearly set out the nature of the conflict (potential or real), the date on which the conflict was identified and disclosed, and the way in which the conflict was or will be managed (for example, by a fully informed resolution of the directors or the approval of the Supreme Court, as the case requires); and

3. ensure all contractors, agents and consultants are engaged through appropriately detailed written contracts with appropriate terms and conditions which should include
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terms and conditions to ensure that any issues of conflicts of interest or duties that may arise are appropriately notified and dealt with.

Recommendation 33 (Chapter 10)

1. On an ongoing basis, community meetings be held not only once each calendar year, but also at least once every 12 months, absent some exceptional reason.

2. In accordance with the Trust Deed, at the community the community be advised that it may vote to elect the entire TAC, not just selected TAC members.

Recommendation 34 (Chapter 10)

3. ISPL's practice of making an up-front payment, previously of $10,000 annually, now of $2,500 quarterly, in advance of TAC members engaging in Trust Activities, be ceased immediately as being inconsistent with the Trust Deed.

4. If a TAC member is in financial hardship or if otherwise a sufficient reason exists for payment of moneys to that person consistent with the charitable objects of the Trust, any payment made be transparently effected in accordance with the Trust's distribution policies and clearly recorded and accounted for as such.

5. ISPL have regard to the Remuneration Tribunal Determination 2017/10: Remuneration and Allowances for Holders of Part-Time Public Office, applicable to the Aboriginals Benefit Account Advisory Committee, when determining a reasonable rate for remuneration for TAC members for time spent on Trust Activities.

6. The Trustee establish and implement procedures to ensure that TAC members do not effectively receive double remuneration for time spent on other activities that are "Trust Activities", such as participating in various TAC subcommittees and attending other meetings.

Recommendation 35 (Chapter 10)

1. A review of the use of proxies be undertaken by the Trustee.

2. If the Trustee considers that the use of proxies should be maintained, the Trust Deed and Trust Rules be amended to clearly delineate the role, status, function, powers of a proxy and any entitlement to remuneration in respect of acting as proxy for a TAC member.
**EXECUTIVE SUMMARY**

**Recommendation 36 (Chapter 10)**

1. While it is not necessary that positions be advertised, it is preferable that they are and that they are subject to a transparent, documented and accountable merit based selection process to avoid both the perception and reality of favouritism or cronyism.

2. Contracts of employment, alternatively contracts of engagement as independent contractors, be executed by ISPL and the prospective employee/contractor before the employee/contractor commences providing services to, and receiving remuneration from, the trustee.

3. ISPL cease providing advances or "loans" of any type to members of the Njamal community, regardless of whether any particular member is employed or engaged by the trustee (including as a TAC member) absent clarification of the nature and scope of any power under the Trust Deed to make loans or advances other than on prudent commercial terms with adequate security.

4. Accounting practices be reviewed and updated if appropriate so that the quantum and nature of benefits paid to TAC members, employees and contractors is clear, and are clearly delineated, on the face of ISPL's records.

**Recommendation 37 (Chapter 10)**

ISPL review existing practices and procedures and consider whether it may and should make any amendments to the Trust Deed to provide for alternative consultation processes to be adopted in particular classes of cases with the agreement of the TAC to allow for flexibility in consultation practices, particularly in relation to routine applications the subject of established distribution policies.

**Recommendation 38 (Chapter 10)**

1. ISPL ensure that whenever money is proposed to be expended on such an investment or distribution that it has first been the subject of proper consultation, in particular in relation to the provision of funds by way of investment or distribution to a related entity. This should therefore be disclosed during consultation.

2. During consultation, the Trustee should disclose whether it is to expend funds on an investment or distribution directly, or whether expenditure is proposed by way of investment or distribution to a related entity (which itself will enter into a transaction or engage in a project).
EXECUTIVE SUMMARY

3. The amount and limit of any proposed expenditure should be specified and documented when consultation occurs to ensure that expenditure above the specified amount does not occur without the Trustee further consulting with the TAC.

4. ISPL ensure that the consultation with the TAC in respect to any future investment decisions is properly and fulsomely recorded in minutes or other TAC endorsed documentation.

5. ISPL prepare and maintain a register of the details of any distributions or investments in respect of which TAC is consulted, which documents the nature and extent of the proposed distribution or investment, the amount/limit applicable to the distribution or investment, when the consultation occurred and the recommendation if any made by the TAC following the consultation. That is particularly appropriate in relation to investments or distributions for projects, economic development or business related activities including family businesses.

Recommendation 39 (Chapter 10)

ISPL prepare and provide a clear set of guidelines to TAC members, staff members and, ideally, Njamal community members, as to the nature and extent of information that will or will not generally be disclosed by it and any restrictions on TAC members or staff members in relation to disclosure of certain types of information generally or of particular information.

Recommendation 40 (Chapter 10)

1. ISPL, in consultation with the TAC, urgently review whether any amendments should and can be made to the Trust Deed and if so, take steps to effect amendments, in particular in relation to:
   - more clearly defining the entitlements of TAC members for remuneration;
   - clarifying the power of the TAC, or the TAC together with the Trustee, to implement rules to control or regulate the TAC’s processes and procedures, including in relation to quorum for a meeting and conduct of TAC members, in a manner not inconsistent with the Trust Deed;
   - the circumstances in and processes by which TAC members may be elected, suspended and replaced and their terms of appointment - in particular, whether the community may vote to elect or re-elect only some members of the TAC and whether, if an elected member dies or becomes incapable of performing their duties or fails to perform their duties for a period of time, provision is made for the
EXECUTIVE SUMMARY

removal and replacement of the TAC member, although this may itself become a matter of disputation if the criteria for such removal are not clearly satisfied;

- the ability to appoint/use, and the circumstances in which proxies may be appointed and act/be used; and what remuneration a proxy may receive (if any) including in lieu of remuneration that would otherwise be paid to the relevant TAC member;

- the frequency of community meetings to elect a TAC – including whether they should be held no more than a period such as 12 months apart, with provision made in exceptional circumstances for the period to be extended by up to a further period of say 3 or 4 months to accommodate unanticipated events, such as where flooding or ‘sorry business’ might justify deferring a scheduled meeting that would otherwise have been held within the period required by the Trust Deed;

- the specification of, or provision for, rules or procedures to be made, specifying the process by which voting at a community meeting is to occur; and

- alternative processes for consultation with the approval of the TAC.

2. ISPL and the TAC urgently review and amend the TAC Rules to remove inconsistencies with the Trust Deed.

Recommendation 41 (Chapter 10)

1. If ISPL considers that a shorter period should be allowed for in certain circumstances, such as circumstances of urgency, and the TAC agrees, the TAC Rules should be amended to reflect the agreed arrangements. Otherwise, ISPL ensure that it provides TAC members with at least 14 days’ notice of TAC meetings, and provides relevant materials to TAC members as far in advance as is practicable to ensure members have a reasonable opportunity to consider the materials before the meeting.

2. TAC members be reminded that they are not required to provide advice or recommendations to the Trustee at a TAC meeting in relation to any proposed investments or distributions. If such a decision is proposed to be made by the Trustee and if, for example, the TAC does not consider it has had adequate time to consider information relevant to the decision and to deliberate, it is open to it to make recommendations or advice in writing, signed by at least 3/4 of the TAC members and provided within 60 days of the meeting.
Recommendation 42 (Chapter 10)
Where practicable, use of written resolutions by TAC members, as distinct from resolutions in properly convened TAC meetings, be avoided. Further, where resolutions or other documents are circulated to be signed by members of the TAC, Applicants or Njamal community steps be taken where practicable to ensure the proposed signatory fully understands the nature of what they are being asked to sign, is not put under any pressure or inducement to sign, and that the signature is witnessed, ideally by an independent person, and dated to ensure that if a dispute arises there is a greater ability to verify the circumstances of the signature.

Recommendation 43 (Chapter 10)
ISPL and the TAC take steps to ensure that persons who have made allegations to, or assisted the Inquiry, are not subject to any retaliatory conduct as a result and use their best endeavours to promote a cohesive and less combative approach to their roles.

Recommendation 44 (Chapter 11)
ISPL review its documentation practices in relation to distribution decisions to ensure that appropriate records are maintained in relation to each decision including full copies of supporting documentation, together with all approvals, authorisations and refusals and the grounds for the decisions.

Recommendation 45 (Chapter 11)
Trustees of charitable trusts proceed with caution in relation adopting distribution systems which involve distributions being paid to family representatives to then disburse, particularly where discretion is then conferred on that person in relation to the distribution of the funds (e.g.: the 'family bucket' system).

Recommendation 46 (Chapter 11)
1. ISPL review its approach to expenditure in relation to economic development assistance to ensure that resources are being effectively targeted and best utilised in this area.
2. ISPL review and take advice if appropriate in relation to the appropriate classification of expenditure such as fees incurred for Mr Green's services and expenditure associated with the engagement of project liaison officers, which is currently classified as distributions.
### Recommendation 47 (Chapter 12)

1. ISPL carefully review the ongoing use of, and funding in relation to, the Pippingarra facilities, including ensuring that there is appropriate governance over the project and that its use meets Trust objects and is not solely for the benefit of one extended family group.

2. ISPL prepare and implement clear guidelines for all material projects which it contemplates funding from Trust Funds to ensure that they are properly planned, assessed and costed before funding is approved and that they are subject to appropriate ongoing governance, controls and periodic reviews to assess their effectiveness.

### Recommendation 48 (Chapter 13)

The Charitable Trusts Act 1962 be amended to give the Attorney General (or his or her appointee) the power to require the trustees and other persons involved in the management and administration of a charitable trust to provide information that the Attorney General considers necessary to determine whether or not the Attorney General should exercise his or her supervisory powers. The failure to comply with such a requirement within a stipulated time period could be an offence with a penalty the same as the penalty for non-compliance with a request under section 20(3) of the Charitable Trusts Act 1962.

### Recommendation 49 (Chapter 13)

Section 20(3) of the Charitable Trusts Act 1962 be amended to expand the scope of the power to require persons to answer questions or provide documentation to extend to any person whom the Attorney General, examiner or inquirer considers may be able to provide information or documentation relevant to an examination or inquiry.

### Recommendation 50 (Chapter 13)

Section 20 of the Charitable Trusts Act 1962 be amended to require a person to comply with a request to produce information, answer questions and give assistance within the time period specified by the Attorney General, examiner or inquirer, or such extended time period as specified by the Attorney General, examiner or inquirer.
EXECUTIVE SUMMARY

Recommendation 51 (Chapter 13)
The penalty for non-compliance with section 20(3) of the Charitable Trusts Act 1962 be reviewed and, if appropriate, increased.

Recommendation 52 (Chapter 13)
Consideration be given to introducing an additional offence provision for misleading the Inquiry.

Recommendation 53 (Chapter 13)
The Charitable Trusts Act 1962 be amended to expand the powers of the Attorney General or other person conducting an inquiry or examination under section 20 of the Charitable Trusts Act 1962 to include a power to require a person to attend and give evidence and be examined on oath or affirmation.

Recommendation 54 (Chapter 13)
1. The Charitable Trusts Act 1962 and/or the Auditor General Act be amended to enable the Auditor General or a delegate to be appointed by the Attorney General to make an inquiry or examine under section 20 of the Charitable Trusts Act 1962 or to assist in such process.

2. Consideration be given to also amending those Acts to confer power on the Auditor General or a delegate generally, or by arrangement with the Attorney General, to perform audits or audit like services in relation to trustees of charitable trusts. The powers of the Auditor General or a delegate be at least as extensive as those conferred upon him with reference to the auditing of public accounts by the Auditor General Act.

3. Additionally, or in the alternative, the Attorney General, or an examiner or inquirer appointed under section 20 of the Charitable Trusts Act 1962 be empowered to require that the trustee of a charitable trust:
   o cause the accounts of the charitable trust be audited by an appropriately qualified auditor (including the Auditor General); and
   o provide the audited report to the Attorney General, examiner or inquirer.
EXECUTIVE SUMMARY

Recommendation 55 (Chapter 13)
1. Section 20 of the Charitable Trusts Act 1962 be amended to:
   o clearly specify the grounds on which a person may refuse to comply with a compulsory request to answer questions or produce documents;
   o require that if a person so refuses, they must specify the ground of their objection;
   o expressly abrogate the right to privilege against self-incrimination/exposure to a penalty, with certain safeguards to prevent those answers or documentation being used against the person who otherwise would have been entitled to assert that claim of privilege.
2. Consideration be given to whether in making any such amendments the right to claim legal professional privilege:
   o be abrogated in the case of a trustee where the communication relates to or concerns the management and administration of the trust and its property, and what safeguards should be imposed in relation to the use of the information or documentation disclosed;
   o be otherwise protected in the event that a person elects not to maintain objections to answering a question or producing a document to an inquiry or examination on that ground but indicates that they otherwise seek to maintain the benefit of that privilege.

Recommendation 56 (Chapter 13)
The Charitable Trusts Act 1962 be amended to introduce a provision by which the Attorney General may recover costs and expenses associated with an inquiry or examination under s 20 of that Act (and by which the Auditor General may recover reasonable costs of an audit if provision is introduced for the Auditor General to conduct compulsory audits as recommended above) from the trustee, charitable estate or a person who requested that the inquiry or examination be conducted, by application to, and at the discretion of, the Supreme Court.

Recommendation 57 (Chapter 13)
1. The Charitable Trusts Act 1962 be amended to:
   o permit a person to make allegations and provide information and documents about a charitable trust to the Attorney General, an examiner or inquirer, notwithstanding
other duties such as a duty of confidence that may apply on respect of the allegations or disclosure;

- protect such a person from civil or criminal liability and proceedings for breach of professional ethics or standards or any principles of conduct applicable to a person’s employment in respect thereof;

- protect the Attorney, an examiner and inquirer and associated staff from liability in respect of performance of their roles, responsibilities and duties in respect of inquiring into and examining issues in relation to charitable trusts;

- provide statutory protection in relation to defamation actions.

2. In determining the scope of the amendments regard be had to sections 219 to 222 of the *Corruption, Crime and Misconduct Act 2003*.

**Recommendation 58 (Chapter 13)**

The *Charitable Trusts Act 1962* be amended to impose a duty of confidentiality in respect of compulsorily provided information or documentation (or such information or documentation voluntarily provided on the explicit basis that the same protections apply) subject to appropriate exceptions in relation to its use and disclosure including, if considered appropriate:

- in the course of the performance of any function and exercise of any power of the Attorney General, an inquirer or an examiner in relation to charitable trusts;

- for the purpose of the conduct of an inquiry or examination or audit (if such a power is included in that Act);

- for the purpose of obtaining or providing legal advice;

- to a trustee of a charitable trust;

- to a person or persons with a recognised advisory role in relation to a charitable trust;

- to a person or class of persons intended to benefit from the application of trust funds to the charitable objects of the trust or a body representing such a class of persons;

- in respect of any legal proceedings instituted by the Attorney General, an examiner or inquirer or to which the Attorney General, an examiner or inquirer is or may become a party relating to the charitable trust;

- as directed by the Supreme Court on application by the Attorney General, an examiner or an inquirer;
EXECUTIVE SUMMARY

- as required by law including an order or direction of a court, tribunal or other entity;
- for the purpose of notifying or referring a matter related to a charitable trust to the Western Australia Police, ACNC, ORIC, ASIC or another prescribed person or body; and
- subject to the recipient of the disclosed information or documentation being able to use or disclose the disclosed information and documentation for the purpose for which the disclosure was made.

Recommendation 59 (Chapter 13)

The Charitable Trusts Act 1962 be amended to explicitly permit the Attorney General to publish a report in relation to an examination or inquiry.

Recommendation 60 (Chapter 13)

The Charitable Trusts Act 1962 be amended to:

- empower the Supreme Court, on the application of the Attorney General or a person authorised by the Attorney General or with the leave of the Court, in circumstances such as where the Court is satisfied that there has been misconduct or mismanagement in the management and administration of a charitable trust or it is necessary or desirable to act for the purpose of protecting existing or future trust property or securing a proper application, for the purpose of the charitable trust, of existing or future trust property, to make orders including to remove a trustee, appoint a new trustee and preclude the employment or engagement of a person in the affairs of a charitable trust;
- if considered appropriate, empower the Supreme Court to make such orders in its discretion where the Attorney General, an examiner or an inquirer following an examination or inquiry under section 20(1) of the Charitable Trusts Act 1962 reports that a trustee should be removed or that a person should be precluded from being employed or engaged in the affairs of a charitable trust;
- as an alternative or supplementary measure, prescribe certain circumstances such as bankruptcy, insolvency, disqualification from managing corporations and conviction of certain types of criminal offences that preclude a person from being a trustee, or being involved in the affairs, of a charitable trust, absent the Attorney General or a body such as the State Administrative Tribunal or the Supreme Court being satisfied on the application of the person who would otherwise be disentitled, and who would bear the onus of proof, that the person is a suitable or
**EXECUTIVE SUMMARY**

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<th>fit and proper person to be so involved and that there are exceptional circumstances such that the person ought be allowed to perform such as role, with or without such restrictions as may be specified;</th>
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<td>o in addition, or in the alternative, introduce a more detailed regulatory regime in relation to those persons who may act as trustees of charitable trusts (or possibly a particular prescribed category of charitable trusts) or be involved in the affairs of a charitable trust, including potentially specifying requirements in relation to suitability, such as a &quot;fit and proper person&quot; test, similar to that used in other regulatory regimes, for persons seeking to be involved in the affairs of a charitable trust.</td>
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**Recommendation 61 (Chapter 13)**

The *Charitable Trusts Act 1962* or other relevant legislation be amended to:

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<th>permit evidence on applications in relation to a charitable trust brought by the Attorney General or a person authorised by the Attorney General, or otherwise with leave of the Court, to be given other than in accordance with the ordinary rules of evidence, and be based on information or belief; and</th>
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<tr>
<td>o if considered appropriate, make the decisions and findings of other relevant regulatory bodies, such as ASIC in deciding to disqualify a person from managing corporations, admissible in evidence (albeit not determinative) on such applications.</td>
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**Recommendation 62**

The Attorney General of Western Australia refer relevant recommendations to ISPL and request ISPL to implement the recommendations expeditiously, and to provide, within 1 month of referral, an initial report to the Attorney General in relation to all steps taken by ISPL, to be followed by a comprehensive further report within 3 months of referral.
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<th>Confidential Recommendation 63</th>
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CHAPTER 1: INTRODUCTION

The Inquiry begins

The Inquiry into the Njamal People’s Trust (Trust) commenced in May 2017 with the appointment of the Inquirer by the Hon. Attorney General pursuant to an Instrument of Appointment dated 3 May 2017 issued under section 20 of the Charitable Trusts Act 1962.

A copy of the Instrument of Appointment is attached as Annexure A. However, it provides that the Inquirer is:

   To examine and inquire into the Trust, and to examine and inquire into
   (a) the nature and objects, administration, management and results thereof; and
   (b) the value, condition, management, and application of the property and income belonging thereto.

To the best of the knowledge of the Inquiry, this is the first time that an Attorney General has exercised the power under section 20 of the Charitable Trusts Act 1962 to formally appoint an inquirer in relation to a charitable trust.

The Trust, the Trust Deed and the Trustees

The Trust is a charitable trust established by Stephen Reginald Byers, its first trustee, by Deed dated 29 October 2003 primarily for the benefit of the Njamal People (Trust Deed).

The objects and purposes of the Trust are specified in clause 4.1 of the Trust Deed, as follows:

   (a) The Trust is established for the primary object and purpose of the relief of poverty, sickness, suffering, distress, misfortune or destitution of the Primary Beneficiaries.
   (b) The Trust is also established for the secondary objects and purposes of:
       (i) the relief of poverty, sickness, suffering, distress, misfortune or destitution of the Additional Beneficiaries.
       (ii) the advancement of education of the Beneficiaries;
       (iii) the advancement of the culture and religion of the Beneficiaries; and
       (iv) other purposes beneficial to the community of the Beneficiaries.
   (c) The objects of the Trust shall be carried out without purpose of private gain.

The Beneficiaries are defined to mean the Primary Beneficiaries and the Additional Beneficiaries.\(^2\)

\(^2\) Trust Deed, clause 1.1.
CHAPTER 1: INTRODUCTION

The Primary Beneficiaries of the Trust are the Njamal People, who are in turn defined to mean:

Persons of Aboriginal Descent who are:

- unless and until the current Njamal Claim is amended, or there is an approved determination of native title for the Njamal Claim, all the members of the current native title claim group on whose behalf the Njamal Claim is made;
- in the event that the Njamal Claim is amended, those members of the native title claim group on whose behalf the amended Njamal Claim is made; and
- in the event that an approved determination of native title is made for the Njamal Claim, those persons who are determined to be the common law holders of native title for the Njamal Claim.

The Additional Beneficiaries of the Trust are defined to be:

(i) any other Persons of Aboriginal Descent living (permanently or temporarily) in the Claim Area; and
(ii) the spouses and children of Njamal People who are not themselves Njamal People.

The Trust has been administered by four trustees throughout its life: Stephen Byers, Abbott, AET and, currently, ISPL (Trustee or Trustees). A more detailed background to the Trust, and its various Trustees, is provided below in Chapters 2 and 3 of this Report.

The Trust Deed has been varied on two occasions: on 17 November 2010 and on 2 April 2012. ISPL informed the Inquiry that, despite making enquiries with the solicitors of earlier eras and former trustees, it does not have a clean, unredacted copy of the Trust Deed, nor did it have a copy of the Deed of Variation dated 2012. It informed the Inquiry that the last known clean copy of the Trust Deed was with Abbott in circa June 2014. ISPL has also obtained legal advice about steps that it should potentially take to address issues about the succession or validity of the appointment of trustees, due to concerns about a break in its records of trusteeship evidence. Abbott was able to provide the Inquiry with a clean, unredacted copy of the Trust Deed and a copy of the 2012 Variation. It is unclear whether ISPL has since addressed the concern it identified, however, if it has not, it should take steps to address the issue.

**The role of the Attorney General in respect of charitable trusts**

The Attorney General has a significant role in relation to charitable trusts. This is in part because, in contrast to trusts which have individual beneficiaries who are capable of enforcing

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3 Trust Deed, clause 3.1(a).
4 Trust Deed, clause 1.1.
5 Trust Deed, clause 3.1(b).
6 The Claim Area is defined to mean the area enclosed by the external boundary of the current Njamal Claim: Trust Deed, clause 1.1.
the trust, in the case of charitable trusts there are none.\textsuperscript{8} The enforcement of such trusts to ensure their due administration and the proper application of their funds for charitable purposes is generally performed by the Attorney General.\textsuperscript{9} The Attorney General represents the Crown as \textit{pares patriae}, representing the objects of the charity.\textsuperscript{10} The role has been described as 'the guardian of the public interest in the enforcement of charities'.\textsuperscript{11} One role, conferred upon the Attorney General by the \textit{Charitable Trusts Act 1962}, is to inquire into, or to appoint someone to examine or inquire into, the management and administration of charitable trusts.

**The Inquirer's Powers**

Historically, when issues have been raised with the Attorney General, they frequently have been, and are still, able to be effectively addressed through other less formal mechanisms, including correspondence with the relevant trustee and other interested persons and matters are generally addressed in a cooperative approach. On a number of occasions information has been obtained in the context of deliberations as to whether an inquirer should be appointed. Such informal mechanisms depend however on the willingness of trustees and other persons to assist and lack any power to compel provision of information, documentation and assistance.

In contrast, the \textit{Charitable Trusts Act 1962} confers certain powers upon the Attorney or by a person appointed by the Attorney General to examine or inquire into matters relating to the management and administration of a charitable trust.

In particular, pursuant to section 20(3) of the Act, an inquirer may request every trustee, and every person acting or having any concern in the management and administration, of the Trust, or of the property or income thereof:

1. to produce to the inquirer all books, papers, writings, and documents in relation to the Trust or the property or income thereof, or to the administration, management, value, condition, and application of that property and income; and
2. to answer all questions and give all assistance in connection with the examination or inquiry that the person is reasonably able to answer or give.

The Inquiry has, from time to time, exercised these powers to obtain documentation, information and assistance from the various trustees of the Trust, and persons acting or

\textsuperscript{8} \textit{BSH Holdings Pty Ltd v Commissioner of State Revenue} [2000] VSC 302; (2000) 2 VR 454 [9].

\textsuperscript{9} \textit{Construction Industry Training Board v Attorney-General} [1973] 1 Ch 173, 183 (Buckley LJ).

\textsuperscript{10} \textit{Attorney-General v Bishop of Worcester} (1851) 9 Hare 328, 361; 68 ER 430, 546-7 (Turner VC).

\textsuperscript{11} See also \textit{Ngarluma Aboriginal Corporation RNTBC v The Attorney General of Western Australia} [2014] WASC 245 [53], [55] (Allanson J); \textit{Num Hoi, Pon-Su, Soon-Duc Society Inc v Num Pon Soon Inc} [2001] VSC 363; \textit{Metropolitan Petar v Misteski} [2001] NSWSC 976 [4]-[5]; \textit{Tomasevic v Jovatic} [2011] VSC 131 [5]-[7].
CHAPTER 1: INTRODUCTION

having any concern in the management and administration of the Trust or of the property or income of the Trust.

Further comments in relation to those powers and recommendations in relation to possible statutory expansion of those powers, and regulation of charitable trusts, are considered in Chapter 13.

The Approach of the Inquiry

The Inquiry has taken far longer than originally expected. There have been a number of reasons for this. The nature and extent of the allegations and periods of trusteeship considered by the Inquiry have been significant. Delays have arisen at various points during the Inquiry awaiting the provision of requested information, documentation and assistance from both ISPL, certain complainants and, in the case of Rod Carter, a prime mover behind ISPL, information and documentation from ASIC in relation to his disqualification for 4 years from managing corporations. The Inquirer and staff assisting have also for much of the time otherwise largely continued to perform their ordinary duties outside of the Inquiry. Further, at a relatively late stage of the Inquiry it received additional information and documentation regarding certain issues that warranted careful review and consideration before the Inquiry concluded. The Inquiry, although not necessarily required to do so, had adopted a process of writing to various persons at the end phase of the Inquiry to accord them an opportunity (in many cases also provided during the course of the Inquiry) to consider and respond to possible findings and recommendations of the Inquiry, prior to it forming a final view in relation to the facts, matters and recommendations in the Report. The Inquiry would likely have been able to proceed more expeditiously, and more quickly determine the facts which were so often in dispute, had its powers been more extensive, in particular it had no power to require witnesses to attend and give sworn evidence and to be examined. It would likely also have been assisted if witnesses had been afforded statutory protections in relation to providing information, documentation and assistance to the Inquiry. Recommendations in relation to legislative reform to address these and other issues are considered in Chapter 13 of the Report.

During the course of the Inquiry it has been approached by a number of persons regarding the scope of the Inquiry and whether it would include any other trusts, including due to concerns about the operation of charitable trusts generally in the area of native title. Since the Inquiry was established the Attorney General has established a further inquiry under the Charitable Trusts Act 1962 in relation to Ygunga-Nya People’s Trust. In addition, the Inquiry understands that a subsidiary of ISPL has recently assumed trusteeship of that Trust.

While the scope of the Inquiry does not extend to other charitable trusts, during the course of the Inquiry a number of issues have emerged which may have relevance beyond the management and administration of the Trust. A feature of native title claims and rights in many regions is the entry into agreements with mining companies and other entities from
which benefits directly or indirectly flow back to the relevant claim groups and Aboriginal people more generally. That is often achieved through the payment of funds into trusts. These are often, but not always, limited by charitable objects for the benefit of such communities. Such limitations serve a useful purpose in directing the use of funds for a broader community good, rather than for a purpose of private gain. However, depending on the nature and terms of the trust established this can create challenges and difficulties for aboriginal communities seeking to achieve outcomes that may conflict, or be difficult to achieve consistently, with the terms of the trust that is established. Many different forms of trust deeds are utilised, as a review of deeds lodged with the Australian Charities and Not for Profits Commission (ACNC) and available on its website reveals. Some are more prescriptive than others and some are less restrictive than others.

Another common theme is the focus and determination of the Njamal People, and many other Aboriginal communities, to achieve native title determinations and self-empowerment to control and advance their own cultural and economic development. This includes overcoming actual or perceived issues of dependency on welfare or other sources of assistance, including, at times, through payments made by such trusts.

The Inquiry has also observed first-hand the destructive tensions and conflict that can arise both for individuals who are involved in this area and aboriginal communities generally where there are strongly differing views and internal ‘politics’ about how best outcomes can be achieved and this flows over into the management and administration of a trust, including the appointment and removal of trustees or advisory committees associated therewith. The spectre of self-interest and its potential to directly or indirectly intrude into decision making, to the detriment of the common good in this area, was also apparent. So too the corresponding importance of transparency and good governance in decision making and strict adherence to duties by trustees and others involved in this area was also manifest in the issues considered by the Inquiry.

A significant challenge for indigenous communities is establishing appropriate structures through which to achieve their objectives. A range of structures have been adopted including in relation to the bodies and trusts to whom funds that may be due under mining agreements may be directed. In many cases, such as this, a charitable trust is established to which such funds may or, under some agreements must, be directed. It is also often the case that where funds must be paid to a charitable trust the representatives of the Aboriginal community may specify a different trust to which those funds are required to be directed. That is however not the only mechanism utilised. In many instances other forms of trust are also established, such as direct benefits trusts or commercial trusts. This facilitates flexibility in relation to how funds are applied, and accommodates expenditure of some funds for objects that are not only charitable. Depending on the structures adopted and their governing instruments, those mechanisms may be more or less effective to assist particular Aboriginal peoples achieve their ambitions. Particular structures may also be preferred in order to conduct particular
activities and for reasons such as tax effectiveness. Tensions however may also arise between the aims sought to be achieved and whether and, if so, how those aims can be achieved via existing structures. That is the case in relation to the Trust considered by the Inquiry.

The Inquiry has been conscious of the importance of, and need to respect, the lore and culture of the Njamal People, including the role of their Elders and decision making structures. To many, the intervention of the government by way of formal inquiry has been seen as an unwanted and unwarranted intrusion into those matters. This was associated with concern that it reflected poorly on the Njamal People, and those associated with the Trust and its operations. That said, the prevailing response from the many Njamal People with whom the Inquiry has made contact was to accept and assist the Inquiry and be forward looking – seeking positive outcomes for the future from any findings and recommendations that the Inquiry may make.

The pride, passion, strength and commitment of the Njamal People and their powerful collective determination to take control of advancing their own destiny have been obvious throughout the Inquiry. Navigating that course has not been, and is not currently without, challenges. Those challenges have included where different views have been adopted as to the best means to achieve such outcomes. Often passionate advocates for change within the Njamal community have adopted conflicting positions, while broadly seeking to achieve often similar goals. This in turn has given rise to significant discord at certain times. A particular difficulty is that a vocal few can potentially sway the views of others, not always based on accurate information. That is particularly concerning when canvassing of support occurs, and funds are disbursed in connection with consultations. The making of cash payments and payment of fees for attending consultations and the risk of that being used in or, at least perceived to be, an attempt to influence decision makers is an area of particular concern to the Inquiry, requiring careful and improved controls.

Wide ranging allegations of varying degrees of seriousness have been made to the Inquiry about the propriety of various actions that have been taken in relation to the Trust, native title claims, negotiation of mining agreements, management of related companies and related decision making processes, as well as the conduct of various persons who have made such complaints. A number of matters fell outside the scope of the Inquiry. Others were only indirectly relevant. The Inquiry has therefore carefully considered allegations made before it and focussed on key areas of complaint or concerns that arose during the course of the Inquiry, particularly where they are of significance for the ongoing management and administration of the Trust, its property and income.

A view expressed to the Inquiry by many Njamal people associated with the Trust, particularly in its early stages, has been that, under the current Trustee, ISPL, the Njamal People have felt more empowered and closer to achieving those goals than under any previous Trustee.
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The view is not however uniform and there have been, and remain, very strong critics of the operations of various Trustees, the current Trustee in particular. Lest it be thought that the concerns raised with the Inquiry have been limited to the strong voices of a view perceived to be seeking to advance their own views and interests over the collective good, it is significant to note that concerns that have been raised with the Inquiry extended to others intimately involved in the operations of the Trust, including current and past employees, officers, directors of ISPL or related entities and TAC members, many of whom were initially strong supporters of the Trustee and its operations. Over time a number of such persons have become increasingly concerned about its governance, management and administration. While the current trustee has progressed many positive programs and steps, for which due credit should be given, a number of serious concerns have arisen about its operations, as elaborated below. The Trustee has also been faced with significant challenges that have made its task far harder. These have included repeated steps taken by certain individuals seeking to challenge the actions of the Trustee and, it would appear, at times leverage the fact of the Inquiry to achieve outcomes they consider to be more beneficial. That has itself generated community concerns and impeded the progress of various initiatives of the Trust. Further, the significant time and resources that have been required to be devoted by the Trust and related entities to such matters has been a drain on Njamal resources and an unwanted distraction, particularly as there has been a focus on achieving a favourable final determination of their long standing native title claims. The existence of the Inquiry has also resulted in some government and commercial third parties being less willing to engage about initiatives that the Trustee may have been seeking to advance.

The Inquiry has identified a number of areas in respect of which it has concerns about the practices that have been adopted, and actions taken, by various Trustees including, in certain significant respects, potentially acting outside the terms of the Trust Deed governing the Trust and therefore in breach of trust. Many of those issues have arisen and ought be considered in the context of the at times very real practical difficulties faced by the trustees in administering the Trust strictly in accordance with its terms, while ultimately seeking to fulfil the objects and purposes of the Trust, for the benefit of the Njamal People, and accommodate the wishes of that community and their elected representatives. The Inquiry has, in addition to making a range of findings, made a series of recommendations, including as to how some of the matters of concern identified by the Inquiry might or should be addressed. Those include changes and improvement to certain policies and practices, possible amendments being effected to the Trust Deed and Trustee Advisory Committee Rules and directions or determinations being sought from the Supreme Court in relation to certain matters, particularly where there is significant doubt as to whether the Trust Deed allows such practices. It is, of course, ultimately open to the Njamal community, which is responsible for electing members it wishes to elect to the TAC, which is invested with the power to remove a
Trustee, the Trustee itself and the Attorney General as *parens patriae*, to exercise such powers as they hold in respect of the Trust and matters identified in the Report.

Given the wide scope of appointment, it has been necessary to identify which aspects of the Trust's operation would be the principal focus of the Inquiry. As the Inquiry was aware of allegations against the current and previous Trustees, it has not confined its inquiry to the management and administration of the Trust by the current Trustee, ISPL. However, given the nature and extent of the concerns raised about the operation of the Trust under the current Trustee and that its actions will continue to impact on the Trust, the recent operations of the Trust under the trusteeship of ISPL have been the principal focus of the Inquiry. The high level management and administration of the Trust as well as a number of specific issues and allegations have also been examined in relation to previous Trustees. That has also been of benefit, in part, to compare and contrast the similarities and differences between the approaches of those Trustees and challenges they have faced.

The Inquiry's initial approach was to make a range of enquiries in order to gain a broad 'helicopter' view of the Trust, its current management and administration, relevant instruments and practices governing its operation (including the Trust Deed, Trustee Advisory Committee Rules, relevant policies and delegations) and related corporate structures that have been established and key persons involved in the Trust. That was particularly important in the context of the current Trustee, ISPL, which has sought to implement Trust objectives through not only the Trustee's activities but also through a variety of related corporate entities and trusts established by it.

Shortly after the Inquirer's appointment, on 8 May 2017 an article about the appointment was published in *The West Australian* newspaper and a statement was released on the WA Government's Media Statements website.¹²

On 17 May 2017, the Inquirer attended (with a solicitor assisting the Inquiry) a meeting of the TAC to introduce himself to the TAC members to discuss the establishment of the Inquiry and its scope. A number of matters were clearly communicated to the Inquiry during the course of that meeting. First, considerable concern was expressed that the Inquiry was publically announced prior to the TAC members or Trustee being made aware of the proposed Inquiry. Related to that point, concern was expressed that an Inquiry had been established in circumstances where a strongly held view was that the primary person believed to have been advancing allegations was Ms Westerman, portrayed as a disaffected former TAC member whose views were in conflict with the Trustee and the TAC generally. A view was expressed that had the allegations made been raised and an opportunity given to respond, it may have been unnecessary for an Inquiry to be established. Given the nature and breadth of

allegations raised, the strongly divergent views of various parties and the high turnover of Trustees in recent years, it is however understandable that an independent inquiry was established. Further, it will not necessarily be appropriate to engage with a trustee or advisory body to the trustee prior to establishing or publically announcing an inquiry. However, given the sensitivities to such an inquiry being announced, it is desirable that specific consideration be given whether to notify the trustee and relevant community members, such as the TAC, prior to any public announcement of the establishment of the inquiry.

Concern was also expressed by the TAC and Trustee about the potential damage to the reputation of the Njamal People and Trustee and impact on them trying to achieve their goals, particularly given the history of having changed trustees on several occasions over a short period and the significant expenditure and disharmony associated with those matters. Some concern was also expressed about ensuring that if any issues were identified, they would be addressed and that suggestions were made to ultimately assist the Njamal People.

The Inquirer explained to those present that he could not comment on many of those issues, and that his role was to conduct the Inquiry in accordance with his terms of appointment. The Inquirer explained that the Inquiry was not being conducted by the State Solicitor's Office as such, although the Inquirer was (and is) an employee within that Office, and that his role was to independently discharge his functions. The Inquirer noted that he was being assisted by certain solicitors from the State Solicitor's Office but that we were in the process of setting up independent contact details for the Inquiry, which subsequently occurred. The Inquirer also outlined the general approach he was intending to adopt and that, once an initial overview had been obtained, more intensive meetings with interested persons would be conducted and various matters would be the subject of more specific enquiries.

Many of the TAC members were generally reluctant, but ultimately broadly accepting of the Inquirer's role and responsibilities and keen for the matter to proceed as expeditiously as possible. The current Trustee, ISPL, on many occasions subsequently reaffirmed its commitment to be open and transparent in responding to the Inquiry and otherwise assisting it. While in many respects it has been, its approach to responding to the Inquiry has at times been far less responsive, timely and complete than the Inquiry reasonably expected. Further, there was a distinct change of tone of response and engagement at various points during the Inquiry, particularly where specific concerns raised in connection with Mr Carter's role were being examined. It also sought to redirect the Inquiry's focus from ISPL to the actions of Ms Westerman in particular in connection with Njamal Mining Pty Ltd, an entity the shares in

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13 Despite this advice being repeated to Mr Carter on a number of occasions, and separate email and contact details being established, Mr Carter repeatedly chose to refer to and characterise the Inquiry as a State Solicitor's Office Inquiry.
which have at all times being held by the current or former Trustees on behalf of the Trust. The approach taken by the Inquiry to those issues is outlined below.

At the above meeting ISPL undertook to provide the Inquiry with a detailed background submission and relevant materials. On 4 July 2017 it provided both the detailed submission it had foreshadowed as well as answers to the questions the subject of the formal letter request for information, documentation and assistance.

A key theme of the response from ISPL was concern over the involvement and motivations of Ms Westerman and persons perceived to be her supporters and the potential damage her allegations may cause. That has not changed, although the focus, primarily of Mr Carter, has widened over time to embrace a number of other persons, including a former director and former staff of the ISPL, whose evidence provided to the Inquiry as to the internal operations of ISPL and Mr Carter's involvement, Mr Carter broadly rejects.

In that regard, it was suggested that the motives included to prevent resources and attention being directed at further tracing the money they allegedly misappropriated and/or mismanaged in relation to Njamal Mining Pty Ltd. It went so far as to suggest that they had done this twice before and were again trying to create a "smoke screen to pervert the course of justice." This type of inflammatory allegation, extremely serious in nature, but often on examination without substantiation, was unhelpful and, in part, reflected less objectivity than one would hope and expect that a trustee would maintain, even when under scrutiny in respect of allegations that might be disputed. It was revealing of the depth of animosity that was present and for many still remains.

ISPL was not alone in such an approach. Ms Westerman and others equally advanced a wide range of sometimes very serious allegations which, in many instances, were not supported by a sound evidential foundation, as distinct from mere suspicion or underlying concern or anxiety about whether inappropriate practices might have occurred or be occurring. That is not to say however that Ms Westerman's concerns were entirely without foundation, or that she was alone in advancing them.

Indeed, as explained in the Report, a range of concerns, of varying significance, have been identified in relation to the operation of the Trust by the current, and, to a lesser extent, former trustees in respect of which the Inquiry makes a series of findings and remedial recommendations.

Outcomes which ISPL indicated that it and the Trust sought included the powers of the Inquiry being used to summons the books and accounts from Ms Westerman for the alleged $2.8 million of proceeds and seed funding from FMG and others that went through the Njamal

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14 Further, as the Inquirer foreshadowed at that meeting, the Inquiry issued a notice requesting information from the Trustee on 24 May 2017.
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Mining Pty Ltd accounts, allegedly leaving nothing except large unpaid debts to the Trust in the vicinity of $400,000.\footnote{On 10 August 2018, at a very late stage of the Inquiry, the current directors of Njamal Mining Pty Ltd, Mr Parker and Mr Troy Eaton, wrote to the Inquiry raising a range of concerns about Ms Westerman’s conduct in relation to Njamal Mining Pty Ltd and seeking that the Inquiry investigate how AET allegedly failed in its duty to protect trust funds.} It sought that they be requested on a monthly basis for the 2013 to 2016 financial years. The Inquiry however indicated that its scope was focussed on the administration, management and operation of the Trust, rather than other entities such as Njamal Mining Pty Ltd. Further, it foreshadowed that while the Inquiry may, as part of its Inquiry, consider aspects of the operations of related entities, it would not be conducting an inquiry into those entities.

In the case of Njamal Mining Pty Ltd, it was also indicated that, given allegations that had been advanced by ISPL of alleged criminality against Ms Westerman in connection with Njamal Mining Pty Ltd, the Inquiry was not intending to examine matters connected with those allegations (which have since resulted in criminal charges, which are contested by Ms Westerman, and some of which have been the subject of a recent hearing by the Court on 21 and 22 October 2018).

Given that Njamal Mining Pty Ltd is a separate legal entity, that although owned by the Trust it was not significantly funded by it (in contrast to many of the recent related entities established under the watch of ISPL), the work previously done by others in this area,\footnote{See interim shareholder’s reports from Mr Coad in November and December 2015.} the need for the Inquiry to prioritise the specific matters it examined as part of its Inquiry and the potentially disproportionate amount of time and resources that would have been expended in inquiring in any detail in relation to this matter, that criminal charges were and remain pending in relation to aspects of Ms Westerman’s alleged conduct in relation to Njamal Mining Pty Ltd, and civil proceedings are also on foot between Ms Westerman, Njamal Mining Pty Ltd and others, the Inquiry has not focussed on allegations about the management and operation of that entity under the watch of Ms Westerman, though they are discussed in some detail later in the Report.

Confidentiality

In its July 2017 response ISPL emphasised that it had serious concerns as to the security and confidentiality of some of the information and documentation requested by the Inquiry, as it related to:

\begin{itemize}
  \item the confidential contents of commercial agreements with large mining companies and their consent had not been obtained to release the information; and
  \item the confidential and very sensitive personal nature of the information contained in the applications for assistance received from individual Njamal applicants where they had detailed their personal circumstances, believing it would be kept private.
\end{itemize}
The concerns of ISPL were reiterated on a number of other occasions including, in certain instances, initially refusing to provide information or documentation requested, albeit this was generally provided after further engagement with ISPL. In one instance, concerning the arrangements regarding accommodation provided to an individual in Perth, given the sensitive nature of the matter, ISPL refused to respond in writing, although did provide some information orally. The concerns about confidentiality have been reflected in the content of the Report so as to avoid disclosure of any commercially confidential sensitive information and personally sensitive information.

**Principles Generally Applicable to Trusts and Trustees**

In examining and inquiring into the Trust and its nature and objects, administration, management and results; and the value, condition, management and application of the property and income of the Trust the Inquiry has paid close regard to the terms of the Trust Deed. That is the primary instrument governing the Trust and its management and administration. It has also carefully examined the powers and duties of the Trustee from time to time, and those otherwise involved in its management and administration and whether they have been discharged.

The Inquiry has also considered and applied where relevant the law applicable to trusts and trustees generally and in the area of charitable trusts, in particular. It is therefore useful at this stage to make some observations about principles generally applicable to charitable trusts, trustees of charitable trusts, and the interpretation of trust deeds. This section does not deal with all of the principles relevant to the subject matter of the Inquiry. A number of other principles are referenced in relevant parts of the Report to which they relate.

**Charitable Trusts**

A charitable trust is a trust for a purpose beneficial to the community rather than for the benefit of beneficiaries, although individual persons may benefit from distributions of trust funds for charitable purposes.\(^\text{17}\)

It is axiomatic that payments from a charitable trust must be made for the purpose of satisfying the trust’s charitable objects.\(^\text{18}\) Payments that are not made for that purpose will be payments made in breach of trust.\(^\text{19}\)

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\(^{17}\) *Commissioner of Taxation v Bargwanna* (2012) 244 CLR 655, [7] (French CJ, Gummow, Hayne and Crennan JJ); *Latimer v Commissioner of Inland Revenue* (NZ) [2004] 4 All ER 558, [29] (Lord Millett); *Attorney General (NSW) v Perpetual Trustee Co (Limited)* (1940) 63 CLR 209, 222 (Dixon and Evatt JJ) (Latimer).

\(^{18}\) See also Trust Deed, clause 4.2(a).

\(^{19}\) A trustee who invests trust funds in a manner that is unauthorised by the trust instrument, statute or the court commits a breach of trust and is liable for any consequent loss: *Speight v Gaunt* (1883) 9 App Cas 1, 19 (Lord Blackburn).
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The Trust Deed contains various provisions that, on one view, appear to contemplate the trust as being discretionary in nature and which have beneficiaries with a recognised interest in the trust. That appears to have influenced the understanding and expectations of a number of beneficiaries, as to their entitlements. The better view however is that the Trust is a charitable trust and that the Trust Deed does not create beneficial interests in the trust property held by any person.\(^\text{20}\)

**Charitable Objects at General Law**

There are four generally recognised categories of charitable objects in pursuit of which a charitable trust may be established:\(^\text{21}\)

1. the relief of poverty;
2. the advancement of education;
3. the advancement of religion; and
4. other purposes beneficial to the community, not falling under any of the preceding heads.

The first category is broadly consistent with the primary objects and purposes of the Trust and first of its secondary objects. The remaining categories are broadly consistent with the remaining secondary objects and purposes of the Trust.\(^\text{22}\)

In addition, although not a traditionally recognised head of charity, payments for recreational purposes may be charitable if the facilities are provided in the interests of social welfare.\(^\text{23}\) The requirement that facilities be provided in the interests of social welfare is not satisfied unless certain conditions (such as that they are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended) are met.\(^\text{24}\)

Moreover, the functions of certain bodies with objects directed towards advancing the interests of aboriginal communities have been held to fall under the fourth head of charity (and possibly even the first category).\(^\text{25}\)

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22. See Trust Deed, clauses 4.1(a) and 4.1(b).


25. Such as an Aboriginal land council under Aboriginal Land Rights Act 1983 (NSW), the functions of which under that Act were to acquire land on behalf of aboriginal people and whose objects under the relevant regulations included to improve, protect and foster the best interests of the Council's members and all aboriginal people within the Council's area and to obtain housing for aboriginal people in Dareton Local Aboriginal Land Council v Wentworth Council (1995) 89 LGERA 120 (Bignold J) (Dareton Council). See also Toomeelah Co-operative Limited v Moree Plains Shire Council [1996] LGERA 48, 59 (Stein J) which concerned a community advancement society under...
Further, because the law recognises that Aboriginal people as a group of people are severely
disadvantaged and impoverished in Australian society, and are a “class which, generally
speaking, is in need of protection and assistance”, gifts for the benefit of Aboriginal people
have been held to create valid charitable trusts.\textsuperscript{26}

In relation to the law relating to charities more generally (as opposed to charitable trusts), it is
also observed that, for the purposes of the \textit{Charities Act 2013} (Cth), an entity with a purpose
directed for the benefit of indigenous individuals,\textsuperscript{27} is deemed to be for a public purpose if the
entity holds funds relating to traditional indigenous rights of ownership.\textsuperscript{28}

Subject to the specific limitations under a particular trust instrument, payments made in
pursuit of one or more of the above recognised objects will be payments that are for a
charitable object and within the power of a trustee of a charitable trust to make and will not
constitute a breach of trust.

However, even in cases where a trust is a recognised charitable trust, as is the case with this
Trust, if money is distributed to an individual member and which does not benefit the group as
a whole, that payment may be characterised as not being made for a charitable purpose and
therefore an impermissible use of trust funds.\textsuperscript{29}

Whether or not a particular payment is a permissible use of trust funds is a question of fact
and depends upon individual circumstances. A distinction has been made between:\textsuperscript{30}

\begin{quote}
...ends, means and consequences. The ends must be exclusively charitable. But if the non-
charitable benefits are merely the means or the incidental consequences of carrying out the
charitable purposes and are not ends themselves, charitable status is not lost.
\end{quote}

There is at times a fine line between a payment which is made for a charitable purpose (for
the relief of poverty, sickness, suffering, distress, misfortune or destitution) ‘without purpose of
private gain’ which has an incidental consequence of a non-charitable private benefit, and a
payment which might be characterised as having been made with an impermissible purpose
of private gain. That is particularly so in relation to support for economic or commercial
activities. In the Inquiry’s views this can however involve degrees of judgment, and must be
considered in the context of the community concerned and ways in which charitable objects

\textsuperscript{26} See [1951] ALR 518, where a gift left by a testator to a named person “to be used by him in his
discretion for the benefit of Australian aborigines” was a valid charitable trust; applied in many
instances since, including in \textit{Gumbangerri Aboriginal Corporation v Nambucca Council} (1996) 131
FLR 115.

\textsuperscript{27} That may not otherwise be for public benefit under that Act due to the relationship between those
individuals.

\textsuperscript{28} Section 9 of the \textit{Charities Act 2013} (Cth).

\textsuperscript{29} \textit{Flynn v Mamarika} (1996) 130 FLR 218.

\textsuperscript{30} \textit{Latimer, 170} [36] (Lord Millet), applied in \textit{Plan B Trustees} [130] (Edelman J).
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might reasonably be advanced. The Inquiry accepts that in certain circumstances it is open to the Trustee to apply Trust Funds to provide assistance to small business (from which an individual Njamal person will derive personal income and profit) where that is done to achieve a larger charitable object or purpose (such as the purpose of improving the social position, economic position, self-esteem and self-reliance and independence of the Beneficiaries as per clause 4.2(c)(i) of the Trust Deed). Considerable caution should however be exercised in exercising such a discretion, due to the perception and potential for such application of Trust Funds to exceed a Trustee's power. This is considered in more detail at page 592 and following.

Trustee's Duties

While the nature of their duties is largely the same, unlike trustees of private trusts, trustees of charitable trusts do not owe duties to individual beneficiaries. Rather, their duty, to promote the charitable objects or purposes of the trust, is a duty to the public represented by the Attorney General.31

In summary, and as a matter of general law, a trustee of a charitable trust must:

1. apply or invest the trust fund in accordance with the trust instrument and relevant trustees legislation;
2. exercise the power of investment in the best interests of the present and future beneficiaries;
3. avoid speculative or hazardous investments;
4. act impartially as between beneficiaries; and
5. take advice.32

Of these the High Court has observed that the duty of a trustee to adhere to and carry out the terms of the trust deed is 'perhaps the most important duty'.33

A necessary corollary of a trustee's obligation to hold and deal with the trust property for the benefit of beneficiaries (or, in the cases of a charitable trust, for the purposes of the trust) is the trustee's liability to account for its stewardship of the trust property.34 This entails an obligation to keep proper accounts and to be ready to render such accounts when called upon

31 Re Church of England Trusts Corporation (Wangaratta) [1924] VLR 201 at 206 (Weigall AJ); Lucker v Bayside Cemetery (2013) 979 NYS 2d 8, 18.
33 Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15; (2003) 212 CLR 484 [32], [33] (Gleeson CJ, McHugh, Gummow, Kirby & Hayne JJ).
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to do so.  

The duty to keep proper accounts and records as it relates to charities in Australia also arises under Division 55 of the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) (*ACNC Act*). Section 55-5 of the ACNC Act provides that a registered entity must keep written financial records that correctly record and explain its transactions and financial position and performance, and enable true and fair financial statements to be prepared and audited, so as to enable any "recognised assessment activity" to be carried out in relation to that entity. A "recognised assessment activity" is defined in that Division to include an activity carried out by the ACNC involving assessment of the entity's compliance with the ACNC Act and compliance with any taxation law. Records must be retained for 7 years after the transactions, operations or acts covered by the records are completed. An entity which does not comply with the ACNC record keeping obligations commits a strict-liability offence.

The ACNC Act also requires that a registered entity provide certain information annually to the ACNC, called an "annual information statement". Such statement must be given to the ACNC no later than 31 December in the following financial year. Further, registered entities with annual income of over $250,000 are also required to annually provide an audited financial report, undertaken in accordance with the auditing standards. Such statement must be given to the ACNC no later than 31 December in the following financial year.

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35 *Freeman v Fairlie* (1817) 3 Mer 24, 43; 36 ER 10, 17; *Pearse v Green* (1819) 1 Jac & W 135, 140; 37 ER 327, 329; *Kemp v Burn* (1863) 66 ER 740; *Re Watson* (1904) 49 Sol. Jo. 54; *Strauss v Wykes* [1916] VLR 200, 203-4; *Re Craig* (1952) 52 SR (NSW) 265, 267; *Williams v Stephens* (unreported, Supreme Court of New South Wales, Young J, 24/3/86, BC8601164); *Re The Will of Ruthenberg* (unreported, Supreme Court of Queensland, Ryan J, 27/10/93, BC9303514). Note that in the case of a charitable trust, the requirement to account would likely be to Attorney General or the Supreme Court absent provision in the trust deed conferring such an entitlement on another person or class of persons.

36 This is also specifically provided for under section 53 of the *Trustee Act 1962*.

37 ISPL is, and AET was, a "registered entity" for the purposes of the ACNC Act.

38 Section 55-10 of the ACNC Act.

39 Section 55-5(4) of the ACNC Act.

40 Sections 55-5(6) and 55-5(7) of the ACNC Act.

41 Section 60-5(1) of the ACNC Act.

42 Section 60-5(2) of the ACNC Act.

43 Section 60-10 of the ACNC Act requires "medium and large" registered entities to give annual financial reports. "Medium registered entity" is defined as an entity with annual income of more than $250,000. "Large registered entity" is an entity with annual income of more than $1 million. Section 60-20 and 60-25 requires that the report be reviewed (medium entities) or audited (large entities)

44 Section 60-35 of the ACNC Act.

45 Section 60-10(2) of the ACNC Act.
A trustee generally may, and in many circumstances should or must, obtain appropriate professional advice in relation to matters such as investments. Some of these obligations are restated in the *Trustees Act 1962*. In addition, that Act imposes further obligations on trustees in respect of any power of investment, including:

1. where the trustee's profession, business or employment is or includes acting as a trustee, or investing the money on behalf of other persons, the trustee must exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons;
2. if the trustee is not engaged in such profession, exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons;
3. exercising powers of investment in accordance with any provision in the trust instrument that is binding on the trustee and requires the obtaining of any consent or approval or compliance with any direction with respect to trust investments; and
4. subject to the trust instrument, a trustee must, at least once a year, review the performance (individually and as a whole) of trust investments.

These principles are returned to below in Chapter 8 of the Report when considering the investments made by the various Trustees of the Trust, in particular ISPL.

**Delegation and Employment of Agents**

Except to the extent authorised by the trust instrument or legislation, trustees of charitable trusts must not delegate the exercise of their powers or discretions to other persons.

As a matter of general principle, trustees have a duty to act personally and may not delegate. That rule is not absolute, and there are certain circumstances in which a trustee may employ an agent or delegate his duties or powers.

Trustees are permitted to employ *agents* to act for them in certain circumstances. Agents are employed to implement decisions taken by trustees. By contrast, a delegate can exercise a discretion of a trustee. The concepts of "agent" and "delegate" are frequently confused.

**(a) Employment of Agents**

At general law, the circumstances in which an agent may be appointed include where there is a "moral necessity or sufficient practical reason from the usage of mankind or otherwise" to
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authorise an agent to do an act on behalf of a trustee.\textsuperscript{53} That phrase has been interpreted to mean that a trustee may employ an agent in circumstances where an ordinary prudent man of business would take such a step.\textsuperscript{54} For example, where a trustee makes a decision to make an investment on the stock-market, he may employ a stockbroker of good credit and direct him to make the investment; or where the trustee sells goods at auction, a broker may be employed to receive money; or where the trustee invests in property, he may employ a rent collector.\textsuperscript{55}

Powers to employ agents are also conferred on trustees by legislation. In Western Australia, section 53(1) of the \textit{Trustees Act 1962} permits a trustee, instead of acting personally, to employ and pay an agent, whether a solicitor, accountant, bank, trustee corporation, stockbroker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust or the administration of the trust property. Section 53(2) permits a trustee to appoint any person to act as his agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating, or otherwise administering any property real or personal, movable or immovable, subject to the trust in any place outside the State (emphasis added), or executing or exercising any discretion or trust or power vested in him in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions, as he may think fit, including a power to appoint substitutes.

These provisions would not appear to empower a trustee to delegate discretionary powers expressly given to the trustee under the trust instrument.\textsuperscript{56}

In \textit{Niak v Mcdonald} [2001] 3 NZLR 334, in relation to section 29(2) of the \textit{Trustees Act 1956 (NZ)}, which is in like terms to section 53(2) of the \textit{Trustees Act 1962}, Paterson J stated:\textsuperscript{57}

Section 29(2) of the Act relied upon by the Judge in this case, does not empower trustees to make a general delegation of their powers. It is an empowering section which enables trustees to appoint agents to implement decisions once the trustees have, in accordance with the powers conferred by the trust instrument or law, made the appropriate decisions. The law as it applies in this case, is that unless the trust deed provided otherwise, the trustees were required to unanimously make a decision and had no authority to delegate to one of their number a general authority to make decisions on their behalf.

\begin{footnotesize}
\begin{enumerate}
\item See \textit{McMillan v McMillan} (1891) 17 VLR 33, 37-9, referring to \textit{Speight v Gaunt} (1883) LR 22 Ch D 727; 741-2 (Jessel MR), see also 756 (Lindley LJ), 762-3 (Bowen LJ); referring to \textit{Ex parte Belchier Amb.218 3F 2.}
\item \textit{Speight v Gaunt} (1883) LR 22 Ch D 727, 740, 742 (Jessel MR).
\item \textit{Speight v Gaunt} (1883) LR 22 Ch D 727, 740-3 (Jessel MR); see also \textit{Kemp v Walker} (1914) 33 NZLR 943.
\item See \textit{Halsbury's Laws of Australia}, [430-4430]; \textit{Ford and Lee: The Law of Trusts}, [9.12150] (in respect of section 53(2)); \textit{Jacob's Law on Trusts}, [17-31] (The Inquiry notes the commentary is somewhat confusing in this regard, as it also states at [17-30] that the Western Australian provisions confer on trustees a general power to delegate any of their powers or duties and that the old principle that a trustee may not delegate has virtually disappeared); referred to in \textit{Wilkinson v Feldworth Financial Services Pty Ltd} (1998) 29 ACSR 642.
\item [2001] 3 NZLR 334 [16]-[18].
\end{enumerate}
\end{footnotesize}
CHAPTER 1: INTRODUCTION

The power to employ an agent may also be specifically permitted by the trust instrument, or may be implied whether the trust so warrants.\(^{58}\)

The trustee must ensure that the agent is employed in a matter which is within the ordinary scope of the agent's business to perform and is under an obligation to be diligent in seeing that a duty given to an agent is properly performed.\(^{59}\)

(b) Delegation

At common law the general rule is that a trustee must not delegate his or her duties or powers, not even to co-trustees, \textit{except} where it is specifically permitted by the trust instrument or by statute.\(^{60}\) The delegation permitted by a trust instrument may extend to the delegation of discretionary powers.\(^{61}\)

In this case it is arguable that clause 10.2(b)(iii) of the Trust Deed should be construed in a manner similar to section 53(1) of the \textit{Trustees Act} 1962 (which uses similar terminology), as not permitting a trustee to appoint a person to exercise the discretions of the trustee. Arguably when read together with clause 10.4 the power to delegate in respect of acts in relation to the Trust Fund, in so far as the discretion to distribute the Trust Fund is concerned, is limited to delegating the doing of acts in relation to distribution which the Trustee has decided should be made.

It is open to argument however as to whether that may be too narrow a construction, particularly having regard to the fact that clause 10.2(b)(iii) expressly refers to delegation, as opposed to an agent (as in clause s 6.2(o) and 8.2 and 10.2(b)(i)) and the breadth of the phrase “doing any act relating to the Trust Fund”. If clause 10.2(b)(iii) were to be construed as permitted the delegation of the discretion to distribute the trust fund, then it appears consulting with the TAC about the distribution of the Trust Fund in accordance with clause 10.4 would also need to fall within “any act relating to the Trust Fund”, otherwise the consultation requirements contained in clause 9.3 could effectively be circumvented by a delegation of power.


\(^{59}\) \textit{Flynn v Mamarika} (1996) 130 FLR 218, 226 (Martin CJ).

\(^{60}\) \textit{Flynn v Mamarika} (1996) 130 FLR 218, 226 (Martin CJ); see also \textit{Scott and others v National Trust for Places of Historic Interest or Natural Beauty and another} [1998] 2 All ER 705, 717 (Robert Walker J); see also \textit{Commissioner of Inland Revenue v Newmarket Trustees Ltd} [2012] 3 NZLR 207, [49]-[51]. In relation to the statutory powers of trustees to appoint delegates in certain circumstances, in Western Australia, that power is found is found in section 54 of the \textit{Trustees Act} 1962 and is restricted to the situation where the trustee is out of the State, a member of her Majesty's forces, or temporarily incapable of performing all of the trustee's duties.

\(^{61}\) See \textit{Re Triffitt's Settlement; Hall v Hyde and Others} [1958] 2 All ER 299, 302 (Upjohn J); \textit{Flynn v Mamarika} (1996) 130 FLR 218. For further example see e.g. \textit{Fitzwood Pty Ltd v Unique Goal Pty Ltd} [2000] FCA 36 and cases discussed below.
CHAPTER 1: INTRODUCTION

In any event, even where an express provision in a trust instrument authorises the delegation of the exercise of discretionary powers it does not relieve the trustee of the duty of exercising the care of a prudent man of business in the appointment and supervision of the delegate.\footnote{Flynn v Mamarika (1996) 130 FLR 218, 226 (Martin CJ).}

These issues are relevant to certain practices adopted from time by different Trustees in relation to the making of payments, including from 'family buckets', at times to family representatives to then distribute to other family members, discussed in more detail below (see page 585).

Recommendation 1 (Chapter 1)

1. If any issues remain in relation to the completeness of ISPL’s documentary records in relation to the terms of the Trust Deed and appointment of Trustees, that ISPL take steps to address those issues and, if requested by ISPL, Abbott provide ISPL with a certified copy of the 2012 Deed of Variation of the Trust Deed dated 2012 and AET of its instrument of appointment.

2. If future inquiries of this nature are conducted, specific consideration be given whether to notify the trustee and relevant community members, such as the TAC, prior to any public announcement of the establishment of the Inquiry.
CHAPTER 2: GENERAL BACKGROUND

The Njamal People

The Njamal (also known as Nyamal) People are Indigenous Australian people of the Pilbara region in northern Western Australia. Njamal country traditionally covers an area east of the coastal Kariyarra country, inland from the town of Port Hedland. It encompasses the towns of Marble Bar and Nullagine and runs north past the Oakover River to the borders of Manyjilyjarra, Warnman, Nyangumarta and Ngarla country and south past the Shaw River.

The Aboriginal people of the Pilbara experienced extensive changes to their culture from the 1870s with the arrival of European pastoral, then mining, industries that took control of much of their land. Despite significant suffering, many Pilbara Aboriginal people managed to remain close to their land as part of pastoralism. In 1946 Pilbara Aboriginal people were the first Aboriginal workers in Australian history to demand better living conditions and wages by carrying out a walk off of Aboriginal pastoral workers.63 A prominent senior Njamal lawman (Peter Coppin) was among those who led the first strike of Aboriginal workers in the nation’s history. The strike involved about 700 or 800 people from 27 stations across the Pilbara at a time when it was considered dangerous for Aboriginal people to agitate for right and justice.64 Since the 1960s, mining development changed the landscape.

Native Title

Currently, the Njamal People are progressing two applications for native title:

1. Kevin Allen & Ors v State of Western Australia & Ors (WAD 6028/1998);65 and
2. Doris Eaton & Ors v State of Western Australia & Or (WAD6003/2000).66

The “Njamal People”, as defined in clause 1.1 of the Trust Deed, are the members of the current native title claim group on whose behalf native title determination applications WAD 6028/98 and WAD 6003/00 have been made in the Federal Court of Australia (the Native Title Proceedings). The named applicants in each proceeding represent the Njamal community in the proceedings (Applicants). As explained in more detail later in the Report, those proceedings were proceeding towards a consent determination late in 2017/early in

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2018. However, at a very late stage, an application was made by an opposing party, with the support of Ms Westerman, to add an additional applicant. That was followed recently by the lodging of an overlap claim by others including Ms Westerman's mother. Those developments have effectively derailed, at least for the time being, the hopes of many Njamal people for their aspirations to be achieved by the making of a consent determination.

It is beyond the scope of this Inquiry to consider the history and conduct of the Native Title Proceedings in any detail. However, it is important to understand, and the Inquiry has examined, various linkages and intersections between those proceedings and related native title issues, and the operation of the Trust and the roles and functions of the Trustee in this area. These matters are considered in more detail later in the Report. In particular, the funding of, and role assumed by the Trustee and other entities, including on behalf of the Applicants, in relation to certain matters relating to native title, future acts and mining agreements is considered by the Inquiry.

For most of the life of the Native Title Proceedings a native title representative body known as Yamatji Marlapa Aboriginal Corporation (YMAC) has acted for the Njamal People. YMAC is recognised as a representative body under Division 2 of Part 11 of the Native Title Act 1993 and is funded to perform its functions by the Commonwealth pursuant to Division 4 of Part 11.

On 24 May 2016, following a community meeting of the Njamal People, YMAC were removed from being the Njamal people's representative in the Native Title Proceedings. This was a significant moment not only for the Native Title Proceedings but for the Njamal community more generally, coming shortly after the appointment of ISPL as the third trustee of the Trust within a 2 year period. This had immediate implications for the funding and performance of work that otherwise would have been attended to by YMAC, and the role that could be and was assumed by the Trustee.

In a letter dated 31 May 2016 from the Acting Principal Legal Officer of YMAC to the Njamal community, the Acting Principal Legal Officer explained the consequences of YMAC's removal:

YMAC formerly provided legal, anthropological, cultural heritage management services, future act services and support to the Nyamal People. The Nyamal People were formerly represented on the Pilbara Regional Committee- a committee which provides policy direction to YMAC on important issues affecting Traditional Owners in the Pilbara region and the YMAC Board of Directors, the governing body of YMAC. Services formerly provided by YMAC are listed below. These services or engaging someone to perform these services is now the responsibility of the members of the Applicant.

The Acting Principal Legal Officer also set out the role that the Applicant in the Native Title Proceedings would have to take going forward:

The Applicant (acting as a group) now have a very important role to play on behalf of the Nyamal Native Title Claim Group. The members of the Applicant now have carriage of all Nyamal matters discussed in this letter, pursuant to the resolution passed by the Nyamal Community on 24 May 2016. The Applicant must make sure that any documentation they are requested to sign, has been properly authorised by the Nyamal People at a properly convened meeting of the Nyamal Native Title Claim Group. It is only the Nyamal Applicant
that can sign agreements or appoint legal representatives and it can only do this if it is confident that the Nyamal Native Title Claim Group has authorised such agreements or appointments.

The Acting Principal Legal Officer also explained the funding implications of the decision to remove YMAC:

YMAC formerly formulated and negotiated budgetary arrangements between proponents, the community and the working group, including negotiating fees from proponents to claimants and acquittal of meetings costs to proponents. YMAC coordinated travel arrangements for Njamal representatives at surveys/meetings. YMAC also prepared financial reporting for decision making and compliance, managed Centrelink and Child Support Agency matters, maintained a database of claimant details re banking and address details to ensure taxation, legislative and agreement compliance, arranged insurance cover for claimants on surveys and attending meetings.

YMAC was also responsible for making funding applications to the Commonwealth of Australia (and ensuring compliance with those funding conditions) for the purposes of fulfilling its functions as a representative body including its facilitation and assistance function under the Native Title Act. Obtaining funding for the conduct of the Nyamal Claims and other matters is now the responsibility of the Applicant or the broader claim group itself.

A variety of reasons have been advanced to the Inquiry for the decision to remove YMAC. These included dissatisfaction of various members of the Njamal community with aspects of the performance of YMAC and a belief that the Njamal People would be better off performing some or all of YMAC's functions themselves. Some considered that this may result in native title proceedings being more proactively advanced, better outcomes in negotiations with mining companies in respect of native title related matters and assisting Njamal People to secure economic benefits from performing work otherwise performed by YMAC. Others were opposed to the change and had reservations, including as to how responsibilities previously discharged by YMAC, for which it received federal funding, would be funded and discharged. While some complaints requested that the Inquiry examine issues raised in relation to YMAC's historic role, the Inquiry did not consider those matters were sufficiently connected to its terms of appointment to warrant their examination.

The consequences of removing YMAC, and changing lawyers has been significant, particularly from a financial and operational perspective. Given that YMAC ceased to perform a wide variety of roles for which it was federally funded, it was necessary for the Applicants to obtain funding from other sources and for arrangements to be put in place to ensure that the role performed by YMAC was appropriately performed by other persons. With this change occurring roughly in parallel with a change of trustee of the Trust, it has had a significant impact on the operation and management of the Trust and, in some respects, resulted in a lack of clear definition and understanding of the different roles assumed by the Trustee and the TAC. These issues, and the potential for conflict to arise in relation to performance of the duties as Trustee and as authorised representative of the Applicants for certain purposes, are explored in more detail later in the Report.

It is important to understand that the Trust's income comes largely from mining royalties and other benefits arising in respect of agreements entered into in respect of mining activity in the
CHAPTER 2: GENERAL BACKGROUND

Njamal native title claim area. The Njamal People have entered into a range of significant agreements with mining companies including FMG, Atlas, BHP, Pilbara Minerals and Millennium Minerals. The manner in which various agreements have been entered into and opportunities arising under those agreements managed, and funds have been expended, particularly under the trusteeship of ISPL, has been a subject of complaint and consideration by the Inquiry.

Broadly though, the agreements are generally, but not only, entered into by mining companies that are looking to undertake activities on land which is subject to either a native title claim, or a determination of native title. Again, broadly, the agreements tend to provide that the mining company may access the land and perform certain works (e.g.: marking out, exploring, prospecting and mining activities) in consideration for conferring benefits, both monetary and otherwise, on the relevant group who has, or is claiming, native title over the relevant land. It is from these agreements that the majority of the income for trusts, like the Trust, is derived. Those benefits may include direct financial benefits and indirect benefits. They might, for example, include preferential employment, tendering and other business or commercial opportunities. It can therefore be seen that decisions made by the Applicants, on behalf of the Njamal community, in relation to such contracts are of great significance in terms of where funds and opportunities are directed, and under whose control those benefits ultimately lie.

Under the agreements entered into by the Njamal People, direct benefits generally flow to a charitable trust as directed by the Applicants or as specified in the agreement, at present being the Trust (i.e. the Njamal People's Trust). That could change, if the Applicants so decided. Where the benefits are paid to the Trust, under the Trust Deed, the Trust Fund is to be applied, invested and distributed by the Trustee, after consulting with the TAC. Conventionally there has understandably and for good reason been a distinct separation of roles between entities that act on behalf of the Applicants in respect of native title proceedings or related future act and mining agreement negotiations and entities that act as Trustee of the Trust. Amongst other things, that ensures that there is no compromise or actual or potential conflict between the duties and interests of the entities performing those distinctly different roles and representing those different interests. Under ISPL, that boundary has been removed. It has assumed multiple roles, both acting as Trustee and acting on behalf of the Applicants, and through them the Njamal People, in relation to various matters in relation to the native title proceedings and future act/mining agreement negotiations, as well as pursuing economic/commercial development opportunities through related entities and trusts that it has established.

On the one hand, the arrangements entered into have enabled matters to be addressed on behalf of the Njamal People with a more unified voice and have been praised by a number of mining companies for the efficient and effective way in which they have been able to negotiate agreements and resolve any issues and have resulted in improved agreements with increased financial and indirect benefits for the Njamal People. On the other hand, questions
have arisen as to the appropriateness of the role assumed by ISPL and, at one stage, Ironside Management Pty Ltd, a company established with ISPL's directors as shareholders, the actions of ISPL and the TAC and issues such as actual or perceived blurring or overstepping of roles and responsibilities, possible conflicts of interest and concerns of an alleged failure to maintain an impartial approach expected of a trustee. That in turn has amplified difficulties where, as has occurred, there are competing interests that are not aligned in relation to both the operation of the Trust and native title related matters.

The native title applications were due for determination by consent in February 2018 and then April 2018. Given its historic importance in the recognition and future self-determination of the Njamal People, this has been a major focus of the Njamal People, the Applicant group and various working groups and other committees. The envisaged consent determination did not however proceed when envisaged. That is as a result of the recent significant development whereby the Federal Court, at a very late stage, granted an application to potentially modify the Applicant group, with potentially significant implications for the future conduct of the claims and any resolution of them. That has since been followed by the lodging of an overlapping native title claim. That has been a source of understandable, major disappointment and discontent for large sections of the Njamal community. It has also resulted in further stretching of the Trust's resources as the prospect of costly further litigation looms before it, assuming it continues to fund the native title proceedings, if issues in relation to the proper claim group and overlap claim cannot be promptly resolved and a consent determination reached.

The conduct of the above native title claims and related matters, including future act determinations and agreements with mining companies and other entities, is explored in more detail below.

**Overview of Trustees of the Trust**

As noted above, the Trust was established by Trust Deed dated 29 October 2003. It is a charitable trust established for the benefit primarily of the Njamal People. Amongst other things, the Trust receives royalties flowing from native title agreements struck with mining companies and controls and administers the distribution of those funds for the benefit of the Njamal People.

As considered in more detail below, the Trust has been administered by four trustees (Trustees) throughout its life: Stephen Reginald Byers, Abbott, AET and, currently and most recently, ISPL.

**Stephen Reginald Byers: October 2003 – August 2008**

Mr Byers was the inaugural Trustee and held that position from 2003 until his retirement in 2008. Given the relative antiquity of Mr Byers' involvement, the Report does not focus on this time period to any significant degree, other than by way of exception.
CHAPTER 2: GENERAL BACKGROUND

Abbott Trustee Services Pty Ltd: July 2008 - July 2014
Abbott was incorporated by Mr Byers (who was then still Trustee of the Trust) and he appointed it as an additional Trustee effective 23 July 2008, after which Mr Byers retired from 15 August 2008.
Abbott remained as Trustee until it resigned on 2 July 2014, although it effectively operated in a caretaker mode from 23 October 2013, when the TAC resolved to remove Abbott as Trustee, while the TAC identified a replacement Trustee.

Australian Executor Trustees Limited: July 2014 - May 2016
AET (formerly Plan B Trustees Ltd (Plan B)), a licensed trustee company, was appointed Trustee with effect from 2 July 2014.
Its tenure as Trustee was short-lived and circumstances surrounding attempts to remove it, and its ultimate resignation and replacement, were controversial and resulted in Supreme Court litigation in 2015.
AET ceased to be Trustee following a resolution of the TAC dated 6 May 2016, with formal retirement and the appointment of ISPL occurring by way of Deed of Retirement and Appointment dated 12 May 2016.

Indigenous Services Pty Ltd: May 2016 - Present
ISPL was initially formally appointed by deed dated 12 May 2016. Unlike previous Trustees, the initial resolution to appoint ISPL on 6 May 2016 sought to limit the appointment to a period of one month, although that was overtaken by a circular resolution and the Deed, reflecting a period of 12 months. That period was purportedly extended to a period of 3 years in late 2016. In the Inquiry’s view, the term of appointment could not be limited to a fixed term, as purportedly occurred, as explained later in the Report, that being inconsistent with the terms of the Trust Deed.
The reign of ISPL as Trustee has been marked by both significant progress and action, and significant controversy.
In the relatively short period in which ISPL has been Trustee, significant changes have occurred in relation to the way in which the Trust operates. Most notably, it is evident that the Trust has been run in a manner that is significantly more proactive and “commercially focussed” than under previous Trustees. This is the hallmark of the more aggressive business model sought to be implemented by ISPL including to distinguish itself from “traditional trustees” and is evident from a number of features. These include that during ISPL’s tenure as Trustee it has moved away from passive investment strategies (such as investment in managed funds) to supporting commercial ventures directly, or through its related entities, such as carbon farming projects, the NPJV Joint Venture Agreement (NPJV) and various other commercial agreements.
ISPL has also incorporated various other entities wholly owned by it as Trustee for the Trust including Njamal Services Pty Ltd and Njamal Security Pty Ltd. It has taken an active role in relation to the negotiation of agreements entered into and both the Njamal People’s Benevolent Trust and the Njamal Charitable and Benevolent Unit Trust have been established. ISPL, Mr Carter and related persons have also sought to expand their sphere of influence as trustee of other Pilbara indigenous charitable trusts. This has itself been controversial in some sections of the community. Earlier this year a wholly owned subsidiary of ISPL, ISPL Y-N Pty Ltd, of which Mr White and Mr Wolf are directors and Mr Parker the secretary, was appointed trustee of the Yugunga-Nya People’s Trust.

The Inquiry has also been advised that persons associated with a number of other trusts have also expressed interest in changing trustees to ISPL or a related entity. The Inquiry is also aware of steps taken by ISPL in relation to a proposal for the possible removal of Abbott, the Trustee of the Kariyarra People’s Trust, and for ISPL to be appointed Trustee of the Trust, although it seems that did not occur. The success of ISPL is therefore relevant not only to the Njamal People but also to those associated with it who seek to expand trustee operations more broadly, including to trusts with substantially more revenue and assets than the Njamal People’s Trust.

Returning to ISPL’s trusteeship of the Trust, it is evident to the Inquiry that this change in the way the Trust is administered, and the rapidity of that change, has led some members of the community to have understandable concerns about the management and administration of the Trust. Some of those concerns have related to differences of views as to how the Trustee might most efficiently and effectively achieve the objects of the Trust. It needs however to be borne in mind that the Trustee’s powers are broad reaching and discretionary. As such, while fundamental fiduciary and other obligations apply in respect of the Trustee’s discharge of its duties, include acting with prudence, a Trustee may legitimately decide to adopt a materially different strategy in order to meet the objects of the Trust and a court will not lightly interfere with the exercise of a Trustee’s discretion. This may include a difference of approach in relation to the amount of, and circumstances in which, funds are distributed, invested or otherwise expended by it. That does not of course give a trustee free range to use or apply the Trust Fund indiscriminately.

Understandably, significant questions arise where, as in this case, the Trustee's strategy involves a dramatic increase in trust activities and distributions, with increased revenue (at least initially) but also a large escalation of costs, primarily for consultant fees, administrative expenses and payments to related subsidiaries. In particular, issues raised for consideration include whether those decisions were prudent, soundly based exercises of discretion, compliant with the objectives and provisions of the Trust Deed. That is particularly so in relation to the lending, advancing or other provision of large sums of money to related entities, without security, including to support members of the Njamal community develop business skills and successfully operate their own businesses. Given the obvious private gain to those
CHAPTER 2: GENERAL BACKGROUND

individuals, resulting from such arrangements, care must be taken to ensure that such actions are compliant with the Trust Deed which requires that the charitable objects of the Trust be carried out 'without purpose of private gain'. Significant questions have also arisen as to the adequacy of aspects of ISPL’s internal governance, compliance with its obligations as Trustee and identification and appropriate management of actual or potential conflicts of interest. The concerns of many have been accentuated by the involvement in the Trust of Mr Carter, who several months after the Inquiry commenced, was disqualified from managing corporations for a period of 4 years.

Each of these matters, and many other issues, are addressed in detail later in the Report.

Sharon Westerman

Before proceeding to further consider in detail matters examined by the Inquiry it is appropriate to make some preliminary observations in relation to Ms Westerman who was the primary instigator of complaints which led to the Inquiry, but by no means the only person who made complaints or who raised concerns with the Inquiry. Ms Westerman's complaints traversed concerns regarding the management and administration of the Trust over a number of years and across a number of trustees. Further, the conflict that arose and continues between Ms Westerman and her supporters on the one hand, and Mr Carter, ISPL and their supporters, on the other, provides important contextual understanding to many of the allegations that have been made by both sides. Mr Carter's role in relation to the Trust is considered in detail in Chapter 5 of the Report.

Ms Westerman presented to the Inquiry as well-educated, hardworking and extremely passionate and committed to achieving the outcomes she sought to achieve for the Njamal People, both in relation to the management and operation of the Trust, the native title proceedings and broader issues of self-empowerment and self-determination. Ms Westerman has single-mindedly pursued a wide range of matters, including complaints which contributed to the establishment of the Inquiry. While Ms Westerman has not been alone in relation to a number of her concerns, undoubtedly she has been the principal actuating force behind advancing those matters. In part by reason of her forceful pursuit of her position, Ms Westerman has often in more recent times been perceived by many TAC members and many of the Njamal People to be very divisive and acting contrary to the community's wishes and interests. Concerns were also expressed that Ms Westerman had nor herself been through the lore and at least a perception that she failed to show adequate respect for Elders in the way in which she has acted. It is also clear to the Inquiry that Ms Westerman sees herself as taking on a prominent role in part to assist voice the position of others, such as by writing matters up and attending to matters such as those to do with finance, which others are less able to do. While Ms Westerman has at various times been supported by many, including in relation to her vision of establishing Njamal Nation, she has had a significant falling out with others including, in particular, Mr Carter.
CHAPTER 2: GENERAL BACKGROUND

It is also relevant to note that Ms Westerman is very strong minded and has been pursuing a broader agenda, seeking control, not only for the Njamal People of their future, but also on one view for herself to have a significant ongoing role. Not all of her actions stem entirely from that objective. The circumstance of Njamal Mining Pty Ltd is a case in point. Ms Westerman was a force behind its establishment and a founding director, becoming its managing director and being employed, it would appear, at a significant salary. The circumstances of the near demise of that company, which it appears has since been resuscitated under ISPL, and Ms Westerman's fall from grace and removal as a director of Njamal Mining Pty Ltd by AET (the justification for which she disputes), raise a number of concerns about Ms Westerman's own conduct and stewardship, in many respects analogous to, if not more serious than, some of the many complaints she has advanced against ISPL.

One of the difficulties the Inquiry faced in assessing the allegations made to it was that in many instances they were not necessarily objectively presented and supported by evidence as distinct from based on rumour, hearsay, speculation and supposition. That was contributed to by, and festered in the absence of, clear information being forthcoming to dispel concerns. Further, the relationship between Ms Westerman and the current Trustee, in particular Mr Carter, has become toxic to say the least. This has been most unfortunate and has, in the Inquiry's view, coloured the approach both Ms Westerman, some of her supporters, and Mr Carter and others associated with ISPL and the TAC have at times adopted. It is fair to say that neither Ms Westerman nor Mr Carter are the type to lightly take a step back from a confrontation. While they were on side, they worked effectively to achieve the removal of AET, although the approach they adopted has itself raised certain concerns in sections of the community. Once their views and interests no longer aligned, conflict has proliferated. That has been to the detriment of the Njamal People, management and administration of the Trust and its related entities and the conduct of the native title proceedings.

Ms Westerman has expressed concern that some of the counter allegations made in relation to her conduct, including the initiation of criminal proceedings against her, which are pending before the courts, was in retribution for her pursuit of concerns such as those raised with the Inquiry. There is little doubt, that the current Trustee and Njamal Mining Pty Ltd, with involvement of Mr Carter and Mr Parker, and the support of TAC, supported these matters being pursued. There is undoubtedly a strong animus between Mr Carter and Mr Parker towards Ms Westerman as a result of her actual or perceived conduct. As those matters are presently still before the Court, the Inquiry says nothing further in that regard. Mr Carter, on the other hand, complained generally about Mr Westerman, what he considered to be the unjustified attacks on his integrity and what he described as having to endure personal "racial vilification" for 14 months at the hands of Ms Westerman and others. The Inquiry is left in little doubt that the repeatedly making of allegations and pursuit by Ms Westerman of her agenda, has been deleterious on the operation of the Trust and has been draining on its personnel.
CHAPTER 2: GENERAL BACKGROUND

The nature and extent of the Inquiry, and demands on time and resources on the Trust has also frequently been a source of concern to the Trustee and members of the TAC.

The Inquiry pauses to note the importance of complainants not being intimidated from raising genuine issues of concern that warrant consideration and, if appropriate, further investigation. That the Inquiry has considered it necessary to carefully consider allegations both made by and against Ms Westerman, and form views as to her and other's conduct, should not be seen to diminish from that objective. One of the difficulties is that Ms Westerman has at times seen fit to voice a range of allegations, and the fact of the Inquiry, in support of her concerns about the Trust's operations and, at times, attempts to wrest back control of the Trust through the removal of ISPL. Just as some such as Mr Carter see the pursuit of these complaints as designed to deflect from scrutiny of Ms Westerman's own conduct in connection with Njamal Mining Pty Ltd, so too the focus of Mr Carter and others in seeking the Inquiry focus on Ms Westerman's conduct, may also be perceived, in part at least, as intended to direct focus away from ISPL and Mr Carter.

The Inquiry has therefore in all instances endeavoured to carefully and objectively assess the allegations and evidence it has received, conscious of the above background. Importantly, even accepting that Ms Westerman has a broader agenda and there is reason to question some of her own actions, does not however detract from the importance of some of the issues of concern that she and others have raised with the Inquiry concerning the management and administration of the Trust.
Abbott Trustee Services Pty Ltd

Abbott’s Appointment as Trustee

Mr Byers (who was then still Trustee of the Trust) incorporated and registered Abbott with ASIC on or about 3 April 2008 for the purposes of Mr Byers retiring as Trustee and Abbott taking over that role. Mr Byers was a founding director of Abbott, a role he retained until 3 March 2010. Abbott was appointed as Trustee on 23 July 2008, a role which it held until it was replaced by AET on 7 July 2014. On 15 August 2008, Mr Byers, by letter of resignation, resigned as Trustee of the Trust.

Abbott did not have a written contract setting out its terms of engagement, however it did charge fees.

Unlike later trustees, AET and ISPL, Abbott was not appointed pursuant to a resolution of the TAC. Rather, Abbott was appointed by Mr Byers pursuant to clause 5.3 of the Trust Deed, which provides that, subject to clause 5.1 (which limits the number of trustees to five) and 9.3 (which requires consultation with the TAC), the Trustee may appoint additional persons to act as Trustee.

In this context the manner in which Mr Byers is said to have consulted with the TAC is unusual. By clause 9.6(a), and subject to some exceptions which are not presently relevant, consultation with the TAC must be undertaken at regular meetings convened for that purpose. Mr Byers informed the Inquiry that he could not recall the specifics of Abbott’s appointment which was now over 10 years ago, but that it would have been done on legal advice and that he would be very surprised if there was not a meeting with the TAC. However, according to recital F to the deed by which Abbott was appointed, consultation occurred by way of letter to the members of the TAC dated 1 May 2018:

The terms of the Njamal People’s Trust allow me to appoint an additional trustee as long as I consult with the Advisory Committee. One way to do that is to write to you, which means, that all Advisory Committee members know what I propose instead of just those who attend the meetings. Please let me know if you have any objections to this.

As far as the Inquiry is aware, no objections were received and Mr Byers retired as Trustee on 15 August 2008, leaving Abbott as the sole Trustee.

Abbott’s Removal

Abbott was replaced as Trustee by AET by way of Deed of Retirement and Appointment dated 7 July 2014.

The circumstances of, and reasons for, Abbott’s retirement are not straightforward. On 23 October 2013 a TAC meeting was held in Port Hedland where it was resolved by a 75% majority of TAC to remove Abbott as Trustee. According to the recitals in the subsequent
Deed of Retirement and Appointment of New Trustee, the TAC had not then identified a replacement Trustee and requested that Abbott remain as Trustee until a replacement Trustee had been identified.

The earliest conversations concerning the Trust between members of the Njamal community and what is now AET occurred in early 2014. At this stage those conversations were had with Plan B, which was acquired by AET in early 2014. With effect from 2 July 2014, Abbott resigned and AET was appointed as Trustee of the Trust.

The Inquiry has received differing narratives as to the reason for the removal of Abbott, which revolve around a property near South and Port Hedland referred to as the "Redbank Building".

By letter from Abbott's solicitors to the Inquiry dated 7 December 2017 Abbott explained:

Leading up to the Trustee being removed Phil Drayson had had a number of emails and telephone calls from Sharon McGann requesting that the Trust purchase a property at Redbank utilising preserved equity funds. The first discussion about this matter occurred on the 2 October 2013 via a telephone conversation with Sharon McGann when she advised that Njamal Mining would lease the property.

By the 11 October 2013 Ms McGann was requesting that Abbott submit an offer to purchase.

Mr Drayson advised Ms McGann that he did not think that this was a wise investment given the state of the building and that there was no guaranteed income if purchased. He also said that he would need to hold an Advisory Committee meeting but Ms McGann insisted that the purchase needed to be immediate. As it happened an Elder passed away and Trust meetings (including the AGM were delayed).

On the 2 October 2013 Elder Tony Taylor and brother of the deceased person advised that the Advisory Committee meeting could be held on the 23rd October 2013 prior to the scheduled funeral on the 26 October 2013. An Advisory Committee meeting was arranged for 23 October 2013.

It is Mr Drayson's view that the refusal to purchase this building was the major reason that the trustee was removed and that Ms McGann initiated the removal of Abbotts.

Abbott have provided evidence of the communications outlined above, including the email on 11 October 2013 from Mr Drayson to Ms McGann (Westerman), explaining that he had been informed two days before that offers were to close that day, that he had not had time to do due diligence, nor discuss it with the TAC. Evidence was also provided that a TAC member had requested that the TAC meeting scheduled for October be delayed until the week before a funeral (held on 26 October 2013).

The minutes of the TAC meeting dated 23 October 2013 record that a resolution was passed to remove Abbott as Trustee, which decision was said:

[to become] fully effective from the 21st December 2013 after a transition period to allow current services to continue and all documents and Trust matters, and documents to be transferred to a new Trustee.

Ms Westerman accepts that the refusal to purchase the Redbank building was one reason for the TAC resolving to remove Abbott, but says that it was not the only reason. In a meeting with Inquiry staff Ms Westerman explained that the community was interested in the Redbank building as an office for Njamal community. Ms Westerman said that she, Doris Eaton and
Kevin Allen heard that there was a large building on a large piece of land and that it was on sale "really cheap" because it was in disrepair. However, due to increased interest in the property the price was raised by the owner from $900,000 to about $1.4m. She also says that part of the interest in the property came from the Kariyarra people, for whom she says Abbott were trustee at the time.

As to Ms Westerman's allegation relating to the interest from the Kariyarra group, Abbott have provided evidence to the Inquiry that Abbott's involvement with Kariyarra's interest in the property began in May 2015. This is some 18 months after the period in which Ms Westerman was pressuring Abbott to purchase Redbank for Njamal.

Ms Westerman's perception, which the Inquiry does not accept was factually correct, was that Abbott opposed the purchase of the property not because it was too expensive but because Abbott just did not want the Njamal People to have an office. Ms Westerman provided the Inquiry with undated documentation she says was sent to Abbott during that period regarding the Redbank Building, including her business case for the purchase of the building, a prospectus for the building and a copy of the proposed Offer for Sale. The documentation provided by Ms Westerman demonstrates that the proposed acquisition of the Redbank building was tied with her proposed corporate structure, a structure that she says Abbott refused to endorse.

Ms Westerman also provided the Inquiry with documentation showing community support for Njamal Aboriginal Corporation, as well as its proposed budget and action plan. A key strategy of the new corporation was to purchase an office. From the materials provided, it appears that her vision was that the office would be used for Njamal Mining Pty Ltd, of which Ms Westerman was then managing director, as well as Njamal Heritage and Njamal Aboriginal Corporation. Ms Westerman also indicated to the Inquiry that mining companies had provided specific amounts to the Trust to assist with the "Njamal Strategic Plan" and acquisition of an office. However, the letter from Consolidated Minerals Limited provided suggests that it had given money for the benefit of Njamal Mining Pty Ltd as general seed funding, rather than specifically for the establishment of an office.

According to Ms Westerman, Abbott's refusal to acknowledge the proposed Njamal corporate structure suggested that the community would never have self-governance whilst Abbott was trustee, so the community met together and voted to remove Abbott as trustee. These matters, together with concerns Ms Westerman and others had about financial accountability, lack of proactive measures taken to create income streams and a lack of meetings, is what Ms Westerman said was the basis for the TAC eventually resolving to remove Abbott.

Because of the historical nature of some of these allegations, it is difficult to know precisely which motivators assumed particular significance for the TAC or to what extent some of the concerns may have had substance, though it is fair to say that tensions around Redbank featured. In any event, regardless of the motivations of the TAC, it seems that all relevant
parties (TAC, Abbott and AET) accept that the removal and replacement of Abbott was performed according to the Trust Deed. Indeed, Abbott's solicitor is recorded in the minutes of the meeting of 23 October 2013 as confirming that the TAC had quorum to satisfy the requirements of the removal process contained in the Trust Deed.

One theme which emerges from the circumstances of the removal of Abbott by the TAC, and which is repeated throughout the history of the Trust, is the central role played by Ms Westerman and the importance that her vision (shared by various other Njamal people) for the implementation of steps to achieve self-governance by the Njamal People be implemented. Based on her discussions with the Inquiry Ms Westerman appears to have seen her role in relation to the removal of Abbott as being to take steps to express and give effect to the concerns and wishes of other Njamal people who might not be as able as Ms Westerman to deal with matters such as finance and writing matters up. While the Inquiry accepts that to have in part motivated Ms Westerman's actions, it also considers that she was and remains strongly driven to effect changes which will result in Njamal People having primary control over such matters, with herself having a significant role in such matters.

Ms Westerman's ongoing role as a key protagonist or agitator in relation to the conduct of subsequent Trustees, as well as in relation to native title proceedings, is considered further below.

Caretaker Period – December 2013 to 7 July 2014

Following its removal at the 23 October 2013 TAC meeting, Abbott wrote to the TAC, requesting that the TAC sign an authorisation to extend Abbott as Trustee until a new trustee was appointed and a new transition period agreed. However Abbott did not receive back the required number of signatures from the TAC.

Accordingly, on 20 December 2013, Abbott notified Njamal community members by letter that they would cease to act as Trustee as of 21 December 2013 and the Trust "will now remain inoperative until such time as a new trustee is appointed or we receive the appropriate authorisation from the advisory Committee to continue as trustee".

Abbott explained that in the period between 23 October 2013 and 2 July 2014 they continued as Trustee until AET was appointed, and that they perceived their role as Trustee during the interim period as being in "caretaker mode": in that period there were no TAC meetings so there was no consultation in relation to funding and no budgets were set.

Trust accounts for the financial year ending 30 June 2014 were signed by Abbott and they reflect that the amount of distributions made that financial year was approximately $500,000 less than in the previous financial year.
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**Australian Executor Trustees Limited**

**AET’s Appointment as Trustee**

Following the TAC’s resolution to remove Abbott at its meeting on 23 October 2013, members of the Njamal community sought expressions of interest from other potential providers of trustee services. One of these was Plan B Trustees Ltd (Plan B) which was acquired by AET in early 2014.

As licensed trustee companies for the purposes of the *Corporations Act 2001,* with Australian financial services licences, both Plan B and AET and their officers and employees were, and AET and its officers and employees remain, subject to various obligations under that Act and related regulations, as discussed later in the Report.

The earliest record provided to the Inquiry of engagement between members of the Njamal community and AET (Plan B as it then was) is a presentation given by Messrs Morgan and Stammers to the Njamal people on 11 April 2014.

That presentation appears to have been well received as on that date the TAC resolved as follows:

> The Njamal People’s Trust Advisory Committee, appoint Plan B Trustees Limited, as the new Trustee for the Njamal people’s Trust, subject to negotiation of a fee that is to the satisfaction of the Njamal People’s Trust Advisory Committee.

> This decision is effective from the 11 April, 2014.

By letter attached to an email dated 14 April 2014, Mr Morgan provided Ms Westerman, as the representative of the TAC, with a formal proposal for the provision of trustee services. Among other things, the proposal sets out AET’s proposed general approach, its qualifications and experience, its key staff and, significantly given the terms of the TAC resolution dated 11 April 2014, its proposed terms of remuneration.

On 11 April 2014 the TAC signed a resolution in accordance with clause 5.5 of the Trust Deed, which advised Abbott that it had found a replacement trustee, being Plan B. Effective 1 May 2014, ASIC granted approval for all estate assets and liabilities of Plan B to be transferred to AET. As a result, AET became the successor in law to Plan B and continued to carry on all aspects of Plan B’s business.

On 2 July 2014, a Deed of Retirement and Appointment of Trustee was entered into by which AET formally became Trustee of the Njamal People’s Trust and trust assets were transferred from Abbott to AET.

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67 As defined in section 601RAA of the *Corporations Act 2001* and listed at item 3 of Schedule 8AA to the *Corporations Regulations 2001.*
AET’s Removal and the Removal of Board of Njamal Mining Pty Ltd

AET ceased to be Trustee following a resolution of the TAC dated 6 May 2016 and its formal retirement and ISPL’s appointment occurring by way of Deed of Retirement and Appointment dated 12 May 2016. The exact circumstances leading up to AET’s replacement as Trustee are the subject of considerable contention.

In brief, AET had become concerned about the management of its subsidiary, Njamal Mining Pty Ltd, and had repeatedly but unsuccessfully sought financial information from its managing director, Ms Westerman. AET ultimately decided, on 31 August 2015, to take steps to remove Ms Westerman and Mr Allen, the then remaining directors of Njamal Mining Pty Ltd, from their positions. Shortly prior to this occurring, on 19 August 2015, Ms Westerman, who was a member of the TAC, sought to have AET removed as Trustee. However, there was a disagreement as to the composition of the TAC, and whether a 3/4 majority of the TAC had voted to validly remove AET, as required under the Trust Deed. The view of Ms Westerman, Travis McPhee and Terry Wilson was that by resolution dated 19 August 2015, AET had been validly removed as Trustee of the Trust. The view of AET was that the resolution was invalid as the 3/4 TAC majority required by clause 5.5 was not formed. Later resolutions to the same purported effect were also disputed by the parties for similar reasons.

In October 2015 Supreme Court proceedings were brought by Ms Westerman, Mr McPhee and Mr Wilson, all of whom AET accepted were members of the TAC, for relief including a declaration that the resolutions of the TAC in August and September 2015 purporting to remove AET were valid. Ultimately, after numerous further attempts to secure the removal of AET and the appointment of a replacement trustee, the matter settled in May 2016 without the need for court intervention after ISPL and AET executed a Deed of Retirement and Appointment by which AET retired as Trustee and ISPL was appointed. The dispute was very acrimonious and costly to the Trust.

The Management and Administration of Njamal Mining Pty Ltd

When AET became Trustee, by deed of retirement and appointment dated 7 July 2014, the shares in the wholly owned Njamal Mining Pty Ltd, which were a trust asset, were transferred into its name by Abbott. AET was therefore properly concerned to understand more about the management and financial position of that company.

AET became increasingly concerned about the financial position of the company, and took a series of steps to attempt to obtain information about its affairs. During this time, Ms Westerman was the Managing Director of Njamal Mining Pty Ltd and AET’s requests for information were made to her in that capacity. At first, AET made those requests somewhat informally by way of email but, when those requests went substantively unanswered, they were formalised. On 30 April 2015, by way of direction issued pursuant to section 293 of the Corporations Act 2001, consistently with section 315(2)(a) of that Act, AET required the
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company’s financial and directors’ reports to be supplied by 30 June 2015. The company did not comply with that direction.

By letter to the Inquiry dated 5 February 2018 AET explained what then occurred, which explanation is supported by source material (emails and letters) also supplied:

On 23 June 2015, Ms Westerman informed AET that Bob Jacobs of Auxilium Partners was appointed as auditor of Njamal Mining.

On 8 July 2015, Lucy Gardner of Butler Settineri provided AET with draft financial accounts prepared by RSM Bird Cameron for the 2013/2014 financial year and asked if these draft accounts would be sufficient to meet AET’s request. The Trustee informed Butler Settineri and Auxilium Partners that it did not consider the provision of this information as compliant with the request for information.

During late-July to early-August 2015, and becoming increasingly concerned with the inadequate responses from Njamal Mining and its consultants, AET was considering what action it might take if the financial and directors’ report was not produced at all. In this regard, AET considered removing and replacing the directors as a viable option, so that an experienced independent company director could consider and report to AET on the company’s financial position. AET commenced contacting professionals in Perth (being experienced company directors and liquidators) who could potentially be appointed as the company’s sole director if this step was taken.

On 6 August 2015 and in furtherance of exploring the option of replacing the company's board, AET purchased an ASIC extract regarding Njamal Mining, to ensure that it had an accurate and up to date understanding of the company’s board structure. It was as a result of this extract that AET discovered Doris Eaton had resigned as a director of the company effective from 22 June 2015. AET found it odd that this fact had not been (and was never) disclosed to AET by the company, despite AET having received correspondence from Ms Westerman around the time of Mrs Eaton’s resignation.

In the week commencing Monday 17 August 2015, AET met with 3 potential candidates it had identified to potentially fulfil the role as sole director of Njamal Mining. This included Simon Coad, who was recommended to AET through Adam Levin of Jackson McDonald.

On 19 August 2015, the first of the purported resolutions to remove AET as Trustee was voted upon by (at least some) members of the TAC. The Inquiry accepts that AET first heard about this vote by way of correspondence received from Njamal Mining Pty Ltd’s solicitors, Hopgood Ganim, on 24 August 2015. AET’s position in response to that correspondence was that the resolutions were not valid and that the power in clause 5.5 of the Trust Deed had not been properly invoked. Thereafter ensued the exchange of some correspondence between AET’s solicitors, Jackson McDonald, and Hopgood Ganim.

AET explains its view of the correspondence received from Hopgood Ganim:

At the time of receiving the correspondence referred to above, AET was aware that Hopgood Ganim were the legal representatives for Njamal Mining on day to day instructions from Ms Westerman. It appeared to AET from the content of the documents provided and the surrounding circumstances that the purported resolutions of the Committee had been orchestrated by Ms Westerman. Having received no previous indication or communication to the effect that the Committee would like to have AET removed as trustee, AET thus presumed that the attempt to remove AET was at least in part to deflect the issue of the overdue financial reports for Njamal Mining.

Shortly thereafter, on 31 August 2015, after taking advice and obtaining suggestions for interim directors, AET as shareholder of Njamal Mining Pty Ltd resolved to dismiss the Board of Njamal Mining Pty Ltd (being Ms Westerman and Mr Allen) and to appoint Simon Coad as sole director of the company. AET also resolved to replace the constitution of Njamal Mining
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Pty Ltd, but has explained that this step was only necessary as AET did not have a signed copy of the company's constitution on its files and could not act upon the unsigned version.

In AET's view, the taking of action to replace the Board of Njamal Mining Pty Ltd with Mr Coad was required for the following reasons:

- the failure of the company to adequately respond to the trustee's requests for information;
- failing to provide audited financial and directors' reports in breach of the Corporations Act;
- the draft reports for FY14 provided by Butler Settineri supported that the company was not in a strong financial position as at 30 June 2014;
- the company never having declared a dividend to the Trust (being its sole shareholder) despite it seemingly having commercial ventures with large companies in the Pilbara mining sector.

In circumstances where it is apparent from the documents that AET was concerned with, and was continuing to press for information about, Njamal Mining Pty Ltd, the Inquiry accepts that it was appropriate for AET to seek to obtain information and then, having failed to obtain that information, to resolve to remove the remaining members of the Board of Njamal Mining Pty Ltd.

In a meeting with the Inquiry Ms Westerman was asked about AET's reasons for removing the Board of Njamal Mining Pty Ltd. In particular, it was suggested to Ms Westerman that AET removed the Board as it had repeatedly requested information from Njamal Mining Pty Ltd which was not provided. Ms Westerman did not demur from this suggestion (and, indeed, Ms Westerman provided an explanation as to why material was not supplied in a timely way, being that the materials could not be provided until an audit had been completed) however she also suggested it was an excuse created by AET. The Inquiry understands Ms Westerman's position to be, in substance, that AET removed the Board as Ms Westerman, who was at that point the managing director of Njamal Mining Pty Ltd, was agitating for the removal of AET as Trustee.

Ms Westerman said that throughout 2015 she (and perhaps others) was trying to obtain information from AET about Trust finances but that information was not provided. Ms Westerman also explained that, as a result, a TAC meeting was held on 19 August 2015 in order to remove AET as Trustee and appoint a replacement Trustee, at that point contemplated to be Perpetual Limited (Perpetual). But, she says, "then 31 August 2015 happened" and the Board was removed from Njamal Mining Pty Ltd.

The Inquiry observes that, despite several invitations to Ms Westerman, it has not been provided with material supporting the suggestion that requests (certainly of any significance)

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68 The explanation for why material was not supplied in a timely way was repeated at another meeting with the Inquiry on 22 March 2018.
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were made to AET before the TAC meeting held 19 August 2015. Rather, from the evidence provided by Ms Westerman and by AET, the only demands for information from Ms Westerman to AET about which the Inquiry is aware are demands made subsequent to the 19 August 2015 meeting. In this respect, the Inquiry also notes that, on the materials before the Inquiry, AET promptly provided the bulk of information sought by Ms Westerman (even though not strictly required to do so).

It should also be noted that, in any event, even if there were requests made by Ms Westerman or other TAC or community members prior to 19 August 2015, the Trustee was not obliged to supply the information demanded, including as to financial minutiae, except to the limited extent required in connection with its obligation to consult with the TAC, discussed elsewhere in the Report. That misconception appears to have underpinned not only a number of Ms Westerman's demands for information from AET and other Trustees, but also similar demands made by others. As explained elsewhere in the Report, in the context of a charitable trust and in the absence of an express term in the Trust Deed to that effect, the specified ‘beneficiaries’ do not have an entitlement to access financial information as may be the case with beneficiaries under other, private, forms of trust.

When asked why Ms Westerman and others sought to remove AET as Trustee, Ms Westerman explained that there were a number of factors at play including primarily dissatisfaction about when and for what distributions would be made by AET. A number of the examples which Ms Westerman gave in this respect have some sensitivity (involving, for instance, payments for funerals) and so are not reproduced here.

However, while that likely was a cause of dissatisfaction for Ms Westerman (and perhaps others), the Inquiry finds that a significant motivation for Ms Westerman seeking to remove AET was its repeated demands for information about Njamal Mining Pty Ltd. While Ms Westerman's view that AET removed her from the Board of Njamal Mining Pty Ltd because she was agitating for the removal of AET as trustee is to an extent understandable given the chronology of events in mid to late 2015, it largely overlooks the significance, frequency and timing of the requests for financial information, to which AET as shareholder of Njamal Mining Pty Ltd was legally entitled, which well preceded the actions by Ms Westerman and others to remove AET as Trustee.

For present purposes, it suffices to note that based on the information available to the Inquiry AET made its first request for information in relation to Njamal Mining Pty Ltd on 1 December 2014. Four more requests from AET followed before Ms Westerman's first request to AET on 12 August 2015, which was for financial information to be provided ahead

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A charitable trustee that is a licensed trustee company may also have an obligation to provide certain limited types of information from time to time under reg 5D.2 of the Corporations Regulations 2001.
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of the TAC meeting then proposed to be held on 19 August 2015. It can be seen then that the requests by AET substantially precede the requests by Ms Westerman. A more detailed chronology of key events is set out in Appendix B.

In the Inquiry’s view, Ms Westerman was undoubtedly the primary mover for the removal of AET as Trustee. This is supported not only by AET’s narrative (set out above) but also from information provided to the Inquiry by Ms Westerman.

In an email to the Inquiry dated 22 January 2018 Ms Westerman explained that:

The process of removing AET and appointing Perpetual as the new Trustee was conducted over two meetings as follows:

- 19th August 2015
- 1 September 2015

The standard sitting fee previously applied by AET for TAC members varied between $400-$500 per meeting. This (often) did not include travel expenses and other time spent on Trust businesses outside the meeting as per Clause 9.12 of the Trust Deed and Clause 6 of the Trust Rules.

Njamal Mining paid $350 per meeting and this fee included all other time /expenses outside the meeting. Where people could not attend the meetings, they were met with individually and paid accordingly.

... Njamal Mining Directors undertook to pay the sitting fees as per the usual practice that AET exercised when compensating TAC members for their time.

It is also apparent from this information, and from the letters to AET and Jackson McDonald penned by Hopgood Ganim, that the corporate vehicle which was at least initially funding TAC meetings for the removal of AET was Njamal Mining Pty Ltd, of which Ms Westerman was then still the managing director.

Ms Westerman’s reasoning for initially using Njamal Mining Pty Ltd funds for sitting fees was that Njamal Mining Pty Ltd needed the correct shareholding structure in which it could operate and that these meetings were to help identify that structure.\(^{70}\)

However, during the same period, a community-endorsed and AET-authorised subcommittee had been set up under Barry Taylor to help identify a preferable Njamal structure (Barry Taylor subcommittee). It is clear from material available to the Inquiry, including relevant TAC minutes, that Ms Westerman was unhappy that she had not been included as part of the subcommittee or separately funded herself to oversee development of a structure.

Ms Westerman also advised the Inquiry that she had asked Andrew Morgan at AET for funding for sitting fees for the meetings she arranged as it was in AET’s interests to resolve outstanding issues, particularly because there was no final report resulting from the Barry Taylor subcommittee. When no funds were forthcoming, she used Njamal Mining Pty Ltd

\(^{70}\) Meeting with Sharon Westerman on 22 March 2018.
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funds as sitting fees. She also asserts that the meetings in August and September 2015 were not necessarily to remove AET but to determine trustee issues and to help identify the structure in which Njamal Mining Pty Ltd would sit. With respect to Ms Westerman, and notwithstanding the absence of a final report from the Barry Taylor subcommittee, it is not clear why Ms Westerman considered it was appropriate for her to set up what was in effect a competing body to the Barry Taylor subcommittee, and to fund that from Njamal Mining Pty Ltd, in circumstances where the TAC and AET had already agreed a process to consider structural change. Ms Westerman's access to funding provided by Njamal Mining Pty Ltd was removed when she was removed as a director of the company on 31 August 2015.

There is a live question as to whether it was within the scope of Ms Westerman's duties as a director of Njamal Mining Pty Ltd to cause that company to fund legal advice and meetings directed towards the removal of AET. While the Inquiry has not considered that question in detail, the Inquiry notes that:

- the constitution of Njamal Mining Pty Ltd provides broad power to company directors to carry on business and prima facie, the funds spent were within power, in the sense that the expenditure was not expressly forbidden by the constitution;

- however, such discretion is subject to general law and statutory directors' duties, including the duties to: (i) act in the good faith in the best interests of the company; and (ii) to act for a proper purpose.

On the face of these competing considerations, the Inquiry takes the view that whether it was proper for Ms Westerman to cause the company to fund action to remove AET is a question whose determination will turn on a close analysis of the facts. On the material available to the Inquiry, and bearing in mind the scope of the Inquiry's terms of appointment, that is not a question the Inquiry has sought to determine.

Appointment of Simon Coad as director of Njamal Mining Pty Ltd

Having removed the Board of Njamal Mining Pty Ltd, AET replaced the Board with a new sole director, Simon Coad. Given AET's concerns it, in addition to providing Mr Coad with a written background briefing on his appointment, and requested him to consider the following as priority tasks:

(a) to the extent possible, preserve and continue any commercial operations;
(b) locate the company bank accounts;
(c) locate documents, including (sic)

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71 Clause 66(1) of Njamal Mining Pty Ltd's Constitution.
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(d) cease wage payments to former directors and deal with employment issues (if any);
(e) make contact with NM's commercial partners including FMG, ICRG, NRW and Indigequip;
(f) consider replacing directors of NM subsidiary companies (Njamal ICRG and NES);
(g) ceasing instructions to NM's advisors (including Hopgood Ganim);
(h) conducting a viability study to determine the financial position of NM;
(i) investigate previous transactions and report to the Trustee; and
(j) attempt to resolve any litigious matters (including with ICRG).

In addition, shortly following the removal of the Board of Njamal Mining Pty Ltd, AET sent pro forma letters out to the Njamal community members explaining what had occurred in relation to Njamal Mining Pty Ltd and AET's purported removal and regarding a community meeting planned for October 2015.

Meanwhile, following her removal as a director of Njamal Mining Pty Ltd, Ms Westerman, in quite an extraordinary letter dated 13 September 2015, advanced a complaint of unlawful discrimination with the Equal Opportunity Commission against AET, its manager, Mr Morgan, and Jackson McDonald in connection with the matter. The complaint was not progressed by Ms Westerman after initial feedback from the Commission, and the respondents appear, as a result, not to have been notified of the complaint.

During this period Ms Westerman also raised concerns with AET (since also raised with the Inquiry), at least once in December 2015, about the appropriateness of appointing Mr Coad as the sole director of Njamal Mining Pty Ltd following the dismissal of the Board. In broad terms, Ms Westerman was concerned about Mr Coad's fitness to serve as director after discovering that Mr Coad had been issued with an enforceable undertaking by the ASIC in April 2014.

In an email dated 18 December 2015 to Mr Morgan of AET, Ms Westerman set out her concerns by reference to the enforceable undertaking, stating as follows:

Of serious concern are the following actions by Mr Coad in this matter [being a reference to the matters set out in the enforceable undertaking]:

- He drew remuneration without authority, or following the proper processes
- Serious questions about his impartiality and independence
- Lack of adherence to proper record keeping and book keeping processes
- Disregard for Australian law as it pertains to liquidators and the Corporations Act. Eg Section 180
- Inadequate communication with stakeholder eg creditors
- Fabricating resolutions of meetings

I think that the various items contained within this publically available document, raises serious questions about Mr Coad's fitness to be a sole Director of Njamal Mining.

The enforceable undertaking is a public document available on the website of ASIC. The Inquiry has reviewed that document. Under the heading "ASIC's Concerns" on pages two and three, ASIC notes that as at the date of the undertaking (April 2014) ASIC was concerned that
Mr Coad, in conducting certain external administrations, failed to carry out or perform adequately and properly the duties of a liquidator and/or duties or functions required by an Australian law to be carried out or performed by a registered liquidator. ASIC then, in a suite of enumerated paragraphs, set out specific concerns.

After those concerns are set out ASIC describes steps that Mr Coad had taken to address the concerns, sets out a formal acknowledgement by Mr Coad of the concerns, and provides a range of undertakings into which Mr Coad entered, presumably to satisfy ASIC as to his continued fitness to practice as a liquidator.

Though the Inquiry understands the concerns that Ms Westerman held in December 2015 regarding the appropriateness of Mr Coad being appointed to serve as a director of Njamal Mining Pty Ltd, the Inquiry is not persuaded that the decision by AET to appoint Mr Coad was inappropriate.

As explained in AET’s pro forma letter to Njamal community members, there was in AET’s view a valid and acceptable reason for Ms Westerman's removal and Mr Coad's appointment:

As we did not know what financial position the company was in (and whether it was solvent or insolvent), we decided it would be inappropriate to appoint Njamal people as replacement directors, because they could potentially face personal liability if the company turned out to be insolvent. Accordingly, we appointed Simon Coad as the sole director, who is an experienced company director and liquidator based in Perth.

Moreover, the existence of the enforceable undertaking was disclosed to the TAC. The minutes of the meeting of the TAC on 21 December 2015 record that Mr Coad attended that meeting and presented to the TAC at length on matters connected with Njamal Mining Pty Ltd and that, before doing so:

S Coad introduced himself and explained that he was appointed sole director of Njamal Mining in August 2015 after the trustee removed the former directors. Explained history regarding his enforceable undertaking with ASIC and that the matter was now at an end as of December 2014. Also mentioned previous success story with a Garyiyarra (sic) property joint venture.

In this respect the Inquiry makes a number of further observations. First, the concerns that ASIC had about Mr Coad related to his role as a liquidator of companies in external administration, they do not relate to his role as director of trading companies. Secondly, the undertakings entered into by Mr Coad concerned, broadly speaking, promises to improve the practices, systems and procedures adopted by Mr Coad in his practice as a liquidator. It appears that by the time that Mr Coad was appointed as the sole director of Njamal Mining Pty Ltd in August 2015, the undertaking had been in force for approximately 15 months and the Inquiry has been provided with no evidence that the undertaking had been breached during that period. Finally, as Mr Coad observed and as is recorded in the minutes of the TAC meeting of 21 December 2015 excerpted above, it appears the undertaking "was at an end as of December 2014."
Mr Coad’s reports into the affairs of Njamal Mining Pty Ltd

On 17 November 2015, Mr Coad issued a then commercial in confidence interim report to AET in relation to Njamal Mining Pty Ltd in which he formed a significant number of adverse views in relation to aspects of the management and operation of the company. As best he could determine from available, but incomplete, records, as at 12 November 2015 the company had a net asset deficit of approximately $265,500 as set out in a balance sheet attached to the report. The report appears to have been reissued on 14 December 2015, without that attachment, and was circulated to TAC members on 18 December and discussed, as noted above, at a TAC meeting convened by AET on 21 December 2015.

According to the minutes of that meeting, Mr Coad went through his report which was summarised in a presentation. Various items were discussed including unaccounted expenditure of over $100,000, the absence of a list of assets and ongoing difficulties Mr Coad had experienced accessing books and records.

Other issues are also canvassed in Mr Coad’s reports, including issues in relation to the employment contract of Ms Westerman, the terms and execution of which is now apparently in dispute in the previously mentioned proceedings initiated by Ms Westerman. Ms Westerman suggested she was owed some moneys where she had used her own money for Njamal Mining Pty Ltd related expenditure. Questions were also raised in relation to Njamal Equipment Supply Pty Ltd which Ms Westerman indicated had been set up to supply equipment into Njamal Mining Pty Ltd’s joint ventures and contracts. Apparently it purchased gardening equipment some of which may still be with Mr Kevin Allen. Issues were raised in relation to the due diligence in establishing that company. Of note, during March, Mr Bradley Hill resigned from being a director of Njamal Equipment Supply Pty Ltd and indicated that he was gifting the shares that Indigequipe Pty Ltd owned in that company to Ms Westerman to do with as she wished, free of charge. Ms Westerman was also a shareholder. It appears that the debts owed to Njamal Mining Pty Ltd by this company of approximately $35,000 were not repaid despite demand and have subsequently been written off by Njamal Mining Pty Ltd during the 2016/17 financial year.

In relation to missing information, Ms Westerman is recorded in the minutes of the meeting of 21 December 2015 as saying that she had delivered the receipts in folders and that further information was at her house in Perth awaiting Mr Coad’s collection, which would explain the transactions. That was contrary to Mr Coad’s understanding that Ms Westerman would bring the books and records into his office, as he had requested. It was agreed that Ms Westerman would notify Mr Coad when she was next in Perth so that he could arrange delivery of the books and records. The minutes also record that Ms Westerman said she had refused to give Mr Coad access to company emails due to confidential Njamal information including native title agreements.
Mr Coad attended a further TAC meeting on 29 February 2016. The minutes of that meeting record Mr Coad stating that there "was a lack of compliance from [Ms Westerman] regarding his requests to obtain the books and records of Njamal Mining". Later in the minutes it is recorded that Ms Westerman said that she did not consider Mr Coad to have been validly appointed, which was why she would not provide the information sought by Mr Coad. Ms Westerman also restated that the reason she did not give the information to AET when requested throughout 2015 was because there was the need for a forensic audit, and that AET "used this [the Inquiry infers this to be a reference to the failure to provide the information] as a mechanism to get rid of her."

The minutes of that meeting do not record a resolution to the issue of access to Njamal Mining Pty Ltd records and it would appear from material supplied to the Inquiry by the current directors of Njamal Mining Pty Ltd that the adequacy of records and access to them has continued to be an ongoing issue.

**The concerns of Messrs Parker and Eaton**

By letter to the Inquiry dated 10 August 2018, Messrs Parker and Eaton (the current directors of Njamal Mining Pty Ltd) say, by reference to demands to Ms Westerman attached to their letter, that the company had gone to "extraordinary lengths to recover [company] property, without success". Messrs Parker and Eaton also express the view that the alleged refusal of Ms Westerman to return the financial records and property of the company, including computers and laptops belonging to the company and that contained relevant corporate data, "can only be interpreted as a deliberate effort by Ms Westerman to avoid scrutiny of her use of company funds". Messrs Parker and Eaton go on to observe that the Inquirer has "resources at his disposal to avoid having to go to the same extraordinary lengths to make Ms Westerman comply with a request for producing company records" with the implicit request that the Inquirer exercise his powers to do so, a request that ISPL had previously explicitly made in discussions with staff of the Inquiry.

In addition to these matters, both Mr Coad in his reports to AET, and more recently Messrs Parker and Eaton in their letter to the Inquiry, have raised concerns in relation to certain expenditure of Njamal Mining Pty Ltd said to have been authorised by Ms Westerman and which, in part at least, is subject to criminal charges against Ms Westerman which are presently before the courts. While the Inquiry takes the view that, in those circumstances, it is not appropriate to comment on the matters the subject of criminal proceedings, something should be said about the nature and quantum of expenditure to which Messrs Parker and Eaton in particular have directed the Inquiry's attention.

In the company's letter to the Inquiry dated 10 August 2018 Messrs Eaton and Parker particularise a number of categories of expenditure which are captured within three headings described as "Wasteful and irresponsible spending", "Personalised expenditure" and "Other transactions under review".
CHAPTER 3: APPOINTMENT AND REMOVAL OF TRUSTEES

Under the first heading are details of parking expenses incurred at Perth Airport said to comprise 41 instances of expenditure amounting to $8,021 across the period September 2014 to August 2015, and legal fees amounting to $171,208 said to relate to actions "most of which were against our own clients, suppliers, contractors and joint venture partners". Neither of these categories of expenditure is, the Inquiry understands, the subject of legal proceedings.

As to the parking expenses, Messrs Parker and Eaton explain that former directors of the company (which the Inquiry infers is a reference to Mrs Eaton, Mr Allen and Mr Ian Taylor) have advised them that the company's policy for taxis was to be used to avoid "such waste". There is considerable force in the criticism levelled by Messrs Eaton and Parker. The expenditure of over $8,000 of company funds on parking at Perth Airport, with the individual cost items ranging from ~$120 up to ~$330, is on the face of it excessive.

Ms Westerman was asked about the suggested taxi policy and the amounts expended on airport parking. In relation to the policy Ms Westerman said simply that the company never had a policy on transport. In relation to the quantum of the amount spent on parking Ms Westerman accepted that at times parking fees were high. She said that one reason they were high was that she often got stuck up in Karratha or Port Hedland or had to change flights, so that the vehicle was parked for longer than originally anticipated.

Ms Westerman also said that "things in Njamal Mining were like mayhem" and that she was not getting enough support from her fellow directors, so she had to go up to Karratha often. She said Mr Allen was supposed to be dealing with things up there but was not so Ms Westerman would have to deal with it. Ms Westerman said that last minute flights and changes to flights added to parking fees, as she was trying to be both the operations manager up in Karratha and general manager down in Perth and did not have any support. She says that is why costs blew out; she wanted the other directors to do more in the community.

As to the legal fees, Messrs Parker and Eaton say that "most of" the fees were incurred in actions "against our own clients, suppliers, contractors and joint venture partners" and that Ms Westerman's actions "were reckless and have caused irreparable damage to relations with some mining companies and service providers in the mining community." It will be recalled that Messrs Eaton and Parker say the amount expended in connection with legal fees was $171,208. However, the materials enclosed with Messrs Parker and Eaton's letter, in particular a schedule of transactions titled "NML Account Issues", suggests the figure may be $107,420.07. Regardless of the sum, it is evident that the fact of the litigation is not in dispute and that during the period of the litigation there was significant disharmony and a decline in relations between Ms Westerman and AET, and later, as a consequence, Ms Westerman and ISPL. Ms Westerman also complains that certain of the litigation should have been pursued and was not after she was removed as managing director.
CHAPTER 3: APPOINTMENT AND REMOVAL OF TRUSTEES

The next heading under which expenditure is categorised by Messrs Parker and Eaton is "Personalised expenditure". Messrs Parker and Eaton explain:

The following transactions represent items of alleged expenditure for personal benefit where we believe Ms. Westerman used NML as an ATM.

Some matters are yet to be reported to the Australian Taxation Office. Other matters will be subject to further investigation by the WA Police.

Then followed a series of transactions which Messrs Parker and Eaton say fit this general description. While the transactions listed in this part of Messrs Parker and Eaton's letter is obviously of concern to the company, given these matters are or are soon to be referred to the WA Police or the Australian Taxation Office, they are not matters about which the Inquiry considers it appropriate to express a view.

The final heading under which expenditure is categorised by Messrs Parker and Eaton is "other transactions under review" which is said to comprise expenditure, totalling $132,260, that does "not relate to NML business or projects and appear to be expenditure for private purposes." The description given to each line item of expenditure is, as one might expect of expenditure under review, relatively vague and Inquiry does not express any view about it nor, consistent with its previously expressed approach to the scope of the Inquiry, is it a matter which it had sought to specifically investigate.

As previously noted, Ms Westerman had a significant financial interest in remaining as Managing Director of Njamal Mining given what she contends was the significant remuneration package to which she was entitled. Indeed, her subsequent pursuit of claims in that regard appears to have been one of the factors that led to the schism between her and the TAC and her one time supporter, Mr Carter. That dispute was unable to be resolved and Ms Westerman has recently commenced proceedings in the Supreme Court of Western Australia against Njamal Mining Pty Ltd, Njamal Services Pty Ltd, ISPL, Mr Carter and Mr Parker seeking the payment of $203,901.74 from Njamal Mining Pty Ltd for wages and benefits Ms Westerman alleges are owing to her from the company as the result of her termination of employment.

Ms Westerman has also brought claims in respect of her alleged entitlement under an alleged employment contract to an incentive payment of 10% of the gross profits of Njamal Mining Pty Ltd from any joint venture projects which the plaintiff was directly responsible for securing, and has alleged that Mr Carter and Mr Parker had conspired to injure to 'defraud' Ms Westerman by incorporating Njamal Services Pty Ltd and directing business opportunities to that company and ISPL and putting Njamal Mining Pty Ltd into care and maintenance. It is understood that one of the reasons that Njamal Mining Pty Ltd has continued in operation has been the fact of these allegations, which are also understood to have had their genesis in mid to late 2016.
CHAPTER 3: APPOINTMENT AND REMOVAL OF TRUSTEES

In any event, the consistent and continued failure by Ms Westerman to supply any of AET, Mr Coad or the current directors of Njamal Mining Pty Ltd with all the information which, self-evidently, has been sought from her on a number of occasions, is troubling. Ms Westerman has, as described above, provided a number of explanations for the failure to supply the material. However, in the Inquiry's view, those explanations are deficient in that they fail to grapple with the simple fact that the information and material sought by the various directors of Njamal Mining Pty Ltd is information and material that is on the face of it owned by the company.

While these matters are of concern to the Inquiry, and while on their face the matters raised by Messrs Eaton and Parker, and separately by Mr Coad in his reports to AET, raise serious questions about the financial state of Njamal Mining Pty Ltd and the management of that company, as foreshadowed earlier in the Report, the Inquiry has not sought to investigate in detail the management of Njamal Mining Pty Ltd. This is because, as noted, Njamal Mining Pty Ltd is a separate legal entity, that although owned by the Trust was not significantly funded by it (in contrast to many of the recent related entities established under the watch of ISPL), the work previously done by others in this area, the need for the Inquiry to prioritise the specific matters it examined as part of its Inquiry and the potentially disproportionate amount of time and resources that would have been expended in inquiring in any detail in relation to this matter, that criminal charges were and remain pending in relation to aspects of Ms Westerman's alleged conduct in relation to Njamal Mining Pty Ltd, and civil proceedings are also on foot between Ms Westerman, Njamal Mining Pty Ltd and others.

**ISPL's proposed action against AET**

Finally, before leaving the topic of Njamal Mining Pty Ltd, the Inquiry notes that Mr Carter has suggested, as the Inquiry understands his position to be, that notwithstanding the steps taken by AET in 2015, AET breached its duty in not acting more precipitously in relation to Ms Westerman and Njamal Mining Pty Ltd. He has also suggested that ISPL was seeking advice about taking action against AET in that regard. That is not without a degree of irony given his initial position of support for Ms Westerman following her removal from being the managing director of Njamal Mining Pty Ltd by AET. Despite invitation, no materials were provided to the Inquiry by ISPL to substantiate or identify the precise basis of that concern.

Similar suggestions have been made by Messrs Parker and Eaton in their August 2018 letter, by which they allege and request the Inquiry inquire into "how AET failed in its duty to protect NPT funds from being squandered by Ms Westerman."

Mr Carter, Mr Parker and others have also felt aggrieved that the Inquiry was not directed to a greater degree in relation to Ms Westerman's conduct and Njamal Mining Pty Ltd. That is in

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74 See interim shareholder's reports from Mr Coad in November and December 2015.
CHAPTER 3: APPOINTMENT AND REMOVAL OF TRUSTEES

part explicable due to the unwanted scrutiny to which the management and administration of ISPL as Trustee has been subject during the Inquiry and the view of some that it was Ms Westerman's conduct that warranted consideration, and was potentially more concerning, than any conduct of the current Trustee.

The Inquiry also however concluded that Mr Carter, in particular, and Mr Parker were committed to pursuing action against Ms Westerman, including, where appropriate, criminal proceedings. While this is understandable, it causes the Inquiry to pause when considering assertions that are then advanced in relation to AET. If ISPL ultimately concludes, after taking appropriate advice, that a cause of action against AET is available and may warrant being pursued, to avoid any perception that any action is motivated by any other reasons other than the proper discharge of the Trustee's duties, the Inquiry recommends that consideration be given to seeking Court directions in relation to any action against AET that ISPL as Trustee would be justified in taking that course, prior to any such proceedings being commenced. The Inquiry otherwise makes no findings in that regard.

Recommendation 2 (Chapter 3)

If ISPL ultimately concludes, after taking appropriate advice, that a cause of action against AET is available and warrants being pursued, consideration be given by ISPL to seeking directions from the Supreme Court of Western Australia in relation to whether it would be justified in pursuing that course, prior to any such proceedings being commenced.

Other matters said to have led to the removal of AET

Despite the above issues in relation to Njamal Mining Pty Ltd, that is not, of course, to say that Ms Westerman and others in the Njamal community did not have any concerns with the manner in which AET managed and administered the Trust.

Those issues, in the order and language presented by Ms Westerman, were:

1. Failing to consult with the Njamal People’s Trust Advisory Committee (NPTAC)
2. Trust Finances
3. AET Fees
4. Breach of Trust, misleading the Njamal people
5. Committee membership (NPTAC)
6. Not culturally inclusive
7. Conflicts of interest
8. Njamal Mining
9. Other (namely, an alleged lack of professionalism and an allegation that AET had been made aware of a previous theft from the Trust but had not followed up)

Given the historical nature of these issues, and given AET was ultimately replaced by ISPL as trustee of the Trust in part at least as a result of the efforts of Ms Westerman, they are not, as with issues concerning Njamal Mining Pty Ltd and AET more generally, of central focus for
the Inquiry. However, in broad summation, some of these issues seem to the Inquiry to be matters of communication or clarity (e.g.: the allegations that AET failed to provide information about trust finances or as to cultural inclusion) rather than breaches of AET's obligations under the Trust Deed or trusts law. To the extent that the complaints traverse other areas, many of those are dealt with elsewhere in the Report.

In relation to the express allegations of breach of trust, the Inquiry has found no evidence to support those suggestions. In particular, the Inquiry does not have a basis for finding that AET breached either the Deed or general trusts law in any of the following ways, as alleged by Ms Westerman:

- AET is making up its own rules about the Trust. Inconsistent and contradictory application of Trust Deed and Trust Rules
- AET promised to get us an office, but they haven’t – this suits AET as we have no ability to organise, and this maximises the need for their admin. Services
- Minutes of meetings concocted and/or not a reflection of what happened. (Eg August 2014, and December 2014)
- Falsifying documents or changing them to suit their own purposes eg minutes of meetings, Trust policies
- AET says that only AET can call meetings – contradicting what they have said in their proposal, policies etc

As to the first item, the Inquiry understands that to be a reference to the alleged inconsistency between the manner in which AET was appointed Trustee and the manner in which it was replaced by ISPL. That concern, which in the Inquiry's view does not, in any event, amount to a breach of trust, is considered at page 513 and following of the Report.

Similarly with the final item. To the extent that there has been any inconsistency between what AET proposed in its proposals and policies and its practice with respect to calling meetings (about which the Inquiry makes no finding), that does not amount to a breach of trust.

The second item, the failure to obtain an office, is not a breach of trust. AET was under no obligation, as trustee, to obtain an office for the Njamal community. No doubt that goal was admirable and aspirational (and was achieved by ISPL) and the failure to achieve it was disappointing for Ms Westerman. However, that is not a breach of trust. The suggestion that “this suits AET as we have no ability to organise, and this maximises the need for their admin. Services” is unhelpful and not accepted by the Inquiry.

The third and fourth items are serious allegations of misfeasance. If substantiated it may be open to say that the conduct complained of constituted a failure by AET to act properly in the administration of the trust. However, those allegations, have not been substantiated. That minutes may not reflect one or more persons’ recollections of a meeting is not sufficient in itself to establish that the minutes have been concocted. Serious allegations of this type require robust evidence to prove their truth and, in the Inquiry's view, that robust evidence has not been supplied, of sufficient cogency to meet the Briginshaw standard of proof,
CHAPTER 3: APPOINTMENT AND REMOVAL OF TRUSTEES

In the Inquiry's view these allegations of breach of trust have not been made out. In any event, matters came to a head shortly after AET resolved to remove Ms Westerman and Mr Allen as directors of Njamal Mining Pty Ltd, when Supreme Court proceedings CIV 2539 of 2015 were commenced by writ dated 25 September 2015. The writ and accompanying statement of claim reveal that the plaintiffs were of the view that AET had been removed by the TAC by resolutions passed in August and September 2015. Consequently, the plaintiffs sought a declaration that the purported decisions to remove AET as Trustee were valid, and appropriate directions pursuant to section 21(1) of the Charitable Trusts Act 1962.

In the end, as foreshadowed above, the Supreme Court proceedings did not result in a decision (though the parties did engage in court sponsored mediation), as a TAC meeting was convened on 6 May 2016 to vote on the removal of AET. At that meeting, which was convened by AET and which AET accepted satisfied quorum requirements, the TAC resolved to remove AET. AET accepted that resolution as validly complying with the requirements of the Deed and AET formally retired its office by Deed dated 12 May 2016 concurrently with the execution by ISPL and AET of a deed of retirement and appointment.

**Barry Taylor structure subcommittee**

Before returning to the steps that were taken to remove AET, it is convenient to deal with one other area of complaint raised by Ms Westerman.

As mentioned earlier, at the community meeting of 18 and 19 November 2014, it was resolved to establish the Barry Taylor subcommittee to identify a preferable Njamal structure. The minutes of that community meeting record that Ms Westerman had suggested that Darryl Pearce act as a consultant in terms of structure and Mr Pearce gave a presentation to the community. However, Barry Taylor set out concerns regarding an alleged conflict of interest on the part of Mr Pearce. The minutes do not record what the conflict of interest was, although it is recorded that a "heated debate occurred on the issue". The Inquiry is aware that Mr Pearce had been director of ICRG JV Pty Ltd, a company in a joint venture with Njamal Mining Pty Ltd and that he had reportedly been removed as the Chief Executive Officer of an investment arm of a (non-Njamal) native title body.

Following the heated debate, it was unanimously agreed that a subcommittee would be formed, with Barry Taylor to chair. It was also unanimously agreed that committee members would be paid sitting fees of $500 per day and that a total budget of $40,000 would apply.

Despite this unanimous vote, Ms Westerman continued to maintain that she was responsible for forming an appropriate structure. While she complained to AET about the Barry Taylor subcommittee and referenced a previous committee that she contends should also have been funded, of which she was a member, notably this complaint was advanced on 7 September 2015, shortly after AET removed her from her position as managing director of Njamal Mining Pty Ltd.
CHAPTER 3: APPOINTMENT AND REMOVAL OF TRUSTEES

Mike Fitz Gerald from Fitz Gerald Strategies was employed as a consultant to meet with the subcommittee to come up with a strategy. He provided an expression of interest on 23 November 2014, and met with AET on 20 January 2015 to settle on an agreed fee of $1,500 per day plus expenses, with a review of the Trust’s business structure to be completed by 31 March 2015. From March 2015 to October 2015, AET as Trustee for the Trust paid Mike Fitz Gerald (through his company) $17,592.91. These fees appear to have been set out by AET to the community in a presentation, the date of which is not clear from the document provided to the Inquiry.

It is apparent that there was a great deal of community politics going on in this period. A Barry Taylor subcommittee meeting was held on 27 January 2015, which was apparently interrupted by Ms Westerman who was, in the words of meeting participants, “aggressive and offensive and caused those present a great deal of stress and anxiety”. The subcommittee also concluded that Ms Westerman (described as the Njamal Mining Pty Ltd director) had caused Njamal Mining Pty Ltd to run afoul of the mining companies due to her management style, calling her the head of a "powerful clique". Barry Taylor tried to have Ms Westerman removed as a director of Njamal Mining Pty Ltd after she had allegedly removed Ian Taylor as a director of Njamal Mining Pty Ltd (he resigned with effect from 20 August 2015) and replaced him with Mr Pearce. On 25 August 2015, eight members of the TAC signed a resolution supporting the removal of Ms Westerman and Mrs Eaton from their roles as directors and to remove Mr Pearce from his role as a consultant to Njamal Mining Pty Ltd.

It is in this context that Ms Westerman made complaints to AET regarding the Barry Taylor subcommittee and, separately, set up meetings using Njamal Mining Pty Ltd funds to discuss and consider AET’s trusteeship and a proposed new Njamal structure in which Njamal Mining Pty Ltd could sit.

Ms Westerman complained to the Inquiry that $17,000 of Trust funds was expended on the Barry Taylor subcommittee and that no final report was ever provided. That is correct, and while it obviously would have been desirable for a finalised report to have been provided that of itself does not mean that the $17,000 of expenditure was inappropriate or wasted. Whilst an undated preliminary report from the subcommittee was provided to the Inquiry, AET confirmed that a final report was never put back before the community. AET has explained that it was concerned, amongst other things, with aspects of the report including the fairly complicated structure proposed and the reliance on previous work in relation to possible structures. Then, before those matters could be rectified, AET was removed as Trustee, ISPL was appointed, and ultimately, as discussed elsewhere in the Report, a different structure was adopted.

Ms Westerman also complained that Fitz Gerald Strategies was engaged without consultation with the TAC. While that might, strictly speaking, be correct, in the Inquiry’s view that is not surprising given that the subcommittee had been appointed by the TAC, with a budget, and
that this is the type of decision which it was reasonable to expect the subcommittee would be principally responsible for making (subject to AET's ultimate approval) within its endorsed budget in the circumstances. Further, under the Trust Deed AET was arguably not in any event required to consult with TAC in respect of this type of expenditure (it arguably being neither a distribution nor an investment, but simply an expense of the Trust).

Selection of a Replacement Trustee for AET

From August 2015, representatives from Perpetual (an ASX listed licensed trustee company) met with Ms Westerman and some other TAC members to consider taking on the role of Trustee on a temporary basis. The Inquiry understands that, ultimately, Perpetual was not willing to be Trustee until there was a clear resolution from the TAC that AET be removed. Due to concerns that Perpetual was not accepting an appointment, and, it has been suggested, by variously Mr Carter and Ms Westerman, other concerns as to whether its reluctance may be connected with a policy of not competing with AET or that a Perpetual employee responsible for liaising about its possible appointment had a prior professional relationship with one or more of the Taylor family (who were then opposed to removing AET) it was decided to appoint ISPL, a company established by Mr Carter, who had become involved in assisting Ms Westerman in January 2016 in relation to her dispute with AET.

Mr Carter's Initial Involvement with the Trust: January-April 2016

ISPL was incorporated under that name on 23 February 2016. For reasons which are not immediately apparent to the Inquiry it was renamed Esplanade Australia Pty Ltd for the period 27 April 2016 to 12 May 2016, before reverting to ISPL on 13 May 2016, shortly after its formal acceptance of appointment as Trustee of the Trust by Deed dated 12 May 2016.

In ascertaining the sequence of what occurred in the early period the Inquiry has largely been guided by documentary evidence and explanations from various witnesses, in particular Ms Westerman and Mr Carter. While there are some, at times not insignificant, differences between their recollections, they are otherwise broadly consistent with each other.

In a statement provided to the Inquiry Mr Carter outlined his involvement in relation to the Trust and Ms Westerman. He indicated that in late 2015, he was involved in giving some commercial advice to many different entities and that whilst in the process of restructuring one small group of those entities he was introduced to Ms Westerman. From the records available to the Inquiry Mr Carter first became involved with issues concerning the Trust in January 2016. Ms Westerman indicated that she was first introduced to Mr Carter through Mr Troy Millen, who was involved with one of the Bluenergy companies. Based on those records, on 22 January 2016 Ms Westerman emailed Mr Carter and Don Patterson (who was initially proposed to be part of the ISPL team but ultimately withdrew from involvement for reasons
that are unclear)\textsuperscript{75} with some background information about the Njamal Mining Pty Ltd shareholding and appointment of AET. At Mr Carter’s request the following day, Ms Westerman forwarded her mobile phone number to Mr Carter.

Mr Carter indicated in his statement to the Inquiry that Ms Westerman was a very agitated and angry lady and related to him many anecdotes regarding her perception of the poor and ad hoc treatment of indigenous people in the Pilbara region. She felt they were being “ripped off” and not kept informed of opportunities for genuine earnings and advancement. He indicated that Ms Westerman was concerned that there were nominal royalties being paid by mining companies into Trusts, which were then distributed to indigenous people. Amongst other things Mr Carter indicated that Ms Westerman explained that she was in a legal dispute to remove what she said was “a corrupt trustee” (referring to AET) and to have it replaced with another. He suggested that she told him that she had no funds to fight this battle as she had been dismissed by AET from her position as being a director of a company called Njamal Mining. He recounted being told by Ms Westerman that AET as Trustee were using the Trust’s own funds in a series of legal actions to defend their own position as Trustee and that, upon enquiries with other parties, he was aware that if this were true, then this was likely an illegal action and AET as Trustee would be compelled to repay the funds. (In passing, the Inquiry observes that, in the context of this particular case, it does not accept that assertion was well-founded).

Mr Carter says that he explained to Ms Westerman that he was happy to advance to her some of the funds necessary to assist in the actions she and other members of the TAC had proposed to recover the funds and to remove AET, on the condition precedent that the majority of the TAC were made aware of and supported his involvement and the purpose for the provision of the funds; and that the TAC supported and agreed to the commercial condition that they would ensure that any funds provided would be recouped at an appropriate time and after discussion with the new trustee. He says further that if no support existed and the majority of the TAC wished to stay with AET and not to actively seek to recoup the funds in question, then he would simply revert to the role as a free source of advice and would not chase Ms Westerman or Njamal for the funds advanced so far. Mr Carter indicated that he did not seek any additional fees or charges as a litigation funder might have also required. He says that he had genuine sympathy for the cause and decided to provide Ms Westerman with sufficient funds to organise for the Njamal people to meet and hold a community level meeting to air, discuss issues, and he was prepared to attend to see if he could help to resolve the issues and suggest actions and directions. He says he said he would attend and be a participant at any meetings should he be required.

\textsuperscript{75} His email address appeared to also be connected with one of the Bluenergy companies.
Mr Carter does not identify with precision when the conversations he refers to occurred, but, except perhaps for the precise detail of the suggested arrangements in relation to the provision of funding, and when in the sequence, those matters were raised, the above conversations he recounts are broadly consistent with the chronology reflected in various documents available to the Inquiry and evidence of Ms Westerman. The terms on which funding was provided is returned to below.

It appears that at about that time Mr Carter and the Inquiry infers from the following email, litigation funding company Global Litigation Funding Pty Ltd, of which Mr Carter was appointed a director, and his son Ryan appointed secretary, on 1 October 2014 and Esplanade Holdings Pty Ltd was the sole shareholder, had become involved both on behalf of Ms Westerman, and supposedly the Njamal people.

Nevertheless, consistent with that having occurred, on 28 January 2016 Ms Westerman sought the view of Mr Carter, whom she described as “Uncle Benny”, in relation to a draft email she proposed to send to Mr Coad in which she stated:

Dear Mr Coad

Please be informed that I have appointed Global Litigation to act on my behalf in relation to matters pertaining to my employment, and monies owed to me by Njamal Mining.

Global Litigation will also be acting on behalf of the Njamal people in regards to losses incurred as a result of actions by yourself and AET

As myself and the Njamal people intend to take legal action, relating to these matters, Mr Rod Carter and his representatives will be contacting you in the near future to inspect the company accounts and documents as per Section 198 (F) (2) (b) of the Corporations Act.

This action has been taken as a result of your actions relating to my employment, and the serious concerns that the Njamal people have about your administration of Njamal Mining

Sharon Westerman

Mr Carter responded by saying:

Excellent

This is the direct approach

It is the only way

As far as the Inquiry understands Global Litigation Funding Pty Ltd did not otherwise have any ongoing role in connection with those matters. Indeed, as explained below, once ISPL had been appointed, Mr Carter, ISPL and Njamal Mining Pty Ltd, of which ISPL became owner on behalf of the Trust, were and remain on the opposite side of that dispute to Ms Westerman, which is now the subject of Supreme Court litigation.

On 10 February 2016 Mr Morgan from AET wrote to the TAC attaching notices being sent to members of the Njamal community in relation to a planned community meeting on 29 February 2016 being called under clause 9.10(b) of the Trust Deed. Ms Westerman

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76 Global Litigation Funding Pty Ltd was subsequently deregistered on 12 June 2016.
forwarded it to Mr Carter after which Mr Carter and Ms Westerman engaged in the following email exchange:

   The way to do this is as follows
   1. Get proxies from the families that support you. Meet them first, have a night where we put on a meal and such.
   2. Outline the plan, such as retirement villages etc
   3. Then only the lawyers and myself go. It takes all the veum (sic) out of it
   I have done this before

Ms Westerman emailed back:

   We can do all that too — but this is a disrespectful insult to the Committee and the Njamal people. There is no accountability from AET re their mismanagement of the Trust — and the reasons why we sacked them.
   It's an attempt to roll the committee, feed the community misinformation and get their own people/structure in place. As I expected they will try to dictate and control the agenda. They are even emailing the people on the committee who sacked them, yet saying we were not the rightful committee??
   I'm going to provide my own information summary to AET and request they send it out this with the notice — plus request agenda items to be added eg Trust financial information
   We need to have our own meeting first and then stitch it up on the 29th

Mr Carter responded:

   Sharon,
   The best way is by Stealth. Turn up with Proxies and vote them out! I can stich (sic) them up later. What you need is a bloodless coup!
   I can help. This is the best way. Confrontation will only play the game they want.
   Damian and I are working on this. We will win!
   Rod

Ms Westerman responded:

   I'm all for bloodless. A positive, happy meeting of Njamal people to elect our committee and board structure prior to this meeting is what we want I can get all the proxies/votes over the next two weeks — but that still won't stop people turning up on the 29th and changing their minds after hearing a lot of lies, or being pressured

   to which Mr Carter replied:

   Not id (sic) we are holding another meeting at the same time and paying sitting fees and outlining your vision!

   Ms Westerman then replied:

   the perfect world, that is what we want to do!

   The email exchange was concluded by Mr Carter:

   And we will. Lets just make a plan and stick to it. best way is to have your meeting the day before. That way they will be blindsided

Mr Carter says that he attended a Njamal community meeting with some 80 people at a bowling club in Port Hedland in early February 2016, which included the TAC representatives,
that, at the meeting, it became apparent that the opinion of Ms Westerman was consistent with that of many other spokespeople for the group and their dissatisfaction with the Trustee (AET) and YMAC and the need for change had broad support. It is not clear to the Inquiry when in February the meeting to which Mr Carter referred occurred, although it appears to be a meeting convened on 26 February described below, a few days before the community meeting convened by AET on 29 February 2016. A number of the aspects of the timing of events put forward by Mr Carter in his statement are inaccurate.

In any event, this and subsequent emails evidence the then close working relationship between Mr Carter and Ms Westerman as they worked towards the removal of AET. They are also relevant to one of the areas of concern raised with the Inquiry concerning the way in which steps were taken to obtain support for Ms Westerman's position and the removal of AET and whether attempts were made to influence, or people were influenced, by the provision of money and other benefits. The reference by Mr Carter to meeting families that supported Ms Westerman first and having a night where they “put on a meal and such” and to having another meeting at the same time (as a meeting being organised by AET) and paying sitting fees are concerning in that regard. This is amplified when regard is had to the quantum of funds distributed by Ms Westerman and Esplanade Holdings Pty Ltd in the period prior to ISPL's formal appointment as Trustee in May 2016. These issues are further considered at page 339 and following of this Report.

On 16 February 2016 Ms Westerman forwarded to Mr Carter a copy of communications with her lawyers including draft proposed resolutions with a view to TAC seeking to remove AET prior to the community meeting.

On 22 February 2016 Ms Westerman forwarded additional information to Mr Carter including in relation to Njamal beneficiary details and applications that had been received but not yet approved.

On 23 February 2016, ISPL was incorporated, with Mr Carter as the then sole secretary and director, with Esplanade Holdings Pty Ltd its then 100% shareholder.

On 26 February 2016 a community meeting was held, and apparently designed to pre-empt the community meeting being convened by AET as Trustee on 29 February 2016. Approximately 60 Njamal people attended the meeting according to the Njamal Nation record of attendance and payments for travel assistance provided to the Inquiry.

On 26 February 2016 Mr Molony of Kings Park Corporate Lawyers wrote to AET's lawyers indicating that they acted on behalf of the beneficiaries of the Trust. That of itself raises a question as to the basis on which they could have been so acting. In any event, putting aside the question as to their client, they advised that they were instructed that written resolutions had been signed by members of the TAC including (purporting) to make resolutions that AET had been removed as Trustee and Perpetual appointed as Trustee, and asserting that Perpetual was now the Trustee of the Trust. That assertion is somewhat surprising in
circumstances in which Perpetual had not then formally confirmed that it accepted appointment as Trustee, albeit it had previously communicated in principle willingness to be appointed. In the letter it was also asserted that the community meeting AET had proposed to convene on 29 February could no longer take place as AET no longer had authority to hold the proposed community meeting given its "removal as trustee of the Trust".

AET responded by email on 27 February 2016 pointing out that it was not aware of any formal confirmation by Perpetual of it accepting appointment and raising issues as to its responsibilities until that occurred, even if a court were to find that AET has or had been removed. Kings Park Corporate Lawyers responded, in an email and attached letter cc’ed to Perpetual asserting that they were instructed that Perpetual had agreed to its appointment as Trustee of the Trust. AET maintained its position and that it had not yet seen any correspondence or communication in which Perpetual had confirmed that position.

As it turned out, Perpetual had not formally accepted appointment and its position was that it was prepared to accept an appointment if AET was presented with a valid resolution that AET was prepared to accept and that it would not be prepared to drawn into any debate as to whether resolutions were valid.

As noted earlier in the Report, on 29 February 2016 AET convened a community meeting at which various matters were discussed including trust finances (in respect of which a resolution was made for a forensic audit of the Trust managed by AET to be conducted), action being taken to remove AET, election of a new TAC, and issues about Njamal Mining Pty Ltd.

According to the minutes, Mr Coad explained the background to his appointment and that audited financials were in process of being completed, but thought it was likely that they would be qualified as there was not full access available to the books and records.

Mr Coad expressed the view that Ms Westerman had set up a good agreement with FMG, and 2 good joint ventures as well, and that lots of money has gone into Njamal Mining Pty Ltd. He said that approximately $2 million had been spent and when he took over as the sole director, there was only about $5,000.00 held in the bank account, and about $250,000.00 owed to creditors.

Mr Coad suggested (based on the extent of his then inquiries) there was no evidence of fraud, but in his opinion, a waste of money, with cameras, laptops, computer games, furniture and $120,000.00 of payments still unexplained.

Mrs Eaton spoke as a former director and gave credit to Ms Westerman for taking on everything and that she tried to do too much. She confirmed that she and Mr Allen had decided to try and remove Ms Westerman due to the non-provision of the requested audit information: "If we see something wrong, we have to pull her up and deal with the issues."
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Mr Allen later spoke and suggested that he also thought Ms Westerman had done a good job, until she changed and wouldn’t stop when she was asked to by him and Mrs Eaton, and “then she went crazy on the corporate card”.

Ms Westerman disputed a range of matters that had been raised, offered various explanations of some matters and raised other concerns about the actions of AET, appointment of Mr Coad and his actions. She also suggested that she had spent $30,000.00 of her own money to pay for trainee needs, and that she looked after those kids because it was in her blood and because she cared about the company and the Njamal people.

The discussion concluded with a suggestion that issues such as this should have been brought to the attention of the community, there should be more feedback, and that there was too much “blame game” going here. The Inquiry’s consideration of the position of Ms Westerman and Njamal Mining Pty Ltd during this period is discussed above at page 88 and following of this Report.

On that same day, 29 February, several emails were exchanged between Perpetual and Hopgood Ganim, with Perpetual making it clear that it would not be involved in community disputes, expressing concern about a meeting having been called otherwise than by AET the previous Friday (26 February) and making it clear that Perpetual was awaiting a clear indication that the community had resolved the matter. It was clearly not prepared to descend into the fray. Rather, Perpetual requested that the deed first be signed by AET to indicate that AET was satisfied their removal was in accordance with the Trust Deed. Hopgood Gamin responded that AET had noted that there was no evidence that Perpetual had accepted the trusteeship and requested that Perpetual confirm to AET that it had accepted the role of Trustee.

Perpetual replied saying that it had been informed that AET was seeking legal advice on the validity of the resolutions and that AET did not yet accept it had been validly removed. Perpetual pointed out that it agreed that AET was obliged to act as Trustee until a new Trustee was validly appointed and that Perpetual had been put in a difficult position. Perpetual did confirm that, subject to confirmation that it had been validly appointed in accordance with the terms of the Trust deed, it was willing to accept the appointment as Trustee of the Trust.

Later that same day, Kings Park Corporate Lawyers advised AET’s lawyers that they had been instructed that Perpetual would, subject to confirmation that it had been validly appointed in accordance with the terms of the Trust Deed, accept the appointment.

Mr Carter suggests that around March 2016 he met with Perpetual to discuss their interest in taking on the role as Trustee for the Njamal People’s Trust and offered to assist the transition by providing business advice where prudent or required by them. He suggested that shortly after the meeting, Penny (apparently an intended reference to Pamela Kaye) contacted him and confided many previously unknown problems and issues she and others had experienced.
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with adverse experiences with Ms Westerman and she did so as a caution to him. He says that the day before the transition was proposed, ‘Penny’ again contacted him and formally advised him that Perpetual was no longer interested in the job” and cited the reasons for this as including:

- As a rule, the trustees work together and do not attempt to directly compete against each other, as this could create a situation where the competitiveness might affect the margins being charged for such work; and
- Perpetual had no desire to work with Ms Westerman as they had previous knowledge and experience with her, and their due diligence with others had found and discovered her history “with a number of organizations each of whom had experienced similar problems and issues with Ms Westerman”.

Ms Kaye broadly denied those suggestions of Mr Carter and maintains that the position of Perpetual was not based on any suggested lack of desire to work with Ms Westerman but rather was as reflected in her emails of 29 February 2016 referred to above. The Inquiry accepts that Perpetual was willing to take on board the position as Trustee, but first required that AET be satisfied that they had been properly removed.

It was shortly after this that the first reference is made in documents provided to the Inquiry about the potential appointment of a company associated with Mr Carter as Trustee.

The circumstances in which this occurred are not agreed between Ms Westerman and Mr Carter. Mr Carter suggests that he relayed the decision and advice from Perpetual to Ms Westerman and she "became very aggressive and basically exploded into emotional tirades and demonstrated a demeanour that I had not directly observed from her before”. He suggests that he considered the matter had run its course but that, in the following week, Ms Westerman approached him with a copy of the Trust’s Trust Deed and copies of the pricing structure and invoices for services under the agreement with AET and with their predecessor Abbott. He suggested that Ms Westerman advised the situation with the Trust was dire, and AET were going to sue the Trust, and terminate their role as Trustee and leave the Trust without a Trustee. Mr Carter suggests that the commercial proposal was made by Ms Westerman that if these prices and services could be matched, then there was an opportunity for a Trustee role now on the table, and a decision was urgent given AET’s actions and decision. Ms Westerman’s recollection is that the TAC (or at least those members or proxies whom were regarded by Ms Westerman as comprising the TAC) decided not to progress with Perpetual and that Mr Carter was the one to suggest that he and Ms Westerman set up a company to be owned by the community and that ISPL had been incorporated as a short term measure, with the understanding that control would be handed over to Njamal entities when they had been set up. The latter part of the assertion is consistent with the limited basis on which ISPL was subsequently sought to be formally appointed and other steps taken with the involvement or knowledge of variously ISPL, Mr Carter and/or Mr Green as elaborated below.
Mr Carter suggests in his statement that he was a reluctant participant. Whether or not that was the case to begin with, it is clear that once Mr Carter agreed through ISPL to potentially take on the role, he actively and vigorously applied himself to achieving that outcome.

In any event, it is clear that the decision to change course from seeking to appoint Perpetual and for a company associated with Mr Carter to be appointed Trustee on a transitional short term basis came about over a fairly short period of time. On 3 March 2016 Mr Carter emailed Kings Park Corporate Lawyers advising that:

> It does appear we will need to move very quickly on our resolutions. It is apparent that Perpetual is not interested and very much backing AET. The new resolutions

1. The removal of AET and the appointment of Indigenous Enterprizes (sic) (Richie has all the details) We need to point out that it was a 3 person Trustee, with a Njamal representative as the EO

2. Approval of establishment of Njamal Nation Ltd as the NFP, representing the group (Sharon to clarify) and holding shares in Njamal Mining

3. Removal of Simon Coad as Director of Njamal Mining, with replacement to be determined by the TAC

4. Approval of honorarium for each family representative on the TAC. Amount to be 10,000 with duties to be determined by the group

Maybe Sharon and Richie can help.

I need this signed over the weekend and then into the Supreme Court next week

Rod

Meanwhile, communications continued between the lawyers in relation to attempts to resolve the impasse about AET’s removal as Trustee. A plan was enacted to, in the meantime, secure further TAC endorsement so as to achieve the removal of AET and, it would seem, its replacement by ISPL, which had only recently been incorporated.

According to the dates appearing adjacent to their signatures, it appears that the resolution to appoint ISPL was signed by Sharon McGann (Westerman) and Gavin Mitchell on 5 March 2016, with other signatories signing during the following week.

A meeting was held at Port Hedland on 14 March, purportedly a TAC meeting, apparently also attended by Mr Carter and Ms Westerman, at which a range of matters were discussed. It is not clear whether this meeting was called pursuant to the terms of the Trust Deed and attendance is not recorded in the minutes provided to the Inquiry so the Inquiry is unable to determine with any certainty who attended the meeting. It is clear however that funding for attendance of various persons was provided via Esplanade Holdings Pty Ltd.

A range of matters are recorded as having been discussed at the meeting, including the establishment of a new Trust structure, involving the setting up of Njamal Nation and a Njamal Trust Foundation, with Njamal Trust Fund maintaining all financial distributions to members and Njamal Nation maintaining the Native Title trust, services and programs to members, the removal of YMAC and under the heading "Issues with AET (Trustee)":
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When the injunction has been served and all finances and information passed over to Njamal, Indigenous Services (Rod Carter & Damien Maloney) to examine and advise on the legal recuperation of misuse and misconduct of finances and providing information to Njamal.

By letter dated 16 March 2016 Mr Carter, then the sole director of ISPL, wrote to Mr Morgan, the manager at AET with conduct of the Trust, stating:

Following from the recent Trusts resolution, I confirm that we accept the role of Trustee and now seek to work with you for an orderly handover.

I would like to have a meeting within the fortnight to arrange for the handover of Trust items in your possession, custody and control.

Can your relevant team member please contact me on [redacted] to arrange a mutually suitable date, time and location?

The assertion was apparently unsupported by any documentation evidencing such a resolution and, it seems, news to Mr Morgan who replied to Mr Carter's letter by email dated 21 March 2016 asking for a copy of the resolution to which Mr Carter referred so that AET could investigate whether ISPL had been validly appointed as Trustee. Mr Morgan went on to say that he saw little merit in meeting with Mr Carter unless and until AET could substantiate the basis of ISPL's claim to be Trustee.

On that same date however, Hopgood Ganim, the lawyers for the plaintiffs in the Supreme Court proceedings, wrote to AET's lawyers referring to various matters and also enclosing two further purported resolutions of TAC in respect of which it asserted:

- the first being a written resolution of the TAC signed by a special majority on or before 14 March 2016 which confirms the continuing appointment of Sharon Westerman as a TAC member for the Allen/Ball family group; and
- the second being a written resolution of the TAC signed by a special majority on or before 14 March 2016 which resolves:
  1. to confirm the termination of AET with immediate effect; and
  2. to appoint Indigenous Services Pty Ltd as trustee of the Njamal People's Trust.

At the same time concerns were being expressed to AET by Mr Allen and Mr Ken Fraser including concerns that attempts to move forward for harmony and unity, with the new TAC with a view to requesting a TAC meeting with AET, were being frustrated by the interference of Ms Westerman. Reference was made to unofficial TAC meetings on 26 February and 14 March 2016 and concerns that it had been alleged that Ms Westerman paid sitting fees as if she were representing Njamal, the Trustee and the TAC. Queries were also raised as to the source of her funds to pay the sitting fees, how she represented herself and what documents she had signed on the basis that she was representing Njamal.

A purportedly 'without prejudice' letter was also sent to the solicitors acting for the Applicants, with the names of 7 TAC members typed at the bottom of the letter. On 22 March Mr McKie circulated an email noting that he had not agreed, and had not signed any document received that day by AET (apparently referring to the above letter) and did not condone anyone using his name on documents without his prior consent and signature to validate that consent. Mr
Barry Taylor responded raising concerns about various TAC members recently holding invalid meetings and issues in relation to the management of Njamal Mining Pty Ltd.

Mr Morgan's email received a response from Mr Carter by email dated 30 March 2016, on a purportedly "without prejudice" basis:

Dear Andrew

“without prejudice”

Thankyou for your “recent” response in relation to the appointment of Indigenous Services as the rightful Trustee of the Njamal People.

Given the response I have recently received relating to Indigenous services, I want to put you on clear notice

1. You have never met or discussed any aspect of the Trustee Company with any Board members of the Trust. In fact, I note “we see little merit in meeting” Your comments are simply misguided and totally incorrect and we reserve our rights in relation to these comments

2. As the newly appointed Trustee, AET are now formally advised, that they are no longer authorized to incur any costs on behalf on the Njamal People, without prior approval of the appointed Trustee.

3. All issue with AET and this supposed dispute are now being referred to the Attorney General and Minister of Aboriginal Affairs with the intention of establishing a Parliamentary inquiry into the operation of AET.

4. As an independent observer, I cannot believe this dispute has been allowed to continue. Surely it is painfully obvious to AET that your supposed services are nothing more than self serving and clearly not wanted by the majority of the community.

I am available to “meet” at a time suitable

Rod Carter

Mr Carter forwarded a copy of the email to Ms Westerman with the comment:

I want this guy to feel some pressure

Next we get rid of the lawyers

A community meeting was also held on 18 March 2016 at the South Hedland Bowling Club at which it appears that a range of matters were discussed including in relation to the establishment of Njamal Nation, that Mr Carter was looking into acquiring a building near Redbank for office set up, acquiring files from YMAC, housing, employment and training programs and restructuring Njamal Mining Pty Ltd, with a new CEO and employment of Njamal people, skilled or through apprenticeships.

On 18 March 2016 Mr Wayne McKie provided Ms Westerman and Mr Carter with a resume and expressed interest in a position with Njamal and that he wanted to be able to commit to their native title group.

On 21 March 2016 Mr Richard Green provided to Hopgood Ganim, Ms Westerman and Mr Carter, a copy of two letters. The first comprised a letter dated 16 March 2016 signed by Mr Carter as director of ISPL to the Trust c/- Mr Molony of Kings Park Corporate Lawyers in which he confirmed that following the Trust's resolution he confirmed that ISPL accepted the role of Trustee and looked forward to working with Mr Molony and the Trust to benefit the
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Njamal People. The second consisted of a letter of the same date to AET referencing the recent Trust's resolution and confirming that ISPL accepted the role of Trustee and sought to work with AET for an orderly handover. By email dated 21 March 2016 Ms Westerman in turn advised Mr Green, copied to others including Mr Carter, that a draft engagement letter for ISPL was needed for the committee to look at the following day. It remains unclear to the Inquiry whether such a letter was ever prepared and forwarded to Ms Westerman. She has no recollection of this occurring. A draft letter was sent to Ms Westerman on 28 April 2016, as discussed below.

It appears that an issue arose as to the appropriateness of the plaintiffs' fees of the legal proceedings being paid from the Trust Fund. Mr Carter and Ms Westerman discussed this and Mr Carter apparently confirmed that ISPL would pay those funds from the Trust Fund as new Trustee. It was therefore decided that a consent order with no order as to costs would be satisfactory and leave open the ability, if warranted, to pursue AET for wrongful payment of its fees from trust funds in defending the proceedings.

On 22 March 2016 Mr Wayne McKie raised a concern that a document received by AET with a list of names underneath it had not been agreed to or at the very least sighted by him. A copy was forwarded to Mr Carter by Ms Westerman who responded "Let's just bury these pricks".

On the same day a workshop was held, purportedly of the TAC, at which various matters were apparently discussed including TAC rules, what Njamal stands for, expectations of what would happen over the next 3 months, conduct of meetings and values including leadership, confidence, pride, determination, community unity to bring back values and drive, positive solutions, mindset and culture of people and information given to families – accountability.

AET, in the Inquiry's view understandably, through its lawyers, wrote to the lawyers for the plaintiffs setting out a range of reasons why they did not accept that a valid resolution had been made and pointed out their concerns about the various factions that appeared to exist and that their duties was to the beneficiaries as a whole and that they were still Trustee until removed in accordance with the Trust Deed.

Mr Carter then became directly active in seeking to achieve AET acceptance that ISPL was the rightful and appointed Trustee. He forwarded email communications to Jackson McDonald in which he on a purportedly 'without prejudice' basis demanded that AET not expend any further Trust funds, including legal costs, observed that a meeting involving Mr Morgan was taped and indicating that it would be his intention to make the tape available to the Federal police, for potential investigation by ASIC and other agencies. He indicated that if AET did not retire as he previously alleged Mr Morgan had promised ISPL would use all possible legal and political avenues to resolve the matter without further costs to the Njamal People.

Jackson McDonald, in the Inquiry's view understandably, rejected Mr Carter's position and in subsequent correspondence raised concerns as to whether the alleged recording of the
conversation was unlawful and foreshadowed injunctive relief being sought to restrain any unlawful communication of the recording. It again reiterated to Hopgood Gamin that AET had always maintained that should a TAC meeting result in a valid resolution replacing AET as Trustee it would willingly stand aside and assist in a proper and orderly handover of the Trust. Ms Westerman was equally involved. Mr Morgan communicated that AET sought to be discharged from its role and was in the process of convening a meeting to take place on 19 April.

Mr Taylor remained very concerned about what was occurring, Mr Carter's and Westerman's actions and the need for transparency for what was happening within Njamal. He expressed concerns including about secrecy surrounding meetings to have AET removed and Mr Carter elected, alleging that Mr Carter had been travelling with Ms Westerman throughout the north-west, with Ms Westerman canvassing support for the appointment of Mr Carter. He was also concerned as to whether Mr Carter was paid by Mr Carter for this to occur and referenced allegations that Mr Carter had been financing invalid meetings by paying TAC members and other Njamal community members cash in hand. This issue is considered further below.

It is also relevant to note that at about this time Mr Allen swore a statutory declaration regarding a meeting he had with Mr Carter and a consultant, Mr Fraser expressing serious concerns in relation to various matters including during a meeting on or about 4 April with Mr Carter. These allegations are considered later in the Report in Chapter 5 in relation to Mr Carter.

In respect of the proposed new structure in relation to the Trust and Njamal affairs:

- On 15 April 2016 Njamal Mining Services Pty Ltd was registered, with the assistance of Mr Richard Green, and to the knowledge of Mr Carter. According to ASIC records its directors were Ms Westerman, Travis McPhee, Terry Wilson and Troy Eaton, each of whom beneficially held 1 of the 4 issued shares in the company. On about 27 October 2016 the shares were transferred to Njamal Limited.

- On 20 April 2016 Njamal Nation Pty Ltd was registered. Ms Westerman and 8 other Njamal people, most of whom were TAC members, were appointed directors. According to ASIC records each was the beneficial holder of one share, except in the case of Ms Westerman who was the beneficial holder of two shares.

- On 21 April logo designs were forwarded to Ms Westerman, Gavin Mitchell, Troy Eaton and Terry Wilson for review, as Mr Carter and Mr Green were aware.

- On 2 May 2016 Njamal Foundation Ltd was registered as an unlisted public company limited by shares and bound by constitution. Its founding directors
were Ms Westerman, as well as 8 other Njamal people who were also then
directors of Njamal Nation Pty Ltd. It had 10 issued shares, although it is not
clear from ASIC documentation whether, as for Njamal Nation Pty Ltd, they
were also held by the directors.

As considered further below, by the latter part of 2016 relations between Ms Westerman,
ISPL and certain other TAC members had largely collapsed and a range of changes occurred
in relation to this corporate structure.

During April 2016, further work progressed in relation to moving ahead under a new trustee. A
TAC workshop meeting was convened on 6 April 2016 at which a wide range of matters were
canvased including setting up a temporary office, incorporation of Njamal Nation, applying
for grants, setting up a heritage company, planning and incorporating Njamal Nation, setting
up a company to negotiate contracts, organising a community meeting to endorse the
structure proposed and YMAC issues. It was also recorded that Ms Westerman was to
coordinate all of the above and be remunerated for time/expenses etc, Wayne (McKie) to
assist and be remunerated and everyone to assist, where required. Based on the payment of
sitting fees that occurred it would appear that 8 TAC members attended the meeting as well
as Ms Westerman, notably no Taylor or Coppin family representatives were present.

On 6 April Mr Carter set out his thoughts for the group and the role of ISPL:

This is my first pass of the Constitution for Njamal Nation. My thoughts for the group and the
role of ISE

1. First 30 days
   (a) Establish working parties looking at areas of need expressed by the community
   (b) Resolve all outstanding legal issues
   (c) Establish a workable website that can be accessed by all Njamal Members, with
        Emails
   (d) Establish confirmed telephone communications by providing Board Members with
        Mobile Phones for the purpose of Njamal business
   (e) Develop NN brand in marketplace
   (f) Evaluate potential property purchase as NN Offices and Headquarters

2. First 3 months
   (a) Establish a workable 5 year business plan
   (b) Meet with all relevant Mining Companies and review all contracts and Royalty
       agreements
   (c) Establish a jobs network via Royalty agreements
   (d) Create housing joint venture with Housing WA

What we want to see is these initiative being driven by the community and owned by the
Njamal People

On 15 April 2016 Mr Green caused Njamal Mining Services Pty Ltd to be incorporated, in
apparent consultation with Mr Carter and Ms Westerman.
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In the meantime, work was continuing in relation to setting up the proposed structure of Njamal organisations.

On 22 April 2016 Mr Carter emailed Ms Westerman indicating that he was under the impression that she was giving his personal assistant, Ms Jing Guo, a budget and requesting that she start providing a reconciliation for funds advanced and an explanation for the spend on the rest of the funds. He concluded "If we are going to keep this on the path we are heading, I will need to be able to recover all funds spent on behalf of Njamal". The following email exchange then occurred:

HI Rod

I have all receipts and everything can be reconciled easily — when I have the time. I'm just trying to get a lot of things done at the moment so haven't got to compiling all the financials yet, but it's all there

I sat down with Jing and made a list of everything that we needed for the office, and for the coming meetings. Difficult to determine what actual costs for the office were until I got back up here to source furniture etc

As discussed with you, I am also trying to get $40 k from the trust to cover the office set up and the community meeting. The sooner we have Njamal Nation set up, the sooner we might be able to access funds from other sources.

Can we approach mining companies? If you want I can get a resolution from the TAC re reimbursement, T\then (sic) I can do this too

Cheers Sharon

...

Hi Sharon,

Yes it is obvious AET are not going to help. I think the office is certainly a milestone, so it should be the priority for sure

As well, can you make sure Gavin gets some funds to keep him in line Coad avoided me yesterday. I think you are right, Troy is the guy for Karratha

Cheers

rod

On 26 April 2016 Mr Carter initially indicated to Mr Green and Ms Westerman that the configuration of companies should be: ISPL as Trustee of the Trust (a company with shares) and would basically be the group that provides governance and business network; and Njamal Nation Foundation Ltd (a company limited by Constitution with no shares as its distribution of funds is on a not for profit basis) "it runs the show and will have PBI, ITEC and exemptions on payroll, stamp duty".

Ms Westerman was concerned that the structure be clear to members of the community and that the Trustee/non Njamal entity was not a shareholder of a Njamal entity. Mr Carter replied that Njamal Nation would be the owner of all enterprises, that is the point, and that this means that you control everything and get the benefits of all the privileges of a charity:

The Trustee has no ownership in NN, it is owned by yourselves and guided by your constitution. For example Njamal mining will be owned by NN, not the Trustee
CHAPTER 3: APPOINTMENT AND REMOVAL OF TRUSTEES

This is relevant because, following the appointment of ISPL, the above structure was ultimately not in fact implemented and Ms Westerman and others in the Njamal community were left with an undoubted and, in Ms Westerman's case, enduring, sense of betrayal.

In addition to the exchange of correspondence and meetings held in March 2016 as described above, it appears that communications continued between, at least, Mr Carter, Ms Westerman and Mr Green directed towards the terms of proposed engagement of ISPL. On 28 April 2016 Mr Green emailed to Ms Westerman a draft letter addressed to ISPL noting he was still awaiting Mr Carter's feedback, and asking if this was what she was expecting. The terms of ISPL's engagement are returned to later in Chapter 7 of the Report.

By this stage Mr Parker was involved and attention was being given to preparation of a presentation for trust officers about ISPL and its proposed focus and role. Mr Carter had endeavoured to identify a range of experts in various fields who might be able to come on board and assist the Njamal People through the Trustee to achieve their goals. They included potentially Troy Millen (Construction), Mr Parker (accounting), Wesley Aird (Indigenous) and Jack Cullity (Mining). All except Mr Millen became directors of ISPL (although all have since resigned, as discussed later in the Report).

Work was also apparently done on developing other materials, including a draft distribution policy as at May 2016 which recorded (apparently in anticipation of this occurring) that the Trustee had agreed to delegate the approval and payment of some distributions to Njamal Nation Pty Ltd, subject to Njamal Nation complying with the Distribution Policy. It identified Ms Westerman as the then Njamal Nation Program Co-ordinator.

It appears that a further community meeting was convened, not by AET however, on 2 May 2016 at which various matters were discussed including obtaining resolutions (from those present, although it is unclear what process was followed to notify and arrange for attendance of community members) endorsing:

- ISPL to take on the role of Trustee
- Terry Wilson and Sharon Westerman to represent their respective families on the TAC
- Njamal Nation Ltd to represent the Njamal people as its governing body in regards to mining agreement negotiations, social programs, business and community corporate structures and the shareholding of Njamal companies including Njamal Mining, Njamal mining Services and Njamal Heritage and Land Management
- Njamal Mining Services Pty Ltd to represent the Njamal community in business and contract negotiations arising from all present and future Njamal mining agreements
- And endorsing Troy Eaton, Terry Wilson, Travis McPhee and Sharon Westerman as directors
- Njamal Heritage and Land Management Pty Ltd to represent the Njamal community in all heritage and land management matters arising from mining agreements and native title negotiations
- Terminate the services of YMAC as the legal representatives for the Njamal People for both Future Acts negotiations and the Njamal Native Title Claim.

The eventual structure adopted under ISPL was substantially different.
CHAPTER 3: APPOINTMENT AND REMOVAL OF TRUSTEES

Following other resolutions at a community meeting held on 1 and 2 May 2016 an application was also authorised to make changes to the list of named applicants in native title proceeding WAD 6028 of 1998; to remove one of the named applicants with his consent and remove the names of certain listed members of the applicant group who were deceased.

**Indigenous Services Pty Ltd**

*Initial appointment: 6 & 12 May 2016*

In fact it appears that ISPL was not officially appointed Trustee until after a resolution of the TAC on 6 May 2016 and the subsequent retirement of AET and acceptance of appointment by ISPL by deed dated 12 May 2016.

At the meeting of the TAC of 6 May 2016 it passed a resolution by ¾ majority to terminate the appointment of AET as Trustee and appoint ISPL until 6 June 2016, the termination taking effect upon ISPL accepting its appointment. The Inquiry understands that the reason for this initial purportedly limited appointment was to assume temporary management and control of the Trust assets from AET and, amongst other things, to permit ISPL time to carry out a forensic audit of the finances of the Trust (as had previously been resolved should occur at a community meeting on 29 February 2016) and to advise the TAC of its financial health. A TAC member, Barry Taylor, expressed concerns that there needed to be a proper process of advertising for a new trustee and that the members of the TAC had been "bribed" into making decisions about removal of the Trustee. Mr Eaton, another TAC member is recorded as saying that the TAC had been attending workshops to develop a plan for Njamal going forward and this was not "bribery". Barry Taylor and two other TAC members, Graham Coppin and Tony Taylor, abstained from voting. For reasons which become apparent below, the Inquiry notes that Travis McPhee chaired the meeting on 6 May 2016.

After the above resolution had been made, according to the minutes, Mr Carter then entered the meeting and the abstaining TAC members left the meeting, which continued in their absence. Matters were discussed including amendment and execution of a deed of retirement of AET, provision of emergency funding to Njamal people who may be in hardship in the transition phase and other actions required to ensure a smooth transition. A member of the TAC expressed concern that this resolution, limited as it was to an appointment of thirty days, would limit what ISPL and the TAC could achieve including in relation to a range of planned activities including conduct of the forensic audit requested by the Njamal community, development of new policies, documents and processes, resolving issues about certain TAC family representatives, setting up office and administration in South Hedland, establishing plans, and budget for Njamal Nation and various other activities. This concern was generally accepted and, accordingly, the TAC considered and agreed to various additional resolutions, to be written up by ISPL and Ms Westerman as circular resolutions. The recorded minutes of that part of the TAC meeting after AET departed, record that:

> It was agreed that some further resolutions would need to be made to ensure that
a) there was minimal disruption to Trust Services;
b) The members of the TAC were fully involved and properly remunerated for their time;
c) A clear plan could be developed for the Trust and for Njamal's future structure.

The resolutions proposed:
- Indigenous Services would be appointed for more than 30 days
- The TAC members who were actively involved in the Trust administration and meetings, would be remunerated $10,000. They would sign an agreement outlining their roles
- Indigenous Services would be repaid all funds loaned to the Njamal people
- The Njamal office would be set up with staff and resources to assist in the administration of the Trust
- Njamal Nation would be properly established with staff and resources
- Njamal Mining is to be returned to the Njamal people and an investigation undertaken by Indigenous Services

Shortly after this, steps had actively commenced on behalf of Esplanade Holdings Pty Ltd to recover funds expended prior to ISPL's appointment taking effect.

Circular resolutions were also subsequently prepared and by circular resolution dated 12 May 2016 the TAC resolved, among other things, to appoint ISPL as Trustee of the Trust for a period of 12 months. It is not entirely clear when the resolution was signed by the different TAC members. The Inquiry has been provided with a copy with the first four signatures, as well as a copy which then had signatures of 8 TAC members and the final version with eleven signatures. Its effectiveness in relation to the term of appointment of ISPL is considered later in the Report.

The full resolutions passed were as follows:

1. The Trustee Advisory Committee members hereby authorise Indigenous Services Pty. Ltd to seek reimbursement for all validated expenses incurred with establishment costs up to the 15th May 2016. Receipts and invoices will be required to justify payment.
2. The Trust Advisory Committee hereby authorise Indigenous Services Pty. Ltd to provide all necessary resources for the establishment of the Njamal Office in South Hedland and the supply of telecommunications such as mobile phones, Ipad's (sic) and Laptops for TAC members to actively participate and communicate effectively.
3. The Trust Advisory Committee hereby authorise Indigenous Services Pty. Ltd to pay $10,000 to each active member of the TAC for their involvement and participation moving forward per annum. This payment to be paid on receiving Trust Funds, with confirmation of all TAC members.
4. The Trust Advisory Committee officially appoints Indigenous Services Pty Ltd as Trustee for Indigenous Services Trust to become the Trustee for the Njamal Peoples Trust for a period of 12 months.
5. The Trust Advisory Committee authorises Indigenous Services to take control of all Njamal Mining assets and report the State of Affairs to the TAC within 14 days.
6. The Trust Advisory Committee authorises Indigenous Services to commence employment of strategic staff in areas of Mining, Community Development and book keeping.

It is of note that the final circular resolution made no reference to Njamal Nation being properly established with staff and resources, although resolution 6 related to ISPL commencing employment of strategic staff in a range of areas. Also, while the minutes
CHAPTER 3: APPOINTMENT AND REMOVAL OF TRUSTEES

referenced ISPL being repaid all funds loaned to Njamal people, the actual resolution was more explicit, endorsing ISPL seeking reimbursement for all validated expenses incurred with establishment costs up to the 15 May 2016. Receipts and invoices will be required to justify payment.

A Deed of Retirement and Appointment was executed by AET and ISPL (then under the name Esplanade Australia Pty Ltd, which was changed back to ISPL the following day) to give effect to the retirement of AET and commencement of ISPL as Trustee of the Trust. It is not entirely clear on what date it was executed, some documents suggesting this occurred on 10 May although the front of the document was dated 12 May 2016.

In addition to the circular resolution, at a relatively late stage of the Inquiry, the Inquiry was supplied by Mr Carter, via his solicitor, with what appears on the face of it, to be a final, signed version, of the draft terms of engagement letter dated 28 April 2016 referred to above. As discussed below, this arrangement was eventually superseded by a further letter agreement dated 25 November 2016 following, it seems, a further proposed extension of the period of ISPL's term at the TAC meeting on 26 October 2016. The circumstances of the signing of the letters and their legal effectiveness, has been the subject of some debate, and is further considered below.

As foreshadowed earlier in the Report, the appointment of a Trustee for a fixed term is not something that is contemplated by the Trust Deed. Once appointed under the Trust Deed (which ISPL was by TAC resolution and formal acceptance of appointment by Deed, both dated 12 May 2016), a Trustee continues to hold that position unless its appointment is terminated in accordance with clause s 5.4 and 5.5 of the Trust Deed. This was raised with ISPL who through a letter from its solicitor dated 1 August 2018 agreed. ISPL's lawyer also commented that:

> It is unclear to me what the parties intended as it could simply refer to a term which was for fixed duration in the sense that it operated akin to a “sunset clause”. That for example would not preclude a trustee appointed in that manner from being removed earlier under the terms of the deed of trust.

ISPL's solicitor went on to say that the matter will be addressed as part of the review being undertaken by his firm on behalf of ISPL "given the procedure we consider the best to be adopted for the appointment and removal of Trustees will be analogous to the appointment and removal of directors of corporations".
Recommendation 3 (Chapter 3)

ISPL and the TAC review existing arrangements in relation to its appointment and the relevant terms of the Trust Deed. If it is considered desirable that the Trustee should be required to retire after a fixed term (unless extended by agreement with the TAC), or that the requirements for the appointment, removal or cessation of a Trustee’s role should be altered, consideration be given to whether and, if so, what amendments to the Trust Deed may be appropriate to make.
CHAPTER 4: ISPL’s TRUSTEESHIP

The First 6 Months – May to November 2016

To put in context the dramatic parting of ways that occurred later in the year between Mr Carter, ISPL and many TAC members, and Ms Westerman and certain of her supporters, it is useful to consider in some detail the events that unfolded in the first six months or so of ISPL’s Trusteehip of the Trust.

ISPL Board meeting – 12/13 May 2016

On 12 or 13 May 2016, ISPL convened a Board meeting at which a range of matters were discussed and agreed to. It is unclear what day the meeting was held given that documents provided to the Inquiry by ISPL purporting to be minutes of various directors’ meetings were in many instances recorded with the word draft and/or with handwritten amendments. While it was provided with draft minutes dated 12 May, it was also provided with minutes dated 13 May 2016. Neither were signed as required under the Corporations Act, nor were almost all minutes of directors’ meetings provided to the Inquiry.

This highlights one of the areas of concern identified by the Inquiry that was a feature of its engagements with ISPL – frequently documentation provided was not in a final form and, on further inquiry, was not necessarily the correct version of a document current at the time period the subject of the request for information and documentation. This lack of adequate documentation, particularly in relation to Trust and organisational governance is considered further in Chapter 8 of the Report.

These included the key roles of directors and how they would be engaged. The agreed key roles were:

- Rod Carter – day to day management, with delegation to expend monies in accordance with the Trust Deed
- Greg Parker – financial oversight, focus on tax opportunities and to resolve the issues with Njamal Mining PL
- Wesley Aird – Determination, Future Acts, Heritage and surveys
- Jack Cullity – Mining Agreement negotiations and compliance (in particular business and employment opportunities), joint venture agreements, general contractual negotiations and issues.

According to the minutes it was agreed that Mr Carter would be contracted through a tabled Service Agreement with Esplanade Holdings Pty Ltd, the others would invoice through their business entities and administrative and management staff referred to in the contract between ISPL and the Trust would be employed and recouped by Esplanade.

It was also agreed that in addition to being delegated for the operations of the organisation (including staff and operating expenditure) Mr Carter was to also be responsible for the administration of the Distribution Policy and that where a member’s request was outside that policy, but fitted the Trust Objectives, Mr Carter had delegated authority to approve. It was
also agreed that the other directors would have delegation to expend Trust funds in their respective areas.

It was agreed to establish and resource a Hedland office, with the aim of accepting membership applications, distribution applications and to start implementing strategies in the 6 key areas identified by the Njamal People. It was also agreed that a Perth office needed to be formed to accommodate the accounts team and those assisting in implementing the strategies.

Finally, it was noted that the Applicants and TAC desired to move the Native Title Claims away from YMAC, and that Wesley Aird was to develop a strategy for discussion.

The Service Agreement referred to above was executed later on 13 May 2016 by Mr Carter on behalf of ISPL and Mr Ryan Carter on behalf of Esplanade Holdings Pty Ltd, with Mr Carter being the person who, for all intents and purposes, was the person by whom those services were principally delivered. It provided in the recitals that ISPL wished to develop a business in providing Trustee Services, business development and administrative support services, for indigenous organisations, that Esplanade had this expertise and was willing to provide that service and that ISPL had agreed to engage Esplanade as Consultant to provide services to it and its Associates on the terms and conditions set out in the Agreement. Under the Agreement Esplanade agreed to provide the Specific Services for a base monthly fee of $20,000 per month plus GST and that ISPL may also request specific advice or assign projects for Esplanade that may be outside the Specific Services to be paid at an agreed hourly rate of $250/hour plus GST. It also made provision for reimbursement of Esplanade's reasonably incurred expenditure in the course of performing its duties (including out of pocket expenses) and including the services of its Project Management Team, including clerical support at $75 per hour. A term of 4 years was agreed to or until such time as the term was agreed to be extended or terminated under the Termination Clause. ISPL was not required to provide facilities for Esplanade, but Esplanade was permitted to provide them as a reimbursable expense and authority was conferred on Esplanade to engage other service providers for the provision of the Specific Services on behalf of the Principal which would invoice ISPL on the basis of reasonable costs, with clerical services being charged at $75/hour plus GST. "Specific Services" was defined as:

"Specific Services" are developing a Trustee business model, working with potential Trust clients, providing strategic advice on the role of a Trustee, attending Board meetings, working with client Trusts to agree on objectives and strategies, providing contracting and employment advice on the role of a Trustee, attending Board meetings, working with client Trusts to agree on objectives and strategies, providing contracting and employment advice, assisting in implementing the strategies, proving administrative and management support, preparing reports, agendas and minutes, developing policies and procedures and creating alternative income streams.

On its face this extended beyond the services which the Trust agreed to provide as Trustee of the Trust, extending to other services in connection with developing a Trustee business model generally.
CHAPTER 4: ISPL's TRUSTEESHIP

**TAC meeting 23 May 2016**

On 23 May 2016 a further TAC meeting was held and chaired by Mr Carter. He indicated (as he had already advised Ms Westerman on 16 May and Mr Taylor on 17 May) that the Trustee accepted Ms Westerman and Terry Wilson as the elected representatives of their individual families, an issue which was still in contention, as discussed later in the Report.

Consideration was given to a range of issues connected with future organisational structures. They appeared to be related to structures which Ms Westerman and the community had previously endorsed being introduced. For example, the draft constitution of Njamal Nation Pty Ltd and a planned model for participation by Njamal people was discussed. It was also noted that it had previously been resolved that the initial Board members of Njamal Mining Services Pty Ltd were to be Troy Eaton, Ms Westerman, Travis McPhee and Terry Wilson. Consideration was given to proposed roles of Managing Director, Program Coordinator, an executive officer position in the interim, a corporate liaison officer in relation to Njamal Mining Services, with a temporary consultancy to be established between Gavin Mitchell and Troy Eaton. A draft budget and Njamal Nation Action Plan were tabled and discussed as well as further developing the budget with a version to be presented at a later date. Issues about timing and responses to payments and a range of other matters requiring further resolution were discussed connected with the distribution policy and exploring the option of greater control and reduced costs impact for Njamal Nation by utilising the background, skills and experience of the firms of the directors of ISPL rather than YMAC.

**YMAC community meeting 24 May 2016**

The following day a community meeting was held at which it was resolved to terminate YMAC’s services.

**Board meeting 25 May 2016**

The following day a directors’ meeting of ISPL was held at which Mr Carter reported back about the TAC meeting on 23 May 2016 and certain issues which required consideration by the Board.

The issue of employment of staff was raised and Mr Carter indicated that he had spoken to a recruiter in relation to filling positions relating to social, housing and infrastructure and secondly mining representative. He indicated that Ms Westerman could be a candidate for the first position.

It was resolved that Jack Cullity and Wesley Aird advise the Board as to what the mining representative role should entail.

It was also resolved that Mr Carter and Mr Parker would meet with the Minister for Housing to discuss a possible opportunity to acquire houses from the Government followed by their potential rental, renovation and acquisition by Njamal families.
CHAPTER 4: ISPL's TRUSTEESHIP

Mr Carter provided an update in relation to Njamal Mining Pty Ltd including its joint venture with ICW (Clinton Wolf) and that Simon Coad had prepared a report. It was resolved that Mr Carter request a copy of the report to distribute to Board members and Mr Parker would investigate if its activities could be performed by a public benevolent institution.

A range of other issues were discussed including past situations where consultants had been engaged by other parties allegedly without the consent of the Trustee and referenced a subcommittee of TAC considering the appointment of an economic adviser. It was resolved to investigate the Board's options in that regard.

It was also indicated that Mr Carter was to "circulate a copy of Indigenous Services Proposal which was subsequently accepted by the TAC."

The termination of the services of YMAC created immediate issues, as Kevin Allen discovered when he was provided notice by YMAC of a list of outstanding tenement applications in the Njamal claim area to which attention was required. As revealed in a series of emails, on 3 June 2016 Jack Cullity in turn recommended the appointment of Casteldine Gregory. Ms Westerman was involved and the next day identified various further matters that needed to be attended to in relation to mining agreements and that she would try to get an update from YMAC and the companies and suggesting that a meeting be arranged as soon as possible between various companies and the Njamal Nation board in mid-June. Gavin Mitchell responded requesting Ms Westerman not to send any emails to or contact the mining companies identified due to concerns that her actions would seriously jeopardise the work he and Jack (Cullity) had done to date and that it was seriously confusing the situation with the mining companies. Mr Mitchell expressed concerns about having his authority undermined and requesting that in future they be referred to him, who would then liaise with Jack Cullity. He raised with Mr Carter the need to meet urgently to discuss roles and responsibilities to avoid confusion that had occurred and have clarity and direction going forward. Ms Westerman disputed those assertions and indicated that she had no intention of contacting companies to arrange meetings until fully discussed with the group. She indicated that she was simply asking them for the latest information as per her right as a Njamal person and member of the working group, TAC member etc etc.

Mr Carter suggested that mid the next week would be a good time to sort out those matters and that his role had always been to create the environment where Njamal People all worked together for the better cause and made reference to the negotiating team just finding its feet, getting some fine tuning going and working together.

In the meantime Ms Westerman and Mr Carter were liaising in relation to who would employ Ms Westerman so that she would have a reporting function. Also, an issue arose due to a restraining order having been issued against Mr Allen in favour of Ms Westerman. Ms Westerman was concerned that a meeting between the TAC and ISPL be held in a different location to the TAC meeting as she was concerned she would not be able to attend the
meeting if Mr Allen attended the applicant meeting. She was also concerned that Mr Allen considered himself a member of TAC and may not leave the premises. Mr Carter indicated an intention to inform Mr Allen to leave the building as he was not a TAC member. By October Mr Carter’s position towards this issue had changed.

TAC meeting 8 June 16

On 8 June 2016 a meeting involving Njamal Applicants, Elders and working group members was convened in the morning, followed by a TAC meeting at which most of those persons remained present.

At the TAC meeting the removal of YMAC and appointing of new legal representatives was discussed, with one TAC member nominating Wayne Bergmann for the role. Mr Bergmann is a former chair of the Kimberley Land Council and lawyer.

The distribution policy was discussed including proposed changes and strengthening of controls and procedures. It was agreed subcommittees of TAC members would be established in relation to different areas for distributions and particular members agreed to sit on various committees. Ms Westerman agreed to sit on 3 of the 8 subcommittees. It was agreed that each member would have responsibilities to review and recommend each application, which would be approved electronically.

In relation to heritage management Mr Mitchell provided an update about working on a heritage and land management system with Terra Rosa.

It was also agreed that Mrs Eaton would be appointed as Chairperson of the Elders with provision of a vehicle and phone and payment of an honorarium. It was also agreed that a fulltime heritage person would be appointed to ensure all contracts with mining groups were controlled and organised for the betterment of the Njamal People. An issue discussed concerned unacceptable behaviour by certain members of the Njamal community in verbally abusing office staff for not being able to process applications immediately. It was further agreed that in the future there would be more emphasis on issuing vouchers rather than cash. The payment of cash by trusts is a significant issue considered separately in Chapter 11 of the Report.

In respect of investment of the Trust Funds, Mr Parker updated the TAC about his review of investment options and it was agreed that the Trustee would report back and form a special committee to work on all financial decisions and inform the group. This is considered further in the context of consultation obligations of the Trustee below.

Three items that were listed on the agenda, but not reflected in the minutes of matters discussed, were a review of Njamal Nation function, review of Njamal Nation office staff remuneration and approval of the contract between ISPL and the Trust.

Njamal Mining Pty Ltd
In the meantime, Mr Parker, a director of Njamal Mining Pty Ltd, was attempting to sort out the 'mess' that had been left. Amongst other things Mr Parker was attending to issues raised by Mr Coad, considering and responding to claims by Ms Westerman that Mr Coad had been negligent and that Njamal Mining Pty Ltd should not have paid certain legal and expert fees that Ms Westerman contended were the responsibility of ICRG (even though the expenses were incurred by Njamal Mining Pty Ltd) and that money was owed by ICRG, consider issues of solvency and potentially reaching a settlement of Ms Westerman's claim relating to her employment and its termination. Ms Westerman also indicated that her next step would be to discuss with people on the ICRG board and go to the media and anyone else who would listen.

Mr Carter was also involved in discussions with Ms Westerman.

He also liaised with a TAC member about certain goods on the asset lists and apparently in his possession which needed to be returned as soon as possible. It is understood from a discussion between the Inquiry and Mr Carter that the TAC member may still have in his possession a trailer and possibly other gardening equipment that he has not returned. If that is the case, consideration ought be given to effecting its return.

**Recommendation 4 (Chapter 4)**

ISPL and/or Njamal Mining Pty Ltd or the entity that owns a trailer and any other equipment that is believed to be in the possession of a TAC member give consideration to requesting and taking steps to effect the return of the equipment.

By 17 June 2016 it appears that Mr Parker and Mr Carter thought the claim had been essentially resolved, Mr Parker emailing Ms Westerman and explaining a proposal to resolve outstanding claims. He indicated however that in addition to entering into a deed of settlement, two further matters would need to be resolved. One was assistance in clarifying the location of various assets of the company and secondly, satisfactory acquittal of the $84,300 advanced to her by Esplanade Holdings Pty Ltd.

It is unclear why Mr Parker was attaching such a condition, although it appears that, as a director of both ISPL and Njamal Mining Pty Ltd, Mr Parker was endeavouring to resolve all outstanding financial issues involving Ms Westerman, including acquittal of funds advanced by Esplanade Holdings Pty Ltd to Ms Westerman, which was considered to be necessary before ISPL as Trustee of the Trust reimbursed Esplanade Holdings Pty Ltd (as discussed in more detail elsewhere in the Report).

Shortly after this, one of Ms Westerman's sons tragically died in a workplace accident.
CHAPTER 4: ISPL's TRUSTEESHIP

On 21 June 2016 Mr Parker initiated contact with legal advisers to prepare a Trust Deed to establish a public benevolent institution of which, at that stage, it was proposed Njamal Nation Pty Ltd would be the trustee.\(^77\) It was then envisaged that the Trust would distribute money to the PBI to assist it to run employment programs for Njamal people and eventually undertake educational, social and cultural programs. The matter had some urgency as an employment opportunity was apparently imminent. It was also intended that the PBI would acquire housing on concessional terms from the WA State Government and make the housing available to Njamal people to purchase, with the initial focus on people who would otherwise be unable to do so. A draft deed was prepared and provided on 1 July 2016, at that stage named the Njamal Nation Benevolent Trust with Njamal Nation Pty Ltd the designated trustee in that draft. Consideration of the terms of the deed and whether they were appropriate, is considered later in the Report.

On 30 June 2016 Ironside Management Pty Ltd was incorporated. Messrs Cullity, Aird and Parker were all directors as well as Ryan Carter (Mr Carter’s son). This shows that as early as this point steps had commenced to move away from the structure that Ms Westerman and others had understood that ISPL was committed to implementing for the conduct of activities connected with the Trust. A partial explanation for the establishment of Ironside Management Pty Ltd is apparent from an email from Mr Greg Parker to the Trust bookkeeper, Ms Lorraine McPhee, on 1 September 2016 in response to a query regarding the role of Ironside Management and her belief that field workers were to be employed under the Njamal Nation umbrella. He responded:

I'm not aware of any reason why you would assume the field workers would be employed under the Njamal Nation umbrella. All heritage surveys are being co-ordinated by Wesley Aird, on behalf of Ironside Management Pty Ltd, which has a signed authority to act on behalf of the Native Title Applicants. This ensures the work gets carried out in a timely and efficient manner. There's a bunch of work to do over the next few months and Ironside's sole objective is to engage with Njamal People to get it done efficiently. This has not been the case in the past because of lack of co-ordination and communication, or so I believe. It also keeps the mining companies on-side. In fact, the feedback from Millennium on the survey just completed has been fantastic.

... Ironside Management Pty Ltd is a service entity which sits along-side ISPL. It was formed to undertake tasks which ISPL, as Trustee for the Njamal People's Trust, can't. There are limitations on what the Trustee can and can't do. The Trust Deed is the best place to start to see what these are and legislation governing Trustees also comes into play. Activities such as liaising with mining companies to negotiate and facilitate heritage surveys and Native Title Agreements is a good example. YMAC was engaged by the previous Trustee to undertake these tasks and we all know how that ended.

(emphasis added)

The Inquiry was recently advised however that ISPL subsequently obtained legal advice that ISPL could, in fact, assume this role, as discussed later in the Report.

\(^77\) Materials provided to the Inquiry on 5 December 2017.
TAC meeting 6 July 2016

On 6 July 2016 a further TAC meeting was held at which the primary focus of discussions was the distribution policy, including issues that had been identified as to a number of payments that had been made, particularly in relation to family buckets. Mr Parker tabled a draft distribution policy and reported that discussions with the ATO and ACNC had identified certain payments as breaching Trust Fund rules and potentially giving rise to loss of charitable status. It was agreed to change various limits and remove family buckets, with more monies being put to emergency relief. It was also proposed to require greater disclosure about hardship and that approvals up to the annual limit for hardship was delegated but for amounts over the limit would require the family representative to certify the person was suffering hardship. A process of setting up accounts rather than food vouchers was being examined by Mr Carter due to some being on sold at a discount.

It was noted that various applications had been received for positions of office manager, liaison officer and casual receptionist and a selection panel was being organised. Interestingly, that same day Mr Wayne McKie was appointed and signed an employment contract as general manager for the Trust's South Hedland office commencing the following week.

The status of Njamal Mining Pty Ltd was also discussed including issues about restoring reputation in relation to the Fortescue Agreement. A concern was expressed by Mr Parker that due to significant legal costs expended it could easily become insolvent. He also is recorded as noting that “the Sharon issue” should be resolved shortly, understood by the Inquiry to be a reference to a claims including for unfair termination by Ms Westerman, which were not resolved as anticipated and has recently led to Ms Westerman issuing Supreme Court proceedings, including against Njamal Mining Pty Ltd, Mr Parker and Mr Carter. Various opportunities for joint ventures were discussed and Mr Parker advised that outstanding issues were exclusivity and profits going to a Public Benevolent Institution for community use. He was confident that future agreements would not require significant capital, or having to share potential losses.

Mr Parker also explained that the application in relation to the creation of a Public Benevolent Institution was in progress.

A financial report was also tabled. A range of other proposals were put forward in relation to a range of possible community projects and agreed that various budgets and proposals would be prepared in consultation with Mr Carter. These included consideration by Mr Aird and Mr Carter of community profiling in order to understand the social and economic profile of each member to assist in identifying the issues of importance to them and, in turn, speed up assessment of disadvantaged claims and encourage the development of programs that meet people’s needs. According to Mr Aird, Mr Carter was resistant to his proposal to undertake
meaningful community profiling, a step he considered to be very important to ensuring that appropriate programs were developed targeted to areas of importance. Mr Carter denies this.

Ms Westerman did not attend that meeting as she had taken bereavement leave.

**July to September 2016**

During the next few months, significant progress was made in relation to a range of matters. It appears to the Inquiry that it was during this period that the fracturing of relationships with Ms Westerman became accentuated.

A policy was issued by ISPL dated 1 July 2016 by which it issued a Board policy under which it acknowledged its focus must at all times be in achieving the Primary and Secondary Objects contained in the Trust Deed with objectives of establishing and maintaining sustainable and mutually advantageous relationships with the Njamal community in aspects of its operations. It provided that ISPL must at all times focus its efforts on achieving these objectives by:

- Maintaining regular communication with the Njamal Community and the Trustee Advisory Committee to promote an understanding of each other’s past and current concerns, challenges and aspirations;
- Assisting the Njamal community to take ownership of and manage issues they face across a broad spectrum of challenges relating to their social, economic and cultural situation;
- Assisting and providing a preference for Njamal people to take advantage of opportunities for training and employment within the Trust and other businesses that may have positions available from time to time;
- Seeking and investing in new opportunities for Njamal family businesses where they will be presented as preferred candidates to participate in achieving the Trust’s Objectives through commercially competitive, contractual and other cooperative ventures;
- Provide encouragement, guidance, training, financial and other assistance to Njamal employees and family businesses to help ensure their success and sustainability; and
- Supporting partnerships that make a positive difference to the Njamal communities in which they live.

On 11 July 2016, at a meeting of directors convened to discuss inter-business loans, Mr Parker tabled a draft policy for discussion, which set out the strategy, methodology and terms of how the Trustee would evaluate loans from the Trust to related entities owned, or majority owned, by the Trust. The minutes record that the policy was endorsed. This is of significance because, as discussed later in the Report, the Trustee subsequently engaged in provision of substantial funding to related entities by way of advance or loan of funds, contrary to the terms of the policy.

On 20 July 2016, in addition to her acquittal of the $84,300 provided to her by Esplanade Holdings Pty Ltd, Ms Westerman issued an invoice to ISPL for $35,068.04 in respect of certain out of pocket expenses and 57 days of alleged work for preparing for and attending various meetings from 26 February to 23 May. The invoice was issued in purported reliance
CHAPTER 4: ISPL's TRUSTEESHIP

on TAC meeting minutes of 14 April and 23 May and clause 9.14 of the Trust Deed in respect of TAC members' remuneration.

On 21 July 2016 the Applicants signed an authority authorising the engagement of Ironside Management Pty Ltd to manage and coordinate all native title, cultural heritage and related business matters concerning the Njamal claims, engaging of various law firms and directing YMAC to provide on request materials to the law firms, Ironside Management Pty Ltd and Indigenous Services Pty Ltd.

On 25 July 2016 Mr Carter continued to engage with Ms Westerman in relation to payment of various invoices presented by Ms Westerman, that certain corrections were first required and that in relation to NM (Njamal Mining Pty Ltd) Mr Parker was happy to pay once the new agreement was signed. Ms Westerman raised a variety of issues suggesting that she wanted to explore all legal avenues first before committing to sign an agreement which she had not seen. Mr Carter was clearly getting frustrated at the delay in resolving these issues, indicating that he wanted it off his desk and was proposing to attend to this the next day, and asking Ms Westerman to fix up the invoices so that the matter could be settled.

7 September 2016 focus group meeting

On 7 September 2016 a focus group day was held in Perth to develop the structure for key activities of heritage, mining company project consultants and cultural awareness.

From the record of the workshop discussion, it is not clear who the 9 members were who were present at the meeting/record of workshop discussion, however, sitting fees were paid from ISPL on 7 September 2016 for “0709 Focus Group Meeting” to Gavin Mitchell, Terry Wilson, Ian Taylor, Doris Eaton, Troy Eaton, Travis McPhee and Mark Walker. Ms Westerman has subsequently complained that the meeting was held with selective members of the Njamal community only and that many of the decisions made were in contravention of previous decisions made by the wider Njamal claim group.

It was recorded that:

Each member confirmed their personal commitment as Njamal leaders to work co-operatively to take the Njamal People forward. They acknowledged the need for strong leadership and to be united for the Group to be successful. The key messages that everyone agreed to was the need to act professionally, work in the best interests of the Group (putting aside personal issues and agenda’s) and to be accountable for their own actions.

Specifically, the issues of accountability and communication (and information flow) were raised as being very important. A communication protocol was discussed and a newsletter as a means to engage with the Elders and the broader group. The Group would consider further its Vision and a code of conduct to ensure that all members remain aligned and can call each other on their behaviour.
In relation to heritage, it was agreed that Njamal Heritage Services Pty Ltd would manage heritage issues, to be owned by the Trust, with directors agreed to.

It was also agreed that Mrs Eaton would assume duties related to the Prescribed Body Corporate and determination and be well placed to keep Elders and Applicants informed about progress of the claim.

It was agreed that six contract positions with the Trust would be filled. These comprised a part time Elders' liaison role that had been offered to Mrs Eaton, a cultural heritage administrator role which had been offered to Joanne Taylor and accepted on a part time salaried basis. The other 4 positions comprised a senior project consultant and three other project consultant roles offered to Ian Taylor ($500 per day) and Travis McPhee, Gavin Mitchell and Troy Eaton ($450 per day). The scope of the roles were to include matters such as developing employment and business opportunities, advising on community protocols, mining company agreement implementation, liaising with legal representatives and the cultural heritage team.

It was proposed that the project consultants (later known as project liaison officers) would be employed by the Trust (ie ISPL as Trustee) and costs would be recouped through new mining agreements.

It was also agreed that given the issues with Njamal Mining Pty Ltd, and need to focus on work and business opportunities, Njamal Mining Pty Ltd would be placed under care and maintenance and a new company, Njamal Services Pty Ltd, would be formed. It was proposed to be the company that engaged with mining companies, contractors and Njamal people to undertake commercial and employment/training opportunities and all its shares would be wholly owned by the Trust. Mark Walker and Travis McPhee agreed to be directors together with Greg Parker and Andrew White who had extensive mining contracting experience. The discussion as to Mr White assuming a role as director had previously been initiated by Mr Parker earlier in August.

It was also recorded that the PBI (Prescribed Benevolent Institution) had been formed and a copy of the Trust Deed for the Njamal Peoples' Benevolent Trust was circulated. It is not clear from the Trust Deed what date it was executed. Also, of note, when originally drafted in July 2016 Njamal Nation Ltd had been recorded as the proposed Trustee. It therefore appears that the TAC and other representatives were not consulted about the terms of the Deed. It was discussed that there was an opportunity to link Njamal Services Pty Ltd to the PBI for labour hire contracting, which would further enhance Njamal job opportunities.

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78 Njamal Heritage Services Pty Ltd was initially a wholly owned subsidiary of Njamal Mining Pty Ltd. In November 2016 its ownership was changed to ISPL as Trustee for the Trust and its name was changed to Njamal Heritage Pty Ltd.
CHAPTER 4: ISPL's TRUSTEESHIP

A heritage administrator was required to attend to various duties including identifying traditional owners who could speak for that country and who have an interest in doing fieldwork and that Ironside would do so until that person was appointed. It was anticipated that Njamal Heritage Services Pty Ltd would be established to deal with heritage matters and be costs recoverable, although that has not been borne out by history.

Other issues discussed included continuing provision by Mark Walker through his existing business, working with Gavin Mitchell and other interested presenters to provide cultural training to mining companies on a for profit basis.

The proposed structure arising from the focus day is set out on the following page.
CHAPTER 4: ISPL's TRUSTEESHIP

Elders Committee

Trustee
- Implement Distribution Policy
- Project Management
- Education
- Housing
- Legal Services and Contracts
- Employer

Office Manager: Wayne Mikkie
Receptionist
Accounts: Lorraine McPhie
Senior Project Consultant: Pibura Minerals and Others
Ian Taylor
Project Consultant – Adaxes Millenium
Travis McPhie
Project Consultant – Altus
Gavin Mitchell
Project Consultant – FMS
Troy Eaton

The Njamal People's Benevolent Trust
Advisory Board: TBA

- Training
- Labour Hire

Njamal Services Pty Ltd
Directors: Mark, Travis, Greg
Parker, Troy Milten, Andrew

- Businesses
- Employment Services
- Joint Venture Agreements – Families and 3rd parties

Njamal Heritage Services
Pty Ltd
Directors: Terry, Willie, Tony

- Administration
- Lore and Culture
- Heritage Surveys
- Cultural Training
- Native Title
- Administration

Elstern Lodge
Dennis Eaton
Cultural Heritage Administrator
Joanne Taylor
CHAPTER 4: ISPL's TRUSTEESHIP

9 September 2016 Board meeting

Although not initially provided to the Inquiry by ISPL when requested to provide it with a copy of all minutes of Board meetings of ISPL, when the request was pressed by the Inquiry a bundle of documents were provided on 15 January 2018. The bundle included a draft minutes with handwritten amendments of a 15 minute board meeting on 9 September 2016 held by telephone. It suggests that the sole item discussed was Njamal Services Pty Ltd and it was agreed that pursuant to the 'direction' of the TAC meeting on 7 September for Njamal Services to be incorporated, the Trust advance funds to Njamal Services Pty Ltd to facilitate the commercial opportunities provided by native title agreements. While reference is made to a TAC meeting, in fact the meeting appears to have been a focus group meeting at which all TAC members were not invited. On 23 September 2016 a special TAC meeting was however held at which various outcomes from the focus group meeting were apparently discussed.

9 September 2016: Njamal Services Pty Ltd incorporated

The same day, on 9 September 2016, Njamal Services Pty Ltd was incorporated. As agreed at the focus meeting, its initial directors were Andrew White, Greg Parker and two TAC members, Mark Walker and Travis McPhee. Mr Parker was and remains its secretary. Its shareholder is and was ISPL as Trustee of the Trust according to an email from Mr Parker. By deed dated 24 November 2016 Njamal Services Pty Ltd the Njamal Charitable and Benevolent Unit Trust was established and ISPL was appointed Trustee, later that day a further deed was entered into by which Njamal Services Pty Ltd assumed the trusteeship.

Mr Parker in an email on 9 September 2016 referenced "Doris's instructions at the Group Meeting on Wednesday that Njamal Mining Pty Ltd be placed under care and maintenance, and that Njamal Services Pty Ltd would be the entity that engaged with mining companies, contractors and Njamal People to undertake commercial and employment/training opportunities. While not clear precisely what the instructions being referred to are, it is clear that the focus group meeting endorsed that position and that it was subsequently endorsed by the TAC at the following meeting.

Removal of Njamal Nation Limited Materials

Following this meeting active steps were taken to remove Njamal Nation references. These included Mr Carter requesting on 15 September 2016 that by early the following week all banners, posters etc relating to Njamal Nation be removed, requesting to ensure any old forms were destroyed and to replace the writing with the Njamal People's Trust as that was the correct entity and approving that updated signs, banners etc be made for the Office.

Ms McPhee, the accounts manager sent an email back to Mr Carter and various others, the following day, cc-ed to others including Ms Westerman, expressing apprehension about removing the Njamal Nation banner for various reasons.
CHAPTER 4: ISPL's TRUSTEESHIP

She noted that:

Community members voted Njamal Nation in at a Community meeting and this was endorsed. I am not aware of the community approving the removal of Njamal Nation and endorsing Njamal Peoples Trust.

Please could you email a copy of the minutes where this has been approved by the Njamal Community and TAC members, as legally we cannot change what the Njamal community have endorsed.

When I have received this confirmation, I will proceed with your request.

Mr Carter responded:

Hi Lorraine

I understand exactly what you have intimated. I intend to make clear and unequivocal directions to yourself and other staff members in the next 7 days The way you have gone about this is very concerning and needs to be addressed.

Rod

This generated an escalating series of emails which illustrate the strength of the concerns on both sides, ultimately leading to Ms Guo and Mr Parker intervening to try and restore relations.

To understand the motivations surrounding the move away from Ms Westerman and the model initially endorsed it is useful to recite the subsequent email sequence:

Ms McPhee emailed Mr Carter:

Evening Rod I feel bemused by the email you sent to me on Friday regarding my concerns about taking down Njamal Nation Banners etc., especially as it was only sent to me.

I do not think you have taken into consideration the sensitivity of the Njamal People Community and to what we experience in the office, and therefore feel you have been unreasonable to be so strident in me asking for the approval that I requested,

I feel reassured you have called for a TAC meeting to go through these issues, however you have previously expressed we should have regular office meetings to be kept in the loop, unfortunately these meetings have not materialised, so I request that we have an office meeting to summarise the schema of Njamal and to develop our internal communications and control, as representative's of Njamal we have difficulty in consulting and communicating with The Njamal community when asked which leads to doubt and confrontation.

I anticipate you now appreciate my concerns.

Kind regards

Mr Carter responded:

Lorraine

I have put my life on hold over this whole Njamal business and feel it is time to bring the recalcitrant individuals to task .

Your email on Friday effectively allowed certain community members access to the malaise that has been caused by the actions of a few, including Sharon Westerman . Millions of dollars have been wasted and the result for Njamal is non existent. Njamal has absolutely no resources to address the real issues of this group of people. The actions of a few has created this situation.

To be perfectly honest, we are spending most of the day sorting the chaos created by Sharon, Gavin and Kevin. These are tasks that are holding back the office and I am effectively shielding the office until I can confront these issues. When you talk about
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functionality, it is apparent to all that the office is at present only undertaking one function, that being approval of hardship and helping people apply.

Until we have sorted the dysfunctional few, it is obvious the office can really only perform that function. Just look at the newsletter, for example.

So let's be real, a line is now drawn in the sand. Friday is not about the office, it is about the very future of Njamal.

In your case, you do not have permission to bulk mail individuals in the community unless it is approved by myself and no one else.

Please understand that I am doing this as Trustee, paying your consultancy.

Kind regards

Rod

This led to the following response:

Rod

I have always endeavoured to act in the best interest of all parties and hold high integrity in doing so.

I understand your position as a trustee, but I have always been under the assumption TAC members were privy to all information regarding Njamal, and believed the office was a community office to liaise with the community, TAC members and yourself, but it now appears not the case.

Regarding the functionality of the office, you have not before expressed concerns about the functions of the office (other than still waiting for the newsletter) as when I have asked you, you have stated things are coming along.

Reiterating my last email, if you recall I have requested office meetings to communicate the office requirements on numerous occasions, if these had of materialised we would have been aware of your expectations.

I hope this clarifies the misinterpretation that has emerged.

Kind Regards

Lorraine McPhee

Mr Carter responded:

Lorraine

I have not misinterpreted anything. The facts are pretty obvious
1. You have a position of Trust and confidentiality that you have chosen to ignore
2. All information regarding Njamal people is confidential and must be respected
3. The office is funded by Njamal People's Trust, not Njamal Nation
4. I am happy for people to discuss any issues that relate to the Trust, remembering the TAC is just that, it's an advisory group.

I will be up Thursday to meet with staff

Rod

Mr Parker eventually intervened:

Rod and Lorraine,

The email thread below is a further example of how much time the Directors of ISPL are spending on re-building bridges that have been swept away by under currents created by only few, but which affect the whole Njamal community.

I've got my own opinion on the divisiveness created by the concept of Njamal Nation and I don't want a bar of it. Any structure that starts at the top with a Council of 45 paid Members is doomed to fail but as I stated, Njamal Nation is just another distraction we don't need but it
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has served its purpose in creating issues between the two of you. When I think about NN, which I try not to, I always think about Prince Leonard and Hutt River Province.
Lorraine, ISPL does not work under instructions from the TAC. ISPL can seek the TAC's advice on any matter it sees fit but it is not bound by it.
Enough is enough guys. We've got work to do.
Kind regards

Ms Guo at one point also attempted to smooth things over, emailing Mr Carter and Ms McPhee and saying:

Hi Rod and Lorraine
I see what you both come from
At this stage, Rod is working on getting the office and staff and all TAC members on the same page. Then we will give the news to the community.
Lorraine is working with Community members at the office and solver their problems as well as getting the feedback.
If there is any misunderstandings between each other, let us talk and make more efforts in communication.
We all want the best interest for Njamal. Let us work together to solve the problems. Kind Regards
Jing Guo
Executive Assistant

Contract offers were prepared as of that date to the persons discussed in the focus group meetings.

Special TAC meeting – 23 September 2016

On 18 September 2016 Mr Carter emailed notice of a special TAC meeting, including Applicants, on 23 September. Ms Westerman understandably expressed concerns about short notice compared to the 2 week period provided for under the TAC Rules including because it appeared some members were unavailable due to other commitments. (The effectiveness of the Rules and issues about meeting notice periods is discussed later, in Chapter 9 of the Report in relation to the TAC). Again, the sequence of emails is informative of how their relationship had declined:

Hi Sharon
I understand that you are actively working on a resolution to your $300,000 claim against Njamal Mining and Njamal People’s Trust
Until that matter is resolved, I am advising you that I will not be putting the group in conflict with you, I hope that you respect this position both legally and culturally. You have placed the group in a very difficult position.
I understand the rules completely and have also been in contact with TAC members regarding your claim. It is to be discussed at the meeting, as well Kevin Allen and his behaviour.
All this unprofessional behaviour needs to end. I intend to do something about it
Kind regards
Rod

...
Hi Rod

I didn't see this on the agenda.

If I am to be discussed at any meeting, then I need to be present

I don't understand why you are being so confrontational towards me just because I am explaining the TAC rules

You have misrepresented the facts here about myself and Njamal Mining

The only division being created is by yourself by sending emails such as this

I am happy to address any issues to do with Njamal Mining if the group wants me to. I have done this before at a TAC and community meeting and can show relevant evidence

This issue has been unresolved because of the actions of yourself and Greg Parker

I have no comment on Kevin Allen as all the relevant facts/evidence about his actions and behaviours have been reported to yourself and Greg by myself some time ago.

Sharon

...

Sharon

I can only see one person attempting to create a confrontation here. I think you need to understand

1. Any group can have a short notice meeting as long as a quorum is present.
2. In this case the meeting and the Agenda are open and as such General Business is also on the Agenda
3. I am quite correct in reserving the rights of the NPT in relation to your legal dispute. NPT is the shareholder and as such has a corporate responsibility to the Njamal People
4. You have informed me that you are legally represented and that is your right. Please allow the NPT the same courtesy
5. I am happy to sit down with you today and go over the suggestions from the focus groups in relation to Structures, roles and responsibilities. My door is always open!
6. I repeat that I cannot further discuss you claim, firstly as I was not present at the time and secondly, that it is now a legal matter.

Sharon, the future on Njamal is in the hands of the Njamal People. The projects and innovations set up by the people and the Trustee are beginning to show signs of engagement at all levels. Perhaps you might think more about what you can do to be involved. This would please everyone, including myself.

Kind regards

Rod

Discussion about attendance at the focus group meeting then occurred, with Mr Carter agreeing to Ms Westerman's air fare being paid, but not for others in her family or another person she proposed attend to discuss structure.

Mr Parker in turn then emailed Ms Westerman alone on 22 September as follows:

Sharon,

I deliberately ignored contributing to your email exchange with Rod yesterday even though you implicated me with some of your derogatory remarks. You'll also notice that I haven't CC'd anyone in this email.

For the avoidance of doubt, the TAC will hear from me tomorrow about the lack of progress in settlement of your claims. However, the point of this email is to give you the opportunity, prior to tomorrow's meeting, to consider a comment made by Darren Pearce when I met with him, Mike Gloyne and Steve Schalit (all of NRW) along with Gavin Mitchell and Andrew White representing Njamal Services Pty Ltd yesterday.
CHAPTER 4: ISPL's TRUSTEESHIP

Darren asked for confirmation of who amongst Njamal NRW should be dealing with in relation to their Altura tender. The reason for his question was that you allegedly have recently told him that Njamal Mining Services Pty Ltd would be endorsed to represent the Njamal People “in a few days” and that NRW should only be discussing contracting and other opportunities for Njamal with you. I asked Darren to repeat what you had allegedly told him because I couldn’t believe what I was hearing.

At last count there were apparently 408 adult Njamal People, only 4 of whom are currently Directors and Shareholders of Njamal Mining Services Pty Ltd. I have it on good authority that, as of tomorrow, you will be the sole Director.

As long as you and/or any other entity you collaborate with meet the definition of a “Njamal Contractor” you can lobby all you like for work from mining companies or anyone else for that matter. However, what you allegedly said to Darren Pearce is false, deceptive and misleading. If you strongly deny what Darren has alleged then you had better clear it up with him prior to the commencement of the TAC meeting as I will be addressing it, along with other matters.

Greg Parker

Ms Westerman replied:

Greg

It is you who has been misleading Njamal Mining Services was endorsed by the community meeting (which you attended) on the 2 May, 2016. The meeting was properly notified and organised so that every Njamal person had the opportunity to attend

I take it that you were happy with that meeting as it also endorsed Indigenous Services

I said this to Darren and that is it

I also have minutes of several meetings held by the TAC that confirm this – including ones that Rod attended. Would you like me to send them to you?

It is not up to you to decide who the Njamal people want to represent them in anything

I have copied in the other Directors because this concerns them too – given your comments If you have been disparaging me to other people, then I will be considering my options here

Sharon

On the same day, 22 September 2016, Njamal Limited was registered, as an unlimited public company limited by guarantee and bound by Constitution. It had the same 9 directors as for Njamal Nation Pty Ltd and Njamal Foundation Pty Ltd. Later in October various other changes occurred in connection with this as the relations between Ms Westerman, the Trustee and certain other TAC members further deteriorated.

Apparently following an Applicant meeting earlier in the day, a special TAC meeting was then held on 23 September 2016. Ms Westerman was present, as was Mr Allen. According to the TAC minutes a range of issues were discussed in relation to the operation of the office and distribution policy, including installation of a security camera following which issues of anti-social behaviour had declined.

Various issues were discussed in relation to Njamal Mining Pty Ltd and the structure endorsed at the focus group meeting. It was clarified to Ms Westerman that Njamal Services Pty Ltd was owned by the Trustee on behalf of the Trust. Advice was also given about the establishment of the PBI and a copy was contained in the TAC paperwork. In respect of structure, roles and appointments, TAC members were asked to take the feedback reports to their families for further discussion and it was noted that the Applicants had approved the
structure with potential modifications after discussions with their family members, the aim being to have final endorsement at the TAC AGM.

It is recorded that Ms Westerman moved that the TAC be provided funding to seek independent legal and accounting advice however the motion lapsed due to lack of a seconder. It seems that Ms Westerman contends the resolution was for the advice to be obtained rather than funding for it, and suggests the item was rushed by Mr Carter.

The minutes record that it was resolved that the Trustee be authorised to fill the positions identified at the TAC meeting for an initial 3 month period with the option for renewal. Ms Westerman abstained from voting and this was minuted at her request. Ms Westerman also disputes whether certain recorded resolutions were actually made.

A list of various positions that would be advertised by a mining company shortly were referenced as well as a list of contracts to be tendered. The TAC resolved that TAC family representatives advise the Trustee as soon as possible as to which business opportunities they were interested in and if any family members wanted to apply for any of the upcoming positions. The Facebook page for the Trust also advised about job opportunities and that interested persons should provide details to the Trust of areas they were interested in and experience, in any event.

A range of other matters were considered and endorsed. These included acquisition of a bus and two vehicles for the purpose of undertaking heritage surveys, noting previous issues with loss and damage of previous vehicles and the need for clearly defined garaging and driver identification to be clearly defined and controlled.

Mr Carter is also recorded as having given feedback about a recent FMG meeting where a Njamal member (understood to be Ms Westerman) was alleged to have stated that the Applicants were bribed to sign documents. It was noted that at an Applicants' meeting earlier that day they had unanimously denied this assertion.

It was also agreed that the TAC rules would be reviewed by a committee comprising Ms Westerman, Ian Taylor and Wayne McKie.

A discussion was also held about Ms Westerman's claim in relation to Njamal Mining Pty Ltd. According to the minutes, Mr Parker for Njamal Mining and then Ms Westerman outlined their positions and then, together with Mr Carter, left while TAC deliberated. Ms Westerman disputes that Mr Parker left the meeting. The minutes record that after they returned they were advised that TAC supported the matter being mediated.

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79 At 7.1, Elders; Liaison, Cultural Heritage Manager, Senior Project Consultant, 3 x Project Consultants.
A range of other proposals were considered and endorsed or endorsed in principal subject to further matters being attended to. It was identified that a proposed housing project was proposed to be effected through the PBI. Carbon farming was also raised for the first time and, as discussed later in the Report, $19,000 was allocated for the Trustee to commission Goldfields Carbon Group Pty Ltd and lawyers to prepare a carbon farming feasibility.

It is also recorded that Ms Westerman asked that her concerns that the Njamal people were not in full control of the proposed structure be noted in the minutes.

**October and November 2016**

Matters continued to deteriorate from here.

Mr Parker was kept occupied dealing with a range of issues in connection with Njamal Mining Pty Ltd including Ms Westerman’s claims and assessing their veracity and on 3 October 2016 he requested a copy of the final report of Simon Coad.

Ms Westerman emailed Mr Carter on 14 October 2016 expressing concern about recent meetings with the Applicants and, amongst other things, what role or function ISPL had assumed in relation to Njamal native title claims and how issues of independence of decision making were addressed.

Between 14 and 20 October 2016 a new Applicants’ authorisation was signed by the Applicants (or at least most of them) authorising, amongst other things, Ironside Management Pty Ltd and/or ISPL to manage and coordinate matters including all native title, cultural heritage and related business matters arising out of the Njamal native title claims, and concerning the Fortescue Companies, and to communicate with the Fortescue Companies regarding those matters.

Subsequently a further, more general authorisation titled ”Njamal Applicants’ authority and directions” was signed by the Applicants on 3 and 4 November 2016, by which the Applicants in the Njamal #1 and Njamal #10 native title proceedings in the Federal Court of Australia authorised ISPL to manage and coordinate:

1. all native title, cultural heritage and related business matters arising out of the Njamal #1 Applicant and the Njamal #10 Application;

2. the engagement of any of the law firms listed below [being McCullough Robertson Lawyers and Castledine Gregory Law and Mediation],

and to communicate with any third party regarding those matters.
CHAPTER 4: ISPL's TRUSTEESHIP

TAC meeting: 26 October 2016

Ms Westerman, having previously sent emails seeking trust financials and minutes of an earlier TAC meeting, sent a further request on 24 October 2016 indicating, amongst other things:

As a TAC member, I can't make decisions and approve funding for programs until I have the following information:

- Income expected to be received by the Trust
- Expenditure relating to programs, employment positions, Indigenous Services fees, travel, consultants fees, vehicle purchases and any other expenditure
- As you are aware, there was $1.6 million worth of funding for different programs proposed at the last Trust meeting

I have no idea if the Trust can afford this and this is something I need to be aware of as a Trust Committee member. The community expects the TAC to know this information as well.

Can you please provide all of the information by close of business today?

Regards

Sharon

Mr Carter responded on 25 October 2016:

Dear Sharon

In response to your various emails, can I offer the following information:

1. At present you are in conflict with Njamal People's Trust in relation to disputed payments
2. This matter is set for mediation. I understand this is with the lawyers and a suitable mediator will be chosen in the next few weeks.
3. For this reason, it will not be possible for you to sit on the TAC until these matters are resolved. In accordance with that, I will also respectfully not be raising any matters in relation to your dispute with the TAC whilst this matter is in legal dispute.
4. I respect that you have a claim and its resolution is of importance to you and Njamal.
5. In relation to the TAC, I have asked Kevin Alien to be present at the TAC meetings in his role as an Applicant

It is not my intention to raise this matter again until the mediation process is complete. Should you require minutes of meetings, once approved I will ensure you have a copy.

I hope this matter can be confidentially resolved in the next short period of time

Kind regards

Rod

The matter also gave rise to correspondence from Ms Westerman's lawyer, Chris Stokes, writing to Mr Carter on 25 October 2016 regarding various matters in relation to Njamal Mining Pty Ltd, as well as a requested undertaking not to disparage or defame her in his communications with members of the Njamal people of the TAC. Mr Stokes also referred to the TAC meeting convened for the following day of which he asserted Ms Westerman was a rightful member with a right to attend and that Mr Carter had refused to pay her air fare or sitting fees to attend, give 2 week's notice and foreshadowed proposing to move a resolution to remove Ms Westerman as a member despite relevant provisions of the Trust Deed.
CHAPTER 4: ISPL's TRUSTEESHIP

requiring a community meeting to remove a TAC member and no such meeting having taken place or been convened.

Certain purportedly without prejudice communications then occurred.

According to ASIC records, on or about 25 October 2016 the shares held by all but Troy Eaton, Mark Walker and Wayne McKie in Njamal Nation Pty Ltd were transferred to Njamal Limited. With effect from 25 October 2016 Mr Eaton also ceased as director of Njamal Mining Services Pty Ltd.

Mr Stokes also emailed Mr Carter and Mr Carter on 26 October 2016 asserting that Mr Allen had no right to attend the meeting in circumstances where Ms Westerman was likely to be present and if he did attend it would be on the basis that Mr Carter was using trust funds to support him breaching the restraining order by paying his airfare to attend and therefore acting inappropriately as Trustee.

Mr Carter responded:

Chris
To be very clear
1. The TAC is merely an advisory body. This meeting is a meeting proposed by some members. The Trustee does not need to accept the any recommendations
2. Sharon has not been invited by that group. This has now been made clear to yourself and Sharon on numerous occasions
3. It is irresponsible of you to attempt the threaten myself. Your correspondence is unacceptable
4. I have informed the Police that Sharon has not been invited. They have also advised her of this position
5. Sharon will be potentially putting herself in harms way if she persists with this aggressive behaviour to her fellow members

Kind regards
Rod

The TAC meeting ultimately proceeded. Despite attempts to exclude Ms Westerman from the meeting, she paid for her own airfare and accommodation and tried to attend the meeting. Ms Westerman also alleges that the location of the meeting was then moved from Lotteries House to the Trust office to further try and prevent her attending. The Inquiry accepts that the meeting was moved and that Ms Westerman was advised once she arrived at Lotteries House that there was no meeting. Ms Westerman subsequently saw people entering and leaving the Trust office. By the time she entered the meeting had concluded. It is also to be noted that, in explanation for the non-production of several documents to the Inquiry, at various stages it was alleged by ISPL or Mr Carter that they either had or were believed to have been stolen by Ms Westerman. Insofar as that allegation is concerned. Ms Westerman says that she saw there were some papers on the table such as minutes, and as she had been excluded from the meeting she removed some of the documents. That was plainly inappropriate, irrespective of the circumstances of her exclusion from the meeting. While Ms
CHAPTER 4: ISPL's TRUSTEESHIP

Westerman indicated that none of the documents were documents like agreements, other than a copy of minutes, she was unable to now identify what the documents were. The Inquiry returns to this issue later, at page 174, in the context of certain documents that were not produced by ISPL to the Inquiry when requested.

According to the minutes of the 26 October 2016 meeting, updates were provided about a range of matters including project updates and the project consultants. It records that Mr Allen was also performing such a role and that Ms Candy Mitchell had been employed by the Trust since the last meeting.

Mr Parker is recorded as raising various matters in relation to Ms Westerman's contact with the mining company, NRW (as he had previously foreshadowed to her he intended to raise) and issues in relation to settlement negotiations to resolve issues relating to her employment and costs reimbursement:

He had been informed by NRW that Sharon had been in direct contact with them and she had notified them that she represented the Njamal people and that all contract negotiations were to go through her and Njamal Mining Services Pty Ltd. He believed this claim was severely damaging the reputation of Njamal Mining in the eyes of NRW. He also explained that Sharon and Njamal Mining Services Pty Ltd do qualify as Njamal Contractors under the existing Native Title Agreement with Altura and the NTA proposed to be entered into with Pilbara Minerals, but Sharon had no right to say she exclusively represented the Njamal People as a whole.

It was recorded that:

Discussion took place as to whether Sharon's representations to NRW meant that she had a conflict of interest as Njamal Mining Services Pty Ltd is not owned by the Njamal People's Trust, but by individual Shareholders who are also the Directors and who definitely don't represent 100% of the Njamal community. It was suggested that Sharon had made similar claims to mining companies and other contractors.

According to the minutes a purported resolution was then made by Travis McPhee, seconded by Tony Taylor, and carried unanimously that:

Until such time as Sharon Westerman stops making claims that she represents the whole of the Njamal Community and her claims against Njamal Mining Pty Ltd are settled, she be suspended as representing the Ball-Allen Family on the TAC.

It was also discussed that Mr Carter would oversee a rebuttal letter being prepared in respect of such alleged claims.

As explained later in the Report, in the Inquiry's view the TAC did not have power to suspend Ms Westerman from being a TAC member.

It is also recorded that four TAC members intended to tender their resignations from the Njamal Nation group of companies and that none could recall having consented to acting as directors in the first place.

Under the heading "Indigenous Services Contract" the minutes of a meeting of the TAC on 26 October 2016 chaired by Barry Taylor record the following exchange and resolution in respect of ISPL's tenure:
CHAPTER 4: ISPL's TRUSTEESHIP

Rod Carter expressed the need for Indigenous Services Pty Ltd to plan beyond the May, 2017 expiry date of its initial 12 month engagement as Trustee of The Njamal People's Trust. This would involve, among other things, engaging key personnel who needed to be offered longer term Contracts and securing suitable office premises.

The Chairman suggested that Indigenous Services Pty Ltd submits a proposal for an extension to its initial term of appointment and that the TAC seeks its own independent legal advice in order to assess its merits.

Moved: Dean Snook
Seconded: Travis McPhee

That the TAC agree in principle to appoint Indigenous Services Pty Ltd for an additional 2 years and 6 months beyond its initial term subject to the TAC receiving legal advice on the terms of the appointment as soon as possible.

The Resolution was carried unanimously

Apparently further to the above resolution, on or about 25 November 2016 a further letter from ISPL as Trustee in relation to its ongoing engagement and terms of engagement was signed by Barry Taylor as Chairman of the TAC. There is some controversy around the process by which occurred and its timing, as well as two versions of the letter with different dates, apparently being signed. This issue is returned to later in the Report.

On or about 1 November 2016 an agreement in relation to Goldfields Carbon Group Pty Ltd and Carbon Management Pty Ltd was entered into. This was the precursor to a substantial investment of funds by ISPL in relation to carbon farming projects connected to Mr Andrew White. Given the significance of this expenditure it is considered in Chapters 8 and 9 of the Report.

By email of 8 November 2016, followed up on 10 November, Ms Westerman sought reimbursement for her flight and accommodation expenses for attempting to attend the 26 October 2016 meeting. The response she received on 11 November was as follows:

Dear Sharon,

The information provided to is responded as follows

1. The meeting you are referring to was a meeting that you had been advised in writing you were not invited . You have no legal right per say . The group is an advisory body as such under the constitution.

2. The meeting was held to discuss various commercial matters, that you are conflicted with

3. I was given specific instructions that you were not to be included and advised you of that fact. The matter is closed and no further correspondence will be entered into

In response Ms Westerman wrote:

Rod can you clarify exactly what commercial matters I am supposed to be in a "conflict of interest" with and who gave you the instructions ? Are you saying that you believe the members of the TAC have no legal standing, or right to be at TAC meetings, under the terms of the Trust Deed? Are you saying that the meeting was only about "contracts", commercial matters? Are you saying that you did not call the meeting? Are you saying it was an official Trust meeting?

Regards Sharon

Mr Carter responded:

Sharon
CHAPTER 4: ISPL's TRUSTEESHIP

The matter is closed. Do not communicate directly with myself, please send all correspondence via your lawyer. You are in litigation and represented. This is the last time I will advise you of the legal position.

Ms Westerman responded:

Rod

I intend send you a letter through my lawyer about a number of issues, but these are very simple questions about the TAC meeting that don't require a lawyer to ask them.

According to you, I'm apparently in a legal dispute with the Trust, but I'm not sure what you are specifically talking about.

I was just trying to clarify.

Sharon

Events at around this time appear to have been the tipping point from the point of view of Ms Westerman. While the Inquiry accepts that, in various respects, Ms Westerman contributed to the disharmony that was central to the ongoing issues, the Inquiry accepts that she had legitimate concerns given the series of events that had unfolded surrounding the management and direction of the Trust.

That same day, 12 November 2016, Ms Westerman first wrote a letter of complaint to the then Attorney General requesting intervention under sections 20 and 21 of the Charitable Trusts Act 1962 to assume control of the Trust and fully investigate its affairs.

Summary of Key Findings

While difficult to determine with precision what led to the spectacular falling out outlined above, having regard to the events described and evidence gathered including from Mr Carter and Ms Westerman in particular, the Inquiry finds that while the precise reasons are not certain, they included:

- the decision by ISPL (which was effected following a focus group meeting on 7 September 2016 and was then endorse by the TAC) to establish a structure fundamentally at odds with the structure that had been supported by the community and ISPL when it was first appointed (involving Njamal Nation Pty Ltd) and which was central to the vision of Ms Westerman for Njamal for self-governance and control of its own destiny, leading to a deep and enduring sense of betrayal;

- the manner in which that change of direction occurred, did not involve full and open communication with all TAC members and involved at times inappropriate exclusion of Ms Westerman and others from aspects of the discussions including her purported suspension from the TAC in October 2016 with ISPL's support;

- growing loss of support for Ms Westerman from the majority of the TAC;
• growing reservations in relation to Ms Westerman's involvement including concerns in relation to the level of control she is said to have wanted, and increasing divisiveness associated with the Njamal Nation branding;

• concerns about approaches by Ms Westerman to mining companies creating confusion about who represented the Trust and Njamal People and issues given negativity in certain areas given past involvement with Ms Westerman and certain mining companies;

• an increasing awareness of concerns in relation to Ms Westerman's actions in relation to Njamal Mining Pty Ltd and use of its funds;

• the pursuit by Ms Westerman of claims against Njamal Mining Pty Ltd which were not settled and other claims for recompense; and

• Ms Westerman's involvement in establishing competing corporate structures after ISPL moved away from the originally agreed vision involving the structure associated with Njamal Nation Pty Ltd.

**Mid-November 2016 Onwards**

From that point on, the disharmony only increased, as parties became increasingly entrenched in their positions. Rather than moving towards a unified approach for the common good of the Njamal People, this entrenchment of positions has served to hinder that outcome, as well as the Inquiry's efforts to review both allegations and counter-allegations and form views about the management and administration of the Trust and its property.

The difficulty, in part, is that, as was the case with AET, many of the concerns expressed by Ms Westerman were not necessarily well-founded. The manner in which ISPL and the TAC responded and sought to deal with various issues to do with Ms Westerman were also at times less than ideal. While the Inquiry appreciates the challenges in being subject to a vast range of allegations in not responding in kind, it is very important that a Trustee maintains an impartial approach and, at times, it or its officers appear to have been engaged in the heat of the fray. With Ms Westerman and certain of her supporters, and Mr Carter, ISPL and a significant proportion of TAC members in conflict, times became all the more challenging.

On 14 November Ms Westerman demanded Mr Carter answer a detailed series of questions about the operations of the Trust and financial details.

On 15 November ISPL distributed a letter to the community providing a short update in relation to various changes and making the point that ISPL was not the beneficial owner of the Trust and that its overriding duty was to obey the terms of the Trust Deed and to act in the best interest of the beneficiaries being the Njamal People. In other words ISPL was limited to managing your money with you and for your benefit". Mr Carter also referenced an attached structure which he described as being "necessary to deliver not just good governance but
also to manage the innumerable obligations and opportunities set up by the many mining agreements, heritage agreements and business contracts." The attached ownership structure diagram broadly reflected the new structure that had been put in place in relation to the Trust, its related entities and the Njamal People's Benevolent Trust. It did not reference the Njamal Charitable and Benevolent Unit Trust, a draft of which was being prepared, and which was executed later that month after Board approval (see below).

On 16 and 17 November a series of TAC and other Njamal members signed notices of resignation, in each case, noting that for the avoidance of doubt, the person had no recollection of consenting to be a Director. Dean Snook, Terry Wilson (copy of electronic signature), Travis McPhee, Mark Walker, Troy Eaton and Michael Taylor.

According to ASIC records, with effect from variously 16 or 22 November 2016, 4 directors resigned from being directors of Njamal Nation Pty Ltd, Njamal Foundation Pty Ltd and Njamal Foundation Pty Ltd (Troy Eaton, Michael Taylor, Mark Walker and Wayne McKie) although the circumstances surrounding their appointment and the appointment of other directors (and whether they consented), and whether others resigned or purportedly resigned, is controversial, as elaborated later in the Report.

On 22 November 2016 solicitors for the Trustee as trustee for the Trust wrote to Ms Westerman alleging that she had distributed a flyer to the beneficiaries of the Trust and a large number of mining companies falsely representing or being likely to represent that Mr Carter and his family had beneficial ownership and control of the Trust and that the flyer and alleged representation were misleading or deceptive or likely to mislead and deceive and demanding such conduct immediately cease and a deed poll irrevocably undertaking to cease doing so be entered into, or the Trustee may commence legal proceedings against her in the Federal Court. The Inquiry accepts that Mr Carter and his family (whether directly or through family companies and trusts) did not have beneficial ownership of the Trust and its property.

On 23 November 2016 Mr Parker emailed Ms Westerman attaching a copy of the resignations and asserting that if the directors had not consented to act, inclusion of each person's name in the "Njamal Community Structure" Organisation Chart could expose her to allegations of false, deceptive and misleading conduct. He suggested that it would be prudent to send to each director a copy of their signed "Consent to Act" to make any such allegation/s go away as quickly as possible.

An ISPL Directors’ meeting was also apparently held on 23 November 2016. The minutes recorded the discussion of two matters, issues concerning appropriate structure for commercial activity and extension of the Trustee's contract. In relation to the former, Mr Parker advised that the appropriate structure for any commercial activity undertaken by the Trust in the future should be carried out by a unit trust comprising the Trust and the Njamal People's Benevolent Trust.
CHAPTER 4: ISPL's TRUSTEESHIP

It was resolved to instruct Mr Parker’s company to establish the Njamal Charitable and Benevolent Unit Trust. In fact the Deed to establish the Trust had already been prepared and was executed the following day. As discussed later, the initially named Trustee was ISPL however that was changed to Njamal Services Pty Ltd later that day by further deed.

Mr Carter advised that the extension of the Trustee contract should be signed shortly and it was agreed that existing delegations would continue. As already noted, the extension appears to have been signed off on or about 25 November 2016.

On 24 November 2016 solicitors who had been appointed for the Applicants circulated a notice of a community meeting in relation to native title matters to be held on 13 December 2016.

A further TAC meeting was held on 1 December 2016. Ms Westerman became aware of the meeting and sought further details about it the previous day as well as a copy of the resolution purporting to suspend her.

Mr Carter responded:

Dear Sharon,

At the last Trust meeting it was moved that you be suspended from the Trust until all matters involving yourself are satisfied. This decision has been made in the best interests of Njamal and its people.

Representing yourself as Njamal Nation and passing on information that is clearly in conflict with and competing with the interests of the Trust is unacceptable to the Trust.

You are not invited to attend the meeting and will not be eligible to attend in any form.

I trust this makes the situation very clear and unequivocal.

Kind regards

Ms Westerman understandably sought further information including why she was not given an opportunity to be heard/due process and why other private Njamal business owners were not similarly conflicted and suggesting that Njamal Ltd, Njamal Nation and its subsidiaries were owned by the Njamal people and so they could not be in conflict. The impasse was not resolved.

The TAC meeting proceeded the next day and in the minuted it was recorded that Mr Carter thanked the Trust members for extending the Trustee’s contract and that this would allow for the longer term appointment of staff positions. It is unclear whether the TAC members were supplied with a copy of the letter agreement dated 25 November 2016 that was signed by Mr Barry Taylor on behalf of the TAC as its then chairman at around this time.

A draft profit and loss and balance sheet was presented and discussed as well as the amounts that had been invested into various indigenous growth, prosperity and property funds, totalling $1.5 million.
CHAPTER 4: ISPL's TRUSTEESHIP

Progress towards finalisation of the Pilbara Minerals Agreement was discussed including that families could bid for work in their own right or could joint venture with Njamal Services Pty Ltd.

Issues about clarifying the role of project consultants and MALC (Mining Agreement Liaison Committees) to simplify matters was discussed and also contracting opportunities for families, including non-mining businesses and that families should think about what they wanted. An update about Ms Westerman issues was provided. It was agreed by the TAC to leave Ms Westerman suspended until after the community meeting, that she not be permitted to be a TAC member for a period of 2 years unless otherwise decided by TAC and invited Pilbara Minerals Limited to the meeting to hear the TAC’s position.

It was recorded that two TAC members confirmed that, contrary to statements by individuals “the TAC is the representative body of the Applicants and the Njamal People”. As a matter of fact and law, that was plainly incorrect insofar as it related to the native title claims.

Ms Westerman requested a copy of the financial documents tabled at the TAC meeting and did not receive them. She then referred to numerous requests that she had made for financial information and asserted that the Trustee had a legal obligation under the Trust Deed to provide that information. Mr Carter responded that no such obligation existed under the Trust.

Attempts to remove ISPL

Since ISPL was appointed, there have been several attempts to remove it as Trustee of the Trust.

2017 attempts to remove ISPL

The first attempts to remove ISPL were by Ms Westerman. A meeting was originally scheduled for 15 July 2017 for the purposes of section 66B of the Native Title Act 1993 (Cth), but was rescheduled to 24 July 2017. According to Ms Westerman, the meeting covered the Trust as well and whilst the meeting was well–attended (she says 140 people attended), the meeting derailed and the Police were called.

The meeting notification circulated by Ms Westerman in July 2017 did not make it clear who was calling the meeting. An email titled “Travel Policy for Njamal Meeting 24 July 2017 from admin@njamal.com.au” was circulated to the community, suggested that travel expenses may be covered. The fact that it was not clear who was calling the meeting was illustrated when Mr Carter replied to that email address (apparently thinking he was writing to the Trust admin rather than Njamal Ltd admin), saying that a bulk email was needed to show that the Trust did not endorse that meeting and that a future meeting would be arranged by the Applicants and to give sufficient notice. Ms Westerman was in fact a recipient of the email.

The issue of it not being clear who has called meetings has continued, with a community member saying (of a June 2018 meeting) that a letter was sent to his address from "Njamal",
CHAPTER 4: ISPL's TRUSTEESHIP

providing notification of a meeting, "same as any other meeting". However, on attendance at the meeting, he found that it was for one of Ms Westerman's companies.

The community meeting and TAC meeting were rescheduled by Ms Westerman in August 2017, the TAC meeting being called for 24 August 2017. The first item on the Agenda was to appoint a new Trustee for the Trust. The agenda set out that the meeting was being called in the best interests of the Njamal community in accordance with:

(i) Clause 9.9 of the Trust Deed (Clause 9.9 of the Trust Deed provides that any TAC member may convene a TAC meeting to remove and replace a trustee.);

(ii) Clause 3 (i) of the TAC Rules (which provides that any TAC meeting can be called by any TAC member or the Trustee); and

(iii) Clause 3 (viii) of the TAC Rules (which provides that the trustee does not need to attend TAC meetings).

The meeting was unsuccessful; ISPL was not removed and a new trustee of the Trust was not appointed. A number of other meetings were also convened, including in relation to native title matters, with considerable confusion generated as to whom had called the meetings and whether travel allowances would be payable by the Trustee from the Trust.

2018 attempt to remove ISPL

Others have also attempted to remove ISPL. On 15 March 2018, Gavin Mitchell emailed TAC members, Applicants and ISPL management and staff proposing a TAC and Applicant meeting for 23 March 2018 in Port Hedland. His email attached an agenda, which included an item to discuss the Trust's finances and an item re review of the 'Trust Service Agreement'. The agenda also stated that the meeting was properly called by a TAC member in accordance with the Trust Deed.

Mr Mitchell also circulated a document titled "Join Team Njamal", setting out his proposal for a new corporate trustee with himself put forward as CEO. The document includes the following comments:

My eyes are wide open – I see what is happening at Njamal and it is not good. We must make this change and we must start to manage ourselves.

…

Rod Carter is a disqualified person on the ASIC website. He was disqualified on July 31st 2017 and will remain a disqualified person until July 30th 2021. It is a matter of public record.

Has he made a statement to Njamal informing us about this?

…

If you have been away from Njamal for a while, corrupted by the promises of a better life or by promises of opportunity than I can assure you we will all have that better life and those new opportunities together and will build the future for our children and grandchildren.

Within an hour of his email giving notification of the meeting being sent, Mr Mitchell was sent a text from Mr Carter:
You are kidding yourself if you think I’m going to put up with your backstabbing
I’ve had enough.

The meeting was apparently sought to be rescheduled to 30 March 2018, which was Good Friday. On 28 March 2018, Mr Mitchell emailed Andrew White, requesting that the Trust provide travel assistance for the TAC and Applicant meeting, to be held on 30 March 2018 in Port Hedland. Mr White replied saying that the next TAC meeting was to be held on Thursday 26 April 2018, and pasting notification of the 26 April meeting, as had been circulated on 26 March 2018.

ISPL did not convene the TAC meeting as requested by Mr Mitchell under clause 9.9 of the Trust Deed and the meeting did not eventuate. Mr Carter has said that not one other person supported it and it was in effect a process for Mr Mitchell and Mr Phil O’Reilly to take over the trust and take over a security contract. Mr Carter also said that the Trust had planned a quarterly meeting to discuss financial matters in the third week of April in any event.

Mr Mitchell had requested the meeting under clause 9.9 of the Trust Deed, which provides that any TAC member may convene a meeting for the purposes of appointing a new trustee and that the method of organising such a meeting as set out in clause 9.6 shall apply. The TAC Rules at item 3 set out the method of organising a meeting under clause 9.6 of the Trust Deed. Relevantly, the Rules provide that, in the event that it is not anticipated that a quorum will be not achievable, such a meeting may be rescheduled.

This instance, as well as other instances referenced in the Report in relation to attempts to remove AET as Trustee, highlight the tension between the Trustee's involvement where one or more TAC members wish to convene a meeting to consider removal of the Trustee. It obviously is not feasible to expect that a meeting be convened at the instigation of a single TAC member, whenever this is requested. However, it is a concern if a Trustee is able to effectively delay such a meeting if it wishes to defer consideration of its removal. Ultimately, what is important is that the process for this to occur is very clear and transparent, so as to limited disputation about such matters.

**Recommendation 5 (Chapter 4)**

ISPL and the TAC give consideration to whether and, if so, how the Trust Deed and TAC Rules be amended to make it clear how and when one or more TAC members may cause a meeting to be convened to consider the removal of a Trustee. Consideration be given to avoiding a Trustee being able to unreasonably delay or prevent such a meeting from being held whilst ensuring that reasonable restrictions apply as to the timing and frequency and necessary support for such a meeting before it must be convened and financial assistance provided by the Trustee.
Overview

Mr Carter has played a central role during much of ISPL's time as Trustee of the Trust. Many people who spoke to the Inquiry spoke interchangeably of ISPL and Mr Carter; to a very large extent his name became, and for many remains, synonymous with that of the Trustee and its management and operation of the Trust and associated activities of ISPL.

There are a number of reasons for this. Most obviously, as described above, Mr Carter was the driving force behind ISPL's engagement by the Njamal community as the replacement Trustee following AET's removal in May 2016, and he has been the key figure with whom members of the Njamal community have communicated. He was the first officer of ISPL to be "at the coalface" liaising with the community in early to mid-2016, a role which he has largely continued to perform, at least until very recently, in September 2018, when ISPL confirmed that he had ceased any role in relation to the Trust. He has an undoubted passion for seeking to empower and advance the interests of indigenous communities in the face of the long standing disadvantages and challenges which they continue to face.

Many Njamal people with whom the Inquiry spoke described Mr Carter in very complimentary terms, and ascribed to Mr Carter, either wholly or largely, the benefits that ISPL has brought to the community during ISPL's tenure as Trustee. Most of those people were generally either employed by the Trust, engaged by it indirectly, or the beneficiaries of support via the Trust in support of business activities. The Inquiry too acknowledges Mr Carter's commitment to improving the standard of living of the members of the Njamal community, and increasing the economic independence of Njamal families, not to mention Mr Carter's often apparently inexhaustible supply of energy.

In very broad terms, it is clear to the Inquiry that Mr Carter has been a driving force behind identifying and implementing many initiatives commenced and maintained by ISPL as Trustee of the Trust. The Inquiry has spoken to a number of members of the Njamal community who express the view that since Mr Carter and ISPL became involved the Trust has made more progress than it had in the previous decade. This is a sentiment that was impressed upon the Inquiry by some members of the community at all stages of the Inquiry's work, including as at the date of the Report.

The Inquiry accepts that through his work with ISPL Mr Carter has had a positive impact on the Njamal community in a number of areas and on the progress made for the advancement of that community. There are a number of examples of the progress fostered by Mr Carter, many of which are dealt with elsewhere in the Report. One which is consistently mentioned is how swiftly Mr Carter moved, following ISPL’s appointment, to obtain first a rented office in South Hedland and then, not too much later, the purchase of an office space in Port Hedland for the business of the Trust. That office is a source of great pride to the Njamal community,
and speaks to Mr Carter's commitment to ensure that ISPL is more than, as it has been put to the Inquiry, simply a traditional, "hands off" trustee. Mr Carter recently advised the Inquiry:

I am the Community Liaison and am the number one contact for community members and am proud of that fact. I have worked hard to improve relationships in the community and the Trust I am asked for advice or to listen on a daily basis.

... Had SSO understood the Cultural significance of my age and that of my family member Arnold Carter, they would have realized we were constantly asked for advice and by other elders who in term gave advice to family members. This was a wonderful realization that the vast majority of Nyamal treated myself and Arnold with cultural respect...

It is true that Nyamal People trusted myself and I clearly understood the Culture and the needs of the group. As Trustee, I did the job with excellent results and the overwhelming support of the Community.

Other examples, primarily of an anecdotal nature, abound of Mr Carter being available to the community on short notice and being ready, willing and able to field calls from all members of the community at short notice and at all hours. In this respect the anecdotal reports received by the Inquiry indicate that Mr Carter, possibly due to his background as a principal at a regional school, has taken on and provides members of the community with a level of practical and pastoral care. As a director of ISPL put it, people with Mr Carter's energy and willingness to engage are a rare species.

Of these matters the Inquiry has no doubt. Mr Carter's commitment, energy and resolve have self-evidently contributed to a number of achievements on behalf of the Njamal community throughout ISPL's involvement with the Trust. Moreover, the Inquiry has no doubt that Mr Carter's desire to do whatever he can to improve the social and economic fabric of the Njamal community is sincerely held; perhaps beyond anything else observed by the Inquiry over the course of its review has been the intensity and consistency with which Mr Carter has elegantly and articulately expressed this view.

However, while for many Mr Carter's contribution is very positively viewed, there is no doubt that Mr Carter has also been a polarising force. His robust, single-minded, and at times forceful and aggressive approach has led to considerable concern by many who have sought to question decisions or practices of Mr Carter and/or the Trustee. He is not frightened of a fight and is quite willing to take steps to protect his reputation from what he considers to be ill-founded accusations and statements, including through litigation. This has led to a reputation which has caused concern by a number of people to whom the Inquiry has spoken of a fear of litigation or perceived retaliation, a concern the Inquiry notes is also generally associated with Ms Westerman.

The Inquiry accepts that many unfounded or unsubstantiated accusations have been levelled against ISPL, Mr Carter and previous Trustees by various members of the Njamal community and that discharging the role of Trustee has been impeded by such matters. Further, trying to implement charitable objectives in the face of demands from persons whose priority is at times focussed on their and their family's needs and benefits, can be particularly challenging, can involve being subject to varying temperaments and assertions and can require a
particular fortitude and commitment. However, notwithstanding these matters, there have been a sufficiently significant number of concerns raised in relation to the conduct of ISPL and Mr Carter's role during ISPL's tenure as Trustee, that his role within it, particularly after he resigned as a director in July 2017, warrants further close attention. That said, the Inquiry makes clear that there is no credible evidence before it to suggest that Trust funds have been misappropriated.

The initial engagement of Mr Carter

According to ASIC records, Mr Carter was a director of ISPL from its registration on 23 February 2016 to 13 May 2016, and again from 24 June 2016 to 4 July 2017. As noted elsewhere in the Report, it appears however that the notifications provided to ASIC by ISPL regarding Mr Carter ceasing as a director between 13 May and 24 June were incorrect and that, as far as ISPL and Mr Carter were concerned, he remained a director. As it transpires, regardless of the ASIC records, during that period Mr Carter continued to perform the role of director, including participating in meetings of directors as the elected chairman.

In any event, from 13 May 2016 until recently two companies associated with Mr Carter, Esplanade Holdings Pty Ltd and Esplanade Consultancy Pty Ltd, supplied the Trust with "trustee services". The initial engagement occurred by an agreement between ISPL and Esplanade Holdings Pty Ltd dated 13 May 2016 (First Deed). Though Mr Carter is not named in the agreement as the principal person by whom the services would be provided, that was the case, as has been confirmed by ISPL and Mr Carter at various points throughout the course of the Inquiry.

Pursuant to the First Deed Esplanade Holdings Pty Ltd was paid $20,000 per month (plus GST) from the Trust Fund for the supply of "Specific Services". Those services were defined in the First Deed as:

"Specific Services" are developing a Trustee business model, working with potential Trust clients, providing strategic advice on the role of a Trustee, attending Board meetings, working with client Trusts to agree on objectives and strategies, providing contracting and employment advice, assisting in implementing the strategies, proving administrative and management support, preparing reports, agendas and minutes, developing policies and procedures and creating alternative income streams

On 21 December 2016 the First Deed was assigned from Esplanade Holdings Pty Ltd to Esplanade Consultancy Pty Ltd by way of a tripartite deed purportedly executed by ISPL and each of the Esplanade companies (Second Deed). In addition to assigning the benefit of the First Deed, the tripartite deed amended the terms of the engagement such that ISPL commenced paying $10,000 per fortnight (plus GST) to Esplanade Consultancy Pty Ltd for Mr Carter's services.

In the course of considering the First and Second Deeds the Inquiry became concerned that they may not have been executed in accordance with ISPL's constitution or section 127 of the Corporations Act 2001. However, after reviewing correspondence on this topic from Mr Carter
the Inquiry it seems that the First Deed was validly executed by Mr Carter for ISPL because, as at 13 May 2016, Mr Carter was both a director and company secretary for ISPL and execution by a single person holding those positions is apparently permitted by ISPL’s constitution. However, the Second Deed was executed for ISPL only by Mr Cullity, who as at 21 December 2016 was only a director. On the face of it, and absent some authority conferred on Mr Cullity by the Board, the Second Deed was not validly executed by ISPL. Nonetheless, it appears that notwithstanding this error, ISPL continued to honour the agreement until Mr Carter left ISPL in September 2018.

ASIC investigation and issue of the Disqualification Notice
On 19 February 2016 ASIC issued a notice to show cause to Mr Carter as to why he should not be disqualified from managing corporations. On 20 July 2017, a decision was made by ASIC to disqualify Mr Carter, pursuant to section 206F(3) of the Corporations Act 2001, from managing corporations for four years, the maximum open period of disqualification being five years. A Disqualification Notice in prescribed form was signed on that date.

For his part, Mr Carter denies that he was validly served with the Disqualification Notice and therefore denies that it has taken effect. Mr Carter recently sought a declaration in the Federal Court of Australia to this effect. However, his application was unsuccessful, with the Court finding that he was effectively served on 31 July 2017, with the Disqualification Notice taken effect from that date. Mr Carter has since appealed that decision to the Full Court of the Federal Court of Australia. The appeal is yet to be heard, though the Inquiry understands it may be listed in the Full Court sittings in November 2018.

Mr Carter also disputes the findings which underlie the Disqualification Notice and has informed the Inquiry that he has recently commenced review proceedings in the Australian Administrative Tribunal seeking to have the Disqualification Notice overturned. In particular, the Inquiry understands from Mr Carter that he contends, amongst other things, that the delegate erred by failing to take into account, or have regard to, a number of documents he says he or his lawyers provided to ASIC, and that the findings of the Australian Tax Office on which ASIC relied had in the interim been successfully challenged. Beyond being aware that the proceedings have commenced, the Inquiry is not aware as to the specific orders being sought and grounds of the application or how far advanced those proceedings are as at the date of the Report.

However, notwithstanding that Mr Carter disputes the basis of the Disqualification Notice, whether it has been personally served on him as required under the Corporations Act 2001 and therefore whether it is of any legal effect, Mr Carter has maintained to the Inquiry since when it first discussed these issues with him that he has out of an abundance of caution taken steps to conduct himself, including by taking advice from his solicitor, as if the Disqualification Notice has taken effect. That advice was provided to Mr Carter and ISPL/Mr White at various

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times has been confirmed by Mr Christensen, without waiving legal professional privilege over the content of the advice.

The Inquiry becomes aware of the Disqualification Notice

Surprisingly, particularly given the Inquiry had been on foot for over two months by the time ASIC issued the Disqualification Notice, no steps were taken by either ISPL or Mr Carter to alert the Inquiry to the fact that ASIC was considering issuing the notice, or to the issue of the Disqualification Notice itself. Rather, the Inquiry became aware of the Disqualification Notice from its own searches of publically available ASIC records carried out in the ordinary course of the Inquiry. Having become aware, the Inquiry made enquiries of Mr Carter to better understand the apparent circumstances of the issue of the Disqualification Notice. It was through these enquiries that the Inquiry also came to understand that Mr Carter disputed service, disputed the process adopted by ASIC, and disputed the conclusions upon which the Disqualification Notice was based, as noted above.

The Inquiry seeks further information from ASIC

As Mr Carter was and has been the driving force behind ISPL and its management and administration of the Trust and had continued to be involved in its affairs, the Disqualification Notice and the ASIC investigation leading to it were matters of relevance to the Inquiry. Consequently, by email dated 6 September 2017 and subsequent formal application dated 22 September 2017 the Inquiry sought disclosure from ASIC pursuant to section 127(4)(b) of the Australian Securities and Investments Commission Act 2001 (ASIC Act) of relevant information, including a copy of relevant documentation, relating to the circumstances surrounding the apparent issue of the Disqualification Notice.

Significant delays occurred in the application being approved, including due to ASIC seeking the views of various persons including Mr Carter in relation to the release of information prior to making a final decision. The Inquiry understands that Mr Carter objected to the release of the information to the Inquiry. Ultimately, ASIC granted the application and on 19 February 2018 the information was provided.

As noted, the provision of this material was made pursuant to the provisions of the ASIC Act. Accordingly, and very importantly, certain use and disclosure conditions were imposed in relation to the information and documentation provided by ASIC.

Having received the information from ASIC, staff of the Inquiry then set about reviewing it.
While the Inquiry has been confidentially provided with information in relation to the above decision, it is conscious that the decision of the ASIC Delegate is in dispute and that Mr Carter broadly denies the findings that were made and appropriateness of the disqualification imposed. Further, the matters obviously have a complex history. The Inquiry also understands that Mr Carter has subsequently taken various actions in relation to a number of the issues. Given those matters, and the inevitable substantial time and resources that would be involved in reviewing such matters and forming an independent view about such matters, and given its terms of appointment, the Inquiry had not sought to do so.

However, absent the Disqualification decision being set aside, the decision and the findings underpinning it are of relevance to various questions considered by the Inquiry, as explained later in this Chapter. In the Inquiry's view, the delegate's reasons are significant for at least three reasons.
CHAPTER 5: MR CARTER

Thirdly, and in any event, putting to one side the findings themselves, the decision to disqualify Mr Carter and lengthy period of the disqualification imposed on him of four years is of significant concern and highly material to questions considered later in the Chapter in relation to the appropriateness of Mr Carter being involved in relation to the management and administration of a charitable trust, at least during the period of the Disqualification Notice.

The Inquiry’s concerns

As Mr Carter has been involved with ISPL, often centrally, for much of the time that ISPL has been Trustee, including as sole shareholder of ISPL from 13 May 2016 to 15 August 2017 (when he was replaced by Esplanade Consultancy Pty Ltd, of which he is the sole shareholder), these findings and observations were of serious concern to the Inquiry.

Accordingly, the Inquiry wished to clearly understand the precise role that Mr Carter had assumed and was continuing to assume in relation to the Trust, its related entities and their management and administration. In part that concern arose because on its terms the Disqualification Notice prohibited Mr Carter from managing corporations, which phrase includes the making, or participating in making, decisions that affect the whole, or a substantial part, of the business of a corporation such as ISPL. Further, the Disqualification Notice, and the findings which underpin it, and nature and extent of Mr Carter’s involvement in the management and administration of the Trust are also relevant to issues for the Inquiry, including:

- the appropriateness of whether, in light of the fact of the Disqualification Notice and the findings which underpin it, and any other relevant matters, Mr Carter should be permitted to continue to have any material role in relation to the management and administration of the Trust or charitable trusts;
- the adequacy of Mr Carter’s disclosure to the TAC and the directors of ISPL of the fact of the issue of the Disqualification Notice;
- the type and appropriateness of any response of ISPL to Mr Carter having been issued with the Disqualification Notice, including in relation to safeguards, processes and practices, if any, put in place by ISPL to define and limit Mr Carter’s role and responsibilities following the issue of the Disqualification Notice; and
- the failure by Mr Carter and ISPL to disclose the fact of the Disqualification Notice to the Inquiry.

The Inquiry’s concerns were accentuated given some of the difficulties that it experienced in receiving adequate explanations and supporting documentation from ISPL in relation to a range of its activities and expenditure, and the role that Mr Carter has undertaken for ISPL since July 2017, matters which are addressed below.

In the context of the management by a corporate trustee of a charitable trust the issues raised by the Disqualification Notice assume a heightened level of significance because of the fiduciary nature of the trustee relationship.
Did Mr Carter notify the TAC and his fellow directors of the Disqualification Notice?

By notice dated 28 May 2018 Mr Carter was asked to answer questions and provide documents in relation to what if anything he communicated to his co-directors of ISPL or to TAC members about ASIC having notified him that it was considering whether to make an order under section 206F of the Corporations Act 2001 and having asked him to demonstrate why he should not be disqualified from managing corporations, and in relation to the issue of the Disqualification Notice.

In response, Mr Carter relevantly informed the Inquiry that:

both before and after 12 May 2018 (sic 2016) I communicated with both the directors of ISPL and members of the Trust Advisory Committee informing them of words the effect that ASIC was seeking to disqualify me from being taking part in the management of corporations. I believe I communicated this to each director and member on different and various occasions the dates of which I no longer recall. I do not recall whether or not I did so in writing although I've been unable to find any copy of the same.

In contrast to this position, Ms Westerman has informed the Inquiry, in effect, that Mr Carter did not declare to her or, as far as she is aware, the members of the TAC, either before, at, or immediately following ISPL's appointment as Trustee, that ASIC had served him with a notice on 19 February 2016 requesting a response as to why he should not be disqualified from managing corporations under section 206F of the Corporations Act 2001. This is supported by a current member of the TAC who has informed the Inquiry, in effect, that the member was not aware of Mr Carter's issues with ASIC when ISPL was appointed Trustee; that, as far as that member is aware, those matters were not disclosed to the TAC by Mr Carter or ISPL prior to ISPL's appointment as Trustee; and that had it been disclosed to the TAC or that member the member would not have voted for ISPL's appointment.

Further, the member told the Inquiry that the first time Mr Carter or ISPL raised the issue of the Disqualification Notice with him and, as far as that member is aware, the TAC, was at a TAC meeting in June 2018. That member had not attended all TAC meetings so that does not exclude the possibility of earlier disclosure, although there is no record of any such disclosure in any of the minutes of TAC meetings as far as the Inquiry was able to ascertain. Further, the first apparent reference (albeit oblique) in the minutes of ISPL board meetings is at a meeting on 4 July 2017 at which Mr Carter resigned as a director.

Mr Carter, in a meeting with the Inquiry in October 2018, appeared to accept, and the Inquiry finds, that he had not told the TAC about the ASIC show cause notice prior to ISPL's appointment in May 2016 because at that point it was a notice and not a penalty and he had

81 The Inquiry understands the reference in Mr Carter's answer to "12 May 2018" to be a typographical error, and that Mr Carter is referring to 12 May 2016, consistently with questions 1 and 2 of the Request made to him by the Inquiry on 28 May 2018.
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no doubt there would be a hearing. However, in a written response he suggested that he had no reason to discuss, nevertheless did advise various "key persons". On the one hand Mr Carter's position is understandable, no final determination having yet been made. However, given the significance of the decision whether to appoint ISPL as Trustee and the important role of Trustee and its fiduciary obligations, it would have been highly preferable for Mr Carter to have advised all TAC members and co-directors prior to the TAC resolving to appoint ISPL. That would have ensured that the TAC and Mr Carter's co-directors were fully informed and avoided any apprehension of them having been misled by omission.

Mr Carter went on to say he told people in about October 2016 when he had an interview with ASIC. Mr Carter said he explained to people and the directors that he could not be there for four days because of the interview.

Further, while Mr Carter may have alerted "key Trust members" at about the time of the meeting that ASIC was considering whether to disqualify him from being a director, the Inquiry finds that not all TAC members were made aware, including Ms Westerman. There is no record of any such notification in minutes of TAC meetings or directors' meetings, except for a possibly oblique reference at a 4 July 2017 meeting at which Mr Carter resigned as a director and it was discussed that a contract would be prepared for him to provide CEO services. Further, in response to an email from the Inquiry requesting clarification about this matter Mr Carter responded on 5 October 2018 to say:

On or about 14th July, Mr Christensen informed myself that I was to be personally served a notice by ASIC in relation to suspension as a Director and Managing a Corporation. To this day I have not been served. Nevertheless, I informed the Directors of the position and asked that adequate steps be made to ensure I was uncompliant (sic) with the order. Andrew White was appointed. All Directors knew. I also informed key Trust members, as I aware this information was public and I did not want to wait till the next TAC meeting

The Inquiry accepts that Mr Carter notified his fellow directors about the issue of the Disqualification Notice sometime shortly after he became aware of it having been issued. It is unclear however when Mr Carter advised TAC members of having been issued the Disqualification Notice. While he may have advised "key Trust members", the Inquiry is satisfied that not TAC members were made aware of the position by Mr Carter or ISPL until sometime in 2018, the topic being raised at a TAC meeting in June 2018 after an article of an investigative journalist, Mr Baker, had been published in May 2018. Given the central role Mr Carter then played on behalf of the Trustee in relation to the management and administration of the Trust in the Inquiry's view he and ISPL ought to have clearly notified the TAC that ASIC had issued the Disqualification Notice, and ensured that the notification was properly recorded and how that may impact on the scope of any ongoing role that may be assumed by Mr Carter.
CHAPTER 5: MR CARTER

What ISPL and Mr Carter say about Mr Carter's role after July 2017.

**ISPL's responses to Inquiry’s Notice dated 18 August 2017**

By questions 30, 31 and 32 of its Notice dated 18 August 2017, the Inquiry asked ISPL to explain ISPL's decision making structure (question 30), who had authority for the making of decisions on behalf of ISPL (question 31) and what Mr Carter's role was in the organisation (question 32).

Subsequently, on 18 September 2017, in response to question 30 of the Inquiry's Notice dated 18 August 2017, and under the heading "Overview", ISPL explained:

In the Administration of the role as Trustee to the Njamal People's Trust, ISPL employs a consultative approach to facilitate as wide an involvement of Njamal People and the use of external expertise as possible.

- The Trust Deed already provides for a Trustee Advisory Committee to be operative with an elected representative from each of the 14 family groups.
- To supplement this and to promote the free flow of experience and ideas, the operations of the Njamal Peoples Trust are also guided by a Management Advisory Committee, generally of 6 members, comprised of 1 representative from the ISPL Board, the Manager- Programs & Services, and 4 Senior Consultants who are engaged upon other works for the Trust's Objectives.

ISPL is cognisant of the preference of the Njamal People to have important dealings or matters important to them to be dealt with in a face to face situation as much as is practicable.

ISPL has utilised this structure informally since inception, and with all management functions and managers being responsible to the Board of Management.

It is proposed in the next few months to formally implement the structure and system as part of the annual review of ISPL and NPT functions, efficiencies and processes.

An overview of this structure is provided separately on the following page and included in the attached records for better legibility.

Under the heading "Comment" ISPL explained:

This structure and composition of work place profiles involved has proven to provide a knowledge base and forum to professionally arrive at the best decisions available, and with cross functional input, awareness and feedback.

It has assisted Mr. Carter in his role as the Manager- Programs and Services, and this role is further guided by the parameters of:

- The Objectives of the Trust Deed;
- The stated wishes and wants of the Njamal People, as articulated at their community meeting with ISPL in May 2016;
- Direction from the Board of ISPL;
- The prevailing annual budget;
- An accordance to the stated objectives and strategies required to fulfil I the targets within the rolling 3-year Strategic Plan and its Key performance indicators; and,
- Financial management and administrative probity and controls.

As previously stated, ISPL is undertaking a whole of function and services review, with the intent of attaining more efficiency and improved system, and to define and implement a proper hierarchy and instrument for the delegation of authority.

This process however, has had to be parked while the Inquiry and other matters relating to Ms. Westerman can be resolved.
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The structure specified that Mr Carter, Esplanade Holdings – Management and Marketing was part of the Management Advisory Committee, that the position he held of Manager, Programs & Services was directly responsible to that Committee and that, in turn, the commercial and operational structure of the Trust fell directly under his position's responsibility, with commercial operations being administered by that position and member services, business development, heritage and corporate services.

Next, in response to question 31 of the Inquiry's Notice dated 18 August 2017, concerning the authority for making decisions on behalf of ISPL, ISPL explained, inter alia, under the heading "Authority":

All positions, all managers and all functions are ultimately responsible to the Board. The nature of the workload and daily responsibilities is such that Mr. Carter has closest dealings with applicants, Liaison Officers and individual TAC members in the field, and travels frequently to the Pilbara for that purpose. Consequently, many announcements and meetings representations are allocated to his role. Any management decisions are made within the parameters of a formal process that has inbuilt reviews and records to ensure consistency of policy and purpose, and an adherence to controls.

Finally, in response to question 32 concerning Mr Carter's role at ISPL, ISPL provided a one and a half page narrative together with a small structure diagram. Not all of that material is reproduced here. However, relevantly, ISPL repeated its response to questions 30 and 31, before expanding as follows:

Mr. Carter has an extremely important role in the administration of the management needs of ISPL for its administration and delivery of Trustee services to NPT, particularly in maintaining his regime of regular consultative meetings with Njamal People and assisting them face to face with their current or personal issues. In this role, he is often seen to be the face of ISPL, and although he may have been one of its founders, he is not a Director. He is a Manager; and like all managers, he reports to and is responsible to the Board on all matters.

In the Inquiry's view, these responses (that is, the responses to questions 30, 31 and 32) reflected Mr Carter's apparently central position within the ISPL business structure, at least as at 18 September 2017. What is less clear and what is considered below, is whether that role was undertaken as a "Programme Manager" or similar, or whether Mr Carter was in effect the Chief Executive Officer for ISPL.

**The Draft CEO Services Agreement**

The documentation provided in response to question 30 also included copies of minutes of various directors' meetings, including on 4 July 2017, which record that on that date Mr Carter advised the Board that due to ongoing issues with ASIC it may be more appropriate for him to resign as a director and work as the Chief Executive Officer. It also recorded that "The Trustees noted that Rod's resignation may be forthcoming, and resolved to prepare a contract for the role of Chief Executive Office in anticipation".

In that respect, the Inquiry was also provided with a draft Chief Executive Officer Services Agreement between ISPL as Trustee for the Trust and Esplanade Consultancy Pty Ltd as
trustee for the Ryki Trust with a proposed term of 36 months and commencement date of 1 July 2017 (Draft CEO Agreement).

Under the Draft CEO Agreement it was contemplated that Esplanade Consultancy Pty Ltd would provide Chief Executive Officer services by Mr Carter to ISPL and that the remuneration for taking on the role was, consistently with the sum paid for the "Specific Services" in the Second Deed, $10,000 per fortnight (plus GST).

The Draft CEO Agreement is poorly drafted. However, it is clear that it envisaged that Mr Carter would be engaged "[o]n behalf of the Directors of ISPL, [to] implement the 7 items of services in the Agreement of 25 November 2016 and the letter of 12 May 2106" [sic].

It is not clear what the "7 items of services" specifically refer to as the "letter of 12 May 2016" contains eight items and the "Agreement of 25 November 2016" contains ten. However, given that context, the Inquiry finds that the phrase is a reference to all of the services which ISPL promised to provide to the Njamal community by its letters dated 12 May 2016 and 25 November 2016.

The Draft CEO Agreement set out Mr Carter's proposed duties, which were extensive, as follows (spelling, grammar and sentence structure uncorrected from the original):

- Work with the Trustees to establish the ISP budget including budgets
- In conjunction with the Trustees and TAC, create a 3 year rolling Strategic Plan with agreed budgets
- Work with trustees, TAC and Members to resolve daily issues
- Delegated authority to implement the agreed Strategic Plan, including the appointment of staff and the
- For proposed initiatives outside the Strategic Plan, prepare a business case for Trustee consideration
- Provide governance support to the Trustees and TAC, including investment strategy and implementation, audits, compliance with ASIC and ACNC, trust Deed
- Manage on behalf of ISPL the provision of labour to NPT in accordance with the Agreement dates 12 May 2016
- Report to Trustees and TAC on quarterly performance, annual review

It can be seen that Mr Carter's proposed role and duties, as set out in the Draft CEO Agreement, were little different to the "Specific Services" he (via the Esplanade companies) provided to ISPL pursuant to the First and Second Deeds referred to previously. In the circumstances the Inquiry finds that the Draft CEO Agreement contemplated a continuation in substance, under a different name and in a different form but for the same remuneration, of the role that Mr Carter (via the Esplanade companies) performed pursuant to the First and Second Deeds.

Having received and considered these responses and their attachments (including the Draft CEO Agreement), the Inquiry by Notice to ISPL dated 6 November 2017 requested an executed copy of the Draft CEO Agreement.
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At a meeting on 13 November 2017 convened at the request of ISPL and attended by a range of representatives including Mr Carter, Mr White, Mr Parker, Mr Barry Taylor and Mr Ian Taylor, when asked about the CEO agreement Mr Carter advised that the Inquiry already had it. In response, a staff member of the Inquiry indicated that the Inquiry only had the Draft CEO Agreement and in turn Mr Carter indicated that they [an apparent reference to ISPL] would get the Inquiry the executed one. No one at that meeting dissented or suggested that there did not exist, in fact, an executed copy of the Draft CEO Agreement. After the meeting, the Inquiry maintained its request for provision of an executed copy of the Draft CEO Agreement, however it was not provided.

Thus, in a Notice issued 22 December 2017 the Inquiry again requested provision of the executed version of the Draft CEO Agreement. In response, rather than provide an executed version of that agreement, Mr White forwarded copies of the First and Second Deeds (which the Inquiry already had), indicating that payments were changed from the one Esplanade company to the other from January 2017 but were not duplicated and that the change was requested by the service provider.

Later, on 5 February 2018, Mr White, on behalf of ISPL, then relevantly indicated, in effect, that beyond the First and Second Deeds, no other written consultancy agreements for Mr Carter's services existed. This response was quite different from that received verbally from Mr Carter at the meeting on 13 November 2017.

The matter was raised by the Inquiry, yet again, at a meeting attended by Mr Carter with Mr Christensen, on 2 May 2018. At the time, the Inquiry understood Mr Christensen, who acts for Mr Carter in relation to the Disqualification Notice, to be in attendance at the meeting as Mr Carter's solicitor. However, on 10 October 2018, in response to an invitation to ISPL to respond to possible findings and recommendations which invitation included a statement to the effect that Mr Christensen was Mr Carter's solicitor, the Inquiry received a letter from Mr Christensen clarifying the position:

CX Law and Mr Christensen act for Mr Carter in respect of the ASIC matters regarding Mr Carter’s disqualification. Neither CX Law nor Mr Christensen act for Mr Carter in respect of his involvement with ISPL or the matters to which the Inquiry is seeking responses and any implication in the Letter that Mr Christensen acts for Mr Carter in this regard is incorrect.

CX Law and Mr Christensen act for ISPL in respect of the matters to which the Inquiry is seeking responses and any attendance by Mr Christensen at the Inquiry with Mr Carter was as legal representative of ISPL and not as Mr Carter’s solicitor.

Thus, it seems, Mr Christensen's attendance at the meeting on 2 May 2018 was in fact in his capacity as legal representative of ISPL, not Mr Carter.

Nonetheless, at that meeting it was foreshadowed by Mr Christensen near the outset of the discussion that Mr Carter may decline to answer various potential questions, particularly in relation to the role he assumed after the issue of the Disqualification Notice, on the ground of privilege against self-incrimination / exposure to a penalty, and that it may be preferable for
certain questions relating to that topic to be put in writing. Mr Carter nevertheless answered a range of other questions to which no objection was taken, and it was indicated that the Inquiry expected to issue further questions in writing in particular in relation to issues such as the role assumed by Mr Carter.

At that meeting, and to the surprise of the Inquiry, Mr Carter explained that, in fact, he never took on the role of Chief Executive Officer. He indicated that he had sought advice from Mr Christensen right away (the Inquiry infers this to be a reference to immediately following the issue of the Disqualification Notice or possibly Mr Carter becoming aware of the likelihood of this occurring) and was advised that he could not be a CEO and was also advised about limitations that applied to his performance of roles for ISPL. Mr Christensen indicated that he advised Mr Carter that he could not do "CEO stuff", like make important decisions, and that he could make decisions under delegated authorities but not in a personal capacity.

As part of a process of inviting responses to possible findings and recommendations that may be open to the Inquiry to reach, in October 2018 the Inquiry invited Mr Carter to provide the Inquiry with further details relating to, or documents in relation to, the taking by him of advice in relation to the limits on his role, or in relation to any changes in his role, the precise timing of when that advice was sought and obtained, and the precise timing of when any limits or changes to the nature and scope of his role occurred following his resignation as a director of ISPL and the issue of the Disqualification Notice. Mr Carter responded to indicate, in effect, that he had taken advice on a regular basis from Mr Christensen from about 14 July 2017 (when Mr Christensen informed him that he was to be personally served with the Disqualification Notice) and that Mr Christensen's advice provided him with valuable insight.

Mr Christensen also responded, on instructions from both Mr Carter and Mr White (for ISPL), as follows:

…I am instructed both by Mr Carter and ISPL to advise that have provided advice to both of them from, time to time, in relation to the limits of Mr Carter's role, and changes, consequent upon the determination by ASIC. The first instance would have been around the time when I became aware of the determination.

I am not instructed that legal professional privilege has otherwise been waived.

To return to the meeting on 2 May 2018, Mr Carter indicated that there had not been a two-step process, from being a CEO to a project manager or similar, that "they" came to see him to see if he could become CEO but he indicated that he could not. He indicated that he had signed a contract after he resigned (as director) and that he would provide that.

Mr Carter also provided a range of answers to queries which had not been clearly addressed in previous responses from ISPL and indicated a willingness to provide, himself or via his solicitor or ISPL, certain further documents to assist the Inquiry.

By email dated 17 May 2018 the Inquiry requested that ISPL provide copies of any agreements signed by Mr Carter in connection with his employment by, or services provided...
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to, ISPL as Trustee of the Trust (including, for example, the final agreement signed by Mr Carter in relation to providing CEO services, alternatively Programme Manager services). By email of the same date the Inquiry also requested that Mr Carter provide various further documents to the Inquiry including copies of any such agreements.

Mr White subsequently confirmed, on 6 June 2018, his earlier advice to the Inquiry that no such document existed.

In contrast, by email dated 24 May 2018 Mr Christensen indicated that:

The requested document(s) cannot presently be located however searches are continuing (unfortunately, some documents have disappeared from the Port Hedland office and it is hoped that these are not some of them). Once found they will be provided to you.

The Inquiry followed up with Mr Christensen on 7 August 2018 and the following day Mr Christensen responded on behalf of Mr Carter to say that it was believed that the original agreement had been illegally removed from ISPL’s Port Hedland Office. No evidence was provided to support that belief at that time. However, in the context of another document referred to later in the report which it was also suggested may have been stolen, on 2 October 2018 Mr Carter supplied the Inquiry with a letter signed by a member of the Njamal community and titled "RE: Sharon Westerman". In that letter the community member writes that she was at a TAC meeting in South Hedland in October 2017 (which the Inquiry determines was actually October 2016) and that when the meeting came to a close and everyone was leaving, she and another staff member witnessed Ms Westerman enter the building and begin rummaging through paperwork that was on the table to be filed. The writer says that Ms Westerman became angry whilst reading the paperwork she snatched from the table. As outlined earlier in the Report, Ms Westerman was asked about this incident. She explains that she did attend the South Hedland Office on 26 October 2016 and that she did so because she had been excluded from the TAC meeting which was being held. Ms Westerman also explains that she did take some paperwork from the office including minutes of a meeting. However, Ms Westerman denies taking anything like contractual documents. Irrespective of which documents were taken by Ms Westerman, that conduct was inappropriate. In any event, that event preceded by more than 7 months the period when the resignation of Mr Carter as a director of ISPL and his engagement to perform CEO services or some different role was in contemplation.

No adequate explanation has been provided as to why a copy of the original agreement that Mr Carter stated had been signed (whether a final agreement in relation to providing CEO services, alternatively Programme Manager services) was never supplied, or at least why details of the terms and conditions of the agreement, when it was entered into and by whom, could not be supplied.

Mr Carter also suggested to the Inquiry in response to a possible finding that the terms on which Mr Carter (or any entity through which he has provided services) has been
engaged since 31 July 2017 and any changes to his roles and responsibilities since then, and when, have not been properly documented by way of an executed agreement or otherwise that:

Terms and agreements have been developed in conjunction with lawyers. This process has been ongoing, with an emphasis on complying on the ASIC notification, until such a time as the full appeal is heard. This process has been diligently and honestly followed, with open communication to all parties. It is false to suggest anything different and concerning that no credible evidence from community or Directors has been requested.

In another response to this issue Mr Carter responded however:

No agreement was signed nor needed to be signed. The role was to work under the direction of the Director. The role was understood by all parties.

In a further response he commented:

The role of myself, until I resigned and handed shares to the Director, was very clear. I was employed through Esplanade Consultancy. I circulated an agreement to my lawyer and the Director. I specifically took advice and I am sure ISPL took advice. The intended role was Community Liaison and business development. This was clearly understood by all parties. I was very effective in this role, with regular reviews from the Director. My position became untenable upon the release of documents by the inquiry, including documents leaked to the Age newspaper. The only thing “opaque” here is the reason for the inquiry.

[It should not be left without comment that the unsubstantiated suggestion, which Mr Carter has in substance made on more than one occasion, of the suggested leaking of documents to the Age newspaper by the Inquiry is rejected. Mr Carter has previously expressed such concerns in relation to financial information appearing in an article appearing in the Age (and affiliated newspapers) authored by Richard Baker. Insofar as financial information is referenced in the article Mr Carter may have overlooked that by the time the article had been published in May 2018, the Trust financial statements for 2016/17 had been filed by ISPL with the ACNC and were publically available via its website.]

Returning to the explanations given by ISPL and Mr White, and Mr Carter and Mr Christensen as to the existence of an executed Draft CEO Agreement or any other agreement as to the terms of Mr Carter's engagement after his disqualification from managing corporations, they are inconsistent, and the Inquiry is left in real doubt as to whether the Draft CEO Agreement was ever finalised and executed.

The Inquiry concludes that:

- it is uncertain whether a finalised version of the Draft CEO Agreement was at some point executed although not provided to the Inquiry;
- no written agreement was executed or otherwise entered into in relation to the provision of services in relation to program or project management or coordination, effectively by Mr Carter;
no proper record was prepared or maintained of the decision by ISPL to enter into an
oral agreement in relation to Mr Carter's ongoing role, by whom it was authorised,
with whom it was entered into, whether with Mr Carter himself, or Esplanade
Consultancy Pty Ltd or any other entity, and its terms or conditions; and

- ISPL breached its obligations as Trustee, including under clause 7.6 of the Trust,
  Deed to keep accurate records of all decisions and resolutions made by ISPL in its
capacity as Trustee.

Mr Carter’s responses to the Inquiry’s Notice dated 28 May 2018

As foreshadowed at the meeting on 2 May, on 28 May 2018 the Inquiry issued a Notice to
Mr Carter pursuant to section 20(3) of the Charitable Trusts Act 1962 asking Mr Carter to
respond to a number of questions primarily directed at better understanding what roles,
functions, services and activities he had engaged in, in connection with the Njamal People’s
Trust, both before and after the issuing of the Disqualification Notice.

The background to the issue of that Notice was set out in a letter to Mr Carter dated
28 May 2018 which, for context, the Inquiry quotes at length:

Indigenous Services Pty Ltd (ISPL) has previously supplied the Inquiry with certain information
and copies of documentation relevant to the roles, functions, services and activities in which
you have engaged in connection with the Njamal People’s Trust (Trust) including, in particular:

- Services Agreement dated 13 May 2016 between ISPL and Esplanade Holdings Pty
  Ltd, executed by you as director for ISPL and Ryan Carter as director for Esplanade
  Holdings Pty Ltd.

- Deed of Variation to Contract dated 21 December 2016 between ISPL, Esplanade
  Holdings Pty Ltd and Esplanade Consultancy Pty Ltd as trustee of the Ryki Trust, for
  the purpose of assigning the Services Agreement dated 13 May 2016 from Esplanade
  Holdings Pty Ltd to Esplanade Consultancy Pty Ltd, and to amend the consideration
  under that agreement from $20,000 per month (plus GST) to $10,000 per fortnight
  (plus GST), but to otherwise leave the terms of the Services Agreement unchanged.

- A draft, unsigned and undated Chief Executive Officer Services Agreement (and KPI
  schedule) between ISPL and Esplanade Consultancy Pty Ltd as trustee for the Ryki
  Trust, the commencement date of which was specified as 1 July 2017, and for which
  Esplanade Consultancy Pty Ltd was proposed be paid $10,000 per fortnight (plus
  GST) to provide your services as Chief Executive Officer to ISPL as trustee of the
  Njamal People’s Trust.

- The ISPL & Njamal Businesses Business Management System Authorisation Matrix,
  Rev 5, dated November 2017, by which you as “Programme Manager” were
  authorised to:
    o expend budgeted capital expenditure of $50,000 or less;
    o expend unbudgeted capital expenditure of $5,000 or less;
    o expend budgeted operational expenditure of $10,000 or less;
    o expend unbudgeted operational expenditure of $5,000 or less;
    o expend project expenditure to up to 10% over approved project budgets;
    o incur domestic travel expenses (hotels, airfares and expense claims);
    o within approved budgets and for direct reports, recruit, dismiss and discipline
      salaried employees, waged employees, independent contractors and
      consultants;
    o issue tender submissions or give contract approval of less than $250,000;
CHAPTER 5: MR CARTER

- approve project budgets; and
- make distributions under the Trust Deed up to 50% in excess of the Distribution Policy.

The Inquiry understands from its meeting with you and your solicitor, Mr Christensen, on 2 May 2018 that, the draft Chief Executive Officer Services Agreement was not in fact executed but that some form of agreement was entered pursuant to which you performed the role of Programme Manager. The Inquiry understands from your solicitor's email dated 24 May 2018 that the agreement pursuant to which you provided “Programme Manager Services” is being located and will be supplied once found.

Thereafter followed a list of 16 questions which Mr Carter was requested to answer.

The first 6 questions were directed to understanding what if anything Mr Carter communicated to his co-directors of ISPL or to TAC members about ASIC having notified him that it was considering whether to make an order under section 206F of the Corporations Act 2001 and having asked him to demonstrate why he should not be disqualified from managing corporations, and in relation to the issue of the Disqualification Notice.

Then followed 6 questions relating to his role, functions, services and activities engaged in, and authority, both before and after the issue of the Disqualification Notice, as well as any limitations, supervision or controls over such matters.

It was also followed by 3 questions in relation to any agreements entered into by Mr Carter in relation to the performance by him of any such roles, functions, services and activities, invoices he has issued or caused to be issued to ISPL or other listed entities and any invoices he had issued to Esplanade Holdings Pty Ltd or Esplanade Consulting Pty Ltd.

Mr Carter was also asked to explain in detail the nature and length of his professional, business, commercial and/or working relationships with a range of listed people being Andrew White, Greg Parker, Wesley Aird, Jack Cullity, Clinton Wolf, Richard Green, Graeme Stevens, Jing Guo, Joyce Lu and Sinou Xu.

Mr Carter responded to say he would require time to take advice and to answer questions. Shortly thereafter on 5 June 2018 the Inquiry received a substantive response from Mr Carter as follows:

Dear Sir
I refer to your email of 28 May 2018.

I will be responding to the first 2 questions you raise but not the balance. It is currently asserted by ASIC that I am disqualified from taking part in the management of corporations. On that basis, I would decline to answer those questions as I am not required to under the requisite statute to answer questions directed towards the possibility of me having committed an offence capable of giving rise to a penalty. As an aside an application has been made to the Federal Court of Australia to determine whether the position taken by ASIC is correct. Depending upon the result of that decision I maybe (sic) able to answer your questions at a later time.

In respect to questions 1 and 2 which imposed I can answer them together in that, both before and after 12 May 2018 [sic 2016] I communicated with both the directors of ISPL and members of the Trust Advisory Committee informing them of words the effect that ASIC was seeking to disqualified me from being taking part in the management of corporations. I believe I communicated this to each director and member on different and various occasions the dates of which I no longer recall. I do not recall whether or not I did so in writing although I've been unable to find any copy of the same."
While Mr Carter referenced questions 1 and 2, his response was, in effect, a response to questions 1 and 4.

Insofar as Mr Carter refused to answer the remaining questions, the Inquiry does not accept that the reason asserted (in effect privilege against self-incrimination or exposure to a penalty) provided a legitimate basis to refuse to answers all the remaining questions, particularly questions 5, 6, 7 and 16. His failure to do so impeded and delayed the Inquiry.

At present the Charitable Trusts Act 1962 does not provide a mechanism, in the way many modern statutes conferring investigatory powers do (e.g.: ASIC Act), by which answers to questions of this type can be compelled albeit that the use of the answers might be restricted to use for specified purposes in relation to the relevant investigation (and not for other purposes, e.g.: prosecution of an offence disclosed by the answer). The Inquiry considers it desirable that this be addressed by legislative amendment to the Charitable Trusts Act 1962, a topic more fulsomely addressed by the Inquiry in Chapter 13.

Community Relations Manager Position Description Document

Finally, on the topic of what Mr Carter has said about his role with ISPL since July 2017, on 10 October 2018 Mr Carter provided the Inquiry with a draft MS Word document titled "Position Description" and which, on its face, sets out the role and responsibilities for a position called "Community Relations Manager". The document is undated and unsigned and the Inquiry had never seen it before receiving it from Mr Carter on 10 October 2018.

Mr Carter provided that document to the Inquiry under cover of an email, which was copied to Mr White and Mr Christensen, in which Mr Carter stated:

In relation to the duties I was performing since the appointment of Mr White.
This is the role circulated to the community.
Given, my role has effectively been terminated as a consequence of proposed recommendations, it is prudent to point out this was the role as I understood it.
Clearly has nothing to do with the Management of a corporation.
My concern being, and that of the Directors, is that no matter what position I am allocated, SSO will interpret this as being covered by the disqualification.
This is the disappointing stance that has been taken, without due consideration of the facts.
I remain very skeptical as to the real reasons for this inquiry.

By reply email dated 10 October 2018 the Inquiry wrote to Mr Carter for clarification:

Could you please clarify when you say the document was created and circulated to the community? The Inquiry's understanding of your email below is that you are not suggesting it was created and circulated during your tenure with ISPL. Rather, you say that while it is a document recently created and circulated it is nonetheless a document whose content reflects the role you performed during your time with ISPL.
CHAPTER 5: MR CARTER

Mr Carter responded 6 minutes later to say:

This document was circulated last year. When Mr White commenced the Directorship he produced a number of documents. The difficulty being to make sure, under legal advice, my position was not to be seen as Managing a Corporation.

This was the document I addressed to the community.

The Inquiry forwarded this response to Mr White to ask him to advise, on behalf of ISPL when the document was created, by whom it was created, and when it was circulated. The Inquiry also requested Mr White provide any other documents in existence (if any) which evidence the time of its creation and circulation.

Mr White relevantly responded as follows:

This goes back quite some time.

I'm aware of the position description from discussions of the role and potential roles that Rod could perform with Lee’s advice.

I'm not aware of when the doc was created, by whom or how Rod may have shared this information other than the discussions we had at the time.

As previously advised, Rod is no longer working for ISPL.

Given the inconsistencies between the explanations given by Mr Carter and Mr White, and given that the first time this document (and the use of the title “Community Relations Manager”) was provided to the Inquiry was by Mr Carter on 10 October 2018 notwithstanding the Inquiry had sought information of this type since learning of the Disqualification Notice in mid-late 2017, the Inquiry is unable to determine with any certainty when the document was created or circulated to the community, or indeed whether it was circulated at all.

**ISPL’s responses to the Inquiry’s Notice dated 1 June 2018**

In any event, the Inquiry proceeded to issue similar questions to those set out in the Notice to Mr Carter to ISPL by Notice dated 1 June 2018.

In response to a question about what roles, functions, services and activities Mr Carter has engaged in since 20 July 2017 in relation to ISPL and various related entities, ISPL (through its director) responded by email of 12 June 2018 as follows:

Response: Since Mr Carter’s resignation as Director of ISPL, his role has been defined to focus on the development and coordination of Trust programmes and initiatives approved by the TAC and to assist in business development activities across the board.

In relation to Trust activities, (primarily items b, c and d above) the function is mainly to coordinate the actions necessary to deliver the expected outcomes of the TAC approved activities in accordance with schedule and budget guidelines.

In relation to the ISPL and other contracting activities (primarily items a and e to m), the activities include promoting the capability of the various entities to compete and deliver project services to the various customers to achieve the stated goals of improving the levels of involvement of the Njamal members in the project environment and ensuring mining agreements deliver real and meaningful outcomes for the Njamal people.
In response to a question as to whether there have been any changes in (including cessation of) the roles, functions, services and activities Mr Carter engaged in since 20 July 2017, ISPL (through its director, Mr White) responded by email as follows:

Response: It is fair to say that the changes in specific activities are made constantly in response to the changing circumstances of the projects and outcomes. Some projects have finished early or have been put on hold for various reasons. The status of mining company tenders and opportunities provided under the various mining agreements and in general commercial circumstances present daily challenges to which we are required to respond in order to maximise the potential for business and job creation opportunities.

The recent award of a significant road construction contract by Pilbara Minerals on the Pilgangoora Project to the NPJV is a good example of how the daily focus changes. Securing these works requires constant attention to ensure the client’s needs are addressed and that we can deliver the scope and quality required with maximum Njamal resources. The role does not change.

ISPL also explained that Mr Carter commenced the role of Programme Manager (or any similar role) on his resignation as a director of ISPL, which the Inquiry understands from minutes of directors meetings supplied by ISPL, took effect on or about 4 July 2017.

In response to question 9 ISPL responded (responses in *italics*):

9. Please explain, in detail, what involvement Mr Carter has had since 20 July 2017 in relation to:

a. authorising or making other decisions in relation to the expenditure of funds of the Trust or any of the entities listed in question 6 above including:
   (i) budgeted capital expenditure;
   (ii) unbudgeted capital expenditure;
   (iii) budgeted operational expenditure;
   (iv) unbudgeted operational expenditure;
   (v) project expenditure;
   (vi) incurring of domestic travel expenses including hotels, airfares and expense claims; and
   (vii) distribution, lending and investment.
   Response: Involvement was limited to scope and budget development in line with his role as programme coordinator. No involvement in approvals

b. the recruitment, dismissal and discipline of employees, independent contractors and consultants of ISPL or any of the entities listed in question 6 above;
   Response: Involvement was limited to performance and capability advice in line with his role as programme coordinator. No involvement in approval of appointments or terminations.

c. the appointment and removal of any directors of ISPL or any of the entities listed in question 6 above;
   Response: None

d. the making of any resolutions or decisions by the shareholder/s of ISPL;
   Response: None

e. the management and supervision of employees, independent contractors and consultants of ISPL or any of the entities listed in question 6 above;
   Response: Involvement was limited to performance and capability advice in line with his role as programme coordinator.

f. the management, oversight and conduct of the Njamal people's native title claims being conducted on behalf of the Njamal people by the Applicants (Applicants) in Federal Court of Australia proceedings Njamal #1 and Njamal #10;
CHAPTER 5: MR CARTER

Response: These are matters for the Applicant. The Trustee has provided all necessary support to assist the Applicant to achieve the goal of Determination. Mr. Carter’s role has been to support any requirements of the TAC and Applicants in this matter in so far as his role as programme coordinator extends. Most of this work however is conducted by the Legal representatives elected by the Applicant.

g. the negotiation or implementation, on behalf of ISPL, the Applicants and/or Njamal people, or any of the entities listed in question 9 above, of any agreements (including, for example, joint venture agreements, native title agreements, mining agreements);

Response: Mr. Carter’s role has been to support any requirements of the TAC and Applicants in this matter in so far as his role as programme coordinator extends. Most of the detailed agreement drafting and review work however is conducted by the Legal representatives elected by the Applicant or appointed by TAC as well as independent advisors with specific knowledge and experience in each circumstance.

h. issuing tender submissions or giving contract approvals on behalf of ISPL, the Applicants or any of the entities listed in question 6 above;

Response: Mr. Carter is not responsible for issuing tender submissions or contract approvals

i. approving project budgets on behalf of ISPL or any of the entities listed in question 6 above;

Response: Mr. Carter is not responsible for approving budgets

j. the setting of policies, including investment and distribution policies, of the Trust or any of the entities listed in question 6 above

Response: These are matters for the Applicant and the TAC. The Trustee has provided all necessary support to assist the Applicant and TAC to achieve the goals of the Trust Deed. Mr. Carter’s role has been to support any requirements of the TAC and Applicants in this matter in so far as his role as programme coordinator extends.

It is important to note that the Trust objectives extend throughout the entities that the Trust owns or controls and so there are no changes in policies between the entities.

k. the setting of the strategic objectives of the Trust or any of the entities listed in question 6 above;

Response: These are matters for the Applicant and the TAC. The Trustee has provided all necessary support to assist the Applicant and TAC to achieve the goals of the Trust.

It is important to note that the Trust objectives extend throughout the entities that the Trust owns or controls and so there is no change in policy between the entities.

Mr. Carter’s role has been to support any requirements of the TAC and Applicants in this matter in so far as his role as programme coordinator extends.

l. the convening of meetings of the TAC, the Applicants, working groups or the Njamal community;

Response: These are matters for the Applicant and the TAC. The Trustee has provided all necessary support to assist the Applicant and TAC to achieve the goals of the Trust.

The Trustee provides feedback on matters for the TAC to consider and this often results in convening of further meetings to resolve issues.

Mr. Carter’s role has been to support any requirements of the TAC and Applicants in these matters in so far as his role as programme coordinator extends.

m. communicating with the TAC, the Applicants, working groups or members of the Njamal community; or

The Trustee provides feedback on matters for the TAC to consider and this often results in convening of further meetings to resolve issues.

Mr. Carter’s role has been to support any requirements of the TAC and Applicants and to answer any questions in these matters in so far as his role as programme coordinator extends.

n. the making of decisions by the TAC, the Applicants, working groups or the Njamal community.

Response: These are matters for the Applicant and the TAC. The Trustee has provided all necessary support to assist the Applicant and TAC to achieve the goals of the Trust.
CHAPTER 5: MR CARTER

The Trustee provides feedback on matters for the TAC to consider and Mr. Carter’s role has been to support any requirements of the TAC and Applicants and to respond to any questions in these matters in so far as his role as programme coordinator extends.

As to the extent to which since 20 July 2017 Mr Carter's roles, functions services and activities were subject to any limitation, supervision or control, ISPL responded to say Mr Carter reports to the directors and that controls and limitations over Mr Carter's roles, function and activities are clearly defined in the Authorisation Matrix, a copy of which the Inquiry already had and the application of which had been outlined in advice provided to the Inquiry by Mr Christensen. To the extent that was a reference to the most recent version of the Authorisation Matrix, dated 8 April 2018, a copy of which had been provided to the Inquiry on 10 June 2018, the Inquiry notes that this version was materially more restrictive than the preceding version approved in October 2017.

Mr Carter suggested to the Inquiry that controls were applied by way of many discussions daily.

The impression one is left with from the responses provided by ISPL, which are rather vague, and responses from Mr Carter, is that Mr Carter's role was very limited, largely it seems to a supporting role. In addition, at least one aspect of the response is known to the Inquiry to be incorrect. That is, while ISPL says that Mr Carter had no involvement in the appointment or removal of any directors of ISPL or related entities, the documents discussed below, and later in the Report in respect of corporate governance, demonstrate that assertion is incorrect: most obviously Mr Carter was involved in the process followed in relation to the removal of Travis McPhee as a director of Njamal Services Pty Ltd in September 2017. Mr Carter was also involved at least in discussions with Mr White in relation to the removal of Mr Phillip O'Reilly as a director of Njamal Security Pty Ltd, although Mr White says that the decision to remove Mr O'Reilly was ultimately made by him alone.

What the contemporaneous records say about Mr Carter’s role after July 2017

Mr Carter resigned as a director of ISPL on 4 July 2017.

In light of matters including the general nature of the answers provided by ISPL to written questions in relation to Mr Carter's role; the lack of any requirement for Mr Carter to document his activities, such as by way of timesheets (as occurred with other directors and key consultants including Mr Aird, Mr White and Mr Parker); and poor internal governance standards, lines of communication and responsibility and documentation of the authorisation of decisions within ISPL\textsuperscript{82} the precise role, responsibilities, authorities and activities of Mr Carter since 4 July 2017 in relation to the Trust, and when they changed, is relatively opaque.

\textsuperscript{82} Addressed in Chapter 8 of the Report.
However, having considered the relevant evidence before it, including various materials obtained via Mr Aird referenced below, that exposed to light some of the true inner workings of ISPL and Mr Carter's role prior to Mr Aird's resignation, the Inquiry finds that:

- Both prior to, and after, the issue of the Disqualification Notice Mr Carter was and remained a member of the Trustee's management committee. Both the role of that committee and Mr Carter's role (whatever title may have been given to him from time to time) has at all times until fairly recently had significant authority and responsibilities and has occupied a significant position in relation to the management and administration of the Trust and certain of its related entities and their organisational structures.

For example:

  - In ISPL's response dated 18 September 2017 to aspects of the Inquiry's Notice dated 18 August 2017 ISPL provided a one and a half page narrative together with a small structure diagram. ISPL's response included the following:

    Mr. Carter has an extremely important role in the administration of the management needs of ISPL for its administration and delivery of Trustee services to NPT, particularly in maintaining his regime of regular consultative meetings with Njamal People and assisting them face to face with their current or personal issues. In this role, he is often seen to be the face of ISPL, and although he may have been one of its founders, he is not a Director. He is a Manager; and like all managers, he reports to and is responsible to the Board on all matters.

  - In ISPL's response it also referenced a structure that had been utilised by ISPL informally since inception and was proposed to be formally implemented in the next few months. In the attached structure diagram it was specified that Mr Carter, Esplanade Holdings – Management and Marketing - was part of the Management Advisory Committee, that the position he held of Manager, Programs & Services was directly responsible to that Committee and that the commercial and operational structure of the Trust fell directly under his position's responsibility, with commercial operations being administered by that position together with member services, business development and heritage and corporate services.

  - See further below in relation to the review process and subsequent corporate structure diagrams for ISPL and related entities.

- Mr Carter was involved in policy development. For example, on 31 July 2017 Mr Carter proposed the adoption of a "drug free" policy for all staff.

- In late July 2017 Mr Carter was involved in communicating with his son, Ryan Carter, whom Mr Carter described as the shareholder (the Inquiry infers Mr Carter means
CHAPTER 5: MR CARTER

shareholder of ISPL), about ISPL and the future directorship of ISPL, including Ryan Carter wanting representation on the directorship and a working 100% director.

- On 1 August 2017 Mr Carter emailed, inter alia, Mr Aird with the subject line "Directorships", and said:

  Dear Wes
  This note is to acknowledge the acceptance of Directorships of Indigenous Services Pty Ltd
  Andrew White
  Scott Dryland
  I hope we can all meet tomorrow and move forward in a positive way

- Mr Carter later that same day emailed Mr White with the subject line "Director meeting", and said:

  Can we make it 11.30
  Suits me
  Rod

- The Inquiry infers that Mr Carter attended and participated in that foreshadowed meeting of ISPL's directors which was not minuted alternatively, if minuted, a copy of the minutes were not provided to the Inquiry. Neither ISPL nor Mr Carter suggested to the contrary when invited to respond to findings that might be open including this conclusion.

- From 31 July 2017 Mr Carter maintained a significant role in relation to native title and mining agreement related matters including:

  - The negotiation of a proposed confidentiality agreement with Carnegie Clean Energy Ltd. For example, on 31 July 2017 after email communications from lawyers for Carnegie, Mr Carter emailed Mr Parker requesting that he finalise the agreement.

  - The negotiation of a native title agreement with Novo Resources Corporation including emails and meetings with representatives of Novo Resources Pty Ltd. For example by emails dated 6 August 2017 and 14 August 2017 Mr Carter emailed Mr Aird, a director of ISPL in relation to the commercial terms he had discussed with the Novo representative whom he was meeting again.

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83 Mr Carter's description of Ryan Carter being the shareholder is not technically accurate because, in late July 2017, the sole shareholder of ISPL was Mr Carter himself, with Esplanade Consultancy Pty Ltd (the company of which Ryan Carter was director) only assuming the role of sole shareholder on and from 31 August 2017. However, Ryan Carter was at this stage the sole shareholder of Esplanade Holdings Pty Ltd which, according to ASIC records, was the ultimate holding company for ISPL at the time. It may that it was in this regard that Mr Carter was referring to Ryan Carter as the shareholder.
the next day and emailed him in the following terms in relation to finalisation of the agreement:

Wes
What is going on here
Do I just sort this. I'm over asking
Rod

- On 1 September 2017 Mr Carter also emailed Mr Aird:
  Wes
  Are FMG having a survey next week with Terra Rosa
  Yes or No
  Rodney Carter
  Executive Chairman
  0411 …
  rod@[redacted]

- On 7 September 2017 Mr Carter emailed Mr Cullity and Mr Parker in relation to an article about a gold development in the Pilbara region involving Calidus observing:
  Have we got these guys nailed down. Definitely Njamal
  Not seen an agreement

- Mr Carter maintained a significant role in relation to instructing lawyers in relation to native title related matters at least until the Review Workshop on 30 August 2017 when it was agreed that Mr Aird would take responsibility for instructing lawyers in relation to native title related matters.

- From 31 July 2017 Mr Carter maintained significant input in relation to the making of distribution decisions. For example:
  - On 4 August 2017 Mr Carter participated in decision making in relation to a potential loan to Mr Nathan Newland and funds for a proposal by Mrs Eaton.
  - On 7 and 8 August 2017 in relation to Mr Coppin and on 16 August 2017 in response to an email from Ms Guo to Mr Carter, Mr Parker, Mr Mack, Mr White, Mr Aird and the Port Hedland General Manager seeking views on certain distributions from the Trust Fund, Mr Carter replied:
    These are matters that should not involve every person in the company
    I will speak to everyone tomorrow
  - In late August and early September, after the Review Workshop described below, Mr Carter was involved in decision making in relation to economic development funding for a Njamal family business, Winaru (the Mitchell family business).
Mr Carter attended and actively participated in the Review Workshop meetings held on 30 August 2017 and 11 October 2017 and related decision making processes in relation to matters including corporate structures, directors, authorisation matrices, budgets, staffing and policies.

In addition, the Inquiry finds that:

- On the morning of 17 August 2017 Mr Aird met Mr White in a coffee shop and raised concerns with Mr White about the governance of ISPL, particularly in light of the Disqualification Notice issued to Mr Carter and Mr Carter's ongoing involvement with the management and administration of the Trust.

- On 18 August 2017 Mr Aird emailed Mr White a note of their meeting of 17 August 2017:

  Meeting called by WJA in response to various governance challenges, organisational dysfunction and poor morale.

  At present the company is at risk of self-inflicting significant damage.

  It was noted work was underway to develop a restructure (in some instances this would likely confirm existing arrangements).

  Having an appropriate structure is important, however, the main challenges for ISPL relate to behaviours resulting in questionable governance practices (refer Ironside and Bowman St P/L) and questionable application of funds (trust distribution policy).

  Within ISPL there are regular instances of approvals and delegations which expose the directors of ISPL to allegations of breaching the Trust Deed and breaching our fiduciary duties.

  It was noted that poor governance is never acceptable regardless of structure.

  It seems most actions causing angst within the company can be sourced to RC and those members of staff with allegiance to him.

  The influence of (and tasking and funding by) RC extends into just about every aspect of the ISPL / Njamal group regardless of functional or hierarchical responsibility.

  Within the Njamal group there remains the perception that he is ‘the man' and the ‘go to' person for approval of financial assistance - even if this means overturning a negative decision made by the Hedland office in line with the Trust Distribution Policy.

  The selective application of funding policies by RC has been raised in correspondence from external (adversarial) lawyers and remains a very live issue for the organisation.

  It could be argued RC is acting as a shadow director. He is likely seen as managing the affairs of the company. In any case, his rogue behaviour place the actual directors at risk.

  It was noted that in spite of continued efforts to sort out the CommBiz banking authorities the process has taken longer than anyone expected. As soon as possible CM will adding or removing payment authorities to tighten financial control.

  It was noted the restructure is to be discussed in the week beginning 28 August.

  It was discussed that it was not acceptable to continue with Business As Usual.

  Two options came to mind quickly – but both required closer examination:

    - the resignation as directors by WJA and AW.
    - The winding up of the company.

  We agreed further options were to be explored.

  Meeting ended.
CHAPTER 5: MR CARTER

- Half an hour later Mr White responded, writing:

  Thx Wesley
  I look forward to your call.
  I'm still confident that irrespective of what has happened in the past, we, the current two directors, have to reset the policies, responsibilities and authorities at all levels.
  This is our urgent task.
  I think the trust has a clear set of objectives and the work to map the functions which achieve these objectives is useful.
  I fully expect that the planned workshop for the week after next will provide the environment, with all relevant parties present, to lay down the new controlling framework to ensure the policies can be implemented through an authorization matrix and appropriate plans and procedures.
  This is an urgent step but requires Craig to first complete the year end accounts so he can be involved.
  Timing is not ideal but I can't see it being practical any sooner.
  Rgrds
  A

Notably, Mr White did not in his email response to Mr Aird suggest that the matters and concerns catalogued in Mr Aird's emails were not discussed. Nor in response to an invitation to Mr White and ISPL to respond to various possible conclusions has either suggested that the discussion reflected in Mr Aird's email did not occur. As to Mr Aird's assertions, Mr Carter contends that they have no basis, "have been made by a disgruntled previous employee and cannot and should not be relied on", and points to various issues which he says explain Mr Aird's "beef with me". He suggests, amongst other things, that he has never had responsibility for the financial aspects of the Trust and never had access to the banking or accounts and that, in the case of Mr Aird, Mr Parker controlled all heritage accounts himself. He rejected, in particular, any suggestion of shadow directing and observed that Mr Aird worked in a different office to him and never attended meetings with him either in Perth or Port Hedland except the AGM.

- The reference in Mr White's email to a planned workshop "the week after next" is apparently a reference to a Review Workshop, which on 24 August 2017 Mr White proposed occur, and which was held on 30 August 2017.

- The following day at 9.16am on 18 August 2017, Mr Parker wrote to Mr Aird and Mr White as follows:

  Gents,
  Further to my discussion with Wesley earlier today I repeat my advice to Wes – Rod's reckless authorisation of payments to the likes of Kevin Allen, distributions for motor vehicle registration being paid under the Medical Assistance category of the Distribution Policy etc etc are:
  1. exposing the Directors of ISPL to claims of breaching the terms of the Trust Deed.
CHAPTER 5: MR CARTER

2. creating confusion amongst the Port Hedland and South Perth office staff and leading to a drop in morale.

3. very much responsible for why Craig Mack has not signed his Employment Contract and, in my opinion, he will resign within the next 4 weeks.

I’m trying to watch your backs here because I feel some guilt in resigning from the ISPL Board. Unless you can reign Rod in (I thought my resignation would, but who was I kidding?) then you should consider your options also.

Kind Regards,
Greg Parker

In relation to Mr Parker’s comments about the “reckless authorisation of payments”, Mr Carter has expressed the opinion that when writing the above email Mr Parker was not in receipt of all the facts. He has also explained that the payment to Mr Allen was for the amendment of a violence restraining order taken out against him by Ms Westerman to permit Mr Allen to attend TAC meetings, and that the payment of motor vehicle registration under the medical assistance category of the distribution policy was because the vehicle licence was required for the particular community member to obtain dialysis treatment. This email, Mr Parker’s evident serious concerns about the need to “reign Rod in”, which he thought his own resignation would do, and Mr Carter’s position is considered elsewhere in the Report in more detail.

- A Review Workshop was held on 30 August 2017. The agenda for the Review Workshop was circulated on 29 August 2017, included a draft sample authorisation matrix to assist discussion which set out a range of potential authorisations for the Board, the "Trustee/Chairman", the Chief Financial Officer, business line managers, general managers, project managers and procurement/contracts managers.

- The reference to "Trustee/Chairman" was, the Inquiry infers, a reference to the then title/position of Mr Carter being a title he (and no one else) had previously adopted and he was referred to as Chairman in the agenda for the Review Workshop.

- The following day, on 31 August 2017, Mr White circulated his first draft of the notes of the meeting. One of his notes, which were inserted to the agenda for the Review Workshop under the authorisation matrix, provides: "Notes: Add in roles of Mngt Committee, CEO, Hardship Committee, Investment Committee”.

In a meeting with the Inquiry on 26 September 2018 Mr Carter said that in relation to the role of CEO the intention was always to have a Njamal person as the chief executive and he invited the Inquiry to go back to the minutes of “the meeting” (Mr Carter does not specify which meeting). To the best of the Inquiry's knowledge the role of Chief Executive was raised at the directors’ meeting on 4 July 2017, and potentially at the Review Workshop on 31 August 2017. Nowhere in the minutes of those meetings is there any indication that someone other than Mr Carter would fulfil that role. Mr Carter also says that a person named Michael Mitchell was interviewed, along with one other, for the role of Chief Executive. According to the minutes of the
Review Workshop held 30 August 2017 Mr Mitchell was proposed as a possible director of Njamal Services Pty Ltd. Further, in Mr Carter's email to Mr Mack and Mr Parker, copied to Mr Green, on 5 September 2017 Mr Carter writes "The Directors of Njamal Services are Mark Walker, Andrew White and Wayne McKie. Have asked Michael Mitchell. He will advise this week".

- It was agreed at the Review Workshop that a management committee be formalised as reflected under actions where it was noted that:
  
  Management committee formalised: Andrew, Craig, Greg, Jack, Rod and Wes

- On 1 September 2017 Mr White circulated a first draft of the ISPL corporate structure which included Mr Carter (alongside Mr Mack) as a "Trust Management Rep" and accommodated ISPL being trustee of other trusts with other TACs.

- Mr Aird subsequently had discussions with Mr Mack in relation to various concerns he had including in relation to the draft budget which he was not prepared to sign off.

- On 21 September 2017 in the evening after work Mr Mack, Mr Parker and Mr Aird met over drinks at the Windsor Hotel. Mr White arrived part way through the evening. While the matters discussed included concerns in relation to the role of Mr Carter, his resistance to changing position to become the Programme Manager, concerns he was influencing the shareholder of ISPL (i.e. his son), the casual approach to governance at ISPL, the opacity of things such as decision making and being informed about such things, options that might be available to avoid them being exposed by Mr Carter's conduct including possibly changing the structure to an Aboriginal organisation and improvements in corporate governance.

In respect of the above matter, the Inquiry understands Mr Carter's position to be, amongst other things, that to the extent he expressed any resistance to his role being changed to a position such Programme Manager it was due to his concern to ensure that any position he assumed conform with his obligations as if the Disqualification Notice had taken effect. Mr Carter has also forwarded the Inquiry an email from Mr Parker in which Mr Parker asserts, amongst other things, that Mr Aird requested Mr Mack and Mr Parker meet him off-site to discuss Mr Aird's issues with Mr Carter which were already well-documented by Wesley so there was no reason to rehash them. Mr Parker had no recollection of Mr White joining himself and Messrs Aird and Mack for drinks. Mr Parker suggested that well prior to the meeting and on "many, many occasions" after he resigned as a director of ISPL on 4 July 2017, he implored Mr Aird to resolve his concerns by simply following Mr Parker's lead and resigning as a director. He says he was sick and tired of Mr Aird "bleating about [Mr Carter] every time" they spoke and Mr Parker put it to Mr Aird that he should "either piss or get off the pot". He also identifies various reasons why he said that Mr Aird hung around,
however nothing identified by Mr Parker in the Inquiry’s view undermines what the Inquiry is satisfied is the essential reliability of the evidence of Mr Aird as to the substance of the above discussion, which it is satisfied occurred. While Mr Parker notes that Mr Aird did not take notes while they were at the Windsor Hotel Mr Aird, who was by this stage very concerned about what was occurring at ISPL, subsequently prepared notes of the discussion. While Mr Parker may have been frustrated that Mr Aird did not simply resign as he did, his own emails such as the one of 28 August 2017 recited above frankly reveals his own concerns about the role of Mr Carter and need to ‘reign him in’ and the background to his own resignation as a director which had not previously been revealed to the Inquiry. In some respects, no doubt, the fact that Mr Aird, revealed such matters to the Inquiry no doubt caused concern to some, including because it exposed for the first time significant internal issues in relation to the operation of ISPL and Mr Carter’s role which had not otherwise been disclosed to the Inquiry. That reaction is revealed in email from Mr Carter on 2 October asking Mr Parker to respond to various issues in an email Mr Carter asserted was given to the Inquiry by “Weazely Aird”. Mr Carter was also disparaging towards Mr Aird in some of his communications with the Inquiry and pointed to various reasons as to why Mr Aird’s motives and reliability as a witness should be questioned and not accepted. Those matters have been considered by the Inquiry and are disputed by Mr Aird. The Inquiry is ultimately satisfied based on its discussions with Mr Aird that he has, in effect, provided information to the Inquiry out of a sense of moral duty to tell the truth and make it aware of events that occurred within ISPL, recognising that it may result in him being the target of criticism by others. The Inquiry is satisfied that his emails reveal his truly held concerns which he was expressing to his co-directors at the time, who also shared a number of his concerns.

- On 1 October 2017 Mr White circulated draft corporate structure diagrams for ISPL and related entities after consultation with the other management committee members (including Mr Carter), except to only a limited extent with Mr Aird (citing the tyranny of distance), inviting further comments. Under that diagram Mr Carter was identified as Programme Manager and, despite concerns that had been raised with Mr White by Mr Aird, still had a significant proposed role in the organisational structure. In each of the structures for ISPL, Njamal Services Pty Ltd and Njamal Heritage Pty Ltd, Mr Carter was centrally located as part of either or both of a management committee or the Programme Manager position:
  - For ISPL Mr Carter was identified as a member of the management committee, which sat immediately below the Board of Directors. The Board was identified as Mr White and Mr Aird with a noted proposed new board comprising Mr Brendyn Grylls/Andrew White, Ryan Carter and Ryan Chorley from Jackson MacDonald. Mr Carter, as Programme Manager, was identified
as being organisationally responsible for his assistant, Ms Guo, and member
services/distributions Port Hedland Office, including its General Manager and
ultimately staff of that office who reported to the General Manager. The
management committee, of which Mr Carter was a member, sat immediately
above him in the corporate structure.

- For Njamal Services Pty Ltd, Mr Carter was identified as Programme
  Manager immediately below the Board. Organisationally below Mr Carter
  were areas of external operations, internal business support and business
development and numerous consultants.

- For Njamal Heritage Pty Ltd, Mr Carter as Programme Manager was
  immediately below the Board. Organisationally below Mr Carter were areas of
  mining agreements, future acts, native title claim and Heritage Coordination.
The areas of administration were proposed to be under the control of a CFO,
Mr Mack and a contracts and commercial committee was proposed of which
Mr Carter was not proposed to be a member.

- On 1 October 2017 Mr White also circulated revision 3 of the proposed authorisation
  matrix which now specifically identified the position of Programme Manager.

- Consistently with the central role that the corporate structures envisaged for
  Mr Carter, the draft authorisation matrix circulated by Mr White contemplated
authorising the Programme Manager to:
  - expend budgeted capital expenditure of $50,000 or less;
  - expend unbudgeted capital expenditure of $5,000 or less;
  - expend budgeted operational expenditure of $10,000 or less;
  - expend unbudgeted operational expenditure of $5,000 or less;
  - expend project expenditure up to 10% over approved project budgets;
  - incur domestic and international travel expenses (hotels, airfares and
    expense claims);
  - within approved budgets and for direct reports, recruit, dismiss and discipline
    salaried staff, waged employees, independent contractors and consultants
    (the approving of Human Resources organisational budgets, setting of
    engagement conditions and remuneration levels was only at ISPL Board
    level);
  - issue tender submissions or give contract approval of less than $250,000 and
    approve terms and conditions of all tenders;
  - approve project budgets and overhead budgets; and
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- approve distributions under the Trust Deed up to 50% in excess of the Distribution Policy.

- Mr Aird obtained confidential legal advice from McCullough Robertson in respect of his directors’ duties, which was received in draft on 9 October 2017. On 10 October 2017 Mr Aird raised these concerns, and the advice, with Mr White in what has been described as a surprisingly brief conversation, in which Mr White is said to have displayed no interest in the advice and instead put that the proposed structure (delegated authorities, org charts and budget) would fix everything.

- On the afternoon of 11 October 2017 ISPL held a further workshop attended by members of the management committee.

- At 1.15pm on that date Mr White circulated documents for consideration at the workshop to Mr Aird, Mr Parker, Mr Carter, Mr Cullity and Mr Mack. Those documents comprised an overview of the ownership structure for the Njamal People’s Trust, corporate structures for ISPL, Njamal Heritage Pty Ltd, Njamal Services Pty Ltd, Njamal Mining Pty Ltd, Indigenous Carbon Services Pty Ltd, Pilbara Indigenous Marine Pty Ltd, Pilbara Village Services Pty Ltd (proposal not yet approved by the ISPL Board), a slightly amended version of revision 3 of the authorisation matrix, a budget, and a royalty forecast.

- In each of the corporate structures for ISPL, Njamal Services Pty Ltd and Njamal Heritage Pty Ltd Mr Carter remained centrally located as part of either or both of the relevant entity’s management committee or Programme Manager. Certain changes were made since the draft circulated on 1 October 2017. The main change was that the areas of mining agreements and native title claim were removed from the Njamal Heritage Pty Ltd chart and inserted into the ISPL chart, still remaining under the immediate responsibility of Mr Carter as Programme Manager. The ISPL directors were amended to reflect Wesley Aird/Ryan Carter, Ryan Chorley and Andrew White/Brendyn Grylls.

- In the slightly amended version of revision 3 of the authorisation matrix additional words were added to the notes section to make clear that in respect of unbudgeted capital expenditure and unbudgeted operational expenditure the specified limits were not to be used in circumvention of the specified authorisation requirements.

- At 9:09am on 12 October 2017 Mr White circulated to Messrs Aird, Carter, Parker, Mack and Cullity an updated revision (revision 4) of the authorisation matrix considered at the Review Workshop requesting any further comments and indicating that if there were no further comments the matrix would be issued by the ISPL board to all concerned with follow up on its implementation. In the authorisation matrix the proposed authority of Business Enterprise Boards was significantly increased and
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proposed authority of the Programme Manager and CFO were slightly reduced. In the case of the Programme Manager it was proposed under that revision of the matrix the Programme Manager could not approve international travel, terms or conditions of tenders or overhead budgets.

- On or about 11 or 12 October 2017, most likely the morning of 12 October, and following the circulation of revision 4 of the authorisation matrix by Mr White at 9:09am, Mr Aird made plain to Mr White in a telephone conversation that in his capacity as director of ISPL Mr Aird could not and would not sign off on the structure owing to the intention to give authority to Mr Carter that would, on the face of it, breach the ASIC banning order (i.e. the Disqualification Notice).

- Later that morning, at 10:45am, Mr White emailed Mr Aird:

Hi Wesley,

Further to our telecon this morning, its my view that this authorisation Matrix needs to be issued by the ISPL Board as soon as possible. It can be revised anytime if we see fit but at the moment it is my view that the authorisation process has not been as clear as it should be and since becoming a Director of ISPL, I see this as an important improvement in the Corporate Governance of ISPL.

Please don’t delay in responding so we can issue this (with revisions if necessary) ASAP and implement this as part of the Continuous Improvement Process I am driving.

Regards,
Andrew

- At 1:05pm that afternoon Mr White also circulated, separately, an updated corporate structure for ISPL, Njamal Heritage Pty Ltd, Njamal Services Pty Ltd, Njamal Mining Pty Ltd, Indigenous Carbon Services Pty Ltd, Pilbara Indigenous Marine Pty Ltd, and Pilbara Village Services Pty Ltd (not yet approved by the Board). He invited further comments, noting it was a working document and that approved revisions would be updated.

- Mr Carter's position in the corporate structure was materially unchanged from the earlier drafts.

- On the face of it, for ISPL Mr Carter’s positions would enable him to significantly influence the operation of the trustee business of ISPL, as was the case in respect of Njamal Heritage Pty Ltd and Njamal Services Pty Ltd for which Mr Carter in his role as Programme Manager was the line manager proposed to have responsibility for all of the business operations of those entities, other than administrative and external advisory matters, which were allocated to Mr Mack, Mr Parker and Mr White.

- Half an hour later, at 1:40pm, Mr White also circulated a revised version of the draft budget circulated immediately before the meeting the previous afternoon.
He noted (in what the Inquiry infers is a reference to the meeting of 11 October 2017) as follows:

Hi Guys,
Pls find attached a slightly updated budget from yesterday incorporating changes discussed
As discussed, this still needs to have further input as follows:

- Royalty Revenue forecast update from Jack
- Community Projects update from Rod (with Budgets and Project Manager Name)
- Review of Operating Expenses from Craig and Greg
- Review of Legal expenses potentially recoverable by Wes
- Contingencies to be added by Andrew

We must also note that the actual costs since 30Jun17 are greater than this budget allows and so we have a significantly tight cash flow for now. The next year looks good and should provide significant opportunity for more community projects and investments.

In the meantime, I think we made good progress in establishing the organisation and review of personnel costs so at least this part of the draft budget should be considered as effective from now. this part of the draft budget should be considered as effective from now. (sic)

Note that the attached spreadsheet has a second sheet which is incomplete but will become a monthly breakdown of the annual budget for management purposes.

Please make sure you only use consider Sheet 1 for now!
Please advise any comments.

Regards,
Andrew

That budget contained, among other things, an allocation of $240,000 (excluding GST) to be paid in relation to performance of services by Mr Carter. Mr Aird had not agreed and did not agree to the document, namely the budget, being effective.

Mr Aird would not agree to the budget for reasons including that:

- in his view, it propped up the Esplanade companies by continuing payments (of $240,000 per annum) for Mr Carter and for staff which were contracted through Esplanade Holdings Pty Ltd; and
- it included, as a revenue item, the recovery of $250,000 from the Commonwealth in connection with native title proceedings. Mr Aird's view was that ISPL had no prospect of recovering that sum from the Commonwealth.

Shortly thereafter, in about the period 17 to 19 October 2017, Mr Aird sought further advice from McCullough Robertson in relation to the then proposed corporate structure and authorisation matrix, and the interaction of those documents with the Disqualification Notice issued to Mr Carter

Mr Aird also brought this advice to the attention of Mr White on 23 October 2017. Mr Aird informed Mr White of the direction of the advice, which was to the effect that the positioning of Mr Carter in the corporate structures together with the
authorisations proposed to be conferred upon him, was effectively to position Mr Carter as CEO, albeit without that title. The Inquiry reaches a similar conclusion.

- Mr Aird also concluded, based on the discussion with Mr White, that Mr White was disinclined to take any notice of the advice and that Mr White commented in effect that lawyers’ advice was only as good as the brief they were given. Mr Aird's recollection was also that Mr White placed faith in the delegated authority structure and the organisational chart and other documents. Mr Aird concluded that the scope of authority given to Mr Carter was not an issue to Mr White as Mr White expressed a view to the effect that there were more than sufficient ‘checks and balances’ in place. Mr Aird was concerned that the so-called ‘checks and balances’ did not exist in reality. Mr White and Mr Aird agreed that they would talk again the next day. The Inquiry broadly accepts Mr Aird's recollection of the discussion. It notes that it is broadly consistent with Mr White's indication to the effect that the difference between his position and that of Mr Aird was that he considered that steps could be taken to address identified issues moving forward.

- The Inquiry finds that, in fact, there were few formal checks and balances introduced, as Mr Aird apprehended.

- On 24 October 2017 Mr Aird and Mr White had a teleconference.

During the conversation Mr Aird says that Mr White did not ask to see the advice from McCullough Robertson and has a note to that effect and says that though Mr Aird read portions of the advice to Mr White, the advice was rejected by Mr White; Mr White made plain that he had no appetite to make any changes to the authorisation matrix or organisational charts insofar as they related to Mr Carter; and the call ended with Mr Aird indicating that they were at an impasse. Mr White however suggests that he requested that Mr Aird provide him with a copy of the advice but that Mr Aird declined. The Inquiry considers that to be unlikely but ultimately does not consider it necessary to make a specific finding in relation to that disputed issue. It accepts that at various times Mr Carter and ISPL, likely via Mr White, sought advice in relation to issues concerning the scope of permissible duties of Mr Carter. However, except to the extent otherwise recounted in this chapter, the precise timing and nature of the advice, which has not been revealed, with legal professional privilege not otherwise being waived.

- Later that afternoon Mr Aird called Mr White and offered as a way ahead for him to resign as a director of ISPL at a convenient time in the near future, but that he would continue to consult to the end of the month and that his invoices would be paid in full as and when due. Mr Aird and Mr White agreed that Mr White would approach the shareholder requesting a shareholders’ meeting to settle, among other things, Board composition.
• Mr White then by emails with Mr Aird agreed the terms of an email to Ryan Carter, which he then forwarded to Ryan Carter regarding the agreement of Mr White and Mr Aird of the need to call a shareholder’s meeting to discuss the direction, management and control of ISPL and arrangements necessary notices to be issued.

• On 27 October 2017 the notice of the general meeting was issued by Mr White for 31 October and later that afternoon, as Mr Aird had discussed with Mr White and Mr Mack, Mr Aird resigned his positions as director of ISPL, Ironside Management Pty Ltd and Bowman Street Pty Ltd, by emails to Mr Mack.

• Despite Mr Aird’s concerns and reference to legal advice obtained by Mr Aird, Mr White, following Mr Aird’s resignation, as the sole director of ISPL, did not cause any material changes to be made to the draft authorisation matrix or organisational charts insofar as they related to the proposed position, organisational responsibilities and authorities of Mr Carter and referred them to ISPL’s shareholder for consideration and endorsement.

• According to the minutes of a meeting of ISPL’s then shareholder, Ryan Carter, with Mr White held on 31 October 2017 Mr Aird’s resignation was noted by ISPL’s shareholder. At that meeting the shareholder also endorsed revision 4 of the authorisation matrix with minor amendments (which were then reflected in revision 5), and the corporate structure, which the Inquiry concludes is the above referenced version of that document circulated by Mr White on 12 October 2017 (namely, revision 6).

• The endorsed authorisation matrix, like revision 4 before it, authorised the Programme Manager to:
  
  o expend budgeted capital expenditure of $50,000 or less;
  o expend unbudgeted capital expenditure of $5,000 or less;
  o expend budgeted operational expenditure of $10,000 or less;
  o expend unbudgeted operational expenditure of $5,000 or less;
  o expend project expenditure up to 10% over approved project budgets;
  o incur domestic travel expenses (hotels, airfares and expense claims);
  o within approved budgets and for direct reports, recruit, dismiss and discipline salaried employees, waged employees, independent contractors and consultants;
  o issue tender submissions or give contract approval of less than $250,000;
  o approve project budgets; and
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- make distributions under the Trust Deed up to 50% in excess of the Distribution Policy.

- On 10 June 2018 ISPL by its director Mr White supplied the Inquiry with a further version of the authorisation matrix.

- This version is dated April 2018 and is designated revision 6. In this version of the matrix the title "Programme Manager" has been replaced by "Programme Co-ordinator", and the authorities granted to the person holding that title (which the Inquiry understands was, as at April 2018, Mr Carter) have been reduced, as follows:
  - expend budgeted capital expenditure of less than $5,000 (previously $50,000 or less);
  - expend unbudgeted capital expenditure of less than $500 (previously $5,000 or less);
  - expend budgeted operational expenditure of less than $2,000 (previously $10,000 or less);
  - expend unbudgeted operational expenditure of less than $1,000 (previously $5,000 or less);
  - expend project expenditure up to approved project budgets (previously up to 10% over approved project budgets);
  - incur domestic travel expenses (hotels, airfares and expense claims);
  - within approved budgets and for direct reports, recruit, dismiss and discipline salaried employees, waged employees, independent contractors and consultants;
  - issue tender submissions or give contract approval of less than $25,000 (previously less than $250,000);
  - approve project budgets; and
  - make distributions under the Trust Deed within the Distribution Policy (previously up to 50% in excess of the Distribution Policy).

- This is a significant change to, and confining of, the authorities conferred on Mr Carter as holder of the position when compared to the broader authorities granted by the previous revision of the authorisation matrix endorsed by ISPL's shareholder on 31 October 2017.

- However, in both the April 2018 and preceding version of the authorisation matrix Mr Carter has been conferred with both authority to approve project budgets and authority to expend project expenditure, initially up to 10% over approved project budgets, and since April up to approved project budgets. Those authorities confer
significant authority on Mr Carter, with no specified limit on quantum, and do not appear to require in their terms specify any required checks or balances such that in exercise of the authority Mr Carter could potentially significantly influence the financial position of the Trust.

- On 2 May 2018 during a meeting with the Inquiry attended by Mr Carter and Mr Christensen, Mr Carter told the Inquirer, in effect, that he didn’t "do trust work anymore" and that Mr Clinton Wolf had been appointed director and would be assuming the role of "general manager" of the Njamal South Perth office. In relation to the authorisations matrices, Mr Carter said, in effect, that the only thing he ever became involved with approving, in conjunction with Mr White, were small things and out of hours matters, like when people come down to Perth on a Saturday night for medical reasons and they needed rooms and couldn't reach Mr White.

- In fact Mr Carter did not it seems then cease his role with the Trust, although the remuneration arrangements may have ceased at about this time. Further, according to ASIC records, Mr Wolf was only appointed as an alternative director for a period of two weeks (during which Mr White was outside of Australia), although Mr White has suggested to the Inquiry that the appointment was on an ongoing basis. Further, on about 20 March 2017 Mr Wolf was appointed to "coordinate with Indigenous Services, Nyamal and other related parties" to "secure Nyamal's Native Title determination in a timely manner", and to report to ISPL on a weekly basis as to progress. Mr Wolf was to be remunerated at $10,000 plus GST per month for six months commencing March 2018.

Both ISPL and Mr Carter were given an opportunity to comment on the substance of these matters by way of invitations issued to them in August and September 2018. While not all matters identified by Mr Carter, ISPL and others in their responses to these and other invitations to respond to the Inquiry are recited in the Report, the Inquiry has taken them into consideration when assessing the evidence before it and prior to finalising any conclusions (including those set out earlier in this Chapter).

The Inquiry notes that ISPL, by its lawyers, responded:

ISPL is continuing its investigation into the issues surrounding the engagement of Mr Carter (in all its forms) and will provide further information and comment in due course.

Further, the relevant parties met on Saturday (15 September 2018) to further discuss the restructure of ISPL and the roles of all personnel were considered. The extent of Mr Carter’s ongoing role (if any) with ISPL was also deliberated at this meeting and is in the process of being resolved. Mr Carter is currently on leave and further information in this regard will be provided to the Inquiry as soon as precise details are available.

It also referenced a recent complete structural review of ISPL and adopted recommendations of the Inquiry by taking steps including that the:
the role of Mr Carter has been significantly altered and is the subject of current negotiation which is in the process of being resolved and further information in this regard will be provided to the Inquiry as soon as precise details are available;

By letter dated 28 September ISPL, by its lawyers, advised that Mr Carter's role and any engagement of Esplanade have now been terminated.

Mr Carter provided a written response to some of the matters set out above, and while Mr Carter objected to some of the matters including in particular comments raised by Mr Aird, no substantive demurrer was recorded to many of the specific examples outlined of Mr Carter's involvement in relation to aspects of the Trust's affairs. However, Mr Carter did state that it was irresponsible of the Inquiry to suggest or infer that he was doing anything outside his duties and that almost all "so called evidence is constructed and has no credibility." In one written response Mr White stated:

At a recent interview it was explained very clearly by Mr Christensen, how my role was involved. "Should there be an emergency, Mr Carter could authorize or arrange something ". I have no role in distribution or approval of funds. That role is firmly in Port Hedland. My role is that of business development and community relations I am unaware of the extent of the matrix as I have no cause to use it in my role. The Nyamal people respect that is my role and I do the role to the expectations of the clients

He also reiterated that he is not the CEO and has never been the CEO (although in interview appeared to accept that at least prior to his disqualification he in substance performed such a role).

Mr Carter's comments about being unaware of the extent of the matrix are a matter of concern, given the importance of the matrix in terms of the roles and authorities of officers including Mr Carter in relation to ISPL's activities.

Mr Carter also addressed some of these matters in lengthy meetings with the Inquiry, most recently on 26 September 2018 and 3 October 2018, the tenor of which was to deny any suggestions that he was involved in the management and administration of the Trust beyond a role he described as a community liaison person, including in particular to deny that he had any involvement at all in any matters regarding the financial affairs of the Trust (which he said was the domain of Mr Parker) and that in his view there seemed to be an agenda from "Westerman and co and yourselves" to construct an argument that he was acting as a shadow director, which he said was absolutely false. In relation to what Mr Carter described as "the whole business with the matrices", Mr Carter said he thought that was Mr White trying to move things forward and that he had no comment on them. Mr Carter also said, in substance, that he always considered himself a community liaison person, someone the community felt they could trust, but that he no longer had a role with the Trust and had taken up an engagement with a publicly listed company. In addition, as addressed below in respect of Mr Carter's interpersonal style, [REDACTED], Mr Carter also summarily dismissed any criticism of him that has been levelled by others, including Mr Aird, Ms Westerman, Mr
O'Reilly, Mr Mitchell or Mr McPhee. One of the very few concessions that Mr Carter was prepared to make was that he thought on occasions he had painted too blue a sky to some people and it had not paid off and that had been his mistake which he would admit to.

**Mr Carter’s interpersonal style**

The Inquiry has been made aware of evidence, and it observed on more than one occasion in its dealings with Mr Carter, that Mr Carter can adopt an aggressive, combative or hostile tone or approach in communications when a person with whom Mr Carter is communicating adopts contrary positions or questions his or ISPL’s actions. That is by no means always the case and Mr Carter can also be very engaging, articulate and positive in his interactions.

In meetings with the Inquiry in September and October 2018 following the issue of the Inquiry’s invitations to respond to possible findings and recommendations, Mr Carter described himself as a “hard arsed businessman” who “does not back down”. The Inquiry accepts that to be the case. In respect of concerns about Mr Carter's style, particularly where people held an adverse or contrary view, Mr Carter explained that certain people he has had to deal with are bullies and that he is straight with everyone he speaks to, but when dealing with people causing the community to have endless meetings, either back away or stand up for your principles. Mr Carter suggested that the Njamal people would not say he is not approachable, dishonest and the like. The Inquiry notes in this regard that many Njamal people have extremely positive views about his interaction with them and apparently wish him to continue having a liaison role.

Mr Carter denies he is a bully but says he is a good negotiator and does things sometimes “out of the box”. He commented that if you snapshotted some of the information and threats given to him you would be absolutely astounded at how he had managed to keep his cool in circumstances where no one else could. The Inquiry accepts the challenges faced by Mr Carter in engaging in community liaison and that at times, in person, or via email, he has himself has been subject to quite aggressive and even threatening statements and actions. The Inquiry is aware of persons other than Mr Carter having to deal with such matters and the high emotions can sometimes arise and need to be managed. It is therefore not surprising that sometimes robust responses might be made in response.

The Inquiry also makes no criticism of sometimes robust discussion amongst directors of trustee companies. However, while accepting that differences in style exist, in the Inquiry’s view Mr Carter has a very strong personality and has a tendency to aggressively engage if he disagrees with a person or feels under attack or question, including making assertions that are not always accurate or soundly based, which can have an intimidating effect and be highly undesirable when coming from a person in authority, particularly given the important duties of a trustee. Besides anything else it potentially compromises, or gives rise to an apprehension, of decision making being conducted in other then an objective, appropriate manner and without an openness to being questioned.
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The aggressive style Mr Carter can adopt when seeking to achieve an outcome or defend his or ISPL's position is evident from a number of communications referenced in the Report. By way of example, these include:

(a) emailing Ms Westerman on 22 March 2016, in connection with action being taken to remove AET as Trustee, with the comment "let's bury these pricks", which the Inquiry infers is a reference to AET;

(b) forwarding to Ms Westerman a copy of an email from Mr Carter to Mr Andrew Morgan of AET, the manager at AET responsible for managing the Trust prior to ISPL's appointment, dated 30 March 2016 with the comment:

   I want this guy to feel some pressure
   Next we get rid of the lawyers

(c) emailing Mr Morgan on 1 April 2016 to say, inter alia:

   Andrew, this dispute is certainly headed for the media and whoever else is interested. I believe your position at AET is now totally untenable. You need to be stood down while a thorough investigation of your actions is undertaken by an independent party such as ASIC or Federal Police; and

(d) messaging a member of the Njamal community, in connection with that member's proposal to call a meeting of the TAC on 31 March 2018 (purportedly to remove ISPL as trustee, though the meeting never took place) with the following:

   You are kidding yourself if you think I'm going to put up with your backstabbing I've had enough

The Inquiry too has seen aspects of this type of robust behaviour from Mr Carter at times when the Inquiry has sought information about, or asked questions of, Mr Carter's role. Mr Carter has also shown a willingness to disparage and mount personal attacks on people with whom he disagrees or whom he considers to be acting contrary to his interests. While the Inquiry accepts that many of Mr Carter's comments to the Inquiry reflect his strong emotional response to allegations he generally regards as being baseless and coming from persons whose motives and at times characters are questionable, the manner in which he has sought to personally demean or denigrate some persons who have expressed concerns, made allegations or provided assistance to the Inquiry has at times been of concern.

A final matter that must be addressed before leaving the topic of Mr Carter's interpersonal style is his failure in many of his responses to the Inquiry to demonstrate insight into the reason for many of the Inquiry's concerns identified in the Report or to accept, except in very limited respects, that any concerns raised about him, the Trust or ISPL have any merit whatsoever. One recent example is Mr Carter's written response to the suggestion that, particularly prior to late 2017, ISPL generally lacked clear and effective internal governance policies, practices and procedures in relation to the management and administration of the
Trust. This view was put to ISPL, which broadly acknowledged it. However, in contrast, Mr Carter responded in part to say:

It is completely false to suggest poor internal governance. It has all the hallmark of a non-objective, constructed comment designed to, in some obscure way, support the conflicted view of the Minister to call this inquiry without any reasonable due diligence being done on the parties making the comments.

Much of these conclusions are festered with the views of Aird, Westerman, Wainright and are racist and condescending on the aboriginal people for whom we were training and creating leadership position.

... It is very self-serving to say the governance standards are poor, when in fact there is no measure by which to judge. This false conclusion lies at the heart of this inquiry and is nothing more than a personal attack on the Nyamal employees and people.

A similar lack of reflection and apparent insight as to the importance of various obligations is seen in Mr Carter's response to the Inquiry's possible view that ISPL generally failed to create and maintain finalised, signed minutes of meetings of directors. Again, while ISPL and Mr Parker accepted that aspects of corporate governance including this one undoubtedly could be improved, Mr Carter said:

Denied. There is no legal requirements to sign minutes and they are accepted at the next meeting. This comment shows a text book approach is not the reality of the real world.

With respect to Mr Carter, he is wrong; the legal requirement which he says does not exist is found in section 251A of the Corporations Act 2001.

There are a number of other examples which, in the interest of brevity, are not repeated here.

Other matters / allegations relating to Mr Carter

At this point it is convenient to comment about a range of allegations received by the Inquiry in relation to Mr Carter (and, in some respects, also Ms Westerman) in particular. The Inquiry received or became aware of a wide range of allegations or concerns in relation to the alleged role of Mr Carter. They were not only raised by Ms Westerman or persons Mr Carter saw as being her supporters. A great many of the matters raised were however unsupported by direct evidence and based on rumour or hearsay or expressed at a level of generality to be insusceptible of meaningful investigation. On a number of occasions when the matter of concern was raised with the suggested source of the concern, the resulting explanation of the matter did not precisely align with the allegation raised with the Inquiry and had a reasonable explanation consistent with Mr Carter not having acted unreasonably or inappropriately. A number of concerns were also expressed to the effect that Mr Carter had been "shadow directing" despite being disqualified from managing corporations. When the evidence said to support such assertions was considered the Inquiry on a number of occasions concluded the
particular evidence identified did not establish the allegations made. Further, on quite a few occasions where specific concerns were raised with the Inquiry, Mr Carter was able to provide a satisfactory and often quite persuasive explanation of the particular event the subject of the allegation.

A difficulty, both for Mr Carter, for some who made allegations and for the Inquiry was that many issues raised concerned conversations or alleged conversations, the content of which was not documented or necessarily witnessed, where time had since passed and it was difficult to substantiate or form a positive view about the alleged conduct. These matters were taken into consideration by the Inquiry when assessing the allegations before it. The Inquiry was also hampered in some cases by the absence of a power to require witnesses to attend and give evidence and be examined under oath or affirmation so as to test the evidence. In the report the Inquiry has not recited all of the allegations against Mr Carter, Ms Westerman or others that is has considered although has identified many of the allegations or themes of allegations.

By way of illustration, certain allegations against Mr Carter are dealt with below, although various other concerns or allegations are dealt with in relevant Chapters of the Report.

**Meeting with Kevin Allen on 4 April 2016**

On 4 April 2016 Mr Carter met with Kevin Allen and Ken Fraser in a café at Belmont Shopping Centre and at that meeting a violence restraining order placed on Mr Allen by Ms Westerman was discussed.

During the meeting, Mr Allen says in a statutory declaration made 22 April 2016, amongst other things, that:

- I contacted RC to request a meeting to clarify his role in dealing with the Njamal advisory committee members and also Sharon Westerman (McGann)
- He explained that he had been having meetings with not only the advisory committee but also selected members of the Njamal community who were in sympathy of Sharon Westerman's.
- He confirmed also that he paid 'sitting fees' to the selected Njamal members for numerous meetings, paid as Njamal funds, ie not from him personally.
- RC stated that he was now the trustee for the Njamal community when Ken Fraser objected to that term calling himself the trustee; RC responded “Let me be very clear I am now the trustee for the Njamal community”.
- At the meeting a violence restraining order placed on my (sic) by Sharon Westerman was discussed. RC clearly stated that if I sign a form that he handed to that he could “make that VRO go away”.
- I refused his offer outright and did not even look at the form that he wanted me to sign. I was disgusted at the tactic which was effectively blackmail.
- I pointed out that RC was in fact only dealing with merely elected advisory committee members and that effectively he was 'wining & dining' those members to procure their signatures. This included flying a number of them down to Perth at his expense to meet with the existing trustee, Australian Executor Trustees (AET)
- RC responded that it was his funds and that he was entitled to do what he wanted in that he had more than enough money to fund this overall action.
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- The meeting finished with the view to meet again.

(underlining added)

Mr Allen says Mr Carter explained the document he was asked to sign related to the Applicants. He says that he did not look at the document, refused to sign it, and indicated that he was open to signing forms but not on that basis.

In a meeting with the Inquiry on 3 October 2018 Mr Carter explained to the Inquiry that when he met with Mr Allen and Mr Fraser Mr Allen was "unbelievably stressed about the Sharon thing". Mr Carter says he went to see Mr Allen about attending a meeting with Pilbara Minerals Limited, something to do with changing the boundary to do a survey. Mr Carter denies that he suggested to Mr Allen that if Mr Allen signed a document he could make the restraining order go away.

Mr Carter also explained that the nature of the meeting was for Mr Carter to mediate with Ms Westerman and that he indicated to Mr Allen that if he did his job Mr Carter would enable him to go to the meetings, but that the "agreement stuff" needed to go to the Applicants in Port Hedland to get it signed. This appears to have been connected with an issue referred to earlier in the report whereby Mr Allen, after YMAC ceased its role in about May 2016, became the contact point for various heritage related applications by mining companies which Mr Allen experienced difficulties in dealing with.

Mr Carter then explained that Mr Allen rang up and said police had visited him and he asked if he could help. Mr Carter said he could.

Mr Carter has subsequently provided the Inquiry, under cover of email, with a letter from Mr Allen, whose signature appears on the document and which is witnessed by Mr Fraser. In relation to this matter, Mr Carter's covering email states:

I met with Kevin Allen and Ken Fraser to clarify the various statements made by NPTI in relation to dealings with Kevin Allen. His notes are in Italics

Lets be very clear

1. I believe has selectively interpreted the various discussion with Kevin and manipulated the situation for the purpose of creating a false impression of my performance. This is evident throughout all of the documents. This is my concern and I want it duly noted.

2. Kevin was not referring in anyway that I "blackmailed" or intended any such consequence of those actions. The actions of SSO are to say the least pretty obvious. No malicious intent ever existed then and in the dealings I have had with any Nyamal People.

In Mr Allen's letter to the Inquiry Mr Allen states, relevantly in relation to the meeting in Belmont:

I point out that the initial meeting was to some extent hostile.

My attitude to Rod altered over a period of time where he has shown a genuine attempt to compromise on situations where there are conflicts between community members.

He has since clarified that his request for asking me to sign the unknown document at our first meeting was based upon his attempt to help me if I helped him to diffuse the differences in my and Sharon's dispute.
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The Inquiry notes that Mr Allen does not resile in the letter from the substance of his earlier statutory declaration and, indeed, it is not directly addressed. Mr Carter's assertions in his covering email about selective interpretation and that Mr Allen was not referring in any way to Mr Carter having "blackmailed" him, are not borne out when regard is had to the statutory declaration made 22 April 2016, more than a year before the Inquiry was established. Insofar as Mr Allen's attitude towards Mr Carter has changed since the events recounted at that meeting, that is accepted. That Mr Carter has approached Mr Allen and clarified his position in relation to the request does little to take the matter further either.

The Inquiry is satisfied that Mr Carter did request that Mr Allen sign a document and at the time made comments in relation to potentially being able to assist Mr Allen if he signed the document. It accepts however that while the conversation was understood by Mr Allen at the time as involving an inappropriate requirement, the precise words used are unclear, and Mr Carter may have been endeavouring to convey that if Mr Allen took positive steps such as signing the document it may help diffuse the dispute with Ms Westerman and that Mr Carter may then be able to assist him in relation to the restraining order. While this event highlights the need for care to avoid perceptions of inappropriate conduct, the Inquiry is not satisfied that the allegation made in the original statutory declaration is made out insofar as it was directed to whether Mr Carter had acted inappropriately.

Using Trust funds to pay legal fees of Kevin Allen

As discussed elsewhere, between May and September/October 2016 the relationship between Mr Carter and Ms Westerman soured. One aspect of that relationship which became particularly vexed was, again as discussed elsewhere, Ms Westerman's entitlement to attend TAC meetings. By October 2016 lawyers were involved.

On 26 October 2016, in the course of a series of email communications, a lawyer acting for Ms Westerman, Mr Stokes, emailed Mr Carter asserting that Kevin Allen had no lawful right to attend a TAC meeting to be held that day in circumstances where Mr Allen knew Ms Westerman was likely to be present at the meeting, and that if Mr Allen did attend it would be on the basis that Mr Carter was using trust funds to support Mr Allen breaching the restraining order by paying his airfare to attend, and that therefore Mr Carter was acting inappropriately as Trustee as that role required him to act lawfully, responsibly and impartially.

Mr Carter responded:

Chris
To be very clear
1 The TAC is merely an advisory body. This meeting is a meeting proposed by some members. The Trustee does not need to accept the any recommendations
2 Sharon has not been invited by that group. This has now been made clear to yourself and Sharon on numerous occasions
3 it is irresponsible of you to attempt the threaten myself. Your correspondence is unacceptable
4 I have informed the Police that Sharon has not been invited. They have also advised her of this position.

5 Sharon will be potentially putting herself in harms way if she persists with this aggressive behaviour to her fellow members.

Kind regards

Rod

On 14 November 2016, a representative from a firm of solicitors acting for Mr Allen wrote to Ms Guo, for the attention of Ms Guo and Mr Carter, as follows:

Good afternoon Jing,

I refer to my conversation with Rod Carter earlier in relation to Kevin Allen, who Mr Gunning will be representing tomorrow at the Perth Magistrate Court.

Mr Carter mentioned that Indigenous Services would like to place $5000.00 into trust to cover further work that will be required for Mr Allen.

The details of our trust account are as follows:

A/C Name: Gunning Barristers and Solicitors Trust Account
BSB: 016 002
A/C Number: 4898 30201

Please include Mr Allen’s name as a reference in the payment, and send us a receipt of payment confirmation. We would be grateful if the amount (or at least $990 which covers tomorrow’s appearance) could be transferred before tomorrow’s court appearance.

If you have any questions, please do not hesitate to contact our office, or contact Mr Gunning directly on his mobile …

On 15 November 2016 payment of $990 was made from the Trust Fund to cover the court appearance scheduled for that day.

On 19 June 2018 Mr White for ISPL was asked about this transaction, and responded for ISPL by email dated 26 June 2018 to say:

We understand that due to a dispute between Mr Kevin Allen and Ms Sharon Westerman, Kevin required from the court a reduction in the limit of permissible proximity to Ms Westerman in order to attend a meeting in Port Hedland. Please refer to the attached email from Gunning Barristers and Solicitors referencing the $900 (plus GST) which was paid into their trust account.

The email to which Mr White refers is the email extracted above, for the attention of Ms Guo and Mr Carter. As far as the Inquiry is aware, the total of $5,000 requested by Mr Allen’s solicitors was never paid into the solicitors’ trust fund. Indeed, Mr Carter has suggested to the Inquiry that the ISPL directors only agreed to meet the cost of varying the order.

Mr Carter’s view of the $900 (before GST) transaction is that the restraining order (which Mr Carter says required Mr Allen to stay 50 metres away from Ms Westerman) would clearly affect Mr Allen’s ability to attend meetings as an Applicant. Mr Carter considered that, given these circumstances, which he describes as “necessitive” and of importance culturally, an application was sought to reduce the distance a court would allow for the two to attend any meetings where both were invited. The cost was $900. He says that it was not the position of the directors to take sides in disagreements between families which occurs frequently.
Mr Carter has also supplied the Inquiry with a copy of an email dated 2 October 2018 from Mr Parker to Mr Carter in which, relevantly, Mr Parker says:

Clause 9.12 of the Njamal Trust Deed provides for the TAC members to have their reasonable out of pocket expenses for all acts done to be paid out of the Trust Fund. Your response to the CTI should deem your assessment of the $900 spent on Kevin’s response to the AVO as being a reasonable cost incurred to allow him to attend TAC meetings.

While the Inquiry does not necessarily accept Mr Carter’s explanation that the funding was justified on hardship grounds (“necessitive circumstances”) as Mr Allen was, at the relevant time, engaged and remunerated by ISPL or that basis identified by Mr Parker provided a proper foundation for payment of the restraining order fee, it accepts that it is at least arguable that in all the circumstances the Trustee could pay the fee. The apparent willingness of Mr Carter to indicate to Mr Allen's lawyers a preparedness (whether by him or ISPL) to ISPL paying $5,000 for Mr Allen's ongoing legal fees (which did not apparently eventuate) is of greater concern.

**Pre-signed blank distribution approval forms**

It has been suggested to the Inquiry that Ms Guo was observed to have a photocopy of a blank approval form signed by Mr Carter for the apparent purpose of Ms Guo being able to make a disbursement of Trust Funds without Mr Carter needing to sign it contemporaneously with any approval for distribution being given. Ms Guo denies the assertion, as does Mr Carter. While the Inquiry accepts that the witness observed Ms Guo with a form which appeared to be a copy of an approval form with Mr Carter's signature, the context of this occurring is not sufficiently clear, particularly given Mr Carter and Ms Guo's denials, for the Inquiry to be satisfied that it was in fact such a form or that it was prepared and used for authorisation of transactions without Mr Carter needing to sign the form.

**Meeting with The Mad Empire representatives**

In early 2018, at least three staff from a business called The Mad Empire, including Ms Penny Tassone, were meeting with various Njamal people, including Mr Allen, Mrs Eaton, Mr Mitchell and Mr Haynes, in connection with proposed celebrations for the then foreshadowed native title determination.

That meeting was a meeting of an Applicants' working group that had been meeting regularly on Thursdays.

It has been suggested to the Inquiry by one person who attended that meeting that:

- Mr Carter turned up and said words to the effect of "Rod, director of the trust, in my office" or "Get in the office, the three of you" and "I am the director of this trust".
- Mr Carter in the course of the discussion that followed questioned why Ms Tassone was present and began to get angry. Mrs Eaton intervened and explained to Mr Carter that the working group needed the girls (i.e. The Mad Empire representatives),
Mr Carter referenced the ancestors strike and said that the girls were going to help her with the culture.

- Mr Carter said he was there because he was the director of the Trust to make sure that “people like you” (which the Inquiry infers is a reference to the representatives from The Mad Empire) don’t take advantage. Ms Tassone said “are you talking about me or are you talking about you?”

- After some further discussion involving another representative of The Mad Empire Ms Tassone told Mr Carter that she had been trying to see him for a while and indicated that the $300,000 budget (for the native title determination celebration) was a joke, and questioned where the $200,000 of travel had come from.

- Ms Tassone indicated that she would tell people not to have the ceremony like this because $300,000 was exorbitant and told Mr Carter that if he wanted to see her budget, that gives you back $170,000.

- Mr Carter said to the group you can have your determination, but you can organise it yourselves. Mrs Eaton stepped in and said no, we are getting people in to organise.

- Ms Tassone said to Mr Carter that $300,000 is too much for on country. Then Mr Carter said you need to listen to me, I am the director of the trust. He said words to the effect of “I don’t know why you even need the determination. I can give you $1,000 each and you don’t need a determination and these people can go” / “I’m trying to do what’s best for the Njamal people and if you guys want $1,000 wouldn’t that be better for everyone here?”.

- Ms Tassone said to Mr Carter, that’s a bribe/that sounds like a real bribe.

- Ms Tassone said that she was there because she cared about the people.

- Mrs Eaton indicated that said she had brought Ms Tassone and her team in and they’re staying.

- Mr Carter said that’s fine if you guys want it then fine, but I would have thought it would be an opportunity for people to do it themselves and make some money out of it.

It has also been suggested by another attendee that:

- At a meeting Mr Carter introduced himself as Rod (and that representative knew he was the manager).

- During the meeting Ms Metcalf, another of The Mad Empire attendees, raised concerns about how the estimate for travel had been made when invitations had not been sent, it was not known who was coming from where and queried why people would be paid to come to the ceremony.
Mr Carter responded negatively to those questions and talked about having given 16 people jobs. He started questioning who The Mad Empire representatives were and why they were there. The representative indicated that they were invited.

In the course of the meeting Mr Carter addressed the Njamal people in the room and said words to the effect of "rather than spend all this money on a determination, I could give you all $1,000."

Mr Carter has commented on this meeting in person to the Inquiry and in writing. The first occasion is in a meeting with the Inquiry on 26 September 2018 where Mr Carter explained that the meeting with the Mad Empire had nothing to do with the TAC; rather it was the committee that was formed with the Applicants. Mr Carter said the Mad Empire had one meeting where they came to them and put a proposal. He says Mrs Eaton came to him and said they were good.

Mr Carter then explained that what happened was he said it (being the project that the Mad Empire were undertaking) was great, as long as they understood that it was the Njamal People's celebration. Mr Carter said he then asked if there was a quote and was told no, just scoping the job.

Mr Carter said that the next day ISPL got a quote for $300,000 including a $86,000 fee for organising. Mr Carter also said the quote didn't contain a figure for getting people to the celebration. Mr Carter explains that he then said that [we/you] don't necessarily need to spend a lot of money on this because a mining company would pay to get people there. He said that Mr White had reviewed the budget and the problem was ISPL didn't know what the transport costs were going to be, but if there was a determination then there would be Njamal people from all over Australia who want to come.

Mr Carter says he then remarked that before doing it, if its $300,000, they could write to everyone and give them $1,000 (which figure was just $300,000 divided by 300 members, equating to $1,000 per member).

Mr Carter said they need to make sure they're getting value for money.

There are some discrepancies in Mr Carter's explanation.

The first is it seems implicit in Mr Carter's comments that the quote for $300,000 was a quote from the Mad Empire. However, the Inquiry has copies of those quotes and the figure quoted by the Mad Empire for the determination celebration was about half that sum. It seems that the figure of $300,000 comes from a document dated 3 November 2017 (which is prior to the Mad Empire's involvement), titled "Project Request Form", and which records the "Proponent" as "Applicants" and the "Approval Level Required" being the "ISPL Board". On its face, that document seems internal to ISPL / the Applicants and the Inquiry was advised it had been prepared by Mr Zikwature from ISPL. That document records next to the words "Estimated
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Budget” the figure of $300,000. It also records, in an attachment, a figure of $200,000. The Inquiry infers this is the sum Ms Tassone says was allocated by ISPL to travel.

The second discrepancy is that neither the Project Request Form, nor the attachment containing various figures, nor the budgets prepared by The Mad Empire, contains an $86,000 fee (or similar) for organising.

In the event, it may be that Mr Carter was conflating the budgets prepared by The Mad Empire with other budget documents prepared by the Applicants’ working group with whom The Mad Empire were discussing the proposed determination celebration and that, insofar as a figure of $86,000 was recalled, that was misremembered.

When asked whether he made any reference to the working group or the Njamal People themselves doing it rather than getting it contracted, Mr Carter accepted that is what he said. He explained that he said to the working group that ISPL had spent two years building up their skills, and that they could do it. An example Mr Carter gave was rather than paying someone $12,000 to be the MC for the day someone like Mrs Eaton could do that. Mr Carter said he felt it was their role and that they could buy in.

Mr Carter explained that by the time of his meeting with the Inquiry a lot had been done and he mentioned in particular how certain mining companies had donated money or infrastructure (e.g.: toilets). He said that the Njamal People were capable of organising this themselves and didn’t need to get someone else in to do it.

The Inquiry also notes that when the complainant in relation to this allegation met with the Inquiry she expressly disavowed any suggestion that her meeting with the Inquiry had anything to do with any payment dispute between The Mad Empire and ISPL, and did not ask or suggest that the Inquiry involve itself in that dispute. Rather, the Inquiry's view is that the complainant simply held strong views about what occurred at the meeting in March 2017, and felt it was proper in all of the circumstances to raise those with the Inquiry. Despite Mr Carter's suggestions to the contrary, the Inquiry does not doubt the complainant's motivations.

In the Inquiry’s view key aspects of the narrative given by Mr Carter in his meeting with the Inquiry on 26 September 2018 are however plausible, ie that Mr Carter was concerned about cost of at least the involvement of consultants in the celebrations, was encouraging the Njamal People themselves to consider doing more of the work, and in making a remark to the effect that he could write to everyone and give them $1,000 and they would accept it rather than have the celebration was intending to convey the importance of the Trust money being well spent on behalf of the Njamal People and the need to be accountable for the amount

84 Adjacent to the figure of $200,000 was an incomplete notation "50 Members $800 ea" in the scanned version provided to the Inquiry which, given the sums ($200,000 / $800), likely reads "250 Members" in the original.
spent on consultants. This accords with Mr Carter's consistently expressed view that one of ISPL's visions is to help the Njamal People up skill and take control of their economic development. It is also supported by aspects of Mr Allen's letter to the Inquiry attached to Mr Carter's 19 October 2018 email wherein Mr Allen says he supported Rod on this occasion, and, amongst other things, that the comments made by Mr Carter concerning the payment of $1,000 to Njamal members were "clearly a response by Mr Carter that many, many community members would not be interested and would probably prefer the cash instead of attending a meeting in Hedland if they had the chance."

In the circumstances, while Mr Carter should ideally have shown greater pause before making the statement he did, and have appreciated the concerns that his comments may have caused, and did cause, it accepts that the comments were made in the course of a fairly heated exchange. It does also reflect that aspect of Mr Carter's personality and management style of being fairly confrontational, particularly if he himself feels confronted or challenged. The Inquiry does not consider the allegation to the effect that Mr Carter made or suggested making an inappropriate offer of payment to any Njamal people is sustained. Nor is it satisfied that he introduced himself as being a director of ISPL, particularly given the conflicting recollections of participants at the meeting.

**Mr Carter’s relationship with ISPL’s previous shareholder**

Between 13 May 2016 and 31 August 2017 the sole shareholder of ISPL was Mr Carter. On and from 31 August 2017 until 26 June 2018 the sole shareholder was Esplanade Consultancy Pty Ltd.

Mr White was asked about his involvement with Esplanade Consultancy Pty Ltd in its capacity as (former) shareholder of ISPL in a telephone conversation with staff of the Inquiry on 18 June 2018. Mr White advised the Inquiry that he spoke to Ryan Carter, then director of Esplanade Consultancy Pty Ltd, from time to time about the Trust and generally kept him up to date. Mr White said that, generally, those discussions were not documented and usually occurred over the phone.

One documented example, however, of Mr White and Ryan Carter meeting to discuss the business of the Trust is, of course, the meeting on 31 October 2017 at which Mr Aird's resignation was noted and the authorisation matrix and corporate structure discussed in the Inquiry's invitation to ISPL dated 27 August 2018 were endorsed.

Mr White also explained that he understood from an outsider's point of view the ownership structure of ISPL was problematic and that he was at that point in time (mid-June 2018) going to be proposing a change to that structure. In the event, that change has occurred, with Esplanade Consultancy Pty Ltd being replaced as shareholder on 26 June 2018 by Mr White (albeit it seems in his capacity as a trustee for a White family trust).
Esplanade Consultancy Pty Ltd has also been asked about its role as shareholder. In particular, Esplanade Consultancy Pty Ltd has been asked to provide all records of shareholder meetings of ISPL since 15 July 2017, and all records of shareholder or director meetings of Esplanade Consultancy Pty Ltd since 15 August 2017 at which the operation, management or administration of the Trust was considered or discussed. The response to each of these requests was that "There are no such documents or records".

Esplanade Consultancy Pty Ltd was also asked to provide a copy of all documents recording or comprising any resolutions, directions, instructions or requests made by the company to ISPL, the Board of ISPL, or any director, agent or employee of ISPL, concerning the operation, management or administration of the Trust since 15 August 2017. The company responded to say that the question "has been asked in prior correspondence and responded to", adding that "The only documents located on these matters were Employment Contract documents pertaining to the role of Mr. Carter, which have previously been supplied to the Inquiry."

Notwithstanding these responses, the Inquiry has been informed that at an ISPL management meeting in about late October 2017 or early November 2017 consideration was given as to whether ISPL should invest in the Hedland Harbour Cafe. The Inquiry understands that the management committee decided against the investment, consistent with concerns expressed by Mr Mack, Mr Parker and/or Mr Aird to the effect that it was inappropriate from a cash flow point of view, was a small business better suited to an owner operator than a large organisation with a manager, and that the investment was otherwise unsuitable because people (the Inquiry infers that this is a reference to potential customers) were leaving Port Hedland at the time.

Mr Carter has commented on this transaction, as follows:

Notes of meetings will show the agreement was reached some 6 months earlier. Mr Mack was not employed and Mr Aird was aware of the interest. It came up in a number of meetings. Strategically it was to supported by all as it was to interface with the Action Catering contract, by providing trainee staff.

The records will show the business was purchased on a Vendor Finance basis. Simply using Mr Aird's emails is not consistent with proper due diligence.

In relation to Mr Mack, he was not present when the deal was done. The deal has been an outstanding success and created many employment opportunities and profit for Nyamal. This is testimony to the excellent decision that was made.

The inquirer has read this completely and deliberately in a false manner. Directors should always conduct robust evaluations and not be afraid to have an opinion. Being a responsible Director has been highlighted in the Royal Commission.

In the case of Mr Aird, he has deliberated given a false impression of ISPL because of his own dismay at being asked to resign. As well as the misconduct, he was unprepared to sign any contracts or give personal guarantees. Now he appears to be your key source of information. Please seriously reflect on this advice and look at the outcomes for the Nyamal People.

However, notwithstanding the view reached by the management committee, the Hedland Harbour Cafe was purchased in mid-November 2017, without reference back to the
management committee. Mr Mack, who was unaware that the purchase had been approved, was contacted while on leave and advised that the investment had been approved. He was requested to make urgent arrangements for the provision of EFTPOS machines for the cafe. Mr Mack was advised (although it is not clear by whom) that ISPL had received a direction from its 'shareholder' that the investment should be made. The Inquiry is unaware, however, of any documentary evidence of such a direction having, in fact, been made.

In his response Mr Carter, amongst other things, suggested that Mr Mack's subsequent resignation was on the basis that "he did not like working with Aboriginal People as he was 'better than them'". This allegation is illustrative of the type of attack Mr Carter made on the motivations or character of the actions of numerous persons who made allegations or provided information or assistance to the Inquiry which may have been adverse to ISPL or Mr Carter. While in some cases it was no doubt intended to convey the strength of Mr Carter's views as to why the evidence of such persons should be rejected, and in some cases there was an underlying basis that warranted the Inquiry exercising caution before accepting a person's evidence at face value, the nature and extent of some of the attacks was concerning.

Mr Mack, for example, presented in his interactions with the Inquiry in a measured, professional manner who was fairly reticent to be drawn in to matters being considered by the Inquiry, yet nevertheless assisted with its understanding in relation to a number of relevant issues. When Mr Carter's above allegation was raised with him, Mr Mack vehemently rejected it, noting that he had he had worked in Aboriginal contracting for 6-7 years and that he was still working in that field now. Mr Mack said that when he resigned he was asked by one of the management of ISPL if he had had enough of working with Aboriginal people, and Mr Mack said he replied to say he had had enough of working with ISPL, but it was not the Aboriginal people he was sick of. The Inquiry accepts Mr Mack's position without hesitation and rejects Mr Carter's assertion. Mr Mack's position is also consistent with concerns he expressed when engaged by ISPL and Mr Parker's recognition in his previously referenced email in August 2017 in which he expressed an opinion that Mr Carter's "reckless authorisation of payments ... are very much responsible for why Craig Mack has not signed his Employment Contract and, in my opinion, he will resign within the next 4 weeks."

In any event, more generally, it has been suggested to the Inquiry that Mr White and Mr Carter were often on the lookout for deals which could be done by ISPL as Trustee of the Trust, and that when that enthusiasm met resistance from others within the ISPL structure, for example because of cash flow or risk management concerns, on more than one occasion after Mr Carter had ceased to be a director of ISPL in July 2017 until at least November 2017, he conveyed to others within ISPL that 'the shareholder' desired ISPL to take the path advocated for by Mr White and Mr Carter. To be clear, this is not to suggest that Mr White was in any way involved in those communications, simply that Mr White, together with Mr Carter, may have had a greater appetite for commercial risk than others in the management of ISPL.
In respect of this suggestion, Mr Carter has commented:

That is a completely false statement based on the gripes of Aird. Any reasoned person can see the enormous benefits that have been delivered to the Nyamal Community by ISPL, yet SSO are focusing on generalizations attributed to a few disgruntled people. SSO have completely missed the point!

While in some circumstances the direction of a shareholder, particularly a shareholder who holds all of the paid up capital in a corporation, may not be inappropriate, in this case the situation is unique. The shareholder of ISPL when these events occurred was either Mr Carter or, from 31 August 2017, a company (Esplanade Consultancy Pty Ltd) which for the relevant period was controlled by Mr Carter's son, Ryan Carter, as sole director, and of which Mr Carter was and has always been the sole shareholder.

In respect of this observation, Mr Carter has commented:

This is commercially acceptable and has no relevance to anything other than SSO making false malicious assumptions.

Mr Carter rejected any suggestion that he referenced the shareholder in support of any position being adopted, saying that he doesn't need to hide behind anything when he says something, and that something like shareholder is not what he would say.

The Inquiry is ultimately satisfied that, despite Mr Carter's denial, he did on more than one occasion between July and about November 2017 make reference to the shareholder or words to that effect. Further it accepts that during this period there was at least some concern and perception arising from Mr Carter’s use of the phrase as to whether ISPL's high level decision making processes may have been influenced or sought to be influenced. However, applying the Briginshaw test, the Inquiry is not satisfied that the circumstances in which that phrase was used are sufficiently clear to draw any adverse conclusion as to its use.

The Inquiry also concludes that Mr Carter, in particular, and Mr White to a lesser degree, had and retain a greater appetite for risk in respect of expenditure on projects and investments than Mr Aird, Mr Mack and Mr Parker and supported expenditure on projects such as the Hedland Harbour cafe despite concerns of Mr Aird, Mr Mack and Mr Parker. In respect of this proposition Mr Carter says:

Clearly, anyone who embarks on a position of Aboriginal engagement and embracement is taking an enormous risk. Given the commercial experiences I have had over 30 years, I can say that no business venture is without risk.

This comment by SSO has no foundation.

We have provided evidence that confirm that the financial risks have delivered over 100 jobs and agreements creating more than $100m for Nyamal People.

That is what SSO should have been looking at.

SSO should also be looking at the role of YMAC and the role of AET.

It is plainly obvious that these organizations milked Nyamal for whatever they could get and took no risks. In AET’s case they were happy to let Nyamal Mining lose $2.7m of funds due to Ms Westerman’s mismanagement, and do absolutely nothing, because they were worried about losing the Trust management.
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If the inquiry found these risks were unacceptable, they would be completely at odds to the facts.

Mr Carter is correct insofar as he draws the Inquiry’s attention to materially increased employment of Njamal people during ISPL’s tenure as Trustee (although the precise nature and extent of the actual increased employment figures is open to some debate). It is also accepted that ISPL caused significantly improved royalty streams to be negotiated on behalf of the Njamal community. But, with respect to Mr Carter, while outcomes are very important, what must never be lost sight of in the course of seeking to achieve outcomes is that as trustee of a charitable trust it is imperative that in seeking to achieve outcomes proper process is at all times followed and the roles and responsibilities of a Trustee of a charitable trust, including to act with prudence when investing the money of others, are fully adhered to.

Here, if the shareholder of ISPL from time to time is related to a director of ISPL and is involved in or is perceived to be involved in management decisions which affect the financial status of the Trust, that raises issues of the proper governance of ISPL and the Trust. Further, it is wrong to think that general precepts of commerciality can be the sole or predominant guide to the proper administration of the Trust.

Findings and recommendations

Findings regarding Mr Carter’s role after July 2017

In summary, in addition to the specific findings already referenced above, and having regard to the above, including the responses received from ISPL and Mr Carter, the Inquiry finds that:

- Until 4 July 2017 Mr Carter was a director of ISPL.

- From 4 July 2017 Mr Carter’s role was conceived of as an executive level role, something akin to a Chief Executive Officer or Chairman, and language of that nature was used to describe Mr Carter’s role until at least about mid-September 2017.

- From about mid-September 2017 Mr Carter’s role ceased being styled as an executive role and was styled as Programme Manager or Program Coordinator.

- While certain steps were taken by ISPL and Mr White to limit the role, responsibilities and authority of Mr Carter, in practice, irrespective of the title that may have been conferred on him from time to time, and despite having been issued the Disqualification Notice, Mr Carter continued to be conferred by ISPL with significant and influential roles, responsibilities and authorities in relation to the management and administration of ISPL as Trustee of the Trust, for the period from 1 August 2017 to April 2018 (when revision 6 of the authorisation matrix was prepared and, presumably, endorsed) and at least until September/October 2017 exercised those roles, responsibilities and authorities.
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- ISPL, as Trustee of the Trust, acting prudently, ought to have, but did not:
  - carefully review the First and Second Deeds and cause them to be varied or terminated, and revise the remuneration provided for, and charged to the Trust, given that by reason of the Disqualification Notice Esplanade Consultancy Pty Ltd was substantially unable to provide the agreed "Specific Services";
  - carefully assess whether, in the circumstances of the issue of the Disqualification Notice, and matters such as the serious concerns expressed by Mr Aird and Mr Parker in relation to Mr Carter's conduct, and issues such as those identified elsewhere in the report in relation to Mr Carter's conduct and approach, including in relation to conflicts of interest and duties, it was appropriate for Mr Carter to have any ongoing role, and, if so, what role, in relation to the Trust;
  - ensure that if any agreement was entered into in relation to Mr Carter having any ongoing role in relation to the Trust:
    - the agreement was clear, transparent, documented and limited the roles, responsibilities and authorities of Mr Carter to ensure that they were consistent with the legal effect of the Disqualification Notice; and
    - controls were put in place to monitor and control Mr Carter's activities including by way of regular records being maintained of his activities, such as time sheets; regular direct supervision of his activities (other than incidental monitoring in the course of Mr White's interactions with Mr Carter) by a designated person above him in the organisational hierarchy; ensuring all decisions in relation to the Trust's management and operation and the person who authorised them were clearly and routinely documented; and

- prior to about April 2018 Mr White ought to have, but was not prepared to, and did not, alter the corporation structure diagrams or authorisation matrixes to ensure that the roles, responsibilities and authorities conferred by ISPL on Mr Carter in relation to the management and administration of ISPL as trustee and the Trust were less significant and influential. The scope of the authorities thereby conferred, if exercised, would potentially have been inconsistent with the legal effect on Mr Carter's conduct of the Disqualification Notice.

The Inquiry does not make any finding as to whether or not Mr Carter's conduct actually contravened the limitations of the effect of the Disqualification Notice on his ability to manage corporations. Ultimately it is not considered necessary or appropriate to reach a concluded
view on that topic, including where those questions might be better considered by other bodies such as ASIC. The findings made as to the nature and extent of his role, and opacity of that role in a various respects, are however relevant to the next issue considered in this section.

**Findings as to whether Mr Carter should remain involved with affairs of charitable trusts**

A fundamental concern arising in the course of the Inquiry concerns the circumstances in which limits can and should be placed on the employment or engagement of a person in the affairs of the charitable trust.

The starting point is to consider the scope for regulation of trustees themselves.

At present, the legislation that is in place at both a state and commonwealth level is primarily concerned with regulating either the conduct of the trustee itself (e.g.: Trustees Act 1962) or the conduct of the officers (or "responsible persons", in the case of the ACNC Act) of corporate trustees (e.g.: Corporations Act 2001, ACNC Act).

In respect of the ACNC Act, however, the Inquiry notes that in Division 85 the Commissioner has the power, the exercise of which is relevantly triggered when the Commissioner reasonably believes that a registered entity (like the Trustee) has or is more likely than not to contravene a provision of the ACNC Act or a governance standard published under that Act, to direct the registered entity to ensure that an individual meeting a certain statutory description (in section 85-10(3)) does not make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the registered entity.\(^\text{85}\) The difficulty with this provision, though, is that it requires the Commissioner to form a reasonable belief that the trustee has contravened the ACNC Act or a governance standard, not simply that a particular person connected with the trustee might pose a risk to the trust.

Under section 77 of the Trustees Act 1962, the Supreme Court is empowered to appoint a new trustee where it is "expedient" to do so and "inexpedient, difficult or impracticable to do so without the assistance of the Court". A series of express examples are given in subsection (2), including where the trustee has been held by the Court to have misconducted himself in the administration of the trust, has been convicted of an indictable offence, or is bankrupt, but these examples expressly do not limit the generality of subsection (1).

This expediency jurisdiction is broad, though not at large, as Jacobs explains (in language similar to that adopted by the Court of Appeal):

> 'Expedit' means 'advantageous or appropriate or suitable to the circumstances of the case'. It is expedient to appoint a new trustee if it is conducive to, or fit or proper or suitable, having regard to the interests of the beneficiaries, to the security of the trust property and to an

\(^\text{85}\) Section 85-10(2) of the ACNC Act.
efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred on the trustees. The dominant consideration is the welfare of the beneficiaries, not the imposition of a sanction or punishment upon the trustee as a consequence of misconduct. The principal element in considering the welfare of the beneficiaries is the safety of the trust estate. A lack of confidence in the trustee's further administration of the trust is sufficient to justify removal. It is not necessary to establish misconduct. 'Misconduct' extends beyond deliberate misconduct. It applies to a trustee who has failed to understand the obligations applying in the administration of the trust.

While the Attorney General is not generally within the scope of persons who may apply for an order under section 77, the Attorney General, in the case of a charitable trust, could however potentially apply for such an order in reliance on the Court's largely parallel equitable supervisory jurisdiction. While certain applications may also be made by the Attorney General under s 21 of the Charitable Trusts Act 1962, that section does not in its terms readily suggest that removal of a trustee is the type of direction it is contemplated that the Court may make under that provision.

The Trustees Act 1962 also does not specifically confer power in relation to controlling the conduct of officers of a corporate trustee or as to the employment or engagement of a person in the affairs of a trust.

In part the answer may be that a trustee in fulfilling its fiduciary duties should ensure that if the continued involvement of one of its officers or the employment or engagement of an officer in the affairs the trust may adversely affect the security of the trust property or an efficient and satisfactory execution of the trusts or a faithful and sound exercise of the powers conferred on the trustee, remedial action should be taken including potentially removing the officer or ceasing to employ or engage the person in question.

It is conceivable that, where such a concern arises, if appropriate action is not taken by a trustee, a court might be persuaded to exercise its discretionary expediency power to remove the trustee given a lack of confidence in the trustee's further management and administration of the trust with that person's continued involvement. The Inquiry is not however aware of the power under the Trustee's Act being called upon to be exercised in such circumstances.

Also, a number of difficulties may arise in advancing such an application, including if some lesser form of action than removal of the trustee is considered a more appropriate remedy.

As observed above, in the context of a charitable trust, the Court also may be asked by at least the Attorney General to exercise its equitable supervisory jurisdiction. Whether it could be persuaded that it could and ought in an appropriate case order that steps be taken to remove an officer from their position or that an employee or contractor's engagement be terminated, is a seemingly open question.

In the specific case of a person who has been disqualified from managing corporations, that has the effect of preventing them from holding an office of director or secretary of a corporation or from managing a corporation. A restriction of similar effect applies in relation to such a disqualified person being a 'responsible person' in relation to a charitable trust under
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ACNC legislation. In certain circumstances the ACNC may also issue directions to a trustee of a charitable trust with a view to ensuring that restriction is complied with, as noted above.

That leaves the case however of a person who might not be performing a prohibited role of managing a trustee corporation or acting as a 'responsible person' but whose involvement or potential involvement, even at some lesser level, is such that it may sufficiently impact on confidence in the security of the trust property and the due administration of the trust that the person should not have any, or should not have more than very restricted involvement. That issue is of potentially heightened significance in the case of a small privately owned corporation, such as ISPL, with a limited number of directors or persons managing the corporation.

At this point the Inquiry accordingly turns to the circumstances of Mr Carter. In the circumstances of this case the question may presently be largely moot. That is because ISPL has already reviewed its position and terminated the engagement of Mr Carter in relation to the affairs of the Trust. Mr Carter has advised that he has taken on other employment. He does not however accept he should be restricted from returning to a role in relation to the affairs of this or other trusts at some future point. Mr Carter also does not exclude the possibility of at some point resuming a role in relation to a trust in the future, and wishes to keep that option open although says that he would not want to be involved in management but does have a continued interest in possibly assisting in a community liaison role, business development or advocacy type role. Whether he would consider a return to such a role he says may depend on whether his assistance was sought by a relevant indigenous community.

The Inquiry notes that it is unclear to it whether the cessation of Mr Carter's role in relation to this Trust also applies to his involvement in relation to the Yugunga-Nya People's Trust of which a wholly owned subsidiary of ISPL is now trustee. In that regard it notes that on 9 October 2018 Mr Carter emailed the Inquiry, possibly intending to email another inquiry, in relation to the Yugunga-Nya litigation, referencing a discussion on the progress of the Yugunga-Nya litigation and hoping that the situation could be one of working together, conveying that Mr Carter appeared to have some involvement with that Trust.

Bearing the above matters in mind, the Inquiry considers it appropriate for it to proceed and deal with the question of whether it considers Mr Carter should have any continuing future role in relation to the Njamal People's Trust or other charitable trusts. Of course, were that to occur notwithstanding the conclusions and recommendations of the Inquiry, it would then require consideration of what, if any action, the Attorney General or entities such as the ACNC might appropriately then take, in the then existing circumstances, in the context of the then existing regulatory position. Recommendations to strengthen the regulatory position in relation to charitable trusts are made in Chapter 13.

The Inquiry approaches this question from the point of view of whether having regard to the strong interest in the due administration of charitable trusts, the broader interests of the
community or section of the community in whose interests such trusts are directed (in this case the Njamal People), and the security of trust property, Mr Carter should not have any, or only limited, involvement in the affairs. It approaches this from the point of view not of seeking in any way to be punitive, but from the perspective of whether there is a sufficient reason to lack confidence in the resulting due administration of the trust if such a limitation did not apply.

In this case, the first point is that, even putting to one side the particular findings that were made by the ASIC Delegate, the fact of the issue of the Disqualification Notice and the nature and extent of the 4 year period of its disqualification out of a maximum period of 5 years is itself a significant cause for concern as to the potential risk, certainly of Mr Carter having any significant involvement in relation to the affairs of the Trust or charitable trusts. In this respect there is some analogy with the removal of individual trustees who are bankrupts – at least one part of the rationale for their removal is that "persons who may not have shown skill and prudence in the management of their own affairs cannot be regarded as suitable persons to manage the affairs of other people". The disqualification does not however automatically preclude Mr Carter having any involvement in the affairs of a charitable trust.

Further, having regard to the following, in the Inquiry’s view there is however a sufficiently strong cause for concern if Mr Carter, at least during the term of the Disqualification Notice, were to resume or commence any material role in relation to the affairs of the Njamal People’s Trust or any other charitable trust, that there is a public interest in him not being permitted to do so:

- the fact, seriousness and consequences of the Disqualification Notice in terms of Mr Carter being prohibited from managing corporations and being a responsible person in relation to charitable trusts for a four year period;
- the immediately preceding findings, and other findings made in the Report, in relation to the conferral on Mr Carter by ISPL of significant and influential roles, responsibilities and authorities in relation to the management and administration of ISPL as Trustee and the Njamal People’s Trust, for the period from 1 August 2017 to April 2018, and his exercise of those roles, responsibilities and authorities until at least September/October 2017 (including the examples itemised and, for example, his attendance at the Review Workshop and role on the management committee and his instructing of Mr Green in relation to the removal of Mr McPhee as a director of Njamal Services Pty Ltd, as discussed in Chapter 8 below); and

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• the serious concerns raised by former directors of ISPL, Mr Aird and Mr Parker, in mid to late 2017 regarding Mr Carter’s conduct, and the fact that those concerns contributed to or caused Messrs Aird and Parker to resign as directors of ISPL.

The Inquiry’s findings elsewhere in the Report add additional weight to the Inquiry’s conclusions, including its findings in relation to:

• the opacity of the precise role that Mr Carter has performed for ISPL since at least 31 July 2017 and absence of Mr Carter’s role, responsibilities and duties being fully and clearly documented and reflected in a written agreement;

• Mr Carter’s strong and forceful personality, at times aggressive interpersonal style and tendency to personally demean or denigrate persons who have expressed concerns, made allegations or provided assistance to the Inquiry and who disagree with his views or conduct;

• Mr Carter’s failure to accept many of the Inquiry’s concerns and the Inquiry’s corresponding disquiet in relation to his apparent lack of insight in relation to those issues;

• findings in relation to inadequate compliance, documentation and governance referred to in Chapter 8 of the Report; and

• matters relating to Mr Carter identified in Chapter 9 of the Report in relation to conflicts.

Finally, if the reasons given by the ASIC Delegate for the issue of the Disqualification Notice themselves are then taken into account, and absent that decision having been set aside (and recognising that the decision and the reasons for it are disputed by Mr Carter and have not been subject to separate review and findings by the Inquiry), the above causes for lack of confidence are, in the Inquiry’s view, only strengthened.

In the Inquiry’s view, while as expressed elsewhere Mr Carter has in many respects been a force for very positive change within the Njamal community and the Trust, the Inquiry has concluded that, notwithstanding the obvious personal and potential financial impact it may have, there is a public interest in Mr Carter not being materially involved in the affairs of the Njamal People’s Trust or other charitable trusts, at least during the term of the Disqualification Order.

In light of that finding, and the recommendations which follow as set out below, and in view of the presently limited nature of the powers in the Trustees Act 1962, Charitable Trusts Act 1962 and the similarly limited reach of the Corporations Act 2001 and the ACNC Act, the Inquiry recommends that consideration be given to effecting legislative amendments to better facilitate individuals being precluded from being employed or engaged in the administration of
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charitable trusts. The precise nature and scope of those proposed amendments are discussed in greater detail in the legislative reform Chapter of this Report, Chapter 13.

Recommendation 6 (Chapter 5)
Mr Carter not be engaged, employed or otherwise materially involved in the affairs of the Njamal People’s Trust or any other charitable trust at least during the term of the Disqualification Order.
Abbott

Abbott is a wholly owned subsidiary of Abbott & Associates Pty Ltd.

Since its incorporation, Abbott's directors have been:

- Stephen Reginald Byers (from April 2008 to March 2010);
- Kimberley Audas (from April 2008 to April 2012);
- Anthony McDowell (from April 2008 to present); and
- Stuart Outtrim (from April 2012 to present).

In addition to being a director from 2008-2012, Mr Audas was also for this period the officer of Abbott responsible for the day to day management and administration of the Trust. Mr Audas retired as a director on 14 April 2012 and ceased to have responsibility for dealing with the Trust from that date. From then until Abbott's replacement by AET in 2014 (being the period primarily considered by the Inquiry), the day to day management and administration of the Trust was delegated to, and conducted by, Phil Drayson, General Manager.

Mr Drayson's authority to deal with the Trust on behalf of Abbott derives from a delegation of this function from the Board of Abbott to Mr Drayson dated 12 September 2012. That delegation was required because, by clause 7.7 of the Trust Deed, where a corporation acts as Trustee, any determination, decision or resolution to be made by that corporation as Trustee shall be made by the board of directors, or governing committee of that corporation, or by any other person authorised in writing by the board of directors or governing committee of that corporation.

The delegation was renewed on July 2014, shortly before its retirement and replacement on 7 July 2014 (see below), following a board resolution to that effect.

**Subsidiaries**

During its term as Trustee a number of companies were established, which became subsidiaries of Abbott. The circumstances of their establishment and Abbott's shareholding therein is not entirely clear. These are briefly considered below with the most significant, Njamal Mining Pty Ltd, considered in most detail.

**Njamal Enterprises Pty Ltd**

Njamal Cross Country Awareness Pty Ltd (also called NCCA, now Njamal Enterprises) was established on 3 December 2008. Upon its incorporation, Abbott was a 94% shareholder and

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87 The Board delegated authority to Mr Drayson to make determinations, decisions and resolutions necessary to run the Trust on a day to day basis.
it held those shares on trust for the Trust. Abbott remains a 94% shareholder to this day, though the shares are now held by Abbott both legally and beneficially.

The Inquiry sought an explanation from Abbott about the establishment of Njamal Enterprises and its unique share structure. In response, Abbott's lawyers said that the establishment of Njamal Enterprises was not a Trust initiative:

Our client can only guess that the company was set up to deliver cross cultural awareness programs and to have an entity to have money paid to. This company took on the role of an entity which conducted heritage surveys for the Njamal people and was paid by mining companies as part of the Aboriginal Heritage Act requirements.

Our client does not know how the shareholders were determined.

This explanation is supported by the minutes of a TAC meeting held 25 August 2010 which records that the TAC resolved as follows:

The attendees agreed that they want to move forward with NCCA to run the Njamal heritage business and agreed that the Njamal Working Group members attending today's meeting approved this Resolution and are to discuss this at their next full Working Group meeting.

Abbott advised the Inquiry that it never paid consideration for the shares in Njamal Enterprises and never received any returns from that company.

**Njamal Mining Pty Ltd**

On 13 February 2012, the Njamal People and FMG entered into an agreement known as the FMG Glacier Valley and North Star Project Area Agreement (PAA). Generally, the PAA provides for the Njamal People’s consent for FMG to develop mining infrastructure in Njamal country for the transportation of iron ore and, in return, FMG promises payment of royalties. In this respect, the PAA provided for the payment of royalties to a trust structure nominated by the Njamal People or, alternatively, for the entry into a joint venture arrangement between FMG and a Njamal-nominated company for the management of an iron ore mine within the North Star project area (the FMG Joint Venture). In this latter case the funds that would flow to the Njamal community would be profits accruing to the Njamal entity from the sale of iron ore back to FMG.

Accordingly, Njamal Mining Pty Ltd was established as the Njamal entity to enter into the FMG Joint Venture. Njamal Mining Pty Ltd was incorporated and registered on 19 April 2013 with Abbott as the sole shareholder in its capacity as Trustee and Mrs Eaton, Ian Taylor, Sharon Westerman (née McGann) and Kevin Allen as the original directors.

Ms Westerman advised at a TAC meeting held 7 March 2013 that the mine the subject of the FMG Joint Venture would be in operation in June 2015, but that FMG required the Njamal entity to be set up by June 2013.

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88 See Part B of the PAA.
89 See clause B3.1 of the PAA.
In terms of selection and appointment of the directors there is no mention in the TAC minutes or other materials supplied by Abbott of a recruitment process being undertaken; rather, it appears that Ms Westerman, with the apparent approval of the TAC, nominated the individuals and advised Abbott of their proposed appointment.

However, while Abbott was not involved in the appointment of the directors of Njamal Mining Pty Ltd, it did fund its creation and commencement following a request made by Ms Westerman to Mr Drayson, and a TAC resolution in support, for $20,000 in start-up costs. Further funds were advanced by Abbott following another TAC meeting on 30 April 2013 at which a request for $50,000 in further funding was approved. The purpose of the additional funding was to cover four director's meetings, and 10 days' worth of legal fees. The financial records provided by Abbott, together with its answers to some of the Inquiry's questions, indicate that these amounts were purportedly advanced by way of loan from the Trust. As discussed further in the sections of the Report concerning ISPL's involvement with Njamal Mining Pty Ltd, these "loaned" funds were not recovered until ISPL was appointed Trustee. As a significant question arises as to the circumstances in which loans may be made by a Trustee using Trust Funds is permissible under such circumstances under the Trust Deed, this is discussed later in the Report.

**AET**

During the period of AET's tenure as Trustee the day to day decision making, including in respect of distributions and other matters under the Deed, was made by Andrew Morgan.

As at the date of AET's appointment, Mr Morgan's title was Manager, Trustee Services, Native Title in which capacity he was the direct overseer of the Senior Trust Relationship Manager. Another significant position holder was Ryan Eaton, Legal Counsel – Native Title.

Clause 7.7 of the Trust Deed provides that, where a corporation acts as Trustee, any determination, decision or resolution to be made by that corporation as Trustee shall be made by the board of directors, or governing committee of that corporation, or by any other person authorised in writing by the board of directors or governing committee of that corporation.

The Articles of Association of AET provide that any powers and authority of the board of directors of AET may be delegated by power of attorney. Such delegation may include an authorisation to sub-delegate.

By power of attorney dated 30 June 2011 AET authorised certain office holders to act in AET's name and on AET's behalf to execute all or any of a certain range of documents, including (relevantly) deeds, agreements and instruments. Among those authorised were
directors of AET and any person holding the title of Manager Trust and Fiduciary Services, Senior Relationship Manager, or Group General Counsel.90

Two questions then arise for consideration. First, does the Power of Attorney comply with clause 7.7? Secondly, if the answer to question one is "yes", was Mr Morgan authorised by the Power of Attorney to deal with the Trust?

As to the former, the Power of Attorney is an instrument in writing which, on its face, was issued by the Board of AET in compliance with AET’s Articles of Association and which authorises the office holders identified therein to act in AET’s name and on its behalf. On its face, the Power of Attorney complies with clause 7.7 of the Deed and is a valid instrument delegating authority to make decisions under the Trust Deed to those officer holders identified therein.

As to the second question, the title of the office held by Mr Morgan did not match the title of the positions authorised during AET’s tenure as Trustee.

This concern was raised with AET, which responded that the Power of Attorney had been drafted in 2011, before the 2014 acquisition of Plan B, so that the slightly different titles of former Plan B employees had not yet been incorporated into the Power of Attorney. AET’s position is that the office of ‘Manager Native Title’ is for all purposes equivalent to the other ‘Managers’ listed in Schedule A of the Power of Attorney. In any event, they say that an action of Mr Morgan would be attributed to AET as Trustee for the Trust, if not on express authority, then by implied authority, ongoing practice or estoppel:

In summary, AET’s view is that Andrew Morgan was a duly authorised attorney of AET for the purpose of Article 111.15 of its Articles of Association for the following reasons:

a) The Power of Attorney made under AET’s seal and dated 30 June 2011 authorised the persons in Schedule A as attorneys of AET;

b) The Power of Attorney was made prior to AET’s acquisition of Plan B Trustees Limited which took effect from 1 May 2014;

c) Those offices include several ‘Managers’ of other trust and estate divisions within AET;

d) At the time the Power of Attorney was made, AET did not have a native title trust business;

e) The office of ‘Manager Native Title’ is for all purposes equivalent to the other ‘Managers’ listed in Schedule A, albeit over a different division of AET.

In either case, AET does not consider this issue material. As the courts have long stated, a ‘trust’ is not a legal entity that can be sued – a creditor can only seek repayment of a debt against the trustee (see para 21 of Commonwealth v Byrnes and Hewitt [2018] VSCA 41 for a more recent example). At its height, a question might be raised as to whether any particular action of AET (as trustee of the trust) was an action of Mr Morgan, or an action of Mr Morgan on behalf of AET, for the purpose of pursuing any debt or damage resulting from that action. Any such case would likely succeed in attributing such action to AET, if not on express authority then at least for implied authority/ongoing practice/estoppel etc.

90 Clause 3(a) of the Power of Attorney.
CHAPTER 6: TRUSTEE STRUCTURE AND MANAGEMENT

The Inquiry accepts that AET has at all times proceeded on the basis that Mr Morgan was duly authorised by the Power of Attorney to act on its behalf. As it is no longer Trustee of the Trust, it is not necessary for AET to take steps to ensure that the Power of Attorney is amended to avoid any doubt as to whether it has properly conferred authority on Mr Morgan to act on its behalf as Trustee. The Inquiry nevertheless considers that AET should take steps to review and, if appropriate, amend existing powers of attorney relating to its duties as trustee of any trusts, including with similar terms to the Trust Deed under consideration in this case.

Recommendation 7 (Chapter 6)

AET take steps to review and, if appropriate, amend existing powers of attorney relating to its duties as trustee of any trusts, including with similar terms to the Trust Deed under consideration in this case, to ensure that they properly confer authority on persons purporting to act on behalf of AET in relation to such matters.

ISPL

As previously noted, ISPL was incorporated on 23 February 2016, briefly changing its name to Esplanade Australia Pty Ltd between 27 April 2016 and 12 May 2016, before reverting to its original name shortly following its appointment as Trustee of the Trust by the TAC on 6 May 2016.

Directors

The inaugural director and secretary of ISPL was Mr Carter.

According to ASIC records, following the appointment of ISPL as Trustee of the Trust, on 13 May 2016 it was renamed ISPL, Mr Carter ceased to hold those positions and Messrs Wesley Aird, Greg Parker and John (Jack) Cullity were appointed as directors, with Mr Parker also assuming the position of secretary. This appears to have been done in error, as with numerous other errors or misstatements in material regulatory notifications and other significant documents examined by the Inquiry, as discussed later in the Report. The unsigned minutes of the ISPL Board record that Mr Carter was present at meetings of the Board in May, apparently as director, and at a meeting on 25 May 2016 was appointed chairman of the meeting and all future meetings of directors until it is noted otherwise. ASIC was subsequently notified by a form certified under the name of Mr Parker, that Mr Carter recommenced as director on 24 June 2016.

Mr Carter later resigned with effect from 4 July 2017 in anticipation of the issue of the Disqualification Notice to him by ASIC from managing corporations, which subsequently occurred on 20 July 2017. At the same time as Mr Carter resigned, Mr Parker also resigned...
as secretary and director. It was also agreed at that meeting that, subject to his signing the required consent, Mr White would also be appointed as a director. Curiously, the ASIC register also records that Mr Carter was appointed and ceased to be secretary of ISPL on that same day. Mr Cullity had resigned as a director earlier in 2017.

Mr Aird subsequently resigned with effect from 27 October 2017 in circumstances considered in more detail later in the Report. When ISPL was asked by the Inquiry by notice dated 22 December 2017 about the circumstances of Mr Aird's resignation the Inquiry was informed by email from Mr White on 13 January 2018:

ISPL understands Mr Aird was concerned about the potential requirement for the directors to provide Directors / Personal Guarantees. It is also noted that the role required significant travel from his home base in Qld where he is also involved in other business activities, thus the need for many phone conferences and time zone considerations in day to day management activities. He tabled his resignation and it was accepted. Replacing him is proving difficult in the current circumstances whilst the Inquiry is in progress.

This explanation is inconsistent with that given by Mr Aird, as discussed in Chapter 5.

The Inquiry concludes that the explanation given by ISPL is misleading, principally by omission and displayed a lack of care or candour that ought be displayed by a Trustee and its director, in that:

- While prior to his resignation Mr Carter had approached Mr Aird and sought that he provide some form of personal/director’s guarantee in relation to a proposed transaction in relation to the Trust, and Mr Aird expressed concerns to Mr Parker about doing so and declined to do so, Mr White was aware from the above mentioned communications with Mr Aird (see Chapter 5), but did not disclose in his response on 13 January 2018, that issues such as Mr Aird’s concerns about Mr Carter’s actions, inadequate governance, potential exposure to liability as a director and Mr White’s disinclination to agree to further changes including to the authorisation matrix and corporate structure diagrams, was central to his decision to resign.

- Mr Aird's decision to resign was not related to the significant travel required from his home base in Qld where he was also involved in other business activities, or any need for many phone conferences and time zone considerations in day to day management activities. Nor did Mr Aird indicate to Mr White or ISPL that this was a matter of concern to him or that it was a reason for his resignation.

ISPL and Mr White were given an opportunity to comment on the substance of the above matters and possible finding, but did not do so in any responses provided to the Inquiry.

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91 Minutes of Directors' Meeting, 4 July 2017.
92 It appears that on 24 November 2017 ISPL under Mr White's authority lodged a notice of this change with ASIC. It appears that subsequently a formal notice of resignation signed by Mr Aird on 9 August 2018 was lodged with ASIC.
CHAPTER 6: TRUSTEE STRUCTURE AND MANAGEMENT

Since Mr Aird's resignation ISPL has only had one director, Mr White. On 18 January 2018 he was also appointed company secretary.

ISPL later appointed an alternate director, Clinton Wolf, for a period of two weeks during which Mr White was outside of Australia. Mr Carter indicated to the Inquiry in a meeting in May 2018 that Mr Wolf had been permanently appointed and was not paid. He also suggested that he, Mr Carter, had ceased doing trust work and that Mr Wolf had taken up a role as general manager, Perth. When Mr White was queried he indicated that Mr Wolf had not taken up that role. He also indicated that Mr Wolf's appointment as an alternate director was ongoing, however this was not borne out by ASIC records. Either Mr Carter's and Mr White's understanding was erroneous or, yet again, ASIC notifications had been incorrectly completed. The Inquiry has recently been advised by ISPL that Mr Wolf has been appointed as an alternate director and can step in to deal with any matters regarding the carbon farming project should the need arise. ASIC records confirm that on 3 September 2018 notice was filed of Mr Wolf's appointment as an alternative director while Mr White was not physically present in Australia and that during that time there were no restrictions on his capacity to act as the alternative director. The notice does not however provide for Mr Wolf to be able to act while Mr White is in Australia and therefore does not enable him to act in the manner suggested by ISPL. This issues is returned to in Chapter 9 in relation to available steps by which Mr White may address the conflict of interest he presently has in relation to carbon farming matters.

Nonetheless, in addition to being appointed as an alternate director, by letter dated 20 March 2017 (sic 2018) Mr Wolf wrote to Mr White to confirm that he was being engaged to "coordinate with Indigenous Services, Nyamal and other related parties" to "secure Nyamal's Native Title determination in a timely manner", and to report to ISPL on a weekly basis as to progress. Mr Wolf was to be remunerated at $10,000 plus GST per month for six months commencing March 2018. Chapter 8 of this Report considers issues in relation to the terms of engagements of consultants by ISPL, including the use in some cases of lump sum periodic contracts without any requirement for regular recording of work performed and improvements which in its view should be implemented by ISPL.

As to past directors, each of Messrs Carter, Parker, Aird and Cullity has served as directors of the company during its tenure as Trustee of the Trust. However, as alluded to above, those directors each resigned, at various points throughout 2017.

The minutes of the Board and a meeting of the shareholder of ISPL record that the dates and reasons for the various resignations were as follows, although as it turns out, the actual reasons were in some cases for more concerning reasons:

On 15 March 2017 Mr Cullity advised the Board that he was resigning due to concern over (undisclosed) potential conflicts of interest. In a meeting with the Inquiry Mr Cullity also explained that while potential for conflicts of interest were one reason for his resignation, another was that he did not think he could add value to the trustee in the position of director.

On 4 July 2017 Mr Carter advised the Board that due to ongoing issues with ASIC it may be more appropriate for him to resign as a director and work as the Chief Executive Officer. The question of what role Mr Carter did assume is dealt with previously in Chapter 5 of the Report.

On 4 July 2017 Mr Parker advised the Board that his contribution to the Njamal people was better served outside the role of trustee due to potential conflicts of interest. The nature of the potential conflicts of interest was not recorded. However, as apparent from the matters considered in the previous Chapter, including emails he sent, it is clear that Mr Parker's resignation was also brought about in circumstances where he thought that by resigning it would 'reign Rod [Mr Carter] in' and had serious concerns in relation to the expenditure in relation to motor vehicle transactions.

On 28 October 2017, that Mr Aird was concerned about the potential requirement for the directors of ISPL to provide personal guarantees. ISPL has also suggested that logistics and time zone considerations played a role in Mr Aird's resignation, as Mr Aird is resident in Queensland. However, the Inquiry has been advised by Mr Aird, and accepts, that travel, logistics and time zones played no part in his decision to resign. As already discussed, his resignation resulted from concerns about Mr Carter's actions, inadequate governance, potential exposure to liability as a director (in the context of concerns as to whether the proposed role of Mr Carter would be inconsistent with limitations on his ability to manage corporations the subject of legal advice that had been obtained) and Mr White's disinclination to agree to further changes including to the authorisation matrix and corporate structure diagrams, was central to his decision to resign.

94 Minutes of Directors' Meeting, 15 March 2017.
95 Minutes of Directors' Meeting, 4 July 2017.
96 Minutes of Directors' Meeting, 4 July 2017.
97 Minutes of Shareholders' meeting, 31 October 2017; email from Mr White to the Inquiry, 13 January 2018.
98 Email from Mr White to the Inquiry, 13 January 2018.
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According to ASIC records, from 13 May to 24 June 2016 the Board comprised Messrs Parker, Aird and Cullity; from 24 June 2016 to 15 March 2017 Mr Carter was also a director, from 15 March 2017 to 4 July 2017 the Board comprised Messrs Carter, Parker and Aird; Mr Aird was the sole director from 4 July 2017 to 2 August 2017 and there was no appointed secretary, from 2 August to 28 September 2017 the Board comprised Messrs Aird and White; and from 28 September 2017 to the date of the Report the Board has comprised Mr White (with Mr Wolf appointed an alternate director for a short period). Mr White was also appointed secretary from 18 January 2018.

In the latter part of 2017, ISPL informed the Inquiry that it had approached and was proposing to appoint the Hon. Brendon Grylls, Ryan Chorley and Ryan Carter as directors, as reflected in the minutes of a shareholder’s meeting of 31 October 2017. Those minutes record:

- Mr. Ryan Carter accepted pending his review of any conflicts and the approval of a current engagement with Deloittes.
- Mr Ryan Chorley will be invited ASAP and his acceptance is also expected to be pending his review of any conflicts and the approval of a current engagement with Jackson MacDonald Lawyers.
- Mr. Brendan Grylls will be formally invited following up on his previously indicated willingness to accept an invitation when presented.

However since that date, none of Ryan Carter, Ryan Chorley or Brendon Grylls have been appointed directors. When asked why that is the case, ISPL explained that the proposed appointees were unwilling to be appointed until after the Inquiry had reported. The Inquiry has contacted Messrs Ryan Carter and Chorley to obtain their views. Mr Chorley explained that he had been approached by Ryan Carter in mid-2017 to join as a director. Mr Chorley said that at that time he was not interested in joining because of the Inquiry and that at no stage did he agree to become a director. When the Inquiry spoke with Mr Chorley in May 2018, Mr Chorley explained that he had decided not to become involved with the Trust. Mr Ryan Carter explained that his appointment was subject to approval by Deloitte and that the approval had not been given. Mr Ryan Carter did suggest, however, that the position might change once the Inquiry completed its work.

While the Inquiry has not approached Mr Grylls, it notes that he is pictured and identified on a proposal to the Kariyarra People’s Trust by ISPL to be appointed Trustee of the Trust, as part of ISPL’s advisory team. That brochure, which is understood to have been issued in 2018, references ISPL having been Trustee of the Njamal People’s trust for two years, that the director was Mr White and that "Rod Carter heads the operations team". It makes no reference to ASIC having issued a Disqualification Notice disqualifying Mr Carter from managing corporations for 4 years from the date of service of the notice, a fact that would no

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99 While clarification was sought from Mr White as to when he actually signed a formal consent to be a director and commenced as a director, this was ultimately not received by the Inquiry.

100 Minutes of Shareholders’ meeting, 31 October 2017.
doubt be of interest to a community being asked to consider a proposal to terminate the existing trustee of the Kariyarra Trust and appoint ISPL as trustee in its place.

**Shareholders**

ISPL's ownership structure has been a source of some concern to the Inquiry, particularly given issues considered later in the Report about potential conflicts of interest and Mr Carter's role following his disqualification from managing corporations that has now been found to have taken effect from 31 July 2017. ¹⁰¹ Its ownership has however been fairly recently restructured in a way that goes some way to addressing those concerns.

ISPL's shareholding comprises 100 ordinary shares. At all times all of those shares have been held by one person or one corporate entity; that is, ISPL has never had more than one shareholder. Initially the shares were held by Esplanade Holdings Pty Ltd and then Indigenous Services Pilbara Limited. ¹⁰² As noted above, ISPL took on the role of Trustee by Deed dated 12 May 2016. From 13 May 2016 until 15 August 2017 the sole shareholder of ISPL was Mr Carter. That position changed on 15 August 2017 and from that date until very recently ISPL has been wholly owned by a company, Esplanade Consultancy Pty Ltd, which itself is wholly owned by Mr Carter and whose sole director is Mr Carter's son, Ryan Carter.

The Inquiry was recently advised first by Mr White that certain changes were being contemplated, to address possible concerns about Mr Carter's position, and later by Mr Carter to the effect that directors required the shareholding be changed to remove any involvement of Mr Carter. Subsequent searches revealed that with effect from 26 June 2018 Mr White has assumed ownership of the shares in ISPL, although he does not beneficially hold the shares. He has advised the Inquiry that he holds the shares on trust for his family trust.

ISPL has, in comparison with its predecessors, Abbott and AET, established a relatively complicated corporate structure to implement trust objectives.

Before turning to that structure, it is convenient to first say something about the structure of certain other companies that are part of the Carter family companies, given the role they have assumed, and, until recently it would seem, continued to assume.

**Esplanade Holdings Pty Ltd**

Esplanade Holdings Pty Ltd is a family company. It was established in 2010. At various times Mr Carter's wife, Delia Carter, has been a shareholder. Since April 2015 Mr Ryan Carter has

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¹⁰¹ That decision is subject to a pending appeal to the Full Court of the Federal Court.
¹⁰² Indigenous Services Pilbara Limited was incorporated as an unlisted public company limited by guarantee on 23 March 2016. Mr Rod Carter was director and secretary and Mr Ryan Carter secretary until 15 April 2016 at which point Mr Parker assumed the role as secretary and he, Mr Cullity and Don Patterson became directors. At that point it was contemplated that Mr Patterson would assume a role with the Trust assuming ISPL was appointed Trustee, however it appears that he did not end up assuming any role going forward.
been the sole shareholder. Mr Carter was the founding director and secretary. The frequency of change of directors over the life of the company bears comment. Since 2014 Mr Carter and his son Ryan have alternated between being the secretary on multiple occasions, often for short periods. So too have they changed directorships. Mr Carter was last director between 10 March 2017 and 30 June 2017, after which Ryan was appointed director on 30 June 2017 and then replaced by Mr Richard Green the following day. Three months later, on 1 October 2017 Ryan Carter resumed as director before being replaced by his uncle (Mr Carter’s brother), Mr Terrence Carter, on 30 May 2018. That followed shortly after the Inquiry contacting Mr Ryan Carter, as the sole director of the company, regarding certain information and documentation, and then issuing a compulsory notice to the company.

According to ASIC records, between early January 2015 and 30 June 2017, at all times the directorship of the company has alternated between Rod and Ryan Carter. Mr Carter was director during the following periods, his son the remainder: 27 April 15 to 1 February 2016, 22 March to 7 April 2016, 1 February to 1 March 2017, 10 March to 21 April 2017 and 12 June to 30 June 2017.

As with the change in secretary, on 30 June 2017 Ryan Carter assumed directorship, only to be replaced by Mr Richard Green the following day. He was in turn replaced by Ryan Carter three months later, after which Ryan Carter held that position until being replaced by Terrence Carter, on 30 May 2018.

**Esplanade Consultancy Pty Ltd**

According to ASIC records this Carter family company was established on 20 December 2016. Mr Rod Carter has at all times been its sole shareholder. He was also its director and secretary until 30 June 2017 when he was replaced by Ryan Carter, who in turn was replaced by Terrence Carter, on 30 May 2018.

In recent communications Mr Rod Carter suggested that Mr Graeme Stevens was being appointed as secretary, and Mr Stevens has asserted that to be the case in email communications with the Inquiry, however as at 27 June 2018 that was not reflected in the ASIC company extract obtained by the Inquiry.

**Organisational Structure**

Returning then to ISPL and the organisational structure established to implement Trust objectives, In its initial submission to the Inquiry in July 2017, ISPL described itself as follows:

**Who We Are**

Indigenous Services is made up of three independent Directors Rod Carter, Wesley Aird and Greg Parker. Each of the directors have specialties in the areas of business, indigenous policy and accountancy. Our experienced lawyer Jack Cullity provides us with the legal expertise.

We have committed ourselves to improving the well being of the Indigenous people, not just protecting funds. We recognise that heritage is important, it needs to be documented and the youth need to be involved and educated in order to preserve their traditional heritage.
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We have established offices in South Hedland and South Perth.
We have a strong focus on financial security for the community and the individual.
We have a reputation for a hands on approach; our aim is to be easily contactable for all Members.

Our Team
Recognition of the Elders in community, culture and country
Manages Trustee obligations and compliance
Experienced commercial team to assist and support business ventures and negotiating with mining companies
Commitment to recording and delivering cultural education especially for the youth

Our team specialises in:

Accounting

Indigenous policy generation and lobbying

Local commercial and social experience

Business services

Legal

ISPL went on, under the heading "Administration", to give an overview of its commercial structure:

The commercial structure of the Njamal People's Trust (NPT) is comprised of a central and overarching Trust, which is serviced by a Trustee Advisory Committee and a Trustee appointed as per the requirements of the Trust Deed and a Deed of Settlement, respectively.

Beneath that ownership structure are the commercial operations which feature proprietary limited companies owned entirely by the Njamal People's Trust, and then the undertaking of joint ventures with third party companies by NPT to generate revenue for the Trust and employment opportunities for the Njamal People.

Further detail was provided under a heading "3.1 Overview", as follows:

The structures of the Njamal People's Trust are represented in the following relationship diagram, from which it can be seen:

(a) The management and reporting relationship structure for operations, project management and asset ownership of the Njamal People's Trust;
(b) The major role of the Njamal Services Pty Ltd in the control of sub Programs and Joint Venture projects for NPT with 3rd parties;
(c) Njamal People's Trust has 100% beneficial ownership of all assets, and conversely, the Trustee has no beneficial ownership over any assets;
(d) The cashflow utilisation and ownership uses a structure of two Trusts operating beneath the main Trust, to maximise the net returns available to the Beneficiaries,(being the Njamal People)
(e) The nested arrangement of the three Trusts in the structure, being such that the ownership of the Njamal Charitable and Benevolent Unit Trust is shared with 50% ownership belonging to The Njamal People's Trust and 50% ownership belonging to The Njamal People's Benevolent Trust.
(f) Indigenous Services Pty Ltd is the Trustee for the Njamal People's Trust, and is also the Trustee for the Njamal People's Benevolent Trust; and,
(g) The Trustee for the Njamal Charitable and Benevolent Unit Trust is Njamal Services Pty Ltd.
Related Entities

The chart and information provided reflects that ISPL is the sole shareholder, as Trustee of the Trust, of Njamal Services Pty Ltd, Njamal Heritage Pty Ltd and Njamal Mining Pty Ltd. It also reflects that Njamal Services Pty Ltd (trustee of the Njamal Charitable and Benevolent Unit Trust), is the sole shareholder of Njamal Security Pty Ltd and 51% shareholder of Indigenous Carbon Group Pty Ltd). ISPL now however indicates that is an error and that ISPL was and is the 51% shareholder. That issue is considered further below as the inconsistent documentation of this matter is a matter of significant concern given the materiality of the transaction entered into.

Njamal Services Pty Ltd

In general terms, which are expanded upon later in the Report, Njamal Services Pty Ltd is the vehicle through which commercial opportunities are pursued. It is also the Njamal partner in a
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joint venture, called the Njamal People’s Joint Venture (NPJV), with a company called Pilbara Resource Group Pty Ltd. Njamal Services Pty Ltd was incorporated in September 2016 and has at all times been a wholly owned subsidiary of ISPL in its capacity as Trustee of the Trust. Its founding directors were Greg Parker, Andrew White, Travis McPhee and Mark Walker. According to ASIC records Mr Parker is secretary of the company and ceased as director on 9 August 2017. ASIC records also record that Mr McPhee ceased as a director on 31 August 2017. Whether Mr McPhee was validly removed and the circumstances of the lodging with ASIC of the notification of change and generation and signing of the minute associated with that occurrence is a matter of significant concern as discussed in Chapter 8 of the Report.

Njamal Security Pty Ltd

Njamal Security Pty Ltd is in turn a wholly owned subsidiary of Njamal Services Pty Ltd. Mr White has advised on behalf of ISPL that Njamal Security Pty Ltd does not have a bank account and that separate financial statements have not been prepared for it. Rather, it is understood that the financial statements provided to the Inquiry for Njamal Services Pty Ltd have subsumed within them the Njamal Security Pty Ltd position.

According to ASIC records Njamal Security Pty Ltd was registered on 6 October 2016 and Ryan Carter (Rod Carter’s son) was its initial secretary and director, together with Mr Terry Wilson as director. Less than a month later, on 1 November 2016 both ceased to hold those offices and Mr Andrew Leahy was appointed as both secretary and director. Mr Leahy ceased holding those positions in August 2017 respectively, although the records are somewhat unclear, the records also recording that Mr Andrew White held the secretary and a director position from 15 July to 31 August 2017 and then being reappointed to both positions on 31 August 2017, while also recording that Mr Phillip O’Reilly held positions as secretary and director from 31 August 2017 to 28 March 2018. In addition, Mr Mark Walker was appointed as director on 11 August 2017 and remains in that position. Curiously, Mr Travis McPhee was recorded as both being appointed and ceasing as a director on 31 August 2017.

Njamal Heritage Pty Ltd

Njamal Heritage Pty Ltd is the vehicle through which heritage matters are managed (e.g. future act proceedings under the Native Title Act 1993). According to ASIC records it was originally incorporated under the name Njamal Heritage Services Pty Ltd on 29 April 2015 as a wholly owned subsidiary of Njamal Mining Pty Ltd (see below). Its original directors were Kevin Allen, Willie Jumbo and Terry Wilson. Mr Allen was also secretary of the company. Four months after the appointment of ISPL as Trustee, in September 2016 Mr Allen ceased as a director and secretary, Mr Tony Taylor commenced as a director and Mr Parker commenced as secretary. In November 2016 the company’s name was changed to its current name, its shares were transferred from Njamal Mining Pty Ltd to ISPL in its capacity as Trustee of the Trust and Mr Taylor ceased as a director. Mr Taylor was later reappointed director in May 2017.
Njamal Mining Pty Ltd

Njamal Mining Pty Ltd is somewhat unique in the structure as it was established in 2013 when Abbott was Trustee, for similar purposes it would seem to those now fulfilled by Njamal Services Pty Ltd. It has at all material times been a wholly owned subsidiary of the Trustee of the Trust, its shares being transferred from Abbott to AET and then to ISPL as Trustee. Its original directors were Sharon Westerman (McGann), Kevin Allen, Ian Taylor and Mrs Eaton.\(^{103}\)

It is discussed in detail elsewhere in the Report and, as noted earlier, the company underwent significant upheaval in the second half of 2015 into 2016. Mrs Eaton resigned with effect from 22 June 2015 followed by Ian Taylor in August 2015. As a result of concerns about the management of the company and its failure to adequately respond to shareholder requests for financial information, on 31 August 2015 AET, the then Trustee and shareholder, appointed an independent director and secretary, Simon Coad, chosen on the advice of its lawyers, and Ms Westerman and Mr Allen were removed from office at the start of September 2015. At around that time Ms Westerman, in the later stages with the support of Mr Carter, was strongly agitating for the removal of AET and the appointment of either Perpetual Limited or, later, ISPL. That eventually occurred by Deed dated 13 May 2016 with ISPL being appointed Trustee.

Shortly after the appointment of ISPL as Trustee, in June 2016 Mr Coad was replaced as secretary and director of Njamal Mining Pty Ltd by Mr Greg Parker. According to ASIC records he ceased those roles on 26 April 2017, being replaced by Mr Carter, but this was effectively reversed 2 days later, with Mr Parker recorded as resuming his roles on 28 April 2017. Mr Parker explained to the Inquiry that he resigned as a director purely driven by his frustration relating to Njamal Services Pty Ltd being contemplated as the preferred joint venture partner of Action Industrial Catering Pty Ltd in the Pilbara Minerals Limited camp services tender. Mr Parker says that the issue was swiftly resolved and he was reappointed 2 days later. Mr Parker personally considers the success of Njamal Mining Pty Ltd to be a priority given what he considered it had gone through under the hands of previous management. Mr Parker remains as director and company secretary of Njamal Mining Pty Ltd. Mr Mark Walker was also appointed as an additional director on 20 July 2016 however he ceased that role on 28 November 2016. Most recently, Mr Troy Eaton was appointed on 29 November 2017.

\(^{103}\) Mr Robert Orelj also served as a director from February to May 2014.
In addition to these core companies, ISPL, Njamal Services Pty Ltd, ISPL’s shareholders, or ISPL's directors, are or have been involved with a number of other companies of note. These include:

1. Ironside Management Pty Ltd (Messrs Ryan Carter, Aird, Parker and Cullity were the directors and shareholders);
2. Indigenous Carbon Group Pty Ltd (Mr White is sole director, ISPL as Trustee of the Trust is a 51% shareholder (although, as separately discussed, ASIC was initially notified, apparently incorrectly, that Njamal Services Pty Ltd non-beneficially held that shareholding) and CO2 Holdings Pty Ltd, a company associated with Mr White, is 49% shareholder);  
3. Pilbara Carbon Group Pty Ltd (Indigenous Carbon Group Pty Ltd is the sole shareholder);
4. Goldfields Carbon Group Pty Ltd (Indigenous Carbon Group Pty Ltd is the sole shareholder); and
5. Pilbara Indigenous Marine Services Pty Ltd (Njamal Services Pty Ltd is now the sole shareholder, and Ryan Carter and Troy Eaton (a Njamal member) are its directors).

These companies are each considered in turn, below.

**Ironside Management Pty Ltd**

The story behind the incorporation and activities of Ironside Management Pty Ltd itself warrants comment.

The timing of the removal of YMAC from its role as lawyers and negotiators for the Njamal people, coming only 12 days after the appointment of ISPL as trustee, caused some difficulty for ISPL and the administration of the Trust. That removal meant that in a very short space of time ISPL had to contend with not only its role and obligations under the Trust Deed, but also had to consider whether and, if so, to what extent it would become involved in the funding and management of the Native Title Proceedings and the other matters set out in the 31 May 2016 letter from YMAC's Acting Principal Legal Officer. Thus, Ironside Management Pty Ltd was incorporated on 30 June 2016 and its inaugural directors were Mr Cullity, Mr Aird, Mr Parker (all then directors of ISPL) and Mr Ryan Carter. Each was registered as beneficially holding one of the four issued shares of the company.

Seemingly as a result of the matters set out in the previous paragraph, on 21 July 2016 the Applicants in the Native Title Proceedings signed a document titled "Njamal People - Applicants' authority and directions" by which the Applicants, among other things, authorised the engagement of Ironside Management Pty Ltd to manage and coordinate:
(i) all native title, cultural heritage and related business matters concerning the Njamal #1 Application and the Njamal #10 Application;

(ii) the engagement of any of the law firms listed below in accordance with the terms of their respective appointments by the Applicant in each of the Njamal #1 Application and the Njamal #10 Application;

It also appointed new lawyers and directed YMAC, on request, to provide its relevant files to the law firms, Ironside Management Pty Ltd and Indigenous Services Pty Ltd.

A partial explanation for the establishment of Ironside Management Pty Ltd is apparent from an email from Mr Greg Parker to the Trust bookkeeper, Ms Lorraine McPhee, on 1 September 2016 in response to a query regarding the role of Ironside Management and her belief that field workers were to be employed under the Njamal Nation umbrella. He responded:

I'm not aware of any reason why you would assume the field workers would be employed under the Njamal Nation umbrella. All heritage surveys are being co-ordinated by Wesley Aird, on behalf of Ironside Management Pty Ltd, which has a signed authority to act on behalf of the Native Title Applicants. This ensures the work gets carried out in a timely and efficient manner. There's a bunch of work to do over the next few months and Ironside's sole objective is to engage with Njamal People to get it done efficiently. This has not been the case in the past because of lack of co-ordination and communication, or so I believe. It also keeps the mining companies on-side. In fact, the feedback from Millennium on the survey just completed has been fantastic.

After discussing various issues about field workers having to supply an ABN and tax invoice, he explained that they were trying to deal with a legacy issue (which Mr Aird separately confirmed had been an issue due to the way in which YMAC had paid field workers in the past). He then continued:

Ironside Management Pty Ltd is a service entity which sits along-side ISPL. It was formed to undertake tasks which ISPL, as Trustee for the Njamal People's Trust, can't. There are limitations on what the Trustee can and can't do. The Trust Deed is the best place to start to see what these are and legislation governing Trustees also comes into play. Activities such as liaising with mining companies to negotiate and facilitate heritage surveys and Native Title Agreements is a good example. YMAC was engaged by the previous Trustee to undertake these tasks and we all know how that ended.

The acknowledgment of the limitations on the activities in which the Trustee was itself able to engage was interesting, particularly given the centrality that this issue has ultimately assumed in the Inquiry. The Inquiry was advised however that ISPL subsequently obtained legal advice that ISPL could, in fact, assume this role.

On that basis, and in circumstances where apparently accusations and abuse were directed to the use of that entity and involvement of the directors of ISPL, as already noted, between 14 and 20 October 2016, the Applicants in the Native Title Proceedings signed another document titled "Njamal Applicants' authority and directions". That document was apparently intended to address concerns by Fortescue companies as to the authority conferred to act on behalf of the Applicants. The new authority was similar in scope except that it was limited to matters concerning the Fortescue companies and extended authority to ISPL. In addition to
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authorising various lawyers the authority also provided for ISPL and/or Ironside Management Pty Ltd to manage and coordinate:

(a) all native title, cultural heritage and related business matters arising out of the Njamal #1 Application and the Njamal #10 Application, and concerning the Fortescue Companies;

(b) the engagement of any of the law firms listed below, and to communicate with the Fortescue Companies regarding those matters.

Subsequently a further, more general authorisation titled "Njamal Applicants' authority and directions" was signed by the Applicants on 3 and 4 November 2016, by which the Applicants in the Njamal #1 and Njamal #10 native title proceedings in the Federal Court of Australia authorised ISPL to manage and coordinate:

1. all native title, cultural heritage and related business matters arising out of the Njamal #1 Applicant and the Njamal #10 Application;

2. the engagement of any of the law firms listed below [being McCullough Robertson Lawyers and Castledine Gregory Law and Mediation],

and to communicate with any third party regarding those matters.

On 5 January 2017 Mr Carter was appointed director, with Mr Cullity, Mr Aird, Mr Parker (all then directors of ISPL) and Mr Ryan Carter ceasing to be directors.

Further, all four shares were recorded as being transferred to Mr Rod Carter (the shares not being beneficially held by him, although it being unclear for whose benefit he held them), with effect from 1 February 2017, following which Mr Ryan Carter was appointed secretary and he and Mr Rod Carter as directors. That change did not last long.

The shares held by Mr Carter were recorded as being transferred with effect from 20 March 2017 back to each of the above four directors, although this time it was recorded that they were not beneficially held by each person, although again it being unclear for whose benefit they were held. Mr Aird has advised the Inquiry that, as far is he is aware, in each instance the directors held their shareholding as trustee for their respective nominated family trust, and did not beneficially own the shares. If that is correct, the initial ASIC notification was incorrect.

The merry-go-round continued and on 1 May 2017 the remaining three original directors were recorded as being re-appointed to join Ryan Carter as Directors, with Mr Rod Carter ceasing to hold that position. The net effect of the changes over that 3 month period was that the original directors were all directors and shareholders again, although this time recorded as not holding their shares beneficially.

As best the Inquiry understands, (based on the recollection of Mr Aird of Mr Green's explanation when he queried the changes), they were brought into effect by Mr Rod Carter because he was attempting to bring the company into the fold of his family companies however later it was realised that the company was required to have an ongoing existence and role given an authority which had been conferred on it by the Applicants in relation to
FMG, in particular. The changes were therefore effectively reversed. The basis on which the changes were effected is itself questionable. On 5 June 2018 an application for voluntary de-registration was filed with ASIC, again the authority for the filing of the application being unclear, and occurring without the consent of Mr Aird.

Indigenous Carbon Group Pty Ltd

This company was registered on 23 January 2017. Its initial director, secretary and shareholder was Mr White. As with the above two companies, on 2 February 2017 Mr Walker and Ms Green were also respectively appointed as director and secretary (as notified to ASIC on 12 February 2017 by a form recording certification by Mr White). Based on ASIC records it appears that on about that day the shares were transferred. Mr Clinton Wolf was also appointed as a director (although resigned 6 months later due to other commitments), and 49% of the shares were transferred to CO2 Holdings Pty Ltd (the shares of which were held by White Partners Capital Pty Ltd as trustee for a White family trust) and 51% were recorded as having been transferred to Njamal Services Pty Ltd (on trust). It was only following several enquiries by the Inquiry of ISPL that Mr White (who was not a director of ISPL at the time this occurred) indicated that a "clerical error" had been made in that the ISPL interest and shares in ICG was originally recorded in the ASIC documentation incorrectly as Njamal Services Pty Ltd as trustee for the "NPB & CUT" (an apparent reference to the Njamal Charitable and Benevolent Unit Trust) "possibly due to the similar sounding names and the amount of activity and workload on the staff." The correction was notified to ASIC on 19 January 2018.

As discussed below, that suggested 'clerical error' is inconsistent with a number of relatively contemporaneous documents and submissions by ISPL. Recently, given the Inquiry's continuing concerns as to the unclear position, it approached Mr Parker and requested he provide additional documents which, on the face of them, recorded that in fact ISPL applied for an allotment of 51% of shares on 23 January 2017, which were then allocated on 3 February 2017. In October 2018 the Inquiry was also provided with an unsigned minute of director's meeting of the Indigenous Carbon Group Pty Ltd said to have been held on 23 January 2017. That recorded an apparent telephone meeting between Messrs White and Walker (although ASIC records record that Mr Walker was not in fact appointed director until 2 February 2017) at which Mr White advised that he had received confirmation from ISPL on behalf of the Trust that the ISPL Board had resolved to invest $500,000 in carbon farming via the acquisition of shares in ICG. It is also recorded that it was resolved that the company allot ISPL, on behalf of the Trust, 500,000 $1.00 ordinary shares. It was not however until an ISPL Board of Directors' meeting on 1 February 2017 that the decision to invest appears to have been formally endorsed (or if it was endorsed at an earlier time it was not properly recorded).
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Goldfields Carbon Group Pty Ltd

This company was registered on 23 February 2016 and the vehicle through which a successful auction bid was made with the Clean Energy Regulator in April 2016 (discussed below).

Its founding director and secretary was Mr Andrew White and initially its shares were held by CO2 Holdings Pty Ltd, a family company of Mr White. A week later Mr White was temporarily replaced as director and secretary by Mr Carter for a 2 month period from early March to early May 2016, before resuming those positions. Mr White indicated to the Inquiry that it was not intended that he be removed during this period, just that Mr Carter be temporarily added. Subsequently, after the Board of ISPL approved a $500,000 investment in Indigenous Carbon Group Pty Ltd and the provision of a $500,000 loan to Goldfields Carbon Group Pty Ltd, Mr Mark Walker was also appointed director and Ms Courtney Green was also appointed secretary, on 2 February 2017. On about that date the shares were transferred to Indigenous Carbon Group Pty Ltd although the shares were recorded as being not beneficially held. It was only following several enquiries by the Inquiry of ISPL that it acknowledged that an error had been made and that in fact the shares were owned beneficially by Indigenous Carbon Group Pty Ltd. This was eventually corrected by advice to ASIC on 22 January 2018.

Pilbara Carbon Group Pty Ltd

This company was registered on 27 September 2016. It was the vehicle through which a successful auction bid was made with the Clean Energy Regulator in November 2016 (discussed below).

Its founding director and secretary was Mr White and initial shareholder was his family company CO2 Holdings Pty Ltd. As with Goldfields Carbon Group Pty Ltd, on 2 February 2017 Mr Walker and Ms Green were also respectively appointed as director and secretary and on about that day the shares were transferred to Indigenous Carbon Group Pty Ltd although the shares were recorded on the ASIC register as not being beneficially held. As noted above, this was incorrect and eventually, after being raised by the Inquiry, corrected details were provided to ASIC on 22 January 2018.

Pilbara Indigenous Marine Services Pty Ltd

This company was registered on 6 March 2017.

Its shares were initially held 51% by Njamal Services Pty Ltd on trust for the Njamal Charitable and Benevolent Unit Trust and 49% by Esplanade Consultancy Pty Ltd (purportedly beneficially). For reasons that are unclear, the shareholdings were reported to have changed by notices filed with ASIC on 25, 26 and 29 May 2017 to 100% non-beneficially held by Richard Green (it is not known for whom they were held), 49% to Esplanade Consultancy Pty Ltd (non-beneficially) and then 100% held by Njamal Services Pty Ltd for the Njamal Charitable and Benevolent Unit Trust. Again, this raises questions as to whether
documents were filed in error. Nevertheless, the current position seems to be that all shares are held by Njamal Services Pty Ltd in its trustee capacity.

Its secretary has at all times been Richard Green and directors Ryan Carter and Troy Eaton.

The activities of this company were described in ISPL’s 4 July 2017 submission as being to provide marine support services including pilot, securing ships and wharf services in Pilbara ports.

**Other Trusts Administered by ISPL or Njamal Services Pty Ltd**

In order to give effect to a broader structure within which the Trustee could seek to give effect to the Trust's objects, it established two further trusts.

The Njamal People's Benevolent Trust was established by undated deed of settlement, with Mr Carter as settlor, by which ISPL was appointed as Trustee.104

ISPL explained the purpose of the Njamal People's Benevolent Trust as follows:105

> Within the structure, the Njamal People's Benevolent Trust was established:
> (a) to provide for the relief of poverty, sickness, suffering, distress, misfortune or destitution of Persons of Aboriginal Descent who (in the opinion of the Trustee) are of the Njamal People of the Pilbara region of Western Australia, with a particular focus on the provision of:
>    (i)  employment; and
>    (ii) housing and accommodation; and
> (b) to do all other things incidental or ancillary to, and in furtherance or aid of, the above purposes.

As previously indicated, based on materials provided to the Inquiry on 5 December 2017 it is apparent that on 21 June 2016 Mr Parker initiated contact with legal advisers to prepare a Trust Deed to establish a public benevolent institution of which, at that stage, it was proposed Njamal Nation Pty Ltd would be the trustee.

Two areas of concern initially arose in respect of the content of the Trust Deed. First, the remuneration provisions and second, the absence of any requirement for involvement of the TAC.

In respect of remuneration, the Inquiry is satisfied that the clause was drafted by the lawyers having regard to Division 4 of Part 5D.3 of the Corporations Act 2001, which sets out certain requirements in relation to fees for a licensed trustee corporation being a trustee or manager of a charitable trust. Under that Division it may choose between whether they will charge a one-off capital commission (not exceeding 5.5% GST inclusive) and income commission (not

104 Njamal People's Benevolent Trust Deed.
105 A submission to the Inquiry into the Administration and Functions of the Njamal People's Trust, 4 July 2017.
exceeding 6.6% GST inclusive) or whether they will charge an annual management fee at a rate not exceeding 1.056% of the gross value of the charitable trust’s assets in the fund. While those provisions do not apply to ISPL as it is not a licensed trustee they nevertheless provide a useful guide in respect of fees that may be appropriate.

The initial draft remuneration clause under clause 11 was apparently drafted by reference to the second of those options and allowed for the trustee to apply the trust fund to:

(a) Pay fair and reasonable remuneration for services of the Trustee at a rate not exceeding 1.056% annually (GST inclusive) of the gross value of the Trust Fund; and

(b) Pay, or reimburse the Trustee for, reasonable expenses incurred as Trustee of the Trust.

At some point this draft clause was changed however to reflect the first option. In the executed version of the Trust Deed it provided that the Trustee may apply the Trust Fund to:

(a) pay a once off commission to the Trustee at a rate not exceeding 5.5% (GST inclusive) of the gross value of the Trust Fund;

(b) pay fair and reasonable remuneration for the services of the Trustee in administering the Trust at a rate not exceeding 6.6% annually (GST inclusive) of the income received on account of the Trust Fund; and

(c) pay, or reimburse the Trustee for, reasonable expenses incurred as Trustee of the Trust.

In relation to the absence of involvement of the TAC, it would seem that no consideration was given to whether that was appropriate. As a consequence, once funds are distributed to the PBI the TAC has no direct role in being consulted about its activities. At best it has an entitlement to be consulted about the extent to which funds are invested in or distributed to the PBI. In practice, that appears to have generally occurred by the particular project that is contemplated being referred to the TAC for its recommendation.

ISPL has informed the Inquiry that, other than in respect of set up costs, ISPL in its capacity as trustee for the Njamal People’s Benevolent Trust has not transacted. A review of the audited financial accounts for the Njamal People’s Benevolent Trust for 2016/2-17, lodged with the ACNC earlier this year, is consistent with that advice. The bank account for this trust was opened on 1 May 2017 with an opening balance of $100.

It is unclear when the decision was made to change the proposed trustee from Njamal Nation Pty Ltd to ISPL or when the final deed, reflecting that position, was executed.

The Njamal Charitable and Benevolent Unit Trust was established by Deed dated 24 November 2016, under which ISPL was appointed as trustee. The units in the Unit Trust were held equally by ISPL as Trustee for the Trust and ISPL as trustee for the Njamal People’s Benevolent Trust. Apparently the naming of ISPL as trustee was done in error. To

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108 Njamal Charitable & Benevolent Unit Trust Deed.
address that a further deed of change of trustee was entered into, also dated 24 November 2016, by which ISPL's resignation and replacement by Njamal Services Pty Ltd as trustee was given effect.

ISPL explained the Unit Trust’s purpose as follows:¹⁰⁹

Njamal Charitable and Benevolent Unit Trust - ABN 58 945 504 025, was created to take equity in commercial opportunities with profits from those ventures being able to be streamed to either the NPT or the NPBT, depending on the funding needs of either entity.

In relation to remuneration, clause 20.1 provides:

Any Trustee who may be a solicitor or accountant or any firm of which he or she may be a member shall be entitled to make all usual and proper charges for both his or her professional and other services in the administration of the Trust Fund and for his or her time and trouble that he or she would have been entitled to make if not a Trustee and so employed and the Trustee from time to time may charge and retain out of the Trust Fund such Trustee’s commission as it may think reasonable and as the Unit Holders in general meeting may approve.

It would have been problematic had ISPL continued as the trustee for reasons including that it would essentially have been responsible for determining its own remuneration.

Further issues in relation to the above trusts are considered later in Chapter 9 of the Report in relation to conflicts. Those issues include concerns in relation to provisions in the PBI Trust Deed allowing the trustee of the PBI and its officers to act in certain circumstances notwithstanding conflicts of interest. They also extend to broader issues in relation to potential conflicts of interest in relation to ISPL being Trustee of that trust as well as the Njamal People’s Trust.

**Trust Structures Generally**

One of the issues faced by indigenous communities such as the Njamal community is difficulty of determining the most appropriate structure through which they try to achieve their aspirations and benefit not only current but future generations. While a common mechanism that is utilised is often a charitable trust, it is not always the only mechanism and it is sometimes utilised in conjunction with other trust mechanisms, such as direct benefit trusts. There are differing benefits and restrictions depending on whether a particular structure is utilised, including taxation benefits (particularly in a charitable context) with corresponding reduced flexibility due to the requirement that trust objectives be charitable and related duties of trustees be strictly directed to that purpose. In contrast, if funds are provided to a direct benefits trust, that may accommodate greater flexibility to facilitate economic and commercial development that may otherwise not be permissible.

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¹⁰⁹ A submission to the Inquiry into the Administration and Functions of the Njamal People’s Trust, 4 July 2017.
CHAPTER 6: TRUSTEE STRUCTURE AND MANAGEMENT

It may also be the case that when a trust structure is initially established it may be suitable to achieve a community's objectives but that over time it lacks the flexibility to achieve this outcome. Further, a simply worded trust deed may suffice where the funds being received are relatively limited in amount and the activities focussed on traditional charitable objectives, rather than commercial objectives.

In the Inquiry's view this is a challenge that has and is faced by the Njamal community. Indeed, one of the difficulties about the Trust's operations is whether it could and may continue to generally fund the activities of its related entities and trusts, at least without the Trust Deed being amended. There is also an inherent tension behind the requirement under the Trust Deed to pursue charitable objects without a purpose of private gain, and seeking to support economic and commercial activities being engaged in by Njamal people, with corresponding conferral of private benefits. In the Inquiry's view it is important that in areas of doubt trustees carefully consider whether to seek court direction to ensure that they are able to act in a particular manner. In this case such action has not been taken, with potentially significant consequences arising if, in fact, the significant payments made to related entities and otherwise, such as by way of loan, are not permissible.

As to the question of appropriate structures, this issue has previously been considered by the TAC and been the subject of some guidance from AET when it was Trustee, advising a TAC subcommittee in relation to possible trust structures that could be considered including, charitable trusts, discretionary direct benefit trusts and a non-assessable, non-exempt trust. It also suggested that consideration be given to whether any amendments might be desired in relation to the Trust Deed, noting however its limited power to make amendments, and the potential need to renegotiate a range of existing agreements if a different trust structure were desired to be implemented. As already mentioned, the Barry Taylor subcommittee was established at about this time to investigate and report in relation to structural issues with an approved budget of $50,000. That expenditure and the absence of a final report from the subcommittee was a source of complaint from Ms Westerman who together with the other Njamal Mining Pty Ltd directors was subject of criticism by the subcommittee.

It is also to be noted that, assuming a charitable trust structure was to be preserved, as an alternative to amending the existing Trust Deed, it would always be open for a similar charitable trust to be established under a more contemporary deed that overcame some of the difficulties that have arisen under this Deed. An example concerns the ability of the Trust to apply or distribute funds by way of loan.
A useful article which explores some of the different structures that are used in the native title context is *Aboriginal Assets? The Impact of Major Agreements Associated with Native Title in Western Australia.*

As is apparent from the previous corporate structure diagram, ISPL has sought to achieve the objects of the Njamal People in a manner consistent with the objects of the Trust Deed, partly through a relatively complicated structure of other trusts and related entities. It has also, given the difficulties it has experienced in operating within the scope of the present charitable trust Trust Deed, considered and provided advice to the TAC about utilising a direct benefits trust structure in part or in whole. In the Inquiry's view great caution should be exercised before a trustee of a charitable trust expends those funds in connection with the potential structure of alternative trusts, particularly where they themselves are non-charitable and, if established, may result in funds that otherwise would have been paid to that Trust being diverted to another trust for non-charitable purposes. It is in that context that the Inquiry, on becoming aware that advice had been provided to the TAC, querying ISPL's actions, to which it received no response. It then became aware that at a TAC meeting the TAC had endorsed a proposal to establish a direct benefits trust. It accordingly wrote to ISPL advising that in its view such a course of action should not be funded with Trust Funds unless court directions sanctioning that course of action were first obtained. It also raises potential issues of conflict of interest were ISPL to be appointed trustee of such a trust while remaining Trustee of the Njamal People's Trust. These issues are further considered in Chapter 9 of the Report in relation to conflicts.

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110 Dockery, Prout and Hoath (Curtin University & UWA, March 2017).
Abbott

The appointment of Abbott did not involve any “agreement” as to terms or conditions of remuneration, in the same way as occurred in relation to the later appointments of AET and ISPL.

Rather, Abbott’s remuneration was charged on the basis of time recorded on timesheets. It did not charge any other fees such as a contribution or management fee.

Different hourly rates were charged according to seniority of who conducted the work. Junior staff charged from $120 per hour while senior staff, including those to whom authority was delegated by Abbott to manage and administer the Trust, were charged at $250 per hour. Mr Drayson was responsible for approving the amounts and invoices were raised monthly and paid from trust funds.

AET

The proposed initial terms of engagement of AET were set out in the formal proposal circulated 14 February 2014. The term of the appointment was not sought to be limited, as subsequently occurred with ISPL. Once appointed, AET therefore continued as Trustee until it resigned or was removed in accordance with the terms of the Trust Deed or by order of the Supreme Court under the Trustees Act 1962.

Initially, AET’s fees were set as follows:

- Contribution fee: 0.5% of royalties when the funds are received into the trust;
- Management fee: 0.25% of balance of funds held in trust, charged on a monthly basis at the end of the month; and
- Administration fees: Hourly rates = $225 per hour for senior staff, $125 per hour for administrative staff. Administrative staff were only to charge for actually work done on processing applications for assistance. Attendance on the telephone for general enquiries would not be charged.

Provision was made for additional disbursements from the Trust for the following:

- travel;
- tax (including BAS preparation and all tax related matters); and
- consultancy fees (when consultants or other professionals were required to be engaged, their costs were charged as disbursements from the trust).

The proposal letter stated that disbursements for investment/fund management would need to be discussed with the TAC at a later date, suggested to be a date closer to the date of maturity of the term deposit. While an allegation was made to the Inquiry as to whether that term deposit was “lost”, that is not the case. Its recording in financial statements appears to have been re-stated in the 2015/16 financial statements and records provided to the Inquiry reflect that it was subsequently redeemed.
This fee arrangement was described as an "interim agreement" by AET in an early TAC meeting, where the TAC was told it would need to decide what it wished to pay for services moving forward. AET suggested it would be beneficial to look at a fixed fee arrangement as soon as possible for mutual benefit. However, it appears that the model for remunerating AET did not change from that set out in the "interim agreement", as reflected by the fact that when the Inquiry sought a copy of AET’s fee agreement/arrangement the 14 February 2014 letter was provided.

**Restrictions of fees charged by licensed trustee companies**

While the fee arrangement and fees actually charged by AET were, in the view of the Inquiry, reasonable, one further potential issue should be noted. AET, in contrast to Abbott and ISPL, is a licensed trustee company. As such it is subject to additional regulation and privileges under the *Corporations Act 2001* and the *Trustee Companies Act 1987*. In particular, Chapter 5D.3 of the *Corporations Act 2001* regulates the fees that such a trustee company may charge. Where it is providing traditional trustee services as the trustee of a charitable trust, it may only charge various commissions or fees specified in s 601TDB including either a capital commission and an income commission or a management fee. Further:

- If charging a one-off capital commission (i.e., that may only be charged once during the period while the trustee company is the trustee of the trust), the trustee company may charge at a rate not exceeding 5.5% (GST inclusive) of the gross value of the charitable trust's assets; if charging an income commission, the trustee company may charge at a rate not exceeding 6.6% (GST inclusive) of the income received on account of the charitable trust's assets;
- Alternatively, instead of charging a capital commission and income commission, the trustee company may charge an annual management fee (GST inclusive) at a rate not exceeding 1.056% of the gross value of the charitable trust's assets; and
- Additionally, if any of the charitable trust's assets are included in a common fund operated by the trustee company, the trustee company may charge an annual common fund administration fee (GST inclusive) not exceeding 1.1% of the gross value of the charitable trust's assets in the fund.

Nothing in Part 5D prevents a licensed trustee company from being reimbursed all disbursements properly made by the trustee company in the provision of a traditional trustee company service. Further, Part 5D.3 does not prevent the charging of fees as agreed with a

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111 Section 601RAA of the *Corporations Act* defines a licensed trustee company as a 'trustee company' that holds an Australian Financial Services Licence covering the provision of traditional trustee company services. 'Trustee company' in this context means a company that is a constitutional corporation and is prescribed by the *Corporations Regulations 2001* as a trustee company for the purposes of the *Corporations Act 2001*.

112 As provided for in section 601TDC of the *Corporations Act 2001*.

113 As provided for in section 601TDD of the *Corporations Act 2001*.

114 Section 601TDC (1) of the *Corporations Act 2001*.

115 Section 601TDC (4) of the *Corporations Act 2001*.

116 Section 601TDD (1) of the *Corporations Act 2001*.

117 Section 601TBD of the *Corporations Act 2001*. 

person or persons who have the authority to deal with the trustee company on matters relating to the provision of the service.\textsuperscript{118}

As AET’s fee structure involved a contribution fee by reference to a percentage of royalties received, and a management fee, it did not fall within the preceding requirements. AET’s view is that its fee structure was not required to fall within those preceding requirements as it was subject to an agreement with a person or persons who had authority to deal with the trustee company on matters relating to the provision of the services. AET is of the view that the TAC were a group of persons who had the authority to deal with it on matters relating to the provision of the service and that its fees were charged in accordance with an agreement with them.

That raises a question as to whether, in the context of the Trust, AET is correct, given that the TAC has authority to appoint or remove a Trustee but no express authority to agree to the Trustee setting particular fees or dealing with the trust company on matters relating to the provision of the services. The fees that may be charged are instead governed by the terms of the Trust Deed itself and must be reasonable.

According to AET, the legislation has been drafted in a manner that is open to differing interpretations and neither the \textit{Corporations Act} nor its Regulations goes on to define any class of persons who fit within this description, and there has been no judgment of which they are aware limiting this. In its submission, in the case of the Trust, the TAC, being vested with the power to appoint and remove the trustee, are also vested with authority to deal with a trustee company for the purpose of a fee agreement under the \textit{Corporations Act}.

As the Inquiry has not received detailed submissions in relation to this question it does not make any finding. It does however appear to be an issue that may warrant further consideration by AET or other licensed trustee companies who find themselves in a similar position.

\section*{Recommendation 8 (Chapter 7)}

If AET is trustee of any similarly worded trust instruments it obtain legal advice, if it has not already done so, as to whether the TAC or any similar group of persons actually have authority to deal with the trustee on matters relating to the provision of the service such that it may agree to charge fees outside of those provided for under Part 5D of the \textit{Corporations Act 2001}.

\textsuperscript{118} Sections 601TBB(1)(b) and 601TBB(2) of the \textit{Corporations Act 2001}. 

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Some uncertainty arises concerning the actual sequence and terms of the engagement of ISPL, contributed to by poor record keeping and incomplete and inconsistent responses from ISPL, Mr White and Mr Carter to requests for information and documentation from the Inquiry.

In relation to the terms of its engagement, ISPL initially provided the Inquiry with a copy of a letter dated 25 November 2016 from ISPL to the TAC, signed by Mr Carter, and an endorsement of agreement and acceptance on behalf of the TAC apparently signed by Mr Taylor and dated 25 November 2016. No reference was made to there having been another version of that letter (with a different recorded date of signature by Mr Taylor by way of acceptance on behalf of the TAC, on 1 July 2016) or to any other earlier letter agreements.

The terms of the 25 November 2016 letter itself referenced however a supposed earlier letter agreement of 14 March 2016 which was said to have set out the appointment terms and conditions for ISPL’s appointment as Trustee and to have contemplated a three year appointment to provide trustee services. Further, during the course of the Inquiry, ISPL provided to the Inquiry, on request, with certain correspondence between it and its auditor. In a letter dated 25 January 2017 reference was made by the auditor to another apparent version of the 25 November 2016 letter apparently dated in July 2016.

Given those matters and the relevance of any agreements between the TAC and ISPL in relation to the terms of appointment and remuneration of ISPL, the Inquiry sought clarification and to be provided with copies of any other agreements.

Despite request, no such letters were provided by ISPL to the Inquiry.

At a meeting with Mr Carter and Mr Christensen on 2 May 2018 Mr Carter indicated that he would provide to the Inquiry a copy of the 14 March 2016 letter agreement referenced in the 25 November letter. By email of 17 May 2018 the Inquiry followed the request up with Mr Christensen, seeking provision of:

a copy of any agreement entered into by Mr Carter or ISPL with the TAC prior to October 2016 regarding ISPL’s terms and fees (in particular, Mr Carter has indicated that an agreement had been entered into in March 2016, however we have not been supplied with any agreement entered into prior to October 2016)

The Inquiry was subsequently provided by Mr Carter, via Mr Christensen, with a pdf copy of a letter of engagement dated 28 April 2016 and purportedly signed by Mr Travis McPhee on about 12 May 2016. In addition to containing Mr Carter’s signature above the date 28 April 2016, the letter also contained the following declaration, accompanied by Mr McPhee’s signature:

I Travis McPhee, being the Chairman of the meeting that passed the Resolution dated 12 May 2016 confirm acceptance of this proposal.

Travis McPhee
Chairman
The document was also initialled on each other page, apparently by Mr Carter and Mr McPhee.

On the face of this document, the extension of ISPL’s appointment was made by circular resolution purportedly on the terms set out in the signed and endorsed 28 April 2016 letter.

No explanation for provision of that document, rather than the referenced 14 March 2016 document, was then provided. It was also not referenced in the 25 November 2016 letter. It was not until a recent further discussion with Mr Carter, that he suggested that the reference in the 25 November 2016 letter to an earlier 14 March 2016 letter agreement may have been a reference to resolutions made in relation to the appointment ISPL as Trustee in March 2016. The Inquiry infers Mr Carter was referring to a written resolution of a purported special majority of the TAC, apparently signed on or before 14 March 2016, by which it resolved to confirm the termination of AET with immediate effect and to appoint ISPL and Mr Carter first asserted it had been appointed Trustee in the place of AET. The Inquiry accepts that, on the information available to it, this is the most likely explanation of the reference in the 25 November 2016 letter to a 14 March letter agreement, or possibly the letter dated 16 March 2016 by which ISPL purported to accept appointment as Trustee. The reference however to a contemplated 3 year period of appointment is not borne out by any documents brought to the Inquiry's attention and the Inquiry accepts that, at that stage, a far shorter transitional appointment was in contemplation. The Inquiry also notes that in an email dated 21 March 2016 Ms Westerman advised Mr Green, copied to others including Mr Carter, that a draft engagement letter for ISPL was needed for the committee to look at the following day. That appears to be inconsistent with there having been a letter agreement dated 14 March 2016. Ms Westerman also has no recollection of a draft having been provided, other than a draft letter sent to her by Mr Green on 28 April 2016.

The Inquiry also observes that in an email to Hopgood Ganim dated 24 March 2016 Mr Carter indicated that in relation to a costs agreement, the agreement would be signed off by each 'group' after consultation and that, on a quick comparison, his expectation was the fees to ISE would be at least half compared to AET. This is consistent with no such agreement having been entered into or reached at that stage.

Given, in particular, that the signed 28 April 2016 letter from Mr Carter at ISPL to the TAC had not previously been referenced or provided to the Inquiry, the Inquiry made further inquiries to confirm the circumstances of the preparation and signing of the document. It was also only

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119 The issue as to whether AET had been validly removed was in dispute, and ultimately resolved in early to mid-May 2016, when by agreement a TAC meeting was convened by AET and it was resolved by the TAC to remove AET and appoint ISPL and written circular resolutions were then also signed.
through those other inquiries that the Inquiry was able to identify that on 28 April 2016 Mr Green emailed to Ms Westerman a draft letter addressed to Ms Westerman, noting he was still awaiting Mr Carter's feedback, and asking if this was what she was expecting. The draft letter dated 28 April was in very similar form to the signed version of the letter provided to the Inquiry by Mr Carter, via his solicitor, and which on the face of it was apparently signed by way of acceptance on behalf of the TAC by its then chairperson, Mr Travis McPhee, and dated 12 May 2016, and initialled on each page.

Ms Westerman did not believe that she had received any follow up beyond the draft letter dated 28 April 2016 or made aware of any such document being finalised and signed by Mr McPhee.

When Mr McPhee was approached by the Inquiry, he recalled having signed a document in relation to the engagement of ISPL but disputed having signed a letter which contained terms and conditions as set out on the final page of the letter and asserted that he neither used nor authorised the use of an electronic signature on his behalf, if the signature was electronic.

The pdf copy of the letter provided by Mr Christensen on behalf of Mr Carter, according to its pdf document properties was created on 21 October 2016 and modified on 23 October 2016.

Mr McPhee’s questioning of the provenance of the agreement led the Inquiry to request that ISPL produce the original of the letter to the Inquiry or make it available for inspection to enable it to verify the document’s authenticity, and whether any signatures were electronic. This did not occur and, after some delay, ISPL responded via Mr White on 7 August 2018 advising that the original document could not be located and was presumed stolen by Ms Westerman from the Port Hedland office of ISPL. That allegation is considered separately in the Report. It is nevertheless somewhat surprising that ISPL did not then itself provide any further evidence about the creation and signing of the final letter to assist the Inquiry, particularly in circumstances where it had been made clear to ISPL and its director, Mr White, in a preceding telephone discussion that the Inquiry was endeavouring to resolve the issue that had arisen in relation to the document given Mr McPhee’s recollection of events. While it was indicated that Mr McPhee had also admitted that he had signed the agreement, what Mr McPhee indicated to the Inquiry was that he did not dispute signing an letter but disputed it contained the terms and conditions set out on the final page of the letter.

In a recent meeting with Mr Carter to discuss various possible findings and recommendations that may have been open to the Inquiry to make, Mr Carter in substance suggested, amongst other things, that the 28 April 2018 letter had been signed by Mr McPhee in front of witnesses, although they were not specifically identified.

Given the above circumstances, the Inquiry does not finally determine whether the 28 April 2016 letter agreement, which on its face was apparently signed by Mr McPhee on 12 May 2016, was actually signed by Mr McPhee on that date, and each page initialled by him. Nevertheless, it has identified other information and documentation obtained during the
course of the Inquiry which is broadly consistent with a letter having been finalised and signed at around that time on behalf of the TAC. These include the preparation of a draft of the letter on 28 April 2016, the TAC meeting to remove AET and appoint ISPL on 6 May 2016, the subsequent TAC circular resolution dated 12 May 2016 and the recording in the minutes of a directors' meeting of ISPL held on 25 May 2016 that Mr Carter would circulate a copy of ISPL's proposal which had subsequently been accepted by the TAC. While the topic of the approval of the contract between ISPL and the Trust was also listed on the TAC agenda of 8 June 2016, the meeting minutes contained no reference to that topic being discussed.

25 November 2016 letter

It appears that or about 25 November 2016, presumably in pursuit of the TAC resolution passed 26 October 2016, Mr Carter on behalf of ISPL signed a letter to Mr Taylor in his capacity as Chairman of the TAC setting out ISPL's proposed ongoing terms of engagement. The Inquiry understands from Mr Taylor and Mr Mitchell that, notwithstanding that the letter was ultimately transmitted on ISPL letterhead under Mr Carter's signature, the letter was prepared by solicitors engaged by the TAC (and paid for out of the Trust Fund). This letter was discussed at a meeting between the Inquiry and Messrs Carter, Parker, White, Taylor and Ian Taylor at the Njamal office in South Perth. During the course of that discussion, Mr Taylor confirmed that the signature on the face of the document was his, and that "we [the Njamal] screwed them [ISPL] down. My lawyer screwed them down." Mr Taylor also indicated that the document was presented to and endorsed by the TAC.

However, quite what occurred is a matter of some debate.

The Inquiry accepts that a lawyer was involved in assisting the TAC, consistent with Mr Taylor and Mr Carter's recollection and the minutes of the 26 October 2016 TAC meeting which record a resolution of the TAC agreeing in principle to appointing ISPL for an additional 2 years and 6 months beyond its initial term (which the minutes record as having been a 12 month engagement) subject to the TAC receiving legal advice on the merits of the proposal (which the then Chairman, Mr Taylor, is recorded as having suggested ISPL should submit).

It also accepts that Mr Taylor and likely some other TAC members were involved in that process, although it is unclear which members were. The Inquiry was also told by at least one current TAC member that the terms of the letter were negotiated by a subcommittee of the TAC which included Ms Westerman, Mr Taylor and, possibly, Terry Wilson. The Inquiry has some difficulty in accepting this as a completely accurate recollection. Ms Westerman disputes having been involved in such a subcommittee. Also, as discussed elsewhere in the Report, Ms Westerman was purportedly suspended from the TAC on 26 October 2016 and was excluded from attendance at the meeting, did not participate in the TAC meeting dated 1 December 2016 (and is not recorded in the minutes as having attended), and was replaced as a TAC member by Mr Allen at a community meeting on 31 January 2017. On the evidence provided to the Inquiry, it accepts that Ms Westerman was not involved in that process.
CHAPTER 7: TERMS OF APPOINTMENT AND REMUNERATION

According to the minutes of an ISPL Directors' meeting held on 23 November 2016 Mr Carter advised that the extension of the Trustee contract should be signed shortly and it was agreed that existing delegations would continue.

In relation to whether the TAC was actually made aware of, and endorsed the terms of the 25 November 2016 letter, the Inquiry notes that, on the one hand, and contrary to this aspect of Mr Taylor's position, one TAC member believed that beyond being signed by Mr Taylor the letter was never circulated to, or considered by, a meeting of the TAC. However, as observed previously, the minutes of the TAC meeting of 1 December 2016 make clear that Mr Carter thanked the Trust members for extending the Trustee's contract and that this would allow for the longer term appointment of staff positions. While it remains unclear whether the TAC members were supplied with a copy of the letter agreement dated 25 November 2016 that was signed by Mr Barry Taylor on behalf of the TAC as its then chairman at around this time (including in circumstances where the Inquiry has not been provided with the bundle of materials that were provided to TAC members for that meeting), it is clear that they were at least aware of this having occurred. What is however clear is that a number of TAC members remain unclear as to the terms on which ISPL had been engaged and, equally importantly, as to the actual amounts that it had been paid following its appointment as Trustee. The letter agreement incorporates a provision by which the TAC could review and dispute Trustee fees, the dispute resolution provision has not, as of yet, been engaged. While invoices appear to be provided to the TAC chairperson from time to time to sign on behalf of the TAC, it is unclear to what extent the fees are reviewed by the chairperson or other TAC members, or otherwise drawn to the attention of the TAC, which is highly desirable to ensure that there is routine scrutiny of the invoices issued by the Trustee.

The alternative dated version of the 25 November 2016 ISPL letter to the TAC

It was only through making inquiries with a former director, Mr Aird, that the Inquiry was able to obtain a copy of the second version of the 25 November 2016 letter, which also contained an endorsement accepting the ISPL proposal apparently signed by Mr Taylor as Chairman of the TAC, although this time dated 1 July 2016. A copy of the letter was forwarded to Mr Parker by Mr Carter on 6 December 2016, copied to Mr Cullity, Mr Aird and Ms Guo and noting that he had filed the original.

As to the circumstances surrounding the creation and endorsement of the 2 versions of the 25 November 2016 letter, some uncertainty remains. The Inquiry's attention was brought to this matter due to an audit exception report letter to ISPL, in respect of matters identified during the 2015/16 audit, dated 25 January 2017. In the letter, reference was made to the ISPL fee structure being set out in the letter to the TAC of 25 November 2016, noting that was accepted by the TAC on 1 July 2016. The auditor noted that the dates were in conflict and mattered as clause 2 (in the letter agreement) was date specific. That appears to have been a reference to at least clause 2.5(a) under which it was indicated that ISPL proposed to charge
"a base fee for consultancy of $20,000 per month commencing upon the first day of the month following the date of execution of this letter agreement". The auditor indicated that he would appreciate if that could be clarified to him in due course. It is unclear whether that, in fact, occurred.

It would seem therefore, that the version of the letter agreement and apparently signed by way of acceptance on behalf of the TAC and dated 1 July 2016 was not dated to reflect the date that the document was signed, but possibly to reflect the date that the agreement was intended to retrospectively take effect. According to records provided to the Inquiry by ISPL, Trustee fees were charged to the Trust for consultancy from 1 August 2016. Under the above letter agreement, the base consultancy fee agreed with the TAC to be charged of $20,000 per month would be charged commencing on the month following the date of execution of the letter agreement. The reason for backdating the date of the agreement being signed on behalf of the TAC is also unclear, particularly if the 28 April letter agreement was in fact signed on behalf of the TAC by Mr McPhee on 12 May 2016.

Given that the signed version of the letter circulated by Mr Carter on 6 December 2016 included the 1 July 2016 date, not the 25 November 2016 date, the Inquiry infers that it is unlikely that the version with the 25 November 2016 date was signed on that date and rather signed at some other time, possibly in response to the auditor's query. Whatever the position be, it highlights a significant issue in relation to the approach taken in relation to important documents connected with the management and administration of the Trust, and why it is difficult to accept, at face value, that a number of documents provided to the Inquiry accurately and fully reflect events that occurred and their timing. The importance of ensuring that complete, properly dated records are maintained by a Trustee, particularly in relation to matters of significance such as these letters, is of great significance. This is but only illustration of a far wider problem with attention to detail and care by ISPL or that occurred under its watch in relation to significant transactions and events. These issues and governance issues are addressed in more detail in Chapter 8 of the Report.

**Recommendation 9 (Chapter 7)**

1. The TAC and ISPL (and any future Trustee of the Trust) ensure that any significant documentation signed on behalf of the TAC in relation to the proposed terms and conditions of the engagement of the trustee be provided to all TAC members and clear records be created and maintained of when this occurred.

2. The TAC and ISPL (and any future trustee of the Trust) take steps to ensure that documents are accurately dated and, where possible, witnessed to avoid uncertainty about whether and, if so, when documents have been signed.

3. The TAC and ISPL review existing practices and procedures and ensure that a clear procedure is put in place for invoices in relation to the remuneration of the trustee to
be drawn to the attention of all TAC members and to ensure that they are routinely reviewed and endorsed on behalf of the TAC and that TAC members understand the ability to cause an audit of, and to dispute, invoices in relation to ISPL fees.

Terms of engagement

Turning then to the terms of the letters of engagement of ISPL, the initial draft letter dated 28 April 2018 forwarded by Mr Green to Ms Westerman, was in similar, but not identical terms to the subsequent signed version of that letter provided to the Inquiry by Mr Carter via his solicitor (the signing of which Mr McPhee disputes).

Of note, the initial draft letter included a key role as working with the Njamal Peoples Trust to appoint a trustee (such as Westpac) to manage the Trust funds, and to co-ordinate the Trustee’s activities.

It included reference that:

- Of note is that we will not be undertaking the funds management role to ensure that we do not have a conflict of interest. Our role is to work with the Njamal Peoples Trust to:
  - Develop a specification of what funds management services are required, ensuring this is in accordance with the Trust Deed
  - Assist in the selection and appointment of the most suitable funds manager
  - Liaise with the Trust, the Trusts entities and the funds manager to ensure smooth operations

This was deleted from the final version of the letter of the same date, as was a reference to a key role of working with the Trust to appoint a Trustee (such as Westpac) to manage the Trust funds, and to co-ordinate the Trustee’s activities. Certain other changes were also incorporated, such as the addition of reference to Ms Jing Guo in the customer support area, and changes to the proposed terms of remuneration.

In the first draft it was proposed that a contribution fee of 0.5% of royalties payable when funds received into the trust, a management fee of 0.25% fee of balance of funds held in trust, charged on a monthly basis, business services fees, senior at a rate of $225 per hour and administrative/financial at $65 per hour, all exclusive of GST. It also proposed that disbursements would be charged at cost plus 5% including for consultancy fees and other professional fees.

In contrast, in the final signed version of the 28 April 2016 letter it was indicated that ISPL proposed to simplify the process and eliminate royalty commissions and Trust Fund commissions. It proposed that Business Services Fees (GST exclusive) would be a base fee for consultancy of $20,000 per month, an administrative/financial $75 per hour (in contrast to $65 per hour), Directors Fees of $20,000 per annum and additional revenue all sources of funds received by the Trust 1%. Disbursements were to be charged at cost. The Inquiry also observes that that while royalty commissions were said to be eliminated they were in fact captured by the 1% charge on additional revenues, all sources of funds, and were more than
double the rate of the initially proposed royalty fee. In fact invoices sighted by the Inquiry reference the fee charged as being a royalty remuneration fee at 1%.

Both letters referenced that ISPL was happy to enter into a Service Level Agreement with the Trust that outlined the tasks that the Trust and its business entities required and how the Trust and its entities would measure its performance. As far as the Inquiry was able to ascertain, that never occurred, although a “Service Agreement” was entered into between ISPL and Esplanade Holdings Pty Ltd. That agreement contained no performance measurement criteria, nor did any of the letter agreements in relation to the provision by the Trustee of trustee services. It is highly desirable that such matters be agreed and that regular reporting against those outcomes occurs. This will ensure greater transparency and ability to evaluate the performance of the Trustee, particularly where large sums of money are being distributed or applied through related entities in commercial and related activities and also on a range of projects. This issue is returned to later in the context of staff and contractors and strategic objectives of the Trustee.

The terms of the 25 November 2016 letter, though broader than the terms of the signed 28 April 2016 letter agreement, nonetheless generally reflect the principal terms of that letter, particularly insofar as fees and remuneration is concerned.

Turning then to the content of that letter, the opening paragraphs record what ISPL saw as the letter’s purpose:

The purpose of this letter is to:

- set out the commitment of Indigenous Services Pty Ltd (ACN ("ISPL", "we" or "us") to act as trustee of the Njamal People’s Trust established pursuant to the trust deed dated 29 October 2003 (as amended) ("Njamal People’s Trust"); and
- set out the terms and conditions upon which ISPL will provide corporate and development services to the Njamal People’s Trust.

The terms of the letter, on their face, convey that ISPL purported to take on the role of Trustee as well as the additional role of provider of corporate and development services to the NPT.

In respect of ISPL’s activities as Trustee, at 1.3 of that letter, ISPL explained:

ISPL confirms it agrees to the appointment as Trustee for a period of three years following the expiry of the current 12-month term approved by the TAC. This would mean that, subject to the right of the TAC to terminate the appointment of the Trustee pursuant to Clause 5.5 of the deed establishing the Njamal People’s Trust, ISPL would continue as Trustee until 12 May 2020.

In respect of ISPL’s activities as provider of corporate and development services, at 2.1 of the letter ISPL stated:

In addition to performing the role of the Trustee and acquitting its statutory and common law duties as Trustee, ISPL will provide corporate and development services as further described in this letter ("Services") to the Njamal People’s Trust. (emphasis added)
CHAPTER 7: TERMS OF APPOINTMENT AND REMUNERATION

The "Services" referred to in this paragraph were then enumerated (though not exhaustively) in paragraph 2.2 of the letter.

Then, by paragraph 2.5, ISPL’s remuneration was set out:

2.5 We propose to simplify the remuneration structure for the Services. We will charge the following fees:

(a) a base fee for consultancy of $20,000 per month commencing upon the first day of the month following the date of execution of this letter agreement;
(b) provision of administrative services at a rate of $75 per hour;
(c) directors’ fees not to exceed $20,000 per annum (in aggregate for all directors of ISPL);
(d) a fee equal to one percent (1%) of all revenue of the Njamal People’s Trust which revenue is generated solely as a result of the provision of the Services by ISPL to be agreed in writing with the TAC members prior to distribution in accordance with the mechanism provided for in clause s 2.5(e), 2.5(f) and 2.5(g) below;
(e) …
(f) …
(g) …
(h) for any other services provided pursuant to clause 2.2 above, an hourly rate not exceeding $225 per hour (excluding GST).

The terms of remuneration generally reflect those set out in the letter dated 28 April 2016 (and apparently endorsed by Mr McPhee on 12 May 2016, but which he disputes).

Paragraphs 2.5(e)-(g) set out an audit process, which was not contained in the earlier document.

Paragraph 2.7 provided that certain disbursements would be charged at cost, including third party consultancy fees and other professional fees.

The amount and reasonableness of fees charged by ISPL and previous Trustees is considered later in Chapter 8 of the Report.

*Invoices for Trustee fees*

Certain other anomalies were also identified by the Inquiry in relation to the dates of various invoices issued for monthly consultancy fees, there often being material delays in their being issued and inconsistencies in their sequencing. Despite endeavours by the Inquiry to ascertain the actual dates when the invoices were presented and paid, the information provided to the Inquiry by ISPL did not assist resolve this question, the account printouts reflecting dates for the periods in respect of which invoices were issued rather than the dates that the invoices were actually issued and payments made.

*Legal efficacy of the 28 April 2016 and 25 November 2016 letter agreements*

The letters dated 28 April 2016 and 25 November 2016 purport to be agreements executed between ISPL on the one hand and the TAC, by its ad-hoc Chairman, on the other.

As a matter of law, the "execution" of these agreements appears to have proceeded on a misconception as to the powers and functions of the TAC, purporting, as they do, to provide
for the appointment of ISPL on terms and subject to conditions and tenure that are not consistent with the Trust Deed. In this respect, the letters purport to be agreements between ISPL and the TAC. However, the TAC is not a body with legal personality itself capable of contracting; rather, it is an unincorporated committee of individuals appointed under clause 9 of the trust deed for specific and limited purposes, namely to advise the trustee (see clause 9.1 of the Trust Deed) and to appoint, remove and replace trustees from time to time (see clause 5.5 of the Trust Deed). Notwithstanding this matter, the Inquiry is supportive of documents like the November letter agreement, provided that they are clearly drafted and explained as being fee disclosure statements rather than contracts and provided to the TAC so as to inform any TAC’s decision to appoint or replace a trustee. It is important that it be made clear that they are not contracts binding on the TAC as, particularly where they specify a term of appointment (which as noted elsewhere would not be contractually binding, in any event), that may carry with it notions of enforcement which can have a chilling effect on a TAC which might otherwise wish to consider replacing an incumbent trustee.

Recommendation 10 (Chapter 7)

ISPL and the TAC review the existing arrangements for ISPL charging fees. If it considered that the TAC ought to be able to agree with a Trustee to limit the fees that may be charged by the Trustee (over and above the existing limitation under the Trust Deed) or otherwise enter into agreements with a Trustee of the Trust in relation to fees, consideration be given to whether and, if so, what amendments be effected to the Trust Deed.
CHAPTER 8: TRUST FINANCIAL POSITION, PERFORMANCE AND MANAGEMENT

In Chapter 8 the Inquiry considers in some depth the Trust's financial position, performance and management.

It commences by setting out certain contextual background about the Inquiry's approach and difficulties experienced in obtaining certain information. It then examines the position reflected in the audited financial statements for the Trust over several years and specifically reviews the various categories of assets, liabilities, income, expenses and certain reported categories of distributions of the Trust over that period, with a particular focus on the period during the trusteeship of ISPL.

The Inquiry identifies a number of areas where recurrent expenditure has been particularly significant and warrants close review and ongoing management by ISPL to ensure that the Trust continues to operate in a sustainable way in accordance with its charitable objects. Areas of focus include expenditure on fees for consultants and staff which is extremely high, as are a range of other expenses such as motor vehicle expenses, travel expenses and meeting expenses.

Particular attention is also given to loans, given limitations under the Trust Deed on the Trustee's power to lend or advance money and the significant amounts expended, particularly to related entities, and significant issues about the power to do so. The ballooning out of those payments in the latter part of 2017 through to early 2018 was of particular concern and not explained to the Inquiry's satisfaction by ISPL.

Cash flow issues are also considered as by late 2017 to early 2018 ISPL was experiencing a very tight cash flow position. The information provided by ISPL in this regard was also at times sub-optimal and the Inquiry has concerns about the apparent lack of candour and acknowledgement about the nature and extent of those issues.

Consideration is also given to numerous issues identified by the auditor as requiring improvement, a number of which had common elements to issues identified by the Inquiry.

The Inquiry also explores a range of serious concerns it holds in relation to poor compliance, documentation and internal governance standards within ISPL.

Certain other specific topics are also then examined including:

- carbon farming transactions. They are significant as over a million dollars has been invested in that area including in companies in which Mr White has a material personal interest;
CHAPTER 8: TRUST FINANCIAL POSITION, PERFORMANCE AND MANAGEMENT

- the reimbursement of expenditure incurred by Esplanade Holdings Pty Ltd (a company associated with the Carter family), of over $250,000 in respect of funds expended prior to ISPL’s formal appointment as trustee; and
- the highly unsatisfactory circumstances surrounding the removal of a director of Njamal Services Pty Ltd in August/September 2017.

Various recommendations are made by the Inquiry directed towards improvements to practices of ISPL and ensuring that it is compliant with the Trust Deed and its obligations as Trustee. Recommendations are also made that financial statements be prepared and audited routinely for certain related entities, particularly Njamal Services Pty Ltd to which substantial funding has been provided by ISPL as Trustee of the Trust. The Inquiry also recommends that consideration be given to making applications to the Supreme Court for directions in relation to issues including the power to make loans to related entities.

The Chapter concludes with consideration of whether in the light of a range of concerns and deficiencies identified ISPL should be removed as Trustee. However, for a range of reasons, including the apparently significant organisational changes that have recently been made, including changes in key personnel such as Mr Carter ceasing to have a role in relation to the Trust, and apparent commitment and progress being made to address identified issues, it is not recommended that the Attorney take such action, at least at this time. That will give the TAC the opportunity to decide for itself whether it wishes to take any action and ISPL an opportunity to demonstrate a commitment to addressing identified issues of concern.

Background

In response to its initial request for information, on 4 July 2017 the Inquiry was provided by ISPL with various documents including copies of financial reports for the Trust for the financial years ending 2013/14, 2014/15\(^{120}\) and 2015/16, as well as interim financial reports for the Trust for the year up until 31 March 2017.

In a meeting with ISPL on 1 August 2017, a request was made for provision of end of year financial reports for the 2016/17 financial year. They were not then available as they were not yet finalised. Mr Parker from ISPL expressed some reservations about provision of draft financial statements for the 2016/17 financial year due to concerns that they may not be correct and may not assist the Inquiry for reasons including that certain year-end adjustments had not yet been entered. An example given was the value of various investments where the

\(^{120}\) Following the transition between Abbott and AET in July 2014 AET brought in-house the maintenance of accounting records and the preparation of the financial report. In preparing financial statements certain errors were detected in relation to the Trust's financial statements for the year ended 30 June 2014 and prior years, in particular in relation to the incorrect application of Accounting Standards. AET sought to address the issue by restating comparative account balances in the 2014/15 financial statements. See note 10 to 2014/15 audited financial statements.
CHAPTER 8: TRUST FINANCIAL POSITION, PERFORMANCE AND MANAGEMENT

valuation reports had only recently been received and had not yet been journalised to adjust the recorded value of those investments. Mr Parker explained that he had had a pre-audit meeting with the auditor the previous week and that completion of the audit depended on various factors but that the end of September 2017 was being aimed for.

Mr Parker explained details of the cloud based accounting system used by ISPL, various systems that were in place and approaches adopted, addressed various queries of the Inquiry and arranged for aspects of that system to be demonstrated by various support staff.

Recognising that the information would not necessarily be in final form, the Inquiry nevertheless sought provision of such information by letter dated 18 August 2017 to enable it to progress the Inquiry and understand, as best it could based on then available information, the financial position and performance of the Trust. Copies of the finalised balance sheet, profit and loss statement and any other financial statements for that financial year were also sought to be provided once finalised.

On 24 August 2017 a draft balance sheet and profit and loss statement for the Trust for the 2016/17 financial year were provided to the Inquiry. The various financial statements were reviewed by the Inquiry to identify items in respect of which further inquiry would be made. A request for further information and documentation was made of ISPL, as well as various meetings and discussions with ISPL directors and staff, to assist the Inquiry better understand the processes, procedures and accounting for Trust Fund expenditure by the Trustee.

It was not until a further meeting in November 2017 that a copy of the financial reports for the 2016/17 year dated 9 October 2017 were provided to the Inquiry, which were completed, subject to audit. Given the elapse of time and the failure of ISPL to provide full and accurate answers explaining certain very substantial loan and inter-company transactions, the Inquiry also sought and was provided in January 2018 with draft financial statements for the Trust and related entities as at 31 December 2017. It continued to seek clearer explanations and documentation in relation to such matters, without much success. It also became concerned, following review of the 31 December 2017 financial statements and the discussion with Mr White to better understand the liquidity and adequacy of budgeting and controls over expenditure of the Trust. This was associated with concerns of which the Inquiry became aware in early 2018 as to whether the Port Hedland office of the Trust may have experienced cash flow issues in relation to meeting day to day expenditure needs of the Trust.

On multiple occasions when the Inquiry met with officers of ISPL, such as Mr White, high level responses were provided to questions with commitments to promptly subsequently provide supporting detail or documentation to the Inquiry. Frequently that did not then occur in a timely manner.

It was not only the Inquiry that experienced difficulties with compliance by ISPL with its obligations. While the ACNC had initially at ISPL’s request extended the deadline for provision
of their annual information statement and annual report/audited statements until 28 February 2018, ISPL failed to comply with the revised deadline in breach of its obligations. It sought a further extension of time which was refused. It was not until April 2018 that the audit concluded and 19 April 2018 that a copy of the audited reports were provided to the Inquiry and made available to the ACNC by the Trust. It was only then that ISPL provided further cash flow information to the Inquiry, which even then was materially incomplete in certain respects. Despite this having been brought to ISPL's attention, this has not been remedied.

Trust Financial Performance

To assist comparison of the income and expenses of the Trust, the following table was prepared by the Inquiry based on information in the audited financial statements for the Trust for the financial years specified. Earlier years were not included due to issues about the way in which statements for those years were prepared.
CHAPTER 8: TRUST FINANCIAL POSITION, PERFORMANCE AND MANAGEMENT

The 2013/14 figures are the restated figures after AET assumed trusteeship and took advice about what approach should correctly be adopted.

<table>
<thead>
<tr>
<th>Income</th>
<th>2016/17</th>
<th>2015/16</th>
<th>2014/15</th>
<th>2013/14</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contribution Revenue</td>
<td>4,898,374</td>
<td>3,489,108</td>
<td>2,395,575</td>
<td>1,365,841</td>
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<tr>
<td>Interest Income</td>
<td>60,291</td>
<td>80,537</td>
<td>65,219</td>
<td>45,817</td>
</tr>
<tr>
<td>Distributions Received – Indigenous Prosperity &amp; Real Estate Funds</td>
<td>158,225</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loans Recovered - Njamal Mining Pty Ltd</td>
<td>70,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Profit on Sale of Assets</td>
<td>224,500</td>
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</tr>
<tr>
<td><strong>TOTAL INCOME</strong></td>
<td>5,411,390</td>
<td>3,569,645</td>
<td>2,460,794</td>
<td>1,411,658</td>
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</table>

<table>
<thead>
<tr>
<th>Expenses</th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Accountancy Fees</td>
<td>11,965</td>
<td>6,441</td>
<td>7577</td>
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<tr>
<td>Applications for assistance</td>
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<td>30,050</td>
</tr>
<tr>
<td>Auditors’ Remuneration</td>
<td>17,755</td>
<td>3,960</td>
<td>5000</td>
<td>3696</td>
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<tr>
<td>Bank Charges</td>
<td>690</td>
<td>5</td>
<td>57</td>
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<tr>
<td>Bookkeeping fees</td>
<td></td>
<td></td>
<td></td>
<td>1283</td>
</tr>
<tr>
<td>Consultancy Fees</td>
<td></td>
<td></td>
<td></td>
<td>5000</td>
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<tr>
<td>Depreciation</td>
<td>33,819</td>
<td>793</td>
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<tr>
<td>Doubtful debt</td>
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<td></td>
<td>70000</td>
</tr>
<tr>
<td>Employee Expenses</td>
<td>304,164</td>
<td>5,469</td>
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</tr>
<tr>
<td>Legal Costs</td>
<td>30,265</td>
<td>266,722</td>
<td>232</td>
<td>10334</td>
</tr>
<tr>
<td>Management Fees</td>
<td>10,917</td>
<td>5404</td>
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<td></td>
</tr>
<tr>
<td>Meeting Costs</td>
<td>353,190</td>
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<td></td>
</tr>
<tr>
<td>Mining Agreement Costs</td>
<td>448,242</td>
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<td></td>
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<tr>
<td>Project Expenses</td>
<td>17,300</td>
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<td></td>
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<tr>
<td>Occupancy Costs</td>
<td>119,374</td>
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<tr>
<td>Trustee Administration Fees</td>
<td>260,078</td>
<td>442,196</td>
<td>66868</td>
<td>70181</td>
</tr>
<tr>
<td>Other Administration Costs</td>
<td>1,062,202</td>
<td>503,129</td>
<td>218121</td>
<td>28859</td>
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<tr>
<td>Other Trustee Fees</td>
<td>8,123</td>
<td>12,104</td>
<td>28275</td>
<td></td>
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<tr>
<td>Movement in Net Market Value of Investments</td>
<td>93,909</td>
<td>143,536</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL EXPENSES</strong></td>
<td>2,743,776</td>
<td>1,412,572</td>
<td>401,534</td>
<td>149,403</td>
</tr>
<tr>
<td><strong>NET INCOME FOR THE YEAR</strong></td>
<td>2,667,614</td>
<td>2,157,073</td>
<td>2,059,260</td>
<td>1,262,255</td>
</tr>
</tbody>
</table>

The annual gross income of the Trust steadily increased from $1.41m in 2013/14 under Abbott, to $2.46m in 2014/15 under AET, to $3.57m (under AET until about 12 May 2016 and then under ISPL) and then $5.41m in 2016/17 under ISPL.
CHAPTER 8: TRUST FINANCIAL POSITION, PERFORMANCE AND MANAGEMENT

In the same period expenditure dramatically increased, from $149,000 in 2013/14, to $402,000 in 2014/15, then more than tripling to $1.41m in 2015/16, before nearly doubling to $2.67m in 2016/17 under ISPL. The change in net income over that period increased from $1.26m in 2013/14, to $2.06m in 2015/2016, $2.16m in 2015/16 and then $2.67m in 2016/17.

It is relevant to note that the primary source of income was revenue from royalties and other payments under mining agreements, which can fluctuate depending on a wide range of issues, including general economic conditions and the point in the development of mines in the area and amount of ore being extracted in any given year. The increase in revenue was also partly attributable to the entry into new agreements with Altura companies and Pilbara Minerals Limited in relation to new lithium based mining operations.

Significantly, it should also be observed that these figures are unconsolidated figures, and do not include the income and expenses of entities controlled by ISPL. Prior to ISPL’s appointment the only relevant entity was Njamal Mining Pty Ltd. After its appointment the relevant entities included Njamal Services Pty Ltd, Njamal Security Pty Ltd, Njamal Heritage Pty Ltd, Njamal Mining Pty Ltd, and Indigenous Carbon Group Pty Ltd. As ISPL’s audited 2016/2017 financial year reports indicate at note 12, if the financial records were consolidated, the notional net income for the Njamal group of companies would be a figure closer to $1.85m, in contrast to the unconsolidated position of the Trust being $2.67m, noting that the related companies have not had their financial positions audited.

As for the current (unconsolidated) position, the 24 May 2018 unadjusted trial balance indicates that, under ISPL as Trustee, the Trust has accumulated revenue, as at 24 May 2018, of approximately $4.4m for the 2017/2018 financial year against expenditure of $2.9m, being a net position of $1.5m (noting that various adjustments would have been required to determine final figures).

The above table illustrates the dramatic change in income and expenses under the trusteeship of ISPL. The Inquiry notes that the change, of itself, does not necessarily indicate that ISPL as Trustee was acting imprudently or otherwise not discharging its duties as Trustee. It did however highlight why various community members have been concerned and why scrutiny of such matters by the Inquiry was clearly warranted.
## Trust Financial Position

The Trust's financial position, based on the reported audited information is as follows:

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>CURRENT ASSETS</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cash and cash equivalents</td>
<td>479,163</td>
<td>31,944</td>
<td>2,346,802</td>
<td>931,653</td>
<td>487,871</td>
</tr>
<tr>
<td>Financial Assets</td>
<td>1,052,691</td>
<td>4,730,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trade and other receivables</td>
<td>2,089,120</td>
<td>1,216,991</td>
<td>1,298,778</td>
<td>818,254</td>
<td>401,908</td>
</tr>
<tr>
<td><strong>TOTAL CURRENT ASSETS</strong></td>
<td>3,620,974</td>
<td>5,978,935</td>
<td>3,645,580</td>
<td>1,749,907</td>
<td>889,779</td>
</tr>
<tr>
<td>NON-CURRENT ASSETS</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial Assets</td>
<td>500,436</td>
<td>57,414</td>
<td>1,141,501</td>
<td>1,187,247</td>
<td>1,140,812</td>
</tr>
<tr>
<td>Trade and other receivables</td>
<td>32,194</td>
<td>4,400</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property, Plant &amp; Equipment</td>
<td>784,031</td>
<td>26,947</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL NON-CURRENT ASSETS</strong></td>
<td>1,316,661</td>
<td>88,761</td>
<td>1,141,501</td>
<td>1,187,247</td>
<td>1,140,812</td>
</tr>
<tr>
<td><strong>TOTAL ASSETS</strong></td>
<td>4,937,635</td>
<td>6,067,696</td>
<td>4,787,081</td>
<td>2,937,154</td>
<td>2,030,591</td>
</tr>
</tbody>
</table>

| LIABILITIES | | | | | |
| CURRENT LIABILITIES | | | | | |
| Trade and other payables | 318,521 | 284,375 | 133,657 | 45,021 | 68,992 |
| **TOTAL CURRENT LIABILITIES** | 318,521 | 284,375 | 133,657 | 45,021 | 68,992 |
| **TOTAL LIABILITIES** | 318,521 | 284,375 | 133,657 | 45,021 | 68,992 |
| **NET ASSETS** | 4,619,114 | 5,783,321 | 4,653,424 | 2,892,133 | 1,961,599 |

| EQUITY | | | | | |
| Settled sum | 10 | 10 | 10 | 10 | 10 |
| Retained earnings | 3,726,258 | 4,890,465 | 3,424,316 | 1,704,878 | 820,161 |
| Preserved equity | 892,846 | 892,846 | 1,229,098 | 1,187,245 | 1,141,428 |
| **TOTAL EQUITY** | 4,619,104 | 5,783,311 | 4,653,414 | 2,892,123 | 1,961,589 |
The changes to the net equity of the Trust between 2014 and 2017 is set out in the following table:

<table>
<thead>
<tr>
<th>CHANGES IN EQUITY</th>
<th>2016/17</th>
<th>2015/16</th>
<th>2014/15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled sum</td>
<td>$10</td>
<td>$10</td>
<td>$10</td>
</tr>
<tr>
<td>Retained earnings</td>
<td>4,890,465</td>
<td>3,424,316</td>
<td>1,704,878</td>
</tr>
<tr>
<td>Preserved Equity</td>
<td>892,846</td>
<td>1,229,098</td>
<td>1,187,245</td>
</tr>
<tr>
<td><strong>Balance start of financial year</strong></td>
<td><strong>5,783,321</strong></td>
<td><strong>4,653,424</strong></td>
<td><strong>2,892,133</strong></td>
</tr>
<tr>
<td>Net Profit / Surplus for year</td>
<td>2,667,614</td>
<td>2,157,073</td>
<td>2,059,260</td>
</tr>
<tr>
<td>Distributions paid/payable</td>
<td>3,831,821</td>
<td>1,027,176</td>
<td>297,969</td>
</tr>
<tr>
<td><strong>Balance end of financial year</strong></td>
<td><strong>4,619,114</strong></td>
<td><strong>5,783,321</strong></td>
<td><strong>4,653,424</strong></td>
</tr>
<tr>
<td>Transfer from/to preserved equity</td>
<td>0</td>
<td>-336,252</td>
<td>41,853</td>
</tr>
<tr>
<td>Retained earnings after transfer</td>
<td>3,726,258</td>
<td>4,890,465</td>
<td>3,424,316</td>
</tr>
<tr>
<td>Preserved equity after transfer</td>
<td>892,846</td>
<td>892,846</td>
<td>1,229,098</td>
</tr>
</tbody>
</table>

The above tables demonstrate a significant change in asset composition and net assets/equity of the Trust over time.

A change occurred in reported net assets/equity from the end of the financial year that AET assumed trusteeship, of $4.65m, to $5.78m a year later, shortly after ISPL had assumed trusteeship. As at the end of the next financial year, the reported equity had reduced however to $4.62m; effectively where it had been 2 years earlier. Over that period the net annual income of the Trust had increased from $2.06 to $2.67m. Significantly, there had also been a dramatic increase in reported distributions by the Trust over that time, from approximately $300,000 in 2014/15, to $1m in 2015/16 and then to $3.8m in 2016/17. That reflected the vastly different approach of ISPL to performing its role as Trustee as compared to its predecessors.

It is important to observe, at this point, that a significant contributor to the above substantial change was the late alteration of the 2016/17 financial statements to deal with the auditor’s concerns as to how a series of substantial intercompany transactions should be reflected in the financial statements. The transactions were entered into between ISPL and its subsidiaries, Njamal Services Pty Ltd and Njamal Heritage Pty Ltd. It, in effect, provided funding to assist those entities and Njamal Services Pty Ltd’s wholly owned subsidiary, Njamal Security Pty Ltd, conduct their operations.

Of note, the original 2016/17 financial statements prepared by ISPL recorded under current trade and other receivables a loan to Njamal Services Pty Ltd of $723,037 and under non-current trade and receivables a loan to Njamal Heritage Pty Ltd of $199,068. As a result of the concerns of the auditor, including that they should not be reflected at those amounts given
doubt as to their recoverability, ISPL determined to instead treat those amounts as distributions. Consequently, in the final audited reports for the Trust for 2016/17 those amounts did not appear as assets but rather were recorded as distributions, as explained in an explanatory note to the statements. This had the consequence that the reported equity and net assets of the Trust as at the end of the 2016/17 financial year in the final audited statements was $922,115 less than it otherwise would have been, and recorded distributions were $922,115 more than otherwise would have been reported.

The proper characterisation of the above transactions and whether ISPL as Trustee had power under the Trust Deeds to enter into, and subsequently recharacterise those transactions, is a matter of considerable significance. That is considered in detail by the Inquiry later at page 343 and following in this Chapter of the Report. The significance is increased given that the loans had significantly ballooned out by the end of 2017, and continued to increase in 2018.

**Trust Assets**

As reflected in the preceding tables, the change in reported assets of the Trust is as follows:

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>CURRENT ASSETS</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cash and cash equivalents</td>
<td>479,163</td>
<td>31,944</td>
<td>2,346,802</td>
<td>931,653</td>
<td>487,871</td>
</tr>
<tr>
<td>Financial Assets</td>
<td>1,052,691</td>
<td>4,730,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trade and other receivables</td>
<td>2,089,120</td>
<td>1,216,991</td>
<td>1,298,778</td>
<td>818,254</td>
<td>401,908</td>
</tr>
<tr>
<td>TOTAL CURRENT ASSETS</td>
<td>3,620,974</td>
<td>5,978,935</td>
<td>3,645,580</td>
<td>1,749,907</td>
<td>889,779</td>
</tr>
<tr>
<td>NON-CURRENT ASSETS</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial Assets</td>
<td>500,436</td>
<td>57,414</td>
<td>1,141,501</td>
<td>1,187,247</td>
<td>1,140,812</td>
</tr>
<tr>
<td>Trade and other receivables</td>
<td>32,194</td>
<td>4,400</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property, Plant &amp; Equipment</td>
<td>784,031</td>
<td>26,947</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL NON-CURRENT ASSETS</td>
<td>1,316,661</td>
<td>88,761</td>
<td>1,141,501</td>
<td>1,187,247</td>
<td>1,140,812</td>
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<td>TOTAL ASSETS</td>
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<td>6,067,696</td>
<td>4,787,081</td>
<td>2,937,154</td>
<td>2,030,591</td>
</tr>
</tbody>
</table>

It is also relevant to note that in the internal draft balance sheets provided to the Inquiry by ISPL dated 31 March and 30 June 2017:

a) the total current assets including cash in bank accounts were recorded as $1.61m and $1.94m respectively, as contrasted to the amount of $4.34m in the balance sheet as at 9 October 2017 which, after audit, was modified to reflect the above amount of $3.62m; and

b) the total non-current assets were recorded as $3.56m and $3.60m respectively, in contrast to the amount of $1.51m in the balance sheet as at 9 October 2017, which after audit was modified to reflect the amount of $1.32m.
The difference requires some explanation and was, in large part, connected with issues of the treatment of various loans/transactions entered into by ISPL on behalf of the Trust, particularly with related entities owned by the Trust.

One major difference was that certain items recorded in the internal draft balance sheets provided to the Inquiry by ISPL were recorded as being non-current assets, whereas in the actual financial statements dated 9 October 2017 and the modified version after audit, they were classified as current assets. This occurred in relation to the financial investments of approximately $1.5m with Indigenous Business Australia (IBA), an investment loan of $500,000 to Goldfields Carbon Group Pty Ltd (initially incorrectly recorded by ISPL in its draft balance sheet as being a loan to the Indigenous Carbon Group Pty Ltd) and various other loans.

Also, substantial inter-company loans were classified as non-current assets in the draft financial statements, and then, in respect of the loan to Njamal Services Pty Ltd, as a current asset in the 2016/17 financial statements dated 9 October 2017, before ultimately being removed in the final audited financial statements and, instead, being recorded as distributions.

The composition and changes in relation to assets, liabilities and equity of the Trust is considered in more detail below, with particular focus on the position under ISPL.

**Current Assets**

**Cash and cash equivalents**

ISPL operated a trust operation account, a saver account and an operating account for the Port Hedland Office.

The cash and cash equivalents held by the Trust as at 30 June 2017 was $479,163 as compared to $31,944 for the previous year. As subsequent inquiries made to the Inquiry revealed, the cash/cash equivalent assets of ISPL varied significantly on a day to day basis depending on day to day cash receipts and expenditure requirements of the Trust and its related entities. Indeed, as discussed later in this Chapter, the amount of cash held has, in the Inquiry's view, at times become unduly low, and unplanned or unpredicted events have apparently required alteration of the financial investment activities of the Trust.

**Financial assets**

As at the end of the 2015/16 financial year $4,730,000 was held in interest bearing securities. This sum was recorded as a current asset in the 2015/16 audited accounts, as was the amount held as at the end of the previous financial year of $1,141,500 in the comparative balance sheet (although in the 2014/15 audited financial statements it was in fact recorded as a non-current asset).
In the course of the 2016/17 financial year the position significantly changed. The large sum held by way of investment was drawn down and, it appears, largely used to fund expenditure on Trust activities and those of its related entities and distribution of Trust funds. In part the funds were transferred into other investments. The decision to invest those funds appears to have been the subject of consultation with the TAC, as required under the Trust Deed, the minute of the TAC meeting of 8 June 2016 recording that Mr Parker updated the TAC about his review of investment options and it was agreed that the Trustee would report back and form a special committee to work on all financial decisions and inform the group.

In early December 2016 $1.5m of the Trust Fund was invested, split between units of the Indigenous Prosperity Growth Fund, Indigenous Prosperity Income Fund and Indigenous Real Estate Investment Trust operated by IBA. This was discussed at the 1 December 2016 TAC meeting. In Inquiry's view the making of the investment was open to the Trustee, acting prudently, in exercise of its power of investment.

On 8 June 2017 $475,000 was transferred out of the Income Fund for other purposes. As at 30 June 2017 the amount recorded in the audited financial statements for those investments was $1.05m, giving some comfort that the Trust had retained a significant (although still substantially lesser) sum in current financial assets. The Inquiry requested and reviewed relevant documentation confirming the above. In the course of reviewing relevant documentation, the Inquiry identified however that on 3 July 2017 the units held in the Growth Fund had been substantially redeemed, with the units in the Real Estate Investment Trust being redeemed in about late September 2017.

Mr Parker has since provided to the Inquiry copies of redemption requests (albeit unsigned) in respect of the Indigenous Prosperity Growth Fund and Indigenous Prosperity Income Fund requesting partial redemption of the income fund by request dated 9 June 2017 and full redemption by request dated 19 June 2017, as well as a request for full redemption of the growth fund by request dated 19 June 2017, noting that the proceeds were not received into the Trust's bank account until after 30 June 2017, ISPL having no control over the time it would take the fund manager to process the redemptions.\textsuperscript{121}

While the 2016/17 financial reports record that the Trust as still holding material current financial assets, albeit vastly less than one year earlier (ie $1.05m versus $4.73m), the reality is that very shortly after the end of the financial year about half of those current financial assets...

\textsuperscript{121} Response dated 11 September 2018.
assets were redeemed, with the remainder redeemed a few months later, and those funds expended on other Trust activities.\footnote{122}

The drawdown of the investments occurred in order for the Trustee to be able to fund ongoing Trust activities and expenditure requirements, including of related entities, which in the Inquiry’s view had progressed in a somewhat uncontrolled manner. It is not clear from the minutes of TAC meetings whether TAC members were consulted about these withdrawals of the funds that had been invested, to meet other operational requirements of the Trust and its related entities. None of ISPL, Mr Carter or Mr Parker in response to invitations to comment on this and other matters suggested that this had occurred.

It is also to be noted that while recorded in the audited financial statements for that and the previous financial year as current financial assets, they were classified in the internal balance sheets provided to the Inquiry as at 31 March and 30 June 2017 (dated 10 April and 24 August 2017) as being non-current assets. It understands from Mr Parker that the classification in those documents is based on a Chart of Accounts allocation used in preparing internal Management Accounts. While that may be the case, it is unclear why they are differently classified. As noted elsewhere, there are also differences in classification of other assets.

**Recommendation 11 (Chapter 8)**

ISPL review its internal chart of account classifications for consistency with their classification in financial statements produced for external reporting purposes.

**Trade and other receivables (current)**

Following request, the Inquiry received an aged receivables schedule from ISPL recording details of various accounts receivable as at 31 March 2017. The total of the figure in the schedule and the figure in the original balance sheet as at that date differed slightly ($1.47m) versus ($1.34m). It was explained that this was due to difficulties in collating all the information required to present the true result and financial position at the end of March 2017, which was why the statements were not presented to TAC at its April 2017 meeting. The amounts recorded largely reflected royalties and other payments due to the Trust from various mining companies which had apparently been invoiced but were not yet due for payment.

In the audited financial statements as at 30 June 2017 the total trade and other receivables was $2.09m as compared to $1.22m a year earlier. The main difference was an increase in

\footnote{122 It is also to be noted that while recorded in the audited financial statements as current financial assets, they were classified in the balance sheet as being non-current assets.}
contributions receivable from mining companies from $936,000 to $1.36m, a reduction in recorded prepayments from $118,000 to $48,000 (apparently reflecting the recording of the advance payment of TAC member fees which initially was made on an annual basis and then later changed to a quarterly basis) and, finally, the recognition of loans of $34,732 to Njamal People, a loan of $500,000 to Goldfields Carbon Group Pty Ltd and a loan of $4,620 to the Pilbara Foundation. The loans recorded as being due to Njamal People and certain other loans had been adjusted prior to or as at 30 June 2017 so as to materially reduce the amount recorded in respect of those loans, in part to reflect the suggest incorrect classification of certain transactions and also to transfer some transactions from the books of ISPL to Njamal Services Pty Ltd and Njamal Heritage Pty Ltd. The rationale for all for these changes, which despite request ISPL did not adequately explain and substantiate to the Inquiry, is addressed below in the overall context of consideration of loans.

Non-current assets

Based on the initial financial information provided to the Inquiry the non-current assets of the Trust appeared to be significant, particularly compared to current assets. In the 31 March 2017 internally generated balance sheet they totalled $3.56m and as at 30 June 2017 $3.6m. However, the classification and recording of those assets in the 9 October 2017 version of the 2016/17 financial statements of the Trust and in the modified audited statements reflected a substantially different position.

A substantial component of the non-current assets were investments in financial assets. Other items of significance included a number of loans to related entities, a loan and shareholding in relation to a carbon farming investment and a series of other loans.

The Inquiry sought further information and documentation in relation to such matters. As explained later in the Report, the Inquiry's endeavours to obtain a clear, detailed explanation and understanding of the circumstances in which, records supporting and authority provided for the entry into loans (or the underlying transactions in respect thereto), was a significant source of difficulty and delay in progressing the Inquiry. The responses of ISPL were often incomplete, inconsistent and unsatisfactory.

Financial assets

As at 30 June 2016 the non-current financial assets of the Trust comprised shares in listed companies of $57,413, which were subsequently disposed of, as well as shares in Njamal Mining Pty Ltd at a notional $1 for cost of the shareholding.

As at 30 June 2017 the main change was the recognition of the $500,000 equity investment in respect of ISPL's 51% shareholding, as Trustee of the Trust, in Indigenous Carbon Group Pty Ltd. As noted elsewhere in the report, numerous other documents, including the original ASIC notification recorded that the shares were either to be acquired, or were acquired, by ISPL's
wholly owned subsidiary, Njamal Services Pty Ltd, in its trustee capacity. Following repeated queries by the Inquiry it was eventually explained that the shares were acquired by ISPL as Trustee for the Trust, not Njamal Services Pty Ltd, and that ASIC had been notified of the correct position in January 2018. Mr Parker recently provided to the Inquiry a copy of the relevant member's register recording the application for a share allotment dated 23 January 2017, with no amount paid and an amount payable of $500,000, as well as a share allocation to ISPL as Trustee of the Trust, rather than Njamal Services Pty Ltd in its trustee capacity, on 3 February 2017. Mr Parker was not able to immediately explain the apparent inconsistency in many documents provided to the Inquiry but suggested that it may have been decided to acquire the interest through ISPL due to the other activities and funding needs of Njamal Services Pty Ltd.

Otherwise, the nominal costs of shares in other related companies and trusts that had been established was recorded, as well as a loan of $305 for establishing one of those trusts.

The recorded amounts in respect of the shareholdings in related entities represents the actual or nominal cost of the shareholdings, not the value of the shareholdings. In order to obtain a clearer picture of the property of the Trust, some consideration was given to the financial position and income of its related entities, particularly in circumstances where their activities were substantially funded by ISPL. That is particularly so in circumstances where those entities all recorded net asset deficiencies in their unaudited 2016/17 financial reports. That may in turn have implications for the recoverability of the funds provided to the entities by ISPL from the Trust and, also, the potentially liability of the Trustee and exposure of Trust Funds if, for example, one of those entities ultimately failed.

For reasons developed later in this Chapter, the Inquiry considers that regular audits of key related entities, in particular Njamal Services Pty Ltd, should be conducted.

**Trade and other receivables (non-current)**

In the audited financial statements of the Trust as at 30 June 2016 and 30 June 2017, non-current trade and other receivables were recorded of $4,400 and $32,194 respectively. It is not identified what the $4,400 related to. The $32,194 amount reflected a loan in relation to the Njamal People's Benevolent Trust of $13,514 and rental bonds of $18,680. Prior to audit the financial statements also included an amount of $199,068 in relation to a loan to Njamal Heritage Pty Ltd. That amount was instead reflected as a distribution in the final audited financial statements, as discussed in more detail later in this Chapter.

**Property, plant & equipment**

The total "property, plant & equipment" recorded in the audited financial statements for 2016/17 was $784,031 as compared to $26,947 the previous year. Before that the Trust held
no such assets, Stephen Byers, Abbott and AET managing and administering the Trust with their own assets.

The increase in property, plant & equipment was primarily explicable by the expenditure of $523,531 in respect of the acquisition of the Trust's Port Hedland premises at 7 Wedge Street and other expenditure on office equipment, motor vehicles and furniture and fittings. The amount recorded in the draft 2016/17 balance sheet recorded motor vehicles at cost of $146,534; in the trial balance as at 31 December 2017 $184,414 and in the trial balance as at 24 May 2018 $185,323.

The acquisition and use of motor vehicles by the Trust and its related entities, as well as rental of vehicles, is considered further below.

**Trust Liabilities**

The reported liabilities of the Trust in its audited financial statements are:

<table>
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<tr>
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</thead>
<tbody>
<tr>
<td><strong>LIABILITIES</strong></td>
<td></td>
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<td></td>
</tr>
<tr>
<td><strong>CURRENT LIABILITIES</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trade and other payables</td>
<td>318,521</td>
<td>284,375</td>
<td>133,657</td>
<td>45,021</td>
<td>68,992</td>
</tr>
<tr>
<td><strong>TOTAL CURRENT LIABILITIES</strong></td>
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<td>133,657</td>
<td>45,021</td>
<td>68,992</td>
</tr>
</tbody>
</table>

Under all Trustees the Trust has not reported any long term liabilities. Its reported current (and total) liabilities have increased from approximately $45,000 as at 30 June 2014, $134,000 as at 30 June 2015, $284,000 as at 30 June 2016 and $319,000 as at 30 June 2017. The increase reflects in part the greater activities and expenditure in which the Trust has engaged under ISPL.

While the Trust has no recorded non-current liabilities, a significant issue however concerns the basis on which it is providing funding to related entities.

**Trust Equity and Distributions**

As reflected in previous tables, the reported equity of the Trust in its audited financial statements is:

<table>
<thead>
<tr>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EQUITY</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Settled sum</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Retained earnings</td>
<td>3,726,258</td>
<td>4,890,465</td>
<td>3,424,316</td>
<td>1,704,878</td>
<td>820,161</td>
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<tr>
<td>Preserved equity</td>
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<td><strong>TOTAL EQUITY</strong></td>
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<td>4,653,414</td>
<td>2,892,123</td>
<td>1,961,589</td>
</tr>
</tbody>
</table>
The changes in equity in the 2014/15 to 2016/17 financial years can be restated as follows:

<table>
<thead>
<tr>
<th>CHANGES IN EQUITY</th>
<th>2016/17</th>
<th>2015/16</th>
<th>2014/15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled sum</td>
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<td>$10</td>
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</tr>
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<td>Net Profit / Surplus for year</td>
<td>2,667,614</td>
<td>2,157,073</td>
<td>2,059,260</td>
</tr>
<tr>
<td>Distributions paid/payable</td>
<td>3,831,821</td>
<td>1,027,176</td>
<td>297,969</td>
</tr>
<tr>
<td><strong>Balance end of financial year</strong></td>
<td><strong>4,619,114</strong></td>
<td><strong>5,783,321</strong></td>
<td><strong>4,653,424</strong></td>
</tr>
<tr>
<td>Transfer from/to preserved equity</td>
<td>0</td>
<td>-336,252</td>
<td>41,853</td>
</tr>
<tr>
<td>Retained earnings after transfer</td>
<td>3,726,258</td>
<td>4,890,465</td>
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</tr>
<tr>
<td>Preserved equity after transfer</td>
<td>892,846</td>
<td>892,846</td>
<td>1,229,098</td>
</tr>
</tbody>
</table>

The above reflects that by the end of June 2017 the equity (or net assets) of the Trust had significantly declined, by more than $1.1m, from the previous year, and slightly below the reported position as at 30 June 2015. Such a decline, if it were to continue at a similar rate, would not be sustainable, and would, notionally at least, result in the Trust's equity being depleted within approximately 4 years (recognising, amongst other things, that assets are not recorded at market value and that ISPL contends that business activities sponsored via Njamal Services Pty Ltd and the NPJV were in a start-up phase).

The principal reasons for the decline in equity have been the large operational expenditure incurred, and increase in the amount of distributions made from the Trust Fund under ISPL, which has skyrocketed.

ISPL points to the significant expenditure and cash flow demands as arising from a multitude of different factors associated with the start-up of new businesses, funding of native title related matters and the conscious decision of this Trustee, in its discretion, and with the general support of the TAC, to put the Trust Fund to active use rather than continue down a pathway of more traditional, passive investment.

The Trustee has a wide discretion and it is of course open to a Trustee in its discretion to adopt a different approach to the amount and timing of distribution of trust funds than a previous trustee. The discretion is not however unfettered. A Trustee is subject to fiduciary and other obligations in respect of its management and administration of the Trust. It must properly and prudently discharge its duties, ensuring it properly considers the current and future needs of the Njamal People and other aboriginal people for whose charitable benefit the Trust exists. These issues are considered further below.
Trust Income

As already observed, while there was a significant increase in gross income earned by the Trust in 2016/17, it was accompanied by a large corresponding increase in expenses, such that the net income earned was lower than the previous year and approximately the same as for the 2014/15 financial year.

The income for the Trust as reported in its financial statements was as follows:

<table>
<thead>
<tr>
<th>Income</th>
<th>2016/17</th>
<th>2015/16</th>
<th>2014/15</th>
<th>2013/14</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contribution Revenue</td>
<td>4,898,374</td>
<td>3,489,108</td>
<td>2,395,575</td>
<td>1,365,841</td>
</tr>
<tr>
<td>Interest Income</td>
<td>60,291</td>
<td>80,537</td>
<td>65,219</td>
<td>45,817</td>
</tr>
<tr>
<td>Distributions Received – Indigenous Prosperity &amp; Real Estate Funds</td>
<td>158,225</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loans Recovered - Njalal Mining Pty Ltd</td>
<td>70,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Profit on Sale of Assets</td>
<td>224,500</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL INCOME</td>
<td>5,411,390</td>
<td>3,569,645</td>
<td>2,460,794</td>
<td>1,411,658</td>
</tr>
</tbody>
</table>

ISPL provided the Inquiry with a further breakdown and a range of supporting documents in relation to the income earned and various expenses incurred by the Trust during the 2016/17 financial year. These are considered in more detail below. While there were some minor differences between the reported figures in the financial reports and the more detailed breakdown provided to the Inquiry, the differences were either immaterial or subject to satisfactory explanation.

Contribution Revenue

The Trust’s Contribution Revenue for the 2016/17 financial year, as advised to the Inquiry, was broken down between:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Native Title signing fees</td>
<td>$230,000</td>
</tr>
<tr>
<td>Other revenue</td>
<td>$311,079</td>
</tr>
<tr>
<td>Reimbursement of Trust expenses – Altura Mining</td>
<td>$41,768</td>
</tr>
<tr>
<td>Reimbursement of Trust expenses – Pilbara Minerals</td>
<td>$262,243</td>
</tr>
<tr>
<td>Royalties Received</td>
<td>$4,052,991</td>
</tr>
<tr>
<td>Total</td>
<td>$4,898,081</td>
</tr>
</tbody>
</table>

The above information broadly reconciled with the audited financial statements and the Inquiry did not identify any reason to question the reporting of these amounts.
CHAPTER 8: TRUST FINANCIAL POSITION, PERFORMANCE AND MANAGEMENT

Native Title signing fees

This item comprised various contractual payments received by the Trust following the Applicants entering into an agreement with Altura Exploration Pty Ltd and Altura Mining Limited (Altura Agreement), and also an agreement with Pilbara Minerals Limited, in relation to mining projects in the Pilgangoora area. Those projects are principally related to mining of lithium.

Although not described as such in the agreements, the initial up-front payments are informally referred to by ISPL and various Njamal people as 'signing fees' for entering into such agreements.

The Applicants were effectively funded by the Trust and, under the mining agreements, various payments were made to the Trust to reimburse or otherwise recognise various expenses incurred on behalf of the Applicants in connection with the negotiation of the agreements and various other expenses.

Other revenue

The reported "other revenue" consisted of revenue received by the Trust, principally under various mining agreements for reimbursement of a range of expenses such as certain liaison officer expenses and travel allowances and sitting fees, the main component being a $250,000 payment from Pilbara Minerals Limited following unconditional and final approval by the board of directors to develop the project the subject of that agreement.

Reimbursement of Trust expenses

These items reflected reimbursement of expenses paid by the Trust in connection with the negotiation and entry into those mining agreements. Therefore, as explained later in the report, while the amount of expenditure incurred on consultants, employees and administration by the Trust and its related entities was very high, certain costs were recouped, such as the above amounts.

Royalties Received

The item "Royalties Received" reflected various royalty entitlements that accrued in favour of the Trust under a range of mining agreements entered into by the Applicants on behalf of the Njamal community. A detailed schedule of such payments was provided to the Inquiry by ISPL. The royalties received by ISPL during 2016/17 were predominantly from Atlas Iron Limited, Millennium Minerals Limited and Consolidated Minerals Limited.

Loan Recovered – Njamal Mining Pty Ltd

In the 2014/15 accounts a loan of $70,000 made in 2013 when Abbott was Trustee to Njamal Mining Pty Ltd was written off and expensed in the Trust accounts by AET due to concerns as to the recoverability of the loan given the apparently parlous state of the records and financial
position of Njamal Mining Pty Ltd when AET took steps to remove its managing director, Ms Westerman, and other remaining Board member, in August 2015.

During the 2016/17 financial year, after the intervention of Mr Coad and then new directors appointed by ISPL, principally Mr Greg Parker, the loan was in fact repaid and, subsequently, certain dividends paid to ISPL. Accordingly, in the 2016/17 financial statements for the Trust, $70,000 income from Njamal Mining Pty Ltd is recorded in reflection of the loan being repaid.

In respect of Njamal Mining Pty Ltd, ISPL provided the Inquiry with balance sheet as at 30 June 2017 and profit and loss statement for the 2016/17 financial year (which included comparative figures for the 2015/16 financial year) as well as a draft profit and loss statement for the 2017/18 financial year up until 26 June 2018.

Those statements revealed that Njamal Mining Pty Ltd had a reported net asset deficiency of approximately $39,000 as at 30 June 2016, increasing to $94,000 as at 30 June 2017. Its principal liability was a $241,000 loan to FMG. As at 26 June 2018 (based on unfinalised financial statements) the company had made a net profit of approximately $166,600, of which $164,000 was distributed back to the Trust by way of dividend, still leaving the company with a small net asset deficit. As to the appropriateness of making dividend distributions to the Trust while still having an apparent asset deficit, Mr Parker advised that he had previously spoken to FMG informally about the repayment of the loan in the past and they did not appear to be concerned about this prospect all the while that Njamal Mining Pty Ltd was paying dividends to Trust, as this was suggested to be the purpose of the Loan in the first place.

From a consolidated point of view, it is nevertheless relevant to note that Njamal Mining Pty Ltd still presently has a net asset deficit based on its financial statements.

Its financial performance and position does however now appear to be improving under the careful control principally of Mr Parker.
Trust Expenses

The audited financial statements record a dramatic increase in trust expenses from approximately $150,000 in 2013/14, to $400,000 in 2015/16, then more than tripling to $1.41m in 2015/16 before nearly doubling to $2.74m in 2016/17:

- Employee Expenses of $304,164 (previously $5,469 for the period of May/June 2016 after ISPL's appointment and, under other Trustees, nil)
- Meeting Costs of $353,190
- Mining Agreement Costs of $448,242 (previously nil, although these were substantially recovered from the mining companies with whom the agreements were entered into)
- Occupancy Costs of $119,374 (previously nil)
- Trustee Administration Fees of $260,078 (as compared to $442,196 for both ISPL and AET Trustee fees, and figures of only $66,868 and $70,181 for the

<table>
<thead>
<tr>
<th>Expenses</th>
<th>2016/17</th>
<th>2015/16</th>
<th>2014/15</th>
<th>2013/14</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accountancy Fees</td>
<td>11,965</td>
<td>6,441</td>
<td>7,577</td>
<td></td>
</tr>
<tr>
<td>Auditors' Remuneration</td>
<td>17,755</td>
<td>3,960</td>
<td>5,000</td>
<td>3,696</td>
</tr>
<tr>
<td>Bank Charges</td>
<td>690</td>
<td>5</td>
<td>57</td>
<td></td>
</tr>
<tr>
<td>Bookkeeping Fees</td>
<td></td>
<td></td>
<td></td>
<td>1,283</td>
</tr>
<tr>
<td>Consultancy Fees</td>
<td></td>
<td></td>
<td></td>
<td>5,000</td>
</tr>
<tr>
<td>Depreciation</td>
<td>33,819</td>
<td>793</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Doubtful debt</td>
<td></td>
<td></td>
<td>70,000</td>
<td></td>
</tr>
<tr>
<td>Employee Expenses</td>
<td>304,164</td>
<td>5,469</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal Costs</td>
<td>30,265</td>
<td>266,722</td>
<td>232</td>
<td>10,334</td>
</tr>
<tr>
<td>Management Fees</td>
<td></td>
<td></td>
<td>10,917</td>
<td>5,404</td>
</tr>
<tr>
<td>Meeting Costs</td>
<td>353,190</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mining Agreement Costs</td>
<td>448,242</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Project Expenses</td>
<td></td>
<td></td>
<td>17,300</td>
<td></td>
</tr>
<tr>
<td>Occupancy Costs</td>
<td>119,374</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trustee Administration Fees</td>
<td>260,078</td>
<td>442,196</td>
<td>668,68</td>
<td>70,181</td>
</tr>
<tr>
<td>Other Administration Costs</td>
<td>1,062,202</td>
<td>503,129</td>
<td>218,121</td>
<td>28,859</td>
</tr>
<tr>
<td>Other Trustee Fees</td>
<td>8,123</td>
<td>12,104</td>
<td></td>
<td>28,275</td>
</tr>
<tr>
<td>Movement in Net Market Value of Investments</td>
<td>93,909</td>
<td>143,536</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL EXPENSES</td>
<td>2,743,776</td>
<td>1,412,572</td>
<td>401,534</td>
<td>149,403</td>
</tr>
</tbody>
</table>

The increase in expenses in the first full financial year of ISPL's Trusteeship of the Trust is largely attributable to:

- Employee Expenses of $304,164 (previously $5,469 for the period of May/June 2016 after ISPL's appointment and, under other Trustees, nil)
- Meeting Costs of $353,190 (previously nil)
- Mining Agreement Costs of $448,242 (previously nil, although these were substantially recovered from the mining companies with whom the agreements were entered into)
- Occupancy Costs of $119,374 (previously nil)
- Trustee Administration Fees of $260,078 (as compared to $442,196 for both ISPL and AET Trustee fees, and figures of only $66,868 and $70,181 for the
years preceding that, noting that AET also respectively charged other trustee fees of $8,123, $12,104 and $28,275 for contribution and management fees).

- Other Administration Costs of $1,062,202 (previously $503,129 and, before that, $218,121 and $28,859)

The increase in expenses were associated with a substantial change of approach and activity under the trusteeship of ISPL. It does however raise for consideration the adequacy of controls established under ISPL to manage expenditure and whether the expenditure was prudently and properly incurred in relation to trust activities and the administration of the Trust.

These key categories of expenses are considered in further detail below.

The Inquiry also observes that, while it has been suggested to the Inquiry on behalf of ISPL that the expenses incurred were much greater than expected and that steps were intended to be taken to control expenses, in 2017/18 the expenses have continued to increase. The amounts expended in various areas continue to be particularly high, including in the categories of travel and sitting fees, motor vehicle expenses, consultants and employees and other administration costs.

The total of expenses for the 2017/18 financial year up until 28 May 2018 were recorded in the unadjusted trial balance provided to the Inquiry as being approximately $3.21m, by then already nearly half a million dollars more than the preceding year. The recorded revenue up until 28 May 2018 was approximately $4.41m. These were of course unadjusted figures before taking into account any adjustments that may have been necessary.

The major components of the 2017/18 expenses (up until 28 May 2018) based on an unadjusted trial balance were:

- Administration and accounting service fees of $230,622
- Car hire – Office of $85,382
- Consulting of $534,954
- Insurance of $83,408
- Legal expenses – General advice of $183,774
- Legal expenses – Native Title of $332,029
- Motor vehicle expenses of $97,561
- Njamal meeting costs of $74,106
- Njamal travel allowance of $89,267
- Rent, electricity and outgoings of $110,479
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- Sitting fees – TAC and all other groups of $89,650
- Travel – administration of $47,581
- Travel – work related of $181,785
- Trustee fee of $232,101
- Wages and salaries of $424,650

Not all of the above components are directly comparable to expenses reported in the audited financial statements. That is because those expenses are sometimes classified at a higher level of generality in the report financial statements than in the individual accounts reflected in internal reports such as a trial balance.

Another difficulty in assessing the quantum of certain types of expenditure by ISPL as Trustee is that a number of similar types of expenditure may be reflected in different expense accounts or, in some cases, reflected as distributions. Examples of this, which are considered further below, are expenses relating to engaging of consultants to provide services, car hire expenses and meeting or travel expenses and allowances, including sitting fees.

Various categories of expense are considered below, in turn. Before doing so, the Inquiry notes that, in response to concerns identified by the Inquiry and as part of a seemingly wider review, ISPL has indicated that steps have been and apparently are continuing to be taken to address issues in relation to expenditure and cashflow management and control. These are returned to later in this Chapter.

Employee Expenses

Employee expenses jumped from $5,000 in the 2015/2016 financial year to $304,000 in the 2016/2017 financial year and were approximately $425,000 by late May 2018 for the 2017/18 financial year. The auditor queried the increase in 2016/17 and ISPL responded to say that this sum comprised wages and superannuation for employees engaged in the Port Hedland office. ISPL noted that these are all Njamal people (though the Inquiry notes that description does not apply to the second general manager of the Port Hedland office, Mr Wainwright or his subsequent replacement) and that the costs were incurred in pursuit of ISPL’s focus to empower more Njamal persons. In a schedule summarising employee payments 15 different employees were identified as receiving payments, with 6 identified as having full-time employment and the remainder casual employment.

The Inquiry has visited the Port Hedland office (and the South Hedland office before that) and met with a number of employed staff. Staff of the Inquiry have also subsequently had telephone conversations with those employees, who confirm their employment and confirm that they are actively engaged in the Port Hedland office.
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In addition to these staff, multiple other persons were either employed or engaged as contractors, in almost all cases through corporate entities established by or on behalf of those staff or their families/family trusts, with those costs separately accounted for as expenses or distributions of trust funds. As discussed later in this section, the full scope of employee and consultant expenses is not readily apparent when regard is had to the audited financial statements of the Trust and greatly exceeds these specified employee expenses.

Meeting Costs

During the 2016/17 financial year a significant expense of $353,190 was incurred for meeting costs. That amount reconciles with the following items in the more detailed draft profit and loss statement provided to the Inquiry for that period:

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Njamal Meeting Costs</td>
<td>42,647</td>
</tr>
<tr>
<td>Njamal Travel Allowance</td>
<td>69,739</td>
</tr>
<tr>
<td>Sitting Fees – TAC and All Other Groups*</td>
<td>240,803</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>353,190</strong></td>
</tr>
</tbody>
</table>

*ISPL advised the Inquiry the correct sitting fees amount was $240,803 whereas $240,353 was recorded in the draft financial statement.

**Njamal Meeting Costs**

In the March 2017 internally generated trial balance report an item Njamal Meeting costs was $46,793, although in its response ISPL advised that after an item by item review of expenditure allocated to that category the revised total was $36,575 comprising costs associated with flights to and from the Pilbara, venue hire and catering for larger community meetings in Pilbara or Perth and meetings held, with catering provided, in the Pilbara or Perth. The breakdown of the items comprising those expenses did not on its face appear unreasonable to the Inquiry, although it notes the importance of the Trustee ensuring that expenses incurred are reasonable and that it carefully monitors such expenses. The amount of $42,647 was recorded in the trial balance as at 30 June 2017, $58,725 as at 31 December 2017 and $74,108 as at 24 May 2018.

**Njamal Travel Allowance**

This item appears to reflect travel allowances or payments paid to or on behalf of TAC members in respect of engaging in Trust Activities, as well as payments to or on behalf of other Njamal people in respect of travel. The extent of travel engaged in, and whether it could be better managed, is a matter of concern raised with the Inquiry by persons both internal and external to ISPL. The Trust of course faces challenges associated with the tyranny of distance. This includes due to the fact that Njamal people are not all based in Port Hedland.
and its immediate surrounds, many now living in Perth and other regional centres. Further, the main representatives of key mining companies with whom the Trustee and related entities may wish to engage are Perth based. It has also been indicated to the Inquiry that many Njamal people generally prefer to meet in person.

That said, it has been suggested to the Inquiry that consideration was being given to better control such costs and consideration being given to video link facilities, for example. The Inquiry is aware of an example where the Applicants were supportive of such arrangements for a proposed regular update meeting. In the Inquiry's views such an approach should be encouraged, to ensure a more efficient and effective use of limited Trust resources.

Much travel appears to be planned and therefore booked at relatively short notice and could potentially be less expensive if arranged in a more planned manner. An example of the approach to travel costs raised with the Inquiry concerned a budget prepared for the proposed ceremony for purposes of a consent determination. The internal budget prepared included a large allowance for travel costs which were then, admittedly, uncertain. It appears that little if any consideration was given however to whether there were alternative measures by which travel assistance could be provided more cost effectively, such as by bus. As was pointed out to the Inquiry, depending on the number of persons concerned, it would potentially be more cost efficient to charter plane services.

**Recommendation 12 (Chapter 8)**

1. ISPL review and monitor practices in relation to travel in an endeavour to reduce the extent of travel not being adequately planned and booked at short notice.

2. ISPL review and continue implementing a previously foreshadowed approach under which more meetings are held via teleconference or videoconference. While face to face meetings may be ideal, and in some cases such as TAC meetings, should be the norm, the holding of meetings in person ought to be balanced against the considerable costs associated with convening all meetings in person.

**Sitting Fees – TAC and All Other Groups**

A material proportion of Trust Expenses in 2016/217 related to expenditure which ISPL classified in documents provided to the Inquiry as sitting fees. That however embraces a range of payments, some for attendance at meetings, which are often commonly described as sitting fees (including in contexts such as remuneration for members of boards and committees attending and preparing for meetings). ISPL and Mr Carter have however suggested that this description can, at least in certain contexts, be considered to be culturally insensitive, including in the context of TAC members whose remuneration is regarded as being payment for performing the role of family representative on the TAC, which extends well beyond that of attending TAC meetings. The Inquiry suggests that, if it has not yet done so,
ISPL amend the descriptions used in its documentation and accounting systems to take account of the sensitivities to which it has referred. It does however note that this term is still widely used, including at least until very recently by ISPL and many Njamal people with whom the Inquiry has had contact. Given this description has also been used in materials provided to the Inquiry, as a descriptor of a range of payments, the Inquiry adopts uses that descriptor on occasions below to avoid confusion, without intending to in any way be insensitive to any cultural sensitivities that may surround the use of the term in certain circumstances.

Whilst the audited financial reports for 2016/2017 do not specifically list sitting fees, they are generally, although not exclusively, recorded in a specific expense account for payment of TAC sitting fees and sitting fees for attendance at all other meetings. Certain fees of this character that have been paid also appear to have been recorded in other expense accounts or, in some cases, as part of distributions of funds. It is therefore difficult to identify with any precision the total of such fees expended by the Trust during the 2016/17 financial year.

The Inquiry queried the significant rise in sitting fees with ISPL, which confirmed that for the 2016/17 financial year a total of $240,803 was paid for such fees and provided a breakdown of these costs. Those fees are not, however, the only such fees paid by ISPL. Similar fees in connection with other activities, such as mining agreement negotiation costs, appear to be accounted in separate cost centres.

According to ISPL, the types of meetings in respect of which such fees have been paid has varied, for other meetings, such as:

- Trustee Advisory Committee sitting fees;
- Applicant sitting fees, as part of the Native Title deliberations process with government agencies;
- Applicant sitting fees relating to legal considerations and negotiations on the Native Title law and processes;
- Sitting fees associated with attending meetings with mining companies over agreements, and land access associated with the Trust;
- Attending meetings for special commercial projects undertaken by the Trust's wholly owned subsidiaries- Njamal Services and Njamal Heritage;
- Sitting fees for Focus Groups, a formal part of the Native Title process’
- Elders meetings and sitting fees;
- Meetings of special purpose held in the regional centres of Port Hedland, Carnarvon, Broome, Marble Bar and Roebourne;
- “Road Map” meetings as part of the Elders culture and Lore directions;
- Sitting fees associated with Land claims, Land Surveys and Mapping meetings;
- Sitting fees for working group meetings held with companies seeking access to the Njamal Lands, such as Atlas, FMG, BHP and Novo;
- Cultural awareness attendances and participative delivery; and,
- Family meetings and community meetings as part of the representative voice of families and in the election of the new TAC members.
ISPL advised that:

This expense centre is the catch-all for all nature of the sitting fee expenses payable to attendees associated with the various meeting types that are necessary in the running of the Trust’s operations.

The fee structure and guidelines were established by the previous Trustee (AET), and we maintained the continuity of the process.

Its content and profile emphasise the Trust’s focus upon ensuring the Njamal People themselves have maximum opportunities for participation in, and ownership of, the future directions of the Trust.

A large proportion of the amount categorised as sitting fees in fact comprised remuneration paid to TAC members. The remaining amount of approximately $100,000 was expended on fees paid for attendances by various Njamal people at other types of meetings.

While the Inquiry is satisfied that it was open to the Trustee to make payments in the nature of sitting fees in a number of the circumstances in which they have been made, it considers that there is uncertainty as to whether they may or ought reasonably be made in all the identified circumstances, particularly where persons are participating in meetings in a general voluntary capacity as part of general consultation, rather than in a specific consultative or other capacity as part of a particular committee or group. This is considered further below.

**TAC Remuneration**

This amount of $118,333 recorded on 1 July 2017 to reflect TAC remuneration that had been paid in advance for much of the 2016/17 financial year, in May and June 2016. Also, on 30 June 2017 an additional amount of $23,561 is recorded as being for “Being Prepaid TAC services Fees paid in 01 July 16 to 30 June 2017”.

As discussed elsewhere, in the Inquiry's view the advance payment of TAC remuneration is not permissible under the Trust Deed, nor is the payment of a sum not quantified by reference to actual time spent by TAC members on Trust Activities. The Trust Deed does not explicitly provide that TAC members are entitled to remuneration for their services. The extent of their entitlements is to receive out of the Trust Fund their “reasonable out of pocket expenses”, including for time expended on trust activities. The Trust Deed provides:  

> The Advisory Committee members shall be entitled, and are hereby authorised to receive out of the Trust Fund their reasonable out of pocket expenses for all acts done and time expended on all Trust Activities, including the Travel Allowance.

Trust Activities is defined to mean "all activities conducted by the Trustee in accordance with its functions, duties and obligations under this Deed".  

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123 Trust Deed, clause 9.12.
124 Trust Deed, clause 1.1.
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Further, there is not a clear delineation between what activities the remuneration is paid by reference to, and in what if any other circumstances TAC members are entitled to other payments. ISPL suggested that TAC members did not receive payments for attending subcommittee meetings and that there was no duplication of payments. It is unclear however to the Inquiry whether there may have been instances of, effective double payment, such as where TAC members were paid $450 per member in respect of their attendance at a 23 September 2016 special TAC meeting, including Applicants.

In the Inquiry’s view, given that the Trust Deed specifically entitles TAC members to certain remuneration and entitlements, it would be preferable if that expenditure were accounted for in a separate expense account to other similar expenditure such as meeting fees paid to Njamal people other than as part of TAC entitlements. That will create greater transparency and readier identification of payments made under the Trust Deed.

Recommendation 13 (Chapter 8)

ISPL review its expense account classifications and account for expenditure by way of TAC member remuneration and other entitlements separately to other expenditure such as meeting fees paid to Njamal people other than as part of TAC entitlements.

Other Sitting Fees

The payment of meeting attendance or participation fees other than to TAC members is a particularly problematic area.

It raises difficult issues as to whether, and, if so, in what circumstances, such fees may be paid consistently with the Trust Deed.

The expectation and practice of payment of these types of fees to indigenous community members who participate in a wide range of meetings has become widespread across many indigenous communities. This has been accommodated by many mining companies and other bodies, particularly as part of negotiations and entry into various mining and other agreements and is often seen as the price of doing business. Without such payments the Inquiry has been advised that it can be difficult to generate the level of participation by appropriate indigenous persons in a range of consultative and decision making processes in these areas. The payment of such fees can however be particularly problematic, including from the point of view of whether the payments may be made, and may reasonably be made, the optics of the decision making process, the potential for improper use, self-interest and conflicts and issues as to whether if such benefits are made to particular persons, they ought properly be accounted for to a broader group, especially if a person receiving payment has fiduciary duties to that group. It may also have implications for the payer and recipient, including from a taxation perspective.
The expectation and accompanying pressure to make such payments can also place
significant pressure on persons such as trustees to facilitate such payments, even where their
ability to do so may be constrained. Given its broader engagement than its predecessors in
relation to native title related issues, and the termination of YMAC’s role, ISPL has needed to
address issues concerning payment of sitting fees and like payments in a wider context. It is
in that context understandable why the payment of fees of this nature under ISPL has
significantly increased.

In support of payment of meeting attendance and participation fees, it is understandably often
contended that the time and effort spent by various indigenous people in many consultative
and decision making processes is valuable and should be recognised by reasonable
remuneration, particularly where other persons involved are being remunerated. This must
however be considered in the context of the particular circumstances of the case including, in
the case of a Trustee in respect of a charitable trust, the Trust Deed, and what it permits or
precludes. In the Inquiry’s view the Trust Deed does not, for example, permit the payment of
effectively *ex gratia* payments, albeit the Supreme Court may, in appropriate circumstances,
permit this.

The Trust Deed allows for the Trustee to receive reasonable remuneration and also contains
provision for TAC members to receive payment of ‘out of pocket’ expenses, including in
respect of time spent on Trust Activities.\(^\text{125}\) It also allows for the Trustee to expend moneys
from the Trust Fund in respect of the expenses of convening community meetings for the
purposes of electing a TAC. It does not however provide for proxies for TAC members to
receive remuneration or for community members to receive fees in respect of attendance at
TAC meetings and, in the Inquiry’s view, the making of such payments would likely be
inconsistent with the Trust Deed and should not be made. In respect of proxies, while it is
understood that the question of remuneration of proxies who may attend TAC meetings is left
as a matter for a TAC member to resolve with their proxy, it appears from the schedule of
payments provided to the Inquiry that on a few occasions such payments may have been
made direct from the Trust, albeit possibly by arrangement with the TAC member. On at least
one occasion a TAC member proposed that their sitting fee be paid directly to a third party. A
director of ISPL intervened, expressing concern that to redirect a person’s pay without a
proper paper trail exposes the company to numerous allegations and is unacceptable.

In the Inquiry’s view, generally, if a person is accepting a voluntary role in assisting the Trust
in a Trust Activity, the Trust Deed does not contemplate payment being made to that person
for their time, and payment of ‘sitting fees’ to such a person would potentially be in breach of
the Trust Deed. That is to be distinguished from circumstances where a person is employed

\(^{125}\) Trust Deed, clause 9.11.
by the Trust or otherwise engaged by the Trust, directly or indirectly, such as under a contract of service or for services, in which case the Inquiry considers that such payments may be made and recouped in appropriate circumstances in furtherance of the Trust's objectives, if reasonable. It may also be that, some form of payment to assist a person could be made under appropriate circumstances if, for example, it was made to accommodate expenses likely to be incurred in attending a meeting.

In some cases it may therefore be open to the Trust to pay remuneration or fees to non-TAC members, especially where they are contributing specialist input, akin to a consultant. An example of this may be the provision of cultural advice by Elders. It is accepted that the appropriate remuneration of persons can also have the benefit of enhancing dignity and self-worth. Care should be taken however not to convert this into an automatic entitlement that any person attending a meeting be paid a ‘sitting fee’. Such payments can also readily give rise to, at least, perceptions of preferential treatment and the potential for such payments to be regarding as not being made to carry out the charitable objects of the Trust 'without purpose of private gain', especially where such payments are made to selected groups. That issue was particularly concerning in the context of payments made with funds provided by Esplanade Holdings Pty Ltd prior to ISPL being appointed Trustee. This is discussed further below. The making of payments for 'sitting fees' is also susceptible to a least a perception of misuse to foster support and nepotism unless their payment is carefully and consistently controlled.

Certain further observations about the payment of sitting fees in particular contexts is considered further below.

**General Community Meetings**

The Trust Deed provides that the “reasonable expenses” of convening a community meeting may be paid out of the Trust Fund, but it does not provide that members of the community attending such meeting may be reimbursed or remunerated for their time attending meetings. In the Inquiry's view it is appropriate, as appears to have generally been the practice under all Trustees, that the Trustee not pay any sitting fees to community members for attending such meetings. To the extent that the Trustee expends funds directly or indirectly by way of travel allowance to assist community members attend such meetings, that arguably falls within the payment of the reasonable expenses of convening the meeting. This latter type of expense has been paid by all recent Trustees of the Trust.

**Native Title and Trust Project Related Meetings**

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126 Trust Deed, clause 9.10(b).
A range of other meetings have been, and continue to be, held in respect of which sitting fees are paid connected with the progression of native title proceedings by the Applicants on behalf of the Njamal community, and other related activities such as the negotiation and entry into mining agreements and attending to other activities such as preparation of the PBC rulebook and “road mapping”.

Previously, the Inquiry understands that mining companies or YMAC arranged for payment of sitting fees where considered appropriate from federal funding provided to it to discharge its functions or funding provided by mining companies or other entities. It is important to recognise that such payments were not being made by YMAC as Trustee of the Trust. Different considerations may arise as to the ability and appropriateness of the Trustee making such payments in the absence of YMAC or any other source of funds to meet such payments.

As noted elsewhere in the report, the Inquiry is satisfied that, in general, provision of a reasonable level of funding to assist with the conduct of the native title proceedings and related native title activities falls within the objects of the Trust Deed and is open to the Trustee to make in exercise of its discretion. So too may it make distributions in respect of other projects which are in furtherance of the objects of the Trust. Whether any particular payment may and should be made depends of course on the particular circumstances of the case.

Insofar as provision of funding is concerned to meet fees associated with native title related activities, an initial issue of relevance is whether such payments have either been authorised or endorsed by the Njamal community on whose behalf the Applicants are acting, or otherwise by the Applicants or other persons within the scope of the authority conferred on them. That is particularly important if the Applicants themselves receive sitting fees or other remuneration or reward. If, in that context, payment of sitting fees (in particular to Applicants themselves) have been authorised or endorsed, but the Applicants and the Njamal community do not have resources from which to meet such fees directly, it may be open to the Trustee to provide funding to meet such fees if reasonable and in furtherance of the objects of the Trust. Even then, whether it should provide such funding is still a matter for its discretion. The financial impact on the Trust and its ability to meet other Trust objectives will be relevant to the discretion.

The situation is more complicated here because ISPL has also assumed a dual role, as Trustee of the Trust and as an entity authorised to engage in certain actions on behalf of the Applicants. The potential for conflict in discharging those dual roles is examined separately in the Report.

Consistent with its earlier observations, the Inquiry considers that it is open to the Trustee to make payments of fees where persons are, in effect, being asked to consult or provide services in relation to particular projects or other activities, given their particular knowledge or
expertise, rather than merely participating in trust related activity in a voluntary capacity. For example, payment of fees to particular Elders to participate in Elders’ road mapping activities (such as occurred where participants were paid $200 to attend a “roadmap” meeting on 25 January 2017 as part of a “roadmap” project relating to understanding and mapping out the heritage of the Njamal people) may be justifiable given their knowledge and expertise, as might payments to persons to participate in certain meetings as part of working groups or committees in relation to native title matters such as PBC rule book meetings and other Applicant meetings. It is conceptually harder to identify a proper basis for payment of sitting fees where members of the community are being generally consulted about proposed actions and their views, such as appears to have occurred on a number of occasions, particularly under ISPL. In the Inquiry’s view it is preferable that the Trust not make such payments, absent the Trust Deed being amended to provide a clear basis for doing so.

Another example where such fees have been met by the Trust, even though often reimbursed by mining companies, concerns attendance of persons at various meetings, such as Monitoring and Liaison Committee (MALC) meetings under the various agreements and broader meetings in relation to the negotiation and signing of such agreements. Where another entity such as a mining company is liable to pay such fees, care should be taken by the Trustee before expending Trust funds to meet such fees pending payment by the liable entity. A proper basis for the Trust to make such payments from the Trust Fund in such circumstances must be identified because, even though the Funds might be recouped, the expenditure must be justifiable in the first instance.

In response to possible recommendations about ISPL reviewing its practices and procedures and adopting a more restrictive approach, Mr Carter contended that the system was working well and that no review was necessary. In contrast, ISPL responded through its lawyer: \(^{127}\)

\(^{127}\) Letter dated 28 September 2018 from CX Law.
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In a further response on behalf of ISPL its lawyer advised that ISPL’s policy was that sitting fees would no longer be paid to members for attendance at community meetings and no payments will be made to proxies for their attendance at any meeting.

Recommendation 14 (Chapter 8)

ISPL continue to review at regular intervals its existing practices and procedures in relation to the payment of fees in the nature of sitting fees to ensure they are applied consistently and not selectively and in compliance with the Trust Deed.

Mining Agreement Costs

In 2016/17 mining agreement costs of $448,242 were incurred, in contrast to no amounts for previous years. While the precise composition of this amount is not entirely clear, based on the detailed draft profit and loss statement for 2016/17 provided to the Inquiry it would appear to be comprised of approximately the following amounts:

- Altura - Signing on expenses: $32,670
- Pilbara Minerals - Signing on expenses: $265,613
- Altura – Applicants’ Signing Fees: $50,405
- Pilbara Minerals – Applicants’ Signing Fees: $97,727
  **Total: $446,415**

It is also to be noted that the following, related amounts, were also recorded as income in that period:

- Native Title signing fees: $230,000
- Reimbursement of Trust expenses – Altura Mining: $41,768
- Reimbursement of Trust expenses – Pilbara Minerals: $262,243

These various expenses were incurred by ISPL as Trustee in relation to the negotiation and entry into the Pilgangoora Project Agreements between the Applicants and Altura companies and Applicants and Pilbara Minerals Limited in a context where YMAC had been removed from its native title related role in May 2016, shortly after ISPL assumed trusteeship of the Trust.

Clarification was sought as to the composition and basis for payment and recoupment of the above mining expenses. ISPL provided a comprehensive, 11 page response to this query, setting out the detailed breakdown of relevant transactions up until 31 March 2017.

In addition, ISPL provided the following narrative explanation:

**Signing Fees**

The amount of Signing Fees paid to the Applicants is subject to negotiation between the Trustee and the Applicant groups. These Fees differ depending on the amount the Trust will receive from each mining company.

As the Njamal People’s Trust benefits from long term revenue streams from Royalties generated from Project Agreements entered into between the Applicants, who execute these Agreements as the “Native Title Party”, and the respective mining company and these Agreements provide for the payment of a lump sum “Signing Fee” (Clause 2.1(a), the payment to the Applicants for part of this Fee is deemed equitable to both the Trust and the Applicants.

The Signing Fees received by the Trust from the respective mining companies to 31 March, 2017 were:

- Altura Mining Ltd $130,000
- Pilbara Minerals Ltd $100,000

The Trust retains the net amount received from the mining companies after paying the Applicants a proportion of the amounts received. There is no net cost of the signing fees as suggested in your question.

**Reimbursement of Trust Expenses**

The mining companies are invoiced for all direct and indirect costs associated with the lead up to the execution of the Project Agreements by the Applicants at a Njamal Community Meeting at which the Njamal people vote to accept the Agreement. The Trust recovers all of the direct and indirect costs associated with the above.

**Trust Objects**

The expenses paid enable the Trustee to generate a long term, recurring revenue stream from Royalties and other amounts payable pursuant to the “Direct Financial Benefits” provided for in the Project Agreements. As such, the payments fall within Clause 4.1(c) of the Trust Deed, being a secondary Object for “other purposes beneficial to the community of Beneficiaries”. The long term, recurring revenue stream from Royalties and other amounts payable pursuant to the “Direct Financial Benefits” also enable the Trustee to generate funds to facilitate meeting expenditure relating to the Primary Object found in Clause 4.1(b) of the Trust Deed.

It is therefore apparent that the mining expenses associated with the negotiation and entry into agreements with Altura companies and Pilbara Minerals Limited were essentially paid from the Trust and then recouped from those companies. In the case of the Altura Agreement it seems that there was an added step - the Trust paid for certain costs notionally incurred by Ironside Management Pty Ltd in relation to the Altura Agreement. Ironside Management Pty Ltd then added a 15% uplift in the fees for administration before billing Altura Mining Limited. When the expenses were recouped from Altura Mining Limited it is not clear if Ironside Management Pty Ltd retained the net difference of approximately $5,450 or otherwise paid it to the Trust. It has been suggested to the Inquiry however that the directors did not receive any benefits and an unsigned minute provided to the Inquiry at a late stage reflected that it was not intended to make profit for its shareholders.

In summary, of the $448,242 of mining expenses recorded in the 2016/17 audited profit and loss statement, approximately $300,000 represented ‘signing on’ expenses, being expenses incurred by the Trust in relation to the negotiation and entry into the agreements, which were directly recovered from the mining companies concerned.
The remaining mining expenses, reflected as Applicants' Signing Fees, comprise gratuitous payments of approximately $148,132 (ie $50,405 in respect of Altura Mining Limited, and $97,727 in respect of Pilbara Minerals Limited) made by the Trustee from the Trust Fund to the Applicants and certain other Elders. The payments were approximately 39% of the initial up-front payment received by the Trust from Altura Mining Limited (of $130,000) and 97% of the initial up-front payment received by the Trust from Pilbara Minerals Limited (of $100,000).

In the Inquiry's view, in general, the expenditure of funds in respect of the reasonable and legitimate costs of the negotiation and execution of mining agreements is likely to be sufficiently connected with the objects of the Trust Deed, such as under clauses 4.1(b)(iii) and 4.1(b)(iv), to be within power. That is particularly so where the agreements are expected to improve the health of the Trust Fund.

As to the particular costs incurred, a substantial component of the expenses were for travel and accommodation in respect of certain Applicants and community meetings, as well as certain other professional expenses. In certain instances, sitting fees were paid to Applicants and some other Njamal people at a rate of $500 per day to attend certain meetings. Insofar as these categories of expense include sitting fees, these are additional to sitting fees recorded in a separate expense account for sitting fees paid in relation to a range of other meetings.

The payment of such fees, can be potentially problematic, as already discussed. In particular, it can be problematic in the case of such payments being made to Applicants unless the making of such payments had been consented to or endorsed by the Njamal community whom they represent in the native title proceedings.

The payment of 'signing fees' from the Trust Fund to Applicants (and as discussed below, to others) is more vexed.

**Signing Fees**

The amounts disclosed as income in the nature of signing fees from Altura Mining Limited and Pilbara Minerals Limited are sometimes colloquially described as such, although they are not described as such in the agreements entered into with those companies. In fact, they represent the first up-front payment required to be paid by each company in the manner agreed with the Native Title Party (in this case by payment to the Trust) shortly after the agreement in question commences. Those fees are not paid under the agreements directly to Applicants or others who may have assisted in negotiating the agreement.

In this connection, representatives from two mining companies engaged in business on Njamal land were asked in relation to their experience in relation to the payment of signing fees. Both responses were similar in effect. The representative of the first company responded to the effect that in his experience payments were not made direct to Elders who sign native title agreements/deeds [with mining companies] and that did not happen. A representative of Pilbara Minerals Pty Ltd indicated that [in his experience] named applicants
would not receive signing fees as you would ‘cop it’ from other people in the community if you did that and from other places. No distributions were made to named applicants. The propriety of doing so was questioned. He and another representative present however indicated that Pilbara Minerals Pty Ltd paid sitting fees at daily rates to attendees to attend meetings and invoiced to accounts for probity and other purposes.

Following issuing invitations to ISPL and Mr Carter in relation to possible findings and recommendations that may be open to the Inquiry in relation to the payment of signing fees, the position of the Chief Executive Officers of two of the companies was communicated to the Inquiry. While the payment by those mining companies of signing fees to applicants directly was said not to occur, it was however indicated that those companies were aware that signing fees were paid to Applicants, either by the relevant native title representative body, or in the present case the Trustee of the Trust, from the first up-front payment required to be paid by each company pursuant to the relevant mining agreements. The payment of sitting and signing fees in this context was described as “common practice”.

While the moneys paid by Altura Mining Limited and Pilbara Minerals Limited were, as required under the terms of the various agreements, to be paid to the Native Title Party, the agreed mechanism was for the money to be paid to the Trust. When that is done those amounts merge into and become part of the Trust Fund with the consequence that the distribution or other application of those funds is then primarily governed by the Trust Deed.

However, having received the sums into the Trust Fund, ISPL as Trustee then paid from the Trust Fund an amount, described as a “signing fee” to each of the Applicants and a small number of other senior Njamal people.

A detailed breakdown of the amounts paid to Applicants and other members of the Njamal community by ISPL in connection with the Pilbara Minerals Limited agreement and Altura Agreement is set out in ISPL’s 11 page response.

In relation to the Altura Agreement, each Applicant was paid approximately $7,100.

In relation to the Pilbara Minerals Limited agreement, each Applicant (or in one case where an Applicant was deceased, a family member of the Applicant) were paid $10,000. In addition, 12 other Njamal people were each paid approximately $2,300. It is not clear why these non-Applicants were paid a “signing fee”, but it would appear to be because they were regarded as Elders who had previously contributed and warranted recognition.

As those payments were made from the Trust Fund the Inquiry has considered whether they were able to be made consistently with the terms of the Trust Deed.

In relation to the Altura Agreement, minutes of TAC meetings prior to the payment by ISPL of signing fees to various Elders make no reference to any consultation with TAC members as required prior to such payments being made. It therefore appears that ISPL either failed to
comply with its obligation to consult or that it is not properly documented in the minutes if this did occur. In contrast, the minutes of the TAC meeting held 1 December 2016 record that consultation occurred in connection with the Pilbara Minerals Ltd Pilgangoora agreement. According to the minutes the TAC was informed (among other things) by Mr Carter of the initial financial benefits under the agreement and that:

… at the Applicants Meeting there was a desire for the $100k sign on to be shared with Applicants and those elders who had previously helped.

The minutes do not record any demurrer or complaint from the TAC. Significantly, this consultation is consistent with what appears to have actually happened: ISPL distributed almost all of the $100,000 (actual figure: ~$97,000) to the Applicants and other Elders of the Njamal community. In the Inquiry’s view, the obligation to consult under the Trust Deed was in this case satisfied in substance.

ISPL has referred to and relied upon the secondary object of “other purposes beneficial to the community of the Beneficiaries” as the purpose to which these payments are directed.

The Inquiry has significant difficulty in accepting this as a proper basis for the payments whether by way of expense purportedly incurred or distribution purportedly made in pursuit of the objects of the Trust. In this respect, unlike sums expended in the course of the negotiation and execution of the agreements, the signing fees appear to be paid to certain members of the community because that is an expected or customary course or is considered culturally appropriate. However, there is no obligation to do so in the Trust Deed. As the minutes of the TAC meeting on 1 December 2016 reveal, payment of those fees in that way was a “desire” of the Applicants. In the Inquiry’s view that does not support the payment of signing fees out of the Trust Fund; and rather, is potentially susceptible to being characterised as the making of payments for private, rather than communal, purposes, contrary to the Trust Deed and its charitable objects.

A complicating factor is that, as Greenwood J explained in Gebadi v Woosup (No 2) [2017] FCA 1467 [101]-[102], the Applicants in the Native Title Proceedings occupy a fiduciary position vis-à-vis the community that they represent:

There can simply be no doubt that Mr Woosup and Ms Tamwoy, as persons constituting the applicant at any time, undertook or agreed to act for and on behalf of and in the interests of the native title claim group in the exercise of any and all powers, responsibilities and discretions affecting the interests of the claim group in a legal or practical sense. Mr Woosup and Ms Tamwoy, by reason of that role, enjoyed a special opportunity to exercise any such powers or discretions to the detriment of the claim group, and the claim group was, plainly enough, vulnerable to any abuse of position by Mr Woosup and Ms Tamwoy. Mr Woosup and Ms Tamwoy thus stood in a fiduciary relationship, often described as a relationship of “trust or confidence” with the members of the Ankamuthi native title claim group. The members of the Ankamuthi claim group were entitled to expect that Mr Woosup and Ms Tamwoy would act in the best interests of the claim group in exercising any of the functions, powers, responsibilities or discretions conferred upon an applicant.

The obligations or duties Mr Woosup and Ms Tamwoy owed to the members of the Ankamuthi native title claim group were these:
(a) an obligation to not place themselves in a position where their private or personal interests came into conflict with the interests of the members of the Ankamuthi native title claim group: a conflict of interest and duty;
(b) an obligation to not pursue and secure a personal benefit: a conflict of interest and duty;
(c) an obligation to not make a profit from their position of trust unless expressly permitted to do so with the informed consent of the Ankamuthi native title claim group: a conflict of interest and duty;
(d) an obligation to not place themselves in a position where their personal interests or duties conflicted with duties owed to the Ankamuthi native title claim group: a conflict of interest and duty, and a conflict of duty and duty.

In a document provided to the Inquiry in October 2018, Mr Carter has commented on the Inquiry's reference to *Gebadi v Woosup*, as follows:

The example given shows poor research and lack of understanding of the issues. The 2 gentlemen were receiving SECRET PAYMENTS. On careful reading of the case it is obvious the issues are totally different
1. The Njamal Applicable ancestors received the money in a public forum
2. The Mining Companies endorsed the payment and understood the Cultural Significance of the payment
3. The community endorsed the payment and instructed the Applicants to sign the agreement.
4. No reasonable person would suggest the precedent you provided is in any way related to this matter, yet SSO have made the precent a key indicator

The key point however is that Applicants in Native Title proceedings hold a fiduciary role vis-à-vis the community on whose behalf they act, which informs the consequences of those fiduciary obligations – the informed consent of the principal (here, the community) being required if a personal benefit is to be sought or received.

More generally, Mr Carter has also commented in relation to signing fees:

Signing fees are common place with all significant ILUA agreements. ISPL canvassed many Trusts and organisations. Clearly SSO have not.
The fees were well known to the Mining Companies and thought appropriate.
The fees were not random and applied to the surviving Applicable Ancestors appropriately as per the Native Title Claim. This group of very elderly, cultural people are the last of the Stolen Generation. They had given in most cases 20 years of their time for nothing, simply to maintain the cultural link with the land. Applicable Ancestors are mostly impoverished and in some cases wheelchair bound. Out of respect for their cultural significance these payments were made with full approval of mining companies. This was a gesture of thanks and goodwill. SSO appears to have no understanding of Culture and the significance of Applicable Ancestors.

This is why most group throughout Australia have enacted payments for Applicable Ancestors.
In aboriginal culture, those people usually hand those funds to other family members as a way of Culture. This is very significant to ISPL as it respects Culture and Tradition.
These payments will always be made as a respect of Culture and family. This needs to be understood by European Society and the lawmakers.

In contrast to Mr Carter's response, ISPL commented on the question of signing fees by a letter to the Inquiry from its solicitors dated 19 September 2018, stating:
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ISPL recognises issues raised by the Inquiry with respect to the distribution of funds received under ILUAs to certain individuals and will implement the proper measures to ensure that this does not occur in the future.

It also later indicated that all payments from the funds of the Trust will be paid to members in accordance with its distribution policy. The distribution policy made no provision for payments in the nature of signing fees.

The Inquiry understands that there may be entirely appropriate cultural and other reasons why payments of signing fees are made, and understands the practice is or may be widespread. The Inquiry does not doubt the ability of the community, properly informed, to consent to payments of this type being made, and does not suggest the payments per se are inappropriate. The existence of such consent, fully informed and appropriately given, is important both to ensure that Applicants who receive such funds do not breach their fiduciary duties (and that persons who make such payments are not a party to any such breach).

It has been suggested to the Inquiry that the community consented to the payments, which were received in a public forum. Certainly, the documents available to the Inquiry, in particular a presentation given to a community meeting on 13 December 2016, indicate that the community endorsed the Applicants executing the Pilgangoora agreement with Pilbara Minerals Limited. The notes on the presentation record that that the following resolution was passed (45 for, 14 against):

The members of the Nyamal Claim Group present at this meeting in person authorise the Applicants to execute the Pilbara Minerals project agreement and Section 31 Deed and any related agreements with Pilbara Minerals.

The notes also record that one of the terms of the agreement was a one-off payment of $100,000 being paid within 20 Business Days of the commencement date of the agreement. However, what the notes do not record is whether it was explained to the community that the $100,000 would in effect be paid out of the Trust Fund to the Applicants and some few others.

Ms Westerman has also supplied the Inquiry with her notes of the community meeting on 13 December 2016. Amongst other things, Ms Westerman's notes record, under the heading "Resolutions":

Resolutions were voted upon as follows

- Authorisation of the Pilbara Mineral- Njamal Agreement
- Authorisation of the Njamal Applicants to appoint lawyers
- Voting process

The resolutions were not properly discussed and explained to the group by the lawyers who rushed through their presentation.

There was no explanation given about key terms in the Agreement eg the nomination of the Njamal People's Trust regardless of beneficial ownership.
On the face of those documents it is unclear whether the intention to pay $100,000 to the Applicants and some few others was expressly raised with the community at the meeting on 13 December 2016. However, the Inquiry accepts that this intention was not secret. As the minutes of the TAC meeting of 1 December 2016 referred to above record, Mr Carter expressly raised the desire of the Applicants for the $100,000 to be shared between the Applicants and those Elders who had previously helped. Thus, at least the members of the TAC present at that meeting, and the Applicants who were present at the Applicant meeting at which the desire was expressed, were aware of that intention.

As to whether the “Njamal Applicable (sic apical) ancestors” received the money by way of signing fees in a public form as Mr Carter suggested to the Inquiry, while that might have occurred in the context of the Altura Agreement, the timing of payments disclosed by ISPL suggests that did not occur in all cases. According to the records provided to the Inquiry by ISPL:

- the payment of signing fees in relation to the Altura agreement were made by ISPL on 6 and 8 July 2016, the agreement being authorised by the community and signed that week. The receipt of the Altura first payment, commonly referred to as a signing fee, was not received until later, on 3 August 2016; and
- the payment of signing fees in relation to the Pilbara Minerals Limited agreement were made by ISPL in part before the agreement was signed and the first payment was received by ISPL from Pilbara Minerals on 13 December 2016, and in part afterwards.\(^{129}\)

In an attempt to gain a better understanding of signing fees the Inquiry further spoke with representatives of a number of mining companies about the general question of signing fees.

One representative of one company explained that the company was aware that signing fees were paid from the Trust (the representative confirmed that signing fees were never paid directly by the companies themselves to the Applicants or others), but that they were not aware of any community resolution specifically endorsing the payment of a signing fee from the Trust Fund to the Applicants or select others. However, the representative indicated that the payments were generally known and spoken about as part of the process and that it was no secret within the community. It was also indicated to the Inquiry that there are a number of meetings which the companies do not attend so it is possible a resolution or endorsement occurred at one of those meetings.

\(^{129}\) Payments were made by ISPL on 27 and 28 September 2016 to one Elder (as an advance), then to other members on 21 and 23 November and 7, 16, 21, 22 and 23 December 2016 and 3 January and 7 February 2017.
Another representative from a different mining company said much the same, indicating that before and after the signing of an agreement he had discussions with Njamal people, both Applicants and non-Applicants, who were aware that they (the Njamal people present at the community meeting at which the agreement was endorsed) would receive some sort of “signing on fee”. When asked whether he was aware that the Applicants – that is the people who actually signed the relevant agreement on behalf of the community – were paid a separate sum by the Trustee, the representative said that his understanding was there was a sum paid by the company to the Trust on execution of the agreement which was then to be distributed at the Trustee's discretion for community benefit. The same representative was asked whether a specific signing fee for Applicants and some few others was, to his knowledge, the subject of any specific community endorsement, resolution or discussion. The representative said he did not know, and noted that he was not present at all times during community meetings as at some points he (and other company representatives) were asked to leave while the community considered the agreement.

In the circumstances, while the Inquiry finds that signing fees are generally known and spoken about in the industry and community and certainly are not secret, it is not clear on the information available to the Inquiry whether the Njamal community specifically endorsed by way of fully informed resolution the payment of signing fees to Applicants and others in respect of the Pilgangoora agreements.

However, as noted above, and putting the above issue to one side, the Inquiry has significant difficulty in accepting that the Trustee is in any event permitted, under the terms of the Trust Deed, to make payments of this type whether by way of expense purportedly incurred or distribution purportedly made in pursuit of the objects of the Trust. That is not a criticism of the payments themselves – they may well be culturally appropriate and accepted and endorsed by the community. It is however a question of whether such payments may be effected in accordance with a Trust Deed with charitable objects which places strict limits on how the Trust Fund may be expended.

**Recommendation 15 (Chapter 8)**

If signing fees are contemplated being paid by ISPL or a future trustee out of the Trust Fund in respect of any future agreements to be entered into by Applicants on behalf of the Njamal community:

- proposed payment of those fees, including how much and to whom, be brought explicitly to the attention of the community at the community meeting at which the relevant agreement is to be endorsed;
- a resolution specifically endorsing the proposed payment of signing fees be moved;
- if the resolution is passed, it be recorded in the minutes of the meeting; and
ISPL first seek directions from the Supreme Court of Western Australia as to whether the Trust Deed permits payment of those sums or for the Court's sanction to the making of such gratuitous payments.

**Occupancy Costs**

Occupancy costs of $119,374 were incurred by the Trust during the 2016/17 financial year. That appears to reflect rent, electricity and outgoings for the premises rented by the Trust noting that the Trustee was renting premises for the Trust in Perth and South Hedland, before later vacating the South Hedland premises and commencing occupation of premises acquired in Wedge Street, Port Hedland during the 2017/18 financial year. A proportionately similar amount had been incurred for the 2017/18 financial year until 24 May 2018 even though, by then, premises were not being leased in South Hedland. ISPL provided the Inquiry with a copy of the lease over the Perth premises from which the Trust presently operates and the Inquiry verified that the lease was entered into by ISPL as Trustee for the Trust commenced in December 2016 for a 3 year period with a rent of $5,000 per month reviewable annually.

**Trustee Administration Fees**

**Abbott**

As previously noted, Abbott's remuneration was charged on the basis of time recorded on timesheets. It did not charge any other fees such as a contribution or management fee.

Different hourly rates were charged according to seniority of who conducted the work. Junior staff charged from $120 per hour while senior staff, including those to whom authority was delegated by Abbott to manage and administer the Trust, were charged at $250 per hour. Mr Drayson was responsible for approving the amounts and invoices were raised monthly and paid from Trust funds.

Based on information including supporting invoices provided to the Inquiry by Abbott, the total charged for this period, including GST, was approximately $155,000. During the 2013/2014 year, Abbott was in "caretaker mode" and accordingly, did not provide many services, or charge many fees during that period. In the audited financial statements for 2013/14 Trustee Administration Fees of $70,181 are recorded.

The Inquiry found no reason to question the nature or reasonableness of the fees charged by Abbott.

**AET**

AET has provided the Inquiry with copies of invoices for fees charged per month from July 2014 to June 2016.
The records provided record "management fees" and an "implementation fee" of 0.55% charged on receipt of royalties. It appears that the implementation fee is the contribution fee, inclusive of GST.

The fees invoiced were generally similar to, but did not completely reconcile to the figures in the audited accounts (possibly due to timing differences) which recorded:

- Other Trustee Fees of $28,275 and $12,104 for 2013/14 and 2014/15 (and $8,123 charged by AET and paid in the next financial year after it ceased to be Trustee);
- Management Fees of $5,404 and $10,917 for 2013/14 and 2014/15; and
- Trustee Administration Fees of $66,868 and $442,196 for 2014/15 and 15/16.

The one exception is that the invoices provided by AET suggest that the administrative fees it charged in 2015/16 were closer to $162,000. It is not clear what the precise components of the 2015/16 reported Trustee Administration Fees comprises and whether it includes legal expenses incurred by AET in defence of the proceedings brought against it to achieve its removal as Trustee or possibly expenses recouped by Esplanade Pty Ltd from ISPL after its formal appointment as Trustee on 12 May 2016.

On the face of the records provided, the fees charged by AET appeared to reflect the fee proposal circulated on 14 February 2014. There was nothing on the face of the fees, or elsewhere in the materials available to the Inquiry, to indicate that they were anything other than reasonable.

**ISPL**

During 2016/17, Trustee administration fees of $260,078 were paid from the Trust Fund by ISPL. This amount comprised $242,000 (inc GST) for monthly consultancy fees charged (at a rate of $15,000 per month until October 2016 when it was then changed to $20,000 per month), as well as charges based on 1% of royalties received.

While the item is described in the accounts as a Trustee administration fee it, in fact, largely reflects a fee charged direct to the Trust under the back to back arrangement purportedly entered into between first Esplanade Holdings Pty Ltd (later purportedly assigned to Esplanade Consultancy Pty Ltd) and ISPL for the provision to it of Trustee services via Mr Carter. Surprisingly, this was not altered after Mr Carter was disqualified from managing corporations early in the 2017/18 financial year and required by law to effectively curtail his central management role. That is a matter of concern considered separately by the Inquiry.

The Trustee administration fees of $260,078 were less than the fees of $442,196 (which as noted above included AET fees which it appears from a statement prepared by AET for that financial year included Trustee administration fees of approximately $162,000. It is unclear whether it also included any of the expenses incurred and later recouped by Esplanade
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Holdings Pty Ltd or possibly legal costs identified in that document of approximately $131,000), but substantially higher than for the two preceding years of $66,868 (AET) and $70,181 (Abbott).

Given the quantum, a question arises as to the reasonableness of the trustee fees charged by ISPL.

An appropriate starting point is what was disclosed to the TAC when ISPL was engaged. In that respect, the fees charged by ISPL for the management of the Trust are consistent with the terms of the various "agreements" said to have been executed by ISPL and the TAC during the early days of ISPL's tenure. That is, as discussed earlier in this report, the fees charged generally reflect the fees agreed: $20,000 per month plus a fee equal to 1% of all revenue of the Njamal People's Trust which revenue is generated solely as a result of ISPL's services. For most of the period of ISPL's term the Trust's only substantive source of revenue was royalties, such that in practice the 1% of revenue has been a 1% on royalties. However, with the development of, in particular but not only, Njamal Services Pty Ltd and the NPJV, there is some prospect that the 1% on revenue will extend beyond royalties. Whether that will occur is yet to be seen.

Having regard to those matters the Trustee fee of $20,000 per month does not on the face of it appear to be unreasonable, though it may be open to question whether it is in addition reasonable to charge the 1% on revenue, particularly if significant new revenue streams are to come online.

As noted earlier in the Report, under Chapter 5D.3 of the Corporations Act, fees chargeable by licensed trustee corporations (which ISPL is not) in respect of being a trustee of a charitable trust, absent agreement to the contrary, may include an annual management at a rate not more than 1.056% of the gross value of the charitable trust's assets. Based on the reported assets of the Trust this would be in the vicinity of $50,000, a significantly smaller sum than that charged by ISPL. Alternatively, a one-off capital commission of not more than 5.5% (GST inclusive) of the gross value of the charitable trust's assets may be charged under that regime and an income commission not exceeding 6.6% (GST inclusive) of the income received on account of the charitable trust's assets. If the upper rate for an income commission were charged by ISPL the fee would be far closer to that actually charged by ISPL. Further, as already discussed, AET adopted a different measure for its fees on the basis that the TAC could agree to that occurring.

130 That is comparable to the scales of charges published by "trustee companies" pursuant to regulation 3 of the Trustee Companies Regulations 1988. By way of example, the scale of fees published by AET for administration of a charitable trust is in the vicinity of 1% of the gross value of the 8 assets under administration, with extra hourly charges for certain additional services.

131 Sections 601TDC(3) and 601TDC(4) of the Corporations Act 2001.
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It is however also important not to view the fee in isolation of any consideration of the various other charges levied or recouped by ISPL in respect of services provided by its directors and employees/contractors for the benefit of the Trust. As expanded upon below, those sums are, in total, very large, and it is important that the Trustee fees which are charged are viewed in the context of what the fee represents, particularly where there is substantial recovery from the Trust funds of charges for a wide range of other charges. The fee should also be considered in the context that, until recently, the $20,000 per month paid to ISPL was in effect simply passed through to the Esplanade companies as remuneration for the provision of services by Mr Carter. In that way, while Mr Carter was part of the business of ISPL, the $20,000 reflected a cost to ISPL of providing services to the Trust, such that its recoup from the Trust Fund was reasonable.

That position has however since changed, with Mr Carter ceasing to be involved in the affairs of the Trust. In those circumstances if the role performed by Mr Carter is now being performed by another person or persons whose services are being remunerated and recouped from the Trust (such as the charge for Ms Kathryn Bates) it may no longer be reasonable for ISPL to charge $20,000 per month as a Trustee fee given that the services it is providing for that fee have effectively contracted. It is therefore recommended that the existing fee arrangement be reviewed by ISPL and the TAC and that the TAC be provided funding to enable it to obtain independent advice in relation to the reasonableness of any ongoing fee structure.

**Recommendation 16 (Chapter 8)**

1. ISPL review existing fee charges including whether:
   - in light of the Esplanade companies and Mr Carter ceasing to be involved in the affairs of the Trust, and in light of the other sums charged to the Trust Fund (as discussed below), it remains reasonable to charge the Trust $20,000 per month for trustee services;
   - it remains reasonable to charge, in addition to the fee of $20,000 per month, a fee of 1% on revenue; and

2. The TAC also review the reasonableness of ISPL fee charges going forward and be provided with reasonable funds to enable it to obtain further independent advice if required.

**Other Administration Costs**

"Other Administration Costs" of the Trust were $1,062,202 in 2016/17, $503,129 in 2015/16 and $218,121 and $28,859 respectively in the 2 years before that.
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The auditor understandably queried the significant increase between 2015/16 and 2016/17. ISPL’s response was that the costs related to increased activity due to ISPL being more commercially focussed (than, the Inquiry infers, previous Trustees) and administrative expenses incurred during the "transition phase” (which, the Inquiry infers, is a reference to the transition from AET to ISPL and its new trustee model).

This category of expense included a range of significant items. Based on the trial balance of accounts as at 30 June 2017 (with the 25 May 2018 comparative figure following in brackets for comparative purposes), they included the following approximate amounts: consultancy fees of $277,000 ($535,000), travel expenses of $277,000 ($229,000), legal expenses for native title matters of $47,000 ($332,000 plus $184,000 for general advice),\(^{132}\) motor vehicle expenses of $36,000 ($98,000) and car hire – office of $25,000 ($85,000). There were also numerous other items including costs of producing the Njamal newsletter, maintaining its website and insurance. The comparative figures in brackets are of some concern in that they show that certain key administrative costs had significantly increased in the 2017/18 year, raising a question as to whether the Trustee had implemented effective measures to control expenditure.

**Consultant Benefits**

The figure of $277,000 recorded for consultants does not however tell the whole story. What it does not reveal is the total amount that was expended on contracted services/consultants, particularly associated with current or former directors of ISPL, or persons with whom they may have professional or personal connections. That is not to say that the amounts expended were therefore improper or necessarily unreasonable. It does however serve to emphasise the significant potential for conflicts of interest to arise and need for that to be prudently and appropriately managed by ISPL, its directors and related entities. Further, it highlights the importance of robust and appropriate practices being put in place to ensure that decisions to engage particular persons are reasonable and that their engagement and expenditure on their engagement is appropriately managed.

ISPL was asked to provide information and documentation in relation to the benefits directly or indirectly received by directors and certain key personnel on several occasions. Its responses were not complete and not consistent. Complete supporting invoices were not provided in many instances, although summaries of payments made (often cross-referenced to invoices), were provided to the Inquiry.

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\(^{132}\) In the 2016/17 audited balance sheet $662,600 was recorded as a distribution for native title expenses. In the 25 May 2018 trial balance that amount had increased to $712,015.
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One of the difficulties of course in determining with accuracy amounts paid to such consultants is that the fees were not only charged to the expense account, but also charged to other accounts depending on the matters to which the fees related. Consultants also received significant remuneration from roles that they assumed in relation to related entities.

Ultimately, putting aside some of the discrepancies, on ISPL’s own figures the amount charged by companies through which various individuals contracted to provide their services, associated with the following current or former directors was approximately the following amounts before GST:

(a) Mr Carter (via Esplanade Holdings Pty Ltd and/or Esplanade Consultancy Pty Ltd):
   (i) $220,000 for consultancy/trustee services provided by Mr Carter to the Trust;
   (ii) $41,000 for Trustee fee on Trust royalty income;
   (iii) $226,400 for administration and accounting services provided by Jing Guo and Joyce Lu to the Trust
   (iv) $58,700 for administration and accounting services provided by Sinou Xu to Njamal Services Pty Ltd

(b) Mr Parker:
   (i) $101,200 for services provided by Mr Parker to the Trust; and
   (ii) $128,700 for services provided by Mr Parker to Njamal Mining Pty Ltd

(c) Mr Aird:
   (i) $130,600 for services provided by Mr Aird, to the Trust; and
   (ii) $84,900 for services provided by Aird to Njamal Heritage Pty Ltd

(d) Mr Cullity:
   (i) $69,100 for services provided by Mr Cullity to the Trust; and
   (ii) $120,000 for services provided by Mr Cullity to Njamal Services Pty Ltd.

(e) Mr White:
   (i) $59,200 for services provided by Mr White to Njamal Services Pty Ltd; and
   (ii) $28,000 for services provided by Mr White to Njamal Mining Pty Ltd.

Thus, for the 2016/17 financial year, companies associated with current or former directors of ISPL were paid a total exceeding $785,000 (exc GST) from the Trust Fund, and over $1.25m from the Trust and related entities for the provision of professional and administrative services. In one response from ISPL it also identified that approximately $27,700 was reimbursed to Esplanade Holdings Pty Ltd for unspecified miscellaneous expenses and office costs.

One of the large items in this list that attracted the attention of the Inquiry was the sum paid to the Esplanade companies for services supplied by Ms Guo, Ms Xu and Ms Lu. The sums paid for Ms Guo and Ms Lu also attracted, it seems, the attention of Mr Parker leading him on 25 September 2017 to express in an email to Messrs White and Aird the following:

I’m finalising the NPT’s Financials for FY17, getting them read for the Auditor.
Some time ago I asked Rod to review what the NPT is paying for Jing and Joyce’s services. Esplanade’s margin on what they were being paid was excessive to say the least.

I’ve just noticed Jing and Joyce’s costs to the NPT have now been reduced to $141,440 per annum and $124,800 per annum respectively. That’s $266,240 per annum. I’ll leave it to you to consider if the NPT is getting value for money.

It is also to be noted that in a draft budget attached to an email from Mr White dated 12 October 2017, the amounts budgeted for Ms Guo and Ms Lu were $96,000 and $84,000 respectively. However, in the covering email Mr White observed that:

We must also note that the actual costs since 30 Jun 17 are greater than this budget allows so we have a significantly tight cash flow for now.

An unadjusted trial balance for the Trust dated 24 May 2018 records “administration and accounting service fees” of $230,622 had been paid out of the Trust Fund as at that point in the 2017/18 financial year.

Materials supplied to the Inquiry indicate that, consistently with the letter ‘agreement’ dated 25 November 2016, administrative staff were generally charged to the Trust at or about $75 per hour. Mr Carter in particular has provided the Inquiry with a spreadsheet demonstrating how that figure was calculated. Of note it was formulated on a 10% mark-up being applied to calculated direct costs per hour. While the Inquiry does not quibble with this rate per se for the type of work performed, the reasonableness of charges depends also on the number of hours that are charged at the specified rate. When regard is had to the amount of time said to have been spent on Trust business by the administrative staff the Inquiry was concerned to understand why contract staff were engaged on hourly rates rather than full time staff on fixed salaries, particularly in circumstances where the staff were engaged through companies associated with Mr Carter. It also raises questions as to the controls over what hours they worked and their services were charged for, and who was responsible for determining this in circumstances in which Esplanade companies stood to benefit.

Mr Parker has explained that the administrative staff were engaged on hourly rates because, to adopt Mr Parker’s language, “of the uncertainty surrounding the amount of time required to undertake various roles”. Mr Carter has also expressed the view, which the Inquiry accepts and which is borne out by the attempts to remove ISPL, that when ISPL were appointed in May 2016 there was considerable uncertainty as to how long ISPL would remain trustee. Comparative figures for similar roles with other trusts have also been supplied.

Mr Parker has further explained, in a manner which is generally reflected in comments from Mr Carter and ISPL, that:  

133 Letter from Mr Parker, 11 September 2018.
If the Inquirer believes it may be open to him to conclude that the quantum of hours was excessive, he would be unfairly reaching that conclusion with the benefit of 20:20 hindsight. No one within ISPL could have reasonably envisaged the sheer volume of work required to be undertaken in meeting the demands/requests of the Njamal People after they were enabled for the first time in 13 years.

The Inquiry accepts that, given the uncertainties faced by ISPL both in terms of tenure and workload that it was not inappropriate for ISPL to engage staff on a contract basis. What Mr Parker does not explain however is his comment in his email that "Esplanade’s margin on what they were being paid was excessive to say the least."

In any event, since raising its concerns with ISPL, the Inquiry has been advised by ISPL through its lawyers that any "indirect engagements with Ms Guo, Ms Xu and Ms Lu" have been terminated, and that Ms Lu had recently been offered direct employment by ISPL on a permanent full-time basis at market rates.

In addition the foregoing, the following persons provided services through their nominated companies (or in Ms Green's case, and Ms McPhee's case, possibly directly) and the amount charged (exc GST) was approximately:

(a) Richard Green:
   (i) $152,300 for services provided by Mr Green to the Trust;
   (ii) $16,200 for services provided by Mr Green to Njamal Services Pty Ltd; and
   (iii) $9,500 for services provided by Mr Green to Njamal Mining Pty Ltd

(b) Courtney Green (Richard Green's daughter):
   (i) $30,300 for services provided by Ms Green to the Trust

(c) Graeme Stevens:
   (i) $16,400 for services provided by Mr Stevens to the Trust; and
   (ii) $29,250 for services provided by Mr Stevens to Njamal Services Pty Ltd.

(d) Lorraine McPhee:
   (i) $45,400 for services provided to the Trust

(e) Craig Mack:
   (i) $17,000 for services provided by Mr Mack to the Trust

In other words, during 2016/17 over $1.5 million (before GST) was expended on Trustee and other major consulting fees to the Trust and its wholly owned related companies.

In addition, nearly $600,000 was also expended on the engagement of Njamal people as Project Consultants/Project Liaison Officers during that period. Those amounts were classified by the Trust in its accounts as distributions rather than operational expenses of Trust Activities.

When regard is also had to employee salaries of approximately $300,000 it can be seen that during 2016/17 over $2.4 million (exc GST) was expended by reference to key consultants and employees. That does not include a range of other persons engaged by Njamal Services Pty Ltd or Njamal Heritage Pty Ltd to provide personal services, costing approximately
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$250,000 and $160,000 respectively, taking the total to over $2.8m before GST on a consolidated basis (excluding other costs such as NPJV costs of $240,000 for the managers' salaries.)

While as previously explained, some costs were recouped from mining companies, the amounts recouped comprise a relatively small proportion of overall consulting and employment costs.

The engagement and remuneration of Mr Green warrants further brief comment.

It is apparent that he carried out a wide range of tasks ranging from administrative support to the Trust to providing assistance with preparation of business plans for Njamal people under the economic distribution head of the Trustee's distribution policy, to assisting with various proposed projects including liaising with the Clean Energy Regulator and "facilitating the science teams" in relation to carbon projects. In the Inquiry's view there was however a lack of clarity as to his role, including the absence of any documented agreement, the lack of any clear specification of his role or duties (whether for ISPL or related entities) and the absence of any performance criteria to ensure appropriate service delivery at the rate charged. Mr Green also has other professional connections with Mr Carter and Mr White (see below in relation to carbon farming) hence providing an additional reason for ensuring transparency as to his role and management of his position. Mr Carter says that Mr Green (who has a range of qualifications) is highly respected by the Njamal People, whom would be very supportive of his role. He says it is a complex, diverse and a 7 day a week job.

A copy of agreements entered into with directors and consultants were requested by the Inquiry from ISPL in its 6 November 2017 and 22 December 2017 notices, in response to which Mr White noted, by email dated 5 February 2018:

Apart from the Services Agreement between ISPL and Esplanade Holdings and (later) Esplanade Consultancy, there were no written consultancy agreements entered into with any of the Director / Consultants referred to. TAC members and remuneration are included in TAC MOM's.

The MOM's of the ISPL Board mtg dated 12 May 2016 also refers and includes references to recovery of costs for other administrative and management services provided by Esplanade Holdings PL …

In all other cases, rates and the scope of work were agreed verbally with consultants. The hourly rates were capped at the rates agreed to by the Trustee and the Trustee Advisory Committee. Because of the sheer volume of work required to be undertaken by the Consultants these hourly rates were provided at a discount to normal market rates. By way of example and one the Inquirer will be able to appreciate, Jack Cullity is a fully qualified legal practitioner and his entity was paid consulting fees at the rate of $225 per hour. The approval for payment of tax invoices at the agreed rates and for work performed was constituted confirmation and evidence of an agreement between both parties.

The Inquiry accepts that the rates charged by its directors per hour were at or below market rates, were invoiced with supporting records for work charged and, although high in total amounts, on their face appeared reasonable given the extent of the work performed. It does
however note that at some point Mr Cullity was paid a fixed retainer – this became a concern to Mr Parker, who was concerned about the amount of work being performed and considered that a similar hourly arrangement supported by time records should be entered into, as with the services that other personnel such as he, Mr Aird and later Mr White provided. Mr Cullity is understood at some point to have agreed to that approach.

Having regard to the very significant expenditure incurred in relation to services provided by current or former directors and consultants, some of whom have professional or personal links with current or former directors of ISPL, in the Inquiry's view it is important that a careful review of the work value of the different positions, terms on which persons are engaged and management and control of charges and performance be reviewed afresh. It appears that ISPL is in the course of doing just this, hence some of the recent changes in personnel engaged by ISPL.

**Motor Vehicle Expenditure**

Motor vehicle expenditure is accounted for in various accounts hence it was not readily ascertainable how much expenditure was incurred by the Trust in relation to motor vehicle expenses. Following enquiries of ISPL it was ascertained that a significant number of vehicles have been procured by the Trust and related entities under ISPL, at considerable expense. As explained below, based on a schedule provided to the Inquiry in July 2018, vehicle related hire, purchase and maintenance costs of **over $620,000** (exc GST) were incurred in approximately 21 months, a very significant amount on the face of it.

Questions have been raised as to how and for whom the vehicles have been obtained, together concerns relating to the overall expense to the Trust. That is unsurprising given the number of vehicles associated with the Trust and its related entities and that the provision of motor vehicles for use by individuals (even if limited to use for Trust activities) can be a lightning rod for community concerns about possible nepotism and private gain. It is therefore important that any decisions as to their acquisition and use be transparent and properly and prudently reached. Decision in relation to motor vehicles must be made in furtherance of the Trust's charitable objects and without any purpose of private gain. Questions in relation to the arrangements by which vehicles were hired/leased/acquired is also considered in Chapter 9 in the context of conflicts of interest.

Given the extensive activities undertaken by the Trust, in conjunction with its related entities, it is unsurprising that there has been a need to procure a number of vehicles to facilitate those activities. However, the appropriateness of the extent of expenditure and provision of motor vehicles was, as considered later in the Conflicts Chapter, a matter of significant concern and debate within ISPL. Indeed, concerns in relation to motor vehicles was one of the reasons that led to the resignation of Mr Parker on 4 July 2017.
TAC minutes record matters regarding such procurement have been referred to and the subject of TAC recommendation on multiple occasions. For example, at a special TAC meeting convened on 23 September 2016 a range of matters were considered and endorsed. These included the acquisition of a bus and two vehicles for the purpose of undertaking heritage surveys, noting previous issues with loss and damage of previous vehicles and the need for clearly defined garaging and driver identification to be clearly defined and controlled. Controlling the use and management of vehicles, including hire vehicles, has however continued to be challenging, including to limit their use for private purposes and misuse by certain users.

ISPL’s submission dated 4 October 2017 provided that it had purchased 3 buses for Njamal People’s Trust purposes (one 24-seat Coach, and two 12-seat commuter buses) and 4 vehicles and 2 trailers for Njamal People’s Trust purposes and remote access. The Inquiry is satisfied that all these initiatives were positive initiatives by ISPL in furtherance of the objects of the Trust and in the interests of the Njamal people. While certain issues were raised with the Inquiry about decisions as to where certain vehicles were located, including one to assist Njamal community members in the Marble Bar area, the Inquiry was not satisfied that the concerns were substantiated and that decisions were made other than in a proper manner.

The Inquiry raised queries with ISPL regarding the details of the Trust's vehicles and use of funds related to vehicles. Although promised a response by Mr Carter in early April 2018, it was not until June 2018 that ISPL provided the Inquiry with a copy of a vehicle register. The register listed a total of 26 vehicles in the custody of the Trust and its related entities. The register lists 5 buses, 15 dual cab / mine spec. vehicles, 4 sedans, 2 wagons, 4 trailers, 3 food vans and 3 "non-Njamal vehicles", all in the name of ISPL or related entities.

The Inquiry raised further queries relating to the nature of the Trust's custody of these vehicles and for details of certain motor vehicle expenses incurred by the Trust which had not been received.

Mr White replied in July 2018, attaching a schedule of car/lease/hire costs (including one second hand car acquisition) incurred by ISPL and Njamal Services Pty Ltd from entities associated with Mr Green and/or Mr Carter, for the period from September 2016 to the end of June 2018, of $303,364 (exc GST): $254,840 being incurred by ISPL and a further $48,524 being incurred by Njamal Services Pty Ltd, as trustee for the Njamal Charitable and Benevolent Unit Trust.

Mr White also explained that ISPL had spent some time summarising other costs (excluding the above) for vehicle hire (Avis, etc.), purchases and repairs and maintenance (no fuel) and identified a total of approximately $318,117 for the period from September 2016 to the end of June 2018.
That reflects vehicle related hire, purchase and maintenance costs of over $621,481 (exc GST) for the Trust and Njamal Services Pty Ltd in approximately 21 months.

ISPL also provided a helpful explanation to the Inquiry in relation to the history of its fleet development and vehicle use:

Any use of typical car hire company vehicles has ended up in significant issues re the condition of the returned vehicle including failure to return vehicles and missing vehicles. I have personally seen a number of reports from fleet hire companies with photos and damage reports. Given time, we could go through and provide some of these.

In response to your specific questions:

...  

Njamal vehicles: history of fleet development and use

The vehicles in the Njamal “fleet” are intended for use solely by Njamal people.

The exceptions are the GM’s vehicle in Port Hedland and the Njamal Security Services vehicles used by security personnel on security contracts.

The Trustee and Trust has established offices in Perth and Port Hedland as well as communities in Carnarvon and Marble Bar.

The Trustee has engaged the Njamal members to establish the Liaison Officer team and other Njamal people in office and communication roles and activities including Heritage Survey work.

It is necessary to have vehicles to facilitate communication activities and to perform survey work which requires vehicles to go on-country.

There were a number of initial issues in delivering these services including:

• the usual vehicle hire companies were reluctant to hire to indigenous people, and for a number of Members/staff, there was outright refusal.

• none of the people selected and involved in these roles had their own vehicles for a variety of reasons.

• In Port Hedland, there were no vehicles that could reliably go off road for survey work or were to minespec necessary to go onto mining leases.

Early lessons from hire vehicles was that generally vehicles suffered more than nominal damage due mainly to lack of driver care, track conditions and items being taken off cars as they were seen as ‘community property’.

The Trust experienced a relatively high number of additional costs and claims, including:

• vehicles being lent to family and not returned, resulting in theft report and write off;

• panel and undercarriage damage while vehicles on country;

• damage to buses and vans being driven into objects;

• front panel damage due to hitting wildlife, especially at night;

• hire vehicles not being returned as promised, in one case for 3 weeks as the Member became uncontactable;

• hire vehicles being left behind, with replacement drivers needing to be organised, transported and additional rentals paid;

• an $8,000 repair bill for a mini bus due to cracked windscreen and mud throughout the bus;

• people not returning vehicles on time leading to penalty rentals;

• high excess km charges as most north west vehicles have daily limits;
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- rental companies charging significant amounts for fuel as vehicles mostly returned with empty fuel tanks;
- Rental companies charging significant amounts for cleaning and damage repair as part of their 'fair wear and tear' clauses.

Given these experiences, it has proven to be a better strategy to procure second hand vehicles through either purchase or on suitable “hire to buy” arrangements. This approach has delivered:

- better availability;
- more accountability from drivers;
- control of insurance claims;
- control of repairs and maintenance.

In general, this approach is a lower overall cost for achieving the objectives of delivering the range of services required.

Currently, the trust has 19 vehicles as owned and 8 vehicles on long term lease.

The above should help clarify the reasons behind the direction chosen and we trust this information assists with your inquiry.

**Use of Vehicles**

The vehicle register provided by ISPL records that, as at June 2018, 15 community members were custodians of Njamal vehicles. Many of those members are contracted to provide services to ISPL as Trustee for the Trust, as project liaison officers or in other roles, with contractual entitlements for the provision of a vehicle for work purposes. Others are designated custodians of vehicles such as buses or trailers. Three of the vehicles listed were vehicles acquired with loans to assist two individuals to establish businesses and one vehicle was allocated in relation to Lore matters. Pool vehicles were available at the Hedland office, for use by staff members (including Njamal staff members) there. Various vehicles also related to activities carried out by Njamal Services Pty Ltd.

While various concerns were raised with the Inquiry including as to the reasonableness of making vehicles available to so many people as part of contracts of engagement, potential nepotism in relation to the persons to whom they were allocated and that other alternatives may be more economic in some cases, such as where liaison officers based in Perth attended meetings, using taxis or the like. Such allegations, of their nature, are difficult to substantiate. It does however highlight the importance of clear processes and procedures being established and maintained in relation to decision making concerning the circumstances in which vehicles are procured and made available for use, whether by staff, contractors or Njamal community members, with a view to avoiding undue expenditure, avoiding nepotism and ensuring that decisions are in furtherance of the Trust's objects and not private gain. Where vehicles are proposed to be made available as a term of a contract of or for services care should be taken to ensure that such provision is reasonable having regards to the requirements of the services, the remuneration or reward otherwise being paid and other avenues by which transport needs might be met.
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Vehicle Repair and Maintenance

As indicated above, ISPL itself identified that the Trust has encountered significant issues relating to damage to vehicles and control of their use. Consistent with those issues, the Inquiry received a complaint that often the cars provided by the Trust are found crashed in the bush. The Inquiry identified a selection of transactions for further examination, including several significant payments to vehicle repair companies identified in Trust bank statements. Documentation in support of certain transactions was eventually provided. While the expenses were significant for repairs and maintenance were significant, reasonable explanations of the incurrence of the expenditure was provided. While the transactions considered are not individually of concern, the total expenditure by the Trust is significant and warrants careful and regular monitoring and review.

Recommendation 17 (Chapter 8)

ISPL review its processes and procedures in relation to the procurement and allocation of vehicles and management of vehicle expenses to ensure that such decisions are transparent, documented, reasonably based, avoid undue expenditure and preferential treatment and are in furtherance of the Trust objectives and not private gain.

Carbon farming

Given the significant investment of over $1m by ISPL and related entities in relation to carbon farming related matters, the material personal interest of Mr White, in particular, in relation to such matters and issues in relation to compliance with requirements under the Trust Deed in relation to consultation with the TAC and in relation to making loans with adequate security, this topic is given specific, detailed consideration below. The question of Mr White’s potential conflicts is dealt with separately in Chapter 9 of the Report in relation to conflicts.

Indigenous Carbon Group Pty Ltd, Goldfields Carbon Group Pty Ltd, Pilbara Carbon Group Pty Ltd

In a submission to the Inquiry dated 4 July 2017, ISPL explained:

Pilbara Carbon has been awarded a performance based contract with the Commonwealth Government, for the purchase by the Clean Energy regulator of 4,000,000 ACCUs over 10 years.

Goldfields Carbon has been awarded a performance based contract with the Commonwealth Government, for the purchase by the Clean Energy regulator of 3,985,000 ACCUs @ $10.50 per unit over 10 years.

The contract awarded to the Goldfields Carbon Group Pty Ltd was awarded to it in April 2016 by the Clean Energy Regulator in respect of a Goldfields Renewal Forest Regeneration project. On 14 February 2018 the project was revoked.
The contract awarded to the Pilbara Carbon Group Pty Ltd was awarded to it in November 2016 by the Clean Energy Regulator in respect of a Pilbara restoration project registered on 28 October 2016. On 9 April 2018 the project was revoked.

ISPL and/or Njamal Services Pty Ltd has been involved, through Indigenous Carbon Group Pty Ltd, Goldfields Carbon Group Pty Ltd and Pilbara Carbon Group Pty Ltd, in those carbon farming projects. That interest takes the form of an equity position in Indigenous Carbon Group Pty Ltd, which is the 100% shareholder of both Goldfields Carbon Group Pty Ltd and Pilbara Carbon Group Pty Ltd, and a loan from ISPL as Trustee of the Trust to Goldfields Carbon Group Pty Ltd. Whether it was ISPL or Njamal Services Pty Ltd that assumed that equity position is a matter of considerable uncertainty and inconsistency in the position advanced historically and to the Inquiry. Mr Parker has confirmed that the registered shareholder of the 51% is since 3 February 2017 has been, ISPL as Trustee of the Trust. If that is correct (rather than the share registry having been misrecorded) it follows that in numerous relatively contemporaneous and more recent documents provided to the Inquiry by ISPL, the shareholder has been incorrectly named.

That includes in the following diagram of the broader structure of the entities involved in the carbon farming projects, taking Goldfields Carbon Group Pty Ltd as an example (which is materially identical for Pilbara Carbon Group Pty Ltd), as follows:

The carbon business is relatively complex and, from the material available to the Inquiry, has been the subject of a number of reports, analyses and overview documents. Perhaps the simplest explanation of the project and ISPL’s involvement in it comes from the business
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overview document dated January 2017 and possibly presented to directors of the Board of ISPL to assist them in making investment decisions.

In that document, under the heading "Introduction", is the following summary:

Indigenous Carbon Group Pty Ltd was formed in early 2017 to bring two significant carbon farming groups together, and to provide a platform for further expansion into indigenous controlled land in Australia.

Indigenous Carbon Group is a Joint Venture company 51% owned by the Njamal people – the traditional owners of the country between South Hedland and Marble Bar in Western Australia, and CO2 Holdings, who control the Goldfields Carbon Group Pty Ltd (GCG) and the Pilbara Carbon Group (PCG) Pty Ltd – both who have contracts to deliver carbon to the Australian Government, and for GCG, the ownership of the pastoral leases for Clover Downs and Mertondale stations in the northern goldfields of WA.

Goldfields Carbon Group Pty Ltd (ACN 610 923 325) has a contract with the Australian Government’s Clean Energy Regulator (CER) as part of the Carbon Farming Initiative (CFI) to deliver 3,999,970 Australian Carbon Credit Units (ACCU’s) over a 10 year period through the Goldfields Renewal Project.

GCG is also the trustee and unit holder of the CDM Trust, which has a contract to purchase the Clover Downs and Mertondale pastoral leases.

Pilbara Carbon Group Pty Ltd (ACN 615 052 278) also has a contract to deliver 4,000,000 ACCU’s over a 10 year project, but focusing on properties in the Pilbara region of Western Australia.

Combined, these two contracts are worth some $100m over 10 years.

ICG has contracted Carbon Management Pty Ltd (CM) to develop and manage reforestation projects to grow carbon for both the two federal contracts and for the internationally accredited carbon units market.

CM has expertise in station management and agricultural activities including growing 'bush tucker’ and sandalwood trees for the incense and oils market.

CM will contract local indigenous groups, and assist through Ranger training programs and the provision of plant and equipment; in fencing, seeding, and watering for establishment, with an ongoing program of feral management.

CM will also work with the traditional owners in developing markets for bush tucker.

The Inquiry was provided with an unsigned copy of a heads of agreement dated 1 November 2016 between Goldfields Carbon Group Pty Ltd and Carbon Management Pty Ltd to manage the project and issue sub-contracts for and on its behalf in relation to performance of work related to the project. It is material to note that Carbon Management Pty Ltd is company connected with Mr White.

In the business overview document provided to the Inquiry dated January 2017 it is indicated that this company was formed to undertake the scientific and operational duties to implement the carbon projects, and to protect the land and contract assets held by GCG and PCG. It is stated that it has put together a multi-disciplinary team to manage the complexities of developing broad acre carbon projects with the accompanying ‘value adds’ to increase profitability. It is also indicated the team is led by Mr White, its managing director. In a March updated version of the document it is stated that Mr White is supported by Mr Green, who has worked in policy, management review and operations in all three tiers of government and that he provides the operating support to the team. The organisational structure in that report also,
apparently incorrectly, identifies that Njamal Services Pty Ltd as trustee for the Unit Trust is the 51% shareholder of Indigenous Carbon Group Pty Ltd.

*Equity Position in Indigenous Carbon Group Pty Ltd*

In its 4 July 2017 submission to the Inquiry, ISPL explained that "Njamal" holds, in its capacity as Trustee of the Trust, a 51% controlling interest in the assets and activities of Pilbara Carbon Group Pty Ltd and Goldfields Carbon Group Pty Ltd. The submission further identified the corporate ownership structure as being that the 51% interest was held by Njamal Services Pty Ltd (wholly owned by ISPL as Trustee of the Trust) as trustee of the Njamal Charitable and Benevolent Unit Trust. Indigenous Carbon Group Pty Ltd itself wholly owns Goldfields Carbon Group Pty Ltd and Pilbara Carbon Group Pty Ltd. This structure was consistent with ASIC records but did not appear to be reflected in the draft March 2017 financial reports for ISPL provided to the Inquiry, which recorded ISPL (rather than Njamal Services Pty Ltd) as holding the equity in Indigenous Carbon Group Pty Ltd. However, after multiple attempts by the Inquiry to obtain clarification of the correct position in relation to the proper shareholder, in early 2018 the Inquiry was finally advised that there had supposedly been an error which had since been corrected, the correct structure purportedly being that the shares were, and are now, held directly by ISPL as Trustee of the Trust. While ASIC records now reflect that ISPL (non-beneficially ie on trust) is the 51% shareholder, a significant question remains as to whether this correction was itself effected in error and that the correct position was that Njamal Services Pty Ltd was the correct shareholder.

The price that was paid from Trust Funds for this controlling share in Indigenous Carbon Group Pty Ltd was $500,000. ISPL also provided an additional $500,000 of funding via a loan to Goldfields Carbon Group Pty Ltd. These amounts are reflected in ISPL’s audited financial statements for the financial year ended 30 June 2017.\(^{\text{134}}\)

The Inquiry identified several significant issues of concern about these transactions which it considers in detail later in the Report. They concern:

- whether the transaction was accurately and properly documented, recorded and accounted for;
- whether, prior to the investments being made, the TAC was properly consulted by ISPL in relation to the investments and adequate records were maintained of that consultation and the position of TAC;
- whether the decision to invest was prudent and the investment was not speculative;

\(^{\text{134}}\) At 10, under “shares in associated entities”.
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- whether the loan was adequately secured;
- whether conflicts of interest were adequately identified and dealt with in respect of the making of the investments; and
- whether Mr White’s ongoing conflict of interest was adequately identified and dealt with, in particular after he became the sole director of ISPL.

Board Approval

According to unsigned minutes of the ISPL Board, on 1 February 2017, at the end of a one hour meeting of the directors of ISPL, directors Greg Parker and Wesley Aird (participating by telephone) approved the purchase of 51% equity in Indigenous Carbon Group Pty Ltd and provision of a $500,000 bridging loan to Goldfields Carbon Group Pty Ltd for the purpose of a proposed purchase of a pastoral lease, subject to satisfactory completion of documentation.

The minutes record that Mr Carter did not attend the meeting and that as he had consented to be a director of Goldfields Carbon Group Pty Ltd for a short period during Andrew White’s absence overseas, he had declared a conflict of interest and would not participate in the discussion. Another director, Jack Cullity, is recorded as advising that he may do work for Indigenous Carbon Group Pty Ltd in the future (which he advised the Inquiry did not come to fruition) and may have a potential conflict. It was agreed that he participate in the meeting but not vote. Mr Cullity also advised the Inquiry that he understood that Mr Carter had also been involved in business consulting in relation to the proposed carbon farming.

Mr White, who was not then a director of ISPL was also in attendance. According to the minutes, he advised that he was also a director of Njamal Services Pty Ltd, which was the 51% shareholder in Indigenous Carbon Group Pty Ltd, and was also the director of CO2 Holdings Pty Ltd, the 49% shareholder. Mr White’s family company, White Partners Capital Pty Ltd, was the 100% shareholder (non-beneficially) in CO2 Holdings Pty Ltd. The accuracy of this statement is questionable given that ASIC records record that, initially, CO2 Holdings Pty Ltd was the 100% shareholder, although, once again, there may be issues with the documentation surrounding the actual sequence of events that occurred or were intended to occur. Further discussion about the ISPL’s process for declaring and registering declarations of interest is addressed at Chapter 9 of the Report.

The recorded purpose of the meeting on 1 February 2017 was to discuss a bridging loan of $500,000 proposed to be made by the Trust to Goldfields Carbon Group Pty Ltd.

The Inquiry pauses to note that, in October 2018 the Inquiry was also provided with an unsigned minute of director’s meeting of Indigenous Carbon Group Pty Ltd said to have been held on 23 January 2017. That recorded an apparent telephone meeting between Messrs White and Walker (although ASIC records record that Mr Walker was not in fact appointed director until 2 February 2017) at which Mr White advised that he had received confirmation
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from ISPL on behalf of the Trust that the ISPL Board had resolved to invest $500,000 in carbon farming via the acquisition of shares in ICG. It is also recorded that it was resolved that the company allot ISPL, on behalf of the Trust, 500,000 $1.00 ordinary shares. Other records suggest that occurred that day with payment being received on 2 February 2017.

Returning to the minutes of 1 February 2017, they record that the purchase of 51% equity in Indigenous Carbon Group Pty Ltd and provision of a $500,000 bridging loan were approved by Mr Aird and Mr Parker.

The minutes also record that Mr Parker outlined the history of the project including that:

- Following a TAC resolution Pilbara Carbon Group PL (PCG) was formed and successfully bid for 4,000,000 Australian Carbon Credit Units (ACCU’s).
- It was agreed that there was business case to join with GCG, who also had a contract for 4,000,000 ACCU’s.
- ICG was formed to be the parent company, 51% owned by Njamal Services and 49% owned by CO2 Holdings. ICG was to have one Njamal and one CO2 director. It is desired that Barry Taylor be the Njamal director, his eligibility is currently being confirmed by our lawyers.
- The proposed agreement is that for its 51%, NPT will provide $500,000 in equity and a $500,000 Bridging Loan for GCG to acquire the Pastoral Leases associated with Clover Down and Mertondale Stations.
- The Bridging Loan will be fully secured by a Registered Mortgage over the Pastoral Leases or Fixed and Floating Charge over the assets of GCG, whichever is the more expedient.
- CO2’s prior investment to fund the Project to get it where it is today and the current premium applicable to the market value of ACCU’s contributed by GCG over the contracted price justifies CO2’s equity position in ICG of 49%.
- A funding submission to IBA will be prepared to repay the Bridging Loan and provide working capital for the Projects.
- He and Andrew attended a meeting with National Indigenous Pastoral Enterprises, who agreed to undertake a review of the scientific, technical and commercial information provided to them.
- Richard Geddes, NIPE’s Senior Environment and Carbon Advisor, advised via email on 31 January, 2017 that he endorses the project, though funding will need to come from Indigenous Business Australia (IBA) or another source as the ILC does not have funding available for this.
- Due diligence has been undertaken into the quality of security for the Bridging Loan – being the Pastoral Leases and the ACCU’s.
- There is a willing buyer for the Pastoral Leases, who is prepared to purchase them above their purchase price if a FID is not made to proceed with the GCG Project by 24 June, 2017.
- The ACCU’s can, with conditions, be currently potentially be on-sold at a premium over the contracted price of roughly 50c each. The interest payable to the NPT on the Bridging Loan is 8% per annum and the Loan may be repaid early.
In summary, Greg believed NIPE’s endorsement of this investment was a critical factor in the due diligence leading to the NPT’s investment in ICG and the provision of a Bridging Loan and, with the security that has been negotiated, has a number of very positive financial and social outcomes for the Njamal People.

Greg and Wesley agreed that, subject to the satisfactory completion of documentation, that an equity payment of $500,000 be made by the NPT on behalf of Njamal Services to purchase 51% of the equity in ICG, and that a $500,000 Bridging Loan be provided by the NPT to GCG for the purpose of purchasing the pastoral leases.

In a response to questions from the Inquiry ISPL later explained that the Trust invested in 500,000 $1 ordinary shares in Indigenous Carbon Group Pty Ltd (51% of its equity) which on-lent the $500,000 to Goldfields Carbon Group Pty Ltd to enable it to complete the purchase of the 2 pastoral leases.

Given the confusion and inconsistency between this position and the position reflected in the original submission from ISPL and documents relatively contemporaneous with events, which suggested that Njamal Services Pty Ltd was the shareholder, by Notice dated 22 December 2017, the Inquiry therefore asked ISPL to "provide a copy of all documents or records evidencing ISPL's purchase of 500,000 $1.00 shares in Indigenous Carbon Group Pty Ltd (e.g.: share purchase agreement and record of share issue/transfer)."

In response, ISPL through its then sole director Mr White explained:

Please be advised as follows:

- There is no separate Shareholder Agreement document, the standard Constitution and "replaceable rules" apply.
- The commercial rationale of the arrangement was that GCG and PCG would be restructured to become 100% owned subsidiaries of the newly incorporated ICG and shares in ICG would be issued to ISPL and CO2 Holdings in the proportion of 51%:49%. No shares were transferred. ICG and PCG have still not traded. GCG is undertaking development work in relation to the Carbon Sequestration science and specific Carbon Estimate Areas (CEA’s) selection and includes the purchase (and now resale ) of Clover Downs Mertondale Pastoral Leases (information provided to the Inquiry separately). The resale includes a separate consent to use additional land areas for the proposed Carbon Farming activities of ICG, providing consent is also granted from the WA Govt.

The above explanation is also inconsistent with ASIC documentation insofar as it records that the initial shareholder was actually Mr White for a period of approximately 10 days prior to the shares being transferred to Njamal Services Pty Ltd (non-beneficially held ie as trustee) and CO2 Holdings Pty Ltd (non-beneficially held ie as trustee) in proportions of 51%:49%. Further, as to the suggestion that the commercial rationale was that the shares would be issued to ISPL, that is inconsistent with numerous other documents and the original submission to the Inquiry. Much, but not all, of the relatively contemporaneous documentation provided to the Inquiry supports the conclusion that the shares were to be issued to Njamal Services Pty Ltd. As noted above, the minutes of the meeting of the ISPL Board of Directors of 1 February 2017 recorded that Mr Parker indicated that Indigenous Carbon Group Pty Ltd would be 51% owned by Njamal Services Pty Ltd (not ISPL), and that Mr White indicated that ICG was formed to be the parent company, 51% owned by Njamal Services and 49% owned by CO2.
Holdings and that the proposed agreement was that for its 51%, NPT would provide $500,000 in equity and a $500,000 Bridging Loan for GCG to acquire the Pastoral Leases associated with Clover Down and Mertondale Stations. The minutes of the TAC meeting 2 days earlier record Mr Carter apparently stating to the following effect:

Indigenous Carbon Group PL (51% owned by Njamal Services PL) has been awarded a $52m contract to grow trees to sequester carbon

The draft business statement prepared in relation to the carbon farming business dated January 2017 also indicated that was the proposed structure, as did the later March version and information disclosed in the newsletter and annual report. So too was that position set forward in the flow chart in the 4 July submission provided to the Inquiry by ISPL, the response from Mr White in August 2017 and the company membership information provided to ASIC. It is however consistent with the recording in the accounts of ISPL that it held an equity position in Indigenous Carbon Group Pty Ltd. Also, in a corporate structure diagram dated November 2017 it records ISPL as Trustee for the Trust holding the 51% equity in Indigenous Carbon Group Pty Ltd.

The question of the entity which acquired the equity in Indigenous Carbon Group Pty Ltd is a matter of importance for several reasons. First, because it affects the legal rights and obligations of ISPL as Trustee and Njamal Services Pty Ltd as trustee of the Njamal Charitable & Benevolent Unit Trust, it is important that the shares are correctly identified as the property of either the Trust Fund or the Fund administered by Njamal Services Pty Ltd. Secondly, it is relevant to questions about whether the transaction was tainted by a conflict of interest in respect of Mr White's involvement with other companies associated with the carbon group of companies.

The Inquiry is concerned that the equity purchase was not documented by way of a formal written agreement. While the Inquiry understands the commercial position adopted by ISPL, when investing trust funds, it is an essential component of the duties of a trustee, both at common law and under the Trust Deed, that the investment be prudent and properly recorded. In the Inquiry's view, taking into account the above matters and notwithstanding ISPL’s responses below, ISPL failed to properly discharge this responsibility.

In response to an invitation to comment on certain of the above concerns, ISPL responded, through its lawyers, and provided a copy of an unsigned minute of director’s meeting of the Indigenous Carbon Group Pty Ltd on 23 January 2017. As noted above at page 318 of the Report the unsigned minute recorded an apparent telephone meeting between Messrs White and Walker (although ASIC records record that Mr Walker commenced as a director on 2 February 2017) at which Mr White advised that he had received confirmation from ISPL on behalf of the Trust that the ISPL Board had resolved to invest $500,000 in carbon farming via
the acquisition of shares in ICG. It is recorded that it was resolved that the company allot ISPL, on behalf of the Trust, 500,000 $1.00 ordinary shares.

It was also suggested that ISPL was locating copies of the Indigenous Carbon Group Pty Ltd share register, any relevant TAC meeting minutes and a related loan agreement and would shortly provide them to the Inquiry. It was further noted that:

For clarity, the transaction with ISPL and the establishment of IGC was before Mr White became a director or even contemplated being a director of ISPL. The structuring of the ICG group of companies was effectively meant to be simultaneous, the ASIC records may not be accurate and will be reviewed and adjusted as necessary.

ISPL’s lawyers subsequently advised by letter dated 10 October 2018 that they had made enquiries of ISPL and Mr White as to the documentation for the transaction and attached a copy of the Loan Facility Agreement between ISPL and Goldfields Carbon Group Pty Ltd (which the Inquiry had previously received). It did not provide any other of the documents foreshadowed, although the Inquiry notes, as apparent from the preceding narrative, that it appears to have already received copies of relevant documents.

**TAC Consultation**

ISPL’s general power to invest the Trust Fund is contained in clause 10.3 of the Trust Deed. That power is subject to the provisions of clause 9.3, by which ISPL is required to consult with and obtain the recommendation of the TAC regarding the investment of the Fund.

Though any recommendation received from the TAC does not bind the Trustee, it is bound to consult. On the face of the documents provided to the Inquiry, they do not record ISPL having complied with this clause. A search of the minutes of various TAC and other meetings provided to the Inquiry records that the following matters were raised or discussed at TAC meetings:

- In materials for TAC members for a special meeting on 23 September 2016 carbon farming opportunities were identified in relation to carbon rights. Issues were raised in relation to their ownership in Western Australia and suggesting that exclusive possession would bring them under federal legislation. It was noted that in discussions with Goldfields Carbon Group Pty Ltd, which had a $44m contract and a number of contracted scientists, they indicated they are willing to undertake a desktop and site assessment to quantify the potential to carbon farm and provide an indicative budget. The cost would be $19,000 inclusive of legal advice. It was also noted that if, as expected, there was a significant potential to grow trees and manage the land for carbon, Goldfields Carbon would assist in preparing the tender documents for the next Federal auction. It was noted that in addition to potentially providing a strong income stream, it could provide an opportunity for a Njamal Rangers program to manage country and employ Njamal people in managing their land. A high level document with background information about carbon farming was also provided.
was recommended that the Trustee commission Goldfields Carbon Group and McCullough Robertson to prepare a carbon farming feasibility. The TAC minutes record that Mr Carter outlined the project and the TAC endorsed $19,000 being allocated to commission GCG and McCullough Robertson to prepare a carbon farming feasibility report.

- Shortly after the TAC meeting, in the first edition of "Njamal Community News" published by the Trust, reference was made to the above opportunities, TAC's support for consideration of carbon farming opportunities and that a feasibility study was then underway.

- On 1 December 2016, at a meeting of the TAC, it is recorded that Mr Carter advised that "we were successful in obtaining a $51m contract over 10 years to grow trees for carbon abatement, this will provide a significant opportunity for long term employment of Njamal people wanting to work on country. Barry Taylor commented the biggest challenge would be sourcing enough suitable land, may need to joint venture with other trusts."

- In the Trust's Annual Report prepared for the community for the 2015/2016 year it was stated that the TAC had endorsed a significant carbon farming program. It noted that "Through our Project Partners" we were awarded a contract to grow some 4,000,000 Australian Carbon Credits over 10 years at a contract value in excess of $50m.

- On 15 January 2017 at the first of a series of proposed family meetings, held in Carnarvon, at which Mr Johnny Mitchell, the then TAC representative for the Mitchell/Mallard family was present as well as various other persons, Mr Carter "advised the Trust had recently received a $100m contract with the federal government to grow trees for carbon, which will generate Njamal employment and improve country".

- On 30 January 2017, at a meeting of the TAC, the minutes record:

  8 Rod- Carbon Farming
  Indigenous Carbon Group PL (51% owned by Njamal Services PL) has been awarded a $52m contract to grow trees to sequester carbon.
  The science team will be on country shortly to identify suitable soils, and to identify the best endemic species.
  Discussions have been held with Indigenous Business Australia for a $10m funding facility to buy equipment and pay for the seeding. The Indigenous Land Council environmental team have indicated that they support the project.
  Clover Downs and Mertondale stations will be the first pastoral leases purchased.
On 31 January 2017 at the community meeting Mr Carter provided an update on behalf of the Trustee in relation to various matters including in relation to carbon farming.

Notably absent from these minutes is any record of the TAC being consulted about and recommending the investment of $500,000 by ISPL by way of loan to Goldfields Carbon Group Pty Ltd or $500,000 from the Trust Fund into Indigenous Carbon Group Pty Ltd, whether in return for ISPL or Njamal Services Pty Ltd receiving 51% of the shares of Indigenous Carbon Group Pty Ltd. Similarly, though ISPL has explained that the transaction was approved by the ISPL Board, the actual application for allotment of shares occurred it would seem on 23 January 2017, prior to the 1 February 2017 Board meeting, although funds were not paid until 2 February 2017, and the allotment is recorded as having occurred on 3 February 2017. While it was suggested by ISPL through its lawyers that the Trust's investment was put before and endorsed by the TAC in December 2016, if that did occur as alleged, it was surprisingly not reflected in the minutes of that meeting, the relevant reference to carbon farming being that set out above.

By letter dated 22 March 2018 issued for the purposes of providing ISPL with an opportunity to comment on possible findings and recommendations that may be open to the Inquiry, this issue (amongst others) was raised with ISPL. In particular, the Inquiry noted that the TAC minutes did not appear to record, nor had any other documents been provided to the Inquiry that appeared to record, that ISPL consulted with or obtained the recommendation of the TAC in respect of any decision to invest $500,000 in Indigenous Carbon Group Pty Ltd for the purchase of a 51% shareholding in that company.

In a response to that letter, given by ISPL's solicitor, ISPL informed the Inquiry as follows:

18. TAC discussed and approved the “investment” in relation to Goldfields Carbon Group Pty Ltd and Indigenous Carbon Group Pty Ltd (“Goldfields” and “Indigenous” respectively).

19. It may be, the minutes do not record these types of decisions but better recording issues are being put in place. Some of these meetings can last over 2 days. In any event, Mr Taylor the chairman of TAC refutes your position. See his letter attached (also for the other issues which are raised in it- given the constraints of time imposed by you, and the location of other members of TAC, we are unable to in the short term provide you with further information from them. My client is happy to do so at a later date). Additional difficulties have occurred with the minutes because it is suspected that some persons with interests contrary to the proper objects of the Trust have stolen some of them.

ISPL has not since proffered any further evidence to support its claim. The Inquiry has already noted earlier in the Report that Ms Westerman accepts that following a TAC meeting on 26 October 2016 she removed certain documents including copies of minutes. However, no relevant TAC meeting has been identified to the Inquiry in respect of which ISPL has suggested that it could not locate a copy of the TAC minutes. Further, when minutes of TAC
meetings were provided to the Inquiry in response to compulsory requests for information and documentation, it was not previously suggested that any minutes were missing.

Attached to ISPL’s response was a letter from Mr Taylor, signed in his capacity as Chairman of the TAC for the Njamal People’s Trust, in which Mr Taylor says (amongst other things):

TAC discussed and approved of the investment to Goldfields Carbon Group including discussing the report from BDO in the TAC meeting. TAC unanimously supported the proposal.

That statement was of limited assistance to the Inquiry to resolve this issue. First, it appears to refer to the investment in Goldfields Carbon Group Pty Ltd rather than also the $500,000 equity investment in Indigenous Carbon Group Pty Ltd. Secondly, the response appears to convey that at the meeting where TAC supported the investment proposal it discussed the Report from BDO. However, the Report from BDO was not commissioned until March and finalised until May 2016, after the Board approved the investment of $1m in total on 1 February 2017. If therefore the Report from BDO was discussed in the TAC meeting where the TAC unanimously supported the investment proposal, the approval of TAC must have occurred after the Board had approved that course of action and the Trustee had already invested the money. Further, when the Inquiry met with Mr Taylor at an earlier stage of the Inquiry, in a brief discussion on the issues, he indicated that the only time he was familiar with the carbon project was when it was put to TAC and they wanted to "get" some Goldfields property. He indicated that a station was acquired and that he wanted to know "what happened there" and did not have a full answer to that yet.

The recollections of various TAC members spoken to by the Inquiry varied considerably. A number of TAC members were unaware or could not recollect having been consulted about the significant amount of the investment that was made in relation to the carbon project. That of course may, in part, be a function of recollection and the passage of time, but equally may have been because such details were not provided to the TAC and the subject of a TAC recommendation to the Trustee. The highest support about the level of consultation was that of Mr Wayne McKie. He was generally positive about the amount of information provided to TAC members, which was generally in a project pack, prior to them resolving whether to support a particular project. He also indicated that the carbon project was talked about over many TAC meetings and that it was 'out at a community level as well'. Mr McKie also indicated that he would follow things up himself to satisfy himself and if he was not comfortable he would bring it up at a meeting or take it up in emails afterwards. He indicated that Mr Carter would often provide updates by text, email or phone.

The TAC minutes confirm that the carbon project was discussed by the TAC on many occasions. That is consistent with the practice of providing updates in relation to various projects at TAC meetings. The Inquiry is also satisfied that Mr McKie generally kept abreast of investment decisions and sought and obtained further information to satisfy himself about
investment decisions. It does not however follow in the Inquiry's view that TAC was properly consulted about this specific, significant investment. While ISPL relies on the completeness of the minutes that were prepared, the Inquiry notes that the minutes of TAC meetings generally descended into reasonable detail about matters which were considered and the subject of approvals by the TAC. There is an obvious contrast between the approval of $19,000 preliminary expenditure in relation to feasibility studies and the absence of any recorded expenditure of $1 million.

Ultimately, the Inquiry is not satisfied based on its enquiries and the information and documentation provided to it by ISPL that ISPL did consult with and obtain the recommendation of TAC to invest $1 million of trust Funds in relation to the carbon farming project. The Inquiry concludes that ISPL either failed to adequately consult with the TAC prior to investing $1 million of Trust Funds in relation to the carbon farming project or failed to keep adequate records of that consultation. Given the sums involved that is highly unsatisfactory.

As recommended later in the Report, the Inquiry consider that ISPL should immediately take steps to ISPL ensure that the consultation with the TAC in respect to any future investment decisions is properly and fulsomely recorded in minutes or other TAC endorsed documentation. Further, ISPL should prepare and maintain a register of the details of any distributions or investments in respect of which TAC is consulted, which documents the nature and extent of the proposed distribution or investment, the amount/limit applicable to the distribution or investment, when the consultation occurred and the recommendation if any made by the TAC following the consultation. That is particularly appropriate in relation to investments or distributions for projects, economic development or business related activities including family businesses.

**Security for Loan to Goldfields Carbon Group Pty Ltd**

As noted above, in addition to its equity position in Indigenous Carbon Group Pty Ltd, ISPL also loaned $500,000 to Goldfields Carbon Group Pty Ltd. This too is recorded in ISPL’s audited financial statements for financial year ended 30 June 2017 and was approved by the directors of ISPL at a meeting of the directors on 1 February 2017. The loan was incorrectly labelled as a loan to Indigenous Carbon Pty Ltd in the Trust balance sheet as at 31 March provided to the Inquiry.

The loan to Goldfields Carbon Group Pty Ltd was formalised in a Loan Facility Agreement executed by ISPL (Messrs Aird and Parker) and Goldfields Carbon Group Pty Ltd (Mr White) on 2 February 2017.

The Loan Facility Agreement records the purpose of the loan in clause 3.2:

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135 At 10, under "shares in associated entities".
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3.2 Purpose

(a) The Borrower must only use the Loan Facility for the following purpose:

(i) $500,000 towards the acquisition of the Clover Down and Mertondale Properties- being land of approximately 145,000 ha in aggregate located close to Leonora, Western Australia ("Approved Property");

the "Approved Purpose".

(c) Any money advanced under this Agreement which is not promptly used for an Approved Purpose must be repaid by the Borrower immediately.

This purpose is also reflected in the minutes of the meeting of the board of ISPL on 1 February 2017. The loan attracts 8% interest per annum.

As discussed above, loans made by the Trustee must be, amongst other things, secured. In this case, the advance is purportedly secured by a mortgage described in the Loan Facility Agreement as a "first ranking registered mortgage". ISPL provided a copy of the mortgage to the Inquiry. However, the copy that was provided was neither executed nor registered. By Notice dated 22 December 2017 the Inquiry requested a copy of the executed and lodged mortgage. In response, ISPL through its director Mr White advised by email:

Pls find Attached a copy of the First Mortgage document. We are currently awaiting Ministerial consent to the Mortgage over the Pastoral Lease before it can be submitted. Ministerial Consent has been requested and is expected shortly. It may be that the transaction for the sale of CDM is completed and the loan is repaid with interest prior to this actually being lodged.

The reference to CDM is apparently a reference to the Clover Downs and Mertondale stations that being operated on two pastoral leases which were to be acquired.

The attached first mortgage document to which Mr White referred was identical to the document previously provided.

Accordingly, on 22 March 2018 the Inquiry wrote to ISPL inviting it to comment in relation to possible findings that might be open to the Inquiry including that in lending money to Goldfields Carbon Group Pty Ltd ISPL acted beyond power and in contravention of clause 6.2(g) of the Trust Deed and its duties as trustee because the loan was not secured.

In response, ISPL by its solicitor said by way of letter dated 29 March 2018:

There does exist an executed copy of Goldfield's mortgage. It is correct however that the Minister has not yet consented to the mortgage but the Trustee has no reason to doubt that it will not be forthcoming. Further, and in any event, an equitable security in the partial leases arises and, given the ownership and identity of the Directors of Goldfields there can be little reason to suspect the moneys cannot would not be repaid indeed you have not suggested to the contrary.

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136 See definition of "mortgage" in the Loan Facility Agreement.
Despite ISPL's suggestion that an executed copy of the mortgage exists the Inquiry notes that, as at the date of the Report, despite request, no copy of an executed mortgage has been provided to the Inquiry by ISPL.

Insofar as security is concerned, under clause 5 of the loan agreement, it is agreed that the obligations of the Goldfields Carbon Group Pty Ltd as borrower will be secured by first ranking registered mortgage granted by it over the pastoral leases. It is also provided that if a mortgage cannot be registered then ISPL as lender will be entitled to take a fixed and floating charge over "the Borrower" to the extent of the loan balance. Nothing indicated by ISPL suggests that this has occurred, nor has any explanation been provided as to when Ministerial approval for the mortgage was sought and why it has not been forthcoming.

Further, under section 134(1) of the *Land Administration Act 1997*:

> With the Minister's approval in writing, but not otherwise, a pastoral lessee may —
> (a) transfer to another person; or
> (b) create a mortgage or charge over,
> the lessee's interest in the pastoral lease, or any part of that interest, including any sublease, licence or profit à prendre.

Therefore, the pastoral lessee may not create a mortgage or charge over the lessee's interest in the pastoral lease.

Even if a fixed and floating charge could otherwise be taken out over the remaining property of Goldfields Carbon Pty Ltd, there is nothing to suggest that Goldfields Carbon Pty Ltd has any other valuable property sufficient to adequately secure the loan being repaid, in any event.

The Inquiry does not therefore accept, even if equity might be said to recognise an interest in the absence of the Minister's approval in writing, that any adequate security was obtained in relation to the investment. Indeed, for reasons that remain unexplained, to the best of the Inquiry's knowledge no such approval has been granted.

On 13 July 2017 a terms sheet was entered into between Goldfields Carbon Group Pty Ltd, which has following receipt of the loan from ISPL acquired the pastoral leases, and another company or its nominee in relation to the sale of the pastoral leases and related business assets. Negotiations ensued in coming months in relation to the sale, maintaining access to areas on those and other landholdings, obtaining QC advice about carbon farming on pastoral leases and handing back the goldfields contract and potentially the federal contract if the State Government did not change its position. In August the Board approved the sale of the stations and moved to terminate the carbon contract, which was mutually terminated in October 2017. In the meantime, in September a contract of sale of the pastoral leases was entered into, subject to conditions including FIRB approval. Consideration was also being
given to other strategies in the event that the Government would not consent given the operation of the Carbon Rights Act 2004.

By November the Government had made it clear that while it recognised the potential for carbon farming a number of complex policy and legislative matters needed to be resolved for it to occur on Crown land. Those matters would be considered in due course, in the development on a State policy on carbon farming on Crown lands, and given their nature was unlikely to be resolved in the immediate future. It also made clear that the State Government was unlikely to provide approvals for individual carbon farming projects until the policy was developed.

Early in June 2018, Mr White advised the Inquiry that FIRB approval had been obtained, and that settlement would shortly follow, with the result that the loan by ISPL to Goldfields Carbon Group Pty Ltd would shortly be repaid. Indeed repayment of the loan was factored into the cash flow projections provided to the Inquiry by ISPL and the delay in payment appears to have resulted in shares issued by Pilbara Minerals Limited being sold (see later in the Report re cash flow and liquidity).

Even recently that settlement had not yet occurred, although again it was suggested it was imminent. In any event, the Inquiry is of the view that the loan of half a million dollars to a related company, whose recovery was subject to FIRB approval of the sale of certain property interests to a foreign company, should have been secured by adequate security comprising the first ranking registered mortgage that was referred to in the Loan Facility Agreement. It is not clear at all the Inquiry why this did not occur or why it has not occurred since the Inquiry began to query the investment.

The Prudence or Commerciality of ISPL Investing in Carbon Farming Projects

One of the core duties of a trustee when investing funds is to ensure that the funds are invested in a prudent way. In the case of ISPL and the Trust this is reflected in clause 10.3 of the Trust Deed which provides:

10.3 Investment of the Trust Fund

Subject to sub-clause 9.3, the Trustees may invest the Trust Fund in any form of investment other than investments which are speculative but, in making an investment, must exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons and may:

(a) obtain and consider independent and impartial advice reasonably required for the investment of the Trust Fund and the management of the investments from a person who is reasonably believed to be competent to give advice; and

(b) pay out of the Trust Fund the reasonable cost of obtaining the advice and/or the management of the investments.

As set out previously, the minutes of the meeting of the Board of ISPL dated 1 February 2017 (the date on which the investments in the carbon projects received Board approval,
contingent upon "satisfactory completion of documentation") record background in relation to the history of the project.

Though it is not completely clear to the Inquiry exactly what documents the Board had before it when considering its investment decision, though ISPL has through its director(s) from time to time assured the Inquiry that the volume of material was large, it seems tolerably clear that the Board had, at least, the business overview document dated January 2017 referred to earlier in the Report. It also appears from the overview provided in the minutes that the key issues (e.g.: due diligence for the loan) had been considered.

In addition, though not available to the Board at the time that the decision was made to invest in the carbon group of companies, in about March/April 2017 ISPL commissioned BDO Advisory (WA) Pty Ltd to provide a valuation report on the projects of Indigenous Carbon Group Pty Ltd. Without divulging the content of the Report prepared by BDO, whose content the Inquiry is informed by ISPL is commercially sensitive and confidential, the Report concludes with a favourable (though caveated) valuation opinion.

On the face of these materials the decision to invest in carbon projects through Indigenous Carbon Group Pty Ltd and its subsidiaries is not uncommercial.

One matter which might transform the investment from one which is, on its face, commercial, to one which is speculative, is that ISPL appear to have invested in Indigenous Carbon Group Pty Ltd and its subsidiaries in circumstances where the projects that those companies wished to embark upon required the written consent of each person who had a registered interest in the freehold or Crown land in respect of which the proposed carbon right was to be created, and that consent had not been obtained.\textsuperscript{137} And, if the land was Crown land, the additional consent of the Minister for Lands was required under section 18 of the \textit{Land Administration Act 1997}.\textsuperscript{138} Those consents were not secured prior to ISPL’s investment and have not been secured since.

This appears to have been a risk about which the directors of ISPL were aware when they made the decision to invest in Indigenous Carbon Group Pty Ltd and Goldfields Carbon Group Pty Ltd, as it is a risk alluded to in the business overview document referred to above. Under the heading "Our Threats" there is a bullet point which reads "State government stalling on carbon rights or excessively taxing" and various strategies to minimise threats are then identified.

\textsuperscript{137} Section 104B of the \textit{Transfer of Land Act 1893}; section 5 \textit{Carbon Rights Act 2003}.
\textsuperscript{138} This position is also reflected, albeit in summary only, in a document provided to the Inquiry by ISPL titled "Evaluation of policy options to support carbon farming in the Western Australian Rangelands".
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The prudence of investing in Goldfields Carbon Group Pty Ltd in circumstances where that company's capacity to make a return on the carbon contracts executed with the Commonwealth critically depended on the reversing of a state policy as to carbon rights is an issue that was raised by the Inquiry in a meeting with Mr White and Mr Green on 14 November 2017. At that meeting Mr White explained that he had obtained the opinion of Senior Counsel with experience in land and native title matters to the effect that the consent could be granted without legislative amendment. However, Mr White also explained that if the project was unable to secure those consents then the project could look to carry out its carbon farming ventures in other states and territories around Australia where the legislation is less restrictive. It must also be noted in this context that at the time that ISPL took the initial investment decision, ISPL were aware that if the final investment decision (FID) was not achievable there was a buyer available to purchase the Cloverdown and Mertondale pastoral leases above purchase price, thus minimising or obviating any risk to ISPL's investment.

In the event, the time for making a final investment decision (FID) on the carbon contracts which Pilbara Carbon Group Pty Ltd and Goldfields Carbon Group Pty Ltd had entered with the Commonwealth lapsed and those contracts were mutually terminated. Following that lapse and termination Goldfields Carbon Group Pty Ltd, which owned the Cloverdown and Mertondale pastoral leases in the Goldfields region of Western Australia, entered into an agreement to sell those leases. The Inquiry has been informed, and has no reason to doubt, that the funds from the sale of the pastoral leases to the foreign company will be used by Goldfields Carbon Group Pty Ltd to repay the $500,000 loan to it from ISPL, with interest. In all of these circumstances the Inquiry is satisfied that, other than the absence of real security for the investments which is dealt with above, the decision to invest in the carbon group of companies was commercial and sufficiently prudent.

Other Expenditure

Payments to Esplanade Holdings Pty Ltd for expenditure incurred prior to ISPL’s appointment as Trustee

As indicated earlier in the report, Mr Carter first became involved with the Trust after being introduced to Ms Westerman by a business associate of his in about late January 2016. Mr Carter's initial involvement, was to provide advice to Ms Westerman in order to assist Ms Westerman and the Njamal community remove AET as the Trustee. He also briefly assisted Ms Westerman in connection with issues related to her former employment and directorship of Njamal Mining Pty Ltd. While Perpetual was originally intended by Ms Westerman and others to become the replacement Trustee, by late February 2016 that option had become increasingly less attractive and it was proposed that Mr Carter, through a company set up by him, take on the role as Trustee for an interim period following AET's removal. Mr Carter also agreed to provide funding to meet various expenses associated with the efforts to remove
AET and, in turn, meet various other expenses incurred in March, April and May, in the lead up to ISPL being appointed Trustee. He effected this via a company associated with him, Esplanade Holdings Pty Ltd.

In that context, on 23 February 2016, ISPL was incorporated, with Mr Carter as the then sole secretary and director, and Esplanade Holdings Pty Ltd as its 100% shareholder.

Early on in the course of the Inquiry, it became apparent that cash payments had been given to Njamal people and other expenses met, not by AET, but by or through Ms Westerman and Mr Carter and his family company Esplanade Holdings Pty Ltd, prior to ISPL being appointed as Trustee by Deed dated 12 May 2016. The nature, extent and circumstances of the payments and basis for their subsequent reimbursement by ISPL after its appointment was then somewhat unclear.

The Minutes of the TAC meeting of 6 May 2016, at which a resolution was passed to appoint ISPL, recorded that "Indigenous services would be repaid all funds loaned to the Njamal People". By subsequent circular resolution of the TAC dated 12 May it was resolved that:

The Trustee Advisory Committee members hereby authorise Indigenous Services Pty. Ltd to seek reimbursement for all validated expenses incurred with establishment costs up to the 15th May 2016. Receipts and invoices will be required to justify payment.

The minutes and circular resolution did not make clear whether the TAC, in making this resolution, was aware of the significant extent of the expenditure that had been made by Esplanade Holdings Pty Ltd prior to it formally being appointed Trustee by deed of that same date (in excess of $250,000), or whether it contemplated that establishment expenditure’ be more limited in scope than the extent of the expenditure which ISPL ultimately reimbursed Esplanade Holdings Pty Ltd.

ISPL was directly asked about these "loans" on a number of occasions. Its answers were inconsistent.

At question 7 of a Notice dated 18 August 2017, ISPL was asked to explain, inter alia, what loans were made by the Trust to Njamal people before or after ISPL became Trustee. ISPL was also asked what the terms of the loans were, when they were made, why they were made, whether they were documented, how much was loaned and whether the amounts were repaid.

ISPL responded that:

The TAC Minutes of the meeting held on 6 May 2016 incorrectly referred to the repayment of all funds loaned to the Trust being made to Indigenous Services. The several Loans made to the Trust were actually made by Esplanade Holdings Pty Ltd. These Loans were for:

| Loan - March 2016 Expenses       | $ 47,354.32  |
| Loan - April 2016 Expenses      | $ 67,715.73  |
| Loan - May 2016 Expenses        | $ 56,987.20  |
| Loan - Sharon Westerman Expenses| $ 84,300.00  |
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Total $256,357.25

Please refer to the attached Schedules detailing the expenses paid by Esplanade Holdings Pty Ltd on behalf of the Trust.

We have also attached a Schedule totalling $84,300.79 and a detailed breakdown of expenses and meeting fees paid to Njamal people provided by Sharon Westerman. These expenses were acquitted to the satisfaction of Indigenous Services Pty Ltd subsequent to its appointment as Trustee.

The terms of the Loans were that they would be repaid by The Njamal People’s Trust upon the appointment of Indigenous Services Pty Ltd as Trustee of the Trust. The Loans were unsecured, interest free and undocumented.

The Loans were made over a period extending from February 2016 to May 2016 to fund the Njamal people in the lead up to the removal of Australian Executor Trustees as Trustee of The Njamal People’s Trust.

The Loans were repaid on 23 May 2016. We have attached extracts from the Trust’s books and records showing how the expenses were accounted for in the 4 separate payments made to Esplanade Holdings Pty Ltd on the above date. Authority for the repayment of the Loans was by virtue of a Trustee Advisory Committee resolution made on 12 May 2016. A copy of the Resolution is attached.

In the course of reviewing additional information and documentation later obtained by the Inquiry, including a statement provided by Mr Carter, the Inquiry was however able to obtain a more complete understanding of the chronology of key events from January to May 2016, including Mr Carter’s involvement and aspects of the arrangements by which Esplanade Holdings Pty Ltd advanced/expended funds (see earlier in the Report).

The quantum of expenses, over a period of approximately 3 months, was significant, being over $250,000.

Based on the acquittal by Ms Westerman of funds advanced to her by Esplanade Holdings Pty Ltd, the first receipt of funds occurred on or about 20 February 2016, shortly before ISPL was incorporated on 23 February 2016. Provision of funds continued until 10 May 2016, shortly after the TAC meeting resolving to appoint ISPL, as subsequently effected by deed dated 12 May 2016.

The supporting documentation revealed that of the $84,300 funds advanced to Ms Westerman, approximately $38,600 was spent by her on fuel, accommodation, office and miscellaneous expenses, $6,600 on cash payments to community members for attending a community meeting on 26 February 2016 and $16,600 on travel assistance or sitting fees to TAC members. Ms Westerman also included amounts for her own personal expenses of $13,400 for accommodation (in part based on a claim of 5 months and 1 week at $2000 per month), sitting fees of $6,200, and $1000 for 2 days of travelling to find TAC members to sign resolutions.

Based on the schedule of other expenditure by Esplanade Holdings Pty Ltd, it appears that in March 2016, once it was apparent that it was unlikely that Perpetual would assume the Trusteeship, Esplanade Holdings Pty Ltd commenced directly expending other funds, other
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than by way of cash payments advanced to Ms Westerman. At about that time it was first contemplated that ISPL may be appointed as Trustee of the Trust.

The primary costs expended by Esplanade Holdings Pty Ltd were for travel allowances, direct transport and accommodation costs, meeting venue hire and sitting fees. Also, in April, certain amounts were expended on a rental bond and office expenses for the South Hedland Office. In May amounts were also expended by way of food and fuel vouchers by way of hardship payments to about 15 people, ranging from $200 to $400. The sitting fees paid in March, April and May were $10,000, $17,600 and $20,900 respectively, with travel allowances of $10,500, $11,050 and $7,900, accommodation bookings of $9,510, $6,800 and $8,900 and other travel bookings of $9,080, $18,100 and $12,100.

In July 2016 Ms Westerman also lodged an additional claim for payment for the period 26 February to 23 May 2016 of approximately $38,000. The claim included a claim for fees for Ms Westerman's 'services' of $25,650 (including a claim for 19 meetings with two days preparation for each meeting, at $450 per day, said to have been covered by authorisations at the 14 April and 23 May TAC meetings and under the Trust Deed) and out of pocket expenses of $9,400 including $2,200 telephone expenses.

As to the suggestion that some of the asserted "loans" were made to the Trust by Esplanade Holdings Pty Ltd, in respect of March to May 2016 expenses "paid by Esplanade Holdings Pty Ltd on behalf of the trust" as well as Ms Westerman's expenses (between 20 February 2016 and 10 May 2016), that was news to AET, the Trustee at the time, which had not been consulted about such payments.

Following up from ISPL's initial response, by Notice dated 6 November 2017 the Inquiry requested ISPL provide, inter alia, records of communications with or between Esplanade Holdings Pty Ltd, Mr Carter, Ms Westerman and AET (who was the Trustee at the time the funds were advanced by Esplanade Holdings), together with copies or details of loan agreements governing the advance and repayment of the funds, an explanation of who on behalf of ISPL and Esplanade Holdings entered the loans and their process for acquittal.

ISPL's initial response to this request was unhelpful. In respect of all matters other than the acquittal process, ISPL responded simply to say "Response provided previously". In relation to acquittal, ISPL said:

The acquittal was undertaken by Greg Parker who liaised with Lorraine McPhee, a bookkeeper, in the South Hedland office. Lorraine was asked to match the expenses claimed by Ms. Westerman to supporting documentation i.e. Tax Invoices and other relevant documentation. Additional documentation was also sought from Ms. Westerman. Please refer to the attachments which reflect the efforts made to acquit Ms. Westerman's claims.

Before the Inquiry could respond with further queries, on 5 December 2017 ISPL provided a further response in which, in response to the following question:
explain what, if any, communications occurred between ISPL and/or Esplanade Holdings Pty Ltd and the former trustee, Australian Executor Trustees (AET), in relation to the making of the purported loan/s (“the loan/s”);

ISPL said:

This matter has been discussed with your office previously.

There were NO discussions with AET, and as the matter was now beyond the tenure of concerns and interest of the former Trustee, none was felt to be required. In context, this was at a time when AET were being replaced, and the situation was a little tense and such an approach was deemed to be unnecessary and potentially provocative. Discussions as to the future direction and needs of the Trust and of the Njamal People were conducted only with TAC and Njamal representatives.

PLEASE NOTE: The situation faced by ISPL and manufactured by Ms Westerman, is now being duplicated in her dealings with JDC corporate, in the same manner and same pattern.

And in relation to this question:

provide details of when the loan agreement/s were entered into, provide a copy of any source documents comprising or recording the entry into and terms of the loan agreement/s, and, to the extent that the agreement/s were entered into orally, in whole or in part, the substance of the communications comprising the agreement and a copy of any documents evidencing those communications;

ISPL said:

This was not a loan agreement. There were no terms, no interest rates. It was an undertaking to fund the reasonable operational costs of the Trust, only until such time as they had resumed normal business sessions, and had access to their own funds. Accordingly, it was a simple matter to recoup the expenses paid by ISPL for the Trust's operations, and as supported by the accounts and invoices paid. The intent and purpose were approved and recorded in the minutes at a TAC meeting of 12/5/2016, a copy of which is again attached.

Please note the specific wording used in the resolution and that confirms this. The recoup of expenses was the subject to the normal creditor account evaluation and validation processes and testing as set out in response 10b below.

Next, in response to this question:

explain who, on behalf of Esplanade Holdings Pty Ltd, entered into a loan agreement with whom on behalf of the Trust when making the loan/s;

ISPL unhelpfully responded:

In light of the responses to 9a and b [above], what loans are you referring to?

In addition, by email dated 27 December 2017, Mr White for ISPL stated, inter alia:

Without pre-empting or predicting the purpose of the line of questioning, it may appear that the use of the word “loan” in some documentation provided is loose terminology which would be more accurately described as “reimbursement of expenses incurred”.

The internally inconsistent positions advanced by ISPL to the Inquiry regarding this issue were unsatisfactory, particularly given its role as Trustee and obligation to answer the requests of and assist the Inquiry. The contradictory positions put to the Inquiry during the series of above answers may, in some respects, reflect an infelicity in description by ISPL of the supposed agreement or arrangement by which funds were expended/advanced by Esplanade Holdings Pty Ltd. They also however reflect a failure by ISPL to carefully and
accurately respond to the Inquiry's request. It may well have been affected by the fact that the agreement or arrangement was largely undocumented and the precise details of the arrangements discussed between Mr Carter and Ms Westerman on a date/s unspecified, were unclear.

In the course of reviewing additional information and documentation later obtained by the Inquiry, it was however able to obtain a more complete understanding of the chronology of key events from January to March 2016, including Mr Carter's involvement and aspects of the arrangements by which Esplanade Holdings Pty Ltd advanced/expended funds.

In a statement subsequently presented to the Inquiry by Mr Carter he stated, amongst other things, that:

... Her account of matters suggested that AET as Trustee were using the Trust's own funds in a series of legal actions to defend their own position as a Trustee.

Upon enquiries with other parties, I was aware that if this were true, then this was likely an illegal action and AET as Trustee would be compelled to repay the funds.

I explained to her that I was happy to advance to her some of the funds necessary to assist in the actions she and other members of the Trustee Advisory Committee (TAC) had proposed to recover the funds and to remove the existing Trustee, on the condition precedent that the majority of the TAC were made aware of and supported my involvement and the purpose for the provision of the funds; and that the TAC supported and agreed to the commercial condition that they would ensure that any funds provided would be recouped at an appropriate time and after discussion with the new trustee.

If no support existed and the majority of the TAC wished to stay with the existing trustee and not to actively seek to recoup the funds in question, then I would simply revert to the role as a free source of advice and I would not chase Ms Westerman or Njamal for the funds advanced so far.

I did not seek any additional fees or charges as a litigation funder might have also required.

I had genuine sympathy for the cause and decided to provide Ms Westerman with sufficient funds to organise for the Njamal people to meet and hold a community level meeting to air, discuss issues, and I was prepared to attend to see if I could help to resolve the issues and suggest actions and directions. I said I would attend and be a participant at any meetings should I be required.

In early February 2016, I was invited and attended a community meeting with some 80 people at a bowling club in Port Hedland.

... Based on Mr Carter's evidence, the arrangement he reached with Ms Westerman in relation to the provision of funds was apparently entered into before the meeting he attended at the Port Hedland bowling club, which the Inquiry understands was most likely the meeting that occurred on 26 February 2016. Mr Carter and ISPL provided no contemporaneous record evidencing that arrangement. It is however apparent that Mr Carter arranged for Esplanade Holdings Pty Ltd to first advance funds to Ms Westerman on or about 20 February 2016. It is therefore reasonable to conclude that Mr Carter and Ms Westerman would have had some communication about the basis on which funds were being provided to Ms Westerman at or about that time.
Mr Carter recently advised the Inquiry that:

I met with the TAC members at the Ibis in Port Hedland in February and it was confirmed at that time that the group had dismissed AET and then Esplanade offered to fund all Njamal expenses incurred from that point until the transition to a new Trustee. It was agreed that these expenses would be reimbursed to Esplanade asap from the new trustee company.

Ms Westerman could not recall the precise occasion/s on which this issue was discussed, but confirmed to the Inquiry that the general understanding she had from communications with Mr Carter was that he wished to be able to recoup expenditure paid for by Esplanade Holdings Pty Ltd if ISPL was appointed Trustee.

The only relatively contemporaneous document that makes reference to recovery of funds advanced by Esplanade Holdings Pty Ltd (which was provided to the Inquiry by Ms Westerman, not Mr Carter or ISPL) was an email exchange, previously extracted in the report, between Mr Carter and Ms Westerman on 22 April 2016 in which Mr Carter indicated that he was under the impression that Ms Westerman was giving his personal assistant, Ms Jing Guo, a budget and requesting that she start providing a reconciliation for funds advanced and an explanation for the spend on the rest of the funds. He concluded "If we are going to keep this on the path we are heading, I will need to be able to recover all funds spent on behalf of Njamal" (underlining added). It is unclear precisely what path Mr Carter was referring to, however it would appear to be a path by which ISPL was anticipated to become Trustee and in the meantime Esplanade Holdings Pty Ltd would continue to expend funds in respect of further meetings and potentially office set up. In Ms Westerman's reply she references steps she was taking or contemplating to source funds, including from mining companies, and concluded:

If you want I can get a resolution from the TAC re reimbursement, T[then (sic) I can do this too.

This email sequence may, on the one hand, be a reflection of an arrangement that was first crystallised at this time – Mr Carter identifying the need to be able to recover all funds spend on behalf of Njamal and not suggesting that any such arrangement had already been agreed. It might also be, in essence, a reflection of an earlier pre-existing arrangement, save perhaps for the new element of the TAC making a resolution re reimbursement.

Ultimately, it is unnecessary for the Inquiry to reach a concluded view about the precise arrangement discussed or entered into between Ms Westerman and Mr Carter/Esplanade Holdings Pty Ltd. It is sufficient to conclude that significant funds were expended by Esplanade Holdings Pty Ltd by way of cash payments to Ms Westerman, and other direct expenditure, between 20 February 2016 and May 2016, which it recouped from the Trust once ISPL was officially appointed Trustee by Deed dated 12 May 2016.

Prior to that time, it is to be noted that resolutions were signed by various actual or purported TAC members or their proxies on or before 14 March 2016 purporting to confirm the
termination of AET with immediate effect and to appoint ISPL as Trustee. Further, on 16
March 2016 Mr Carter asserted in correspondence to AET that ISPL had accepted
appointment as Trustee. It promptly became clear however that this asserted position was
disputed by AET, in the Inquiry's view for good reason.

**Approach taken by ISPL to reimbursement of expenses**

The approach taken by ISPL to reimbursing any expenditure incurred by Esplanade Holdings
Pty Ltd or payment sought by Ms Westerman, was to seek supporting documentation to
validate the nature and extent of the ultimate expenditure, consistent with the TAC resolution
of 12 May 2016 which required receipts and invoices be provided to validate expenses.
Indeed, as the email exchanges between Mr Carter and Ms Westerman on 22 April 2016
revealed, there was already by then a recognition of the need for receipts and to reconcile
expenditure that had occurred.

By 11 May 2016 steps had commenced on behalf of Esplanade Holdings Pty Ltd to recover
funds expended prior to ISPL's appointment taking effect. Ms Jing Guo emailed Ms
Westerman advising that:

1. The total money we have been advancing to you either by cash or bank transfer I $89,900.
2. Could you please advise us how do you want to reconcile those transactions happened from
   February.
3. Eventually it will be the TAC who will want to review.

On 15 May Mr Carter emailed Mr Paul Berresford via his Esplanade Holdings Pty Ltd's email
address in relation to services for the purposes of audit of Trust spending. He indicated that:

1. As of last Friday Indigenous Services Pty Ltd (IS) was appointed Trustee of the Njamal
   Peoples Trust I would like to seek your services for purposes of Audit of Trust Spending.
2. The issue we have at present is the following
   1. We would like to recoup funds advanced to various Njamal People over the last 2
      months. The issue being that the existing Trustee challenged our appointment and
      ceased payment of Njamal People for all Charitable requests and meetings.
3. 2. We need some direction in how best to account for the advancement of funds.
4. 3. As well, we would like you look into expenditures made under the previous Trustee. I
      want to be able to assure the community that all is above board, as a number of
      community members have raised concerns.
5. 4. Can we get together later in the week.
6. 5. I would like to see a proposal and rates before engagement .This will then be submitted
to our Board for ratification

Later that evening Ms Jing Gou (Personal Assistant) forwarded a copy of previous trustee
presentations in February 2016 and transaction details from Esplanade Holdings to Njamal
from February until then. Mr Berresford sought further information including a copy of the
Trust Deed. Ms Guo indicated certain information had not been received from AET at that
stage and requested for advice on:
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... how best to account for our funds to NJAMAL for the last 3 months? There is a resolution passed from Trust Advisory Committee Members stating that we will seek reimbursement once the invoices are validated. We are thinking of a validation form for each TAC members to sign.

Mr Berresford’s response appropriately included reference to the position of the Trustee being an onerous one and the rules of how the Trust must be operated are set out in the Trust Deed (with amendments). He noted that it was obviously very difficult to advise in the absence of the Trust Deed however noted that if a copy of the TAC resolution could be forwarded may be useful, enquiring whether the resolution was binding on the Trustee. He observed that once they had established a framework, they could put appropriate procedures in place etc. Mr Carter then requested that Ms Westerman forward a copy of the Trust Deed to Mr Berresford.

While it is not known whether further advice was forthcoming, the Inquiry accepts that a process was put in place to validate and document expenditure which was being reimbursed.

As already noted, by 17 June 2016 it was apparent that issues still remained including Mr Parker seeking satisfactory acquittal of the $84,300 advanced to Ms Westerman by Esplanade Holdings Pty Ltd on 23 May 2016. This occurred on about 20 July 2016.

Mr Carter has also in substance advised the Inquiry that in addition to the sums that were reimbursed, he/Esplanade Holdings Pty Ltd also expended a significant additional amount by way of cash payments in respect of which he did not seek recovery, apparently including in January and February 2016 when he says expenses were incurred but never claimed.

The making of significant cash payments underpins evident concerns in sections of the community about cash payments being made and potentially being used to influence and secure support. While that was not necessarily the case, and a range of explanations for the payments made have been provided, in the Inquiry's view such payments should be avoided, certainly absent careful controls, due to the real potential to influence, or be perceived to influence, the support of community members, and risk they might be seen to fall outside charitable objects.

**Power of ISPL to Reimburse Esplanade Holdings Pty Ltd its Expenses**

The Inquiry has considerable difficulty in identifying a basis on which many of the above expenses could properly be reimbursed to Esplanade Holdings Pty Ltd by ISPL from the Trust Fund.

First, most of the expenditure occurred prior to ISPL being formally appointed Trustee by Deed dated 12 May 2016. During that period AET remained Trustee and did not authorise the expenditure in question. It is for that reason difficult to conceive of Esplanade Holdings Pty Ltd’s expenditure as expenditure of the Trust.

Secondly, the resolutions of the TAC, even if they purported to do so, in fact conferred no valid authority on ISPL to make the payments. As noted elsewhere, the TAC is an
unincorporated body of persons with no independent legal status whose only real power is to appoint and replace Trustees pursuant to clause 5.5 of the Trust Deed. Otherwise, the TAC's role is limited to providing recommendations and advice to the Trustee, which the Trustee is not bound to accept.¹³⁹

Thirdly, insofar as TAC related expenditure is concerned, under clause 9.12 of the Trust Deed TAC members have an entitlement, and are authorised to receive out of the Trust Fund, "their reasonable out of pocket expenses for all acts done and time expended on all Trust Activities, including the Travel Allowance." Clause 1.1 of the Trust Deed defines "Trust Activities" to mean "all activities conducted by the Trustee in accordance with its functions, duties and obligations under [the deed]". As AET was still on the face of it the Trustee when relevant activities were occurring and funds expended by Esplanade Holding Pty Ltd, it is difficult to see how TAC members were entitled to payments in respect of many of the activities in question and, certainly as to whether the amounts expended were reasonable. Expenses associated with convening and attending a TAC meeting to vote in relation to the replacement of a TAC member is one possible exception.

Fourthly, the TAC members were arguably not in fact 'out of pocket' and were not themselves making claims against the Trust Fund for reimbursement; those claims were made by Esplanade Holdings Pty Ltd, a stranger to the Fund. Nor does it appear that Esplanade Holdings Pty Ltd had any right to claim on behalf of the TAC members (for example, by way of subrogation) and there is no evidence to suggest that it purported to do so. On the face of the transactions the reimbursement appears to be, in effect, an ex gratia payment to a related party.

Fifthly, while under clause 10.2(a) of the Trust Deed the Trustee may pay and discharge Trust Expenditure out of the Trust Fund, 'Trust Expenditure' is defined to mean:

...all costs, disbursements, liabilities, commissions, fees, taxes and other proper outgoings, whether of a capital or recurrent nature, incurred in the course of Trust Activities or in the course of the administration of the Trust.

The expenses incurred by Esplanade Holdings Pty Ltd were not "incurred in the course of Trust Activities or in the course of the administration of the Trust", ISPL not being the Trustee when the expenses were incurred. Insofar as ISPL seeks to maintain that it was, in fact appointed Trustee on or about 14 to 16 March 2016, in the Inquiry's view it is unlikely that is the case.

Sixthly, ISPL as Trustee does not have power as Trustee to make an ex gratia payment from the Trust Fund. If the circumstances justify such a payment, the appropriate course is to apply

¹³⁹ Trust Deed, clauses 9.3, 9.4 and 9.5.
CHAPTER 8: TRUST FINANCIAL POSITION, PERFORMANCE AND MANAGEMENT

to the Supreme Court to sanction such a payment. (Mr Carter however contends that ISPL has the power to make the payments, as the Trust is discretionary).

Seventhly, in the Inquiry's view the expenses reimbursed from the Trust Fund included costs that Esplanade Holdings Pty Ltd incurred in assisting Ms Westerman and like-minded other Njamal people, to remove AET, and then appoint ISPL and were not properly payable from the Trust Fund. Mr Carter contends that the costs were associated with involving the community in the appointment of a new Trustee, which was the right course of action, and that the people need a voice, which Esplanade gave them. While that may well have largely reflected Mr Carter's thinking, the Inquiry notes again the email communications between Mr Carter and Ms Westerman at this time including a reference by Mr Carter to meeting families that supported Ms Westerman first and having a night where they "put on a meals and such" and to having another meeting at the same time (as a meeting being organised by AET) and paying sitting fees. In the Inquiry's view both Ms Westerman and Mr Carter were aware that expending money in such ways would more likely result in engagement by community members and facilitate their objectives.

Eighthly, it is in any event questionable whether many of the payments were reasonable, particularly in relation to 'sitting fees', and it is difficult to see any proper basis under the Trust Deed for such fees to have been paid to non-TAC community members. Mr Carter suggests that this is culturally and factually incorrect and points to the payments at community meetings involving mining companies of sitting fees. That does not however directly answer the Inquiry's concern in the context of this matter, where ISPL is a Trustee of a charitable trust. This broader question is considered earlier in this Chapter.

Finally, it not clear from the documentation provided by ISPL whether the payments may have extended to the payment of any travel and accommodation expenses of Mr Carter or others associated with ISPL, including prior to ISPL's purported appointment on or about 14 March 2016. The Inquiry has not identified any basis on which such expenses could properly be reimbursed from the Trust Fund. Mr Carter denies this and asserts that the payments were all recoups and rightly payable as 'acting Trustee'. Even if the payments were recoups, this does not clarify whether the recoups included any expenses incurred by Mr Carter or other associated with ISPL.

In large measure it seems that the Trust Fund was applied by ISPL to reimburse the costs that Esplanade Holdings incurred in assisting Ms Westerman and others to engage with the community and thereby facilitate their involvement and effect the removal of AET and appointment initially of Perpetual and then, in later stages, ISPL.

Mr Carter disputes the above matters and contends that the expenses were as a result of AET being dismissed by resolution of the TAC on 15 September 2015 and refusing to fund meetings to determine the next Trustee, that Esplanade Holdings Pty Ltd was acting under
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the direction of the TAC and that ultimately they endorsed Esplanade Holdings. Further, that
Esplanade Holdings was effectively acting as interim Trustee by appointment of TAC and Ms
Westerman was effectively a self-appointed CEO and paid as such. He contends that AET
had been dismissed in the eyes of the TAC and the community and that TAC were in
agreement that in the interim, whilst they make a decision, that Esplanade Holdings could
provide the needed funding and it would be refunded. This assisted Njamal with interim
funding.

The Inquiry acknowledges that there was a dispute as to whether AET had been validly
removed at various stages in 2015 and 2016 and that ISPL and Mr Carter contended on 16
March 2016 that it had been appointed. There is however in the Inquiry’s view serious doubt
as to those assertions, as considered elsewhere in the Report. It would also, even if correct,
not be a complete answer to the concerns identified by the Inquiry.

Given the nature and circumstances of the payments, the above matters and that ISPL was a
related entity to Esplanade Holdings Pty Ltd, in the Inquiry’s view the strongly preferable
approach would have been for ISPL to have applied to the Court for directions prior to
reimbursing the significant expenditure incurred by Esplanade Holdings Pty Ltd prior to ISPL’s
appointment. Not having done so, it exposes the potential of funds having been misapplied by
it in breach of trust, even though TAC support was provided for this occurring. While it may
well have been considered to be fair by a Court to allow some or even many of the expenses
to be reimbursed (especially in relation to establishing a Njamal office and providing relief
from hardship), the Inquiry doubts that is the case for all the expenditure.

Given the significant doubt as to the legitimacy of all the expenditure being reimbursed, the
Inquiry therefore considers that ISPL should either reinstate the sum of $256,357.25 paid out
of the Fund to Esplanade Holdings Pty Ltd and such of Ms Westerman’s further claim of
$38,000 that pre-dated 6 May 2016 as was paid by ISPL from the Trust Fund, and/or seek
relief from the Supreme Court including, if considered appropriate, exoneration in respect of
payments that have been made.

In response to an invitation provided to ISPL to comment in relation to the above matters its
solicitor indicated that it had asked each of its previous directors and management to respond
to the specific issues raised and that it would supply responses to the Inquiry. ISPL indicated
that it would also provide the Inquiry with a response as to how it intends to proceed which
may include the possibility of seeking directions from the Supreme Court as to further actions
in the circumstances. It subsequently advised by letter of 28 September 2018 that it was still
awaiting on the foreshadowed responses (the only response received by the Inquiry was from
Mr Carter) and that dependent on the nature of the responses, ISPL considers it will be
prudent to seek directions from the Supreme Court under the Trustees Act 1962 as to its
proposed actions in this regard. It was also indicated that ISPL would obtain advice upon the
facts raised by the Inquiry, subject to any clarification they also be given) before seeking such directions. The Inquiry endorses the proposed approach of seeking directions to address this issue.

Recommendation 18 (Chapter 8)
ISPL either reinstate the sum of $256,357.25 paid out of the Fund to Esplanade Holdings Pty Ltd and such of Ms Westerman’s further claim of $38,000 that pre-dated 6 May 2016 as was paid by ISPL from the Trust Fund, and/or seek relief from the Supreme Court including, if considered appropriate, exoneration in respect of payments that have been made.

Loans and Advances
A significant question arises under the Trust Deed as to the circumstances in which a Trustee may lend or advance Trust funds.

This is important because first Abbott and later ISPL, but not AET, lent or advanced funds in a variety of circumstances which, on one view at least, did not comply with the terms of the Trust Deed. As explained below, given the degree of uncertainty as to the scope of the power to lend outside of the explicit power to lend “on prudent and commercial terms with adequate security” and in any event, the degree of uncertainty as to the scope of the power to make grants to related entities whose constituting documents do not limit their objects, and the very high amounts loaned by ISPL by way of related inter-company transactions (which were subsequently recharacterised by it as distributions by way of grant) the Inquiry considers that ISPL should seek directions from the Supreme Court in relation to this matter.

The directions should potentially relate both to the scope of the power and, if necessary and appropriate, exoneration in respect of loans and grants that have already been advanced. Further, the Inquiry recommends that ISPL obtain advice as to whether it is open and appropriate to amend the Trust Deed to clarify the scope of its powers.

Further issues considered below include whether ISPL could properly recharacterise or reclassify loans, retrospectively, as distributions by way of grants; the adequacy of the process by which the making of loans was authorised, approved and recorded by ISPL; the adequacy of the nature and extent of conferral by ISPL with the TAC in regard to the making of loans and the circumstances surrounding ISPL making loans to Njamal people.

Power to make loans and advances
Competing constructions of the power to loan or advance funds
At least three views are available in relation to the scope of the Trustee’s powers to make loans or advances from the Trust Fund. Ultimately, the answer involves a question of the proper construction of the Trust Deed.
On the first view the Trustee’s power is limited to lending by way of investment and cannot otherwise be exercised by way of distribution/application of the Trust Fund. On this view there is a single power of distribution of the Trust Fund under clause 10.4, which does not extend to applying funds by way of lending or advancing funds (which if it occurred would on this view amount to an exercise of the investment rather than distribution power). Also on this view, clause 4.2 is construed as conditioning the circumstances in which the power of distribution in clause 10.4 may be exercised, rather than as a separate source of power to pay, distribute, or apply the Trust Fund.

Further, on this view, the power of investment by way of lending money is limited by clause 6.2(g) of the Trust Deed, which empowers the Trustee to (only) “lend or advance money on prudent and commercial terms with adequate security”. Reference to the requirement for security contemplates a right to resort to some fund or property in the event of default in payment. In support of this view it was held in *Khoo Tek Keong v Ch’ng Joo Tuan Neoh* that a loan upon an unsecured promise to repay is not an investment at all, hence, absent clear power to lend money by way of investment other than with adequate security, arguably the Trustee has no such power.

The second view is that while the power of investment extends to lending money in the circumstances specified in clause 6.2(g), the power is not limited by this clause and there may be other unspecified circumstances in which a loan may be made by way of investment even though the restrictions in clause 6.2(g) have not been complied with. That is subject to the investment not being speculative and the Trustee exercising the care, diligence and skill that a trustee would exercise in managing the affairs of other persons (see clause 10.3). Support for this argument is to be found, in particular, in the introductory words to clause 6.2 which indicate that the enumerated powers do not otherwise limit the Trustee’s powers under clause 6.1 which, in turn, provides that:

Subject to this Deed, for the purpose of giving effect to its powers and functions under this Deed, the Trustees shall have all the rights and liberties as would be available to the Trustees, if the Trustee were carrying out such functions and powers on their own behalf.

Further, section 17 of the *Trustees Act 1962* provides that a trustee has power, unless expressly prohibited by the instrument creating the trust, to invest trust funds in any form of investment. By section 18(2), a trustee is however bound to exercise a power of investment in accordance with any provision in the instrument creating the trust that is binding on the trustee and which requires the obtaining of any consent or approval or compliance with any direction with respect to trust investments.


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A third view is that, irrespective of whether the power of investment is limited to lending money on "prudent and commercial terms with adequate security", the power does not prevent funds being lent or advanced by way of distribution rather than investment, provided that this occurs in furtherance of the objects of the Trust. In support of this, it may be argued that the power to invest is a power, consistent with the word's ordinary meaning: 144

To put (money) to use, by purchase or expenditure, in something offering profitable returns, especially interest or income.

Consistent with its dictionary definition, it has been held that its normal meaning conveys: 145

To apply money in the purchase of some property from which profit or interest is expected and which property is purchased in order to be held for the sake of the income which it will yield.  

It may therefore be argued that the power to distribute extends to an application of Trust Funds by way of loan or advance, not by way of investment of the funds in order to preserve the funds and make profitable returns, but in order to otherwise assist achieve the objects of the charitable trust. On this argument, the references in the Trust Deed to applying, distributing and paying 146 reflect that the power to distribute extends in an appropriate case to lending or advancing funds.

On this third construction, if charitable funds are otherwise able to be expended in certain circumstances for a particular purpose, it may be open to the Trust to instead lend the money in those circumstances for that purpose. For example, if the Trustee may pay money to a particular Njamal person to carry out the charitable objects of the Trust 'without purpose of private gain', such as to assist Njamal People overcome hardship, the money could equally be lent for the same purpose. In practice it can be seen why in some cases this may be a more effective way of achieving the objects of the Trust than an outright payment. This was certainly the view taken by ISPL.

The Inquiry pauses to observe that various other trust deeds contain more explicit provisions which make far clearer the nature, extent and limitations on any power to lend money. For example, in Flynn v Mamarika (1996) 130 FLR 218, in the context of a more clearly worded

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144 See also Oxford English Dictionary Online, (Mar 18): "To employ (money) in the purchase of anything from which interest or profit is expected; now, esp. in the purchase of property, stocks, shares, etc., in order to hold these for the sake of the interest, dividends, or profits accruing from them."; Macquarie Dictionary Online (Mar 18): 'Investment' is defined to mean, amongst other things, "1. the investing of money or capital in order to secure profitable returns, especially interest or income. 2. a particular instance or mode of investing. 3. a thing invested in. 4. that which is invested.


146 Clause 10.4 speaks of the Trustee’s discretion to determine when and how the Trust Fund “is to be applied for the benefit of Beneficiaries”. Clause 4.2(b) refers to “applying or distributing” the Trust Fund. Clauses 4.2(a) & 4.2(c) speak of how the Trustee may “pay and apply” the Trust Fund for the objects of the Trust.
trust deed, the Court concluded that the trustee had a power to lend moneys to beneficiaries by way of distribution, as well as by way of investment.

Abbott and ISPL do not accept the first view and contend that the Trustee has power to lend money other than in the circumstances provided for in clause 6.2(g) of the Deed. The Inquiry is also aware that other trustees with similarly worded trust deeds have from time to time made unsecured loans on non-commercial terms to members of the communities for whose benefit the trusts in those cases were established.

Ultimately, the Inquiry does not purport to determine which of the competing constructions is the correct construction; that is ultimately a matter for the Supreme Court. However, as returned to below, in the Inquiry's view the ambiguity in the Trust Deed and the competing approaches that are open signals that this is a matter about which directions should be sought, or in relation to which the Trust Deed might be amended.

Loans or advances to persons or bodies who have a discretion as to how the loan or advance is expended

A further issue arises where charitable funds are distributed to a person or body where that person or body then is able to choose how to disperse them. This gives rise to the significant prospect that such payments would be outside the charitable objects of the Trust. However, the Trust Deed explicitly recognises in clause 4.2(c)(viii) that (with its chapeau):

Without limiting the generality of the foregoing, the Trustees, may pay and apply the capital and income of the Trust Fund for the objects and purposes set out in sub-clause 4.1 in the following ways:

...  
(viii) providing money, property or benefits to or for such persons, firms, companies, organisations, bodies (corporate or unincorporated), whether formed by statute or otherwise, which have similar objects to this Trust and provide similar programs, assistance or opportunities for the Beneficiaries.

On its terms, the provision has two important caveats, that is the entity to whom money, property or benefits are provided must meet two requirements; it must have similar objects to the Trust and it must provide similar programs, assistance or opportunities for the Beneficiaries. These limitations are important and understandable because they act as a protection to ensure that the funds will not be diverted to other non-charitable purposes but will be applied for similar charitable objects by an entity providing similar programs, assistance or opportunities for the Beneficiaries of the Trust.

It is open to question whether Njamal Services Pty Ltd and Njamal Heritage Pty Ltd meet those requirements. Notably, when one looks to their constituting documents to ascertain their objects, they are not constrained in any way. Nor in the case of Njamal Services Pty Ltd is the trust of which it is trustee, the Njamal Charitable & Benevolent Unit Trust, constrained or limited by objects that are similar to those of the Trust. ISPL suggests that one may look further afield and, it would seem, look both to the activities of those companies and that their
shares are wholly owned by the Trust and conclude that the objects of those companies are the same as the Trust. Whether that is a permissible approach is debatable.

**ISPL's position**

In response to an invitation to respond to possible findings and recommendations that may be open to the Inquiry in relation to the making of loans to the above entities ISPL asserted that the loans made by it were made within power.

In support of ISPL’s position, its legal representative, Mr Christensen, by letter dated 29 March 2018, amongst other things, contended that:

4. The making of "investments" in organisations such as Njamal Heritage Pty Ltd ("Heritage") and Njamal Services Pty Ltd ("Services") is clearly supported by the terms of the constituent trust deed.

5. In relation to Services the shares are owned by the Trust. Its directors are all material times appointees of the Trust. It also undertakes the business operations to achieve the trust's objectives including, making the "loans" of the benefit Njamal People which you refer to in your letter. It is entirely under the control of the Trustee. The Trustee is trustee of the Njamal People's Trust which is the beneficiary of the Njamal People's Charitable and Benevolent Unit Trust. The fact that its constitution and trust deed (which appear to be "off the shelf") does not specifically refer to objects that are the same or similar to those of the Trust is not to the point. It acts not inappropriately by reason of the ownership and direction of the Trust and as you will see with the approval and involvement of TAC. It's objectives are clearly aligned with the Trust's goals and purposes.

6. In relation to Heritage it was incorporated for the sole purpose of promoting the Njamal People's native title determination and management of "Future Acts". It too is wholly owned by the Trust. Its directors are appointees of the Trust. I would point out that through a clerical error only the ASIC register (which has now been rectified) showed that Mr Walker had ceased being a director. That was incorrect. The fact that its constitution and trust deed (which appear to be "off the shelf") does not specifically refer to objects that are the same or similar to those of the Trust is not to the point. It acts not inappropriately by reason of the ownership and direction of the Trust and as you will see with the approval and involvement of TAC. It's objectives are clearly aligned with the Trust's goals and purposes.

7. In relation to both Heritage and Services the ultimate fact is that the beneficial interest (using its widest commercial and legal sense) in relation to these entities is and remains with the Njamal People. For the reasons discussed below the funds paid to them is in effect a payment to itself and indeed the directors and employees of the Trust consider this view when payments are authorised. The payments made to them have been made to ensure they are able to achieve the purposes for which they were established namely, the same as the objectives of the Trust. Your approach to the relationship between these parties fails to recognise nor understand this important relationship and progress which has been made since their establishment. Amongst other things, work undertaken by the trust that is bringing commercial activities with mining companies of self dictates the commercial reality of having structures which are commercially recognisable to them and which ensure that the terms of the various mining agreements are adhered to in respect of employment of Njamal People and their family businesses (most of which the Trust through these vehicles is funding).

ISPL separately also sought to call in aid of its position the 'precedent' of the provision of significant funding by way of grant by another trustee to a related entity to conduct similar activities to those performed by Njamal Services Pty Ltd, as reflected in audited accounts.
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The relevant trust deed in that case is however materially different to the Trust Deed governing the Njamal People's Trust.

Abbott's position, much like that of ISPL, is that the (much smaller) loans made by it to Njamal Mining Pty Ltd and other corporations (see below) were to corporations which were run by Njamal People and benefited Njamal beneficiaries. It indicated that the purpose of the loans was to assist beneficiaries to improve their economic position, self-reliance and independence as provided in clause 4.2(c)(i) of the Trust Deed and the Trustee was fulfilling one of the purposes of the Trust. It contended that the Trustee had the power to do this pursuant to clause 6.2(b) which permits the Trustee to distribute and invest any of the Trust Funds in accordance with the Trust Deed and any agreement between the Trustee and any other person. Abbott's representative acknowledged however that perhaps in hindsight the Trustee should have made a distribution to the corporations instead of classifying it as a loan.

ISPL also foreshadowed that if required by the Inquiry, ISPL was prepared to seek court directions in relation to the matter. In the Inquiry's view, having regard to the importance and degree of uncertainty surrounding the issues, particularly given the quantum of funding being provided to the related entities, this step should be taken as reflected in the recommendations made at the end of this section of this Chapter of the Report.

Having expressed these views the Inquiry now turns to consider in greater detail the circumstances in which loans of the Trust Fund have occurred during the tenure of Abbotts, AET and ISPL.

**Loans made by Abbott**

In 2012 Abbott's distribution policy relevantly provided that "no further Loans due to non-payment of two current outstanding loans".\(^{147}\) That restriction was not specified in the 2013 version of the policy.

Abbott was requested to provide the Inquiry with details of loans made by it as Trustee with details including when they were granted, why and under what object of the Trust, to whom they were granted, their terms, and whether and to what extent they were repaid. A copy of supporting source documentation comprising or recording the loan agreements was also requested. Various documents, including TAC minutes and journal entries were provided in support of the loans. They did not comprehensively record each loan and its terms, as ought to have been done, however it is acknowledged that, given the period that elapsed since many of the loans were made, difficulties were experienced by Abbott in locating all relevant documents.

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\(^{147}\) This is consistently referred to in the Distribution Policy.
In the response received from Abbott it identified six loans. Four were apparently provided to assist the operation of businesses including the Yandeyarra Community Store, a landscaping business, a cultural awareness business, and then eventually to support Njamal heritage surveys, and to provide for the running costs, insurances and repairs to a Njamal bus and another vehicle. The amounts were said to have been loaned pursuant to clauses 4.2(a) and 4.2(c)(i) of the Trust Deed.\textsuperscript{148}

Clause 4.2(a) provides:

The Trustees are to hold the Trust Fund in perpetuity and shall pay or apply the capital and income amongst the Beneficiaries for the objects and purposes set out in sub-clause 4.1.

Clause 4.2(c)(i) provides that:

Without limiting the generality of the foregoing, the Trustees may pay and apply the capital and income of the Trust Fund for the objects and purposes set out in sub-clause 4.1 in the following ways:

(i) improving the social position, economic position, self esteem, self-reliance and independence of the Beneficiaries.

While it may have been open to Abbott to make distributions of this nature on this basis, the provision of loans is subject to the potential difficulty identified above. On the materials available to the Inquiry clause 6.2(g) was not complied with in respect of these loans. In each case the moneys advanced were however repaid to the Trust Fund, albeit by way of a distribution from a "family bucket". That system – the "family bucket system" - had its own difficulties (as discussed in Chapter 10, particularly from page 585 and following).

A loan of approximately $1,800 was also made to the Njamal Aboriginal Corporation in June 2011, to assist paying for the insurance costs of a bus purchased for the corporation. The General Journal also records an intention to have the amount repaid "out of CML MV". It is not clear whether the amount was ever repaid. However, the amount is small and of only historical interest, having been made over six years ago.

Finally, a loan was also made to Njamal Mining Pty Ltd to assist with start-up costs. The initial loan of $20,000 was made in 2013, with further funding of $50,000 approved later that year, both with TAC approval. It appears that at least one of the loans was intended to be repaid immediately a loan from FMG under the Glacier Valley and North Star Project Area Agreement was paid to Njamal Mining Pty Ltd, however this did not occur. As discussed earlier in the Report, these "loaned" funds were not recovered until the 2016/17 year when, under the guidance principally of Mr Parker, Njamal Mining Pty Ltd commenced a return to

\textsuperscript{148} The response from Abbott refers to clause 4.2(b)(c)(i). However, that clause does not exist. The Inquiry assumes it is a clerical error.
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profitable trading and repaid the loan to the Trust. As with the preceding loans, this loan was not made in accordance with clause 6.2(g) of the Trust Deed.

**Loans made by AET**

As already indicated, AET did not lend any Trust Funds during its period as Trustee of the Trust.

The 2014/15 and 2015/16 audited financial statements of the Trust record the loan to Njamal Mining Pty Ltd as a "doubtful debt". In the 2014/15 financial statements it is noted:

> While it is expected there are likely to be substantial and significant opportunities available once iron ore prices strengthen, the current Trustee is of the opinion there is insufficient evidence at this time to express certainty about the recovery of the loan made from the Trust, resulting in the provision for the full loan balance as a doubtful debt.

A note to this effect was also included in the 2015/6 financial statements.

**Loans made by ISPL**

The Inquiry now turns to consider the main categories of loans made by ISPL during its time as Trustee of the Trust.

As indicated earlier in the Report, ISPL expended significant sums by way of loans to related entities (Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust, Njamal Heritage Pty Ltd and Goldfields Carbon Group Pty Ltd), as well as by way of loans to a range of individuals and to certain other entities. The loan of $500,000 to the Goldfields Carbon Group Pty Ltd was considered in detail earlier in this Chapter in a section considering carbon farming transactions.

As will be apparent from the commentary below, it was a most unsatisfactory and convoluted process for the Inquiry to obtain information and supporting documentation in relation to various "loans" recorded as such in the accounts and financial statements of ISPL.

**Loans to Njamal Services Pty Ltd and Njamal Heritage Pty Ltd**

The loans to Njamal Services Pty Ltd and Njamal Heritage Pty Ltd were initially recorded in the accounts and financial statements of ISPL as being loans. However, as part of finalisation of the audit of the 2016/2017 financial statements, then outstanding loan balances were recharacterised as being distributions of equity by way of grant rather than as assets in the balance sheet. For internal purposes at least, in the 31 December 2017 financial statements and the 24 May 2018 unadjusted trial balance, those amounts continued to be recognised as distributions of equity rather than assets however additional expenditures were recorded as being loans and therefore assets.
In relation to the above entities, the amounts recorded as loans or distributions at the following dates were as follows:

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<td>-</td>
<td>723,037</td>
<td>723,037</td>
<td>723,037</td>
</tr>
<tr>
<td>Total</td>
<td>$564,746</td>
<td>$679,761</td>
<td>$723,037</td>
<td>$1,888,272</td>
<td>2,126,817</td>
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</tr>
</tbody>
</table>

|                  | Njamal Heritage Pty Ltd | Loan   | Distribution | Total   | $263,449 | $199,068 | $199,068 | $412,455 | $369,744 | $611,523 | $568,812 |
|                  | Loan             | $263,449 | $199,068 | $199,068 | $412,455 | $369,744 | $611,523 | $568,812 |
|                  | Distribution     | -        | -        | -        | -        | 199,068 | 199,068 | 199,068 |
| Total            | $263,449 | $199,068 | $199,068 | $611,523 | 568,812 |

The recharacterisation of the loans as distributions of equity resulted largely from concerns of the auditor, including that they should not be reflected at the amounts recorded in the 9 October 2017 pre-audit financial statements given doubt as to their recoverability. ISPL determined to instead treat those amounts as distributions. Its legal adviser wrote to the auditor in support of the position that was taken.\(^{149}\)

**The recharacterisation by ISPL of loans to Njamal Services Pty Ltd and Njamal Heritage Pty Ltd as distributions**

The Inquiry has some difficulty in relation to the position that was adopted by ISPL and the adjustment of its financial statements in the manner set out above. As explained below, ISPL asserted in its responses to the Inquiry that the moneys loaned or advanced to or on behalf of the above related entities were expended on terms that they were to be repaid out of net income generated from the commercial activities Njamal Services Pty Ltd undertakes/the heritage surveys Njamal Heritage Pty Ltd undertakes. If, therefore, the legal effect of the transactions was that they comprised loans or advances, it is unclear on what proper basis they could then be changed subsequently and retrospectively to equity distributions as at 30 June 2017. That is different of course to erroneously recording or classifying a transaction.

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\(^{149}\) A copy of the advice was provided to the Inquiry on the basis that in doing so legal professional privilege over the advice was maintained. While not needing to be determined, it is not on the face of clear to the Inquiry on what basis a claim of legal professional privilege is advanced in the first place in circumstances where the letter is from lawyers on behalf of ISPL advancing arguments on behalf of ISPL to the auditor.
in an account or financial statement and then correcting it afterwards and ensuring that reported financial statements correctly reflect the true nature of the transactions.

It is important that the proper legal character of the amounts outstanding from time to time as between the related entities and ISPL are correctly identified and reflected in ISPL's accounts. That is important and has ramifications including if, for example, the related entity were to be unable to pay all of its debts to creditors. If an amount was a grant that was not recoverable, ISPL would have no rights, in contrast to if the amounts were expended by way of loan and the related entity was indebted to ISPL. That ought be clearly documented and agreed in writing between ISPL and its related entities.

**Loans to members of the Njamal community**

During the period of ISPL's tenure as Trustee it has granted a number of loans to members of the Njamal community.\(^{150}\) Those loans were not on commercial terms and were not generally secured.

However, as a result of issues identified internally and by its auditor in relation to the making of these loans or advances, a series of actions were implemented by ISPL including to better document and recover outstanding loans, reclassify certain loans (such as loans where it was considered they ought to have been recognised differently in the accounts, such as by way of hardship distribution) and transfer certain loans from ISPL to related entities, which was considered better aligned to their review and collection, with the consequence that they no longer appeared on the books of ISPL as Trustee. This also had the consequence that such loans are largely outside audit view, as noted by the auditor in a letter of 30 May 2018 following completion of the 2016/17 audit.

In its response to the Inquiry dated 18 September 2017 ISPL explained:

> As mentioned in the response to question 4, the total value of loans and their nature has been revised down and is awaiting signoff by the auditor to validate the process used in the review.

> Essentially some of the expenditure made by the Trust had been temporarily allocated and coded as being “Loans” being made by the Trust, where as in fact the review found it was more accurate to account for some payment as representing:

> - Prepayments against Other programs of Njamal member entitlements that were urgently advanced due to the urgent family hardship needs of the applicant;

> - Prepayments to Trustee Advisory Committee (TAC) members as drawings or an advance on their Annual end of year TAC fees (usually to help their family members who are experiencing distress); or,

> - Business establishment fees and capital purchases for program expenses and start-up business costs associated with projects being undertaken by Njamal Services Pty Ltd or Njamal Heritage Services Pty Ltd.

\(^{150}\) Those whom the Deed refers to as Beneficiaries or Additional Beneficiaries.
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[Njamal Heritage Services Pty Ltd is the former name of Njamal Heritage Pty Ltd]

The following table summarises the balances of this category of loans at various times:

<table>
<thead>
<tr>
<th>Date</th>
<th>Draft</th>
<th>30.06.17</th>
<th>30.06.17</th>
<th>31.12.17</th>
<th>24.05.18</th>
</tr>
</thead>
<tbody>
<tr>
<td>31.03.17</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>30.06.17</td>
<td>$109,741</td>
<td>$58,092</td>
<td>$34,732</td>
<td></td>
<td></td>
</tr>
<tr>
<td>30.06.17</td>
<td></td>
<td>$34,732</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>31.12.17</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>24.05.18</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unadjusted Trial Balance</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In addition, a number of specific loans to Njamal staff or TAC members were separately accounted for by ISPL.

As a result of the steps referred to above, the amount said to still be on loan to Njamal People as at 30 June 2017 was $34,275 as compared to $58,092 in the draft financial statements and $109,741 in the internal balance sheet as at 31 March 2017. As at 31 December 2017 and 24 May 2018 it appears that this category of loans has a nil balance, presumably for similar reasons to the changes in balance in the preceding period. In addition, ISPL informed the Inquiry that it will no longer make, or purport to make, loans to members of the Njamal community. Various loans are however still made via Njamal Services Pty Ltd.

An exception to the general proposition that ISPL will no longer loan funds to members of the Njamal community however would seem to be a loan of $30,000 recorded as a distribution in a trial balance of the Trust as at 24 May 2018. The Inquiry understands that the loan related to the provision of assistance to a family with a child with special needs, who requires completely different education and processes, including in relation to housing. The loan was apparently secured over property by way of a mortgage, but Mr White has suggested that over time this loan may be waived. The circumstances surrounding the making of this loan are considered further at page 572 and following of this Report.

The auditor recommended that steps be taken to address various issues in relation to these loans, in respect of which various steps are understood to have been taken. However, despite attempts by the Inquiry to clarify the particular transactions which were reclassified in ISPL’s accounts, or removed to Njamal Services Pty Ltd’s or Njamal Heritage Pty Ltd’s accounts, and the reasons for each decision, this was not forthcoming from ISPL at the level of detail requested. While it is apparent from various account records provided that various loans were adjusted to transfer some or all of the amounts from the accounts, the basis and pathway for those decisions was not sufficiently explained. The appropriateness and justification for ISPL doing so has therefore not been able to be verified and substantiated by the Inquiry.

As discussed below in the distributions Chapter of the Report (Chapter 11), at least prior to the issue of the Disqualification Notice, distribution and loan decisions in the Perth office
CHAPTER 8: TRUST FINANCIAL POSITION, PERFORMANCE AND MANAGEMENT

generally involved Mr Carter as he had delegated authority on behalf of the Board in relation to distribution decisions, including where caps in the distribution policy were to be exceeded. Further, based on the transactions reviewed by the Inquiry, there was a comparatively poorer level of documentation of distribution and expenditure decisions at the Perth office than the Port Hedland office (which was generally of a good standard). Documentation issues were noticeable in relation to various loans/advances to Njamal people approved at the Perth office. The documentation provided by ISPL was often incomplete or sometimes missing if indeed it was completed.

For example, only limited documentation was provided to the Inquiry in response to its request to ISPL for such documentation in relation to loans of approximately $4,400, $12,600 and $11,900 made to three TAC members (on 2 November 2016, 3 March 2017 and 8 December 2016). Loan agreement forms signed by the loan recipient and Mr Carter do not specify the duration of the loan, or the frequency of repayments, and make no provision for security or interest.

Mr Carter has provided further clarification of the circumstances of the provision of certain of these loans/advances, which he contends were made in a range of "necessitive circumstances", which the Inquiry understands have been repaid, or largely repaid. He also suggests that there were additional documents, such as emails in relation to those loans. If that is the case, they have not been supplied to the Inquiry, and it nevertheless highlights the inadequacies of ISPL's responses to the Inquiry and record keeping practices. Further, even accepting that, the loan forms themselves were poorly completed compared to the standard of documentation completed at the Hedland office that the Inquiry reviewed.

The nature and extent of loans or advances that were granted also involved preferential treatment in the sense that TAC members or employees/contractors appeared more likely to receive such payments, for higher amounts, than Njamal people with no Trust involvement. This may be explicable in many cases due to the fact that many of the payments were treated as advances against income or entitlements that these persons had yet to earn but were expected to receive from the Trust.

ISPL also failed to consistently and clearly distinguish, in its records provided to the Inquiry, between payments made to TAC members or Trust employees/contractors in respect of entitlements earned in performing those roles and payments made or purportedly made on some other basis, for example by way of distribution or "loan".

Auditor’s concerns in relation to loans by ISPL to members of the Njamal community

A range of concerns were identified by the auditor in relation to the granting of loans by ISPL. In that regard, by letter dated 17 July 2017, forwarded by email the following day, the auditor wrote to ISPL’s directors to the attention of Mr Parker and referenced their/his enquiry concerning loans.
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It is unclear precisely what the enquiry concerned. However, in the letter the auditor observes as follows:

The central issues appear to be:

1. The Njamal Peoples Trust has loaned $137,000 to community members in 37 loans varying from $171 to $34,644. These loans are not documented. They may not have Board approval. They may not be recoverable.

2. The Trustee may have been under duress to make these loans, as certain members of the Trustee Advisory Committee and the community believe the Trustee has an obligation to make to lend money to any Njamal person as it's their money.

3. The Board appears to delegating their responsibility on this matter to the Auditor.

Scoping the loan issue.

1. The trust deed sets out how the Njamal People’s Trust will operate:
   a. Clause 3 sets out the beneficiaries and I see no issues here.
   b. Clause 4.1 sets out the primary objectives of the Trust. It does not mention that the Trust may make loans.
   c. Clause 4.1 (c.) states that the objects of the Trust will be carried out without purpose of private gain.
   d. Clause 4.2(c.) amplifies the manner in which the capital and income of the Trust can be used to benefit the community.
   e. Clause 6.2.g empowers the Trustees to lend or advance money to any person or corporation on prudent and commercial terms with adequate security. This may not have been met.
   f. Clause 6.3 and 6.4 give the Trustee Advisory Committee [TAC] the right to advise the Trustee but states clearly that the determination of the Trustees shall be final and binding.

2. The matter of issuing loans to beneficiaries is a delicate issue within a small Community. Who determines the borrower priority, sum. and terms of the arrangement? Is the loan truthfully a loan to be repaid or is the end position a gift in disguise? Is the loan based on fairness and equity, and defensible to the community at large, or is there an element of cronyism? Can the Trustee be coerced into making loans either directly or indirectly?

   I can understand and empathise with any TAC and community view that the Trustee has an obligation to lend money to any Njamal person as it’s their money.

   However a fair response to this is a Board paper that deals with this issue, and which has the understanding of the TAC. As noted above in para 1.f, the determination of the Trustee will be binding on the TAC.

3. The list of current loans that has been supplied to me is large and comprises 37 loans totalling $137,000. The loan balances vary from $171 to $12,624 in the generality of things. One loan is for $34,644 to enable a community member to start a courier business and the Trustee has a charge over a vehicle. It would appear the matter has become a wide-spread issue and possibly there is now a community expectation of loan entitlement.

   However there is no indication currently, that as noted in para 1.e. above, these loans have been made on prudent and commercial terms and with adequate security as required by the Trust Deed para 6.2.g. Indeed the loans may be undocumented.

The audit issue
CHAPTER 8: TRUST FINANCIAL POSITION, PERFORMANCE AND MANAGEMENT

From an audit point of view, I will be seeking that these loans are documented in accordance with the Trust Deed, and are collectable.

1. Does a loan agreement exist, and does it set out the purpose, terms and security for the loan, the interest rate, and the repayment sums and dates?
2. Is the loan being repaid, and is it a collectible debt?
3. If there is a bad debt provision, will this become infectious and encourage other borrowers to default?

The Trustee issue

In any large community there will be a person who is critical of any Trustee. If any of these loans defaults, and they have been made without full regard to the Trust Deed requirements, there remains a possibility that an action for recovery may be mounted against the directors.

I therefore recommend that the making of loans cease until the Board reviews its position on loans, and the audit requirements above are met.

The Inquiry shares the auditor's concerns.

The authorisation and approval of loans to Njamal Services Pty Ltd, Njamal Heritage Pty Ltd and members of the Njamal community

As observed earlier in the Report, the Inquiry's endeavours to obtain from ISPL a clear, detailed explanation and understanding of the circumstances in which loans were made together with records supporting the making of and the authority provided for the entry into loans (or the underlying transactions in respect thereto), was a significant source of difficulty and delay in progressing the Inquiry. The responses of ISPL were incomplete, inconsistent and often unsatisfactory and required repeated approaches by the Inquiry.

Early in the life of the Inquiry ISPL supplied the Inquiry with a balance sheet as at 31 March 2017 which recorded, inter alia, significant loans including to Njamal Services Pty Ltd, Njamal Heritage Pty Ltd and Njamal People. The latter loans are considered separately later in this section.

In order to understand the nature and circumstances in which the loans were provided, whether they were properly recorded and authorised and granted consistently with the requirements of the Trust Deed, by Notice dated 18 August 2017 the Inquiry requested ISPL supply in relation to the loans to Njamal Services Pty Ltd:

1. the purpose of the loan and the basis, by reference to the trust deed, for the making of the loan;
2. what, if any, application or other supporting documentation was received by ISPL in relation to the loan;
3. what processes were followed by ISPL in authorising the loan;
4. who on behalf of ISPL authorised the loan;
5. the terms of the loan;
6. what security, if any, was given; and
7. copies of any application for the loan and supporting documents.
ISPL responded to this request stating, inter alia:

1. the loan was to support Njamal Services in deriving revenue from commercial opportunities generated by native title agreements entered into by the trust, as well as creating opportunities for both the establishment of Njamal family businesses and employment;

2. the loan was made on the basis of clause 4.2(c)(viii) of the Trust Deed, which provides that the trustee may apply the capital and income of the Trust Fund for the objects and purposes set out in sub-clause 4.1 by, among other things, providing money, property or benefits to or for such persons, firms, companies, organisations, bodies (corporate or unincorporated), whether formed by statute or otherwise, which have similar objects to the Trust and provide similar programs, assistance or opportunities for the Beneficiaries;

3. ISPL was instructed on 7 September 2016 by a focus group meeting, consisting of 9 senior Njamal members, to incorporate Njamal Services, which incorporation was attended to on 9 September 2016;

4. the Board of ISPL resolved that loans be made progressively to facilitate Njamal Services achieving the outcomes envisaged by the TAC;

5. the Board of ISPL authorised the loan in accordance with "the Policy of the Trustee's Board"; and

6. the terms of the loan are that it will be repaid out of net income generated from the commercial activities Njamal Services undertakes; it is interest free and unsecured on the basis that it was uncommercial to charge interest or secure the loan in circumstances where the Njamal people are beneficiaries of the unit trust (of which Njamal Services is the trustee).

A similar request was made in relation to Njamal Heritage Pty Ltd to which ISPL responded in a similar manner to the above response, stating:

1. clause s 4.1(b)(iii) and (iv) of the Trust Deed formed the basis of the making of the loan, and the amounts were for the advancement of the culture and religion of the Njamal people;

2. the Board of ISPL authorised the loan in accordance with "the Policy of the Trustee's Board";

3. the terms of the loan are that it will be repaid out of net income generated from the heritage surveys the company undertakes; it is interest free and unsecured on the basis that it was uncommercial to charge interest or secure the loan in circumstances where the Njamal people are the "beneficial owners of the shares in the company"; and

4. as at the date of this response from ISPL, no repayments had been made.

A copy of an ISPL policy document was enclosed with the responses, but that document does not refer to the making of loans at all. The Inquiry identified that the draft minutes from a meeting of the Board on 11 July 2016 indicate that Mr Parker tabled a draft Inter Organisation Loan Policy which was approved by the Board. The Inquiry returns to that document, which was provided to the Inquiry in February 2018, below.

Further, despite ISPL's assertions above, at no stage has ISPL identified to the Inquiry with any precision when the Board of ISPL supposedly made the resolutions referred to above or when or how the loan terms were agreed to. It is possible that ISPL was in part referencing a directors' meeting which appears to have occurred on 9 September 2016. Although not initially provided to the Inquiry by ISPL when required to provide it with a copy of all minutes of Board meetings of ISPL, when the request was further pressed by the Inquiry a bundle of documents were provided on 15 January 2018. The bundle included draft minutes with handwritten amendments of a 15 minute Board meeting apparently held by telephone on 9 September 2016, the day Njamal Services Pty Ltd was registered.
According to the minute, the sole item discussed was Njamal Services Pty Ltd and it was agreed that, pursuant to the ‘direction’ of the TAC meeting on 7 September 2016 for Njamal Services Pty Ltd to be incorporated, the Trust advance funds to Njamal Services Pty Ltd to facilitate the commercial opportunities provided by native title agreements. As noted earlier in the Report, while reference is made to a TAC meeting, in fact the meeting appears to have been a focus group meeting at which all TAC members were not invited. It does not appear to have been until 23 September 2016 that a special TAC meeting was held at which various outcomes from the focus group meeting were apparently discussed. While the provision of funding of Njamal Services Pty Ltd may have been discussed at the focus group meeting and the later TAC meeting, the records of those meetings do not reference any consideration and endorsement of the nature and extent of any such funding, or any limits to be applied. That is important given that since that time over $2 million has been lent or granted to Njamal Services Pty Ltd.

The question as to when and how the terms on which funding was provided were agreed is significant, including in circumstances where the directorships of the above entities were not the same as the directorships of ISPL, although they did frequently have at least one common director. Even if ISPL provided funds on a particular basis, when and how was this communicated to and accepted by the related entities? It would seem from subsequent responses received from ISPL that this may have been a common understanding between the key ISPL directors, some of whom were or are directors of the other entities, and possibly discussed but not documented. It is also not clear whether the directors of the other companies (including a number of Njamal directors) were kept informed, although the level of their involvement in operational matters varied. The apparent lack of clear documentation and authorisation of the loan processes is concerning, particularly given the very substantial quantum of the loans, and the obligations of ISPL both as a matter of company law and trusts law to maintain proper records.

Returning to the Inquiry’s attempt to get greater clarity of the position, by Notice dated 22 November 2017 the Inquiry renewed its requests for information in relation to, inter alia, the above loans. In particular, the Inquiry expressly requested ISPL provide a copy of any documents evidencing the loan/s, their terms and the decision/s and authorisations process to make the loan/s, including but not limited to any minutes or other records of the board of ISPL, TAC, or any other person considering or approving the provision of the loan/s and a copy of any loan agreement.

In response ISPL said in relation to loans to Njamal Services Pty Ltd:

The Loans were progressively made on an “as required” basis. There is no Loan Agreement as Njamal Services Pty Ltd is ultimately wholly owned by the Njamal People.

In response ISPL said in relation to loans to Njamal Heritage Pty Ltd:
The loan was progressively made to fund cultural and heritage work required to be undertaken by the Trust subsequent to the Community voting to dismiss YMAC. The Loans were progressively made on an "as required" basis. There is no Loan Agreement as Njamal Heritage Pty Ltd is ultimately wholly owned by the Njamal People.

ISPL also attached to its response two documents, apparently being printouts of transactions recorded in the accounts established by ISPL in relation to loans from the Trust to the above related entities.

No primary documentation was provided setting out what the amounts were for or who actually authorised them, nor has such documentation been provided since. Further, as commented on elsewhere in the Report, despite ISPL being requested, by email dated 8 August 2018, for an updated version of the document titled "Loan - Njamal Services Pty Ltd Transactions", containing transactions for the period 1 January 2018 to date, and reminders including by email dated 30 August 2018, to date no response has been received to this request.

While some transaction items involved expenditure on particular items, such as a motor vehicle, for the vast majority of the items in the list the only narration is "Njamal Services" or some variation thereon. In effect, it appears that the amounts transferred or expended were transferred or expended to meet the operational requirements of each subsidiary from time to time including, in the case of Njamal Services Pty Ltd, its obligations to provide funding to the NPJV. The transfer of funds into and out of the loan account from each related entity suggested that an approach was adopted whereby money was transferred to or from those entities as the need was seen to arise. That is clearly apparent when the bank account records for those entities is examined, and was broadly confirmed in discussions with Mr White on 4 April 2018 and other staff subsequently. That practice raises questions as to the basis on which funds are being transferred backwards or forwards and whether the transactions are being approved both by ISPL and the related entity.

As recounted earlier in the Report, following receipt of an unadjusted trial balance report for the Trust, as at 31 December 2017, in which the amount said to be loaned to Njamal Services Pty Ltd was recorded as $1,884,792, the Inquiry met with Mr White on 12 February 2018. At that meeting Mr White was asked about the increase. He was not then able to do so but undertook to provide the Inquiry with further information to address the Inquiry's queries, including "loan path" documentation to further explain the Njamal Services "loans".

Following that meeting and also partly in response to an email request made 6 February 2018, on 22 February 2018 Mr White supplied a copy of the draft Inter Organisation Loan Policy. That policy related to the strategy and methodology that would be adopted by the Trustee (and, implicitly, its directors to whom any delegated authority had been provided) in relation to the making of loans to beneficiaries and organisations.
As reflected in the endorsed policy, the background to its adoption included that:

- the TAC wished the Trustee to focus on 6 specified objectives (Objectives), within the context of the Primary and Secondary Objects set out in the Trust Deed. That position was endorsed by and followed by ISPL as Trustee;

- an issue had arisen, in the context of assisting families and individuals to develop and alleviate poverty and their potential to provide training, about whether rather than make payments (i.e. direct distributions of money) it would be better to educate beneficiaries in financial management through the provision of loans;

- additionally, the Trustee wished to ensure that there was a proper cultural basis incorporated into its decision making processes. This would give rise to circumstances where decisions were made where it considered that the Njamal People should not rely upon handouts to being put in a position where they would be required to consider personal financial, commercial management and obligations; and

- in commencing business organisations such as Njamal Heritage Pty Ltd and Njamal Services Pty Ltd, which the Trustee considered would support one or more of the Objectives, it was considered prudent for the Trustee to work with them at arm’s length, including in the provision of funds as loans (rather than direct distributions of moneys from the Trust);

The strategy that was endorsed, to encourage financial accountability, was that where the funding of members, family and other businesses (including, implicitly, organisations such as Njamal Heritage Pty Ltd and Njamal Services Pty Ltd) met the Objects of the Trust and the Objectives, funding would be provided in the form of a loan, rather than a distribution payment.

The methodology that was endorsed:

- distinguished between smaller loans under $20,000 and other loans, over $20,000;

- in respect of smaller loans, provided for a simple formal proposal being provided, that did not necessarily need to offer security, and, after approval, a simple document, or letter, being prepared and signed by both parties;

- for loans above $20,000:
  - required a more formal proposal (which could include a full business plan for larger amounts) that was expected to clearly address various specified matters including how it would achieve the Objects and Objectives; propose performance indicators and targets against the Objectives; have a SWOT analysis for the Trustee to assess its risk; cashflow including loan repayments,
interest proposal (which for commercial activities should be market rate); security offered, which as a minimum should be a charge against the company and any items financed through the loan;

- provided that the loan should be subject to a formal agreement signed by both parties; and

- provided that for significant loans the Trustee may seek independent advice and TAC comments;

required that the Trustee maintain a Register of Loans and undertake a quarterly review of the loan book and activity to ensure, amongst other things, that loan commitments were being met, and if not, there was a strategy in place and, for larger loans, the performance indicators were being met, or if not, what remedial act was.

As far as the Inquiry was able to ascertain, despite the policy having been endorsed, in practice ISPL generally did not comply with its own policy, including in relation to the substantial related inter-company loans. Despite the reference to loans above $20,000 requiring a more formal approach and being subject to an agreement signed by both parties, that did not occur in relation to the significant inter-company loans.

In Mr White's response on behalf of ISPL of 22 February 2018 he stated:

This draft document was never finalised and remains a work in progress. One of the issues confronted by the Trustee in determining amendments to the draft was the contentious issue of references to loans to Njamal people and Njamal businesses. There were instances between July 2016 and May 2017 where the Trustee did inadvertently make loans to Njamal people and Njamal businesses, however this practice ceased when ISPL determined that it did not wish to put the Trust into a position where it had to sue a Njamal person or family to recover a loan.

Another fact that will not have been lost on you is that the Stakeholders in Njamal Services are exclusively Njamal people, either as the sole beneficiaries of the NPT or as sole beneficiaries of the Njamal People's Benevolent Trust. As such, you should understand why ISPL;

- waived the requirement of formal Loan Agreements acknowledging advances by the NPT to Njamal Services

- took a less formal approach to authorising requests by Njamal Services for additional funding, but certainly not at the expense of Njamal Services having to justify and subsequently acquit the expenditure.

Referring to my comment above regarding the many jobs and business opportunities created by Njamal Services and the NPT, we believe the loan to Njamal Services is critical in achieving the 1st, 3rd and 6th Objectives (endorsed by the Njamal community) contained in the draft Inter Organisation Loan Policy.

The first, third and sixth objectives to which Mr White referred are (as copied directly from the policy document):

1. Promote the financial development of the Njamal People

3. Protect the well-being of the Njamal People by assisting Njamal People to obtain life’s essentials like accommodation and promoting pride in one’s self and self-care
6. Provide Njamal People with access to education and training, assisting with school attendance, early childhood financial training and life skills.

Insofar as Mr White indicated in the above response that the policy was a draft document and never finalised, as previously noted, according to the draft 9 September 2016 minutes it was approved at that directors’ meeting.

In ISPL’s lawyer’s 29 March 2018 submission on ISPL’s behalf (see further above) it was subsequently stated that:

Not every proposal has been funded in relation to the Inter Organisation Loan Policy it is suspected the document you have been shown is not one adopted either by TAC or the trust but is one which was prepared for and included in the “PBC” rulebook which has been lodged with the relevant regulatory authorities.

That is a surprising proposition given the minutes of the Board provided to the Inquiry, the content of the document, the previous responses from ISPL which identified the document as a relevant policy document and the absence of any reference to such a document or attachment of it, or a similar document, in the Prescribed Body Corporate rule book for the Nyamal Aboriginal Corporation that was registered on 6 February 2018.

Returning to Mr White’s 22 February 2018 response, he explained:

Finally, we are meeting with the NPT’s Auditor on Tuesday of next week to discuss issues that need to be discussed before he finalises the audit. One of those issues is the treatment of the Loans to Njamal Services and Njamal Heritage. These currently appear as Assets on the Balance Sheet. Without wishing to pre-empt the outcome of those discussions, I am receptive to the idea of re-classifying the Loans to Njamal Services and Njamal Heritage as Distributions of Trust Funds i.e. instead of these items appearing as an Asset they’ll be treated as a Trust Distribution. I’m more than comfortable relying on the precedent set by The Myer Family Company Pty Ltd in providing non-refundable Grants to Karlka Developments and accepted by Grant Thornton, the NCT’s Auditors.

Despite the Inquiry’s repeated attempts to ascertain specific details about who authorised transactions which were reflected as loans to these related entities, this information has not been forthcoming from ISPL. While the Inquiry has a high level understanding of the approach adopted, including via an authorisation matrix that was developed between August and November 2017, unanswered questions remain.

In a response provided on behalf of ISPL on 29 March 2018 (see above), its legal representative, Mr Christensen, indicated that all financial decisions require the approval of the Board from time to time. He noted that the Trust was unaware of any time that decisions had been made without appropriate authority and noted that the Inquiry had not provided examples of the same. Further and in any event, the Trustee’s position was that as a checking mechanism all payments are made by a process that requires the authority of 2 persons.

Further, in a further response in October 2018 Mr Christensen relevantly advised:

Loans and Advances to Njamal People
ISPL is investigating the quantum of any loans or advance payments made to Njamal people from Trust funds, where such loans or advances were granted contrary to ISPL’s policies or not documented.

Transfer of funds from the Trust to Njamal Services Pty Ltd (NS)

The method by which funds were transferred from the Trust to NS is set out in the 2017/2018 Audited Financial Report (copy attached). These transfers are currently classified as distributions (as opposed to loans) and the reason for this has been set out in prior correspondence to the Inquiry.

The purpose of these funds is so that NS may provide the NPJV with working capital (transferred to NPJV by way of loan) and to provide members of the Njamal People with funds to assist in the development of businesses by the Njamal People (transferred to each relevant member by way of distribution).

We refer to prior correspondence by ISPL to the Inquiry in this regard, specifically an email dated 22 February 2018, a copy of which is attached.

Payment authorisations are built into the bank account administration and authorisation processes. Distributions from the Trust to NS are authorised by a director of ISPL and loans by NS to the NPJV and distributions by NS to members of the Njamal People are authorised by the directors of NS but only after the receipt of a completed requisition form.

Where NS is providing members of the Njamal People with funds to assist in the development of businesses under its “Economic Development” objectives, ISPL has a practice of encouraging repayment of these funds. So despite these being technically distributions by the Trust, this “loan” terminology is important and useful to promote the idea of having to repay business assistance and encourages the continued operation of the business, keeps the funding of businesses to a minimum and in turn facilitates the financial support of other businesses.

Going forward these practices are being documented in the BMS.

While the Inquiry acknowledges the explanation of the approvals processes that are apparently in place, the fact remains that ISPL has failed to clearly identify the particular person or persons who, on behalf of ISPL, authorised and approved, or has or have continued to authorise and approve, the ongoing lending or advancing of funds to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust, which significantly increased in 2016/17. While undoubtedly Mr White authorised and approved some expenditure, it is not known who else did, nor have any documents reflecting such authorisations and approvals been provided to the Inquiry. This is of concern and possibly ties in to the auditor's concerns referred to later in this Chapter regarding the absence of visible authorisation in relation to a high percentage of payments sample tested.

A further point should be made. While ISPL has apparently been adopting an approach of complete inter-organisation transparency in its approach to managing the Trust and related activities, that comes with risks. These include the possibility of the separate legal personality of the related entities and the responsibilities of officers of the related entities to those entities, and of the Board of ISPL to ISPL, and of ISPL as Trustee, being overlooked if appropriate care is not taken. For example, while the authorisation matrix confers authorities on various different persons, including of the related entities, it is not clear whether those entities have themselves endorsed or adopted equivalent policies or practices in relation to expenditure of funds, and not all of them have had common directors at all times.
Further, where funds are routinely transferred to and from the bank accounts or related entities to meet cash flow requirements, the question arises as to whether those transactions have been approved by the related entities. It is important that ISPL and its related entities clearly document and approve the process by which such transactions may occur so that the practices adopted are clearly endorsed on both sides of the transactions.

**ISPL’s consultation with the TAC in relation to loans and advances**

In the Inquiry’s view ISPL did not fully comply with its consultation obligations under the Trust Deed in respect of funds loaned or advanced to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust and Njamal Heritage Pty Ltd.

The Inquiry does however accept that the TAC minutes record considerable consultation with the TAC in relation to various proposals that were being considered or had been entered into by the Trustee or those entities, including proposals which had been or were ultimately entered into by Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust, effectively funded by the Njamal People’s Trust. Also, the minutes are not always complete and do not always record all significant aspects of matters discussed.

The Inquiry is also satisfied based on those records and its general enquiries, including discussions with many individual TAC members, that the TAC was generally kept aware by ISPL and consulted with it in relation to various projects that were contemplated being entered into. However, while particular projects were the subject of consultation and potential budgets or expenditure limits discussed, it is important that the nature of each proposed investment or distribution and any limits on expenditure be cleared communicated in the consultation process.

The Inquiry ultimately concludes that ISPL did not fully comply with its consultation obligations under the Trust Deed. Neither the TAC minutes nor other documents provided to the Inquiry appear to record, nor is the Inquiry satisfied based on its other enquiries, that ISPL consistently consulted with and obtained the recommendations of the TAC in respect of decisions to loan or advance funds, whether by way of investment or distribution, particularly to the significant extent to which that has occurred, to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust and Njamal Heritage Pty Ltd.

ISPL has however indicated that it is reviewing and has commenced altering its practices. The adequacy of consultation with the TAC and relevant recommendations are discussed further in the TAC Chapter, Chapter 10.

**Recommendation 19 (Chapter 8)**

1. ISPL seek appropriate directions from the Supreme Court in relation to the scope of its power to lend or advance moneys and to distribute moneys to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust, and to Njamal.
Heritage Pty Ltd, and, if necessary and appropriate, to absolve it in respect of any breaches of trust that may have arisen in relation to the loans and grants that have already been made by it.

2. ISPL consider whether to obtain advice as to whether it is open to, and if considered appropriate, to amend the Trust Deed to clarify the scope of its powers in relation to lending or advancing money, and distributing money to wholly owned related entities.

3. ISPL and its related entities review and document in writing the terms and conditions on whose authority from both ISPL and the related entity funds may be provided to or expended on behalf of the related entities, by ISPL as Trustee of the Trust.

4. ISPL ensure that any such transactions are correctly and accurately recorded and classified in its accounts to reflect the true legal character of the transactions.

5. ISPL, review previous decisions where any loans have not been fully repaid or were effectively waived or recharacterised despite having originally been characterised as loans, to ensure that the decisions are properly documented and defensible and, if not, take such remedial action as may be warranted.

**Cash Flow and Liquidity**

In late 2017 the Inquiry was made aware of concerns that ISPL may have been placing limits on certain expenditure, due to limits on available funds. One particular example was in relation to funding aspects of native title working group meetings. This was queried with Mr Carter who indicated that there were no difficulties with such funding being provided.

Given the ongoing delays in finalisation of the audit of the 2016/17 financial year and the passage of time, the Inquiry sought updated financial information from ISPL.

On 11 January 2018 the Inquiry was provided with a further copy of the unaudited financial reports for the Trust dated 9 October 2017, and trial balance as at 31 December 2017, with a caveat that not all general administration accounts had been reconciled due to administrative staff having been on leave. It was also indicated that the audit was expected to be completed on or before 15 February 2017 (sic 2018). The Inquiry identified that there had apparently been a significant change in the financial position of the Trust which warranted further consideration. In particular, it was apparent from that document that the loan from the Trust to Njamal Services had dramatically increased from $723,037 as at 30 June 2017 to $1,884,792 as at 31 December 2017 and the loan from the Trust to Njamal Heritage Pty Ltd had more than tripled, from $199,068 to $608,402, in the same period.

Given the difficulties the Inquiry had already experienced in ascertaining a clear explanation and supporting documentation in relation to the authorisation and decision-making process to approve inter-company loans, the Inquiry was concerned to understand why there had been
such a substantial increase in those loans, whether appropriate controls were in place, and any implications for the cash flow and sustainability of such funding.

On 16 January 2018 various other financial reports were provided to the Inquiry including for Njamal Services Pty Ltd as trustee for the Njamal Charitable and Benevolent Unit Trust and for the NPJV for 2016/17. The Njamal Services Pty Ltd financial statements disclosed a net loss, and corresponding net equity deficit, for the 2016/17 financial year of $529,970, in part contributed to by its 60% share of the NPJV loss for that period of $161,274. Its liabilities included an inter-company loan from the Trust of $722,473 and assets included a loan to the NPJV of $191,722. The NPJV profit and loss statement for the 2016/17 financial year recorded a net loss, and corresponding net equity deficit, of $268,790 and a liability in the form of a loan from Njamal Services Pty Ltd of $191,065.

Given the financial performance and position reflected in the financial statements for Njamal Services Pty Ltd and the NPJV at the end of the first financial year in which they operated, the Inquiry was concerned to better understand whether the position had improved or deteriorated over the next 6 months, recognising those entities were in a start-up phase and were not necessarily expected to be profitable immediately.

On 29 January 2018 the Inquiry therefore requested trial balance reports for those entities as at 31 December 2017. On the morning of 9 February 2018, shortly before the Inquiry met with Mr White, he provided the Inquiry with balance sheets for those entities as at 31 December 2017 and profit and loss statements for the period 1 July to 31 December 2017.

The Inquiry briefly reviewed the statements before meeting Mr White. Based on statements, amongst other things, Njamal Services Pty Ltd recorded an improvement in performance in that it recorded a net profit of $110,462 for that 6 month period, inclusive of its revenue of $334,420 in respect of its 60% share of the NPJV profit for that period. Its recorded assets included a loan to the NPJV of $750,676 and profit attributable to joint venture of $173,146 (being the accumulation of its 60% share of the net loss incurred in the NPJV’s initial part year of operation and the profit during the first 6 months of the 2017/18 financial year). Its liabilities included an amount recorded as being a loan from the Trust of $1,885,292. While still recording a net asset/equity deficit, the deficit had decreased from the position at 30 June 2016 and was now a deficit of $420,729 rather than the $529,970 deficit 6 months earlier.

In respect of the NPJV, its performance substantially improved, recording a six month profit of $557,366 in that period, which was recorded as being distributed between the joint venturers, leaving a negative net equity position of $261,248 ie essentially the same position as it was in at the start of the period, prior to profits being distributed. The NPJV was then indebted to Njamal Services Pty Ltd in respect of its loan of $750,676.

At the meeting with Mr White a range of issues were discussed in relation to the management and administration of the Trust. These included the Inquiry’s ongoing concern about being
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provided with further information and documentation in relation to the process of authorisations of the making of the above inter-company loans, assessing the performance of the related entities and the reasons for the substantial escalation of the amount of intercompany loans.

One of the immediate concerns of the Inquiry was to ascertain the reason why the loan to Njamal Services Pty Ltd had escalated so much, and was so much higher than the loan to the NPJV from Njamal Services Pty Ltd. In other words, of the recorded loan of $1,885,292, only $750,676 was attributable to the funding of the NPJV, leaving over $1.13m to seemingly fund the other operations of Njamal Services Pty Ltd and, through it, Njamal Security Pty Ltd.

When asked about the loan provided by the Trust to Njamal Services Pty Ltd, Mr White explained that "the loan is effectively working capital" for the NPJV. That explanation is correct insofar as it relates to the portion of the loan which was effectively on-lent by Njamal Services Pty Ltd to the NPJV (on many occasions payments were paid directly from a Trust bank account to the NPJV bank account or vice versa, without having passed through a Njamal Services Pty Ltd account). It was not however accurate insofar as it applied to the balance of the loan, which itself considerably exceeded the proportion provided to the NPJV.

Mr White was asked about the jump in the quantum of the loan from approximately $700,000 as at 30 June 2017 to $1.8m as reflected in the Trust's 30 December 2017 balance sheet. Mr White, who, in fairness, it seems had not previously reviewed this aspect of the statement (although it was he who forwarded it to the Inquiry on behalf of the Trust) initially suggested that the total may have included the $1m loaned or otherwise invested in the carbon group of companies (discussed previously) but when his attention was drawn to separate line items in the trial balance for those monies, Mr White indicated he was not able to explain the increase but undertook to look into it and to provide the Inquiry with "loan path" documentation to further explain the Njamal Services "loans". He also raised an issue as to whether significant 'work in progress' may not have at that stage been reflected in the accounts.

Mr White's lack of immediate knowledge in respect of the loan was concerning to the Inquiry as Mr White has been the sole director of ISPL since October 2017 when Mr Aird resigned and, prior to that, had been one of only two directors since August 2017, Messrs Carter and Parker having resigned on 4 July 2017. He was also a director of Njamal Services Pty Ltd since its inception. This leads the Inquiry to ask: if Mr White, as sole director, did not authorise the significant loans/funding provided to Njamal Services Pty Ltd in the second half of 2017, who did? To date, the Inquiry has not been provided with a satisfactory answer to this query.

In relation to the approach taken to funding the NPJV, Mr White broadly indicated that ISPL had a cash flow approach and that they knew what funds were coming in and what funds were reasonably available for what was required. Decisions were then made with that in mind so that a sustainable investment decision was made in the NPJV/Njamal Services Pty Ltd. He
further explained that their preparedness to provide capital funding had reached its limit and that as the NPJV had now operated successfully for 12 months it could now obtain its own facilities. While Mr White accepted that ISPL had reached the limit of supporting the NPJV from the Trust, he maintained that this was not because the Trust did not have the capacity to provide the funds.

In relation to the funding of other Njamal related business through Njamal Services Pty Ltd or the NPJV, Mr White explained that some funds and assistance had been provided, in some cases like seed funding, and the businesses were generally operated to begin with under a profit share agreement, either under the umbrella of the NPJV or Njamal Services Pty Ltd, depending on the nature of the business. This would help those businesses grow while their Njamal operators gained experience. While it was anticipated funds would be returned through those businesses, Mr White made the point that the Inquiry was examining the position during the ramp up phase and that there had not necessarily been sufficient time to see the outcomes of supporting these activities. The point had also been made by Mr Parker and Mr White at earlier stages in the Inquiry, which the Inquiry accepts, that it was not necessarily to be expected that all indigenous projects and businesses supported through the Trust were to be expected to always succeed, and that there were many and varied challenges that might arise, and had, in some cases already arisen.

Mr White was also questioned in relation to the means by which ISPL directors were made aware of the activities and financial position of the Trust's wholly owned companies. He explained that the organisation operated on a principle of complete inter-organisation transparency, such that directors and other relevant staff could access information, including financial information, about the other entities as part of the established practices. The Inquiry also understands that the Trustee insisted on the accounts for those entities all being maintained by Trust staff, including in the case of joint ventures such as the NPJV. As discussed later in the Report, this raises a number of potential governance issues. That includes because, in practice, certain of the companies were largely centrally funded by the Trust and operated in a manner whereby if cash flow was required by one entity, it would be transferred from another entity or vice versa depending on the particular need.

At the conclusion of the meeting it was agreed that Mr White would provide further information and documentation to the Inquiry in the immediate future to address a range of issues and concerns discussed. This included detailed cash flow information including for future royalty payments and explanation of the loan pathway for approval of loans to related entities. While Mr White promptly forwarded some cash flow records and projections and budgets for the NPJV, he did not follow up with the other discussed materials, apparently under a misunderstanding. Even after the position was clarified, it was surprising, given the significance of such matters and concerns expressed by the Inquiry at the meeting with Mr White, that these matters were not attended to with much greater urgency.
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Mr White also provided the Inquiry later that day with the following materials, which in November ISPL had indicated would be provided (and had been the subject of follow up requests from the Inquiry):

1. a copy of the agreement executed by Njamal Services Pty Ltd and Pilbara Resource Group Pty Ltd for the creation of the NPJV;
2. NPJV’s budget and cash flow forecasts; and
3. the NPJV capability statement.

Before returning to the narrative of the engagement between the Inquiry and ISPL in relation to cash flow and related financial issues, it is convenient to say something further about the NPJV.

**NPJV**

Broadly the above three categories of document reflect that the NPJV "was formed to provide greater opportunities and development for the Njamal people", that Njamal Services Pty Ltd has a 60% interest in the profits and liabilities of the venture, and that Njamal Services Pty Ltd's' primary obligation in respect of the venture is to provide all working capital (as an interest bearing loan). These core matters were also confirmed in meetings between staff of the Inquiry and Scott Dryland, one of the directors of Pilbara Resource Group Pty Ltd. Mr Dryland explained that there were three priorities for NPJV, in the following order of priority; to create a return to the Trust, to gainfully employ Njamal people, and to identify family business opportunities and manage those opportunities end to end so that the family businesses could succeed. The Inquiry accepts that to be the case.

The documents confirmed that a reasonably detailed budget forecast had been prepared and endorsed by both joint venturers in relation to its first 12 months of operations, as well as budget and cash flow forecasts that were apparently updated at regular intervals. The Inquiry was also advised that regular management reports were prepared and made available to both joint venture partners. While various projections were included in the materials provided to the Inquiry, the projections appeared to be prepared on the premise that the NPJV would be the successful tenderer for a range of different projects. In reality, it had not at that point been as successful and profitable as quickly as some of the projections reflected. That is understandable as the NPJV tenders in a competitive market and must demonstrate capability, so will not always be successful in its bids. Further, the cash flow budgets are management tools and there are numerous variables that can affect the revenues and costs of entities engaged in the provision of the type of services engaged in by the NPJV. This highlights however why Njamal Services Pty Ltd, with its obligation to fund working capital of the NPJV, and in turn ISPL which, in effect, has been providing funding to enable that obligation to be met, ought be reasonably cautious in relying on receiving repayment of
particular projected amounts to fund other expenses and activities, without appropriate contingencies being allowed for. So too, in considering future income projections, the amount of royalties that might be received on a year to year basis can vary considerably depending on the economic conditions and a range of other factors and, as Trustee, prudent assumptions should be made to protect the Trust's ability to meet other commitments. It follows that ISPL's apparent system of keeping minimal cash balances has been potentially problematic.

The Inquiry met with Scott Drysdale, General Manager of the NPJV and director of the Pilbara Resource Group Pty Ltd, and was impressed with his drive, knowledge and apparent ability together with his colleague, Scott Thompson, Operations Manager, to drive the successful operation of the joint venture, and achieve positive outcomes for Njamal people through that process. The Inquiry has little doubt that the primary driver of the success of the NPJV has been the commitment, effort and ability of Mr Drysdale and Mr Thompson to achieve the above objectives in partnership with the Njamal People. Indeed, testament to the success of the NPJV and its reputation for its capability and successful partnering with the Njamal People is its receipt in July 2018 of the 2018 Australian Mines and Metal Association National Indigenous Employment and Retention Award. The press release provided:

Leading Western Australian Indigenous contractor, NPJV, has won the 2018 AMMA National Indigenous Employment and Retention Award, in recognition of its impressive employee retention rate and innovative business model.

AMMA is the national representative for Australia's resources, energy and supply industry employers.

The award, announced last night in Melbourne, recognises an organisation that has embraced training and employment initiatives resulting in the successful engagement of Indigenous Australians.

NPJV is less than 2 years old and started with only three employees and an ambitious plan to introduce a new concept in Native Title contracting.

The company now employs a large amount of people and has secured more than $15 million in contracts.

It has also helped establish four businesses run by Njamal families with the aim of each company eventually being a stand-alone enterprise.

The Njamal People partnered with highly respected Pilbara Resource Group Pty Ltd (PRG) to help make their vision of a professional, financially astute contracting business a reality.

They formed the unincorporated Njamal People Joint Venture (NPJV) with a focus on continuous, rigorous training, and a robust management framework to support Indigenous workers to deliver quality services to Western Australia’s mining and construction sectors, now and in the future.

A team of technical and governance professionals drive the company with specialist knowledge and insight into what it takes to meet the demands of major miners and contracting firms based in the mineral-rich Pilbara region.

Managing Director, Scott Dryland, who travelled to Melbourne alongside Njamal Traditional Owner Elizabeth Walker to accept the award at AMMA’s Centenary celebration, said it was a significant acknowledgement for the Njamal People and their aspiration to be industry leaders.
“In a very short period of time NPJV has demonstrated that a strategically operated business which recognises the values of Indigenous people and strives for optimum professionalism can be commercially and culturally successful,” he said.

AMMA chief executive Steve Knott said the NPJV journey was truly remarkable.

“NPJV now employs a high percentage of local Njamal People and it competes for and wins work based on its professional business model.”

Returning to the engagement between the Inquiry and ISPL in relation to cash flow and related financial issues, further information and materials sought at that meeting with Mr White were not provided, despite follow up and a commitment by Mr White to provide a bundle of substantial further information by 22 March 2018, including as to financial position and cash flow forecasts. The Inquiry therefore issued a further request for information and documentation in connection with various issues including the financial position, liquidity and performance of the Trust and Njamal Services Pty Ltd. It sought an urgent response to various questions and, in any event, by no later than dates specified in late April. ISPL provided a response to many requests on the last specified day, some of which were incomplete and also omitted to respond to a number of the requests.

In the meantime, on 4 April 2018 the Inquiry met with Mr White and Mr Carter to discuss a range of outstanding issues and clarify ISPL’s position in respect of those matters. At the meeting it was provided by Mr White with a copy of the recent account balances of the bank accounts of the Trust and certain of its wholly owned subsidiaries. The printout of the account balances was current as at 3.28pm on 23 March 2018 and revealed that the account balances were then as follows:

- Njamal Heritage Society Cheque Account 612810692536 $4,981.08
- Njamal Peoples Trust Society Cheque Account 612810679649 $195,471.04
- Njamal Services Pty Ltd Society Cheque Account 612810692296 $208.22
- NPT PHE Society Cheque Account 612810697388 $231.54
- NPT Trust Saver Business Online Saver 612810679868 $12.43

While the funds in several of the accounts were very low, the funds in the Trust cheque account were still significant. The Inquiry's concerns about cash flow issues were therefore somewhat allayed. As discussed later in the Report, it was accordingly of considerable concern to the Inquiry to learn, at a later stage, that $100,000 had been transferred into the trust cheque account by ISPL from the NPJV account, immediately before the transaction balance printout was printed, and then a few days later transferred back, it is said due to working capital and cashflow requirements. The Inquiry was not advised of this occurrence when provided with the printout of the account balances, although in its view this ought to have been done, to avoid the Inquiry being misled.

At the meeting on 4 April 2018, discussion was also held in relation to the information that had been sought by the Inquiry, including that which Mr White had previously undertaken to provide to the Inquiry in relation to cashflow and ISPL’s financial position and additional
information about the process of authorisation for funds going to related entities. Mr White indicated that they did expect to respond shortly, and that the close out of the auditor's report would help with that, which was expected to be signed off the following day. He indicated that when everything was consistent they would deliver the information, which would come with the previous quarter cash flow movement.

Mr White also explained that, as later occurred, a spreadsheet would be provided with incoming and outgoing transactions. He emphasised that the Trustee was not trying to maximise the bank account, it was managing the cashflow like a business, it was no good having a large bank balance, and the Trustee was making the money work.

In response to queries as to whether the Trust had experienced any cash flow difficulties in terms of meeting debts Mr White indicated that most of the revenue stream of the business was quarterly and that ISPL planned the business to run the cash out on a quarterly basis; that is, using the funds. He noted that if there were unexpected costs it would stress the position but that the Trust was currently in the best shape that it had been for some time and was starting to see the benefits of the substantially different mining agreements [that had been negotiated under ISPL] with $900,000 of cash and shares being received from Pilbara Minerals Limited that day. Subsequent examination of records provided by ISPL confirmed that to have occurred, by way of a $450,000 cash payment and allocation of $450,000 of shares, as provided for in the agreement reached in relation to the Pilgangoora project.

Mr White acknowledged that quarterly payments are always variable. In respect of the NPJV he indicated that the working capital was approximately $700,000 and that, as the business had now been running for over 12 months and had a good track record that banks were recognising, they were looking to get normal facilities in place. That would also potentially allow the Trust to maximise the variety of things that the Trust did other than making its money work and create jobs through the NPJV. The types of contracts entered into were intended to be long term sustainable contracts with low risk, such as catering, security and water contracts. This was also confirmed in discussions with Mr Scott Dryland, the NPJV General Manager.

Further documents were eventually provided on 26 April 2018 after conclusion of the audit and release of the audited financial statements for 2016/17.

The information was surprisingly limited given the history of exchanges and period of time taken to deliver the material. It was nevertheless informative, albeit incomplete in certain key respects. In the covering letter it commenced:

Thank you for your further inquiry into the Njamal People’s Trust and the Njamal owned businesses and family business activities.

The information on historical cash flow since 1 January 18 to date and the forecast to end September 18 is attached and shows a carefully managed use of funds to obtain the maximum benefit to the Njamal community.
It is important to note that the Njamal People’s Trust is now focused on job creation and business development for the Njamal people.

We note that the typical "trustee managers" are often reimbursed on what could be described as conflicting arrangements whereby their remuneration is related to the cash balance in Trust bank accounts. The conflict is that therefore they are motivated to enhance their Trustee fees by maintaining high cash balances as opposed to meeting Trust objectives of advancing and promoting the health, wealth and wellbeing of the beneficiaries.

ISPL at the NPT is focused on family business development, job creation, sporting, community, health and wellbeing and generally promoting Njamal heritage and culture. Consequently, rather than maximising bank account cash balances, ISPL is focused on putting the money to work on projects, businesses and employment. ISPL manages NPT capital through investing in and creating business opportunities which provide long term benefits as well as immediate employment.

The letter then went on to describe various investments made by the Trustee. Surprisingly given the extensive delay in provision of cash flow materials, certain key figures in relation to profit projections were missing, as emphasised in bold:

Investments include:

- NPJV – current revenue $15m p.a. and profitability for 2017---18 projected of $x (60% share)
- Action Catering Njamal Mining JV – current revenue exceeds $500,000 per month and Njamal Mining Pty Ltd’s share of profit for 2017-18 is projected to be in the vicinity of $200,000
- Indigenous Carbon Group – Long term investment (51% share) and (indirectly) owner of Clover Downs Mertondale Pastoral Lease
- NPT’s PHE Office, 7 Wedge Street Port Hedland – Property Investment current value estimated at $700,000 (vs $500,000 purchase cost)
- Njamal Heritage Pty Ltd – restructured and now fully managed by Njamal people, 1 F/T job created, 10 P/T jobs created
- Westsafe (Njamal Services security business) – 12 jobs and profit f/c for Q1 2018 of $x (100%) owned
- Hedland Harbour Café business – current revenue f/c for Q1 2018 of $x and profitability of $x (This is being used as a Training Centre for catering services) – 3 jobs created
- Family Businesses created:
  - Jukawali Courier Service - 2 jobs
  - Cunderline - Labour Hire – 18 jobs created
  - LC Cranes – Rigging and lifting services – 2 jobs created
  - Winaru Cultural Awareness Training Services and cultural development work – 1 job created
  - Wyndaru Catering - 5 Jobs created
  - Indigenous Marine Services - 3 jobs created
  - Land Surveys Njamal JV - 1 Job created
  - In total 32 jobs created in family business

The NPT is providing working capital for the above businesses. This working capital is currently being treated as “loans” with an obligation on the businesses to repay it in due course.

At the moment these businesses are all relatively new and are already operating with profitability that will see them able to repay the "loans" or obligations placed on them.
We do not need to remind you that The NPT is a discretionary trust. ISPL has chosen to implement that discretion by investing Trust funds, as outlined above, pursuant to Clause 4.2 of the Trust’s Deed.

After consulting with the Trust’s Auditor and legal advisor (Trainor Legal), and in order to comply with Australian Accounting Standards, ISPL has treated parts of the value of the Loans made to Njamal Services Pty Ltd and Njamal Heritage Pty Ltd as “Distributions” in the Trust’s financial statements for the year ended 30 June, 2017. This treatment is entirely consistent with the manner in which other Trustees have dealt with Loans made to indigenous enterprises in the past. We have previously provided you with an example of how other Trustees of indigenous Trusts account for the economic support they provide to the beneficiaries, being The Myer Family Company Ltd’s treatment of Grants (not Loans) made to Karlka, the Njamal Services Pty Ltd equivalent of The Nyiyaparli Charitable Trust. These non-recoverable Grants totalled $1.867m and $2.199m during the years ended 30 June 2016 and 2015 respectively.

It is now clear that since the Njamal People engaged ISPL to make a difference, ISPL has made giant inroads into creating businesses, creating jobs, creating pathways for the long term benefits of Njamal people that it was mandated to do. This focus is materially different to the passive approach that has been the habit of self-serving, arguably conflicted Trustees, whose inactivity in promoting the best interests of those they claim to serve is hardly the best use of the assets at their disposal.

We provide the attached information which must be read in light of the above, and consider particularly that the NPT wealth is now actively working in the businesses effectively owned by the Njamal People’s Trust and the Njamal members and families rather than sitting in passive bank accounts.

Managing the Trust’s cash flow is a complex matter given the activities the Trustee is undertaking to “Bridge the Gap” and will continue to be however it is not useful for people with limited knowledge of the Trust businesses to convey misinformation to the Inquirer. We are please for the opportunity to clear any concerns and trust that this satisfies your questions in relation to the Liquidity of the Trust.

In the above letter it was suggested that the information on historical cash flow since 1 January 2018 to date and the forecast to end September 2018 in a spreadsheet provided to the Inquiry "shows a carefully managed use of funds to obtain the maximum benefit to the Njamal community". The Inquiry rejects that assertion. Further, as noted below, the Inquiry identified significant issues with some of the figures in the spreadsheet to which it has received no satisfactory explanation to date. ISPL noted that managing the Trust’s cash flow is a complex matter. The Inquiry agrees. However, while the Inquiry accepts that the approach to managing funds was designed to maximise the benefit to the Njamal community, and many successes have been achieved, it does not accept that this was consistently carefully and effectively managed and that adequate allowance was made for future uncertainties.

The letter then went on to describe various investments made by the Trustee. Surprisingly given the extensive delay in provision of cash flow materials, and significance of those matters, certain key figures in relation to profit and revenue projections were missing and were noted as $x. Despite this omission being drawn to ISPL’s attention and clarification being sought as to the omitted figures, the Inquiry has never been provided with the missing information. That raises further concerns as to the ongoing profitability of those various businesses and the adequacy of ISPL’s review and control of such matters.
The cash flow spread sheets revealed that at times the available cash in bank accounts was effectively run down or expected to be run down to a very low balance.

One document provided by ISPL was a cash flow schedule for the Trust for the period from January until May 2018, on a weekly basis, the final two weeks containing forecast rather than actual figures.

According to the actual cash flow portion of the cash flow chart the week end cash flow position from the start of 2018 until the week ending 18 February 2018 varied between approximately $710,000 and $1.2 million. The Inquiry's own analysis of the bank account statements provided to the Inquiry showed many of those figures to be significantly at variance with the actual cash balances in all accounts as at the end of the weeks specified. For example, as contrasted to a recorded closing bank balance of $710,674, the actual combined bank balance was $95,406 on 28 January 2018. Further, on 4 February 2018 the reported balance was approximately $800,000 as compared to the actual amount based on bank statements of approximately $640,000. While there may have been some timing differences between amounts recorded in the actual bank statements and amounts used in preparation of the cashflow spread sheets, there was no obvious explanation apparent to the Inquiry as to some of the significant differences.

Further, according to the cash flow spreadsheet provided to the Inquiry, during the week ending 18 February 2018, the transfer of a significant sum of $804,564, recorded as an intercompany loan of $804,564 to Njamal Services Pty Ltd, was recorded as purportedly having been made, resulting in a substantial depletion of the bank balances to approximately $227,000. As far as the Inquiry could ascertain, that is not however reflective of the actual transactions which are recorded in relevant bank statements provided to the Inquiry. It therefore sought a copy of the loan account for the Trust to Njamal Services Pty Ltd covering that period. Remarkably, given that it can be readily printed from the accounting system of ISPL, and despite further request, ISPL has still failed to provide that information. It also despite repeated request failed to provide certain management reports sought in relation to the NPJV, only doing so on 2 September 2018. Of note, the report dated 28 May 2018 records that the loan account was not reconciled and that a comparison was to be done of Njamal Services Pty Ltd NPJV records.

According to the cash flow spreadsheet, the total closing end of week bank balances then declined until it was only approximately $25,000 as at the week ending 11 March. With the receipt of payments of $450,000 from Pilbara Minerals in late March/early April the reported total bank balance increased to $525,000 at the end of the week ending 1 April 2018, before dropping to $80,000 as at 8 April, $11,000 as at 15 April and was forecast to be only $5,031 at 29 April. The following week it was predicted that the balance would increase to
approximately $475,000 with the forecast receipt of royalties from mining companies, of $625,000.

It is apparent from the above that the cash flow position of the Trust is highly dependent on forecast mining royalties, and limited scope to accommodate any unexpected expenses (absent drawing upon other assets or potentially itself obtaining finance, the latter of which to date ISPL has not done as far as the Inquiry is aware).

On 2 May 2018 a further meeting was held with Mr Carter, accompanied by his lawyer, Mr Christensen. In the course of the discussion the Inquirer indicated that the cash flow information provided did not answer whether there were circumstances of debts being not paid or unable to be paid. It was also indicated that the Inquiry still needed to know, and did not yet know, who authorised payments particularly loans that had since been altered to be reflected as distributions.

At the request of the Inquiry, and owing to concerns that the Inquiry had about the liquidity of the Trust, ISPL also supplied the Inquiry with bank statements for the accounts held by ISPL and related entities. There is a large amount of data in those statements, some of which is dealt with elsewhere in the Report, but for present purposes the Inquiry simply notes that the balance of each account as at 24 May 2018 was in credit, with the total cash at hand being approximately $167,000. Mr White also indicated, in writing, that other than in respect of some legal fees which are the subject of a taxing process, ISPL has not defaulted on any debts due and payable. The Inquiry notes that a dispute also currently exists in relation to various fees charged by Mad Empire in relation to work connected with the contemplated determination celebration (which did not proceed, as noted elsewhere in the Report).

Cash Position in January/February 2018

At around this time the Inquiry also became aware of concerns from more than one source as to whether the Trust was experiencing cash flow issues. This was in part due to reported concerns that the Port Hedland Office had been unable to make various distributions as it did not have sufficient funds remaining in its account.

That ISPL had been experiencing a period of tight cash flow is borne out by an email from Mr White dated 12 October 2017, attaching a draft budget, in which he observed that:

> We must also note that the actual costs since 30 Jun 17 are greater than this budget allows so we have a significantly tight cash flow for now.

In mid to late January 2018 issues arose as a series of payments had been authorised through the South Hedland office but payment was declined by the bank due to there being insufficient funds in the South Hedland account to cover the payment. This created difficulties as Njamal people in at times urgent need of assistance were not receiving support as
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anticipated and were "having a go" at Ms McPhee, the bookkeeper in Port Hedland, as they believed that she was not approving the payment of bills.

Ms McPhee tried to follow up with the Perth office of ISPL on 31 January without success, asking that $7,000 be transferred into the South Hedland account so that a series of payments authorised between 17 and 24 January could be paid and asking for a further $7,500 to be paid to the bank to cover the costs of that day's payments.

On 1 February the Port Hedland General Manager, Mr Van Der Ende, tried to ascertain the problem and if the South Hedland account had been topped up. Ms Guo eventually responded, cc'ed to Mr White and Mr Zikwature, the ISPL accountant based in Perth, that:

NPT simply has no money.

In the Inquiry's view, such a response would understandably have been extremely concerning to Ms McPhee.

Ms McPhee responded late that evening, expressing her concerns:

Really??... NPT Simply has no Funds! ! !.... This is what Njamal Peoples Trust is for. .. to support the Njamal People!... I know the distribution policy budget is well under budget spending for the Year, so what have the funds been spent on? Where are the acquittals of spending. ... this is totally unacceptable!. I have over $6500 of payments from the last 3 weeks that have been declined as there were insufficient funds transferred to the pH bank account for distributions & $7500 from Wednesday that needs to be paid Answers to this situation are needed as the trust are not managing funds effectively, efficiently or correctly! I await a response shortly Regards Lorraine

Mr White responded:

Thx for your email, Loraine, Due to travels of account authorizers including myself being in Sydney, it seems some transfers have not been possible. We will sort tomorrow. Regards, Andrew

Mr Van Der Ende also responded:

Hi Lorraine

The issue that we have faced over the last few days is not insufficient funds to undertake our role but rather a desire to ensure that the CRM package which has recently been introduced is accounting for and transferring correct data throughout our systems This will ensure that all payments are accounted for and processed correctly. As you are aware there have been
significant systems issues that we have encountered since the introduction of the new CRM system and I believe as of today that these should have been resolved.

After discussions with Andrew, Rod and Gerald I am convinced that we have ironed out the bugs and I expect us to recommence full operations shortly although we will continue to monitor and check the CRM for accuracy.

I am confident that all of the issues of the past 10 days or so have been sorted and we will resume normal production to continue the good work that we are doing. I expect the CRM system to be up to date by the end of this week or early next week. It has been particularly difficult given the number of Education Applications that we have received this week. I am sure the instance that Jing referred to was an accounting issue between the systems with concerns related to what the CRM and Accounting systems were showing.

As discussed earlier today lets catch up and have a discussion tomorrow.

Regards

John Van Der Ende I General Manager

In relation to the CRM, the Inquiry notes that at its meeting with Mr White on 12 February 18 he explained that distribution applications were generally handled by the Port Hedland office and a new CRM (Customer Relationship Management) system had been implemented to track those applications. He did not mention then, or when asked about any cash flow issues, that there had been issues in relation to the topping up of the Trust's Port Hedland bank account or that they had been related to issues with the CRM. Nor is it apparent to the Inquiry how difficulties with implementation of the CRM may have affected the failure to ensure the Port Hedland account had sufficient funds to meet routine expenditure needs.

Based on the bank statements provided to the Inquiry it is apparent that:

1. the balance of the Port Hedland Trust cheque account was approximately $40 from 25 to 28 January, $7,000 on 29 January and $4,000 on 30 and 31 January 2018;

2. the balance of all Trust bank accounts was approximately $35,000 between 25 January and 28 January 2018, before dropping to approximately $19,000 by 31 January. On 1 February 2018 the balance increased to approximately $549,000 following the receipt of a royalty payment from Atlas Mining of $542,000; and

3. the balance of all trust accounts, Njamal Services Pty Ltd accounts and Njamal Heritage Pty Ltd accounts in that period was approximately $87,000 from 24 to 28 January and $84,000 on 29 January, before dropping down to approximately $37,000 on 31 January. The combined balance was approximately $614,000 the following day.

The Inquiry accepts that it is open to ISPL, as Trustee, to adopt a significantly different approach to expenditure of Trust Funds than commonly occurs under more traditional trustee models which use a more conservative passive investment approach. In so doing, it must at all times act prudently in its management and investment of the Trust Fund. That is not to say, as Mr Carter appears to interpret this finding to convey, that ISPL must liken itself to other trustees whom he regards as underperforming and failing to proactively address issues such
as generating employment, wealth and prosperity for the Njamal People and address the many endemic associated issues with indigenous affairs including drug addiction, unemployment, housing, suicide and domestic violence. Nor is it to say that the Trust was not seeking to economically or financially operate in furtherance of the objects. Given the nationally recognised imperative to bridge the gap, the Inquiry's findings are not intended to discourage innovative approaches to addressing such issues. The NPJV is a case in point, which it appears Mr Carter firmly advocated for, despite resistance from others, at least in the first instance. What is fundamental however is that at all times, a trustee strictly comply with its duties and any constraints on its operations and acts prudently in its expenditure and investment of Trust funds.

One of the common themes of a number of communications with senior personnel associated with ISPL was that expenditure during 2016/17 had far exceeded what had been anticipated originally (although no budgets for that period were provided to the Inquiry) and that steps were being taken to put in place improved financial controls.

However, as already noted, the total of expenses for the 2017/18 financial year up until 28 May 2018 were recorded in the unadjusted trial balance provided to the Inquiry as being approximately $3.21m, by then already nearly half a million dollars more than the preceding year. The recorded revenue up until 28 May 2018 was approximately $4.41m.\(^{151}\)

The Inquiry finds that ISPL adopted an at times overly ambitious program of expenditure and 'making Trust money work' without sufficient controls to manage expenditure and accommodate the uncertainty of future cash flow projections. The approach of ISPL had limited flexibility to accommodate the risk of cash flows not occurring as predicted.

In the Inquiry's view ISPL was also was reticent to acknowledge to the Inquiry what, self-evidently was, for a not insignificant period in 2017 moving into 2018, a tight cash flow position. That is evident from the materials eventually provided to the inquiry as well as evidence from persons associated with ISPL. Mr Carter suggested, and the Inquiry accepts, that this was affected by factors including delay in the carbon farming agreement in relation to the sale of pastoral interests being delayed for reasons beyond ISPL’s control (the matter is still apparently yet to be finalised), delays in the timetables for construction and ore production by Pilbara Minerals Limited and Altura Mining Limited and consequent delays in respect of various contractual entitlements due to be paid to the Trust, the NPJV growing fast and drawing on funds and then significant expenditure in respect of an unanticipated community meeting to address, it would appear, native title issues. While it is accepted that these issues impacted on the cash flow of the Trust, it highlights the need to allow appropriate

\(^{151}\) These were of course unadjusted figures before taking into account any adjustments that may have been necessary.
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contingencies for these type of events and managing expenditure. Mr Carter also acknowledged that it may be appropriate for a trustee running this sort of trust to maybe need a liquidity level like the banks have.

A tension also existed within the management team of ISPL between certain members who had an apparently greater appetite for risk in respect of expenditure on projects and investments and more optimistic views of potential returns (Mr Carter in particular and, to a lesser extent, Mr White) than other members such as Mr Parker, Mr Aird and Mr Mack. This led to some at times robust communications and internal disharmony.

Mr Carter, who had a very significant role within the Trust until his disqualification and, even then continued to have a significant and influential role, including as part of the management team, was prepared to make very few concessions in respect of the Inquiry’s concerns and maintained a robust defence of the Trust, his role and its achievements. His failure to accept many of the Inquiry’s concerns of itself causes the Inquiry disquiet in relation to his apparent lack of insight in relation to many of the issues raised.

As observed earlier in the Report, one of the very few concessions that Mr Carter was prepared to make was that he thought on occasions he had painted too blue a sky to some people and it had not paid off and that had been his mistake which he would admit to.

In contrast to Mr Carter’s position, ISPL was far more receptive, generally acknowledged many of the Inquiry’s concerns and has either taken or proposed taking a variety of steps to address those concerns. For example, in response to various issues of potential concern identified by the Inquiry and, as part of an apparently broader review by ISPL of its practices, procedures and operations its solicitors indicated on its behalf by letter dated 4 October 2018 that:

ISPL has undertaken a review of its expenses and moving forward all contracts and expenses (including in relation to employees, consultants, administration costs, motor vehicles, travel fees etc).

ISPL has also implemented more stringent controls and new policies to guide what is acceptable in this regard.

Further, all third party contracts are being reviewed and as a result are being systematically terminated or renegotiated.

A full review was conducted by ISPL of all employees and consultants. As a result of this review, ISPL has terminated its relationship with Esplanade and will terminate any consultancy with Mr Green’s associated imminently.

Those employees of ISPL that now remain or have been newly engaged are currently subject to quarterly reviews to ensure that funds in this area are being appropriately allocated.

ISPL has also continued to develop its IT network to better facilitate internet video meetings and to monitor air fare bookings to achieve a lower cost of travel when travel is necessary.

It is also noted that with respect to travel and sitting fees, the number of community meetings held in the period to January 2018 was extraordinarily high due to the issues created by Ms Westerman and the increasing number of mining agreements and business development work. It is acknowledged that while situations such as this may occur in the future, steps are being taken to minimise as far as possible the costs associated with these meetings.
Further, in response to a range of issues and concerns raised with ISPL in relation to cash flow, it responded:\textsuperscript{152}

The rationale in relation to cashflow is to apply funds to achieve the objectives of the Trust, including creating business and job opportunities. The level of income prior to the commencement of the mining agreements with Altura Mining Ltd and Pilbara Minerals Ltd in particular was relatively tight.

The cashflow position of the Trust is highly dependent on the receipt of mining royalties and has limited scope to accommodate unexpected expenses at the moment. The cashflow position has also been significantly impacted by the existence of the Inquiry.

ISPL has now adopted a more rigorous approach to expenditure approval and cash flow planning to ensure it is able to deliver to the beneficiaries in accordance with the Distribution Policy.

Further, in order to alleviate cash flow pressures and ensure that sufficient liquid funds are available to meet the expenditure needs of the Trust (especially if unexpected), ISPL is developing long and short term investment policies which will include diversified active and passive investment components and provide the Trust with reserve funds to call on if required. All potential investments are to be reviewed and approved by TAC and which will consider forecasted increases (and decreases) in future income under the mining agreements. The development of these investment policies is especially important given the expectation of considerably larger royalties being received from Altura Mining Ltd and Pilbara Minerals Ltd in 2019 (these projects have now commenced shipping product).

ISPL is also tracking its distributions through the CRM so that alternative sources of funding can be sought. For example, if many of the members are having similar health issues, ISPL may seek funding from the private and public health sectors.

ISPL is continuing to further integrate its accounting and CRM systems so that the historical problems which arose following the initial introduction and integration of the CRM system are not repeated.

The Inquiry acknowledges the recent positive responses received from ISPL and initiatives it has undertaken or intends to undertake. It notes however that in some respects similar suggestions were made to it over a year ago with apparently limited progress in addressing some of the issues identified. It is therefore important that ISPL, assisted by its new management team and structure, immediately and proactively address these issues in practice in the future.

\begin{recommendation}
1. ISPL continue to implement the actions it has proposed undertaking including a more rigorous approach to expenditure generally, particularly in relation to travel, sitting fees, motor vehicles and consultants and employees.

2. ISPL adopt a more rigorous approach in relation to approving projects and investments involving significant expenditure to ensure that they have been properly assessed, budgeted for, documented and routinely reviewed.
\end{recommendation}

\textsuperscript{152} Letter from CX Law dated 4 October 2018.
3. ISPL complete development of a detailed organisational strategic plan to guide its activities and regularly review its activities and performance against defined criteria.

4. ISPL immediately review and monitor on a regular basis its investment, distribution and expenditure of funds to ensure that it operates in a sustainable manner having regard to the objects of the Trust and both present and future beneficiaries of the Trust.

Auditor's Exception Reports

The post-audit letters from the auditor raised a number of matters that came to the auditor’s attention during the audits he conducted.

In respect of matters identified during the 2015/16 audit, the auditor identified in an exception report letter dated 25 January 2017 that:

1. Internal Control

Accounting internal controls exist so that reliance can be based on the accuracy and veracity of transactions. They assume: the segregation of accounting duties, one persons’ work being checked by another, the visible authorisation of transactions, and a visible overall review.

Internal control is not a test of character.

High levels of internal control might be expected of a professional trustee. The observations below are made as auditor.

[a] The primary book-keeper is also a joint cheque signatory for transactions below $500 provided these transactions are authorised in Port Hedland. This is a systems weakness.

I recommend the primary book-keeper is not a bank transaction signatory.

[b] I noted that few expense invoices were visibly authorised for payment. They may well have been verbally authorised but not visibly. Many large expense claims were not supported other than by spreadsheet.

I recommend as follows:

- All expense payments be visibly authorised for payment by a director/officer.
- Expense payments also be visibly signed off by the paying bank signatories.
- Officers have their own expense payments approved by another officer.
- Expense claims be supported by original documents. Where this is impracticable for normal commercial reasons, that retrospective board approval be minuted.
- Board approved operating budgets be established and resultant performance be vetted by the Board.

[c] There is no accounting procedure manual. I understand the trustee company wishes to extend its trustee operations.

I recommend a brief accounting internal control manual be developed for clarity and to safeguard officers.

Trustee minutes

I saw no trustee minutes. These are of great assistance to the auditor in reviewing high level decisions that may have a bearing on financial report disclosures and evidencing that financial statements are reviewed, and that financial reports, audit representation letters, and post audit management letters receive appropriate authorisations or review.

- I recommend that trustee minutes be kept.
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ISPL fee structure
The ISPL fee structure is set out in a letter to The TAC 25.11.16. This is accepted by the TAC 1.7.16. The dates are in conflict and matter as clause 2.5 on fees is date specific.

- I would appreciate if this could be clarified to me in due course.

Concerningly, despite the auditor’s concerns, it seems that not all the issues identified by him in his exception letter were promptly and effectively attended to.

In the auditor’s letter of 30 May 2018 following completion of the 2016/17 financial audit he raised 6 broad issues which are considered in turn below.

1. Consolidation – Financial Results

On the question of consolidation of financial results, the auditor expressed the overall view that:

a. By not consolidating the group, and only reporting on the parent entity, it is unlikely that the reported results paint the full financial results for the year.

b. The issue may escalate in significance as further subsidiary operations are added after 30.6.17.

c. The Trustee is legally within its rights not to consolidate due to the operation of Accounting Standards. This also the current position of the Australian Charities and Not-for Profits Commission (ACNC) as regulator.

d. The insertion of Note 12 to the financial statements, which gave brief information on the results of non-consolidated subsidiaries, ameliorated my audit concerns on adequate disclosure.

The auditor observed that even if it is correct that the Trust is only required to prepare special purpose rather than general purpose financial reports, as the auditor points out, it is open to the Trustee to voluntarily embrace the consolidation accounting standards (AASB 10 and its derivatives).

He also pointed out that the ACNC and the Australian Accounting Standards Board (AASB) were currently in dialogue and were about to commence public consultation about whether to excise special purpose reporting.

The auditor concluded that while he agreed that technically the Trustee was correct in its stance on not consolidating its group results, as auditor he found the current tests potentially unsound in the current circumstances and recommended that the trustee consider offering consolidated accounts.

He accordingly recommended that the Board consider the consolidation issue with a view to embracing consolidation of group results in Trust financial reports. He also recommended that the Trustee consider visual graphics displays as adjuncts to statutory financial reports if it considered consolidated accounts too complex for users.
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2. Consolidation – Asset Impairment

The auditor referenced the fact that as the Trust did not consolidate its group results he examined the Trust balance sheet and concluded that certain inter-entity loans were worth below book value as at 30 June 2017. This gave rise to a suggested audit impairment of around $700,000. The matter was resolved by the Trustee re-categorising cash payments to those 2 wholly owned subsidiaries, from current account loans into distributed grants, totalling $922,000. The reclassification was supported by legal advice and passed audit review.

The auditor anticipated that the circumstance may recur as at 30 June 2018, noting that start-up operations invariably need working capital, and incur losses before they move into profits. He noted that from an audit perspective anticipated unachieved future profits are given little weight.

He recommended in relation to wholly owned subsidiaries that all the Trust’s inter-entity loans be reviewed before 30 June 2018 to determine if funding in the year was recoverable as at the balance date, or whether they were grant distributions to wholly owned subsidiaries.

3. Consolidation-Disclosed Net Profit

By not consolidating, and by subsidising the new start-up companies with a distribution/grant, and by inserting fair disclosure in Note 12 to the financial statements, the Trustee achieved two things. First, the trust net income of $2.67m was $814,000 higher than it would have been on consolidation. The auditor observed that the reported profit compared well against the 2015/16 net profit of $2.16m but that had it been reported on a consolidated basis of $1.85m profit this would have compared less well. He noted that the reporting of the unconsolidated result could give rise to adverse comment, but that the disclosure in Note 12 overcame the concern about adequate disclosure. The auditor repeated his recommendation that the Board embrace consolidation.

4. Consolidation – Audit Scope

The subsidiaries of the Trust are neither consolidated nor audited. The auditor observed that he had estimated that 16% of group revenue and 40% of group overhead was therefore not subject to any audit review in the 2016/17 financial year. He assumed that with group expansion activity the percentage would increase in the 2017/18 financial year. He observed:

The question then arises as to what is the purpose of an audit, and especially so in the light of differing viewpoints,- being those of the Beneficiaries, the Advisory Committee, the Trustee and the Regulator. I believe the trustee’s duty of care case over-rides the cost/benefit case. After all, what is a trustee?

The auditor recommended that the Trustee consider the merits of widening the audit scope, to encompass the whole Trust group, or at least its core and material components. He also recommended that the Trustee consider updating the Trust deed on the matter, which
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contains little reference to financial reporting and is silent on the issue of audit. The Inquiry
endorses these recommendations, as elaborated below.

Before turning to the 5th issue raised, it is worthy of note that Mr Parker, on behalf of the
Trustee, was initially reluctant to agree to the level of disclosure proposed in note 12 to the
accounts. The reason advanced was concerns about the use Ms Westerman may put such
information to at the next community meeting, including potential to demand a forensic audit
of all entities, even though the investment in the entities would more than likely produce
positive returns, with the exception of Njamal Heritage Pty Ltd, the function of which was
contemplated being brought back into the Trust in the not too distant future. The auditor was
rightly concerned that this would hide the impact of the part of the group that is not audited.
He was of the view that material non-disclosure was misleading and that he believed that the
Trustee had a high moral duty of care and disclosure and that it may be deemed questionable
to rely on technicalities [ASB 2013-8] to suppress information and that this may force the
auditor into adding a rider to the audit report. Ultimately the Trustee agreed to the form of
disclosure proposed by the auditor in the audited financial statements.

5. Internal Control

As previously identified by the Inquiry, it has concerns as to the inadequacy of a number of
internal controls and governance structures within the Trust. The auditor also identified a
range of issues in the course of transactional testing during the 2016/17 audit. His comments
bear extracting in full:

Strong internal controls are required in the NPT accounting function as the entity is a Trust for
Beneficiaries, to give Trustee Directors confidence in their controlled entities, to safeguard
cash and all assets and to provide control, and in acknowledgement that NPT has a high
volume of transactions. Without adequate internal controls. no level or audit transactional
testing can give comfort to Trustee directors on issues of malfeasance or fraud.

Accounting internal controls exist so that reliance can be based on the accuracy and veracity
of transactions. They assume:- the segregation of accounting duties, one person’s work being
checked by another, the visible authorisation of transactions, and a visible overall review.
Internal control is not a test of character.

Our audit transactional testing revealed the following weaknesses:

[a] 79% of payments sample tested were not visibly authorised for payment. They may well
have been verbally authorised but not visibly. This does not mean the payments are wrong. It
means that a visible control mechanism is absent.

**Recommendation**

That all expenses and inter-company payments are visibly authorised for payment, as a
fundamental internal control requirement, prior to payment. I am advised this has now been
enforced.

[b] Year end creditor cut-off tests showed creditors understated by approximately $95,000
and overstated by approximately $15,000. The financials were amended to incorporate these
adjustments. The cause was a misunderstanding of principle by the relevant staff member.

**Recommendation**

That staff in this area be supervised.

[c] A $2,000 overdue debt was noted in the debtors ledger which proved to be uncollectable.
No audit adjustment was sought due to its immateriality.
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Recommendation

That aged debtors be subject to periodic management review.

[d] During the year, loans totalling approximately $135,000 were made to beneficiaries. This process was stopped by the Trustee, and they were reduced to $35,000 at 30 June 2017 within NPT through a variety of measures. One of the measures was to transfer some of these loans to another subsidiary deemed better aligned to their review and collection. A bi-product was that they were removed to a subsidiary enterprise outside audit view.

Recommendation

I have no recommendation other than to reflect on the previously mentioned audit scope limitations.

[e] Records for audit were boxed due to relocations. This impeded the audit.

Recommendation

Adequate tidy storage has its place in the scheme of things.

[f] I received no response from the Board on my 2016 post audit management letter dated 25 January 2017. Some observations were still relevant at 30 June 2017.

Recommendation

I recommend that Board receipt of this letter be minuted and responded to, and that if relevant, we meet to discuss anything deemed contentious.

[g] There is no internal procedure manual. I understand the trustee company wishes to extend its trustee operations.

Recommendation

I recommend a brief internal control manual be developed for clarity and to safeguard officers and beneficiaries.

I made a suggestion on an internal control review and manual 25 January 2017 and I will forward that again for consideration. It does not form part of this letter.

In relation to the staff member, referenced by the auditor, the issue concerned an apparent misunderstanding as to when certain debts were required to be recognised and whether it was based on the date when the invoice was received, although it was noted that this had been applied inconsistently.

Pre 30 June 2018 Audit meeting

The auditor also recommended a pre-30 June 2018 planning meeting be held to discuss a range of issues

a. The consolidation issue
b. New enterprises
c. 2018 audit scope
d. Internal control issues
e. An interim audit aimed solely at internal control issues
f. A Port Headland visit
g. Related Party transactions
h. Any future audit issues emanating from the current State Government NPT Inquiry.
i. Topical audit issues
   • Income tax/PA YG/ABN compliance
   • Fringe Benefits Tax compliance
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Inquiry's Observations

The above concerns raised by the auditor are largely mirrored by concerns identified and conclusions reached independently by the Inquiry.

The Inquiry considers that ISPL should immediately and comprehensively address all issues identified by the auditor, particularly in relation to internal controls and visible authorisation of expenditure.

Further, the Inquiry supports the auditors calls for related entities to be routinely audited. It supports further close consideration being given by ISPL and the TAC to whether reports are also prepared on a consolidated basis.

In response ISPL acknowledged the preferences of the Inquiry and recommendation of its auditor that the related entities be audited and consolidated Financial Statements be prepared.

It observed that:

ISPL agreed to the Auditor's request to disclose the operating results of these related entities in the Financial Report for the year ended 30 June 2017 and for subsequent financial years. However, ISPL is of the firm opinion that the significant additional costs of undertaking auditing and consolidation of the related entities outweighs any benefit to the Njamal Community in undertaking the Auditor's suggestion. The additional costs associated with preparing the accounts in this manner would also require consultation with TAC.

As things presently stand, the Trust is not a "Reporting Entity" with a requirement to prepare Special Purpose Financial Reports. ISPL will comply with future amendments to reporting requirements set down by the various regulatory bodies but, in the meantime, it will continue to report to the Trust's stakeholders in the most cost-effective manner.

It would be remiss of ISPL to not point out to the Inquiry that the primary audience of the Trust's Financial Reports are the Njamal People themselves. Presenting a set of Consolidated Accounts to this audience would guarantee, at this time, that the large majority of the Njamal People would be overwhelmed by the contents and not be able to understand them. This would be an unintended consequence of the Inquirer's suggestion.

The Inquiry is not persuaded by ISPL's arguments, particularly in relation to audit of related entities, even assuming that group reports are not prepared on a consolidated basis.

Given factors including:

- the very substantial sums injected by ISPL as Trustee into related entities, particularly Njamal Services Pty Ltd and, to a lesser extent, Njamal Heritage Pty Ltd;

- that the proper financial management and performance of those entities is integral to achieving many of the Trust's objectives and to the value of the Trust's shareholdings in those entities and potential returns of loans and distributions made and cash flow demands;
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- the opacity of precisely who within ISPL approved or authorised significant funds transfers to Njamal Services Pty Ltd and precisely how they have been used within those entities;
- concerns identified above in relation to aspects of ISPL’s overall expenditure and cash flow controls and broader corporate governance issues (see below);
- the tight cash flow position that has been experienced and inadequacy of ISPL’s responses to issues raised in relation to such matters,

in the Inquiry’s view ISPL should immediately cause financial statements to be prepared and audited for at least Njamal Services Pty Ltd, Njamal Security Pty Ltd and Njamal Heritage Pty Ltd for the 2017/2018 financial year.

That should go some way to providing the TAC and Njamal people with greater insight and confidence in relation to financial management and administration of those entities and ultimate use of significant Trust funds. The Inquiry also considers that such financial statements and audits should be routinely conducted thereafter, irrespective of whether it is technically required under other obligations on the Trustee.

It is also considered by the Inquiry that the audited financial statements be disclosed to at least the TAC, Njamal community, Attorney General and ACNC.

The Inquiry accepts that the question of preparing reports on a consolidated basis is more complex, but nevertheless recommends that ISPL, the TAC and ISPL’s related entities give further serious consideration to the potential benefits and desirability of this occurring.

That is not to say that the Inquiry considers a forensic, as distinct from a financial audit, is warranted. While it has been made aware, indirectly, of a concern about certain funds use within Njamal Services Pty Ltd and/or Njamal Security Pty Ltd, the concern was hearsay and not supported by any substantiating evidence.

On the topic of forensic audits, the Inquiry notes that it has been a common theme of Ms Westerman’s in relation to both AET and the current Trustee to demand full forensic audits be conducted. While the Inquiry has identified a range of matters of concern in relation to the Trustee’s management and administration of the Trust and higher level corporate governance issues, it has not formed a view that a forensic audit of the nature called for by Ms Westerman is warranted.

Recommendation 21 (Chapter 8)

1. ISPL and/or its related entities immediately cause financial statements to be prepared and audited for at least Njamal Services Pty Ltd and Njamal Security Pty Ltd and Njamal Heritage Pty Ltd for the 2017/2018 financial year.
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2. ISPL and/or its related entities cause financial statements to be prepared and audited routinely thereafter.

3. ISPL and/or its related entities disclose the audited financial statements to at least the TAC, Njamal community, Attorney General and Australian Charities and Not-for-profits Commission.

4. ISPL, the TAC and ISPL’s related entities review and give further serious consideration to the auditors’ recommendation, which is endorsed by the Inquiry, of preparing financial statements on a consolidated basis.

Auditor Concerns re Loans

By letter dated 17 July 2017, forwarded by email the following day, the auditor also raises a series of concerns in relation to loans. These are referenced earlier in the loans section of this Chapter.

Internal Governance and Controls

As identified elsewhere in the report, ISPL has established a range of very positive initiatives in relation to the policies and procedures of the Trust and Trust distributions, designed to ensure various types of payments that were made were within the scope of the Trustee’s power, particularly under the apparent guidance of Mr Parker. Numerous very useful documents have also been created and made available via a website established for the Trust and in hard copy at the Perth and Hedland offices of the Trust. Thousands of applications for assistance are processed annually in a prompt and responsive manner. Assistance is also made available to Njamal community members, in person, including at a largely Njamal run office in Hedland, including assisting in the making of applications for assistance. Mr Carter was also routinely called upon after hours, particularly in the period of the initial establishment of the Trust, to assist individuals in a range of ways including where they were in hardship or needed other assistance. The commitment of Mr Carter and staff to assist the Njamal community is acknowledged and not in question.

At an early stage of the Inquiry there was a general acceptance by a number of key personnel interviewed that there was significant room for improvement. The ISPL position more formally however was along the lines that issues were being identified and addressed as part of ongoing continuous improvement processes. A range of such improvements were evidenced, including the introduction of a CRM system.

What became clear however as the Inquiry progressed, was that while there may have been a range of practices and procedures implemented across various aspects of the Trust’s operations, as well as that of its related entities, that there were significant deficiencies in relation to a range of internal governance and controls, and documentation of sometimes
important matters. While it is understandable that in an organisation that expanded as quickly as this one did, there may be gaps exposed from time to time in relation to such matters, in the Inquiry’s view the deficiencies went further than that. The focus on activity and progress often came at the expense of such matters. That is particularly concerning where the responsibility for such matters largely lies with a company in its capacity as trustee.

The Inquiry makes clear that it is not here referring to or making any criticism of the many Njamal persons who have been and are employed or engaged to work for the Trust or its related entities, as Mr Carter suggests in a written response to the Inquiry. The focus of ISPL in engaging with, training and assisting the advancement of many Njamal People is not in question. The Inquiry is rather referencing higher order governance practices and procedures that in its view ISPL management and directors, including Mr Carter, who effectively filled a role as Chief Executive Officer (at least until his disqualification from managing corporations) ought to have ensured were more carefully addressed.

Mr Carter rejects suggestions of poor governance and controls and points to the achievements of ISPL. His response to the Inquiry about such issues included the following:

...It is important to point out that the Trust, since inception in 2016 has built its activities at a significant rate, and with significant growth comes teething issues. It is also important to point out to the enquiry that the Trust has embarked on significant new businesses and the creation of vast opportunities for the Njamal people, together with the expansion of current agreements, for example Pilbara Minerals. Prior to the Trusts appointment, Njamal were receiving one quarter of the royalty that they currently enjoy, without any guarantees of indigenous employment or contracting.

Previously this type of negotiation would have been undertaken by lawyers, with a less than impressive result for the community. ISPL’s negotiation included the traditional owners to ensure that they gained a greater understanding of how the trust can and should work for them, a better understanding of the value of their assets and how they themselves can have an impact on employment and other community issues by making the most of the opportunities before them.

Community members have never before been meaningfully included in any Trust negotiations and as such, have embarked on a learning curve alongside a Trustee that has their best interests at heart, both professionally and culturally.

ISPL took on a Trust that was under-performing with unexplained payments to the value of $2.7m from Njamal Mining for which Ms Westerman and the previous Trustee were responsible.

At the outset, ISPL set out to turn this situation around and attempt to bridge the gap - as per the Australian Government directive, ensure a cultural understanding, create commercial opportunities which could train and employ young unemployed Njamal people, and purchase a permanent home for the community, and their commercial activities.

Since 2016, all of these objectives have been achieved, driven by myself with the overwhelming support from the majority of the Njamal people.
I also ensured the institution of a strong and experienced management team of 4 Directors of which I was one.

In answer to the issue stated above, ISPL has and is continually improving its processes and procedures to meet the needs of the growing business, workforce and the community, with a priority on necessitive circumstances surrounding all Aboriginal people.

This can be confirmed with the current Directors.

While the Inquiry recognises that significant progress has been made, it nevertheless finds that ISPL in many respects lacked clear and effective internal governance policies, practices and procedures in relation to the management and administration of the Trust and its related entities, particularly prior to late 2017. Issues of concern identified by the Inquiry include:

- a lack of clear delineation of roles, responsibilities, authorities and lines of reporting as between officers, employees and contractors/consultants of ISPL (Mr Carter disputes this and suggests that roles evolved as the needs were met and the training implemented. Consistent with the tenor of many of his written responses, Mr Carter seeks to characterise the conclusion as "racist and constructed on a self-serving basis");

- poor communication and at times inconsistent decision making between the South/Port Hedland and Perth offices;

- decisions made in South/Port Hedland to refuse or limit distributions being overridden at the Perth office, generally by or on the instructions of Mr Carter as part of his delegated authority to make such decision, without the decision being consistently and clearly documented and communicated back to the original decision maker;

- difficulty experienced with some decisions made by the former general manager at the South/Port Hedland office lacking flexibility from time to time, where circumstances may have warranted the exercise of the Trustee's discretion to exceed usual distribution policy limits, hence leading to decisions being overridden at the Perth office;

- at times poor management culture, particularly involving strong negativity by Mr Carter towards questioning by staff, contractors or TAC members of the adequacy of practices, procedures and decisions, particularly if Mr Carter perceived those persons to be questioning him or the Trustee, for example, Mr Carter's emails to Ms McPhee on 19 September 2016 (Mr Carter contends that management culture "was outstanding" and points to issues that were present during the period of appointment of one former General Manager not being otherwise present. He also points to the strong support for him by many Njamal
staff and community members, which is undoubted. That is not to say however that Mr Carter's very direct and at times aggressive management style did not contribute to concerns and difficulties for a number of staff or contractors);

• comparatively poorer level of documentation of distribution and expenditure decisions at the Perth office (in respect of which Mr Carter, at least prior to his disqualification from managing corporations, had delegated authority in relation to making decisions) than the Port Hedland office (which was generally of a good standard), particularly in relation to loans/advances to Njamal people and either not documented, poorly documented or poorly collated such that the documentation provided to the Inquiry was incomplete;

• general non-compliance with ISPL's own Inter Organisation Loan Policy endorsed by the Board at its meeting on 11 July 2016; and

• the issues of concern or 'exception' identified by the auditor in correspondence to ISPL dated 25 January 2017, 17 July 2017 and 30 May 2018.

While some steps were taken by ISPL to review and improve corporate governance, particularly in mid to late 2017 (e.g.: the introduction and circulation of authorisation matrices, budgets and corporate structure charts), the nature, extent and effectiveness of any implementation of those changes is unclear. ISPL has however recently conducted an internal review and, it seems, proactively commenced addressing issues of concern. In that regard, in its response to the Inquiry's potential findings and recommendations in relation to these matters, ISPL acknowledged the issues of concern raised by the Inquiry and indicated that it "was actively working towards establishing a comprehensive management system with policies, plans and procedures addressing all aspects of management and internal processes." It continued:

As a result of the structural review, which began in June/July 2018, redistribution of roles within ISPL and preparation (and implementation) of new policies and procedures, many, if not all, of the functional and governance issues raised by the Inquiry will be alleviated. This restructure process will take some time to implement fully and in effect will always be a work in progress as part of the "Continuous Improvement Programme" built into the system. This is one of ISPL’s primary objectives moving forward. A completely revised organisational chart is being prepared and will be provided to the Inquiry.

On the face of it, these are all positive changes. A concern for the Inquiry remains however to ensure that ISPL in fact proceeds with expedition to implement these changes and comprehensively addresses the concerns identified. The change of personnel and engagement of a new chief executive gives some comfort that the improvement will occur.

A major change of which the Inquiry was advised was that Mr Carter is no longer involved with ISPL or the Trust. Mr Carter advised that he had now taken up a new appointment with a publically listed resource development company. It has also indicated that Mr Green's
involvement (through his associated entities Greenco Holdings and Economic Car Hire) would cease imminently after ensuring the transfer and control of important information. This does, as ISPL anticipated, address some of the inquiry's concerns regarding ISPL going forward.

As referred to above, ISPL is actively working towards establishing a comprehensive Business Management System (BMS) describing all aspects of management and internal processes as well as implementing a new suite of internal policies to improve governance and controls and maintain them at an acceptable standard...

The roll out of these policies, procedures and guidelines by ISPL will be accompanied by an appropriate training program.

In respect of roles and decision making, ISPL advised:

The existing decision-making matrix of ISPL has been revised and clear job descriptions and lines of reporting for all staff are being prepared. This will greatly improve management of the Trust as each employee will have a clear understanding of their role and who is responsible for each of the different aspects of the Trust.

For example, a new Distribution Policy (a copy of which has been previously provided to the Inquiry) has been implemented and all decisions regarding distributions of Trust funds to members are to be directed to one person, “Manager, Member Services”. For an application for distribution to be considered, ISPL requires an application form with supporting evidence to be submitted so that it may be assessed. Such assessment will consider what has already been received by that member to ensure distributions are maintained within the Distribution Policy limits approved by TAC as well as annual limits placed on what each member can receive.

All distributions made are recorded in the customer relationship management or CRM system which assists managing distribution requests, recording transactions etc. In the event any distributions were to fall outside the scope of the Distribution Policy then the “Manager, Member Services” may refer the issue to TAC and/or ISPL for direction.

A difficulty the Inquiry has with this submission is that most of the requirements referenced above were requirements under previous versions of the distribution policy, yet were not routinely followed in the Perth office. It is therefore imperative that ISPL not only establish but consistently implement procedures. In particular it is of considerable importance that records of authorisations be consistently maintained. Where there is a departure from established policy or guidelines and limits, this should be documented as well as the reason for the departure.

**Recommendation 22 (Chapter 8)**

1. ISPL continue to routinely review its internal governance policies, practices and procedures and update and revise them as appropriate.

2. ISPL consistently apply and enforce those policies, practices and procedures once reviewed.

**Poor Documentation**

As many of the examples referenced throughout the Report evidence, the Inquiry finds that ISPL has on many occasions failed to appropriately and adequately document important agreements and Trustee decisions and maintain controls over key documents. It is self-
evident that this ought occur to ensure that trustee and related corporate obligations are properly discharged and that it is accountable for its decisions. The above failures are of some significance and cast a shadow over the ability to understand and reliably verify the circumstances and basis of some decision making by ISPL. Indeed, the inadequacy of many documents provided to the Inquiry caused considerable difficulties in its ability to ascertain and verify a range of matters that were in question during the Inquiry.

For example:

**Directors Meetings**

The Inquiry finds that ISPL:

- Generally failed to create and maintain finalised, signed minutes of meetings of director;
- Failed to ensure minutes were prepared of all directors’ meetings; and
- Failed to document all decisions or resolutions of the Board and significant decisions or recommendations of the management committee.

In a response to the above possible findings Mr Carter stated:

> All companies are required to provide books and records for ASIC reporting. All of the requirements of the ASIC have been met.

> Directors of ISPL were in constant contact and met almost daily. It would have been impossible to minute every conversation between Directors. Commercial reality is that no Company minutes all actions and meetings of Directors. Signed minutes are not a requirement of a Pty Ltd Company.

> The findings are a construct that is designed to support the case of SSO to prove that ISPL was a non-compliant company. This is false and rejected outright.

The Inquiry does not, of course, suggest that every conversation between directors should be minuted. It is however of fundamental importance to good governance that the previously mentioned matters be consistently complied with.

In clear contrast to Mr Carter’s position, in its response to the Inquiry ISPL acknowledged the historical issues identified by the Inquiry in relation to directors’ meetings and indicated that as part of its continuous improvement program (relating to administration), its current practice ensures good corporate governance practices are adhered to in respect of all directors’ meetings.

**Contracts**

The Inquiry also finds that ISPL failed to consistently maintain appropriate standards of documentation of contractual agreements and controls over those documents. While it was engaged directly or indirectly through related entities in a wide range of activities, and especially in its start-up phase focused on achieving outcomes, this at times came at the
expense of proper documentation. For example, as discussed in more detail elsewhere in the Report:

- Various issues arise in relation to various engagement letters between the TAC and ISPL as Trustee of the Trust;

- The Njamal Charitable and Benevolent Unit Trust was established by Deed dated 24 November 2016, under which ISPL was appointed as trustee. The units in the Unit Trust were held equally by ISPL as trustee for the Trust and ISPL as trustee for the Njamal People's Benevolent Trust. Apparently the naming of ISPL as trustee was done in error. To address that a further deed of change of trustee was entered into, also dated 24 November 2016, by which ISPL's resignation and replacement by Njamal Services Pty Ltd was given effect;

- The Second Deed by which on 21 December 2016 an earlier deed was assigned from Esplanade Holdings Pty Ltd to Esplanade Consultancy Pty Ltd by way of a tripartite deed purportedly executed by ISPL and each of the Esplanade companies was apparently not properly executed in that it was only signed by one director of ISPL, who was not also a secretary of ISPL;

- In relation to the NPJV Agreement:
  - The NPJV Agreement, a copy of which was originally provided to the Inquiry in July 2017, was dated in handwriting 31 January 2017. It named Njamal Services Pty Ltd as trustee for the Njamal People's Benevolent Trust (ABN 34 614 726 760) and Pilbara Resource Group Pty Ltd as parties. The signing clause referred to Njamal Services Pty Ltd as trustee for the Njamal People’s Benevolent Trust Pty Ltd (ABN 34 614 726 760). Both descriptions were incorrect, as Njamal Services Pty Ltd was the trustee of the Njamal People’s Benevolent and Charitable Unit Trust and ISPL was trustee of the Njamal People’s Benevolent Trust. The original NPJV Agreement was also signed by ISPL as trustee for the Trust although ISPL was not a party to the agreement; and
  - Following queries by the Inquiry in December 2017, Mr White on behalf of ISPL provided the Inquiry with a different NPJV Agreement, with a typed date of 31 January 2017, signed by Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust (ABN 58 945 504 025) and by Pilbara Resource Group Pty Ltd. Unlike the original NPJV Agreement provided in July 2017, it was not signed by ISPL as
trustee for the Trust. It may be open to the Inquiry to question the date on which this deed was in fact executed and whether it was executed after 31 January 2017 and then type dated with the date of the initial agreement;

- Arrangements in relation to the hire, lease and/or acquisition of motor vehicles with entities connected with Mr Green and/or Mr Carter were inadequately documented. For example, ISPL apparently entered into arrangements with "Economical Care Hire" (which is a business name rather than a legal entity capable of contracting) that were not properly documented and which were only subject to a draft unexecuted agreement dated 1 August 2016 for on and off hire of vehicles (or that was at least all that ISPL was able to locate and provide to the Inquiry);

- Agreements with individual contractors/consultants and the companies through which they contracted and staff:
  - were frequently poorly documented, if at all, in relation to contractors/consultants and often not signed, or not signed until after the contract had commenced; and
  - were frequently documented as agreements with the individual who in fact provided the service rather than the corporate entity nominated by that person with whom the agreement to provide that service was supposedly entered into with; and

- The terms on which Mr Carter (or any entity through which he has provided services) has been engaged since 31 July 2017 and any changes to his roles and responsibilities since then, and when, have not been properly documented by way of an executed agreement or otherwise.

In its response ISPL acknowledged the historical issues regarding entering into contracts. It indicated that ISPL is committed to ensuring that only certain personnel will be authorised to enter into contractual arrangements and that all contracts will be properly documented and approved:

All current contracts, across all Trust entities, will be assessed and any issues regarding their implementation or continued operation will be resolved. Where appropriate ISPL will seek to terminate or renegotiate terms. This will be a long process but ISPL is committed to the ensuring that it is completed.

ASIC Notifications

ISPL has had poor controls over governance and statutory notifications including in relation to changes to the directors and share ownership of ISPL and related entities.
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For example:

- Mr Carter was recorded in ASIC notifications as having ceased as a director of ISPL on 13 May 2016 and recommencing on 24 June 2016, apparently in error, in circumstances in which he continued in that role in the meantime, with unsigned minutes of the ISPL Board recording that Mr Carter was present at meetings of the Board in May, apparently as director, and at a meeting on 25 May 2016 Mr Carter was appointed chairman of the meeting and all future meetings of directors until it is noted otherwise, which suggests that ASIC was incorrectly notified;

- As at 2 February 2017, the shares in Goldfields Carbon Group Pty Ltd and Pilbara Carbon Group Pty Ltd were notified to ASIC as being held by Indigenous Carbon Group Pty Ltd, not beneficially, in error. This was subsequently corrected only after the Inquiry raised the issue with ISPL on 22 January 2018 to reflect that the shares were, in fact, beneficially held by Indigenous Carbon Group Pty Ltd;

- As at 2 February 2017, the shares in Goldfields Carbon Group Pty Ltd and Pilbara Carbon Group Pty Ltd were notified to ASIC as being held by Indigenous Carbon Group Pty Ltd, not beneficially, in error. This was subsequently corrected only after the Inquiry raised the issue with ISPL on 22 January 2018 to reflect that the shares were, in fact, beneficially held by Indigenous Carbon Group Pty Ltd;

- According to ASIC records Goldfields Carbon Group Pty Ltd's founding director and secretary was Mr Andrew White and initially its shares were held by CO2 Holdings Pty Ltd, a family company of Mr White. A week later Mr White was temporarily replaced as director and secretary by Mr Carter for a 2 month period from early March to early May 2016, before resuming those positions. Mr White indicated to the Inquiry that it was not intended that he be removed during this period, just that Mr Carter be temporarily added;

- ASIC was erroneously notified by ISPL that as at 2 February 2017, 51% of the Indigenous Carbon Group Pty Ltd shares were held by Njamal Services Pty Ltd non-beneficially (i.e. on trust), before being corrected, only after the issue was raised by the Inquiry, on 19 January 2018 by notice to ASIC that ISPL was the relevant shareholder non-beneficially (i.e. as trustee for the Njamal Peoples Trust). As previously explained, that was inconsistent with numerous relatively contemporaneous documents and subsequently prepared documents including information in the initial July submission from ISPL to the Inquiry and an ownership structure diagram as at June 2017 contained therein;
• The ASIC register records that Mr Carter was appointed and ceased to be secretary of ISPL on 4 July 2017, the day he resigned as director. The reasons for this are unclear;

• According to ASIC records Mr Travis McPhee was recorded as both being appointed and ceasing as a director of Njamal Security Pty Ltd on 31 August 2017 – the notification of his appointment filed with ASIC was dated 6 September 2017. By notice dated 6 April 2018 ASIC was advised that he ceased being a director on 31 August 2017; and

• According to ASIC records, during 2018, ISPL appointed an alternate director, Clinton Wolf, for a period of two weeks during which Mr White was outside of Australia. Mr White has indicated to the Inquiry that Mr Wolf’s appointment as an alternate director is ongoing, however this is not borne out by ASIC records reflecting either that Mr White’s understanding is erroneous or that, again, ASIC notifications have been incorrectly completed.

• The purported removal of Mr Travis McPhee as director of Njamal Services Pty Ltd on 31 August 2017 and subsequent notification to this effect lodged with ASIC as considered in detail later in this Chapter of the Report.

Several of the above examples were specifically drawn to Mr Carter’s attention, who in a response to the Inquiry stated:

Mr Parker was responsible for the corporate key. I am sure all of these matters would have been resolved and no amount of mischief making by SSO could lead to any conclusion other that the records on the Internet are only a guide and not admissible in any Court of Law. I am sure if SSO had asked Mr Parker for the records he would have supplied them happily. It is a mistake to accept any online records, as they can be changed electronically without the knowledge of the Company Secretary.

Mr Carter’s response is concerning, again not appearing to acknowledge the significance of the issues raised. Again, in marked contrast, in respect of these issues ISPL responded as follows:

ISPL has previously acknowledged that this was an area of poor control and the requirements are now better understood. ISPL agrees that a historical analysis of the ASIC register of ISPL and the other Trust related entities and the rectification of any errors it contains must occur. Due to the constraints of time and personnel this has not yet occurred. However, ISPL is also looking to appoint a commercial manager who will undertake a company secretarial role and ensure compliance with ASIC requirements and rectify any errors that currently exist.

The apparent repeated failures by ISPL and its staff to accurately complete such notifications strike at the heart of the reliability of ASIC records and the ability to rely on those records. Issues in this area have been apparent to ISPL for a significant period of time. While steps were apparently taken at Mr White’s behest to improve practices at about the time of the very concerning events surrounding the notification to ASIC of the removal of Mr McPhee as a
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director of Njamal Services Pty Ltd (considered further below), ensuring that errors in notifications to ASIC are remedied does not appear to have been given the priority warranted.

Other Matters

The Inquiry notes below, by way of further example, certain other matters of concern of which it became aware during the Inquiry

- ISPL failed to comply with ACNC deadlines for the lodging of the 2017/2018 Audited Financial Report despite having received an extension of time to do so;
- ISPL has continued as trustee of the Njamal Peoples Benevolent Trust after 4 July 2017 despite having, since that date, only one director whereas under the relevant trust deed a minimum of 3 directors is required;

By way of response ISPL advised:

Njamal Peoples Benevolent Trust

Unfortunately, as previously advised, it has not been possible for ISPL to appoint additional directors because of the existence of the Inquiry. ISPL is reviewing the trust deed of the Njamal Peoples Benevolent Trust to assess the ability for variation of the deed to allow for one director in the short term. No decisions will be made by the Njamal Peoples Benevolent Trust until such time as this issue is rectified.

- issues in relation to the making of loans or advances to Njamal people were granted contrary to ISPL's own policies and procedures without being properly documented, or erroneously classified in accounts as loans when they ought to have been (and later were) treated as distributions, and/or transferred from those accounts without adequate explanation and justification being provided to the Inquiry in respect of each transaction;
- the nature and extent of loans or advances that were granted also involved preferential treatment in the sense that TAC members or employees/contractors appeared more likely to receive such payments, for higher amounts, than Njamal people with no Trust involvement. This may be explicable in many cases due to the fact that many of the payments were treated as advances against income or entitlements that these persons had yet to earn but were expected to receive from the Trust.
- a failure to consistently and clearly distinguish in records provided to the Inquiry between payments made to TAC members or Trust employees/contractors in respect of entitlements earned in performing those roles and payments made or purportedly made on some other basis, for example by way of distribution or "loan";
- ISPL's practice, at least historically, of permitting persons other than those to whom banking security tokens were issued to use those tokens to authorise
transactions; and situations where one person has had custody of more than one security token, thus enabling that person to authorise payments without the involvement of a second person (see below);

- ISPL’s failure to disclose that a significant transaction reflected in the total of a bank account balance printout had been reversed a few days later (see below); and

- Inadequacy of ISPL’s responses to the Inquiry, including failure to provide information sought, including in relation to specific authorisations and approvals of transfers the Trust Fund to Njamal Services Pty Ltd, whether by way of loan or distribution and whether for working capital for NPJV or otherwise.

- While ISPL prepared a draft 2017 to 2020 Strategic Plan, it was substantially incomplete and, as far as the Inquiry understands, was not finalised, although recently it understands further work may have been done in relation to strategic planning.

In isolation, a number of the above matters are understandable in the context of the amount of activities that have been engaged in by ISPL and its related entities over a relatively short period of time. However, in combination they convey a more concerning picture and point to the need for an immediate need for significant material improvement in the practices of ISPL.

In that regard, ISPL, via its legal representative has positively responded to the Inquiry’s contemplated recommendations and undertaken a complete structural review and implemented, or plans to implement, many of the Inquiry’s recommendations. As noted in its letter of 19 September 2018:

As referred above, ISPL has recently undertaken a complete structural review of ISPL and adopted recommendations of the Inquiry by taking the following steps:

- as early as mid-July 2018, ISPL engaged Ms Kathryn Bates to provide assistance on regulatory compliance and governance;
- further to her engagement, Ms Bates has now been appointed as Chief Executive Officer to ensure regulatory compliance on all activities undertaken by the Trustee, including all legal and corporate governance;
- appointment of Mr John van der Ende as General Manager and who will have responsibility for approving all applications for funds and all distributions made by the Trust;
- the role of Mr Carter has been significantly altered and is the subject of current negotiation which is in the process of being resolved and further information in this regard will be provided to the Inquiry as soon as precise details are available;
- dismantling existing internal controls and replacing them with new systems, for example in relation to IT;
- terminating any engagement of “Esplanade”, resulting in the removal of Mr Green and associated personnel;
• Ms Bates is working through the balance of the reorganisation and amendment of the authorisation matrix to reflect the new structure of the Trustee and the roles now being undertaken by each person;
• increasing the diversity and skillset of the board of directors by increasing the directorship of ISPL to 5 directors following the conclusion of the Inquiry, as it has been difficult to attract quality applicants while the Inquiry is on foot; and
• systematically reviewing and updating all consultancy agreements and contracts.

Reported Bank Balance

As noted earlier, at the meeting on 4 April 2018 with Mr White and Mr Carter, at which issues were discussed including the cash flow and liquidity of the trust, Mr White provided to the Inquirer a copy of the recent account balances of the bank accounts of the Trust and certain of its wholly owned subsidiaries. The printout of the account balances was current as at 3.28pm on 23 March 2018 and revealed that the account balances were then as follows:

- Njamal Heritage Society Cheque Account 612810692536 $4,981.08
- Njamal Peoples Trust Society Cheque Account 612810679649 $195,471.04
- Njamal Services Pty Ltd Society Cheque Account 612810692296 $208.22
- NPT PHE Society Cheque Account 612810697388 $231.54
- NPT Trust Saver Business Online Saver 612810679868 $12.43

While the funds in several of the accounts were very low, the funds in the Trust cheque account were still significant. The Inquiry's concerns about cash flow issues were therefore somewhat allayed. However, the Inquiry later identified when it sought and was provided with copies of bank statements, that on the same day (23 March 2018) as the printout was made, $100,000 had been transferred into the Trust cheque account, thereby increasing the amount in the account.

The bank statements and other records in relation to the loan from the Trust to Njamal Services Pty Ltd, revealed that:

(a) on 23 March 2018 $100,000 had been transferred into the ISPL cheque account, in reduction of a significant loan from ISPL to Njamal Services Pty Ltd and, in turn, Njamal Services Pty Ltd to the NPJV; and

(b) on 26 March 2018 the transaction was effectively reversed by ISPL, with the repayment of the funds to the joint venture.

Supporting documents were sought in relation to the authorisation of the transactions. They were provided by ISPL on 5 August 2018. The authorisation record reflected that the initial payment was authorised by Mr White from Njamal Services Pty Ltd and Mr Dryland of its joint venture partner on 23 March 2018 and involved a transfer from the NPJV bank account to the Trust cheque account processed at 6.10pm (EST). The authorisation records provided recorded that Mr Carter and Ms Jing Guo authorised the transfer back of the funds on 26 March 2018. In a note to the Inquiry it was suggested however that, in fact, the token
custodian was Ms Joyce Lu, acting on instruction from GZ/AW ie Gerald Zikwature and Andrew White. Significantly, the printout of account balances provided to the Inquiry was printed four minutes later, at 6.14pm (EST), apparently by Mr Zikwature or another person using his account access.

In an accompanying email Mr White observed:

Payments are authorised with 2 levels as shown on the transaction reports. Noting that for administrative purposes, the authorising toggle allocated originally to Rod Carter is in fact assigned to Accounts admin. We have been working with CBA for over 6 months now to rearrange all the account authorities but are continually frustrated by CBA process and errors on their part in not achieving the desired structure in a reasonable time frame.

The transactions in question were effectively for internal cash flow management and working capital purposes.

The issue of toggles is considered separately below.

Further clarification was sought from Mr White, by email as follows:

Can you please clarify why it was necessary for cash flow reasons to transfer $100,000 from the NPJV into the ISPL Cheque Account on 23 March 2018 and then to transfer an identical sum back on 26 March 2018, when the balance of the account into which the funds were transferred was sufficient to meet all of the expenditure from that account over that three day period?

Please also confirm whether you were the person who authorised the repayment on 26 March 2018.

Mr White responded:

There was a change in the forecast cashflow circumstances.

As this was effectively an internal transfer, at the time a 2 stage approval was required in accounts admin with my knowledge.

We are constantly improving the way we work and we have since changed the approval process with CBA for any two of 4 people can authorise with at least one being a Director.

The supposed change in the forecast cashflow circumstances was not specified.

The Inquiry invited ISPL and Mr White to respond to an invitation to comment on the above and potential findings that may have been open to the Inquiry to make. ISPL through its lawyer responded: 153

ISPL has undertaken an evaluation of the cashflow of the Trust at the time of these transactions and we are instructed that these transfers relate to the operation of the joint venture between the Trust and the Pilbara Resource Group (NPJV) which is held 60/o by the Trust and 40/o by the Pilbara Resource Group.

We are instructed that it was common practice to transfer excess working capital of the Trust from the NPJV into the Trust's account. On 23 March 2018, $100,000 was transferred to the Trust. It was expected at the time of this payment that the NPJV would receive revenue of around $500,000 allowing for ongoing working capital. When it was realised that this amount

would be delayed, the $100,000 previously transferred to the Trust was transferred back to
the NPJV by the Trust.

We have requested evidence as to these payments and will provide them to the Inquiry.

ISPL’s lawyers later provided the Inquiry with an extract of a bank statement for the NPJV
detailing transactions which occurred during the above period. It was noted that a number of
deposits were received by NPJV clients in the days following the transfer of $100,000 from
the NPJV to the Trust but that they were not received in time for certain payments to be made
to the NPJV and, as a result, the $100,000 was transferred back to the NPJV by the Trust to
allow for the payments to be made.

The bank statement discloses that following the withdrawal of $100,000 the balance of the
particular NPJV account reduced to approximately $15,500 at the end of that day. After the
$100,000 was transferred back on 26 March a payment of approximately $22,000 was paid
from the account the following day. A series of significant payments were received into the
joint venture account the following day.

Although the original rationale for the transfer of the $100,000 from the NPJV account to ISPL
was supposedly for internal cash flow management or working capital purposes, the Inquiry
notes that once the funds had been returned to the NPJV account and it shortly thereafter
received the significant payments from other sources, with its account returning to a
significant positive balance, the funds were not then transferred back to the Trust account
during that week (except possibly for a $10,000 transaction on 29 March 2018).

Ultimately, while the Inquiry is left with considerable disquiet surrounding the circumstances of
the provision of the statement of account balances to the Inquiry; it is not satisfied to the
Briginshaw standard that the transactions that occurred involving the $100,000 involved a
deliberate attempt to mislead the Inquiry. It does however consider that, given the
circumstances in which the transactions are said to have occurred, and that the $100,000 in
funds had been transferred back prior to the meeting with the Inquirer, ISPL and Mr White
should have drawn this to the Inquirer’s attention to avoid the Inquiry being misled. That is
particularly so in the context where the Inquirer was raising issues in relation to cash flow and
liquidity with ISPL and Mr White. In the Inquiry's view this instance further evidences the
difficulties with the cash flow management approach adopted by ISPL where even small
delays in anticipated payments being received created the need to take such steps.

CommBiz

Under CommBiz banking facilities, according to publically available information in relation to
security:154

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What system security is in place for CommBiz?

All CommBiz sessions are connected to your computer system through a Secure Socket Layer (SSL) using the industry standard 128 bit encryption.

Security tokens, that generate a one-time password (OTP), are used in addition to the standard password and login ID access. Tokens are assigned to authorisers and administrators you have registered to your service.

Authorisers have the ability to authorise transactions with the one-time password (OTP) generated by their token. Administrators are provided with tokens to enable them to make changes to the service and the profile of the users. This provides a method to control access to accounts, viewing transaction information and the ability to perform certain functions within the service.

You can also request all users regardless of their profiles to be required to have a security token to access your CommBiz service.

An online audit log of user information and actions is recorded with a date and timestamp. This information can be printed from the Admin section, using the audit report function.

In order to process a transaction two people, with separate security tokens, are required to authorise it.

The obvious purpose of this system is to provide adequate security, transparency and accountability in respect of transactions carried out on the CommBiz platform.

However, ISPL has adopted a practice, at least historically, of permitting persons other than those to whom the security token was issued to use those tokens to authorise transactions. The Inquiry has also been informed of situations where one person has had custody of more than one security token, thus enabling that person to authorise payments without the involvement of a second person.

This practice is particularly concerning given it effectively circumvents the security and control measures put in place in relation to authorising expenditure from bank accounts. In addition, this practice has the highly undesirable consequence that financial records may be unreliable, which in turn impedes the ability of a third party (including the Inquiry and any auditor) to readily identify the person who in fact authorised a particular transaction.

The Inquiry had previously been advised of difficulties in ISPL obtaining timely and correct alterations to proposed authorisations in respect of the tokens or toggles, the Inquiry finds that the above internal practices within ISPL permitted significant lapses of corporate and financial security and considers that immediate steps should be taken to ensure such inappropriate practices immediately cease and do not recur.

In its response to an invitation to comment in relation to the above issues, ISPL responded via its lawyer that the Commbiz system was now working however only after a significant effort and a large number of work orders issued to Commbiz and NetBank since late 2017 to establish the correct protocols. It was noted that Commbiz now offers the Trust a two-tiered structured system of operator access for processing and director access for authorisation and approval. It was indicated that steps had been taken by ISPL to restrict access to Commbiz
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and that the security tokens were now with specified personnel being Messrs Wold and White with level A authorisation and approval, Mr Zikwature with level B authorisation and 3 other personnel who had operator access. Operator access allows personnel to enter expenses into the system for payment and that any two of the people with level A or level B authorisation being required to approve the payment of expenses. It was also indicated that ISPL was also investigating other financial institutions so as to achieve a more responsive arrangement.

Recommendation 23 (Chapter 8)

ISPL review its existing practices and procedures in relation to the use of banking security tokens/toggles and authorisation of bank transactions to ensure that only appropriately authorised persons have custody of the token/toggles and enter or authorise transactions.

The removal of Travis McPhee as a director of Njamal Services Pty Ltd

As noted elsewhere in the Report, according to ASIC records Travis McPhee was removed as a director of Njamal Services on 31 August 2017. Mr McPhee raised this matter with the Inquiry and suggested that he had been improperly removed following an exchange of emails between him and various people associated with ISPL in early to mid-September 2017.

The circumstances of his removal, beginning with its discussion at ISPL/Njamal management workshop on 30 August 2017, and the commentary the Inquiry has received from ISPL and persons currently and previously associated with ISPL, is set out in some detail below, in terms which reflect the content of an invitation to ISPL (and certain current or former directors) to respond to certain possible findings that it was considered may be open to the Inquiry. The responses received and ultimate conclusion of the Inquiry is then addressed.

On 30 August 2017 an ISPL/Njamal management workshop was convened by Mr White. According to the record of that meeting circulated by Mr White on 31 August 2017, it was attended by Messrs Aird, Carter, Cullity, Mack, Parker and White.

In relation to the topic of corporate entities it was relevantly noted as follows:

Current Status:

• Corporate Entities needs stronger consideration before creating
• ASIC Controls and Corporate Secretarial Management is decentralised
• Director Appointments not readily workable
• Suggested Improvements:
  • Review corporate structures
  • Centralise and control all ASIC responsibilities
  • Review Director appointments

Notes:
All current entities are required (some historical contract links)
Ironside has 22 July authority
Njamal people need to be represented on business activity boards:

- NH - Directors to be Wes, Tony and Willy
- NS – Directors to be Andrew and 2 of Sticks, Michael Mitchell, Wayne McKie and Dolly
- ISPL Directors – as is with Wes and Andrew

The reference to "Sticks" is apparently a reference to Mr Ian Taylor.

It was noted under "Actions:", amongst other things, that "Craig to review ASIC – ASAP" and various "Org Structures" were to be developed including by "Andrew – for NS".

While it seems therefore that potential changes to directors to various of the Njamal entities was discussed, it is evident that this did not involve an actual decision by the Boards of ISPL or any of the entities to appoint or remove any directors, but reflected the then intention about what changes were contemplated may be made.

According to minutes of a purported meeting of ISPL as sole shareholder of Njamal Services Pty Ltd, signed by Mr White and supplied to the Inquiry by ISPL, a meeting was purportedly held by telephone at 7am on 31 August 2017, recorded in the minutes as follows:

Removal of Director:
The Chairman explained that, in his opinion as a Director of Njamal Services Pty Ltd and as a Director of Indigenous Services Pty Ltd, Travis McPhee was heavily conflicted in his role as a Director of Njamal Services Pty Ltd. The Chairman explained that Travis was under a lot of pressure from certain members of his family to reveal to them details of the business affairs of Njamal Services Pty Ltd and this situation was untenable.
Resolved: That Travis McPhee be removed as a Director of the Company.

The purported attendees were Mr White (as Chairman of the meeting) and Mr Aird (by telephone). The Inquiry observes that the concern about conflicts expressed in the minutes is not reflected in the minutes of the workshop meeting held 30 August 2017. As outlined further below, it may be open to the Inquiry to conclude that, contrary to the minutes, no such meeting occurred.

On and from 1 September 2017 Travis McPhee engaged in various email communications with Jing Guo in relation to a forthcoming TAC meeting scheduled for 6 September 2017. On 4 September Mr McPhee emailed a list of items he wished to add to the agenda including noting:

NPJV partnership as a Director of Njamal Services I need current statements documentation on the following

Thereafter followed a list of items in relation to the NPJV, It was also noted that:

Njamal Based Directors not being Engaged in meetings Management or being paid.
Mr McPhee also raised that as a TAC member he received a lot of complaints from his family and "member of Njamal" regarding cut backs on assistance and sought a wide range of information about Trust investments and income.

As part of the email exchange Mr McPhee also emailed Ms Guo raising concern that meeting notifications needed 2 weeks' notice not 1 week and concerns that notices and agendas did not meet requirements.

On 18 August 2017 the Inquiry sought from ISPL details of agreements under which payments were received for services, employment or directorships. Some contracts were provided on 25 September 2017, although others were only provided in February 2018 after a further request, and some remain outstanding.

On 1 September 2017 Mr McPhee also engaged in a series of text exchanges with Mr Carter:

- Found out the issue
- Need a contract signed so I can pay you
- Was requested by STATE Solicitor wants to see it. It's for your Director fees
- Will email soon as I get it
- Rod

    Well put me on the Books for Njamal Services Easy fix the Company is in a JV it's active I need to be engaged with this entity

    That is what this is for

    Yeah well that's all that I wanted sorted...I need to be included...I got no issues moving for2

    Forward

The copy of the contract ultimately provided to the Inquiry in relation to Mr McPhee was a Project Consultant agreement that:

- was unsigned and undated;
- had an electronic date of 23 October 2016 below the space Mr Carter was to sign, nearly a year before it was requested from the TAC member; and
- was between ISPL as Trustee for the Trust and the TAC member personally, despite the fact that payments had been going from the Trust to that person's company.

On 5 September 2017 Mr Carter emailed Mr Mack and Mr Parker, copied to Mr Green (but not either of the directors of ISPL, Messrs White and Aird), as follows:

- Dear All,
- Not sure where the corporate keys are here
- 1. Travis is supposed to be the Director of Njamal Security (sic)
- 2. Once Njamal Security received funding he was conflicted
- 3. The Directors of Njamal Services are Mark Walker, Andrew White and Wayne McKie. Have asked Michael Mitchell. He will advise this week

Please make these changes
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Rod

In response Mr Green stated:

And Phil O'Reilly is also a Director of Njamal Security as he will be the licence holder due to Travis’ firearms offence

Mr Mack in turn responded:

Has any of the paperwork been completed – i.e. resignation letter/Directors resolutions/Consent to act as Director forms?

Greg – if you could forward the corporate keys to me, I can action this

Craig

Mr Parker replied to all, attaching an ASIC extract as of that day for Njamal Services Pty Ltd. He also noted that he had the Secretarial Registers in his office and would drop them off to Mr Mack when he was next at Melville Parade. He also provided corporate key details and officeholder online services registration details, under the user name andrewwhite, and the password.

Mr Green responded to all indicating that Courtney Green (his daughter) would also give Mr Mack all her corporate files "so we can have a single source..."

Mr McPhee also emailed Mr Carter later during the morning of 5 September 2017 in relation to concerns about TAC meetings, the way Njamal was heading and issues about being a director and being paid:

Rod

What’s the go with this TAC Meeting no notification of time location Agenda I have items I have to add and I’ve had to message Jing constantly just to get a location and time ... Not good enough buddy I got issues with the way Njamals headed and my role and Families inclusion in negotiations and meetings ... I’m a director and a TAC member and totally being ignored with dealings with mining companies and being included in general. like I said I want to be reinstated as a Director with Njamal mining and start being paid as a director similar to Greg Parker Andrew White and Richard Green if a Njamal blooded Director hasn't got a position available then we have a major problem.

Regards

Travis

The email was forwarded by Ms Guo to Mr Green, copied to Mr White and Mr Parker, later that morning.

Mr Green responded to Mr McPhee clarifying that he (that is, Mr Green) was not a director of any Njamal entity. Mr McPhee responded:

That's good you confirmed this let's sort this all out this week

This was followed shortly afterwards by an email from Mr McPhee:

Who is the Njamal services Director and NPJV management team

Then 15 minutes later by email:
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Richard/Rod/Andrew/Greg

Who are the Njamal services Director and NPJV management team

Mr Carter replied shortly thereafter, copied to Messrs Green, White and Parker:

Travis
Everyone was emailed 2 weeks ago
Call me. I need to sort out Consolidated Minerals
You are a Director of Njamal Securities
Rod

On 6 September 2017 at 10.07am [apparently EST ie 8.07am WST] the ASIC register was updated by notice that Mr McPhee has been appointed a director Njamal Security Pty Ltd on 31 August 2017. The notice was purportedly certified by Mr White.

On 6 September 2017 at 8.10am Ms Green emailed Mr Green in respect of Njamal Security Pty Ltd, apparently attaching a new ASIC printout, and observing:

New basic with Travis added

Later that morning two further notifications were lodged. The first, under the name of Mr White, that Phillip O'Reilly had been appointed as a secretary of Njamal Security Pty Ltd on 31 August 2017 (Mr O'Reilly had previously been appointed director of the company by notice lodged 31 August 2017) and the second, lodged under the name of Mr O'Reilly, as director, that Mr White ceased as both director and secretary on 31 August 2017.

Much later, by notice filed by McKinnon Taxation Pty Ltd on 6 April 2018 and purportedly certified by Mark Walker, ASIC was notified that Mr McPhee ceased as a director as at 31 August 2017, that Mr O'Reilly ceased as a director and secretary as at 28 March 2018, that Mr Walker was appointed director as at 11 August 2017 and that Mr White was appointed as a director and secretary as at 31 August 2017. While the Inquiry understands Mr O'Reilly resigned from Njamal Security on or about 28 March 2018, it is unclear why the remainder of the changes recorded in the ASIC notice dated 6 April 2018, most of which were extremely late or backdated, occurred. It is also not clear what relationship Mr Walker has with McKinnon Taxation Pty Ltd (an entity who has previously provided services for Mr Carter) or in what way Mr Walker instructed or authorised McKinnon to lodge the notice dated 6 April 2018 with ASIC

At a meeting on 19 September 2017 with Mr Mack, when queried as to who were then the directors of Njamal Services Pty Ltd, Mr Mack advised that the directors were Mr White, Mr Walker and Mr McPhee. That was based on an apparent misapprehension in that Mr Walker had been a director, but only for a short period in 2016. Notably, although Mr Mack was present at the 30 August management workshop, his understanding was not reflective of any change in directorship having then occurred. However, by the following day, 21 September
2017, Mr Mack had in an email to Mr White, copied to Mr Carter, Parker and Aird, and in the context of an email chain discussing the removal of Mr McPhee as a director of Njamal Services Pty Ltd, realised that Mr Walker was not a director of Njamal Services Pty Ltd and was not able to sign resolutions on behalf of the company.

On 18/19 September Mr McPhee and Mr Carter exchanged further emails in relation to issues including questions of directorships.

Mr Carter noted various things including that it appeared that the ASIC record needed adjustment, and this had been made. He also made observations about Mr McPhee being conflicted once he received money from Njamal Security Pty Ltd as it was funded by Njamal Services Pty Ltd and that this was standard commercial practice. He noted that obviously something was motivating Mr McPhee to start these agitations:

Travis, I can only go so far. You are not a Director of Njamal Services or Security. Njamal Services Directors must have no conflicts
I am happy to keep pushing your case for Woody Woody, that is it. You are free to independently pursue any other business interests you have. I hope it goes well.
Please be advised the car is not for your personal use and will be needed on site very soon.
Kind regards
Rod

On 19 September 2017 at 1.59pm Mr McPhee emailed Mr Carter, Mr White and Mr Parker indicating:

Hi Rod
Please find attached issues that need to be resolved
Kind regards
Travis McPhee
Director
[redacted]

As best the Inquiry can ascertain the attachment was a letter, an unsigned version of which dated 7 September 2017 was provided to the Inquiry. In it Mr McPhee wrote to Mr Carter expressing concerns in relation to his being concerned, for some time, that he may not have been fulfilling his duties as director of Njamal Services Pty Ltd and observing that it was no error on his part or Mr Carter's that he was a director of that company, not Njamal Security Pty Ltd. He sought a wide range of information about Njamal Services Pty Ltd and the NPJV.

On 20 September at 11.32am Mr McPhee emailed Mr Carter:

Rod

Let me make myself clear I have from day one insisted that I be a Director of the Njamal entity that deals with Mining Companies I only took up the security Management Team as advised by you and you have tried to keep me there despite my objection despite the on going problems this is all from you're behaviour...You seem to take it on you're shoulders that you can dictate to us how this is all going to work I have text messages emails you confirming that you want to put me on the books as a Director of Njamal Services you're not
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in charge here we are all you can resort to is Sharon McGann Westerman Smoke and Mirrors BS to what's you are doing ..Everyone can see what's happening you think you can negotiate with certain Njamal Members in the back ground and that's sufficient for you to do what you think is right .. You got seven days to fix this Im not going away you can try dictate what you want to the Community I'm a Director of Njamal Services Njamal Mining what ever story you want to make up it's all BS Regards

Travis

As for any suggestion that Mr McPhee had been appointed a director of Njamal Services Pty Ltd in error, that is inconsistent with Mr Parker’s email of 9 September 2016 to Mr Barry Taylor, copied to persons including Mr Carter, Mr White and Mr Green, the day that company was registered and the directors were notified to ASIC, that the directors were Mr Walker, Mr McPhee, Mr White and Mr Parker.

On 20 September 2017 at 1.30pm Mr Carter emailed Mr Parker and Mr White, copied to Mr Green, indicating:

We need the NS minutes to indicate Travis is unappointed once Njamal Security commenced
He is obviously being guided by some one else

On 20 September at 2.26pm Mr Green emailed Courtney Green asking:

Is this key still active?
From memory we needed this to remove Travis?

At 2.36pm Ms Green responded:

Craig has it. A copy is also in the lockable drawers or on my desk

At 2.36pm Mr Green further emailed Ms Green:

Rod has asked we remove Travis from Njamal Services on the same day we appointed him to Njamal Security.
Do you know the date or do I need to run an ASIC report?

At 2.51pm Ms Green responded:

Not off the top of my head no. best to run another report

At 3.47pm Mr Green responded:

31/08/17
Can we please change the office address?

Meanwhile, at 2.41pm on 20 September Mr McPhee further emailed (spelling and grammar uncorrected):

Greetings Gentlemen

Could you offer an explanation as a Director of "Njamal Services" why I haven't actively been engaged or at least invited to participate in Director Meetings Management Meetings Mining Company Negotiations etc I informed you both over the phone about this months ago. I'm probably at fault as anybody else but for some time I have had discussions with Rod about actively engaging with Njamal Services as this is my main goal and role I sort for quiet some time. I. My displeasure of managing Njamal Security has been raised with Rod for months,
never ending operating and strict policing problems caused a no interest and engagement on my behalf. Moving forward I insist and note that my role as ‘Njamal Services’ Director be acknowledge by fellow Directors of the entity and related Companies be accepted and treated no differently to what is expected of yourselves. Could you please from today include me in Director meetings, Mining Company meetings, and all related discussions and a contract and Director fee be drafted up ASAP.

Kind Regards
Travis McPhee
Director

According to ASIC records at 11.48am [apparently EST ie 9.48am WST] on 21 September 2017 a notice was lodged under the name of Mr White as director that Mr McPhee ceased as a director of Njamal Services Pty Ltd on 31 August 2017.

Shortly afterwards, at 9.55am, Ms Green emailed Mr Carter, copied to Mr Green, with an attached document apparently being an ASIC printout in relation to Njamal Services Pty Ltd as at that day. Ms Green advised:

Morning,
Travis has been removed as director for Njamal Services on the 31/8/17 which s (sic) the same day he was made Director of Njamal Security.
Please find attached the current company details.
Thanks,
Courtney

At 12.36pm that day, Mr McPhee emailed Mr White, Mr Parker and Mr Carter again:

Gentlemen
You're silence is golden and very much appreciated you have seven days to respond and Comply with my last correspondence before all avenues are assessed as a Director, TAC member, MALC member and all round great bloke are perused .. You can keep pulling the Sharon Westerman card just place me in a different category and problematic Njamal member Basket.
Kind Regards
Travis McPhee
Director

At 12.48pm Mr White emailed Mr Mack, copied to Mr Carter, Mr Parker and Mr Aird:

Hi Craig
Pls see below.
Pls draft the necessary circular resolutions as suggested by Greg to formalize the removal of Travis as a director of NServices (which apparently should have been when Njamal Security was established).
Mark walker and I will sign as required.
Rgrds
A
At 2.53pm Mr Mack replied to all:

Andrew,

It would appear that someone has beaten me to it!

A form was lodged today at 11.48am removing Travis as a Director with a cessation date of 31/8/17.

Please also note that you are the sole Director and Greg is the Company Secretary - i.e. Mark Walker is not a Director. This was done under the login Greg gave me (in your name)

I will draft a resolution for the above change for your signature when you are in the office tomorrow.

Craig

At 2:55pm Mr White responded:

Ok thx
Did Greg do it?
Rgds
A

A 3:14pm, in response not to Mr White's email but to Mr Mack's, Mr Parker said:

Wasn't me!

I think "they" took Mark Walker off when "they" were applying for an ABN and TFN for the Njamal Charitable & Benevolent Trust. He wasn't able to provide his personal TFN for the online Application from memory.

Kind Regards,
Greg Parker

In response to this email from Mr Parker, Mr White responded to all at 3:20pm to say:

Ok so we need to find out who did.

At 3.55pm Mr Mack responded to all:

I just spoke to Richard- he made the change as requested by Rod
Richard has agreed not to make any future changes.

Craig

On 22 September Mr McPhee became aware of his removal as a director of Njamal Services Pty Ltd as he received notice from ASIC. He emailed Mr White, Mr Parker and Mr Carter at 10.44am:

Gentleman
You better have a strong case to argue for you're recent actions on to why I was recently removed as a Director of Njamal Services

Kind Regards
Travis McPhee
Director
[redacted]
Mr White forwarded this email to Mr Aird, copied to Mr Parker, Mr Carter and Mr Mack.

Separately, at 11:30am on 22 September 2017, Mr Parker forwarded to Mr White, Mr Aird, Mr Carter and Mr Mack an email chain from Mr Coad and provided the following commentary:

Gents,

I received the following email from Simon Coad (former sole Director of Njamal Mining). Check out the email below his.

I had no idea of who 61437…@online.telstra.com.au was until I started typing the phone number 0437…. into my Contacts. In case you’re not as clever as me, you’ll find it’s Travis McPhee.

Travis is looking for a good reason why he was dismissed as a Director of Njamal Services Pty Ltd.? I think this is also reflected in the Member’s Minutes of Njamal Services (attached) if I’ve not mistaken.

Attached to Mr Parker’s email was an unsigned PDF document titled “Njamal Services Pty Ltd Minutes of Shareholder’s Meeting 31 August 2017”. That document is an unsigned version of the minutes dated 31 August 2017. A review of its metadata indicates it was generated by Mr Parker converting an MS Word document to PDF on 22 September 2017.

At 12:39pm that day Mr White emailed Mr Carter, Mr Parker, Mr Cullity, Mr Mack, Mr Green, Ms Guo and Ms Green, copied to Mr Aird, directing that the Board of ISPL had delegated to Mr Mack the responsibility for the management of all ASIC Matters and indicating that Mr Mack was the only person authorised to make changes under Board direction to the ASIC documentation for ISPL, including any and all companies owned or controlled through ISPL or various trusts. Mr White went on to say that any unauthorised access may be reported to ASIC.

At 1:21pm on 22 September 2017, in response to Mr McPhee’s email of 10.44am that day, Mr White emailed Mr McPhee a signed copy of the purported minutes of 31 August 2017, copied to Mr Parker, Mr Carter, Mr Aird and Mr Mack:

Dear Travis,

I am in receipt of your email below re your position as Director of Njamal Services Pty Ltd. Please be advised that the Shareholder of Njamal Services Pty Ltd, Indigenous Services Pty Ltd ATF for the Njamal Peoples Trust, resolved at a Njamal Services Pty Ltd Shareholder meeting on the 31st August 2017 to remove you as a director of Njamal Services Pty Ltd.

The Shareholder was aware of your conflict of interest as a Director of Njamal Services Pty Ltd and acted accordingly.

A copy of the relevant Minute is attached.

Yours sincerely,

Andrew White

Director

Njamal Services Pty Ltd

Mr McPhee responded 7 minutes later:

Andrew
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I've never consented to being a Director of Njamal Security or authorised anybody from Indigenous Services to add and remove my directorships I was coerced to MANAGE Njamal Security by Rod to what I suspect and now confirm to keep me from any way dealing with Njamal Services please provide Documentation as me being a Director of Njamal Security before the 31 of August you are all out of order to make and enforce any decision like this without my consent

Regards

Travis

The Inquiry is unaware of any evidence that Mr McPhee signed a consent to act as director prior to his purported appointment as a director of Njamal Security Pty Ltd. According to ASIC records Mr McPhee was recorded as both being appointed and ceasing as a director of Njamal Security Pty Ltd on 31 August 2017 – the notification of his appointment filed with ASIC was dated 6 September 2017 and by notice dated 6 April 2018 ASIC was advised that he ceased being a director on 31 August 2017. Why the later notice was filed is unclear, possibly in recognition that he had not been properly appointed in the first instance.

Minutes of meeting of ISPL as shareholder of Njamal Services Pty Ltd

As noted earlier, minutes of a meeting of ISPL as sole shareholder of Njamal Services Pty Ltd, signed by Mr White, have been supplied to the Inquiry by ISPL. The minutes, which purport to reflect a meeting held by telephone at 7am on 31 August 2017, record:

Removal of Director:

The Chairman explained that, in his opinion as a Director of Njamal Services Pty Ltd and as a Director of Indigenous Services Pty Ltd, Travis McPhee was heavily conflicted in his role as a Director of Njamal Services Pty Ltd. The Chairman explained that Travis was under a lot of pressure from certain members of his family to reveal to them details of the business affairs of Njamal Services Pty Ltd and this situation was untenable.

Resolved: That Travis McPhee be removed as a Director of the Company.

The purported attendees were Mr White (as Chairman of the meeting) and Mr Aird (by telephone).

Mr Aird does not recall this purported meeting/discussion and has no diary record of any such meeting/discussion. On the morning of 31 August 2017 Mr Aird was due to fly from Perth to Brisbane on a flight which boarded at 7.15am. Mr Aird's view is that in those circumstances it was unlikely that he would have participated in a meeting, even by telephone, with Mr White for the purposes of removing Mr McPhee as a director of Njamal Services Pty Ltd.

On 14 November 2017 at a meeting in the South Perth Njamal Office attended by Mr White, Mr Green, the Inquirer and a solicitor assisting the Inquirer, ISPL indicated to the Inquiry that Mr McPhee had been removed from the position of director of Njamal Services Pty Ltd on the basis that Mr McPhee had undisclosed firearms offences. However, offences of this type do
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not automatically disqualify a person from acting as a director of a corporation.\textsuperscript{155} It appears Mr White might have conflated the reasons for Mr McPhee ceasing his role with Njamal Security Pty Ltd with the reason for his removal as a director of Njamal Services Pty Ltd.

Notices were issued to ISPL and various individuals seeking further information and documentation regarding the purported removal of Mr McPhee from being a director of Njamal Services Pty Ltd and related matters.

In an email response of 23 August 2018 Mr White relevantly advised:

...  

This request has further background to it in that Travis was originally appointed director of Njamal Security Pty Ltd and was going to be responsible for developing his family interests in this business. The Trustee actively promoted his role.

However, an undisclosed firearm offence impacted his ability to obtain a security license.

The reasons for the changes to Njamal Services were discussed at the workshop on 30 August 2017. You have copies of the workshop correspondence already.

The Sole Shareholder mtg took place by phone early in the morning of the 31st Aug 2017 due to travel arrangements.

The changes were agreed at the sole shareholder meeting and were to be implemented at that date. The emails around the 5th September are related and refering to the necessary paperwork to make the changes. It appears that the work was not completed timely and was followed up around the 21st September. By coincidence or otherwise, the follow up appears to have at about the same time as communications from Travis at that time.

The Inquirer will be aware that the Minutes are not required to be signed off immediately and they were signed off in the time frame of normal reporting.

a) Please refer to the email dated 21 Sept 2018 from AW to CM attached.

b) Please refer to the email dated 21 Sept 2018 from AW to CM attached. Whilst it was Craig Mack instructed to make the change, it apparently was submitted by Richard Green an hour or so earlier. The email correspondence shows some confusion as to who did it but ultimately the change was authorised by AW as per the minutes.

c) Please see attached bundle of emails.

d) The copy of the original signed MOM is attached. There are no known subsequent documents or drafts.

Mr Parker's response to questions directed to him personally bore similarities, although was in certain material respects in conflict with the response from Mr White on behalf of ISPL. In response to the following questions, Mr Parker's answers were as specified (italics added):

In relation to the meeting of ISPL as shareholder of Njamal Services Pty Ltd that is said to have occurred on 31 August 2017 (31 August Meeting) by telephone for the purposes of removing Mr McPhee as a director of Njamal Services Pty Ltd:

a) Please advise what, if any, role you had in connection with the 31 August Meeting and the preparation of any minutes (whether draft or final) for that meeting.

   [GP] My recollection of the role I had in the preparation of the Minutes was limited to giving Craig Mack verbal input on the wording. I believe Craig inadvertently dated the Minutes 31 August 2018 when they should have been dated on the day of the

\textsuperscript{155} Section 206B of the \textit{Corporations Act} 2001.
Management Meeting, held a day earlier at the Perth Zoo conference centre when the removal of Travis McPhee as a Director of Njamal Services Pty Ltd was discussed. There were no objections to his removal because it was felt he was leaking commercially sensitive information to Sharon Westerman regarding Njamal Services Pty Ltd. Upon reflection, the wording of the Resolution did not reflect the level of concern expressed at the Management Meeting that he Ms. Westerman's mouthpiece. Having now seen Mr. White's response to the CTI regarding this matter, I believe either Mr. White or even Craig Mack may have inadvertently got the date and time of the Directors’ Meeting wrong, however Mr. Aird did not object to the removal of Travis McPhee at the Management Meeting on 30 August 2018. Mr. Aird returned to Brisbane on the morning of the 31st of August 2018.

b) Please provide a copy of the original and any subsequent drafts of any minutes prepared by you in the original unaltered format in which they were prepared (with document property information unaltered), and advise on whose authority, instruction or request they were prepared.

[GP] I don't appear to have a copy of the original and any subsequent drafts of any Minutes to do with the removal of Travis McPhee and I would be surprised if I did. I believe Mr. White has provided a copy of the original to you, however I've attached it again as part of my response to (c) below.

c) Please provide a copy of all emails between you and any one or more of Mr Carter, Mr White, Mr Aird, Mr Green and/or Mr Mack between 19 September and 23 September 2017 relating to:

(i) the removal or proposed removal of Mr McPhee as a director of Njamal Services Pty Ltd; and/or

(ii) draft or final minutes of the 31 August Meeting.

[GP] Please refer to the attached copies of the emails you've requested. I assisted Mr. White in compiling this bundle of documents in order for Mr. White to prepare his response to your questions. I have no others.

d) Please advise, if you are aware, who lodged the notice with ASIC notifying ASIC that Mr McPhee had been removed as a director of Njamal Services Pty Ltd.

[GP] Craig Mack’s email to Mr. White and I dated 21 September 2018 confirms that Richard Green lodged the Form 484 with ASIC.

Perhaps most significantly, Mr Parker did not assert that a meeting of directors (in their capacity as representatives of ISPL in its capacity as shareholder of Njamal Services Pty Ltd) actually had occurred as the minutes purport to reflect. At the same time, however, Mr Parker appears to excuse or justify the document based on Mr Mack or Mr White possibly inadvertently misdating the minutes. He then seeks to justify what is recorded in the minutes by reference to the workshop meeting on 30 August 2017.

ISPL (and it would seem Mr White, who forwarded the email response on its behalf) in contrast maintained to the Inquiry that the meeting did occur as reflected in the minutes.

Notably, neither ISPL (via Mr White) nor Mr Parker referred to or provided the Inquiry with a copy of the email and attached draft minutes circulated by Mr Parker on 22 September 2017.

As foreshadowed, the Inquiry invited any responses, documents or other information in relation to the above matters and a series of conclusions which the Inquiry considered may be open to it to make, from ISPL and Messrs White, Parker and Carter in relation to this matter.
ISPL's response, which was also apparently on behalf of Mr White, was provided by way of a three page letter from its solicitor dated 9 August 2018. On page one, ISPL's solicitor summarised:

The management workshop on 30 August 2017 had no official minutes and indeed, management workshops do not as a rule do so although, notes are prepared. These notes do not reflect the entire discussions in particular, as there was a concern about confidentiality of matters raised at workshops. Discussions at this time included particular appointments and the removal of different persona some of which were not resolved and some were. The position of Mr McPhee was clearly discussed and it was determined that he cease being a director of “Services”. It was a resolution of the workshop to establish or workable boards of directors with appropriate persons as such. Mr McPhee was never considered as an option for “Njamal Services”. At this meeting instructions were given to make desired changes including in relation to Mr McPhee. Over the next few weeks communications with Mr McPhee raised the question for Mr White as to whether the changes had been made and recorded. Mr White instructed Mr Mack and Mr Parker to undertake all the necessary paperwork which he signed based upon his recollection this meeting. Mr White is unaware why Mr Green undertook these tasks as responsibility had been given to Mr Mack. The outcome was the same. Either way Mr White was not happy with the controls and issued instructions accordingly.

The Inquiry observes that this explanation – that the decision to remove Mr McPhee as a director of Njamal Services Pty Ltd was made at the meeting on 30 August 2017 – is directly inconsistent with Mr White's explanation, given to the Inquiry by email dated 23 August 2018 and excerpted above, that the decision was made at the meeting of ISPL as shareholder of Njamal Services Pty Ltd on 31 August 2017. It is also directly inconsistent with the terms of the minute signed by Mr White as a record of a purported shareholder's meeting of ISPL by telephone between its directors.

Further confusing matters is the following passage from page two of ISPL's lawyer's letter dated 9 August 2018 where it is stated that:

In August and September 2017 (including after the resignation of Mr Aird) Mr White and Mr Aird had numerous discussions including early in the morning due to travel schedules. These interactions are too numerous and varied to format and populate in any record or register. Clearly, they included a number of vigorous discussions regarding responsibilities of directors of ISPL. Given those exchanges Mr White does not expect that Mr Aird to have been concerned (he did not appear so to Mr White) about “Njamal Services” whilst his focus was on his principal responsibility and day-to-day work with "Njamal Heritage".

It is not clear from this narrative whether ISPL is positively asserting that the meeting of ISPL as the shareholder of Njamal Services Pty Ltd on 31 August 2017 actually took place, or whether ISPL is making a broader point that early morning telephone discussions between directors were not unusual. If the former, this appears inconsistent with the passage from page one of the letter excerpted above, and Mr Parker’s explanation that "either Mr. White or even Mr Mack may have inadvertently got the date and time of the Directors’ Meeting wrong, however Mr. Aird did not object to the removal of Travis McPhee at the Management Meeting on 30 August 2018."

In an attempt to clarify what occurred during these two days in August 2017 the Inquiry sought the views of Mr Mack. However, while Mr Mack recalls that the composition of the
board of Njamal Services Pty Ltd was discussed at the meeting on 30 August 2017, he did not recall whether any decisions were taken in that respect, nor did he recall the minutes of the meeting of the shareholder dated 31 August 2017 when shown a copy of them.

In relation to particular findings which the Inquiry considered may have been open to it to make, ISPL’s lawyer responded (on pages two to three of his letter) as follows:

In relation to the list of potential findings identified by you the following initial comments are made:

1. The entire construct of your correspondence is based on a selective use of the information available. Matters which appear you have ignored are referred to below.

2. The notes from the above workshop do not include any reference to Mr McPhee as an ongoing director of “Njamal Services”.

3. The appointment of Mr McPhee as a director of “Njamal Security” was intended to meet his well-known long-standing desire of his to develop a security business. This was clearly to be separate from “Njamal Services” and of itself did not provide scope for Mr McPhee to be able to access information of “Njamal Services”. Mr McPhee was a known supporter of Ms Westerman and there was good reason to suspect that Mr McPhee was providing information and modelling to Ms Westerman which gave rise to a conflict and action had to be taken. This information was being used to promote competing businesses of Ms Westerman.

4. The failure of Mr Aird to recall these issues from the workshop meeting does not mean that a decision was not taken. It simply means that Mr Aird does not recall. Other persons present at that meeting recall the matter of Mr McPhee being decided as subsequently acted upon. These discussions included other companies related to ISPL. In this regard, it is thus wise clear recollection of the issue was discussed and dealt with as described above. Additionally, we had the benefit of seeing Mr Parker’s response on which Mr White agrees.

5. The removal of Mr McPhee was properly authorised by ISPL as the sole shareholder of the relevant company. The time and date of the minutes it is conceded could be incorrect but the will of ISPL was clearly carried out. Given, recent changes to the organisation such administrative issues ought not arise again.

6. The email from Mr Carter was correctly responded to by Mr Mack and asking for the relevant documentation. Both Mr Carter and Mr Mack were both aware of the workshop discussions and their outcomes.

7. Mr White did query whether relevant paperwork had been completed in relation to Mr McPhee. As it transpired it not been and was quickly corrected. Instructions were given to make the changes made however, Mr Green, for whatever reason made them in a fashion that he did not assist and that highlighted to Mr White the lack of specific controls relating to ASIC records and prompted his email in relation to these matters.

8. From the perspective of ISPL the emails between Mr McPhee and Mr Carter carry no authority on behalf of ISPL.

9. Mr Walker was not a director and was not readily available in any event to provide circular the resolutions in relation to “Njamal Services”.

10. The Inquiry’s conclusions to be drawn from what Mr Aird has said to the Inquirer is taken as fact but this is inconsistent with the recollection of others present at the meeting. It seems Mr Aird has no recollection of these matters.

11. The decision to change the directors was effective. It is one thing to say something didn't happen it is another to say that they are unable to recall which is all Mr Aird does.

12. ISPL does not quibble regarding its corporate governance in September 2017 and steps have been taken remedy it.

13. The ASIC records in this regard were eventually accurate for example, Mr McPhee did not consent to act as a director of “Njamal Security”. Records were adjusted to reflect this.
14. We do not understand the point being made regarding the email of 22 September 2017.

15. The outcomes of the management workshop relating to the changing directorships were thought by Mr White to have been implemented. After seeing the communications from Mr McPhee in September 2017 steps were taken to ensure they were.

Further communication on this issue will be undertaken as discussed above.

No further communication on this issue was received from ISPL.

However Mr Parker also responded to the Inquirer's invitation by letter to the Inquiry dated 26 September 2018. In his letter, Mr Parker first addresses his earlier response, extracted above, given to the Inquiry on 23 August 2018:

The Inquirer’s statement contained in his latest Invitation that I attached an unsigned PDF document titled “Njamal Services Pty Ltd Minutes of Shareholders’ Meeting 31 August 2017” (“the Minutes”) to an email I sent to Messrs. White Aird, Carter and Mack on 22 September 2017 clearly contradicts my response to previous questions directed to me by the Inquirer and casts a doubt over my credibility.

I have located both the Word and .pdf files for the Minutes in the Company Secretarial folder of the Njamal People’s Trust Directory on my computer. In preparing my response to previous questions directed to me by the Inquirer I searched the Company Secretarial folder of Njamal Services Pty Ltd. Please refer to the attached screen shots of both folders. I erred in saving the Word file in an incorrect Directory.

The Inquiry accepts Mr Parker’s explanation.

Having located the Word and .pdf versions of the minutes, Mr Parker clarifies the timing of the creation of the minute, and explains that he has checked his timesheet for 21 September 2017 (a redacted copy of which Mr Parker supplied to the Inquiry) and noted that he “spoke to Mr. White and Mr. Mack between 3:20pm-3:45pm about Njamal Services Pty Ltd, presumably in relation to the manner in which the Resolution to remove Mr. McPhee should be drafted.”

Next, Mr Parker confirms his view that the decision to remove Mr McPhee as a director of Njamal Services Pty Ltd was taken at the workshop meeting on 30 August 2017:

As the Inquirer has correctly pointed out, Mr. Aird was subsequently included in my email to Messrs. White, Carter and Mack on 22 September 2017 and a copy of the Minutes were attached. To my knowledge, Mr. Aird did not subsequently raise any objection to the contents of the Minutes. It would be reasonable to conclude from Mr. Aird’s silence that he was happy, at that time at least, to acknowledge that the Minutes reflected the decision taken on 30 August 2017 to remove Mr. McPhee as a Director of Njamal Services Pty Ltd.

Mr Aird’s apparent silence was also noted by the Inquiry. In response to queries about that silence Mr Aird explained:

My receipt of the emails regarding Mr McPhee ought to be viewed in context of my longstanding frustrations with the ISPL group of companies and associated management. By 22 September I had become very realistic in my expectations with regard to those matters over which I had influence and other matters that were being handled in a way that was not open to negotiation. It is worth noting that by around this time I had accepted that my relationship with ISPL was coming to an inevitable end.

I do not specifically recall receiving the emails. My records show I had conversations with Greg Parker and Jack Cullity on 22 September 2017, however, I cannot recall if we specifically spoke about Mr McPhee.
Finally, Mr Parker expressed the view that:

The Inquirer has gone to great lengths to question the manner in which Mr. McPhee was removed as a Director and it’s clear Mr. McPhee is being portrayed as a victim. For the record, in my professional opinion, Mr. McPhee’s only objective throughout the period the Inquirer has focused on, and at most other times, was to obtain commercially sensitive information from Njamal Services Pty Ltd to pass on to Sharon Westerman. Of that I have no doubt.

That ISPL was entitled as shareholder of Njamal Security Pty Ltd to remove Mr McPhee from being a director of Njamal Security Pty Ltd is not in doubt. Nor is it in doubt that ISPL had legitimate concerns as to the apparent pressure on Mr McPhee to obtain and disclose information about the operations of the Trust and its entities to his family and that he was by this time relatively closely associated with Ms Westerman. As to assertions of Mr McPhee deliberately releasing sensitive confidential information, the Inquiry was not provided evidence that substantiated that assertion. The Inquiry is not seeking to portray Mr McPhee as a victim. If however he was improperly removed from office, it is understandable why he would be entitled to feel wronged. What is of fundamental concern to the Inquiry is the adequacy of the governance, candour and actions of ISPL, as Trustee from whom very high standards of conduct are to be expected, and the actions of those involved in relation to notifying ASIC of Mr McPhee’s removal from office as a director and preparing and signing minutes to that effect.

ISPL’s legal representative also advised the Inquiry that from the perspective of ISPL the emails between Mr McPhee and Mr Carter carry no authority on behalf of ISPL.

Having taken into consideration the information received by it from various participants in the above events, the responses provided to it in response to invitations to respond, the possibility of some confusion in different persons’ recall of the precise sequence events, and the objective evidence reflected in contemporaneous documents reflecting communications in relation to this matter, the Inquiry finds that:

- At a management workshop meeting held on 30 August 2017 discussions were held in relation to the composition of the board of Njamal Services Pty Ltd, ISPL and other related to ISPL entities including proposed changes to directors. An outcome of the workshop meeting was that it was generally agreed that changes should be made to the directorships of Njamal Services Pty Ltd and ISPL including that Mr McPhee should be removed as a director of Njamal Services Pty Ltd;

- The meeting did not constitute a meeting of directors of ISPL or the directors or shareholder of Njamal Services Pty Ltd and no resolutions were made or purportedly made by those directors, in their capacity as directors or as representatives of the shareholder of Njamal Services Pty Ltd, at that meeting in relation to changes to the directorships of Njamal Services Pty Ltd or Njamal Security Pty Ltd.
More specifically, it was not resolved by ISPL (by its directors) as shareholder to remove Mr McPhee as a director of Njamal Services Pty Ltd as at that or any other specified date.

It is highly unlikely that a meeting of directors of ISPL as shareholder of Njamal Services Pty Ltd was held by telephone between Mr Aird and Mr White on the morning of 31 August 2018, or at all, by which it was resolved to remove Mr McPhee from being a director of Njamal Services Pty Ltd with effect from that or any other date.

On 5 September 2017, despite having been disqualified from managing corporations and despite necessary steps not having been taken, including relevant resolutions made and paperwork completed, Mr Carter emailed Mr Mack and Mr Parker, copied to Mr Green, instructing that changes be made including, in effect, for Mr McPhee to be appointed as a director of Njamal Security Pty Ltd and the directors of Njamal Services Pty Ltd to be altered to reflect Messrs Walker, White and McKie as directors, and potentially Mr Michael Mitchell, whom Mr Carter had asked.

Notwithstanding Mr Mack querying whether any of the paperwork had been completed – i.e. resignation letter/Directors resolutions/Consent to act as Director forms and that he could action this - Mr Green and/or Mr Carter caused Ms Green, on 6 September 2017, to notify ASIC of purported changes to the directorship of Njamal Security Pty Ltd. That included the purported appointment of Mr McPhee as a director, despite him not having consented in writing to that course.

Following a series of further email communications between Mr Carter and Mr McPhee on about 18 and 19 September 2017, on 20 September at 1.30pm Mr Carter, despite having been disqualified from managing corporations, emailed Mr Parker and Mr White, copied to Mr Green, indicating:

We need the NS minutes to indicate Travis is unappointed once Njamal Security commenced

He is obviously being guided by some one else

The reference to NS was apparently a reference to Njamal Services Pty Ltd. Mr Carter held a view that Mr McPhee had been, or had been intended to be removed, as a director when Njamal Security Pty Ltd commenced.

Unbeknownst to Mr White or Mr Parker, and without Mr White's or Mr Aird's authority or the authority of Indigenous Services Pty Ltd or Njamal Services Pty Ltd, Mr Green, in response to Mr Carter’s email, caused Ms Green to notify ASIC that Mr McPhee had been removed as a director of Njamal Services Pty Ltd as at 31 August 2017, the date from which ASIC had previously been notified that Mr McPhee had been appointed director of Njamal Security Pty Ltd.
Seven minutes after updating the ASIC records, Ms Green advised Mr Carter and Mr Green (but not Mr White or Mr Aird) of the update.

A little more than half an hour later, at 12.36pm that day, Mr McPhee emailed Mr White, Mr Parker and Mr Carter again, which email prompted Mr White to email Mr Mack instructing him to draft "the necessary circular resolutions as suggested by Greg to formalise the removal of Travis as a director of NServices", which Mr White indicated he and Mr Walker, the then other director of Njamal Services, would sign;

Mr White was then unaware that this had occurred, requested Mr Mack to draft the necessary circular resolutions to formalize the removal of Mr McPhee as a director of Njamal Services Pty Ltd on the understanding that this apparently should have happened when Njamal Security Pty Ltd was established and apparently misunderstanding that this could be effected by Mr Walker and he signing a circular resolution as directors of Njamal Services Pty Ltd. That is not consistent with Mr White having had a telephone meeting with Mr Aird on 31 August 2018 by which they resolved on behalf of ISPL as shareholder to remove ISPL with effect from that date.

Mr Mack then discovered that the change in directorship had already been effected and drew this to Mr White's and others' attention.

Mr Mack then indicated to Mr White that he would prepare minutes to reflect the change and pointed out that Mr Walker was not a director and could not sign a resolution of the directors.

The precise events that then occurred in relation to the drafting of the minutes are not clear. However, with Mr Parker's acknowledged involvement it would seem that Mr Mack, with input as to wording from Mr Parker, prepared draft minutes to reflect that a meeting had occurred on 31 August 2017 by telephone between Mr Aird and Mr White recording that it had been resolved that Mr McPhee be removed as director. Mr Parker appears to no longer maintain that such a meeting occurred on that date, nor it seems does Mr White or ISPL, although their position is less clear. The date of the minutes reflected the date that had been specified in the notice previously filed with ASIC by Ms Green, without Mr White's, Mr Parker's, Mr Aird's or Mr Mack's knowledge.

Due to his concerns about the changes that had occurred to ASIC documentation without his authority, Mr White took steps to reiterate that only Mr Mack was authorised to make changes under Board direction to ASIC documentation for ISPL, including any and all companies owned or controlled through ISPL or various trusts. Mr White went on to say that any unauthorised access may be reported to ASIC.
Mr Parker circulated the draft minute to Messrs White, Aird, Carter and Mack by email at 11:30am on 22 September 2017, together with an email chain from Mr Coad and provided the following commentary:

Gents,

I received the following email from Simon Coad (former sole Director of Njamal Mining). Check out the email below his.

I had no idea of who 61437@online.telstra.com.au was until I started typing the phone number 0437…. into my Contacts. In case you’re not as clever as me, you’ll find it’s Travis McPhee.

Travis is looking for a good reason why he was dismissed as a Director of Njamal Services Pty Ltd.? I think this is also reflected in the Member’s Minutes of Njamal Services (attached) if I’ve not mistaken.

Attached to Mr Parker’s email was an unsigned PDF document titled “Njamal Services Pty Ltd Minutes of Shareholder’s Meeting 31 August 2017”. That document is an unsigned version of the minutes dated 31 August 2017. A review of its metadata indicates it was generated by Mr Parker converting an MS Word document to PDF on 22 September 2017.

Those minutes had, in fact, only been prepared with Mr Parker’s involvement that day and/or the previous day.

Mr White, in circumstances in which, without Mr White’s authority, a notice had already been filed with ASIC notifying ASIC that Mr McPhee had been removed as a director of Njamal Services Pty Ltd on 31 August 2018, signed the minutes that purported to record a meeting by telephone between Mr White and Mr Aird on that date, and forwarded them to Mr McPhee, asserting that Mr McPhee had been removed at a meeting on 31 August 2017.

ISPL had extremely poor control over its corporate governance in September 2017. ASIC notices were filed in relation to the directorships of Njamal Security Pty Ltd and Njamal Services Pty Ltd that were inaccurate and without the knowledge or consent of Mr White, Mr Aird, Mr McPhee, ISPL, Njamal Services Pty Ltd or Njamal Security Pty Ltd.

ISPL (through Mr White) and Mr Parker failed to fully comply with requests from the Inquiry for information and documentation in relation to the purported meeting and removal of Mr McPhee and minutes that were prepared. In particular, neither provided to the Inquiry a copy of the email of 22 September 2017 from Mr McPhee to Mr White, Mr Parker and Mr Carter at 10.44am or the email from Mr Parker at 11:30am on 22 September 2017. While Mr Parker’s explanation for not providing the email of 22 September 2017 is accepted, no explanation was provided for not providing a copy of the email from Mr McPhee of 10.44am that same day. It appears that Mr White may have largely relied on Mr Parker to collate relevant emails within the scope of the
compulsory request issued to ISPL. Nevertheless, this failure to comply with the compulsory notice is concerning, particularly given the significance of the email in question and reflects, at least a failure to diligently comply with its obligations.

- The explanation given to the Inquiry by ISPL to the effect that, regardless of the process adopted “the will of ISPL was carried out”, is unsatisfactory and appears to reflect a failure to appreciate the significance of what, on any view of the above events, involved serious failings on behalf of ISPL and its officers.

- The Inquiry considers that it very unlikely that a meeting occurred on 31 August 2017 as purportedly reflected in the minute, or that the date specified in the minute of 31 August was erroneously intended to reference the management meeting held on 30 August 2017.

- Having regard to the Briginshaw standard of proof, the Inquiry is not however prepared to find on the evidence available to it that Mr White or others knowingly participated in the creation, execution and dissemination of a false document. In that respect, the Inquiry notes, amongst other things, that while Mr Aird doubts any meeting occurred having regard, amongst other things, to his absence of any recollection of such a telephone meeting, his travel schedule that day and absence of any record of the meeting, he cannot explicitly and unequivocally state that it did not. The Inquiry also notes the explanations proffered by Mr Aird in relation to the minute that was circulated by Mr Parker and signed by Mr White (he does not recall the document and had by this point in time accepted his time with ISPL was drawing to a close), Mr Mack (he does not recall the document), ISPL and Mr Parker (that, in effect, the minute appears to have been poorly drafted and incorrectly dated).

Concluding remarks

In the Inquiry's review, having regard to the issues identified in this Chapter, and range of other matters raised elsewhere in the Report, including in respect of cash flow and expenditure management, serious internal governance and documentation deficiencies, the making of loans, the incomplete, inconsistent and inadequate responses the Inquiry has from time to time received from ISPL including a failure to fully and clearly explain all the underpinning transactions with, in particular, Njamaal Services Pty Ltd, the role played by Mr Carter in relation to the Trust after his disqualification from managing corporations and ISPL’s failure to respond and provide other information to the Inquiry a question arises as to whether ISPL should be removed from office.

While a number of the findings that the Inquiry has reached, particularly in relation to the role of Mr Carter, the at-times unsatisfactory state of the Trust’s cash position, and the ongoing issues that ISPL has had in respect of corporate and trustee governance seriously concern the Inquiry, the Inquiry's ultimate view is that, on balance, an application by the Attorney
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General for the removal of ISPL may be counterproductive to the health of the Trust and stability of its management.

A number of steps have, it seems, been taken in recent times by ISPL in response to the Inquiry's work, and those steps are promising insofar as they appear to demonstrate a commitment by ISPL to improve its governance, its liquidity and its transparency. Examples of this new approach are the termination of Mr Carter's engagement by the Board of ISPL, the engagement of a new and independent Chief Executive Officer, the direct engagement of Ms Lu (rather than indirectly engaging her through a company connected with Mr Carter, Esplanade Consultancy Pty Ltd), and the improved business management systems which ISPL appear to have invested significant time in. However, given the findings reached in this Report, ISPL's commitment to change is of course viewed by the Inquiry with a degree of caution, and the Inquiry considers it critical to restoring confidence in the Trustee that demonstrated progress be shown in relation to these matters in the immediate future.

It should be borne in mind that notwithstanding the at times serious concerns with aspects of the management and administration of the Trust by ISPL, it has as best as the Inquiry can determine been relatively well received by much of the Njamal community. While it is true that the Inquiry has received complaints from certain parts of the Njamal community, and from people associated with those sectors, it is equally true that the Inquiry has received feedback which is highly complimentary of ISPL. In particular the Inquiry notes the consistently positive feedback that it has received from representatives of the mining companies that are conducting business on Njamal land in respect of the hands-on model that ISPL has adopted in its management of the issues confronting the Njamal People. While a former director of ISPL has suggested that it would not be difficult to replicate that success with another trustee if ISPL were to be removed, the Inquiry, having regard to the plethora of matters in which ISPL is deeply involved, does not necessarily share that degree of confidence. The Inquiry is also conscious that an enduring theme of many comments from senior Njamal people was the wish for Government not to interfere in what the Njamal regard as their business, and that they would consider the findings and recommendations of the Inquiry and take such action as they considered to be appropriate. They were also concerned that the result of the Inquiry be focussed on improving their position as they seek to move forwards, with unity if possible.

In addition to these matters it is apparent to the Inquiry that the TAC is aware of the power vested in it under the terms of the Trust Deed to remove and replace the trustee should it wish to do so. To the extent that there are members of the TAC concerned that the various "agreements" that have been purportedly entered with ISPL in relation to ISPL's security of tenure – including for example the 25 November 2016 "agreement" – provide ISPL with a remedy should the TAC seek to remove ISPL, those members of the TAC should be heartened by the Inquiry's finding, set out above, that those agreements are legally ineffective. In short, if the TAC wishes to remove ISPL as Trustee it can do, provided the
requirements in clause 5.5 of the Trust Deed are met. In the Inquiry's view if ISPL is to be removed it is, given the content of this Report, the TAC who should, at least in the first instance, be given the opportunity to make that decision.

Further, there may be a benefit in allowing ISPL a further short period to demonstrate its commitment to effect changes and address the matters identified by the Inquiry.

However, while this is the Inquiry's view, the Inquiry is critically aware of the duty of the Attorney General as parens patriae. In this respect, the Inquiry recommends that the Attorney General request ISPL immediately implement relevant recommendations contained in this Report, including in particular the recommendations in respect of conflicts, cashflow (including as regards Trust expenditure), loans, internal governance, financial audits of ISPL's key related entities including in particular Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust, and reviews of contracts ISPL has executed (purportedly or otherwise) with directors, related companies and employees or contractors, and provide an update and report to the Attorney General in respect of those matters within one month of ISPL being notified of the recommendations, with a further comprehensive update within 3 months.
CHAPTER 9: CONFLICTS

General Principles

A trustee is the archetype of a fiduciary. A person who occupies a fiduciary position may not use that position to gain a profit or advantage for himself, nor may he obtain a benefit by entering into a transaction in conflict with his fiduciary duty, without the informed consent of the person to whom he owes the duty. These principles, often described as the "profit rule" and the "conflict rule", are fundamental to the role of any fiduciary and are exceedingly strict: a trustee will only be permitted to act contrary to the conflict and profit rules in circumstances where the trust deed, the fully informed beneficiaries of a cestui que trust, or a court, authorises the contrary act.

While the nature and extent of fiduciary obligations may be modified by the terms of the trust instrument itself, under the Trust Deed that modification has not occurred other than insofar as ISPL is permitted to be remunerated pursuant to clause 5.7; the fiduciary obligation not to act in a position of conflict, however, applies with full force. It is accordingly important that the Trustee of the Trust strictly complies with the obligation not to enter transactions in conflict with the Trustee's duties or to otherwise make unauthorised profits.

However, it is not only to trustees that the conflict and profit rules apply. In the context of this Inquiry the conflict and profit rules also apply to the directors of the corporate trustees that have been entrusted with the stewardship of the Trust. Thus, each of Messrs Carter, Parker, Aird, Cullity and White had from time to time been subject to these rules as directors of the Trust.

In addition, there is a live question in Australia as to the extent to which the courts are willing to pierce the corporate veil and impute the conflicts of the directors of a corporate trustee to the trustee itself. The trend of modern authority also suggests that at least some of the duties of a trustee company are also imposed on the directors of the company, including for example the rule against purchasing trust property.

The Inquiry considers that this modern trend is to be accorded significance, particularly in the context of charitable trusts where the section of the community for whose benefit the charitable objects are directed, are often vulnerable groups of people. In that respect, consistently with the general approach of equity, transactions which benefit those natural

156 Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, 68 (Gibbs CJ).
157 Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, 67 (Gibbs CJ).
158 Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, 73 (Gibbs CJ).
persons associated with corporate trustees, including its directors (or their relatives or associates), are to be viewed with extreme disfavour.

In this respect, equity regards transfers of trust property to near relatives of a trustee, including a son, with "extreme disfavour". Although not necessarily voidable, they must be justified by the trustee. The mere fact that the trustee makes no direct or immediate pecuniary gain from the transaction will not necessarily save it from invalidity, because the vitiating factor is not the benefit derived by the transaction but the position of conflict from which the transaction was entered; the very purpose of the conflict rule is to dissuade persons from acting in those types of positions.

The appropriate course when a trustee intends to sell trust property to a close relative such as a wife or child is to seek the consent of the court, which will require the "clearest evidence" that the sale is in the interests of the trust and the consideration paid is full and adequate and is the best price obtainable.

While the authorities regarding dealing with family members involve sales of trust property, it is arguable that the same principles might apply to the purchase of goods or services from family members by a trustee for trust purposes, such that the conflict rule prohibits those types of transaction. If so, it is likely that the directors of a corporate trustee, as controllers of the trustee, are bound by the same or similar obligations in this regard as the trustee itself, such that the directors cannot without consent or court approval cause the trustee to enter transactions with members of their families because to do so would be to put the trustee in a position where it was preferring the interests of a director (vis-à-vis the family member) to its duties to the trust, even if the transaction was otherwise commercial.

The position may be less clear in the case of dealings with friends or associates of the directors, as opposed to close relatives, because it may factually be harder to point to a conflict between the interests of the director vis-à-vis the friend or associate with whom the trust is dealing (cf: spouse) and the duties owed by the director to the corporation.

However, the courts have recognised that it is perfectly possible for a non-pecuniary personal interest, for the purposes of the conflict rule, to arise from a business association as well as kinship. In either case whether there is a conflict that results in breach of fiduciary duties will depend on the nature, intensity and duration of the association: the question is whether the reasonable observer would perceive a real, sensible possibility of conflict.

Given the importance of this obligation, and given concerns have been raised with the Inquiry as to whether the Trustees, their directors and the members of the TAC have complied with the conflict rule, the Inquiry has undertaken a review of the various practices, processes and procedures that the different Trustees and the TAC have adopted to identify and manage conflicts of interest and duty.
CHAPTER 9: CONFLICTS

That review entailed considering:

1. the terms of the Trust Deed;
2. the Trustees’ documented practices, processes and procedures for disclosing and managing potential conflicts between the Trustees’ duties to the Trust and their own interests;
3. the Trustees’ documented practices, processes and procedures for disclosing and managing potential conflicts between the duties owed to them (as companies) by their officers and those officer's personal interests; and
4. the TAC’s documented practices, processes and procedures for disclosing and managing potential conflicts between the duties imposed on the members of the TAC by the Trust Deed and those members' personal interests.

TAC Conflicts

In relation to TAC members, clause 9.13 of the Trust Deed provides:

9.13 Advisory Trustees Relationship with Beneficiaries

In providing recommendations or advice to the Trustee under sub-clause 9.3(b) and 9.4 and where:

(a) an Advisory Committee member is also a Beneficiary; or
(b) a Beneficiary is closely related or otherwise associated with an Advisory Committee member;

that Beneficiary may still receive benefit from the application of the Trust Fund, provided that his or her eligibility is determined only on merit and in accordance with the objects of this Deed. In such a situation, the member of the Advisory Committee referred to in (a) or (b) shall declare an interest, but may participate in the decision relating to any such benefit.

While perhaps surprising on first read, clause 9.13 is understandable once it is understood that by clause 9.5 the Trustee is not bound to act on any recommendation or advice of the TAC, and that by clause 6.4(b) the determination of the Trustee is final and binding on the Beneficiaries. Accordingly, the risk of conflicts of interests at a TAC level affecting the discretionary decision making of the Trustee is mitigated, though not entirely removed. The extent to which, in practice, conflicts of interest at a TAC level have been disclosed and managed is considered below.

Before turning to the specific circumstances of each of the current and previous two Trustees, the Inquiry also notes the terms of clause 10.5 of the Trust Deed, which provides:

10.5 Trustees’ Relationship with Beneficiaries

In applying the Trust Fund for the benefit of the Beneficiaries and where a:

(a) Trustee is a corporation and a Beneficiary is any member, officer or employee of the corporation; or
(b) Beneficiary is closely related to or otherwise associated with a Trustee,

a Beneficiary may still receive benefit from the Trust Fund, providing his or her eligibility shall be determined only on merit and in accordance with the objects of this Deed.
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From the information available to the Inquiry it has only been during ISPL's tenure as Trustee of the Njamal People's Trust that the terms of clause 10.5 may have been engaged. This is because until ISPL took on the role of Trustee, no Beneficiary was a member, officer or employee of either AET or Abbott. However, since ISPL's appointment in May 2016, a number of Njamal people have been employed by ISPL, thus bringing the operation of clause 10.5 into focus. The Inquiry returns to the operation of that clause below in its discussions of the practices, processes and procedures adopted by ISPL for the disclosure and management of conflicts.

Abbott explains that during its tenure as Trustee:

> With the exception of Njamal Enterprises and Njamal Mining, to the best of our client's knowledge it does not know of any Advisory Committee members being involved in or financially benefitting in relation to providing services to any other commercial operating entity in which the Trustee had an interest while Abbott was trustee of the Trust. In relation to Njamal Enterprises sometimes elders would go on surveys and be paid by Njamal Enterprises for conducting the surveys. The people providing the cross cultural training programs would have been paid.

In addition, Abbott supplied the Inquiry with a document titled "Njamal People's Trust Policies and Procedures" which by clause s 9.12 and 9.13 provided:

**9.12 Conflict of Interest**

This policy outlines the principles applying to the declaration and management of actual and potential conflict of interest.

The objectives are:

1. to protect the Advisory Committee's interest in making impartial and objective decisions
2. to protect the reputation of the Advisory Committee by maintaining ethical standards of good judgment, fairness and integrity in all its dealings to ensure that Advisory Committee always observe the highest standard of ethics
3. to avoid any activity or interest that might reflect unfavorably upon the integrity and good name of an Advisory Committee member, or upon the integrity and good name of the Njamal People's Trust.

**9.13 Procedure**

Members of the Advisory Committee must:

1. declare any actual, potential or perceived conflicts of interests in all matters relating to the Trust thereby maintain the integrity and best practice methods
2. withdraw from any discussion and leave the committee meeting for the duration of that item (unless requested by the committee to remain during that time) and shall not participate in any discussion or vote.

An example of this practice being adopted by the TAC during Abbott's tenure as Trustee is recorded in the minutes of the meeting of the TAC on 30 April 2013 where funding for Njamal Mining Pty Ltd was being considered. There the minutes record that the directors of Njamal Mining Pty Ltd left the meeting while the TAC discussed the funding request. Beyond this matter, though, the issue of conflicts of interest does not appear to have arisen.

In contrast to this relatively sophisticated regime for the identification, disclosure and management of conflicts at a TAC level, it appears neither AET nor ISPL had a formal
arrangement in place for the same. However, as appears below, notwithstanding the absence of a formal regime during AET’s tenure, it appears that conflicts at a TAC level were generally identified and managed on an "as they arose" basis.

However, in this context, a TAC member raised a concern with the Inquiry that during the period of ISPL’s trusteeship, generally TAC members remain seated in the room when 'family things' come up in TAC meetings when there are pecuniary or family interests raised. He alleges that they do not declare conflicts (as required under clause 9.13 of the Trust Deed). He also identified a concern when Elders as Applicants were allowed to sit in the room as courtesy and thereby potentially influence the process.

The Inquiry agrees that conflicts are not currently being consistently declared by TAC members. In effect, a declaration of an interest is required to be made by a TAC member where in providing recommendations or advice to the Trustee under sub-clause 9.3(b) and 9.4 (in relation to investments, distributions, other expenditure or business of the Trust) the member or a person closely related to or otherwise associated with the TAC member is a Beneficiary may benefit from the application of the Trust Fund by reason of the matter under consideration. Of course, in many circumstances the nature of the conflict may be obvious to all present because the potential for the member or a known family member to benefit is obvious. It is also possible that in some instances conflicts are declared but not minuted.

Examples identified by the Inquiry where conflicts were either not declared or, if declared, were not minuted include when the TAC voted to support provision of a significant contribution of capital to a member towards a boxing ring and when the TAC supported the Trustee providing a TAC member and his mother certain benefits (such as an employment position and use of a car) from the Trust.

This is in apparent contrast to the position under previous Trustees, when TAC members recused themselves from voting where there was a possible conflict of interest. For example, at the 22 October 2015 TAC meeting (during AET’s tenure), on four separate occasions TAC members abstained from voting due to potential conflict of interest.

In the Inquiry’s view it is important that such declarations of interest be made and recorded, preferably in the minutes, where a TAC member is required to do so, irrespective of whether other TAC members present or representatives of the Trustee might already be aware of the interest of the TAC member or a person closely related or associated with the TAC member. It ensures that the conflict is drawn to everyone’s attention and serves as a reminder of the importance of ensuring that any decision which results in the conferral of a benefit through the application of the Trust Fund must be made purely on merit and in accordance with the objects of the Trust.

In the Inquiry’s view while it will often be desirable for a member declaring a conflict to then absent themselves from the meeting while the relevant issue is discussed or, at least, not actively participate in the TAC decision making process about that issue, that will not always
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be the case. In some cases it may, for example, be that the TAC member can provide further information about a family member's application that is under consideration which would assist TAC deliberations.

Further, absent amendment to the Trust Deed this cannot be mandated as such a requirement would cut across the provisions of the Trust Deed which require a declaration of conflict to be made in certain circumstances but nevertheless permit the TAC member to participate in the decision making process.

In respect of this issue, ISPL's lawyer expressed the view that:

The provisions of the Trust Deed dealing with the issues raised and their procedures are another matter which is the subject of review. You will include trying precisely, if possible, ascertain the fiduciary nature of such membership is in a lot of decisions that is not case. Later in your letter (item 8) you discuss this in more detail. Depending upon the context it probably goes beyond good practice for persons with a conflict to absent themselves. Interestingly, there is academic debate about the extent to which committees of this nature can make their own rules. That in itself was another reason for wholesale changes to the trust deed and the procedures and practices to it. To this extent, there will be a community meeting convened to address these changes.

As noted, this issue is also apparently being considered as part of a broader review of the Trust Deed being conducted by ISPL's solicitors.

In the Inquiry's view, the Trustee should be conscious of identifying where such conflicts may exist, whether they have been declared or not, and in ensuring that if the TAC member concerned does participate in the discussion or vote of the TAC, that in making the ultimate decision the Trustee is satisfied as to the merits of the decision and that it accords with the objects of the Trust.

Recommendation 24 (Chapter 9)

1. Declarations of interest be made and recorded in the minutes of the TAC, on each occasion where a TAC member is required to do so, irrespective of whether other TAC members present or representatives of the Trustee might already be aware of the interest of the TAC member or a person closely related or associated with the TAC member.

2. The Trustee be conscious of identifying where such conflicts exist, whether they have been declared or not, and in ensuring that if the TAC member concerned does participate in the discussion or vote of the TAC, that in making the ultimate decision the Trustee is satisfied as to the merits of the decision and that it accords with the objects of the Trust.

Trustee and Directors' Conflicts

Abbott

The Inquiry, by Notice, asked Abbott about the position Abbott adopted in respect of conflicts of interests:
Conflicts of interest and duty

40. Please advise what, if any, practices, processes or procedures the Trustee or TAC applied whilst Abbott was Trustee of the Trust in relation to disclosing, recording and addressing any actual, potential or perceived conflicts of interest or duty that the Trustee or a TAG member may have had in relation to their involvement in relation to the Trust and its operations or the operations of any other entity or activity associated or connected with the Trust or Njamal people. If these were documented, please provide a copy.

**Answer**

Since Mr Drayson has been involved with the Trust there has been reference to conflict of interest in the Policies and Procedures which relates to the conduct of the Advisory Committee members. The Trustee did not hold any of the shares for itself. Accordingly, there was never any decision about the shares that the Trustee had to make where it would benefit itself. There was never a conflict of interest.

In addition, Abbott supplied the Inquiry with copies of its constitution and, as noted above, a document titled “Njamal People’s Trust Policies and Procedures” which the Inquiry understands was in place from about September 2013.

Clauses 64 and 65 of the constitution, which because of their length are not set out here, comprise a regime for the identification and declaration of conflicts in circumstances where a director has a material personal interest in a matter that relates to the affairs of the company.

The Inquiry is not aware of any evidence of any circumstances suggestive that Abbott, its directors, or employees may have had such a conflict which needed to be identified and declared, though Ms Westerman has stated that at the time that Abbott was trustee of the Trust it was also trustee of a trust for the Kariyarra people, and that in 2013 both Njamal and Kariyarra were interested in the purchase of a building at Redbank near South Hedland, though ultimately neither purchased it. However, as discussed elsewhere, Abbott’s involvement with Kariyarra’s interest in the property began in May 2015, some 18 months after the period in which Ms Westerman was seeking Abbott to purchase Redbank for Njamal.

The Inquiry makes no findings or recommendations in relation to conflicts during Abbott’s tenure as Trustee.

**AET**

By email dated 8 March 2018, AET confirmed that, whilst it was Trustee, it did not have any practices or procedures in place relating to disclosing, recording or addressing any conflicts of interest or duty that the Trustee or a TAC member may have in relation to their involvement with the Trust and its operations. This position was said to have been adopted on the basis that there were no actual, perceived or potential conflicts of interest with AET or its employees whilst they were Trustee.

The absence of any documented policy assumes some significance in the face of concerns raised by Ms Westerman that AET acted in positions of conflict. Specifically, in a document headed “Summary of Issues – Australian Executor Trustees”, Ms Westerman sets out the following matters under the subheading “Conflict of interests”:

AET administering the Trust in a way that provides maximum financial benefit to AET eg Fees
Allowing an individual with his own commercial enterprise (Barry Taylor) to utilise Trust funds to further these interests. No accountability for expenditure/outcomes

Utilising perceived conflict of interest scenario to stop the engagement of a Njamal selected consultant to help build the overall Njamal structure (contradictory to the above scenario with Barry Taylor)

Engagement of Jackson McDonald lawyers in court action against Njamal people. The Trust lawyer, Ryan Eaton, is ex Jackson McDonald, ex YMAC and ex Njamal Mining lawyer

Utilising Trust finances to fund AET's legal costs

Engagement of RSM Bird Cameron to do unspecified work (we can't get copies of the invoices relating to this)

However, with respect to Ms Westerman it is not clear how these items constitute conflicts between AET's duties to the Trust and interests personal to it. Pursuant to clause 5.7 of the Trust Deed AET was entitled to charge for its professional services and was entitled to be indemnified for costs it incurred in managing and administering the deed (including legal expenses). The real core of Ms Westerman's complaint concerning legal fees appears to be that the fees were incurred in responding to an action Ms Westerman and others brought in the Supreme Court seeking orders removing AET as Trustee. As discussed elsewhere, that matter ultimately settled out of Court with AET retiring as trustee and being replaced by ISPL.

While Ms Westerman may have been unhappy that AET was expending Trust Funds on its defence of an action commenced by her and others, in circumstances where that defence was on its face the proper conduct of a Trustee administering the Njamal People's Trust (albeit that Ms Westerman and the other plaintiffs contended that AET had been removed), AET was entitled to meet the expense of that defence from the Trust Fund. Put another way, that AET was paid sums out of the Trust Fund does not, itself, constitute a breach of the conflict (or profit) rules, particularly in circumstances where those payments were authorised by the Trust Deed.

Similarly, in the Inquiry's view, AET was acting within the powers conferred on it under the Trust Deed when it engaged third party consultants and advisors to assist it in managing and administering the Trust. There is nothing in the materials before the Inquiry to indicate that the engagement of Mr Eaton, Jackson McDonald, or RSM Bird Cameron constituted a conflict between AET's duties to the Trust and interests personal to it. Indeed, in respect of Mr Eaton and Jackson McDonald, it appears that to the extent that there are a number of interests involved those interests aligned, rather than conflicted.

As to the complaint about Mr Taylor, it is difficult to see how distributing funds to a third party for the purposes of that third party furthering a commercial interest can be understood as an infringement of the conflict rule. While in certain circumstances it may be beyond the power of the Trustee to make distributions of a commercial nature that is a different matter to the distribution being made from a position of conflict. As far as the Inquiry is aware, AET had no interest in, and derived no benefit from, whatever commercial interest Mr Taylor might have sought to advance.
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Finally, as to the complaint about using a perceived conflict of interest scenario to stop the engagement of a consultant to help build the overall Njamal structure, the Inquiry understands that this is a reference to Ms Westerman’s attempt to engage a consultant to assist in the development of Njamal Nation Limited. From a review of the materials available to the Inquiry it appears that issues of conflict concerning the consultant were raised by Mr Barry Taylor at a community meeting held on 18 and 19 November 2014.

The minutes of that meeting (relevantly) record:

5. Discussion re: Njamal Structure

AM - Welcomed everybody and gave a brief overview about role of Trustee and the trust and explained that the agenda items differ in that the trustee has no involvement aside from where it is a shareholder.

Sharon McGann spoke about the appointment of Darryl Pearce to act as a consultant in terms of structure. Advised the group that it was confirmed by AT’s

Barry revised the issue of potential conflict of interest of Darryl and outlined what that was.

General discussion and heated debated took place over the issue. It was agreed consensus that the community should hear from Darryl re; his proposed structures and in regards to his proposal. It was also agreed to here [sic] from Barry Taylor in regards to his proposed structures.

Barry went over his proposal and presented on the big screen. Suggested that the current doesn’t work in his view. His proposal centre around much of what exists today. CEO appointed, independent director. Proposal Attached

Sharon McGann made mention that Njamal Mining are doing similar things in terms of social outcomes. Doris Eaton - Njamal people should join forces, act together. YMAC is willing to hand back heritage back to Njamal Enterprises P/L.

Daryl Pearce- Talked presented to the group. He talked of “politics”, politics in his view distract Njamal getting where it wants to go. Referred to the group as “Njamal Nation” which needs to be separate and different to all other Corporations in Australia.

Darryl discussed he was never appointed to the board, he consented to be the nomination to be appointed which had to be agreed by the JV partners. After meeting with JV partners Darryl withdrew his consent to act as a Director based on the meeting and he advised Njamal should not enter into the JV with 1 CRG.

Members- Asked Daryl for his background. Daryl provided both a personal & business background.

As with the complaint concerning Mr Taylor, and based on the material available to the Inquiry, it is difficult to see how the engagement or non-engagement of Mr Pearce as a consultant would constitute an infringement by AET of the conflict rule. It may be that certain members of the Njamal community (for example, Mr Taylor) considered that engaging Mr Pearce would involve Mr Pearce in a conflict, but this is different to AET as Trustee acting or purporting to act in breach of the conflict rule.

While it appears that circumstances did not arise in respect of which AET was required to identify, disclose and record any conflicts of interest, it is desirable that trustees of charitable trusts have a documented process in place to accommodate such circumstances arriving. The Inquiry therefore makes the following recommendation:
CHAPTER 9: CONFLICTS

Recommendation 25 (Chapter 9)

AET review its existing policies and procedures and ensure that it has a documented process in place for the identification, disclosure and recording of conflicts of interest in relation to any charitable trusts of which it is trustee.

ISPL

Because of the more active nature of ISPL’s involvement in the Trust, the potential for infringements of the conflict rule arises in a number of ways, each of which are dealt with below.

However, before turning to those specific instances, it is convenient to set out the process the Inquiry took to understand ISPL’s approach to the disclosure and management of real or potential infringements of the conflict rule.

By Notice dated 6 November 2017 the Inquiry asked ISPL the following question:

Please explain what, if any, processes, practices or procedures have been implemented by the Trustee and when in relation to disclosing, recording and addressing any actual, potential or perceived conflicts of interest or duty that ISPL, its shareholders, directors, officers, contractors, agents, employees or TAC members may have or have had in relation to their involvement in relation to the Trust and its operations or the operations of any other trust or entity (including all commercial entities) or activity associated or connected with the Trust or Njamal people. If these are documented, please provide a copy.

In a spreadsheet attachment to an email from Mr White dated 18 December 2017, ISPL responded:

In general, potential conflicts are handled through disclosure. With the disclosures made to date, there are currently no known conflicts or issues. There is no documented procedure at this stage however it is intended to develop the business management system documentation.

Similarly, in a meeting with the Inquiry on 13 November 2017 Mr Carter explained that if there were conflicts they “just wouldn’t do it” and Mr White explained that “it goes to the integrity of our directors”.

In addition to the responses provided on behalf of ISPL, the Inquiry notes clause s 88 to 91 of ISPL’s constitution, which provide:

88. Directors are entitled to be remunerated for other work (including professional work) for the company, and are entitled to hold another office with the company. The exception is that no director may hold an office of auditor or do auditing work for the company.

89. If a director of the company has a material personal interest in a matter that relates to the affairs of the company, that director shall notify the other directors of the company of that interest in accordance with Section 191(1) of the Corporations Act if Section 191 of the Corporations Act so requires.

90. If a director of the company has a material personal interest in a matter that relates to the affairs of the company, and:
   ➢ the director does not need to disclose the nature and extent of that interest under Section 191 of the Corporations Act; or
   ➢ the director discloses, at a director meeting, the nature and extent of the interest and its relation to the affairs of the company, in accordance with Section 191 of the Corporations Act; then:
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- the director is permitted to vote on matters relating to the interest;
- the transactions relating to that interest may proceed;
- the director may benefit from the transaction, and does not have to account to the company for any profits arising therefrom;
- the director shall not be disqualified from office for the reason only that such a personal interest exists; and
- the company is not permitted to avoid the transaction for the reason only that such a personal interest exists.

91. General notice that a director is an officer or member of any specified firm or corporation or has some interest therein may be given by the director at the registered office. That notice thereafter becomes effective as disclosure of that interest in any subsequent matter involving the company and that firm or corporation; but only to the extent that the director’s interest does not at that subsequent time exceed the interest stated in that general notice. The general notice must accurately set out the extent and nature of the interests, as well as their existence.

Beyond the regime for identification, disclosure and absolution of conflicts set out in ISPL’s constitution, sections 191 and 192 of the Corporations Act 2001 also contain regimes for the giving of standing notice (section 192) and notice of matters in which a director has a material personal interest (section 191). When all of these provisions are read together it is apparent that, as regards the directors of ISPL at least, there is a regime in place for the identification and disclosure of conflicts. How those conflicts are recorded, once identified and disclosed, is also dealt with in ISPL’s constitution which by clause 130 requires disclosures of interests to be recorded in the minutes of director meetings.

The question, then, is whether and how the regime for the identification, disclosure and recording of conflicts set up by ISPL’s constitution in conjunction with sections 191 and 192 of the Corporations Act 2001 has been applied throughout ISPL’s tenure as Trustee. To reach a view on that question the Inquiry has sought and reviewed the minutes of the meetings of the directors (from time to time) of ISPL, though the Inquiry notes that in almost all cases the copies of the minutes which have been supplied by ISPL are either in draft, have handwritten amendments to them, or are unsigned (contrary to section 251A of the Corporations Act 2001). Having reviewed those minutes the Inquiry identified a number of areas of potential concern, are dealt with in turn below.

Potential and actual conflicts associated with ISPL’s directors

Motor vehicles

The first and perhaps most significant area identified by the Inquiry as concerning potential infringements of the conflict rule was in relation to the hire of motor vehicles by ISPL and Njamal Services Pty Ltd through companies associated with Messrs Green and Carter.

Materials supplied to the Inquiry by ISPL reveal that ISPL and Njamal Services Pty Ltd had, as at the date of those materials, expended over $300,000 on the hire and purchase of motor vehicles from entities described as “Bluenergy Engineering Australia”, “Esplanade Holdings”, “Greenco Holdings Pty Ltd” and “Economical Car Hire”.

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"Bluenergy Engineering Australia" is Bluenergy Engineering (Australia) Pty Ltd (now in liquidation), which is a wholly owned subsidiary of Esplanade Holdings Pty Ltd. Its directors were Mr Carter (from 7 December 2015 to 30 June 2016) and Mr Green (from 1 May 2016 to 19 October 2017). Mr Carter has explained that:

Blue Energy Australia was a company that I was asked to form as an SPV to finalise a project in Perth that was related to a collapsed Engineering group. Once the project was finished, the Company was to be liquidated. This was to occur after all warranties expired. I asked Mr Green to take the company Directorship as I was involved in ISPL. The Company had some carry over assets in the form of leased machinery and cars. This was a project which paid me fees until I appointed Mr Green to take my role. At a point in time, it was suggested by myself that the cars could be used by Nyamal to solve some interim issues of renting cars. That is the basis of the involvement of Blue Energy. I was conscious of conflict and ensured all decisions involving finance were at arms-length to me.

Esplanade Holdings Pty Ltd is, as noted above, a company associated with the Carter family. Since April 2015 the sole shareholder has been Ryan Carter, Mr Carter's son. Between early January 2015 and 30 June 2017, the directorship of the company alternated on numerous occasions between Rod and Ryan Carter and subsequently has been held by Ryan Carter or Richard Green and since 20 May 2018 by Terrence Carter (Mr Carter's brother).

Mr Carter has suggested that the recording of transactions (as to which see below) against Esplanade Holdings Pty Ltd in respect of motor vehicles in the pre-March 2017 period was incorrect and may be a coding error and in fact all of the transactions said to have been entered into with Esplanade Holdings Pty Ltd were with Bluenergy Engineering (Australia) Pty Ltd. In Mr Carter's words, Esplanade Holdings Pty Ltd "didn't get a cracker" from the motor vehicle transactions.

However, the Inquiry has not been provided with the underlying invoices or other documentation in support of the transactions and this assertion. Moreover, Esplanade Holdings Pty Ltd itself refused, contrary to the provisions of the Charitable Trusts Act 1962, to comply with a request from the Inquiry for information in relation to the nature and extent of any remuneration or benefits received and any direct or indirect business or financial interest Esplanade Holdings Pty Ltd has or has had in connection with ISPL. In those circumstances the Inquiry is unable to reach a concluded view as to the accuracy of Mr Carter's statement. This is a matter which ISPL should ensure is included as part of a full review and audit of all such transactions.

Greenco Holdings Pty Ltd is a family company connected to Richard Green, who has various business connections to Mr Carter. Economical Car Hire is a business name used by Greenco Holdings Pty Ltd. Since 2014, the sole director of Greenco Holdings Pty Ltd has been Courtney Green (Mr Green's daughter). Ms Green is also the current sole shareholder,
although it appears Mr Green also held a share at some earlier point in time and is involved in the business of the company.

Accordingly, on the face of the schedule provided by ISPL, the ~$300,000 in car hire and lease payments made by ISPL and Njamal Services Pty Ltd as disclosed in the material supplied to the Inquiry by ISPL were made to:

- companies of which Ryan Carter was the ultimate sole shareholder (Esplanade Holdings Pty Ltd and Bluenergy Engineering (Australia) Pty Ltd, which was then wholly owned by Esplanade Holdings Pty Ltd);
- companies in which Mr Carter, Mr Green and Ryan Carter had, from time to time, held positions as directors (Esplanade Holdings Pty Ltd and Bluenergy Engineering (Australia) Pty Ltd);
- a company through which members of the Carter family held indirect pecuniary interests as beneficiaries of the Delia Carter family trust, the current trustee of which is Esplanade Holdings Pty Ltd; and
- a company connected to Mr and Ms Green (Greenco Holdings Pty Ltd).

Further, Mr Carter was a director of ISPL between 24 June 2016 and 4 July 2017, and the sole shareholder from 13 May 2016 until 31 August 2017. He has never been a director of Njamal Services Pty Ltd. However, Njamal Services Pty Ltd has at all material times been a wholly-owned subsidiary of ISPL as trustee of the Njamal People's Trust, which was in turn wholly owned by Mr Carter, either directly or through Esplanade Consultancy Pty Ltd (as trustee for Carter family trusts). That position remained unchanged until 26 June 2018 when Mr White became the sole shareholder of ISPL (albeit it appears from ASIC records that Mr White holds that shareholding on trust for some undisclosed person or entity, though Mr White has indicated in conversation to the Inquiry the shareholding is held on trust for his family trust).

Unsigned minutes of a director's meeting of ISPL on 15 March 2017, attended by Mr Carter, Mr Aird, Mr Parker and Mr Cullity record that Mr Carter declared an interest in respect of a discussion of hire vehicles being provided to Liaison Officers as Mr Carter supplied vehicles to the hire business. No other declaration is recorded in any minutes provided to the Inquiry by Mr Carter or ISPL in relation to any other interests in relation to any hire/lease or acquisition of vehicles.

However, on the face of the minutes and the transactions extracted above, there are a number of difficulties with Mr Carter's declaration and with the motor vehicle purchase and hire transactions more generally (The Inquiry notes that Mr Carter suggests that the minutes were acceptable to the auditor).
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First, and significantly, according to schedules provided to the Inquiry by ISPL in relation to car hire/lease expenses incurred by ISPL as Trustee of the Trust, prior to Mr Carter making his declaration of interest to the ISPL Board on 15 March 2017, a total of $43,544 had already been incurred in what might fairly be described as related party transactions:

- in respect of office related car hire:
  - Esplanade Holdings Pty Ltd invoiced $840 (exc GST) on 28 December 2016 (Mr Carter suggests this was clear the invoice was paid to Bluenergy Engineering (Australia) Pty Ltd and may have been a coding error)
  - Bluenergy Engineering (Australia) Pty Ltd invoiced $1,680 (exc GST) in January 2017
  - Economical Car Hire invoiced $4,880 (exc GST) in late February and early March 2017, for a total expenditure of $7,400;

- in respect of Project Officers’ car rental:
  - Bluenergy Engineering (Australia) Pty Ltd invoiced $18,944 (exc GST) in the period September 2016 to January 2017
  - Esplanade Holdings Pty Ltd invoiced $4,200 (exc GST) on 28 December 2016 (again Mr Carter suggests that the invoice was in the name of Bluenergy Engineering (Australia) Pty Ltd and that this is a coding error, although the Inquiry notes this amount concerned more than one transaction)
  - Economical Car Hire invoiced $13,000 (exc GST) in February and early March 2017, for a total expenditure of $36,144

Accordingly, to the extent that the disclosure had any effect for the purposes of absolving Mr Carter of conflicts of interest, that absolution cannot apply to transactions entered before 15 March 2017.

Secondly, Mr Carter’s disclosure was in connection with his supply of vehicles to a hire business which hire business on-hired the vehicles to ISPL as trustee for the Njamal People’s Trust. That hire business was Economical Car Hire, being the name of the business carried on by a company associated with Ms Green (who, as noted earlier in the Report, is Mr Green’s daughter), Greenco Holdings Pty Ltd. That connection was not, at least so far as the minutes reveal, disclosed by Mr Carter or otherwise noted and minuted, although Mr Carter suggests however that this was known from the directors from day one.
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Thirdly, on the face of the minutes of the meeting the disclosure relates only to the supply of vehicles in connection with Liaison Officers and does not in its terms extend to any other direct or indirect interest Mr Carter had in connection with expenditure by ISPL and Njamal Services Pty Ltd on motor vehicles.

In this respect, in the period of approximately 21 months until the end of June 2018, the total amounts invoiced by these entities to ISPL as trustee for the Njamal People's Trust and Njamal Services Pty Ltd as trustee for the Njamal Charitable and Benevolent Unit Trust (Unit Trust), excluding GST, was $303,364 comprising:

- ISPL as trustee of the Njamal People's Trust
  - Bluenergy Engineering (Australia) Pty Ltd: $20,624
  - Economical Car Hire: $229,176
  - Esplanade Holdings Pty Ltd: $5,040
  for a total expenditure of $254,840

- Njamal Services Pty Ltd as trustee for the Unit Trust
  - Economical Car Hire, $48,350
  - Greenco Holdings Pty Ltd, $174
  for a total expenditure of $48,524

According to the spread sheets provided to the Inquiry of the expenditure by ISPL and Njamal Services Pty Ltd over this period, and which the Inquiry accept to be the case, the expenditure related to more than simply vehicles hired for the purposes of provision to liaison officers.

This view is also supported by an email from Mr Green to Murray Reynolds of Discount Leasing on 19 September 2017 in which Mr Green writes of the provision of cars to Elders:

Hi Murray

Njamal is looking at how to provide vehicles initially for 5 'law elders'. They live in communities, so need a 4wd for the gravel roads and creek crossings.

I am looking at 2 options.

The first is to buy second hand dual cabs at under $25k with less than 190,000km. Generally they seem to be 2010-12 models.

The second is to buy new – something like a Colorado for $35k.

In both cases I am seeking no balloon and the lowest repayment – can you plse give me an estimate of period and monthly repayments for both options?

Ta

Richard

Mr Green was provided with an opportunity to comment on this email and in an email to the Inquiry dated 14 September 2018 Mr Green provided the following context:
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You quote an email between myself and Murray Reynolds. To help put in context, there was a resolution from the floor at a TAC meeting for the Trust to buy vehicles for Law Elders. I was taking the minutes of that meeting and tried to get clarification on the value of the purchase and how specific needs were going to be catered for – to no avail.

Immediately after the meeting I was approached for a $40,000 Landcruiser. When following up the Trustee I was told the maximum was $14,000 per vehicle. As one cannot buy a reasonable quality dual cab 4WD for that - $25k buys a reasonable quality that would need around 3% per year of maintenance, I was tasked to look at alternatives. At the time Colorado was on run out, and selling cheaply. The hypothesis was that the cost of leasing a cheap new car and having it fully maintained would be cheaper than purchasing a second hand vehicle with higher maintenance costs.

The answer was that no leasing company would do a maintained vehicle in that physical environment (do the drive out to Yandeyarra or Pippingarra for an understanding of the tough conditions), the depreciation from operating in that environment would be significant and so the cost was very high. Plus most funders were reluctant to lend into an aboriginal trust structure based on previous experiences, and would require Directors personal guarantees as a minimum preferably secured.

Fourthly, in other dealings with ISPL as Trustee for the Trust, Esplanade Holdings Pty Ltd has contracted as trustee for the Delia Carter Trust, a Carter family trust. Accordingly, any benefit derived from the identified transactions involving Esplanade Holdings Pty Ltd (if they are not erroneously recorded) may flow through to that trust and potentially benefit Mr Carter and other Carter family members as the primary and secondary beneficiaries under that trust. Though Mr Carter has recently explained to the Inquiry in a meeting held 26 September 2018 that the only beneficiaries of the Carter family trusts are, and have only ever been, his children, that is only partially correct. A review of the Delia Carter trust deed indicates that Mr Carter’s wife is a primary beneficiary of the trust and Mr Carter, as Ms Carter’s spouse, is a secondary beneficiary.

The Inquiry pauses here to note that when the Inquiry was first attempting to obtain information about these and other matters, Esplanade Holdings Pty Ltd refused to comply with a compulsory request to produce documents and information including a copy of the Delia Carter family trust deed, indicating that:

- the request could not be met for the time being;
- the Inquirer had previously been made aware of this and the circumstances;
- there are legal cases and complex matters involving litigation against the ATO that involves these and other documents, and their release cannot be made at this time as it would prejudice and hamper the progress of the long-standing matter and legal actions underway.

None of those responses provide an acceptable basis for Esplanade Holdings Pty Ltd to have refused to comply with the compulsory request to produce a copy of the document, nor has the Inquiry been made aware of any reason, beyond that set out above, as to why the request could not be met. Mr Carter, later provided the Inquiry with a copy of the Delia Carter trust deed (including two deeds of retirement and appointment by which the trustee was changed) at a meeting with the Inquiry on 26 September 2018.
Compounding matters, ISPL has also failed to provide responses to some requests connected with the hiring and purchase of motor vehicles; including requests to provide the executed agreements and a select range of identified invoices pursuant to which these transactions were made, authorised and paid. In this respect ISPL's response to the Inquiry's request was inadequate.

While it may be inferred that Mr Carter, Mr Green, Ryan Carter and corporations and family members who are beneficiaries of the family trusts administered by the corporations, may potentially have benefitted from the transactions, the Inquiry is unable to determine with any certainty whether they did in fact benefit and, if so, the extent of that benefit, noting that Mr Carter suggests however that the position is very clear; no such benefits flowed in any way as there was no profit derived or intended to be derived from the lease/buy transactions. Mr Green also seems to support that proposition. At present however the Inquiry has been provided inadequate materials to support it reaching that conclusion. Some form or independent analysis is apparently being conducted, although has not been provided to the Inquiry as at the time of this Report being completed.

Fifthly, while Mr Carter's declared an interest in respect of the supply of vehicles by him to a hire car business, which as noted above was the business operated by Ms Green through Greenco Holdings Pty Ltd, it appears that both Mr Green and Mr Carter were involved at least to some degree in day to day operational decision making with respect to cars.

For example:

- the various invoices from Automasters supplied by ISPL to the Inquiry which invoices are made out to Mr Green;
- the email chain commencing with Mr Reynolds' email to Mr Green on 19 September 2017, which refers to prior arrangements with "Esplanade" and which was then forwarded to Mr Carter by Mr Green on 21 September 2017; and
- Mr Carter responded to that email, also on 21 September 2017, writing that the spend on the vehicles for law Elders should be limited to $14,000.

Sixthly, the content of the disclosure obligation in the ISPL constitution is defined by reference to sections 191-192 of the Corporations Act. Section 191(3) provides that notice of a material personal interest must include details of the nature and extent of the interest and its relation to the affairs of the company and must be recorded in the minutes of the directors' meeting when it is given. On the face of the minutes of 15 March 2017, details of the extent of Mr Carter's interest and its relation to the affairs of the company have not been adequately documented. For example, neither how nor how often Mr Carter supplies the vehicles, or what financial benefit accrues or may accrue to him or those associated with him from the transactions, is recorded in the minutes. (Mr Carter suggests that no requirement was necessary, as no benefit was sought or received.)
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Moreover it is also unclear whether Mr Carter absented himself from any future discussion, debate or decision making in respect of the hire or hire-purchase of motor vehicles including the terms on which such agreements were entered into. In circumstances where Mr Carter was involved in the day to day affairs of ISPL, including in some degree in connection with transactions relating to motor vehicles, mere disclosure of an interest is unlikely to have been sufficient to discharge the duties Mr Carter owed to the company. At a minimum, Mr Carter ought to have complied strictly with sections 191 and 192 of the Corporations Act 2001 and ensured that steps were taken and documented, by him and by ISPL, whereby Mr Carter had no involvement in any discussion, debate or decision making in connection with motor vehicles. This does not appear to have occurred. (Mr Carter suggests that no benefit was received and no conflict occurred)

It is also unclear whether Ms or Mr Green's (and any associates') interest in the transaction was ever considered and recorded by ISPL, for example by way of a declaration of conflict or a clause in any agreement by which Greenco Holdings Pty Ltd was engaged to the effect that conflicts would be disclosed, in the course of its decision to engage in a series of transactions which may have been to the benefit of Greenco Holdings Pty Ltd, Ms Green, Mr Green and potentially members of the Green family by way of trust structures. (Mr Carter disputes this was required as Mr Green was a contractor and unrelated to IPL in any way).

In this respect, on 29 August 2018 ISPL provided the Inquiry with a draft unexecuted copy of an agreement whose parties are said to be ISPL and Economical Car Hire (rather than, as is technically accurate, Greenco Holdings Pty Ltd) and which is dated 1 August 2016.

The recitals record that ISPL had a need for vehicles for the Trust, Njamal Services and other related entities, and that Economical Car Hire had agreed to provide vehicles to ISPL on the terms set out in the agreement. The fees for that service are set out in item 2 of the schedule to the agreement, which also includes a note that after 52 weeks of hire the vehicles may be purchased by ISPL at its agreed residual value. When the draft agreement was supplied Mr White indicated that ISPL had been unable to locate an executed copy, but that he understood the invoices had been "per this document".

From the point of view of conflicts the Inquiry notes that the agreement does not contain anything like a declaration of conflict, either in its terms or its recitals. More generally, though the agreement is dated 1 August 2016, it does not capture any transactions with Bluenergy Engineering (Australia) Pty Ltd or Esplanade Holdings Pty Ltd (if any) for the hire or lease/purchase of vehicles. Similarly, the agreement does not contemplate a situation by which a vehicle would be purchased outright by ISPL (or Njamal Services Pty Ltd) without a period of hire, which occurred from time to time. It is presently unclear to the Inquiry whether,

in fact, the agreement applied to all of the numerous transactions in which these entities were involved.

ISPL and Messrs Carter, Messrs Parker, Green and Cullity were invited to comment on various aspects of the matters set out above, in invitations issued to them in October 2018. At present, Messrs Parker, Cullity, Green and Carter have provided substantive responses, while ISPL has indicated that it is continuing to consider the position.

Mr Parker, who at the relevant time was a director of ISPL and its chief financial officer (though not titled as such) in a letter to the Inquiry dated 11 September 2018, commented on the arrangements for hire cars, the disclosure by Mr Carter and the apparent inadequacy of the documentation recording Mr Carter's declaration of interest. Mr Parker's explanation is worth setting out in full:

On the face of the Minutes of the meeting of Directors held on 15 March 2017, I agree that the wording of those Minutes is deficient in respect to the discussion of Mr. Carter's interest in the supply of vehicles to Mr. Green's car hire business. In the strict interpretation of section 191 (3) of the Corporations Act 2001 you are of course right. It’s fair to say that the Directors didn’t have a copy of the Act to refer to at the meeting. Having said that, Minutes of any Meeting rarely record verbatim what was discussed. Furthermore, ISPL has never had the luxury of having the resource of an experienced Minute Secretary at its disposal.

At that particular Meeting I was quite vocal about my concern in respect to the amount being spent on car hire for the Liaison Officers and I queried the daily rates being charged. My concern was not reflected in the Minutes, nor was the involvement of Bluenergy Engineering (Australia) Pty Ltd from memory.

What was discussed, and also not recorded, was the reason for the provision of the hire cars to enable the Project Liaison Officers to perform their roles. It was already apparent that a majority of these Officers hadn’t been able to afford to buy a car in the past nor could they obtain personal finance to acquire one at that point in time.

In respect to the car hire transactions being a proper application of Trust Funds, as distinct to daily rates charged, the roles of the Project Liaison Officers in advancing the Objects of the Trust were never in doubt. I believe the Inquirer has previously received a detailed description of the part they play in sitting between the Trust and the mining companies and the personal development ISPL has seen take place in most Njamal people engaged in those roles.

I continued to voice my concern over the car hire arrangements during the ensuing months. This was a factor leading up to my resignation as a Director on 4 July 2017.

Mr Cullity, who resigned as a director at the meeting at which Mr Carter made his declaration of interest in relation to motor vehicles, has also commented in respect of the issue of conflict of interests in the hire cars space, which he did by email to the Inquiry dated 17 September 2018:

Conflict of Interest - I resigned as a Director at the Board Meeting on 15 March 2017. My recollection is that as a consequence, I did not participate in any of the decisions that were made at that meeting. In particular I do not think that I had an obligation to enquire further once Mr Carter made his declaration of interest in relation to hire cars after I had resigned.

In addition to these former directors, Mr Green has also commented. Beyond that which is set out above, Mr Green in his email to the Inquiry dated 14 September 2018 expresses the following views:

I am sure Mr Carter will further outline the Directors strategy when it came to vehicles and the desire to create a single billing entity.
It was not the role of Economical Car Hire to make money from vehicle rentals to Njamal – only direct costs such as licencing and fines were deducted and paid, the net amount passed to the respective vehicle supplier. No administrative costs were deducted.

As the rates were regularly market tested at the request of the Director/s (and from memory invoiced rates changed), I would be surprised if the vehicle supplier made a commercial return.

Nor do I believe that any ‘in kind’ benefits were received from Automasters, while I acknowledge it would have better if the invoices were clearly marked “Indigenous Services Pty Ltd as trustee for the Njamal People’s Trust”, they did have the rego of the vehicle being serviced for traceability.

I would welcome you asking Kim, the Service Manager at Automasters Como, to confirm that no-one, including myself, received a benefit from them.

I (sic) suspect he would state that while we are one of his better customers, we are demanding in that we often need work done at short notice (when a car comes into Perth, or we have a vehicle coming onto fleet that needs to be serviced), that we give them short windows of work, and the work can be difficult as many of our vehicles are regularly off road and need new rubbers, boots, fluid and air filters – much more complex than most clients.

While I acknowledge the links between the parties, I do not believe there has ever been a conflict of interest.

The Directors supported the arrangements as it solved a number of issues such as not wanting to guarantees to fund vehicles, changing vehicle needs as the business grew, a single source of invoicing and managing the not inconsiderable amount of driver infringements.

I understand most if not all of the TAC members knew – again I would refer you to the senior TAC Members such as Barry Taylor, Troy Eaton and Mark Walker for verification.

The reference to invoices from Automasters is a reference to a series of transactions by which ISPL paid out of the Trust Fund for repairs and maintenance to a range of hire vehicles. Those payments are not directly relevant to the Inquiry’s concerns about disclosures of potential and actual conflicts of interest in respect of motor vehicles, and are discussed elsewhere in the Report in the context of the quantum of expenditure on motor vehicles. The Inquiry is not suggesting that Mr Green in some way received “in kind” benefits in respect of those transactions with Automasters.

Finally, Mr Carter has also commented, on a number of occasions, on the matters set out above. Some of those comments are set out in the above narrative. However, the most fulsome response from Mr Carter is contained in a document titled "Conflict over cars" provided to the Inquiry by Mr Carter on 5 October 2018. In support of the proposition that there was no conflict, and that he has made no profit from the arrangements, Mr Carter also provided the Inquiry with what he described as “the position in relation to the lease/buy of vehicles”, which appears to be a summary of the financial loss he says was incurred in respect of the lease/hire arrangements of motor vehicles.\footnote{Email from Mr Carter, 10 October 2018.}

In the "Conflict over cars" document, which is a very helpful document from the Inquiry’s point of view, Mr Carter excerpts the content of a number of emails said to have been sent, though
copies of the emails themselves have not been supplied (despite request), nor have Mr Green, Mr Parker or Mr Aird been able to provide a copy of any such emails of which they are said to have been recipients (or, in the case of Mr Green, a sender). In addition, 17 days after sending the “Conflict over cars” document to the Inquiry, Mr Carter emailed the Inquiry stating:

I have finally received the information regarding the source documents.
1. Please disregard the document sent. It has typos and needs to be not considered.
2. The issue being the servers changed about 12 months ago from indigenous services to ISPL and the IT guys tell me they cannot be date stamped
3. I have asked Richard, Jing and Greg to find what they can on their PC’s and send it to me
4. Richard is best placed as he was basically the person setting up the interface at the very beginning. I have included him on the email, so he can send information directly to you.
5. Can I repeat, no such conflict ever existed as this was discussed from day 1 with all parties
6. The business was only ever set up to recover what was spent. I saw it as a tool to achieve an end, without any risk to the Trust
7. The outcomes were very successful to the Nyamal People.
8. I will hopefully have the audited accounts in the next few days. I will immediately send to you.

The following day Mr Carter emailed the Inquiry again, stating:

Please ensure you use this email address going forward.
I no longer have any access to ISPL
PLEASE RESEND ANYTHING FROM THE LAST WEEK

The next morning Mr Green emailed the Inquiry in the following terms:

I understand that Rod has responded to his section regarding car hire – he has asked me to confirm several key points.
I did make some simple comments regarding car hire in my 14 September response.
Rod has asked that I confirm:
1. On 6 June 2016 I emailed Rod in my role as a Director of Blueenergy Engineering (Australia) PL about providing 3 vehicles below market rental rates, I know both Wesley Aird and Greg Parker were aware because Wesley and I were doing the Project Consultant appointments and working out how to supply vehicles for the Njamal people moving to Perth to take up these roles, and Greg as there was discussion on how the salaries and on costs were to be allocated, and to confirm that he was happy that there was no conflict as I had just signed my contract.

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The Inquiry has requested a copy of the emails and related email chains of communication. As at the date of the report they had not yet been supplied. It is unclear why at least the emails referred to in Mr Carter’s response have not been supplied in circumstances where it would appear that someone must have had access to them in order to prepare the response. However, the Inquiry understands that various materials have been provided to a major accounting firm to review and that there were also some difficulties as it was believed at one point relevant emails had been deleted by Mr Aird from the server and steps were being taken to recover them.
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2. In November 2016 I was involved in some focus group meetings in Perth, where the need for considerably more vehicles were recognised, and strategies to solve this were discussed with the Directors. (The need for a new office (the current Melville Pde one was also identified and approved). I specifically recall that none of the Directors were willing to provide the personal guarantees as I had talked to a number of funders when trying to buy the vehicles, and all wanted Directors guarantees.

3. That no-one profit. Based on my knowledge of buy rates, lease costs and the capital loss on vehicles as they took a pounding for a variety of reasons, I would be surprised if any profits were made. I do know that recently 3 newer mine spec cars were handed back which will have a shortfall of at least $15k each.

Returning then to the context of the "Conflict over cars" document, all of the emails excerpted are from mid-2016 and, in Mr Carter's view (at least as expressed in the document itself, though the Inquiry is left in some doubt given that which is set out immediately above), support his twin contentions that adequate disclosure was made to directors prior to the hire or lease/purchase of any vehicles, and that there was in any event no conflict of interest.

The first email extracted is dated 16 May 2016 and is from Mr Carter to Mr Green. It stated:

Hi Richard,

I am currently the director of Bluenergy Engineering Australia and now with the growing requirements and demands of the Njamal People's Trust I am far too busy to perform this role anymore and wish to step away entirely from this Directorship role.

I have you in mind to take over this role in BEA as my permanent replacement, and to steer the company through the emerging phase of settling and selling off all equipment, vehicles, cars and other disposable assets owned by BEA.

Would you be interested in taking over this position as Director, and to see matters through this phase?

I think this could be a brilliant opportunity for you to utilise your connections and knowledge of asset values etc within the Perth market.

Can you consider this offer as a priority and let me know asap please?

Thanks

Rod

Mr Carter says that at about this time the need for cars for the Njamal operations was becoming apparent, and that the need was discussed with ISPL directors at length.

The next email which is excerpted is an email from Mr Green to Mr Carter (and, Mr Carter says, others) dated 1 June 2016, which stated:

Further to our discussion about Njamal's urgent need for vehicles, and the issues currently being faced with leasing, the financial implications on the accounts and issues with some individuals renting vehicles; there is an option to use some of the BEA vehicles.

We have 3 vehicles available.

Rather than sell them we can offer them under lease or lease-buy arrangements to Njamal and Indigenous Services.

1. Lease Rates:

I have sought rates from rental agencies.

* For XR6 Falcons they would charge a daily lease rate of $120.00 per day plus GST.

* For a mine specs Ranger ute, a rate of $160 plus GST per day

2. Other Considerations:
Due to the high risk of the client group and with the rough terrain and remote locations where
the car is going, it will be a condition of the agreements that:

* the Trust maintains the vehicles
* the Trust Insures the vehicles

We both need to make sure that there are no conflicts of interest.

Richard

Mr Carter says that, realising there was a potential for conflict, he wrote to the directors and
resigned from Bluenergy Engineering (Australia) Pty Ltd. Mr Carter also says he asked
Mr Green to take over the company directorship as he (that is, Mr Carter) was involved in
ISPL. These explanations are supported by both ASIC documents which record Mr Green
being appointed a director of Bluenergy Engineering (Australia) Pty Ltd on 1 May 2016 and
Mr Carter ceasing as a director on 30 June 2016, and the email dated 16 May 2016 excerpted
above.

Mr Carter also says that "ISPL Directors all understood that the vehicle lease deal or
arrangement were to be on a cost recovery basis only, and with no profit." The Inquiry infers
that if the directors understood this to be the case they were likely informed verbally by Mr
Carter as Mr Carter has not produced any documents in support of the proposition to the
Inquiry.

The third email excerpted in Mr Carter's "Conflict over cars" document is an email from him to
Messrs Parker and Aird on 9 July 2016, which stated:

Below is the email from Richie that we discussed.
As agreed I will resign as a Director of BEEA to avoid conflict.
Please note that BEEA is to be liquidated once warranty work periods have concluded on a
handful of jobs. Accordingly, Esplanade Holdings will need to remain a shareholder for that
time.

Rod
<Email 01.06.2018 attached>

Mr Carter says that ISPL made the decision to proceed on a temporary basis. Mr Carter also
says that the lease rates were below market norms, rates were for cost recovery and no
profit, and the cars leased could be taken over at current value. Mr Carter also says that rates
featured no limit on mileage.

The final email excerpted in the "Conflicts over cars" document is an email from Mr Carter to
Messrs Parker and Aird on 6 November 2016, which stated:

As you are aware, more cars are needed and as directors you have advised you are not
prepared to provide the Personal guarantees required to fund through the Trust.
The current arrangements for the cars have been good for Njamal.
I am happy to provide the personal guarantees necessary to obtain the finance to purchase
vehicles. Richie & Courtney are happy to continue arrangements under a formal agreement
and they are going to set up company entity, so we can lease-buy the vehicles for Njamal and
other Trusts as they come on board.
They will advise of the company name and details shortly.
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No one is to make a profit from this, it's part of what we do as a service.
If this is an issue let me know.
Rod

The reference in this email to "a formal agreement" is, the Inquiry infers, a reference to the
draft but not executed agreement between ISPL and Greenco Holdings Pty Ltd referred to
above. In a meeting with the Inquiry on 10 October 2018 Mr Carter suggested that he had
seen an executed copy of an agreement with Greenco Holdings Pty Ltd. However, one has
not been supplied.

Following this email there is a heading "Summary Position" under which Mr Carter explains:

Fundamentally, the situation then was one where;
1. ISPL Directors were happy I take all the risk and responsibility.
2. Their approval and sanction was strictly on the absolute basis of there being no
   guarantees nor financial demands made upon them individually or collectively, or that
   impinges upon ISPL of NPT.
3. Leases to be over a 3-year period, as per recent discussions
4. The rates and the agreement/deal are to reflect rates equal to or less than the free
   market rates (even though some Njamal people could not get access to similar offers)
5. Lease Rates are inclusive of unlimited travel kms
6. Insurances and cover arrangements were put in place to protect the asset, me, NPT,
   the drivers and ISPL
7. My role was as a facilitator/ helper and goodwill focused,
8. There was no commercial gain from my involvement (quite the contrary) and myself
   and the Directors of ISPL emphasized this and ensured it was a fact as we were
   aware of obligations from ACNC issues, probity issues, and Trustee requirements.

Accordingly,
1. suitable vehicles were located and purchased and provided by Mr Green through
   Economical Car Hire, in a manner as to allow lease costs and daily leasing charge
   out rates to be contained to cost recovery only.
2. My role was to be responsible for the guarantees to be made that could enable the
   finance for purchases to be completed.

Mr Green and his Accountant are obtaining reports necessary and will provide these to the Inquirer
next week, to enable the Inquirer to observe the nature of the transactions.

I believe these will show that In the period Aug 2016 to date:

• 16 cars involved in the leasing arrangements
• Leasing charges to be approximately $360,000
• 10 vehicles with a buy price of $190,000 being transferred into Nyamal ownership and
• $170,000 being paid to finance companies, and
• I still have a personal guarantee outstanding on the remaining vehicles and residual
   costs.

Without these arrangements Nyamal programs and vehicles could not have been attained.

There was and is no profiteering by any participant.

The inquiry should note the effort of Mr Green to work tirelessly to ensure needs are met across
the board. Since paying off a significant portion, Nyamal has definite assets and resources. The
inquiry would be incorrect if it considered this transaction to be anything but fair, with all conflicts
clearly identified.
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As noted above, following receipt of the “Conflicts over cars” document, Mr Carter emailed the Inquiry on 10 October 2018 with a summary of what he says is the financial position in relation to the lease/buy of vehicles. In the chapeau to that material, Mr Carter says that “this was about the Nyamal People and providing them the resources to improve their lives economically.”

The summary position is then set out as follows:

LEASING VEHICLES SUMMARY
1. 16 vehicles were involved in the Leasing
2. Total supply cost of fleet (finance + purchases + stamp duty etc) = $522,565
3. I provided guarantees for all vehicles.
4. Proceeds from Leasing - reconciled to Xero reports and past materials to Inquiry, receipts total = $358,870
5. Number of vehicles Sold/transferred to Nyamal = 12
6. Proceeds from Sales to Nyamal = $32,000
7. Of remaining vehicles,
   a. 1 is still on lease, est. current value = $16,000
   b. 2 are off lease, est. current value = $70,000
   c. The remaining vehicle has been disposed of at cost.

The summary position is that you are in loss or debt after remaining vehicles are sold, to a level of $46,195

SUPPLY COSTS - $522,565
LESS RECEIPTS
LEASE REVENUE $358,370
SALE PROCEEDS $32,000
VALUE OF RESIDUAL FLEET $86,000
SUMMARY POSITION - $46,195

There will be an improvement in that position of $9,000, which is the proceeds received or to be received from an insurance payout from one vehicle claim pending.

Still leaves you in arrears; but definitely not in breach of Trust obligations etc.

In addition to these matters Mr Carter has also indicated that “[t]he recording in the minutes [dated 15 March 2017] was in relation to finalising all potential conflicts identified by the Auditor in discussion.” The Inquiry infers that this comment is a reference to ISPL’s auditor being aware of the motor vehicle transactions, noting that a conflict had not been formally declared in ISPL’s minutes, and requiring that to be remedied for the purposes of the corporate record.

These responses from Mr Carter are very helpful in assisting the Inquiry to more fully understand the circumstances surrounding the hire and purchase of motor vehicles from Bluenergy Engineering (Australia) Pty Ltd, Esplanade Holdings Pty Ltd (if indeed this occurred) and Greenco Holdings Pty Ltd. The need to do so is particularly acute in circumstances where:
the quantum of the transactions between ISPL, Esplanade Holdings Pty Ltd, Greenco Holdings Pty Ltd and Bluenergy Engineering (Australia) Pty Ltd are significant;

- there are, on the face of the minute of that meeting, deficiencies in Mr Carter's disclosure of his interest(s) to the Board at the meeting on 15 March 2017 and/or, deficiencies in the completeness of the minute;
- Mr Green (and Mr Carter at least to some degree) appear to have had an ongoing involvement in connection with motor vehicles at an operational level;
- Esplanade Holdings Pty Ltd refused to provide relevant material or to otherwise indicate that nothing of relevance exists;
- the rules set out earlier in this Report about how equity views transactions with directors, relatives and business associates.

In light of all of the materials presently available to the Inquiry it appears that the evident purpose of the hire-purchase of motor vehicles was primarily (though not only) to provide a cost-effective method of providing motor vehicles to project liaison officers and others (including, for example, Elders) and while seeking a cost-effective alternative was one understandably pursued by ISPL:

- Mr Green, Mr Carter, Greenco Holdings Pty Ltd, Bluenergy Engineering (Australia) Pty Ltd were involved in the supply of motor vehicles to ISPL and Njamal Services Pty Ltd, and Esplanade Holdings Pty Ltd may have been;
- It is unclear whether Esplanade Holdings Pty Ltd, Greenco Holdings Pty Ltd and Bluenergy Engineering (Australia) Pty Ltd may have directly benefitted from the supply of motor vehicles to ISPL and Njamal Services Pty Ltd;
- It is unclear whether Mr Green, Mr Carter, Ryan Carter and other members of the Carter and Green families may have indirectly benefitted from the supply of motor vehicles to ISPL and Njamal Services Pty Ltd, either in their capacities as shareholders of the above-named companies, or of beneficiaries of trusts administered by Esplanade Holdings Pty Ltd and Greenco Holdings Pty Ltd;
- the Inquiry has been unable to substantiate whether any net benefit may have been obtained by the companies or the natural persons connected to them, and, if so, the quantum of any such benefit, but notes without accepting or rejecting it, Mr Carter's summary position to the effect that a net loss was made on the transactions;
- in June 2016:
  - Mr Carter may, though the Inquiry has some doubt, have disclosed to Messrs Parker and Aird in writing that Bluenergy Engineering (Australia) Pty Ltd to would supply motor vehicles to Njamal, and that he would resign from
Bluenergy Engineering (Australia) Pty Ltd to avoid conflicts of interest (in this respect, the Inquiry has requested source documents from Mr Carter supporting this alleged disclosure but, as at the date of this Report, those documents have not been provided; the Inquiry also notes that Messrs Parker and Aird were not themselves able to provide a copy of the alleged emails upon which Mr Carter relies to demonstrate his alleged disclosure); and

- Mr Green was a director of Bluenergy Engineering (Australia) Pty Ltd having been appointed on 1 May 2016, and Mr Carter was a director of the same until he ceased on 30 June 2016.

- at a point in time after 30 June 2016, probably around January or February 2017, Bluenergy Engineering (Australia) Pty Ltd effectively ceased supplying motor vehicles to ISPL and Njamal Services Pty Ltd, and Greenco Holdings Pty Ltd trading as Economical Car Hire took over that role;

- it is unlikely that an agreement for the hire-purchase of vehicles from Greenco Holdings Pty Ltd trading as Economical Car Hire, Esplanade Holdings Pty Ltd or Bluenergy Engineering (Australia) Pty Ltd was ever executed by ISPL or Njamal Services Pty Ltd and, if it was, there has been a failure by ISPL and the counterparty to ensure that the executed document was properly secured;

- a draft agreement for the hire-purchase of vehicles from Economical Car Hire was prepared in July/August 2016 but:
  - it was never executed;
  - it does not purport to capture transactions with Esplanade Holdings Pty Ltd or Bluenergy Engineering (Australia) Pty Ltd;
  - it does not contemplate the outright purchase of a vehicle from Economical Car Hire without there first being a period of 52 weeks of hire;
  - it does not contain a conflicts of interest declaration, either in its recitals or terms;

- notwithstanding the comments of Mr Carter and Mr Green, the Inquiry is unable to determine whether the terms of the draft agreement with Economical Car Hire were commercial arms-lengths terms and in this respect notes Mr Parker's comments that:
  - at the directors’ meeting on 15 March 2017 he was vocal about his concern in respect of the amount spent on car hire and he queried the daily rates being charged; and
  - he continued to voice his concerns over the car hire arrangements during the ensuing months and this was a factor which lead to his resignation as a director on 4 July 2017;
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- the Inquiry does not know the source of the vehicles which Greenco Holdings Pty Ltd trading as Economical Car Hire's hire-purchased to ISPL or Njamal Services Pty Ltd, though the minutes of the meeting of the directors of ISPL dated 15 March 2017, and the financial summary provided to the Inquiry by Mr Carter, both suggest that Mr Carter was involved, including as the provider of personal guarantees given in connection with the acquisition of the vehicles;

- Mr Green and Mr Carter (at least in some limited respects) were involved in communications in relation to decisions made by ISPL concerning motor vehicles, including in respect of their hire and repair;

- the Inquiry does not know who authorised the entry into each transaction for the hire-purchase of motor vehicles supplied through or by Esplanade Holdings Pty Ltd, Bluenergy Engineering (Australia) Pty Ltd and Greenco Holdings Pty Ltd;

- Mr Carter declared an interest in relation to the hire car business being conducted by, at that point, Greenco Holdings Pty Ltd trading as Economical Car Hire at the meeting of the directors of ISPL on 15 March 2017, however:
  - that declaration was late, and should have been made and recorded in or about August or September 2016, prior to the first hire car transactions being entered;
  - it is unclear from the record of that declaration as to whether the declaration complied with the requirements of the Corporations Act 2001, in that it is unclear whether Mr Carter disclosed:
    - how and how often he supplied the vehicles; and
    - the nature and extent of any financial benefit that did or might accrue to him or those associated with him from the transactions;\(^\text{164}\)
  - certain matters which Mr Parker recalls being discussed at the meeting, including in particular his queries about the daily rates being charged for the hire of the vehicles, and the involvement of Bluenergy Australia Pty Ltd, were not recorded in the minutes;
  - the minutes are an incomplete record of the discussion and debate that occurred on 15 March 2017;
  - if and to the extent that Mr Carter's declaration extended beyond the extent to which it was recorded in the minutes, Mr Carter failed to ensure that the transactions.

\(^{164}\) Notwithstanding that Mr Carter now submits to the Inquiry that he in fact made a loss on those transactions.
declaration was properly recorded in the minutes to avoid them being misleading;

- irrespective of whether the transactions infringed the conflict rule and irrespective of whether Mr Carter, Mr Green, or any of Esplanade Holdings Pty Ltd, Greenco Holdings Pty Ltd and Bluenergy Engineering (Australia) Pty Ltd in fact derived a profit from the transactions, the transactions were nevertheless transactions which:
  o should be viewed with extreme caution;
  o need to be justified by ISPL as being in the best interests of the company and the Trust Fund which the company administers and from which funds were applied for the motor vehicle transactions;
  o give rise to the perception of conflicts of interest, particularly given the inadequate recording of any disclosures by Mr Carter;
  o should have been clearly and fulsomely documented, including in respect of prompt and adequate disclosures of potential conflicts;
  o should have been, prior to their entry, the subject of a concluded and executed formal agreement; and
  o ought to have been the subject of legal advice as to their appropriateness, alternatively directions from the Supreme Court of Western Australia.

In addition, the Inquiry makes the following recommendation:

**Recommendation 26 (Chapter 9)**

**ISPL:**

- at its expense (not from the Trust Fund) cause an independent forensic audit and review of the nature, quantum and circumstances of all the motor vehicle related transactions with Greenco Holdings Pty Ltd (whether trading as Economical Car Hire or otherwise), Bluenergy Engineering (Australia) Pty Ltd and Esplanade Holdings Pty Ltd (if any), and who approved the entry into each transaction, and provide a copy of that report to the Attorney General within three months of this recommendation being brought to the attention of ISPL;

- cease entering transactions of this nature absent clear and documented declarations of any conflict, and clear, documented and executed agreements for the provision of vehicles; and

- consider whether, after receipt of the audit report referred to above, it is necessary or appropriate to approach the Supreme Court for directions in respect of the motor vehicle transactions already entered.
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Pilbara Indigenous Marine Services Pty Ltd

As noted earlier in this report, Pilbara Indigenous Marine Services Pty Ltd is described by ISPL in its 4 July 2017 submission as a company which provides marine support services including pilot, securing ships and wharf services in Pilbara ports. Its current sole shareholder is Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust (whose unit holders are ISPL as trustee for the Trust and ISPL as trustee for the Njamal People's Benevolent Trust).

Pilbara Indigenous Marine Services Pty Ltd is considered in this part of the Report because of the following which is recorded in the minutes of a meeting of the directors on 15 March 2017:

Rod reported on an opportunity to become involved in the provision of shore based labour for the docking of tugs and ships. Indigenous Marine Services Pty Ltd has a number of contracts at Port Melville, Darwin and Port Hedland. Its wholly owned subsidiary Indigenous Marine Foundation (a PBI) has an EBA that provides cost effective labour.

There are significant opportunities for an indigenous group to obtain Defence work throughout Australia.

Rod has secured a 51% interest in the company through Pilbara Indigenous Marine Services Pty Ltd. Tray Eaton, who did a similar job for RIO in Karratha for 8 years, has agreed to be a Director of Pilbara Indigenous Marine Services.

Rod is offering Njamal Services 51% of Pilbara Indigenous Marine Services PL at no cost, and with no financial commitments or guarantees required.

At this point the minutes record that Mr Carter declared an interest and did not participate in further discussions. A resolution was then passed (moved by Mr Parker and seconded by Mr Aird) as follows:

Subject to due diligence being undertaken by Indigenous Services PL as Trustee for the Njamal People's Trust, the Board consents to the acquisition of 51% of Pilbara Indigenous Marine Services Pty Ltd for nil consideration and without any financial commitments of any nature.

An unadjusted trial balance for Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust dated 24 May 2018 records that, as at that date, Njamal Services Pty Ltd (as trustee) had loaned Pilbara Indigenous Marine Services $53,237.90, up from $5,164 which had been loaned to date as at 31 December 2017. It is not clear what this sum has been spent on though in ISPL's 4 July 2017 submission it notes:

Training of Njamal people is underway for the emerging roles, and it is anticipated that shortly 8 people will be employed, and it is projected that this could become 30 full time employee equivalents before June 2018, if negotiations with mining companies continue to proceed at the current tempo.

In any event, given Mr Carter's declaration of interest made at the meeting on 15 March 2017, it does not appear to be affected by any ongoing conflict of interest issues.

In discussion with the Inquiry on 2 May 2018, Mr Carter explained that initially there was a contract with FMG to tie ships up in Port Hedland pursuant to which a number of people were engaged. Mr Carter said at some point FMG decided the contract was costing FMG too much and it was cancelled, with the people supplying the services then engaged on a labour hire
basis on hourly rates. More recently, the Inquiry has learned that Pilbara Indigenous Marine Services Pty Ltd has become the majority shareholder (51%) in a company called Aboriginal Maritime Pty Ltd, on whose Board Mr White sits as an executive director.  

Given Mr Carter's declaration of conflict on 15 March 2017, and Mr White's involvement in Aboriginal Maritime Pty Ltd, it is recommended that:

**Recommendation 27 (Chapter 9)**

ISPL and Njamal Services Pty Ltd review the circumstances of all previous, current or proposed transactions in relation to Pilbara Indigenous Marine Services Pty Ltd to ensure that there are and have been no conflicts or if there are, or have been conflicts, those conflicts are disclosed, considered, clearly documented and subject to any further action that may be warranted.

**Redimed**

As discussed below, ISPL has indicated to the Inquiry that there is an ambitious project, currently in its embryonic phase, aimed at the provision of respite care and aged care beds in South Hedland. In May 2018, Mr Carter informed the Inquiry:

"This is a very large project that is designed to create Aged Care beds and Respite Care. At present cost to Government is enormous as the only place in Hedland and surrounds is the Hospital. This is a $15m project that will be funded by the various Port Hedland Trusts, Federal Health Minister and Medicare. Below is the email from Landcorp. These are the real projects Government needs experienced people to implement."

ISPL has informed the Inquiry that the proposed tenant was Redimed. When questioned as to whether this was Redimed Respite Care Pty Ltd, the secretary of which was Mr Carter, the current director of which is Ryan Carter, a former director of which was Clinton Wolf, and a shareholder of which is Esplanade Consultancy Pty Ltd or Redimed Pty Ltd, of which Dr Hanh Huu Nguyen is a director, Mr White responded that he was not sure which entity it was with, but negotiations were with Dr Hahn Nguyen, suggesting that the proposed tenant is Redimed Pty Ltd.

In view of that uncertainty as to whether Redimed Respite Care Pty Ltd or any other persons or entities that are or have been connected with the Trust have any interest in this project, the following recommendation is made:

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Recommendation 28 (Chapter 9)

ISPL review its current or future proposed transactions with Redimed to ensure there are and have been no conflicts or if there are, or have been conflicts, those conflicts are disclosed, considered, clearly documented and subject to any further action that may be warranted.

Carbon Farming

Given the significance of the transactions that were entered into by ISPL and Njamal Services Pty Ltd in relation to carbon farming, that Mr White, who subsequently became a director of ISPL and has been (and remains) a director of Njamal Services Pty Ltd, and other companies through which he and his family may benefit from carbon farming activities the Inquiry considers the issue of conflict in detail below.

On 4 July 2017 ISPL resolved that, subject to signing a formal consent, Mr White be appointed a director of ISPL. ASIC records that Mr White's appointment commenced on 2 August 2017. From 27 October 2017 Mr White has been the sole director of ISPL, though at various times Mr Wolf has been appointed as an alternate director.

One of ISPL's investments is in carbon farming enterprises. To that end, prior to Mr White becoming a director, ISPL advanced $500,000 by way of loan to Goldfields Carbon Group Pty Ltd (GCG) and $500,000 by way of equity funding to Indigenous Carbon Group Pty Ltd (ICG).

Mr White has interests in ICG, GCG and Pilbara Carbon Group Pty Ltd (PCG). GCG and PCG both successfully bid for carbon credit contracts from the Clean Energy Regulator at auction in April 2016. At all times from the registration of those companies until 2 February 2017 Mr White was the sole director and secretary of all three companies (with the exception of a two month period between March and May 2016 when Mr Carter replaced him as the sole director of GCG). He was also the ultimate shareholder of all three companies – he held the shares in ICG directly, and those in GCG and PCG were held by CO2 Holdings Pty Ltd, the shares in which are in turn held by White Partners Capital Pty Ltd as trustee for a White family trust.

On 2 February 2017, GCG and PCG became wholly owned subsidiaries of ICG, and the shares in ICG were transferred, 51% to ISPL as trustee for the NPT, and 49% to CO2 Holdings Pty Ltd. Mr White also ceased to be sole director of all three companies, being joined by Mark Walker as director and Ms Green as secretary. Mr Wolf also became a director of ICG for a period of six months before resigning.

At the time ISPL made the decision to invest in ICG (and, by extension, its soon-to-be subsidiaries GCG and PCG) on or about 2 February 2017, it does not appear that any individual was interested in, or influenced the decision-making on, both sides of the transaction. This is because, at that stage, Mr White was not a director, officer or shareholder.
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of ISPL (nor was he a potential object of appointment under the Trust Deed). Presumably out of abundance of caution, Mr White also declared that interest at the meeting of the Board of ISPL at which the investment decisions were endorsed, possibly because he was a director of Njamal Services Pty Ltd, which was wholly owned by ISPL on behalf of the Trust, and possibly because he may then have understood that it was to be Njamal Services Pty Ltd that was to acquire the interest in ICG.

However, as and from his appointment as a director of ISPL, Mr White was in an obvious position of (a) conflict of duties as between his duties as a director of ISPL and his duties as a director of ICG, GCG and PCG; and (b) a conflict of duty and interest as between his duties to those companies and ISPL and his personal interest in ICG, GCG and PCG as the ultimate holder (along with his family) of 49% of their value.

From the point of view of the companies he may have been able to avoid breach of his directors’ duties by declaring that interest. In respect of his directorship of ICG, the Inquiry notes that this occurred at, and was recorded in the minutes of, a meeting of the Board of ICG on 7 August 2017:

3. Andrew White Potential Conflict of Interest

Andrew advised that he has just been appointed as a Director of Indigenous Services PL, trustee of the Njamal People’s Trust. He expressed concern that he is the Director of C02 Holdings, which is the 49% shareholder in Indigenous Carbon Group, as well as the Director of ISPL, which is the 100% shareholder of Njamal Services Pty Ltd, who owns 51% of Indigenous Carbon Group. The meeting agreed that Andrew would continue to implement the Board’s decisions (see Item 1) and manage the day to day operations. If there was an issue outside of these, Andrew would discuss with Mark.

The reference to “Item 1” is a reference to various steps that had been or were proposed to be taken in relation to the sale of Clover Downs and Mertendale stations and carbon farming related matters.

On the face of the minutes, as and from 7 August 2017 Mr White was authorised by the Board of ICG to implement these items and to manage the day to day operations of ICG.

However, even if the declaration and authorisation was sufficient in the context of Mr White’s director’s duties to ICG, the position is different when viewed from the perspective of the Trustee.

Mr White is plainly alive to the potential for conflict in this space and has made it clear to the Inquiry on a number of occasions that he has taken steps to avoid issues arising. The Inquiry accepts that the concern is sincerely held and that Mr White took the steps he considered appropriate.

In this context, Mr White has in conversation with staff of the Inquiry contended that to the extent there are presently conflicts, any conflict is not presently a problem because there is no need for ISPL (that is, him) to make decisions about ISPL’s investment in ICG and GCG. Those investment decisions were made in February 2017 and will, on this view, proceed
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according to those decisions. However, strictly, that is not entirely accurate: as both lender and shareholder the Inquiry would expect ISPL to have an ongoing duty to monitor its investment in ICG (as an aspect of its duty to exercise reasonable care when investing).

An actual conflict may also crystallise if, for example, ICG were to be wound up. That conflict would arise because of the competing interests and duties of Mr White in his tripartite roles as sole director of ISPL (majority shareholder in ICG), director of ICG, and minority shareholder (albeit via trust vehicles) in ICG. If that winding up was voluntary Mr White may be involved in or responsible for distributing the unapplied capital of ICG to its shareholders. Though the Inquiry does not suggest that Mr White would favour himself in any winding up, it is nonetheless an obvious example of Mr White being in a position of conflict.

Further, and leaving that point aside, the current position as a matter of law is that the rule against conflicts extends to situations involving not only actual, crystallised conflicts, but situations involving a potential for personal interest to be preferred or for a potential for breach of duty to occur.\(^{166}\)

Accordingly, even if, contrary to the above, Mr White is not presently affected by a conflict which has actually crystallised, he may nonetheless be in a position of potential conflict, which is equally impermissible.

Moreover, because of the positions he holds, Mr White may have caused ISPL to breach its duties as Trustee of the Trust simply by remaining as sole director in circumstances where (a) ISPL was a major investor in ICG and (b) Mr White had a personal interest in, and a duty to act in the best interests of, ICG. There is an obvious potential for that interest and duty to come into conflict with his duty of loyalty to ISPL, as described above. A further example is if ISPL had reason to withdraw its support for ICG’s carbon farming project and sell its shareholding in circumstances where that would affect the viability of the project and the value of Mr White’s interest in the company.

The Inquiry wrote to ISPL via Mr White in relation to these concerns, and indicated that there may be a number of potential solutions to the situation of conflict. Most obviously, Mr White could relinquish his shareholding in, and directorship of, ICG, CGC and PCG, or he could resign as director of ISPL. Alternatively, it may be that the appointment of additional directors to ISPL, combined with Mr White adequately disclosing his interest to those directors and absenting himself from any discussion, debate or decision making concerning ISPL’s relationship with ICG, GCG or PCG, would remedy the conflict.

In response, ISPL by its solicitor in a letter dated 28 September 2018 advised the Inquiry that:

In relation to those issues raised regarding Mr White, ISPL accepts that a situation of conflict could arise in this regard and prefers that the alternative solution proffered by the Inquiry in

\(^{166}\) *Agricultural Land Management Ltd v Jackson [No 2] [2014] WASC 102 [263] (Edelman J).*
second paragraph of page 50 be taken. ISPL has always intended to seek the appointment of additional directors, optimally 5, however it has been difficult to secure quality candidates whilst the Inquiry is on foot.

In the interim, Clinton Wolf has been appointed as Mr White’s alternate director and can step in to deal with any matters regarding the carbon farming project should the need arise.

If any issue of doubt arises ISPL may also seek directions from the Supreme Court under the Trustees Act 1962 (WA) should the need arise.

A difficulty with the proposition in respect of Mr Wolf being able to step in and deal with any matters regarding the carbon farming project should the need arise is that ASIC records record that his recent further reappointment as an alternative director is only operative while Mr White is outside Australia. Further, Mr White should have no ongoing role on behalf of ISPL in relation to carbon farming matters absent being sanctioned by the Court.

In light of the position adopted by ISPL, the Inquiry makes the following recommendation:

**Recommendation 29 (Chapter 9)**

1. Either the following steps be promptly taken or Mr White resign as a director of ISPL.

2. Mr Wolf or another person be appointed as a director or alternative director of ISPL with full authority to act in relation to matters in relation to carbon farming.

3. Mr White fully discloses his interests to Mr Wolf (or any other directors that may be appointed) and absents himself from any discussion, debate or decision making concerning ISPL’s relationship with Indigenous Carbon Group Pty Ltd, Goldfields Carbon Group Pty Ltd and Pilbara Carbon Group Pty Ltd and carbon farming interests and ensures that his interest is properly and adequately recorded in a corporate record (for example, the minutes of a relevant directors’ meeting and a conflicts register).

4. ISPL ensures that Mr White discloses his interests to Mr Wolf (or any other directors that may be appointed) and absents himself from any discussion, debate or decision making concerning ISPL’s relationship with Indigenous Carbon Group Pty Ltd, Goldfields Carbon Group Pty Ltd and Pilbara Carbon Group Pty Ltd and carbon farming interests, and that the interest is registered in a conflicts register to be maintained by ISPL.

5. ISPL actively consider whether, when and what directions might or should be obtained from the Supreme Court of Western Australia in relation to Mr White’s potential or actual conflicts of interest.

**19 Labouchere Road, South Perth**

On six occasions between 10 May and 31 August 2016, ISPL expended trust funds for the short term rental of units at 19 Labouchere Road, South Perth for the use of Njamal people (notably Mr Mitchell). The rate paid was $150 per night for a single unit (total 17 nights) and
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$318.18 plus GST per night (total $350 per night) for three units (total 11 nights). The total expended across all transactions was $6,500.

Mr White on behalf of ISPL has informed the Inquiry that there was no written lease for the Labouchere Road property but that ISPL paid market or better than market rates. Mr Carter also stated that the rental arrangement was undocumented.

No minutes of ISPL board meetings have been provided in which a decision was made to pay funds for the Labouchere Road properties or in which Mr Carter declared any interest in Studio Homes Australia Pty Ltd (Studio Homes) (as to which see below). Mr Carter has, however, asserted that he would have informed people of his interest in Studio Homes. Regardless, there is no evidence that Mr Carter excused himself from any deliberations or resolutions regarding the lease of the Labouchere Road units.

At the time, the registered proprietor of at least one unit (no. 6) was Studio Homes. One of the directors of Studio Homes is Ryan Carter and one of the two shares in the company has at all material times been held by Esplanade Holdings Pty Ltd as trustee for a Carter family trust. Mr Carter was a director of Esplanade Holdings Pty Ltd between May and August 2016. Mr Carter was also a director of ISPL at the time and has indicated at a meeting with the Inquiry on 4 April 2018 that he was an investor in the company.

The invoices for all of the units were issued by Studio Homes and addressed to ISPL as trustee for the Njamal People's Trust. Three of the invoices, namely the invoices for July and August 2017, request that payment be made to an account in the name of "Esplanade Holdings Pty Ltd ATF for Studio Homes Australia". The remaining invoices, for May and June 2017, request payment into the same bank branch and account numbers but without the "Esplanade Holdings Pty Ltd ATF Studio Homes Australia" narration. That account was presumably controlled by Mr Carter as director of Esplanade Holdings Pty Ltd at the relevant time. The same account is also associated with payments from ISPL to Esplanade Holdings Pty Ltd as trustee for the Delia Carter Trust, another Carter family trust, for services rendered by, amongst others, Mr Carter and Ms Guo.

In a meeting with the Inquiry on 26 September 2018 Mr Carter explained that as at the time of the expenditure of funds on the rental of a unit owned by Studio Homes, Mr Carter was an investor, along with several others, in a unit trust of which Studio Homes was the trustee. Mr Carter also explained that while the Studio Homes accounts were held by Esplanade Holdings Pty Ltd, that company retained none of the rental funds. Rather, Mr Carter said that Studio Homes was a unit trust and that any monies received for rent for the properties owned by Studio Homes were paid to the unit holders directly (albeit, it seems, via Esplanade Holdings Pty Ltd at least insofar as that company was the signatory to the relevant bank account into which rental payments were made).
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Owing to the refusal of Esplanade Holdings Pty Ltd to supply, when requested, material in relation to the benefit, if any, it received from ISPL or its related entities, the Inquiry is unable to substantiate Mr Carter’s comments by reference to the source documents.

Mr Carter says that the decision to rent the Studio Homes apartment to a member of the Njamal community arose due to personal issues with that community member. Mr Carter says that when this occurred he wrote to a then-director of Studio Homes to indicate that he did not want to be conflicted and that payments made to Studio Homes were made to the unit holders directly (other than to Mr Carter, who says he received no benefit from the transactions). When it was put to Mr Carter that the invoices issued by Studio Homes sought payment into an account controlled by Esplanade Holdings Pty Ltd, Mr Carter suggested that Esplanade Holdings Pty Ltd held the Studio Homes accounts but that the money received into those accounts was transferred to the unit holders.

Mr Carter also provided the Inquiry with a copy of an unsigned letter from Ms Susan Tapper dated 3 September 2018 in which it was stated, among other things, that:

- Ms Tapper was a director of Studio Homes, which served as trustee of the SHA Bowman Trust, between February and January 2018;

- Mr Carter approached her to house some members of the Njamal People’s Trust, which he advised could not otherwise be housed in Perth, in approximately April 2016;

- Ms Tapper and Mr Carter agreed to provide accommodation on the proviso that Mr Carter’s company [which is not identified in the letter] provided care and maintenance at the units during the period, which it did; and

- All rental funds received were allocated to other unit holders in the Unit Trust so as to avoid any conflict of interest on Mr Carter’s part.

In all the circumstances the Inquiry finds that the decision to lease properties which are the property of a unit trust in which Mr Carter had an interest through an investment and (at the relevant time) as a director of one of its shareholders, and the transactions themselves:

1. should be viewed with extreme caution;

2. need to be justified by ISPL as being in the best interests of the company and the Trust Fund which the company administers and from which funds were applied for the motor vehicle transactions;

3. gave rise to the perception of conflicts of interest;

4. should have been clearly and fulsomely documented, including in respect of prompt and adequate disclosures of potential conflicts of any interest that Mr Carter or his family (directly or as a shareholder or beneficiary of related companies or trusts) held in Studio Homes;
CHAPTER 9: CONFLICTS

5. should have been, prior to their entry, the subject of a concluded and executed formal agreement; and

6. Mr Carter failed to properly disclose to ISPL his and his family's interest in transactions involving Studio Homes or failed to ensure that, if a disclosure was made, that disclosure was properly minuted in minutes of a meeting of the Board of ISPL.

**Recommendation 30 (Chapter 9)**

1. ISPL take steps to satisfy itself that none of the Trust Funds expended on the Studio Homes unit at South Perth benefitted Mr Carter or entities or persons associated with him (e.g.: Esplanade Holdings Pty Ltd, or the family trust(s) controlled by that company).

2. ISPL ensure that future transactions of this nature not be entered in circumstances where there is a real or potential possibility for a director of ISPL to benefit from the transaction, unless the potential for conflict is properly disclosed, considered, debated and recorded in the minutes of the Trustee in accordance with the provisions of ISPL's constitution and the *Corporations Act 2001*.

**The remuneration of ISPL's directors**

Early in the life of the Inquiry it became apparent that the Trustee and business operations of the Trust were being conducted by a small group of people, namely Messrs Carter, Parker, Aird, Cullity and White, all of whom have served as directors of ISPL at various times throughout the course of ISPL's tenure as Trustee.

It also became apparent, as noted earlier in the Report, that each of those persons had, through private companies connected with them, separate consulting contracts with ISPL or entities connected to ISPL by which they provide various professional services to ISPL, Njamal Heritage Pty Ltd, Njamal Mining Pty Ltd, Indigenous Carbon Group Pty Ltd, Goldfields Carbon Group Pty Ltd and/or Njamal Services Pty Ltd via corporate vehicles.

Examples include:

1. Mr Carter, through Esplanade Holdings Pty Ltd and later Esplanade Consultancy Pty Ltd, provides certain services to ISPL, for which Esplanade Holdings Pty Ltd and Esplanade Consultancy Pty Ltd have been paid. (The services provided by Ms Guo, Ms Xu and Ms Lu to ISPL and its associated or related entities were also provided via Esplanade Holdings Pty Ltd and Esplanade Consultancy Pty Ltd).

2. Mr Parker, through Parkers BCA Pty Ltd (formerly Northpoint Nominees Pty Ltd), provided accounting and consulting services to ISPL and Njamal Mining Pty Ltd.

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3. Mr Cullity, through RMOB Pty Ltd, provided legal and consulting services to ISPL and Njamal Services Pty Ltd.

4. Mr Aird, through Geographe Strategies Pty Ltd, provided heritage, native title and consulting services to ISPL and Njamal Heritage Pty Ltd.

5. Mr White, through White Partners Capital Pty Ltd, provided (and continues to provide) business and consulting services to ISPL, Njamal Mining Pty Ltd and Njamal Services Pty Ltd.

For the financial year ending 30 June 2017 over $550,000 was paid to companies associated with Messrs Carter, Parker, Aird, Cullity and White for fees directly associated with the services provided by them, over $785,000 was paid to those companies for all professional and administrative services provided to the Trustee/Trust and over $1.25m was paid to those companies for all professional and administrative services provided to the Trustee/Trust and related entities.

Before turning to the issue of potential conflicts raised by these arrangements something must be said about the difficulty the Inquiry faced in attempting to gain from ISPL an understanding of the true position of what was paid to whom.

In this respect, the Inquiry raised with ISPL on a number of occasions the level of remuneration or other benefits directly or indirectly received by the directors of ISPL and those associated with the directors (including Ms Guo, Ms Xu and Ms Lu). For a lengthy period of time the responses to those queries were frustratingly opaque.

On 24 May 2017, for example, the Inquiry asked ISPL to first explain how the Trustee's remuneration is determined, quantified and approved and to provide details of the remuneration received by the current Trustee and then, next, to explain whether the Trustee, its directors or shareholders, have any other roles or financial interests connected to the Trust's activities. In response to this second query, the Inquiry was told that there are no other roles or financial interests held by directors or shareholders.  

Consequently, in August 2017, the Inquiry required ISPL to provide the Inquiry with the total amounts paid to Messrs Carter, Parker, Aird, and White, together with the amounts paid to Ms Guo and Ian Taylor, plus any other current or former directors or employees of ISPL and any other current or former TAC members. As to the directors (current and former) and Ms Guo, the Inquiry was advised that none of these people received payments individually and that all remuneration is received through corporate entities. Though that would have been the opportune time for ISPL to supply that information to the Inquiry, it did not.

As a result, on 6 November 2017, the Inquiry sought from ISPL details of the benefits certain individuals had derived directly or indirectly from providing services to ISPL and its related companies, and the agreements by which those individuals were engaged. In response to this question ISPL said simply, but unhelpfully, that the question had been asked and answered.

Materials provided to the Inquiry included various relating to work performed by Messrs Carter, Parker, Aird and Cullity, although they were not in all cases complete. The Inquiry sought greater clarity surrounding these and other payments that had been made. On 4 February 2018 the Inquiry received a response from Mr White (by this stage the sole director of ISPL) setting out the total sums that each of the identified persons had received in financial year 2016/2017 together with a document listing the payments that had been made.

As a result of the information received, and also as a result of the time it took for ISPL to properly respond to what was in effect a simple request for details of the benefits obtained by people associated with the Trust, the Inquiry was concerned with the processes that ISPL and its directors had adopted to ensure that the conflict rule had not been infringed.

The Inquiry was also concerned that, as it appeared to the Inquiry, ISPL had engaged consultants without documenting, by way of agreement, the terms and conditions of the engagement, particularly in circumstances where many of those consultants held positions of authority within ISPL (for example, Messrs Parker, Cullity, Aird and, eventually, White).

This latter concern, absence of documentation, was realised in February 2018 when Mr White advised by email that:

Apart from the Services Agreement between ISPL and Esplanade Holdings and (later) Esplanade Consultancy, there were no written consultancy agreements entered into with any of the Director / Consultants referred to. TAC members and remuneration are included in TAC MOM's.

However, Mr White went on to add that:  

In all other cases, rates and the scope of work were agreed verbally with consultants. The hourly rates were capped at the rates agreed to by the Trustee and the Trustee Advisory Committee. Because of the sheer volume of work required to be undertaken by the Consultants these hourly rates were provided at a discount to normal market rates. By way of example and one the Inquirer will be able to appreciate, Jack Cullity is a fully qualified legal practitioner and his entity was paid consulting fees at the rate of $225 per hour. The approval for payment of tax invoices at the agreed rates and for work performed was constituted confirmation and evidence of an agreement between both parties.

As to ISPL's formal recording of this position, the minutes of the meeting of the directors dated 12 May 2016 reflect, to a degree, these arrangements. Under item 1, "Key Roles", the minutes (which the Inquiry has only in draft) record:

The meeting affirmed that the key roles were:

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168 Email dated 4 February 2018.
CHAPTER 9: CONFLICTS

Rod Carter- day to day management, with delegation to expend monies in accordance with the Trust Deed
Greg Parker- financial oversight, focus on tax opportunities and to resolve the issues with Njamal Mining PL
Wesley Aird- Determination, Future Acts, Heritage and surveys
Jack Cullity- Mining Agreement negotiations and compliance (in particular business and employment opportunities), joint venture agreements, general contractual negotiations and issues.

The minutes then record that, consistently with the permission set out in clause 88 of ISPL's constitution (see above) each of Messrs Carter, Parker, Aird and Cullity would be remunerated for the services they would be providing, albeit that the remuneration would through their nominated business entities:

It was agreed that Rod would be contracted through the tabled Service Agreement with Esplanade Holdings PL att the Delia Carter Trust, the others would invoice through their business entities.

In addition, the minutes also record the administrative and management staff referred to in the 25 November 2016 letter from Mr Carter to Mr Taylor as Chairman of the TAC would be employed and recouped by Esplanade. In this respect, the Inquiry infers that the reference to "administrative and management staff" includes, at least, Ms Guo, Ms Sinou and Ms Xu. Unfortunately, what is not clear is whether the terms on which each of these individuals would be engaged and remunerated were discussed.

Though these arrangements obviously give rise to both perceived and real conflicts between the personal interests of Messrs Carter, Parker, Aird and Cullity, and the duties they owed (and in the case of Mr White, still owe) to ISPL as officers of the company, any express declaration or discussion of those conflicts is not minuted. This is not to say that the discussions were not had or that the directors were not actually aware of the conflicts; it is simply to say that if those conversations occurred they are not, contrary to clause 130 of ISPL's constitution, recorded.

Notwithstanding this absence, the Inquiry is satisfied, having spoken with all of the relevant directors, that each of Messrs Carter, Parker, Aird and Cullity were sufficiently well versed in corporate governance that they ought to have been aware of, and ought to have turned their minds to, the conflicts that arose in connection with their remuneration. Given this, and given the terms of clause 88 of ISPL's constitution which permits directors to perform paid work for remuneration, it seems likely that, as a matter of substance if not form, the conflicts were apparent and were either expressly or implicitly considered by each of the directors. For those reasons, the Inquiry is not inclined to find that the directors acted inconsistently with the conflicts rule, insofar as it concerns the provision by them or their related entities of services to ISPL.

The difficulty, though, is that there is a tension between the provisions of ISPL's constitution which permit directors to perform paid work for ISPL, and the provisions of ISPL's constitution which require conflicts to be identified, declared and recorded. In the Inquiry's view that
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tension should be resolved in favour of the identification, declaration and recording of the conflicts. There are at least two reasons why it is preferable to resolve the tension in this way.

The first is that ISPL is not simply conducting ordinary commerce; rather, it has taken on the rather special role of trustee of a charitable trust. In that sense, though ISPL is the legal owner of the Trust Fund, the Fund is required to be managed and applied in pursuit of the charitable purposes set out in the Trust Deed. To adopt language used by some members of the Njamal community – it is not ISPL's money. Given this, and given that in a financial sense there is a level of vulnerability and inequality as regards the Trustee and the members of the Njamal community, the Inquiry is of the view that the actual or perceived conflicts of ISPL or its officers should, without exception, be formally identified, discussed, disclosed and recorded.

The second reason why the tension should be resolved in favour of identification, disclosure and recording, is that in the case of ISPL each of the founding directors had (and some continue to have) a personal interest which was in conflict with the duties those directors owed to ISPL. As a result, the entire Board of ISPL was, as at 13 May 2016, conflicted to some degree. In that case, there is a live question as to whether the Board, constituted by conflicted individuals, was capable of acting impartially and independently of those interests. At best, the optics of a Board constituted by conflicted individuals acting collectively to absolve each other of, or to approve, those conflicts are poor. Thus, it is in the interests not only of the Trust and ISPL that conflicts be clearly identified, disclosed and recorded, but it is also in the interest of the directors.

Potential and actual conflicts of ISPL as Trustee

The Njamal People’s Native Title Claims

As already noted, a document titled "Njamal Applicants’ authority and directions” signed by the Applicants on 3 and 4 November 2016, the Applicants in the Njamal #1 and Njamal #10 native title proceedings in the Federal Court of Australia authorised ISPL to manage and coordinate:

1. all native title, cultural heritage and related business matters arising out of the Njamal #1 Applicant and the Njamal #10 Application;
2. the engagement of any of the law firms listed below [being McCullough Robertson Lawyers and Castledine Gregory Law and Mediation],
   and to communicate with any third party regarding those matters.

Accordingly, and pursuant to this authorisation, ISPL is involved in the management and administration of the Njamal #1 and Njamal #10 proceedings in the Federal Court of Australia. Importantly, this role does not derive from ISPL's appointment as trustee under the Trust Deed and does not constitute a Trust Activity as that term is defined in the Trust Deed for which ISPL can be remunerated from the Trust Fund.
At least two questions arise from these circumstances; whether ISPL is able to fund the native title proceedings from the Trust Fund, and whether ISPL is permitted to manage or administer the native title proceedings on behalf of the Applicant or whether that constitutes a conflict between ISPL’s duties to the Trust and its duties to the Applicant.

**Can the Trustee fund the native title proceedings?**

The first of these matters is whether the Trust Deed permits ISPL to fund the Native Title Proceedings. In respect of this issue, the Inquiry’s view is that the Trust Deed does permit ISPL to fund the Native Title Proceedings.

Support for that proposition is found in the decision of the Court of Appeal of New Zealand in *Latimer v Inland Revenue Commission* [2002] NZCA 121 where, in considering whether a purpose of assisting Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal was a charitable purpose, the Court held that there was no doubt “that in this case the public benefit which we have described is, in the context of New Zealand society at this time, of a charitable character.” While *Latimer* went on appeal to the Privy Council, this finding was not disturbed. In 2017, in a case in the Supreme Court of the Northern Territory, the comments of the New Zealand Court of Appeal in *Latimer* were considered to be “compelling” and “extremely persuasive”.

The Inquiry agrees. In particular, the Inquiry finds that distributions of the Trust Fund to fund the progress of the Native Title Proceedings are permitted by clause 10.4 of the Trust Deed for the purpose of giving effect to the secondary objects and purposes of the Trust in advancing the culture and religion of the Beneficiaries (clause 4.1(b)(iii)) and for a purpose beneficial to the community of the Beneficiaries (clause 4.1(b)(iv)).

In this connection, and in response to a query from the Inquiry concerning the costs of the Native Title Proceedings, ISPL explained:

> To most indigenous people, their Country is the cornerstone of their culture. Achieving Native Title over the area recognised as Njamal Country is the only way the Njamal People may control who comes onto their land and what those visitors can and can’t do on the Country. This level of lawful control is the only way they can protect their Country and culture.

Clause 4.1 (b)(iii) of the Njamal People’s Trust Deed, the advancement of the culture and religion of the Beneficiaries, is the charitable object supporting the expenditure.

There are 2 Native Title Applications currently being applied for, and in the Federal Court, being WAD6028/1998 and WAD6003/2000. Additional expenses have been incurred in overseeing Future Acts on the Njamal Country.

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169 [2002] NZCA 121 [40].
170 *Latimer v Inland Revenue (New Zealand)* [2004] 3 NZLR 157 [17].
171 *Groote Eylandt Aboriginal Trust Corporation v Deloitte Touche Tohmatsu* [2017] NTSC 4 [196].
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The funding of the Native Title Proceedings has come at a significant cost to the Trust. From the documents supplied to the Inquiry by ISPL, those costs can be tracked as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Source</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>31.03.17</td>
<td>Transaction details for the period from 1 July 2016 to 31 March 2017</td>
<td>$507,071.53</td>
</tr>
<tr>
<td>30.06.17</td>
<td>30 June 2017 Balance Sheet</td>
<td>$523,091</td>
</tr>
<tr>
<td>31.12.17</td>
<td>Trial Balance</td>
<td>$712,015</td>
</tr>
</tbody>
</table>

While the jump in the amount expended on the Native Title Proceedings from June to December 2017 is significant, a review of publicly available information on the website of the Commonwealth Courts Portal of the Native Title Proceedings reveals that between 30 June 2017 and 31 December 2017 nine documents were filed by the parties in the proceedings and there were 10 court dates. In addition, the Inquiry understands from its attendance at a meeting of the Applicants and the TAC, that as the Native Title Proceedings progressed towards a consent determination listed in early 2018 (which was later vacated) significant work was being completed in order to establish the Njamal prescribed body corporate (an entity recognised under the *Native Title Act 1993*) and its associated rules and structures. Against that background it is not surprising that the amount of Trust Funds expended on the Native Title Proceedings increased in the second half of 2017. The Inquiry notes that some of those legal costs are the subject of dispute between ISPL and the relevant law firm, and the Inquiry has been informed that they are the subject of taxation proceedings in Queensland.

*Can the Trustee manage and coordinate the Native Title Proceedings?*

The second matter which arises for consideration, and the one which is more vexed, is whether the Trustee can involve itself not just in the funding of the Native Title Proceedings but in its management and coordination.

As with any complex litigation, especially in proceedings involving multiple applicants such as a native title determination application, the solicitors with conduct of the proceeding will need to ensure that they are at all times acting within the scope of their instructions. It is not uncommon for a large group of litigants to delegate to a smaller group, or to an individual, the function of providing instructions to their solicitors so as to render the provision of instructions more manageable.

Whether that task can or should be delegated to an individual who is not him or herself a litigant, such as ISPL, raises difficult issues. However, in this respect, one thing which is clear is that, in the Inquiry’s view, the coordination or prosecution of the Native Title Proceedings is not a function or power vested in or conferred on the Trustee under the Trust Deed. That is, it is not within the phrase “Trust Activities” as defined in the Trust Deed. In particular, the native title rights sought to be vindicated by the Native Title Proceedings are not part of the Trust Fund. It follows that, to the extent ISPL is engaging in such activities, it itself is not entitled to reimbursement out of the Trust Fund of its expenses or to remuneration from the Trust Fund for performing such tasks.

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From the materials provided to the Inquiry, it does not appear that ISPL itself is charging for services in connection with the Native Title Proceedings. In response to a question from the Inquiry about this, ISPL supplied the Inquiry with a list of transactions from 14 July 2016 to 31 March 2017 which comprise the $507,071.53 expended to that date on native title matters. That transaction list reveals that the amount was expended as follows:

- Castledine Gregory, a law firm authorised by the Applicant in the 21 July 2016 and 14 October 2016 authorities was paid $170,170.59 from the Trust Fund;
- McCullough Robertson, another law firm authorised by the Applicant in the 21 July and 14 October 2016 authorities was paid $311,959.23 from the Trust Fund;
- Geographe Strategies Pty Ltd, the corporate alter-ego of Mr Aird, was paid $12,354.71 from the Trust Fund;
- Mipela GeoSolutions, an information management and geographic information system service provider,\(^\text{172}\) was paid $11,456.00 from the Trust Fund; and
- RMOB Pty Ltd, the corporate alter-ego of Mr Cullity, was paid $250 from the Trust Fund.

The Inquiry has not interrogated the invoices standing behind these payments. However, given the very large majority of the payments have been made to *prima facie* legitimate service providers; that the Inquiry has found that ISPL may fund the Native Title Proceedings; and that none of these amounts are payments made to ISPL for services connected with native title matters, the Inquiry considers ISPL has not infringed the Trust Deed or its duties at general law in connection with the management and coordination of the Native Title Proceedings.

However, that role, which is distinct from, but in some respects in practice appears to have overlapped with the role that ISPL plays as Trustee of the Trust, does raise a further question about whether ISPL has, by accepting that role, placed itself in a position of conflict between its duties as Trustee and its duties to the Applicants in the native title proceedings.

At first blush, these roles are not immediately or obviously inconsistent. The "primary beneficiaries" of the Njamal People's Trust are members of the Njamal native title claim group, with the addition of other Aboriginal people living in the claim area, and non-Njamal spouses and children of the members of the claim group (known as "additional beneficiaries"). There is nothing necessarily inconsistent in advancing the native title claims being pursued by many of the potential objects of the trust and administering the trust itself.

However, as noted above in relation to Mr White’s carbon interests, the current position as a matter of law is that the rule against conflicts extends to situations involving not only actual, crystallised conflicts, but situations involving a potential for personal interest to be preferred or for a potential for breach of duty to occur.¹⁷³

In that respect, the Inquiry finds that ISPL may have contravened the rule against conflicts by entering into the transaction due to the potential for a conflict to occur, such as if the Applicants requested, or ISPL in acting in their best interests considered it appropriate, that ISPL act in a particular way, which was inconsistent with its duties as Trustee. A potential for conflict may also arise in circumstances in which the members of the community who may benefit from the application of the Trust Fund extend beyond those persons on whose behalf the native title claims are being pursued, which may warrant a course of action by the Trustee that it not consistent with how the Applicants seek to pursue the native title claims.

In any event, beyond potential conflicts, on the facts as the Inquiry understands them the Inquiry finds that ISPL may have acted in a position of actual conflict between the duties it owes the Trust and the duties it owes the Applicants.

Two examples where the Inquiry concludes that this occurred are:

- First, in relation to disputes within the Njamal community about whether the claim group is properly constituted and an overlapping claim (Federal Court proceedings WAD289/2018) has been lodged:
  - The Trustee has become involved in disputes about the legitimacy of the existing claim group, including a proposal from members of the TAC to remove members of the competing claim group from the class of potential objects of the Njamal People’s Trust.
  - If ISPL were to expend trust money in support of one group over another, or were to discriminate against members of the opposing group in making distributions from the trust fund, questions might well arise as to whether the distributions were for the objects of the trust or were made for a proper purpose.
  - In this respect, the draft minutes of a TAC meeting dated 5 July 2018 record under item 6, general business, the following resolution:
    Moved: Mark Walker Seconded: Wayne McKie
    1. The Trustee be asked to not pay benefits to any Member who supports the overlap claim
    2. The Applicants decision to seek a strike out action against the overlap claim be supported

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3. If the strike out action takes more than 3 months, the Applicants with the help of the Hedland office, be supported to organise a 66B meeting at the law ground to affirm the current Applicants.

CARRIED UNANIMOUSLY

Travis McPhee joined the meeting at this point

- The Inquiry understands the reference to the overlap claim to be a reference to WAD289/2018, filed by Ms Mavis Westerman and others.

- In this respect, the Inquiry has been informed that on 10 July 2018 the then general manager of ISPL's Port Hedland office, sent the following text message to a member of the Njamal community:

  In regard to your dad the TAC and Applicants recommended to the Trustee that all Nyamal Ltd supporters be suspended for three months and during this time they are not eligible to receive funds.

- On the face of the text message, it appears that ISPL acceded to the TAC's request that payments be suspended to persons who would otherwise be eligible under the provisions of the Trust Deed to a distribution from the Trust Fund.

- Mr Carter, in a meeting with the Inquiry on 3 October 2018, expressed the view that this conduct by the then general manager was wrong, that there is no value in isolating Njamal people, and accepted that the Trustee cannot tell people they're "banned".

- Similarly, a complaint has been made to the Attorney General by another member of the Njamal community that he too has been suspended from receiving any funds from the trust and that, despite his efforts to discover the reasons for that suspension, the Trustee has not provided him with a response.

- Mr Carter points out that he has not seen an application for funding by this community member. Neither has the Inquiry. However, if an application was made or if correspondence was issued to the member to the effect that he had been suspended from receiving funds from the Trust then, as with the first case above, the Trustee may have improperly acceded to the TAC's request that payments be suspended to particularly categories of people who would otherwise be eligible under the provisions of the Trust Deed to a distribution from the Trust.

- Further, if this occurred, ISPL would be in breach of its duties as Trustee of the Trust, including most likely its duty to act impartially, were it to accede to the request of the TAC not to pay benefits to any beneficiary who supports WAD289/2018 simply because that beneficiary supported WAD289/2018.
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- Secondly, in relation to ISPL’s involvement in encouraging or discouraging members of the community from attending meetings in relation to native title proceedings:
  - Mr Green emailed undisclosed recipients on 8 June 2018 from his @njamal.org.au account, on behalf of the Applicants, advising people not to attend a meeting on 11 June 2018 called in relation to the native title proceedings, and further stating in that email:
    
    Dear Sharon
    
    MEETING 11 JUNE 2018 Called by Nyamal Ltd
    
    This meeting has not been authorised by the Applicant for Nyamal Native Claim #1 or Nyamal Claim #10.
    
    The meeting has not been authorised by the Trust or the Trust Advisory Council. We also believe that the Notice Period for this meeting is short and that this is being held in a time of significant cultural issues among Nyamal people with several funerals being held.
    
    - Mr Green, later in that same email, stating, in bold red font:
      
      SHOULD YOU ATTEND
      
      It is the opinion of the Applicant that you do not attend this meeting. It is also recommended that IF you do attend that you vote NO to all resolutions.

Mr Carter has commented on this email in a response provided to the Inquiry. In that response Mr Carter says, “This is not a meeting of the Trust, but of a competing Trust. Mr Green was instructed by the rightful applicants.” While that might be true the point is that by acting for the Applicants in the Native Title Proceedings and as Trustee, ISPL has placed itself in a position where its duties to those groups can, and on occasion do, conflict.

In addition to these matters, and irrespective of whether acting as representative of the Applicants at the same as acting as Trustee of the Trust constitutes a conflict, the Inquiry finds that the carrying on of those dual roles is undesirable for the reasons set out above, but also because it potentially results in the blurring of the distinction between the roles.

Evidence of this blurring is found in the minutes of the TAC meeting held 1 December 2016, which was attended by representatives of Pilbara Minerals Limited, and at which two members of the TAC indicated that “contrary to statements by individuals, the TAC is the representative body of the Applicants and the Njamal People”. This statement is as a matter of fact and law plainly incorrect, but reflects that the roles had blurred together, or were not clearly understood and understandably perceived to have become blurred.

Mr Carter, quite understandably and consistently with the general concern for the Njamal community that he has expressed throughout the period of the Inquiry, responded to this concern. Mr Carter says:

Without the financial support of the Trust, Nyamal People would be left without independent legal representation, and find themselves with agreements drawn up by the very same mining companies which form part of those agreements.
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This would be a clear conflict and leave the aboriginal people with a less than satisfactory result. This is what was happening some years ago. The exploitation of Aboriginal people by mining companies is well known. Aboriginal people need strong advocacy. It is within the Trust objectives to support all aspects of Aboriginal Peoples lives and culture.

The Inquiry is not equipped to comment on the suggestion that "the exploitation of Aboriginal people by mining companies is well known" but, with that exception, Mr Carter's commentary is undoubtedly correct. In the absence of funding from the Trust, having dismissed YMAC in mid 2016, the Njamal Native Title claims would not be capable of pursuit. As noted earlier in the Report the Inquiry has no difficulty with the Trust funding the Native Title proceedings. The difficulties only arise when the Trustee seeks to go beyond a funding role and to adopt an active role in managing and coordinating both the Native Title proceedings and the Trust.

In sum, in light of the foregoing, the Inquiry finds that:

1. the management and administration of the Njamal #1 and Njamal #10 proceedings is not a function or power conferred on ISPL pursuant to the Trust Deed and is therefore not a "Trust Activity" for which ISPL can be remunerated;

2. if ISPL received remuneration from the Trust Fund for managing or coordinating the Njamal #1 and Njamal #10 proceedings (and the Inquiry notes that it has seen no evidence of this), that remuneration would be an improper application of the Trust Fund and would need to be repaid to the Fund;

3. ISPL has by accepting the role of representative of the Applicants, and contrary to its fiduciary obligations, placed itself in a position where its duties to the Trust potentially conflict with its duties to the Applicants and has potentially contravened its fiduciary obligations by acting in a position of conflict of duties by discriminating against applicants for distributions from the Trust Fund; and

4. even if ISPL has not infringed the conflict rule, the carrying out of the dual roles of trustee of the Trust and representatives of the Applicant is in any event highly undesirable for the reasons set out above, and it is recommended that it cease.

ISPL was invited to comment on such matters prior to the Inquiry reaching a final view. In a letter from ISPL's solicitor to the Inquiry dated 28 September 2018, ISPL commented:

Involvement in Native Title Claims

Moving forward, ISPL does not act in matters of native title or in respect of the Njamal People's native title claims. Njamal is currently represented by the Yamatji Marlpa Aboriginal Corporation in respect of all matters relating to native title.

On 5 October 2018 the Inquiry received a further letter from ISPL's solicitor by which ISPL brought an error in this paragraph to the attention of the Inquiry and advised that it should actually be read as follows:

Moving forward, ISPL does not act in matters of native title or in respect of the Njamal People's native title claims. The Njamal People are currently represented by Arma Legal in respect of all matters relating to native title. However, this representation is in the process of
being partially taken over by the Yamatji Marlpa Aboriginal Corporation (YMAC) in respect of the current native title claim.

The delay to this change in representation has been due to a conflict issue with another native title group in the region who is also represented by YMAC. This issue is in the process of being resolved by YMAC.

Absent directions being obtained from the Supreme Court sanctioning the existing dual role currently undertaken by ISPL in relation to the Trust and the management and coordination of the Native Title proceedings and related matters, the Inquiry is supportive of this change insofar as it removes that dual role.

**The Njamal People’s Benevolent Trust and the Proposed Direct Benefits Trust**

By an undated deed executed by Mr Carter and ISPL, ISPL accepted the appointment as trustee of the Njamal People’s Benevolent Trust (NPBT).

As a result, from the execution of that deed ISPL was trustee of both the NPT and the NPBT.

ISPL has also foreshadowed taking on the role of trustee of a Direct Benefits Trust (DBT) for the provision of direct (private) benefits to members of the Njamal community.

ISPL owes duties to both the NPT and the NPBT, including the overriding duty to act in the best interests of those charities. If it purported to take on the role of trustee of a DBT it would also owe that duty to the DBT.

This duty is known as the duty of single-mindedness, or undivided, loyalty.

That duty cannot be diluted. As Millett LJ said in *Armitage v Nurse* [1998] Ch 241: 174

… there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts … The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts…

It may be open to the Inquiry to find that the duty to act in the best interests of the trust (that is, the NPT, the NPBT or the DBT) is part of the “irreducible core” of a fiduciary’s duties.

In circumstances of a conflict of loyalty, it is impossible for a trustee to maintain their single-mindedness; they cannot properly act for either charity and must withdraw from one.

ISPL may have caused itself to be in a position where its duties of loyalty to the NPT and the NPBT conflict by taking on the role of trustee of the NPBT in circumstances where ISPL already owed a duty of single-minded loyalty to the NPT. Similarly, it may have put itself in a position where its duties of loyalty conflicted if it were, while maintaining the position as trustee of either the NPT or the NPBT, take on the role of trustee of a DBT.

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174  253-254.
CHAPTER 9: CONFLICTS

The fact that ISPL may not yet have been placed in a position where its duties of loyalty to the NPT, the NPBT and any proposed DBT actually conflict is irrelevant. As Edelman J explained in *Agricultural Land Management Ltd v Jackson [No 2] [2014] WASC 102*, and as discussed above, the current position as a matter of law is that the rule against conflicts extends to situations involving not only actual, crystallised conflicts, but situations involving a potential for personal interest to be preferred or for a potential for breach of duty to occur. In the case of ISPL acting as trustee for any two of the NPT, the NPBT and any DBT, there is a potential for breach of duty, being the duty of undivided loyalty, to occur.

By way of hypothetical example, it may be that a particular State or Commonwealth grant, or some other pool of money, is or becomes available to trustees of charitable trusts. In those circumstances ISPL's duty to the NPT to act in its best interests by seeking the funding may conflict with ISPL's duty to the NPBT to do the same.

Similarly, some singular business opportunity (including investment) might present itself for exploitation by ISPL. In that case, ISPL's duty to the NPT to act in its best interests by seeking the opportunity may conflict with ISPL's duties to the NPBT and any DBT to do the same.

A further example of where a potential conflict could arise is where ISPL's interest in its remuneration as trustee, and its interest in absolving itself of conflicts in the transacting of trustee business, conflicts with its duties of undivided loyalty.

Pursuant to clause 5.7 of the deed for the NPT, ISPL is entitled and thereby authorised to retain and receive out of the Trust Fund its reasonable professional costs and charges for all acts done and time expended on all Trust Activities. Alternatively, it is entitled and is thereby authorised to retain and receive out of the Trust Fund its reasonable expenses incurred in relation to undertaking Trust Activities, including but not limited to, the Travel Allowance.

In contrast, ISPL as trustee of the NPBT is entitled to different, in some circumstances potentially more generous remuneration. Pursuant to clause 11 of the deed for that trust ISPL may apply the Trust Fund to:

1. pay a once off commission to the Trustee at a rate not exceeding 5.5% (GST inclusive) of the gross value of the Trust Fund;
2. pay fair and reasonable remuneration for the services of the Trustee in administering the Trust at a rate not exceeding 6.6% annually (GST inclusive) of the income received on account of the Trust Fund; and
3. pay, or reimburse the Trustee for, reasonable expenses incurred as Trustee of the Trust.

A similar disparity exists as regards absolution of conflicts as the trust deed for the NPT does not contain any provisions permitting ISPL or its officers to act in positions of conflict while the deed for the NPBT provides extensive permission, as set out in clause 14.3:
Subject to the requirements of clause 5 and any Relevant Law, the Trustee and any Officer of the Trustee may exercise or concur in exercising all powers and discretions given by this Trust Deed or by law even though the Trustee or that person:

(a) has or may have a direct or personal interest or a conflict of fiduciary duty in the method or result of exercising the power or discretion; or

(b) may benefit either directly or indirectly from the exercise of any power or discretion;

and even though the Trustee is a sole Trustee.

Thus, ISPL's interest in taking advantage of the potentially more generous remuneration and conflict absolving provisions of the NPBT is, on the face of it, in conflict with the duty of undivided loyalty that ISPL owes to the NPT.

Moreover, there is an additional layer to the conflicts problem posed by having ISPL assume a dual role as trustee of the NPT and the NPBT, in that clause 14.3 of the NPBT purports to extend the permission to act in positions of conflict to the directors of ISPL, such that the directors personally have an interest in directing business to the NPBT over the NPT, thus putting the directors of ISPL, at least on the face of the documents, in a position where their duties of loyalty to ISPL as trustee for the NPT conflict with their duties of loyalty to ISPL as trustee for the NPBT. While this situation may be possible to absolve or resolve consistently with provisions in ISPL's constitution, the Inquiry nonetheless considers that it is a position that ISPL and its directors should avoid confronting in the first place.

**The “beneficiaries” of the NPT, the NPBT and any proposed DBT**

In discussions with the Inquiry representatives of ISPL have suggested that there is no conflict, and cannot be any conflict, because ultimately both trusts are "owned" by the Njamal people.

However, insofar as this suggests that the NPT and the NPBT benefit identical groups, in the Inquiry's view this is incorrect.

Clause 4.1 of the NPBT provides (emphasis added) that the trust is established for the benefit of Persons of Aboriginal Descent who (in the opinion of the Trustee) are of the Njamal People of the Pilbara region of Western Australia.

The NPT is far broader, and does not contain the element of opinion expressly reserved to the trustee of the NPBT. Thus, by clause 3.1 of the NPT deed there are Primary Beneficiaries and Additional Beneficiaries. The Primary Beneficiaries are Njamal People, defined as members of the native title claim agitated in the Federal Court of Australia, as amended from time to time and in the event that the claim is determined, those persons determined as the common law holders of native title for the Njamal claim. The Additional Beneficiaries are
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defined as any Persons of Aboriginal Descent living (permanently or temporarily) in the claim area and spouses and children of Njamal people who are not themselves Njamal people.

Thus, while the NPT and NPBT undoubtedly have overlap in respect of their memberships, those memberships are not precisely congruent.

In any event, as the trustee of charitable purpose trusts (cf: private trusts) the duty of undivided loyalty owed by ISPL to each of the NPT and the NPBT is a duty owed in connection with the fund constituted by those trusts, and not a duty owed to those who may ultimately benefit from distributions of the fund. Thus, whether the memberships of the NPT and the NPBT correlate is not directly relevant to the question of whether ISPL has, by taking on the role of trustee of the NPT and NPBT, divided a duty of loyalty that must remain undivided.

While, ultimately the precise terms of any DBT would require assessment, in principle the position of the "beneficiaries" of the NPT and the NPBT when compared against any proposed DBT is also vexed. In the former the trusts are for purposes, with the conferral of individual private benefits being incidental to the exercise of the trustee's discretions for the charitable objects. In the latter, the trust is expressly contemplated to be a non-charitable trust for persons. In those circumstances, there appears to be an irreconcilable conflict between the interests ISPL would, in acting as trustee for either of the NPT/NPBT as well as the DBT, be required to serve.

These matters were drawn to the attention of ISPL, who commented as follows:

These issues are under consideration by ISPL and ISPL will obtain legal advice on the issues raised.

In the interim, ISPL makes the following comments in this regard:

- it is typically clear from the source of any income which trust the income must be directed to; and
- each of the trusts referred to will have separate detailed investment policies which will clearly dictate which investment opportunity will be made available to which trust; and
- where there is doubt as to the direction of any income or investment opportunity, ISPL will consult with TAC and if deemed necessary, seek direction from the Supreme Court.

In any event, much depends upon the objects of each trust. It is to be noted that one of the of the trusts referred to it yet to be finalised. The terms of these trusts, in part, will be directed by what the Inquiry has noted. It is also fair to say that work on the new trust deed for the Trust has been deferred whilst we have assisted ISPL in dealing with these matters raised by the Inquirer.

Mr Carter also commented on these matters, as follows:

Given EVERY Trust in Australia takes on this dual role for very obvious reasons, these recommendations are simply out of touch with reality. Perhaps the inquirer needs to look at his own conflicts, given the obvious conflict that exists with SSO, the Attorney General and the so-called inquiry.

It seems to me a clear conflict that the AG would call for an independent enquiry and then instruct his own departments who are clearly not independent.
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With respect, Mr Carter's response is unhelpful. His comment that "every trust in Australia takes on this dual role" is undoubtedly overstated and, unlike ISPL's response, takes no cognisance of the importance of the objects and terms of the various trusts (both current and contemplated) when considering issues of conflict.

Recommendation 31 (Chapter 9)

ISPL resign as either Trustee of the Trust or trustee of the Njamal People's Benevolent Trust, or take steps, if they may properly be taken, to amend the terms of the deeds constituting those trusts to remove the possibility of conflict, and refrain from taking on the role of trustee of any Direct Benefits Trust, or seek directions from the Supreme Court of Western Australia pursuant to the provisions of the Trustees Act 1962 as to how it ought to act in respect of the Trust, the Njamal People's Benevolent Trust and the proposed Direct Benefits Trust.

Ironside Management Pty Ltd and Bowman Street Pty Ltd

Two other areas where issues of potential concern to the Inquiry relating to potential conflicts and self-interest concern Ironside Management Pty Ltd and Bowman Street Pty Ltd, two companies in which current or former directors of ISPL and/or Njamal Services Pty Ltd held interests as shareholders.

Ironside Management Pty Ltd was incorporated on 30 June 2016 and its inaugural directors were Mr Cullity, Mr Aird, Mr Parker (all then directors of ISPL) and Ryan Carter. Each was registered as beneficially holding one of the four issued shares of the company. Subsequently, on 5 January 2017, Mr Carter was appointed sole director, with the above ceasing to be directors.

Further, all four shares were recorded as being transferred to Mr Carter (the shares not being beneficially held by him, although it is unclear for whose benefit he held them), with effect from 1 February 2017, following which Ryan Carter was reappointed as a director and appointed as secretary, such that he and Mr Carter were the company's only office holders from 2 February 2017 to 1 May 2017.

The shares held by Mr Carter were recorded as being transferred with effect from 20 March 2017 back to each of Mr Cullity, Mr Aird, Mr Parker and Ryan Carter, although this time it was recorded that they were not beneficially held by each person. It is not clear for whose benefit they were held.

Mr Aird has advised the Inquiry that, as far as he is aware, in each instance the directors held their shareholding as trustee for their respective nominated family trust, and did not beneficially own the shares. If that is correct, the initial ASIC notification was incorrect.

On 1 May 2017 the remaining three original directors were recorded as being re-appointed and Mr Carter was recorded as ceasing to hold that position, such that the directors were,
again, Mr Cullity, Mr Aird, Mr Parker and Ryan Carter. The net effect of the changes over that four month period was that the original directors were all directors and shareholders again, although this time recorded as not holding their shares beneficially.

As best the Inquiry understands, (based on the recollection of Mr Aird of Mr Green's explanation when he queried the changes), they were brought into effect by Mr Carter because he was attempting to bring the company "into the fold" of his family companies on the basis that Ironside Management Pty Ltd no longer had any role to play in connection with the Trust. However, later it was realised that the company was required to have an ongoing existence and role given an authority which had been conferred on it by the Njamal Applicants in relation to FMG, in particular. The changes were therefore effectively reversed. The authority on which the changes were effected is open to question.

According to Mr Parker, the company was formed to undertake tasks which ISPL, as Trustee for the Njamal People's Trust, could not undertake due to limitations on what the trustee can and cannot do. Mr Parker referenced activities such as liaising with mining companies to negotiate and facilitate heritage surveys and Native Title Agreements as good examples.

In practice the company only engaged in very limited activities – being responsible for co-ordination of one heritage survey in relation to the Altura Agreement, before the decision was made to effectively cease using it as a vehicle for any activities associated with the Trust or native title issues. It was also initially appointed by various instruments to have a role on behalf of the Njamal Applicants in connection with native title proceedings in the Federal Court of Australia.

The Inquiry understands that the fees for the heritage survey were incurred by the Trust and then billed by Ironside Management Pty Ltd to Altura together with a 15% "administration fee". As previously discussed, it is not clear what became of the relatively small administration fee, although it has been suggested none of the directors/shareholders received a benefit. Further, the Inquiry has recently been provided with a copy of an unsigned minute of a meeting apparently held on 27 June 2016 at which it was agreed that the role of the company was a not for profit role.

On 5 June 2018 an application for voluntary de-registration was filed with ASIC, the authority for the filing of the application being unclear.

The establishment and role of the company, of which then directors of ISPL were shareholders, raises potential questions in relation to potential conflicts of interest and duty and whether the directors would potentially have benefited from their role as directors of ISPL, the trustee of the Trust, and been liable to repay any amounts they personally received to the Trust. However, given the limited role the company played and apparent absence of any benefit being received by its shareholders, the Inquiry does not consider that issue further.
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Turning to Bowman Street Pty Ltd, it was registered on 27 November 2016. Its shareholders were Mr White, Mr Parker, Mr Parker, Mr Aird and Mr Cullity. Its initial directors were Mr Aird and Mr Cullity. It is unclear to the Inquiry what if any role Bowman Street Pty Ltd ultimately assumed. The Inquiry understands that at one stage in 2017 it was contemplated that Bowman Street Pty Ltd would assume a role as a commercial vehicle for its shareholders including potentially in relation to commercial activities of Njamal Services Pty Ltd from which it would potentially receive significant remuneration for referral of business to Njamal Services Pty Ltd. It is unclear however whether that ever occurred. Mr Carter suggests that the company was contemplating involvement in relation to another project, unconnected with Njamal, which Mr Cullity eventually contracted in relation to directly.

Mr Aird resigned as a director of Bowman Street Pty Ltd with effect from 27 October 2017, by notification by email to Mr Mack. However, it appears that this was not notified by Bowman Street Pty Ltd to ASIC, as ASIC records when recently checked continued to record Mr Aird as a director.

An application for voluntary deregistration of the company dated 15 June 2018 was filed with ASIC and strike-off action is presently in progress in relation to the company. It is unclear whether that application was properly authorised. The application indicated that the company is not carrying on business, has assets worth less than $1,000 and has no outstanding liabilities.

As with Ironside Management Pty Ltd, the establishment and role of the company, of which current or former directors of ISPL or Njamal Services Pty Ltd are shareholders, raises potential questions in relation to potential conflicts of interest and duty and whether the directors would potentially have benefited from their role as directors of ISPL or Njamal Services Pty Ltd, the trustee of the Trust, and been liable to repay any amounts they personally received to the Trust. However, given the limited role the company played and apparent absence of any benefit being received, the Inquiry does not consider that issue further.

Both of the above cases highlight the importance of proper processes and practices being put in place to ensure that if arrangements are entered into that may benefit current or former directors, safeguards are put in place to ensure that any agreements entered into are appropriate, transparent and on an arm’s length basis and any conflicts are transparently declared, recorded and correctly managed.

The Inquiry’s concerns are supported by concerns expressed by Mr Aird, shortly prior to his resignation as a director of ISPL that questionable governance practices had occurred in relation to those companies.
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General recommendations in relation to potential and actual conflicts

In addition to the foregoing findings and recommendations, the Inquiry also makes the following recommendations:

Recommendation 32 (Chapter 9)

1. ISPL and its directors:
   - actively adhere to its constitution and ensure that directors’ interests are:
   - fully and adequately disclosed in accordance with the requirements of the company’s constitution and the Corporations Act 2001;
   - minuted in detail in minutes which are formally endorsed by the directors at a subsequent meeting.

2. take immediate steps to implement a conflicts register that records not only conflicts that ISPL itself might have, but also the conflicts, potential or actual, of its officers, agents, contractors, employees and consultants; which register should, in the Inquiry’s view, clearly set out the nature of the conflict (potential or real), the date on which the conflict was identified and disclosed, and the way in which the conflict was or will be managed (for example, by a fully informed resolution of the directors or the approval of the Supreme Court, as the case requires); and

3. ensure all contractors, agents and consultants are engaged through appropriately detailed written contracts with appropriate terms and conditions which should include terms and conditions to ensure that any issues of conflicts of interest or duties that may arise are appropriately notified and dealt with.
The nature and function of the Trustee Advisory Committee

The Trust Deed

The Trust Deed specifies in clause 9 that an Advisory Committee is required to be appointed to advise the Trustee.\(^{175}\) That committee is generally known as the TAC, being an acronym for Trust Advisory Committee, and is referred to as such in the Report.

The TAC is largely an advisory body. In contrast, the Trustee has ultimate decision making power in all matters relating to the Trust.\(^{176}\) It is solely entitled to determine all questions and matters of doubt which arise in the course of the management and administration of the Trust, although may take the advice or recommendations of the TAC into account in such determination.\(^{177}\) The Trustee is not bound to act on the recommendation or advice of the TAC,\(^{178}\) although is obliged to consult with the TAC in certain situations.\(^{179}\) In practice however Trustees have afforded significant weight to the views of the TAC. That is understandable given that the TAC is elected by the community and its views are important. Further, if its views are disregarded by a Trustee, it may impact on whether the TAC chooses to exercise its power to remove the Trustee. It has however created some difficulty from time to time, where it has been necessary or appropriate for a Trustee to act otherwise in accordance with the preferences of the TAC. It is important that the TAC members recognise that it is ultimately the Trustee that has the responsibility to make ultimate decisions and, in particular, to ensure that its actions are in accordance with its obligations as Trustee of a charitable trust, both under the terms of the Trust Deed and other obligations. There will therefore be times when, quite properly, its views are not reflected in decisions by the Trustee.

The principal role of the TAC is to advise and make recommendations to the Trustee in relation to matters associated with the investment and distribution of the Trust Fund, any variations to the Trust Deed, any decision by the Trustee to terminate the Trust and any variations to the Trust Deed.\(^{180}\) In respect of each of these matters the Trustee is under a duty to consult with the TAC. The Trustee may also consult with the TAC about 'Trust Expenditure' or any other 'Trust Activity'.\(^{181}\)

\(^{175}\) Trust Deed, clause 9.
\(^{176}\) Trust Deed, clause 6.4(b).
\(^{177}\) Trust Deed, clause 6.4(a).
\(^{178}\) Trust Deed, clause 9.5.
\(^{179}\) Trust Deed, clause 9.3.
\(^{180}\) As to variation, see Trust Deed, clause 14.2.
\(^{181}\) Trust Deed, clause 9.4.
CHAPTER 10: TRUSTEE ADVISORY COMMITTEE

However, while it is broadly correct to speak of the TAC as simply an advisory body, the Trust Deed does confer on it (and only it) the power (subject to quorum requirements) to terminate the appointment of a person as Trustee and to appoint a person or persons as a replacement Trustee. The TAC has exercised this power on two occasions, in the replacement of Abbott with AET in 2014 and AET with ISPL in 2016, and it has been sought to be exercised on a number of other occasions. Those actual or attempted exercises of power are discussed in more detail in Chapter 3 of the Report.

The Trust Deed originally specified that the number of TAC members shall not exceed 10.\textsuperscript{182} This number was varied by amendments to the Trust Deed in 2010 and then 2012. The maximum number of TAC members is now 14.

Whilst the Deed itself does not require that TAC members be beneficiaries,\textsuperscript{183} or that each TAC member is to represent a distinct Njamal family group, as a matter of practice, and based on the procedure by which the TAC is elected at a community meeting, the TAC is comprised of fourteen Njamal people who each represent a particular Njamal family group.\textsuperscript{184} The family groups are set out in a table later in this Chapter.

\textit{The TAC Rules}

Whilst the Trust Deed provides for establishment of the TAC and governs its role, the Trustees in conjunction with the TAC have historically drafted rules, known as the TAC Rules, which govern the practices and process of the TAC and its meetings.

Under Abbott, from 2012 the TAC Rules were set out in a document titled "Njamal People's Trust Rules and Policies" (Abbott TAC Rules) which, amongst other things, included provisions about the TAC and its meetings. The Abbott TAC Rules is described as having been generated, amongst other reasons, "to assist the Njamal Peoples Trustee Advisory Committee to consider options, make well informed decisions for the allocation and distribution of Njamal Trust funds to Njamal beneficiaries." They were amended in 2013.

Shortly after AET was appointed Trustee, new TAC Rules (AET TAC Rules) were established. The AET TAC Rules were adopted by resolution of the TAC in consultation with the Trustee on 28 July 2014 and were signed on behalf of the TAC by its then acting chairperson, Ms McGann (Ms Westerman) and on behalf of AET by AET's manager of trustee services (Mr Morgan).

The AET TAC Rules were not amended during the course of AET's trusteeship and when ISPL replaced AET in May 2016, they were adopted by ISPL. While consideration has been given by ISPL to amending the AET TAC Rules, no amendments have to date been made of

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\textsuperscript{182} Trust Deed, clause 9.8.
\textsuperscript{183} Trust Deed, clause 9.7.
\textsuperscript{184} As per ISPL’s submission, 3.5.
\end{flushleft}
which the Inquiry has been advised and the AET TAC Rules, as endorsed in 2014, continue
to apply. ISPL has however recently been reviewing the Rules and Trust Deed with a view to
effecting amendments, taking into consideration issues raised by the Inquiry. The Inquiry
understands that issues in relation to the potential amendment of the Trust Deed and Trust
Rules were due to be raised at an annual community meeting (described in practice as an
annual general meeting or AGM) convened by ISPL as Trustee on 22 October 2018.
A number of questions have arisen in respect of the TAC Rules including, in particular, the
power or capacity of the TAC to formulate rules of this type (with or without the consent of the
Trustee), and the extent to which the TAC Rules are or may be seen to be inconsistent with
the Trust Deed. The various inconsistencies are dealt with below under their relevant topic
headings.
As to the question of whether the TAC has the power (with or without the agreement of the
Trustee) to establish a set of rules by which it may control its own meeting processes and
practices, the Inquiry notes that the Trust Deed is silent on this topic. As previously observed,
the Trust Deed does however provide that arrangements for TAC meetings are to be agreed
between the Trustee and the TAC members. While it might be argued that pursuant to this
requirement arrangements may be agreed between the Trustee and the TAC in relation to
procedures for TAC meetings, that is by no means clear. Absent that as a source of power, it
would be necessary to imply from the Trust Deed that the TAC is empowered to
establish rules about its practices and procedures, but only insofar as those practices and procedures
do not conflict with the terms of the Trust Deed. To the extent that there is any conflict, the
terms of the Trust Deed prevail.
The Inquiry also notes that this is an issue about which ISPL is alive. In a letter from ISPL's
solicitor dated 9 August 2018, ISPL's solicitor remarks that "there is academic debate about
the extent to which committees of this nature can make their own rules" before going on to
say "That in itself was another reason for the wholesale changes to the trust deed and the
procedures and practices to it". ISPL's solicitor concludes by indicating that "there will be a
community meeting convened to address these changes." That meeting occurred on
22 October 2018 however the Inquiry is not aware of its results.
The Inquiry finds that the approach reflected in the letter from ISPL's solicitor is one to be
commended as recognising and seeking to address the lacuna in the Trust Deed when
dealing with the practices and procedures of the TAC.

Election of the TAC: inconsistency between Trust Deed and TAC Rules

As noted, the original TAC was comprised of 10 members of the Njamal community, whose
identities are specified in clause 9.2(b) of the Trust Deed. By clause 9.2(a) of the Trust Deed
that initial TAC was to act until such time as its members retired, or were replaced in
accordance with the Trust Deed. Clause 9.2(b) reflects the more general specification in
clause 9.11 of the Trust Deed that the TAC shall act from the time it is elected until the election of a new TAC at a community meeting of the Njamal People.

The election of the TAC and resignation and filling of positions of TAC members is governed by clause 9.10 of the Trust Deed. Pursuant to clause 9.10(a), and subject to clause 9.10(f) (which provides for the replacement of a TAC member who resigns), the members of the TAC hold their positions until a new TAC is chosen in accordance with clause 9.10.

Pursuant to clause 9.10(b), the Trustee is to organise a community meeting of the Njamal People and thereafter ensure that such a meeting is organised at least once each calendar year. The reasonable expenses associated with convening the community meeting may be paid out of the Trust Fund.

Pursuant to clause 9.10(c), a quorum for a meeting convened under clause 9.10(b) is fifteen adult Njamal people. Pursuant to clause 9.10(d), if a quorum is present then the community meeting may elect a new TAC by simple majority of votes, which shall upon election replace the previous TAC. If a quorum is not present then, pursuant to clause 9.10(e), the Trustee is required to call another community meeting as soon as is reasonably practical and a quorum at that meeting is the number of Njamal people present.

Having regard to this process, the Inquiry finds that the Trust Deed contemplates that the Njamal community may replace the TAC, wholesale, at a community to be held once each calendar year. This of course does not mean that certain incumbent members of the TAC may not be re-elected in consecutive elections; that undoubtedly is the case. Rather, it means that the Trust Deed contemplates the removal and replacement of the TAC as a whole, not on a member by member basis.

In contrast to this process, the AET TAC Rules provide:

Advisory Trustees shall hold office for 2 years from the date of election at the AGM. Each year, only half of the available positions shall be elected, thus ensuring that the committee has a succession plan in place continually.

The AET TAC Rules further provide that the appointment of a TAC member shall be in place until the TAC member resigns, dies, loses legal capacity, or a 2 year period is served. Non-attendance at 3 consecutive meetings with no genuine supported reason for non-attendance will result in that TAC member being replaced by their proxy.

The policy behind the half-election position adopted in the TAC is understandable and reflects the half-election process adopted by other representative bodies (e.g.:the Australian Senate). However, it is inconsistent with the provisions of the Trust Deed which require the election (or

185 The 2013 version of the Abbott Trust Rules, which were not applied in relation to the election of the TAC due to no relevant community meetings being convened after their introduction, first introduced such a provision.

186 See under heading 2 "Replacement/Removal".
re-election, as the case may be) of the entire TAC once every calendar year. Likewise does not provide for a fixed length of service of TAC members and does not permit removal and replacement of members from their TAC position for non-attendance, or removal for other reasons. The Inquiry finds such mechanisms are legally ineffective; they cannot override the provisions of the Trust Deed. Therefore, if such removal were desired to be effected directions from the Supreme Court to that effect would need to be obtained, the Trust Deed would need to be amended, or a community meeting would need to be convened pursuant to the present terms of clause 9.10. As noted, it appears from the letter from ISPL's solicitor dated 9 August 2018 that ISPL is opting to amend the terms of the Trust Deed.

**Election of the TAC: voting at community meetings**

There is very little guidance under the Trust Deed (and none in the TAC Rules) on how an election of a TAC at a community meeting is to occur, aside from providing as discussed above that there be a community meeting at least each calendar year and that, if a quorum is present, the community may elect a new TAC by a simple majority of votes.

The Inquiry has also been made aware of concerns of bullying and that by having votes by a show of hands rather than by secret ballot, some Njamal persons may feel intimidated or pressured in relation to how they vote at a community meeting. It is to be observed that at the most recent community meeting the vote in respect of the Ball/Allen family member was conducted by secret ballot.

While in practice it therefore appears that the procedures adopted at community meetings may have flexibility to accommodate how voting might best be conducted, in the Inquiry's view it is preferable that these matters be clearly specified, in advance, in rules or procedures that are expressly countenanced by the Trust Deed, as is set out in the recommendations below.

**Membership of the TAC**

**Abbott**

The Inquiry has not undertaken a detailed analysis of the TAC for every year that the Trust was under Abbott’s trusteeship; rather it has focussed its attention upon Abbott’s trusteeship in relatively recent years.

**2012**

The TAC was elected at a Trust community meeting on 9 March 2012. At that community meeting it was agreed that TAC membership be increased from 12 to 14 people. At the meeting, the fourteen families each put forward their nominations for TAC. With the exception of one family, each family group only put forward one nomination per TAC member and one nomination for their proxy. The minutes record that there were no speakers against and that the TAC was voted upon "Unanimous by Show of Hands".
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2013 & 2014

Under the revised policies and procedures introduced in 2013 whilst Abbott was Trustee, the election of new TAC members was to take place at annual community meetings where nominations were to be called for from the floor. Seven members would be elected each annual community meeting and then the remaining seven were to be elected at the next year’s annual community meeting. If there was more than one person nominated, the names were to be written down and a vote was to be taken. However, as a matter of practice, this did not occur. Community meetings were not convened by Abbott in 2013 or the part of 2014 for which Abbott was Trustee, despite the requirement in the Trust Deed that the Trustee convene such a meeting each calendar year, with the consequence that the TAC membership did not change during that period.

Abbott has explained the lack of community meetings in 2013 and 2014:

Community meetings were held each year with the exception of 2011 when the Community meeting was scheduled but had to be cancelled and was not able to be held during that year. Then again in 2013 a Community meeting had been scheduled but had to be cancelled. Then Abbotts were removed as trustee at a Advisory Committee meeting on 25 October 2013 so no Community meeting was then held prior to the handover to AET in 2014.

AET

2014

The first community meeting under AET's trusteeship occurred in South Hedland on 18 and 19 November 2014 and was described as a "Trust AGM". From the minutes provided to the Inquiry by AET, it appears that 49 members attended. At that meeting AET explained that the maximum number of TAC members under the Trust Deed, 14, was considered a high number and sometimes hard to work with in regards to getting a quorum at meetings. A resolution was put up that the TAC membership remain as it was:

RESOLUTION: Advisory Committee represented by people representing the existing family groups acting in the best interest of Njamal People?

From the minutes, it appears that much discussion took place over this resolution. The resolution was not passed however AET suggested that it would keep the existing committee, subject to families putting forward a written submission within 14 days to state why their family representative should be replaced. From the information provided to the Inquiry, it appears that no submissions were made and the TAC remained as it was.

2015

AET did not convene a community meeting in 2015. While it sent notices to do so, the TAC made recommendations at its meeting of 22 October 2015 to reschedule the meeting due to sorry business following the passing of a Njamal person. AET accepted that recommendation and rescheduled the meeting to February 2016. That decision is understandable, although not in strict conformity with AET's obligations under the Trust Deed. This circumstance highlights
CHAPTER 10: TRUSTEE ADVISORY COMMITTEE

why in exceptional circumstances it is desirable for there to be a degree of flexibility in relation to the timing of community meetings, particularly given the importance of community members having a reasonable opportunity to participate in community meetings, which may be more difficulty at particular times of year or due to unforeseen events.

**The 19 August 2015 TAC composition controversy**

The composition of the TAC in 2015 was central to the Supreme Court proceedings to remove AET: whilst some TAC members and proxies had purported to remove AET in August 2015, AET did not accept that the procedure under the Trust Deed for removing a Trustee had been followed. Particularly, they did not accept that a 3/4 majority of the TAC had decided to remove them as required under clause 5.5 of the Trust Deed. This turned in part upon determining the proper composition of the TAC.

On 19 August 2015, and as discussed earlier in the Report in the context of the removal of the board of Njamal Mining Pty Ltd, a meeting was convened to consider removing AET. A disagreement existed as to the TAC membership of three family groups: Ms Westerman and other plaintiffs in the Supreme Court proceedings were of the view that Tanya Mitchell and Dean Snook were no longer TAC members because, in their view, Ms Mitchell had resigned in writing and Mr Snook had been removed due to non-attendance at TAC meetings. The plaintiffs were also of the view that the Ngurrpangu, Coppin, Williams, Taylor, Brierly member was a particular person (now deceased) (TW). AET took the view that Mr Snook and Ms Mitchell remained on the TAC and that Barry Taylor was the relevant representative for the Ngurrpangu, Coppin, Williams, Taylor, Brierly family group, with TW only acting as a proxy for Mr Taylor in certain situations and not being authorised to vote in relation to the removal of Trustee in August 2015.

The disparate views are set out in the table below:

<table>
<thead>
<tr>
<th>Family Group</th>
<th>TAC MEMBER</th>
<th>Endorsed resolution to remove AET?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>AET’s view</td>
<td>Plaintiffs’ view</td>
</tr>
<tr>
<td>1 Allen/Ball</td>
<td>Sharon McGann (Westerman)</td>
<td>Yes</td>
</tr>
<tr>
<td>2 J McPhee</td>
<td>Albert Pianta</td>
<td>No</td>
</tr>
<tr>
<td>3 Mack/Tinker/Corbett</td>
<td>Nina Corbett</td>
<td>Yes</td>
</tr>
<tr>
<td>4 Mitchell</td>
<td>Johnny Mitchell</td>
<td>Yes</td>
</tr>
<tr>
<td>5 Monaghan, Geary et al</td>
<td>Darren Geary</td>
<td>Yes</td>
</tr>
<tr>
<td>6 Ngurrpangu, Coppin, Williams, Taylor, Brierly</td>
<td>Barry Taylor</td>
<td>TW Yes (TW) No (BT)</td>
</tr>
<tr>
<td>7 Puntalong, Coppin, Wilson</td>
<td>Terry Wilson</td>
<td>Yes</td>
</tr>
</tbody>
</table>
CHAPTER 10: TRUSTEE ADVISORY COMMITTEE

<table>
<thead>
<tr>
<th>Family Group</th>
<th>TAC MEMBER</th>
<th>Endorsed resolution to remove AET?</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>Putungaja, Eaton, Waiters, Miller</td>
<td>Christopher Miller</td>
</tr>
<tr>
<td>9</td>
<td>Snook</td>
<td>Dean Snook</td>
</tr>
<tr>
<td>10</td>
<td>Stewart, Mitchell</td>
<td>Tanya Mitchell</td>
</tr>
<tr>
<td>11</td>
<td>Taylor</td>
<td>Tony Taylor</td>
</tr>
<tr>
<td>12</td>
<td>Walker, Murphy, Jenkins, et al</td>
<td>Willie Jumbo</td>
</tr>
<tr>
<td>13</td>
<td>R McPhee</td>
<td>Travis McPhee</td>
</tr>
<tr>
<td>14</td>
<td>McKenna</td>
<td>Kathleen McKenna</td>
</tr>
</tbody>
</table>

On the view of the plaintiffs in the Supreme Court proceedings, there were only 12 TAC members as at 19 August 2015 and in their view 11 of those 12 endorsed a written resolution to remove AET. On AET’s view, there were 14 TAC members and only 10 of the 14 (71%, being less than the requisite 75%) endorsed the resolution to remove AET. Thus, the validity of the resolution as a resolution properly carried pursuant to the terms of the Trust Deed was disputed.

On the information provided to the Inquiry, AET had reasonable grounds to dispute the composition of the TAC and whether it had been validly removed. The Inquiry does not however make any finding as to the actual composition of the TAC as at 19 August 2015 given that issue was itself the subject of contested litigation and that a TAC was later elected at a community meeting some six months later, on 29 February 2016.

*The election of the TAC on 29 February 2016*

A community meeting was convened by AET on 29 February 2016 at which a TAC was elected. According to AET’s minutes of that meeting, the composition of the TAC following the community vote was as follows:

<table>
<thead>
<tr>
<th>Family Group</th>
<th>Member</th>
<th>Proxy</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><em>Allen/Ball</em></td>
<td>Sharon McGann (now Westerman) or Kevin Allen or Patricia Ball*</td>
</tr>
<tr>
<td>2</td>
<td>J McPhee</td>
<td>Wayne McKie</td>
</tr>
<tr>
<td>3</td>
<td>Mack/Tinker/Corbett</td>
<td>Mark Walker</td>
</tr>
<tr>
<td>4</td>
<td>Mitchell</td>
<td>Johnny Mitchell (Ernest)</td>
</tr>
<tr>
<td>5</td>
<td>Monaghan, Geary, Little, Perry</td>
<td>Thomas Geary</td>
</tr>
<tr>
<td>6</td>
<td>Ngurrpangu, Coppins, Williams, Taylor, Brierly</td>
<td>Barry Taylor</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Family Group</th>
<th>Member</th>
<th>Proxy</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 Puntalong, Coppin, Wilson</td>
<td>Graham Coppin</td>
<td>Terry Wilson</td>
</tr>
<tr>
<td>8 Putungaja, Eaton, Walters,</td>
<td>Troy Eaton</td>
<td>Christopher Miller</td>
</tr>
<tr>
<td>Miller</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9 Snook</td>
<td>Dean Snook</td>
<td>Eric Snook</td>
</tr>
<tr>
<td>10 Stewart, Mitchell</td>
<td>Gavin Mitchell</td>
<td>Donele Mitchell</td>
</tr>
<tr>
<td>11 Taylor</td>
<td>Tony Taylor</td>
<td>Jane Taylor</td>
</tr>
<tr>
<td>12 Walker, Murphy, Jenkins,</td>
<td>Willie Jumbo</td>
<td>Harry Norman</td>
</tr>
<tr>
<td>Jenkins, Rastus, Woodman</td>
<td></td>
<td></td>
</tr>
<tr>
<td>13 R McPhee</td>
<td>Travis McPhee</td>
<td>Robert McPhee</td>
</tr>
<tr>
<td>14 McKenna</td>
<td>Kathleen McKenna</td>
<td>Peter Murray</td>
</tr>
</tbody>
</table>

A question arises as to whether a TAC member was elected, or otherwise continued to hold office, in respect of the Ball/Allen family. AET recall that the Ball/Allen family were unable to come to a decision on the day (there were suggestions of bullying to get votes) so it was suggested that the family reconvene and vote, with the community endorsing one of either Ms Westerman, Kevin Allen or Patricia Ball.\(^\text{187}\) Ms Westerman alleges that members of her family (the Ball family) outnumbered members of Mr Allen's family (the Allen family) at the meeting on 29 February 2016, but that:

...AET manipulated the dispute - which Kevin started at the meeting, and declared the Ball/Allen TAC member "in doubt". This was to benefit AET in the Supreme Court action.

The Inquiry does not accept the assertion that AET manipulated the dispute.

*The dispute over the Ball/Allen TAC representative*

Following the meeting, to AET's understanding, this family vote never occurred and the membership for the Ball/Allen group remained in question. Ms Westerman provided the Inquiry with a copy of documents apparently signed by Ms Westerman and 10 other TAC members between 5 and 11 March 2016 purporting to terminate the appointment of AET as Trustee and to appoint ISPL as Trustee and purporting to resolve that Ms Westerman continued her appointment as representative of the Ball/Allen family group until replaced in accordance with the Trust Deed. It was noted in the recitals that at the community meeting various TAC members were elected and that the Allen/Ball family did not appoint a replacement. It was therefore suggested that in purported accordance with clause 9.10(d) of the Trust Deed Ms Westerman remained the representative of that family group. It was not suggested that there had been a subsequent vote of the Allen/Ball family and that Ms Westerman had thereby been re-elected.

\(^\text{187}\) Minutes of Community Meeting 29 February 2016 at Agenda item #4.
Ms Westerman also provided to the Inquiry a copy of confidential legal advice she obtained at the time supporting the view that she remained the TAC representative for her family group. A difficulty with that proposition however is that following the election of the new TAC on 29 February 2016, if a representative was not elected to the TAC for the Ball/Allen family, the consequence was not that the previously elected member for that family would retain their TAC membership but that all previous TAC members (including the previous representative for the Ball/Allen family) ceased to hold their positions, with the result that the position of TAC member for the Ball/Allen family remained vacant.  

Ms Westerman also contends however that the family did vote and that she was the member decided upon. In that regard, Ms Westerman provided the Inquiry with a document titled "family representation of the Njamal People's Trust Advisory Committee for the Ball/Allen family group", purporting to endorse Ms Westerman as TAC member following the 29 February 2016 meeting. Ms Westerman asserts that there were 35 members of the Ball family and 12 members of the Allen family. She says that the document evidences "undisputed support for her from 25 members of the Ball family". On its face, the document has apparently been signed by 12 members of the Ball/Allen family, however two persons also appear to have purportedly signed the document on behalf of a further 13 members (bringing the total to 25, as suggested by Ms Westerman). In this respect, Ms Westerman says that two Elders, Mavis Westerman (her mother) and Timothy Ball, were authorised by their children and grandchildren to be proxies.

It is apparent that Mr Allen also took steps to secure written evidence of support for him being the family representative on the TAC. Ms Westerman provided the Inquiry with copies of signed documents apparently obtained by Mr Allen recording support from various members of the Allen family including, it appears, Patricia Ball. The documents are variously dated 1 March 2016, 11 March 2016 or are undated.

Ms Westerman also prepared a draft letter from Mr Carter to Mr Allen on about 10 April 2016. Ms Westerman was uncertain if it was sent and Mr Carter advised the Inquiry that it was not. The draft letter, issued on a purportedly 'without prejudice' basis, dealt with various issues including asserting that Mr Allen was definitely not the family representative, but that he was purporting to be so despite the legal resolutions clearly showing the opposite.

Ms Westerman also asserted that the issue was put beyond dispute at a Njamal community meeting on 2 May 2016 (at which ISPL was also apparently endorsed by the community as Trustee prior to the TAC signing a resolution to appoint them). The community meeting on 2 May 2016 was not however organised by the Trustee (then AET) as required under clause

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188 Trust Deed, clause 9.10(d).
189 Meeting with Inquiry 26 September 2018.
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9.10(b) of the Trust Deed. Rather it was called by supporters of ISPL and Ms Westerman for the purpose of the community endorsing ISPL as Trustee and endorsing the Njamal Limited/ Njamal Nation trust structure. As this meeting was not one called by the Trustee pursuant to the provisions of the Trust Deed, in the Inquiry's view it was not a relevant meeting for the purposes of electing a TAC required under clause 9.10 of the Trust Deed.

The dispute over the Ball/Allen membership of the TAC does not appear to have impacted on the validity of the TAC vote on 6 May 2016 to remove AET and temporarily appoint ISPL as Trustee as all possible TAC members were present, including all possible Ball/Allen representatives, each of whom purported to vote to remove AET.

On 16 and 17 May 2016, Mr Carter made it clear in emails to Ms Westerman and then Mr Barry Taylor and that he had made determinations on the information available to him on matters relating to the appointment of all TAC members and the determinations involved the recognition of Ms Westerman and Terry Wilson as legitimate members of the TAC. At a TAC meeting held on 23 May 2016 and chaired by Mr Carter, he confirmed to the TAC that the Trustee accepted Ms Westerman and Terry Wilson as the elected representatives of their individual families. On the face of clause 6.4(a) of the Trust Deed, and assuming Mr Carter was duly authorised by ISPL, it was open to Mr Carter on behalf of ISPL as Trustee to make and communicate this determination as to "a matter of doubt" which had arisen "in the course of the management, administration and realisation of the Trust".

However, notwithstanding this determination, the issue nevertheless appeared to continue to be the subject of debate.

By letter dated 2 June 2016 from Mr Allen to Mr Carter, Mr Allen referenced various signatures he had acquired (as well as two texts) and that he also had six signatures from Ball/Allen family members not then on the list of members. He suggested that the signatures he had acquired from members form 55% of the family and further signatures from unlisted members, bringing his support to 64%. Ms Westerman asserts, however that not all of Mr Allen's supporters were recognised members of the Trust (that is, they had not on Ms Westerman's view been recognised as "Beneficiaries" as that term is used in the Trust Deed) and did not reflect the Trust's lists (of Beneficiaries) at the time.

Consistent with the position indicated by Mr Carter, and whether correctly or not, ISPL recognised Ms Westerman as the elected member of the TAC, at least until she was purportedly suspended and replaced by Mr Allen later in the year.

Thus, as the Inquiry understands matters, as at June 2016, ISPL considered the TAC to comprise the following members:

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190 The contact details on the notice of meeting are "administration@njamalnation.com.au (sic)".
191 Email Mr Carter to Mr Barry Taylor dated 17 May 2016.
The purported suspension of Ms Westerman on 26 October 2016

The Trust Deed does not confer any express power on the TAC, the Trustee or the Njamlal community to suspend TAC members. Further, even if the TAC or the Trustee can in certain respects regulate the practices and procedures of TAC meetings (e.g.: by establishing TAC Rules) it is questionable whether this power, which if it exists must be implied in the Trust Deed, extends to an ability to suspend a person from acting as a TAC member. In the event that the TAC wishes to suspend a member, the Inquiry’s position is that the only lawful way of achieving this outcome is for the Trustee to apply to the Supreme Court of Western Australia pursuant to the Trustees Act 1962 for appropriate orders.

However, as previously noted, in the course of an email exchange with Ms Westerman, on 25 October 2016 Mr Carter asserted, in effect, that by reason of her alleged conflict with the Trust in relation to disputed payments (which was principally it would seem a dispute with Njamlal Mining Pty Ltd) it would not be possible for her to sit on the TAC until those matters were resolved.
The Inquiry notes that disputes about such issues had been in existence when previous TAC meetings had been held and were able to be addressed without Ms Westerman being suspended or precluded from attending the meetings. Mr Carter also indicated in his email that he had asked Kevin Allen to be present at TAC meetings in his role as an Applicant.

Ms Westerman's lawyer also had an email exchange with Mr Carter at about this time in which Ms Westerman's attendance was foreshadowed and issues were raised about provision of funding for Mr Allen to attend given the restraining order that was in place. In response, on 26 October 2016 Mr Carter indicated, amongst other things, that Ms Westerman had not been invited by the members of the TAC, that the police had been informed that Ms Westerman was not invited and that the police had advised her of the position.

The meeting that occurred, according to its endorsed minutes, was however a TAC meeting and Mr Allen was recorded as being present (and may even have voted) as purported proxy for the Ball/Allen family despite Ms Westerman being available to attend. Ms Westerman was, on the face of it, entitled as a TAC member (or at least as the member previously accepted by the Trustee as being a TAC member) to attend the meeting on 26 October 2016 and ought not to have been denied by Mr Carter, on behalf of the Trustee, her entitlement to travel and accommodation allowance in respect of her attendance at the meeting. As it was, Ms Westerman paid her own expenses and when she sought reimbursement by email of 8 November 2016, followed up on 10 November, Mr Carter refused her request by email of 11 November.

As noted earlier in the Report, at the TAC Meeting on 26 October 2016, Ms Westerman was purportedly suspended as a TAC member by way of what is described in the minutes as a resolution which was carried “unanimously”. However, only 5 elected TAC members were present (Barry Taylor (Chairman), Troy Eaton, Travis McPhee, Dean Snook and Tony Taylor), 6 if Candy Mitchell was the member for the Mitchell family instead of Johnny Mitchell) and 4 others proxies were present, one representing 2 TAC members (Lynda Dridi for Mark Walker, Ian Taylor for both Gavin Mitchell and Wayne McKie, Marty Coppin (presumably for Terry Wilson though not described in the minutes as a proxy)).

Kevin Allen was also present, recorded in the minutes as proxy for “Allen Ball”, though as Ms Westerman was the TAC member for that family at that time, and as Ms Westerman did not instruct Mr Allen to vote in favour of the resolution, it is not clear in what capacity Mr Allen was attending the meeting (though Mr Carter’s email dated 25 October 2016 indicates Mr Allen was attending in his capacity as an Applicant) or whether he “voted” in support of the resolution.

Messrs Carter and Parker were also recorded as making various statements, at a number of points in the minutes, although it is not clear whether they were excluded from any portions of the meeting.
It is understandable that TAC had concerns about issues of potential conflict of interest given the disputes that had arisen involving Ms Westerman, and issues raised by Mr Parker at the meeting as to alleged representations made by Ms Westerman to one mining company in particular in relation to representing Njamal people (which Ms Westerman disputes were accurate). However, it must also be borne in mind that the change of proposed structure by which ISPL would conduct or promote Trust activities, and move away from the model it had initially endorsed, in many respects blindsided Ms Westerman.

In the Inquiry's view it was beyond the power of the TAC to suspend Ms Westerman from being the TAC member representing the Ball/Allen family group, as it purported to do. Further, it would have been prudent for ISPL, as Trustee with obligations to consult the TAC and its members, to have taken its own advice as to whether the TAC had power to suspend a member, particularly in the circumstances described above. It is also surprising that neither the Trustee nor the TAC offered Ms Westerman any opportunity to be heard as to why she should not be suspended prior to making or acting on the purported decision.

ISPL was provided with the opportunity to comment on the capacity of the TAC to suspend a member, and the role that Mr Carter had in relation to the purported suspension of Ms Westerman. In a letter from its solicitor dated 9 August 2018 ISPL responded:

The provisions of the trust deed dealing with the issues raised and their procedures are another matter which is the subject of review.

... To the extent that you suggest that Mr Carter in an email exchange of 24 October 2016 made the decision which was communicated that is incorrect. To the extent that TAC acted in such a way Carter was doing no more than they what TAC thought, at least, it could do. Mr Carter was not behind this decision indeed in 2015 Mr Carter and non-Njamal people present at the community meeting were required to leave when TAC discussed Ms Westerman's position. Once again these are matters which will be attended to in the review we are undertaking.

Whether or not Mr Carter was involved in supporting the TAC's purported decision to suspend Ms Westerman on 26 October 2016, the Inquiry notes Mr Carter's comments to Ms Westerman and her lawyer, including the comment that it would not be possible for Ms Westerman to sit on the TAC, preceded the TAC's meeting, its discussion and its decision. Further, Mr Carter acted on the suspension. As noted earlier in the Report, on 30 November Ms Westerman sought details about the next TAC meeting held on 1 December 2016 as well as a copy of the resolution purporting to suspend her. Mr Carter responded:

Dear Sharon,

At the last Trust meeting it was moved that you be suspended from the Trust until all matters involving yourself are satisfied. This decision has been made in the best interests of Njamal and its people.

Representing yourself as Njamal Nation and passing on information that is clearly in conflict with and competing with the interests of the Trust is unacceptable to the Trust.

You are not invited to attend the meeting and will not be eligible to attend in any form.

I trust this makes the situation very clear and unequivocal.
In addition, the Inquiry notes that this is not the only occasion on which Mr Carter became involved in questions of suspending TAC members. In the course of a text exchange with Mr Travis McPhee he texted:

> You should be ashamed of yourself. Don't contact me or any staff unless you can be civil. I will be asking for you to be suspended from the TAC.

**Community meetings**

Following its appointment, the first and only community meeting convened by ISPL for the purpose of electing a TAC was held on 31 January 2017.

Ms Westerman disputes that the meeting was properly convened and the validity of votes taken at the meeting including in respect of the limited purported election of TAC members that was held at that time. According to the draft Minutes of Meeting provided by the Trustee, Mr Carter (then a director of ISPL and sole shareholder of ISPL's sole shareholder) indicated that the only TAC members to be voted on were Barry Taylor and Kevin Allen. Mr Taylor was elected by a show of hands (with Debra Williams as proxy) and Kevin Allen was elected by secret ballot. According to Ms Westerman, as reflected in written comments regarding the completeness and accuracy of ISPL's draft minutes, the Mitchell/Mallard member was also discussed, with Aileen Mitchell apparently informing the group that she was now the Mitchell/Mallard representative in place of Johnny Mitchell. This is consistent with the Minutes of the 15 January 2017 Trust meeting in Carnarvon, where Johnny Mitchell informed the group and staff from ISPL (including Mr Carter) that he would no longer like to be the TAC representative, which arguably reflected an intention to resign forthwith, and that the current TAC member for the Mitchell/Mallard group was currently Aileen Mitchell. It is unclear however whether the TAC ever voted to fill the position apparently vacated by Johnny Mitchell by appointing Aileen Mitchell to temporarily fill that vacant position. Further, even if it had, she would have ceased to hold that position when the community meeting was held on 31 January 2017. Significantly, the minutes of the community meeting do not reflect the meeting actually voting to elect Aileen Mitchell as a TAC member or to re-elect current members from any other families.

As noted earlier in this Chapter, the Trust Deed contemplates community meetings being convened at least every calendar year at which, if the community so wishes, it may elect a new TAC (i.e. elect an entire TAC, not just certain members). The community did not however vote to elect each TAC member, but only the TAC members for certain specified families. As the entire composition of the membership of the TAC was not voted on by the community (such as by also voting to re-appoint all other existing TAC members), the requirements of the

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Trust Deed were not complied with. A serious issue therefore arises as to what the correct current composition of the TAC actually is. This is of importance to matters including the proper discharge of any functions and duties of the TAC and the Trustee in connection with the TAC and its members.

In the Inquiry's view it is therefore important that a community meeting be convened by the Trustee, in the immediate future, for the purpose of electing a TAC in compliance with the requirements of the Trust Deed.

In respect of the Inquiry's concerns regarding the inconsistencies between the Trust Deed and Rules, and in particular, the serious doubt as the correct composition of the TAC, ISPL's lawyer responded that this is the subject of review and another reason for "wholesale changes to the Trust Deed and the procedures and practices to it." No suggested changes were given at this stage, although ISPL did indicate that there would be a community meeting convened to address the changes.

Since raising this concern with ISPL, Mr Carter has advised that a community meeting was being convened by ISPL on 22 October 2018, as confirmed by Mr White. That is the date, as was well known to ISPL for many months, of a hearing of certain charges against Ms Westerman. While Mr Carter suggested that the timing of the meeting on that date was coincidental, the Inquiry has significant concern that the timing may, in fact, have been deliberately chosen, so as to prevent Ms Westerman's attendance.

2018

Regarding community meetings to vote on the TAC, there has not yet been a community meeting in 2018 and it is now more than 21 months since the last community meeting. The community meeting to vote on the TAC was originally proposed to be held late 2017, but has, the Inquiry understands, been deferred several times including to allow work on the consent determination and preparation of the PBC Rule Book to be focussed on, and due to the delay in finalising the audited 2016/17 financial statements. On 2 May 2018, the Inquiry was advised by Mr Carter that the meeting was proposed to occur on 8 June 2018. Mr Carter informed the Inquiry that permission had been sought from the ACNC, taking into account that each time a community meeting is held it costs the Trust about $300,000. For reasons that are unknown to the Inquiry, the meeting was again deferred. It is has since been held on 22 October 2018. The requirement that community meetings be convened at least once a calendar year (as opposed to once every 12 months) has the consequence that a Trustee

193 While the Inquiry was not referred to any compulsory requirement under ACNC legislation for a trustee of a charitable trust to convene an annual general meeting, in the context of Trusts with members it is suggested as a step that may be taken to ensure the Trustee is accountable to its members: http://www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds_overview.aspx, ACNC Governance Standard 2 – Accountability to Members.
that wishes to delay such a meeting, including to delay an election of a new TAC or avoid community scrutiny, practically, may delay the convening of a meeting by nearly two years in some instances, by convening a community meeting in January one year and then December the following. As noted by the lawyers for ISPL, while it may be desirable for meetings to be convened at least every 12 months, sometimes "practicalities and various factors" arise. \(^{194}\)

While dealing with the topic of community meetings, the Inquiry notes that Ms Westerman has also complained that ISPL did not provide adequate notice to the community of the 31 January 2017 community meeting. And that, as the community was not given sufficient notices to attend and vote at the January 2017 community meeting, the TAC is not correctly appointed. However, when the Inquiry put this to ISPL, it advised that correspondence was issued to all members over a month before the meeting by the solicitors directly and there was a Notice posted on the Trustee's public Facebook page on 18 January 2017 (13 days prior to the meeting). The Inquiry is of the view that sufficient notice was given and this is not a ground to challenge the constitution of the TAC.

The Inquiry foreshadowed to ISPL possibly recommending that it, to address any ongoing uncertainty about the proper composition of the TAC, convene a community meeting in the immediate future at which, in accordance with the Trust Deed, the community may vote to elect the entire TAC, not just selected TAC members. It understands that on 22 October such a community meeting was held, although has not been advised of the outcome of the meeting as at the date of this Report.

### Recommendation 33 (Chapter 10)

1. On an ongoing basis, community meetings be held not only once each calendar year, but also at least once every 12 months, absent some exceptional reason.

2. In accordance with the Trust Deed, at the community the community be advised that it may vote to elect the entire TAC, not just selected TAC members.

### Remunerating TAC members

The Trust Deed does not explicitly provide that TAC members are entitled to remuneration for their services. The extent of their entitlements to remuneration or reimbursement is to receive out of the Trust Fund their "reasonable out of pocket expenses", including for time expended on trust activities. The Trust Deed provides: \(^{195}\)

> The Advisory Committee members shall be entitled, and are hereby authorised to receive out of the Trust Fund their reasonable out of pocket expenses for all acts done and time expended on all Trust Activities, including the Travel Allowance.

\(^{194}\) Letter from CX Law dated 9 August 2018, point 3.

\(^{195}\) Trust Deed, clause 9.12.
Trust Activities is defined to mean "all activities conducted by the Trustee in accordance with its functions, duties and obligations under this Deed". The Travel Allowance is defined to mean "a reasonable payment for mileage travelled in a private vehicle based on rates set by the Australian Taxation Office".

The above clause is not clearly worded, as ISPL through its lawyers appears to accept. It has given rise to some debate and uncertainty, both in the context of this Trust and other trusts operating under deeds with similar terms, in relation to the circumstances in which TAC members may be remunerated for their time expended on Trust Activities. The principal difficulty is determining what an "out of pocket expense for…time expended on all Trust Activities" extends to. Remunerating a TAC member for time spent would not ordinarily be described as an "out of pocket expense". On one view this extends to circumstances where a TAC member actually suffers a loss of income the member would otherwise have earned by spending time on Trust Activities. In that sense, the member might be said to have suffered a loss or perhaps an "out of pocket expense" in the sense that the member is financially worse off by expending their time. An example of this may be if, for example, a member was required to take unpaid leave to attend a TAC meeting and sought reimbursement for lost income (subject to the reasonableness of the amount). That would have the consequence that a member who could not demonstrate such a loss of income would not be entitled to payment for their time spent from the Trust Fund. A more beneficial interpretation of the clause is that a TAC member is entitled to reasonable remuneration for their time spent on Trust Activities, without needing to demonstrate that the member otherwise lost income in doing so. On either view, the entitlement is related to time spent on Trust Activities by the TAC member.

In the Inquiry's view it is desirable that the Trust Deed be amended to more clearly set out the entitlements of TAC members for remuneration to provide the Trustee and the TAC with greater certainty and clarity in relation to such payments.

The Inquiry has heard concerns that if each TAC member were differently remunerated based on time actually spent (rather than, for example, a reasonable allowance for time expected to be spent) it may give rise to practical difficulties in administration and possibly as between TAC members.

In practice, different approaches have been adopted by Abbott and AET on the one hand, and ISPL on the other. As explained below, the Inquiry considers that the remuneration regime adopted by ISPL does not comply with the requirements of the Trust Deed and recommends

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196 Trust Deed, clause 1.1.
197 Trust Deed, clause 1.1.
CHAPTER 10: TRUSTEE ADVISORY COMMITTEE

that it be modified subject to any amendment to the Trust Deed to clarify or otherwise amend the operation of the provision.

Abbott and AET provided a fee for attendance at TAC meetings, by reference to a daily rate, whereas ISPL has implemented fees paid by way of an annual payment, although that has since been adjusted to represent a quarterly payment. The system under Abbott and AET, where fees were provided at daily rates for time actually spent at meetings, is more likely to come within the Trust Deed than the system under ISPL, where there is no obvious link between the $2,500 quarterly fee and time actually spent by TAC members on trust activities. Further, the Inquiry considers that the Trust Deed does not allow for the payment of remuneration in advance of the time being spent on Trust Activities.

On a number of occasions ISPL has also effectively advanced funds to TAC members, apparently as an advance payment of TAC fees/remuneration or possibly a loan to then be repaid. As outline below, the Inquiry considers that any such practice should be ceased.

_What remuneration is reasonable?_

Both Abbott and AET provided $400 per day to TAC members for attending meetings on the basis that this was a reasonable amount. The Inquiry agrees.

AET reasoned that this amount was similar to amounts given to advisory committee members under the federal Remuneration Tribunal determinations. The Remuneration Tribunal is the independent statutory body that handles the remuneration of key commonwealth offices. In recent years, it has released several determinations relevant to part time public office holders; the most similar position to a Trustee Advisory Committee to an indigenous charitable trust is the Aboriginal Benefit Account Advisory Committee. The Aboriginal Benefit Account Advisory Committee is established under Commonwealth legislation to advise the Minister for Indigenous Affairs in connection with the provision of funds for the benefit of Aboriginal people living in the Northern Territory. Members are nominated by their respective Land Councils and make decisions relating to over $400 million available funds. Whilst the function of that advisory committee is similar to that of the Trust's TAC: advising on the distribution of funds for the benefit of indigenous people, the quantum of funds involved by that committee is significantly higher than those in the Trust, and the pool of potential recipients is significantly larger (being the whole of the Northern Territory).

Most recently, Determination 2017/10: Remuneration and Allowances for Holders of Part-Time Public Office Schedule A sets out a daily fee of $481 per member of the Aboriginals

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Benefit Account Advisory Committee. In 2012 this amount was $418 and in 2016 the amount was $462.

Abbott

The Inquiry requested that Abbott provide information in relation to TAC sitting fees or other remuneration for the 2012/2013 and 2013/2014 years. Abbott responded that TAC members were paid a sitting fee of $400 per meeting. This fee was considered to be a reasonable fee to assist with the time expended by each TAC member attending the meeting. TAC members were not paid remuneration other than a $400 meeting fee and travel allowances. For the 2012/2013 financial year, there were four TAC meetings, resulting in the total amount paid to each TAC member for attending TAC meetings of $1,600 that year. Subcommittees made up of TAC members and other Njamal people to deal with specific issues were also established while Abbott was Trustee. An education subcommittee was formed on 21 February 2011. Its role was to make recommendations to the Trustee for distributions under the Education funding program. A further subcommittee was formed post October 2013 to deal with finding a new Trustee once Abbott had retired. AET informed the Inquiry that it is common practice for trustees to pay TAC members to attend subcommittee meetings due to a community expectation that people will be paid for their time and that rates given in the Pilbara can be two times as much paid by AET.

AET

Whilst AET was Trustee, fees were paid to TAC members by AET in accordance with the AET TAC Rules as adopted 28 July 2014 at a consulting fee of $400 per meeting day, based on attendance. As set out at page six of the AET TAC Rules, the sum was paid on the basis that each individual TAC member has duties outside of meetings that include:

- Review and consider applications for assistance and other trust documents as required;
- Actively communicate trust business and activity, including changes of policy to other trust members within their respective family groups and to assist with formally reporting to the wider Njamal membership group such matters at least once every calendar year at the AGM; and
- Continually assist with development or implementation of any current strategic plan, and report to the Njamal people as required by them in regards to that plan.

Further, as referred to above, AET informed the Inquiry that these figures were based upon similar published rates and provided the Inquiry with a copy of the following determinations of the Remuneration Tribunal (Commonwealth):

- Determination 2012/13: Remuneration and Allowances for Holders of Part-Time Public Office, Schedule A sets out a daily fee of $418 per member of the Aboriginals
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Benefit Account Advisory Committee, Schedule D sets out a daily fee of $418 per member of a Torres Strait Regional Authority; and

- Determination 2014/08: Remuneration and Allowances for Holders of Part-Time Public Office\(^{200}\) sets out specified daily rates of $462 for the Aboriginal Benefit Account Advisory Committee, Torres Strait Regional Authority and Torres Strait Regional Authority Member Advisory Committee.

These amounts are similar to the $400 paid to the Trust’s TAC members. Whilst AET was Trustee, TAC meetings were held every 3 months, which suggests an annual total payment of $1,600 to TAC members who attended every meeting. In addition, TAC members were paid:

- living allowances at a per day rate of - Breakfast $25, Lunch $20 and Dinner $50;
- mileage of $0.50 per km where a round trip exceeds 50km from usual place of residence;
- taxi fares when in Perth at Trustees discretion; and
- accommodation and airfares paid directly by the Trustee.

TAC members were not provided with phones or other electronic devices.

The accounts from when AET was Trustee indicate that TAC members (and other Njamal people) were paid to attend subcommittee meetings. For example, 3 TAC members (as well as an Applicant who was not a TAC member) were all paid $500 subcommittee sitting fees on 28 January 2015.\(^{201}\)

**ISPL**

ISPL does not compensate TAC members by reference to meetings attended, but rather remunerated its TAC initially by reference to an annual amount and, more recently, by reference to a quarterly amount.

The 12 May 2016 TAC Resolution which appointed ISPL includes resolutions that:

- mobiles, iPads and Laptops to be provided to TAC members; and
- $10,000 pa to be paid to each “active” TAC members.

ISPL has since confirmed that each TAC member has received either an iPad or an iPhone with a $50 per month limit. From information provided to the Inquiry, $10,000 was paid to each TAC member on 16 May 2016, and was paid irrespective of their length of service (i.e., if they are only members for 6 months), whether they used a proxy or whether they actively attended meetings.

\(^{200}\) Table B3 column 4.
\(^{201}\) Similar payments were again paid on 15 September 2015, 23 October 2015 and 28 January 2015.
ISPL's approach to TAC payments has since changed. Whilst a one-off, upfront payment was made in May 2016, by April 2017 concern was voiced as to the upfront method of payment. The minutes of the TAC Meeting of 11 April 2017 state at 10.2:

Auditor is concerned that fees are paid in advance, one TAC member resigned, having been paid the whole fee and then his replacement was paid a fee for 6 months.

In its September 2017 response to the Inquiry, ISPL informed the Inquiry that, as of 13 May 2017, the TAC are now paid quarterly in advance for their services, not annually.

When this issue was discussed with Mr Parker at an early stage in the Inquiry, he explained that an annual payment of $10,000 split quarterly was considered reasonable having regard to the time TAC members were expected to spend on Trust matters and was analogous to directors’ fees. He noted, and the Inquiry accepts, that ISPL is more engaged with the TAC than its predecessors and accordingly, the TAC have a more active role in the Trust's operation. TAC members attend meetings, answer calls and liaise with the community.

Mr Parker further explained that there are practical difficulties in engaging with the TAC without payment. That is understandable. It accords with AET’s evidence of a common expectation that people get paid to attend meetings. When queried as to whether ISPL sought to measure the actual time each TAC member spent in relation to TAC activities and then remunerate each member on that basis, Mr Parker explained that this would be practically very difficult and may potentially lead to trouble in the community if different members were paid different amounts.

While the Inquiry understands the pragmatic reasoning behind the approach adopted by ISPL, of making an up-front payment, previously of $10,000 annually in advance, now of $2,500 quarterly in advance, of TAC members engaging in Trust Activities, is not permissible under the Trust Deed.

Further, the practice creates a risk that a Trustee might be influencing, or be perceived as influencing, TAC members in either electing a Trustee in the first place (particularly where an upfront payment of $10,000 is proposed, as occurred prior to ISPL was elected) or maintaining the presently appointed Trustee. Indeed, the Inquiry received allegations of persons being effectively bought off by the payment of $10,000 each, apparently in reference to the proposal which was initially implemented to pay TAC members $10,000 per year.

Additionally, the practice in some cases of making advance payments to certain TAC members of the quarterly payments in advance of when they would ordinarily receive the quarterly payments that are paid to TAC members is not generally permitted under the Trust Deed and should cease immediately. If a TAC member is in financial hardship or if otherwise a sufficient reason exists for payment of moneys to those persons, consistent with the charitable objects of the Trust, this should be transparently effected in accordance with the Trust's distribution policies. It should be clearly recorded and accounted for as such.
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The payment of $2,500 per TAC member per quarter in arrears may be reasonable in some, but will not necessarily be reasonable in all, circumstances, depending on the amount of work that was reasonably required to be expended by TAC members on Trust Activities in that quarter, but may not be paid in advance. The approach of fixing an amount per quarter is administratively understandable.

Absent amendment to the Trust Deed the Inquiry considers that the Remuneration Tribunal determination 2017/10: Remuneration and Allowances for Holders of Part-Time Public Office, applicable to the Aboriginals Benefit Account Advisory Committee, provides a useful guide to which it is recommended that ISPL have regard when determining a reasonable rate for remuneration for TAC members for time spent on Trust activities.

Subcommittees

The Inquiry asked ISPL about what TAC subcommittees (if any) had been formed and whether fees were paid for subcommittee members' time. The following types of subcommittee have been identified:

i. At a meeting with the Inquiry, ISPL replied that, as a matter of practicality, a few subcommittees (Hardship, Lore & Culture and Sport) had been established. These committees assist the Trustee in making distribution determinations for cases where the application exceeded the cap in the distribution policy. The Lore subcommittee consists of senior Lore men and Elders and gives control back to the Njamal families to ensure that the Lore money is not abused. ISPL informed the Inquiry that members of these subcommittees are not provided with any additional compensation for their time on these subcommittees.

ii. Groups of Njamal people and Applicants who assist with the mining negotiations are usually referred to as monitoring or liaison committees (colloquially referred to as MALC committees), but are sometimes, unhelpfully, referred to as "mining subcommittees." These groups are not a subcommittee of the TAC. Sitting fees received by members of these groups are discussed above.

iii. Correspondence from ISPL to the Inquiry has also made mention of a Heritage subcommittee and a Rules subcommittee. As at March 2018 the Rules subcommittee had not yet met. The Heritage subcommittee is apparently a MALC committee, which has met regularly as per various Indigenous Land Use Agreements. Sitting fees were paid to the MALC committee, which are discussed in more detail discussed above.

202 See reference in Pilbara Minerals Reimbursement account to "Negotiation sub-committee meeting".
In addition, as explained previously, various TAC members and other Njamal people have from time to time been paid fees to attend and participate in a range of meetings. Particularly where the participation in some such meetings may be properly regarded as "Trust Activities", it creates the potential for double payment, particularly where a quarterly payment is made not by reference to clearly defined activities that have been engaged in.

Given the potential, if not carefully monitored, for TAC members to effectively receive double for time spent on other activities that are "Trust Activities", such as participating in various TAC subcommittees and attending other meetings, it is recommended that the Trustee establish and implement procedures to ensure that this does not occur.

In response to an opportunity to comment, ISPL's lawyer acknowledged that the question of entitlements for TAC members is subject to some uncertainty given the wording in the Trust Deed and that it is a matter subject to the review being conducted by his firm on behalf of ISPL. He also advised the Inquiry that he was still obtaining instructions and could not at that point in time respond in any meaningful detail to the issues raised. No further response was received.

**Recommendation 34 (Chapter 10)**

1. ISPL's practice of making an up-front payment, previously of $10,000 annually, now of $2,500 quarterly, in advance of TAC members engaging in Trust Activities, be ceased immediately as being inconsistent with the Trust Deed.

2. If a TAC member is in financial hardship or if otherwise a sufficient reason exists for payment of moneys to that person consistent with the charitable objects of the Trust, any payment made be transparently effected in accordance with the Trust's distribution policies and clearly recorded and accounted for as such.

3. ISPL have regard to the Remuneration Tribunal Determination 2017/10: Remuneration and Allowances for Holders of Part-Time Public Office, applicable to the Aboriginals Benefit Account Advisory Committee, when determining a reasonable rate for remuneration for TAC members for time spent on Trust Activities.

4. The Trustee establish and implement procedures to ensure that TAC members do not effectively receive double remuneration for time spent on other activities that are "Trust Activities", such as participating in various TAC subcommittees and attending other meetings.

**Proxies**

Significant concerns have been raised with the Inquiry about the status and use of proxies during the trusteeship of each of Abbott, AET and ISPL. It has been a matter of ongoing contention and disputation including, in one instance in 2015, litigation. In the Inquiry's view there have been significant problems with the appointment of persons as proxies and the role
that proxies have played. In some respects that role has been inconsistent with the provisions of the Trust Deed, with potentially significant implications. It is therefore highly desirable that the ability to appoint and the circumstances in which proxies may act be clarified by amendment to the Trust Deed and that Trust Rules, to the extent they deal with proxies, conform with the Trust Deed.

The Problems of Proxies

At common law, a right does not generally exist to appoint another person to act and vote on a person’s behalf by way of proxy.  

The Trust Deed makes no provision for proxies to attend TAC meetings, to vote at those meetings, or otherwise to be consulted or involved in advising, making recommendations or making other decisions on behalf of TAC members. It does however provide that arrangements for TAC meetings are to be agreed between the Trustee and the TAC members. While it might be argued that pursuant to this requirement arrangements may be agreed between the Trustee and the TAC in relation to whether proxies may be used at meetings, the ability to do so is by no means clear. As observed by ISPL’s lawyer, there is academic debate about the extent to which committees such as the TAC can make their own rules.

Further, even if that is the case, it is difficult to see how that may extend to the use of proxies in other circumstances, such as consulting with TAC members or the making of written resolutions by TAC, outside of TAC meetings.

If proxies are not able to be used, that may present very real practical issues for the TAC and Trustee in terms of ensuring that a representative of all family groups is involved in the TAC consultation process. It may also make it more difficult for the TAC or the Trustee to convene a meeting which satisfies the Trust Deed’s quorum requirements. On the other hand, the flexibility for conduct of meetings, including the use of telephone, teleconferencing or other electronic media, somewhat mitigates such difficulties. Nonetheless, the practical difficulties may in part explain why in practice a fairly pragmatic approach seems to have been adopted, including in TAC Rules, in respect of proxies. However, while the Inquiry understands the pragmatic approach that has been adopted in order to overcome the practical difficulties might arise in the absence of a system for proxies, their use in an environment where their limits are not proscribed by the Trust Deed gives rise to a number of fundamental concerns,

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204 Letter from CX Law dated 9 August 2018, point 3.
particularly where powers are exercised in relation to matters such as the appointment or removal of a Trustee or the variation of the Trust Deed.

To understand the role assumed by proxies in this Trust, it is necessary to view it in context of decision making by the Njamal People and its various family groups. In practice, each family group nominates a proposed TAC member and the decision in relation to the appointment of the TAC is made by the community at a community meeting. Each family group also usually nominates at least one proxy and this is also endorsed at a community meeting. This process recognises the importance of the Njamal community in making decisions affecting the Njamal People and the interests of its different family groups. Further, it appears that there is at least a community expectation, if not belief, that a nominated proxy will fill a vacant position and substitute for an elected member if the member is unavailable for conferral.

In respect of TAC meetings, clause 5.4 of the 2012 Abbott Trust Rules, in relation to meeting protocol, relevantly provides that:

a) Trustee Committee meetings are NOT open to NPT members unless invited,

b) Only Trustee Committee members can vote at a meeting.

c) Non Trustee Committee members can contribute and speak during General Business if invited to do so.

This was slightly amended in the 2013 version (clause 9.7):

a) Trustee Committee meetings are closed meetings;

b) Only Trustee Committee members can vote at a meeting;

c) Other Beneficiaries (and/or members of the public) can attend if invited;

d) Non Trustee Committee members can contribute and speak during General Business if invited to do so.

Further, under the 2012 version, clause 6.1 (under Responsibilities) relevantly provides:

Quorum for the meeting will be in accordance with the trust deed agreement. A Proxy for a family group can come along

In contrast, the 2013 version provides at clause 9.5 in respect of proxies that:

An Advisory Committee member who cannot attend a Committee meeting will arrange for a family member to attend as a proxy (Proxy form to be supplied with meeting notice). The Advisory Committee member will advise either the Trustee or another Advisory Committee member who will inform the meeting.

The use of proxy forms is consistent with the general position that where a proxy may be appointed, for the appointment to be valid at law, it must be in writing, and must state the business or matter in respect of which the proxy is to act for his or her principal. If a proxy is to vote at a meeting/s, the appointment should state that the proxy is to vote for the principal.

205 The minutes of the 29 February 2016 meeting (under AET) show a resolution to elect a new advisory committee and also list the proxies decided upon; see also minutes of 9 March 2012 AGM under Abbott, where proxies were also decided upon.
at a particular meeting, or at all meetings for a specified time, or at all meetings for a specified purpose. If a proxy is invalidly given or irregularly employed, any vote cast by the proxy will be void. 206

It is not clear from the Abbott Trust Rules whether it was contemplated that a proxy who attends a meeting may vote at the meeting or otherwise participate in decision making by the TAC or be counted as part of the quorum required for various decisions.

The Inquiry asked Abbott what its position was on the use of proxies generally and more specifically how proxies received instructions from the TAC members at a TAC meeting held on 9 March 2012. Mr Drayson replied that he was not employed by Abbott during the period covering the dates of the variations to the Trust Deed, so he is unaware of the policy at this time in relation to proxies.

However, he provided the following information relating to Abbott's views of proxies whilst it was Trustee:

While I was Delegated Trustee of the Njamal People's Trust, we accepted proxies if an Advisory Committee member could not attend. This policy was documented in the Policies & Procedures which were developed once I was Trustee (Provided previously titled “Policies and Procedures 2013 - Document 09)

When sending out notices we would attach an agenda and any other information available at the time.

If a committee member could not attend they either called our office to inform us that they could not attend and nominate a proxy OR we may not have known until the meeting commenced and a proxy would advise us that they were there as a Proxy for the committee member not in attendance.

We would usually check that the committee members were ok with this situation.

If this occurs now (with other trusts) we call the committee member who hasn’t turned up and check with them if the proxy attending is acceptable to them.

Now, and depending on the content of each trust deed, when an important decision has to be made and a vote has to be taken on it, the vote would not take place if there wasn’t sufficient committee members present (without proxies), unless, either the proxy was able to telephone the person they were proxy for and got instructions or they told us that they had previously spoken to the person they were acting as proxy for and had instructions on how to vote.

In respect of the position that prevailed when AET was Trustee and continues to apply to ISPL, the AET TAC Rules provide that: 207

- ...  
- One Proxy per Advisory Trustee person is in place so as to ensure that family representation is achievable at each and every Advisory Trustee meeting.
- Aside from invited guests as agreed to by the Advisory Trustees, Advisory Trustee meetings shall be closed meetings;
- Only Advisory Trustees may vote on proposed resolutions

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206 McLaren v Thomson [1917] 2 Ch 261.  
207 Clause 3 iv.
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This appears to be similar in effect to the position under Abbott, though again it is not entirely clear whether it is intended to recognise that only TAC members (described as ‘Advisory Trustees’) may vote or that in the absence of a TAC member that member's appointed proxy may vote. In practice, it appears that the latter view has been adopted and proxies have voted in the absence of the relevant TAC member.

Even assuming that certain acts of TAC members may be performed through proxies, it is important to recognise that a proxy acts as an agent for the person on whose behalf they are proxy rather than acting on their own behalf. This is recognised in the process outlined by Mr Drayson.

In practice, proxies may well on various occasions have participated in decisions being made by the TAC, including signing resolutions, in circumstances in which they were not necessarily authorised and acting on behalf of the corresponding TAC member. This is problematic, particularly so where the views of the elected TAC member and proxy fundamentally differ on issues of significance, as has occurred from time to time, including in the context of the Ball/Allen family group.

The practice of using proxies and permitting proxies to vote on resolutions, including in the absence of an express (preferably written) authority from the relevant TAC member, has also resulted, in some circumstances, in attempts to secure the support of proxies rather than the properly elected members of the TAC, including where it has been anticipated or known that the TAC member would likely not support the resolution being sought to be advanced.

The appointment of proxies also appears to fulfil another role. That is, if a TAC member resigns, then the TAC fills that vacant position by appointing the proxy to the substantive role. While the TAC has discretion as to whom it chooses to fill a vacant position in the event of a member resigning, and is not bound by such a decision at a community meeting, it is entitled to act on that nomination and endorsement.

Under the Abbott Trust Rules and Policies (clause 5.5 of the 2012 version, mirrored under clause 9.11 of the 2013 version), under “Code of behaviour” it is relevantly provided that TAC members have an obligation to attend all meetings, and:

... if a Trustee Advisory member does not attend three advisory meetings in a row and does not nominate a proxy or register their apology then the committee will request their resignation or remove them from the committee in accordance to the Charitable Trust deed.

If a member agrees to resign, as already noted, the TAC may elect a person to replace the member until the next community meeting. If the person refuses to resign, either a community meeting would need to be convened to elect a new TAC or, in an appropriate circumstance, it may be open to seek the assistance of the Supreme Court.
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Under the AET TAC Rules it is also envisaged that a proxy can replace a TAC member if that TAC member does not attend 3 consecutive meetings. However, that is inconsistent with the Trust Deed, which makes no provision for removal and replacement of a TAC member except in limited specified circumstances. Any attempt to remove a TAC member for failing to attend 3 consecutive meetings would be invalid.

**Examples of decisions possibly affected by the problems with proxies**

The consequence of the use of proxies, if their use is not permitted under the Trust Deed or otherwise at law, is potentially significant. This is particularly so where consultation about and decisions regarding removing or appointing Trustees or amending the Trust Deed are concerned. At times throughout the history of the Trust proxies have been significantly involved in those decisions.

Several illustrations of circumstances in which concerns about the use of proxies have arisen are set out below.

One aspect of the 2015 dispute and Supreme Court litigation concerning whether AET had been validly removed concerned the status of the purported signing of a written resolution by various TAC members and a person alleged to be a proxy, rather than the elected TAC member for the Taylor family, Mr Barry Taylor, in circumstances where Mr Taylor did not support the removal or authorise the proxy. The other side contended the person was the actual member. As alluded to earlier in this section of the Report, a proxy is an agent for his or her principal. If Mr Taylor did not support the removal of AET then, if he was the TAC member, the proxy could not permissibly support a resolution to remove AET. If the proxy purported to do so, that may have some effect on the validity of the resolution, which is the position AET took on that question in the litigation.

In this context, Ms Westerman has complained that the process by which AET was appointed was the same as the process by which they were purportedly removed in 2015, in that for AET’s appointment, Ms Westerman contended that unauthorised proxies were used and fewer than 10 members/proxies were present on the day of the vote. In response AET says that before it was appointed as Trustee, it relied upon information received from Abbott and the community. In that context, AET’s understanding was that (i) there were only 13 TAC members at the time, so that 10 TAC members constituted the relevant majority; and (ii) proxies had been accepted by Abbott, such that Abbott did not dispute the validity of their removal.

The Inquiry has some sympathy with AET’s position. Before AET’s appointment to the office of Trustee AET was virtually a stranger to the Trust, Abbott did not dispute the validity of their

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208 Clause 3 i.
removal and no issues were apparently raised by the TAC or the community in relation to the removal of Abbott and appointment of AET.

Once appointed Trustee, AET’s fundamental duty was to adhere to and carry out the terms of the Trust Deed. This is a paramount duty. Throughout late 2015 and early 2016, when attempts were made to pass TAC resolutions removing AET as Trustee, AET was required as a matter of trusts law to ensure that there had been compliance with the terms of the Trust Deed. Having reached the view that the process by which they were purportedly removed may have been non-compliant with the Trust Deed, it was understandable that AET took the view that their removal had not been effected, and took the view that communication of this position – to Ms Westerman and to the then-proposed replacement trustee Perpetual - was proper. Likewise, in view of that expressed position, it is understandable why Perpetual would not accept appointment until AET had satisfied itself that the relevant TAC meeting(s) had been properly convened and resolutions properly passed.

Ms Westerman has also complained both historically to Trustees and more recently to the Inquiry about the alleged failure of the Trustee on various occasions to provide what her lawyer calls “adequate and proper proxy voting”, including by ISPL. She has also complained that ISPL uses proxies that were not nominated by family groups at a Trust annual community meeting. As to that complaint, as already noted, such proxies have no official status, even if in practice they are often consulted in the absence of the elected TAC representative from that family group. However, the potential for a practice of this type to arise simply serves to underscore the problems with a proxy regime that is not expressly provided for or delineated by the Trust Deed.

At most TAC meetings, including the 26 October 2016 TAC meeting at which it was decided to purportedly suspend Ms Westerman as a TAC member and retain ISPL for two further years beyond May 2017, proxies were present in the place of TAC members. As already noted, only 5 elected TAC members were present (Barry Taylor (Chairman), Troy Eaton, Travis McPhee, Dean Snook and Tony Taylor), 6 if Candy Mitchell was then the member for the Mitchell family instead of Johnny Mitchell) and 4 others proxies were present, one representing 2 TAC members (Lynda Dridi for Mark Walker, Ian Taylor for both Gavin Mitchell and Wayne McKie, Marty Coppin (presumably for Terry Wilson though not described in the minutes as a proxy)).

Kevin Allen was also present, recorded in the minutes as proxy for “Allen Ball”, though as Ms Westerman was the TAC member for that family at that time, and as Ms Westerman did not instruct Mr Allen to vote in favour of the resolution, it is not clear in what capacity Mr Allen was

\[\text{209}\text{ Letter from Mr Chris Stokes on behalf of Ms Westerman to ISPL dated 13 February 2017, 1(e).}\]

\[\text{210}\text{ In contrast, the TAC vote to remove AET and appoint ISPL was conducted by the TAC members themselves.}\]
attending the meeting (though Mr Carter's email dated 25 October 2016 indicates Mr Allen was attending in his capacity as an Applicant) or whether he "voted" in support of the resolution.

Given these matters the validity of any resolutions passed at this meeting is open to question, including the resolution to retain ISPL for a further two years (as appointment of a Trustee requires a ¾ majority decision of all TAC members). It is also open to doubt whether, in the circumstances, the meeting even constituted a valid meeting of the TAC.

However, as explained elsewhere in the Report, in the view of the Inquiry, under the Trust Deed, the appointment of a Trustee cannot be limited to a fixed term. The position is different insofar as the meeting purported to suspend Ms Westerman as a TAC member. As discussed at page 496 and following of the Report, that resolution was likely beyond the power of the TAC to pass.

By way of further example, proxies were extensively involved in consultations leading to two amendments to the Trust Deed so as to increase the number of members of the TAC. As outlined earlier, on 25 August 2010, a TAC meeting was held to consult on changing the maximum number of TAC members from 10 to 12. Four TAC members were in attendance, with 6 proxies also attending. The Minutes of the meeting record:

The attendees discussed family representation on the Njamal Trust Advisory Committee. KA advised that the current Trust Advisory Committee were dually elected at the AGM held on 15.12.09.

The attendees requested that the Trustee instruct June Kenny, (Dwyer Durack), to amend the Trust Deed to increase the number of representatives on the Trust Advisory Committee from 10 members to 12 members to enable fair family representation on the Committee. This formula is based on there being 12 Family Groups and having 12 family representatives.

Following this consultation, a Deed of Variation was entered into, increasing the maximum number of TAC members to 12.

At a community meeting/Annual General Meeting held on 9 March 2012, at which a new TAC was also elected. The minutes of the meeting record that the community 'approved' the Trust Deed being amended to increase the number of TAC members to 14. Abbott apparently also consulted with certain TAC members and certain proxies before entering into a Deed of Variation. The recitals to the Deed of Variation sets out that:

- 6 TAC members were consulted (three by telephone);
- 3 proxies were consulted; and
- Abbott was unable to get in touch with one TAC member.

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211 TAC minutes dated 25 August 2010.
212 Annual General Meeting held 9 March 2012.
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The Deed of Variation is silent regarding whether the final two TAC members were consulted, although it appears that at least one of those members, Mr Miller, was present at the community meeting.

Following various issues in relation to the use of proxies being raised by the Inquiry with ISPL, it indicated that this is a matter which is going to be clarified by us in our review.213

The Inquiry supports the review of proxies by ISPL and recommends that review consider amendments to the Trust Deed to clarify the role, status, function, powers and remuneration of proxies (where they act for TAC members), if their use is proposed to be retained.

Recommendation 35 (Chapter 10)

1. A review of the use of proxies be undertaken by the Trustee.

2. If the Trustee considers that the use of proxies should be maintained, the Trust Deed and Trust Rules be amended to clearly delineate the role, status, function, powers of a proxy and any entitlement to remuneration in respect of acting as proxy for a TAC member.

Employment or engagement of TAC members by ISPL

An overview of the issues

With the exception of one TAC member, all TAC members are or have been employed or engaged through corporate alter egos by ISPL (as trustee) or one of its subsidiaries. As with the contracting of consultants (discussed in Chapter 8 of the Report) the engagement of TAC members by ISPL has led to significant costs.

Clause 10.2(b)(i) of the Trust Deed provides that the Trustee may, for the purpose of meeting the objects of the Trust:

...engage, remove, suspend and remunerate such employees and agents as the Trustees from time to time consider appropriate for the proper administration of the trust.

Significantly, the Trust Deed does not prohibit TAC members from being engaged as an employee or agent of the Trustee. However, while permitted under the Trust Deed, the employment or engagement of TAC members by the Trustee or its related entities raises a number of potential concerns. These include the risk that the relationship and provision of benefits may directly or indirectly influence the TAC member in making recommendations or providing advice to the Trustee, particularly if the advice or recommendation is not supportive of the position of the Trustee. That risk is accentuated where, as has occurred under ISPL, the Trustee and its representatives, particularly Mr Carter, adopt a forceful position that is, or is perceived to be, adverse to persons not seen to be supportive of the Trustee. This may

also potentially influence the decision of a member whether to speak out and take action if concerned about any conduct of the Trustee and in deciding whether to take or support action to remove the Trustee in appropriate circumstances due to concern it may have an adverse financial impact on the TAC member.

The employment or engagement of TAC members and provision of associated benefits to them also carries the risk that it may conceivably be used, or at least be perceived to be used, by a Trustee in a nepotistic or preferential way, as a means of securing the support of TAC members for the proposed actions of, or retention of, the Trustee.

While the Trustee has a discretion in relation to whom it employs or with whom it contracts, it is particularly important that it ensures that its decision making process is documented, robust and impartial and can withstand scrutiny in circumstances such as this, particularly where all except one TAC member have been employed or engaged directly or indirectly by the Trust or its related entities, principally in positions as Project Liaison Officers.

**ISPL’s position**

During the course of the Inquiry, ISPL made a submission to the Inquirer in connection with the employment or engagement of TAC members, stating:214

> The Inquirer should be aware that the engagement of Njamal people in managing and performing Njamal business activities is a priority and also serves to meet the Objects of the Trust Deed. As a result they will often have more than one role at any time however, this does not mean they are paid twice.

However, whilst the Inquiry accepts ISPL’s submission that employment or engagement of Njamal people may assist to meet one of the primary objects of the Trust Deed, being the alleviation of poverty, and while the Inquiry has heard from many of the Njamal people employed by the Trustee who spoke of the hope in the community arising from increased employment rates, the issues raised above nonetheless remain live.

Accordingly, ISPL was invited to comment on these concerns by invitation dated 1 August 2018. In its reply, provided by letter dated 9 August 2018 through its solicitor, ISPL stated:

> The comments you make are noted however, to prohibit the employment of members of TAC would go too far. Although, my client would not necessarily agree with your comments regarding Mr Carter [Inquiry note: that is, the suggestion that Mr Carter adopts a forceful position that is, or is perceived to be, adverse to persons not seen to be supportive of the Trustee] his position and mandate going forward is one that even if you were correct, which is denied, your concerns will not present themselves.

> If for example, the employment of TAC members by the trustee was done for the predominant purpose to be supportive of the trustee then there may be something in what you say however, you do not assert that to be the case and, it is not. I also note that you do not allege that any of the TAC members are not capable of performing the tasks they were employed for.

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214 Email from Mr White dated 20 March 2018.
In any event, IPSL takes the view that it is important in creating the appropriate environment within the community to have its leaders used as role models and putting them in positions of influence. In any event, every direct job relating to an indigenous person in remote areas has a significant flow on effect within the relevant communities. That some are TAC members should be embraced. In some circumstances the field of possible employees is limited in any event. It is a very complicated and intricate issue when dealing with community and family arrangements within aboriginal communities anyway. So far no problems have been evidenced by reason of these engagements.

**Preferential treatment**

Allegations of preferential treatment are, of their nature, difficult to substantiate. Whilst it is true that a high proportion of Njamal people who are Trust employees/contractors are members of the TAC, there are many other Njamal people who are employed or contracted by ISPL who are not members of the TAC. Further, it is not surprising that many TAC members have been engaged by the Trust in roles outside of being TAC members given their backgrounds, status and wish to be gainfully employed. In the case of project liaison officers, the Inquiry was, for example, told about positions being allocated by reference to the relevant family groups on whose traditional lands particular mining activities were being conducted.

A specific allegation made to the Inquiry was that that jobs are not advertised, and are instead just given to certain individuals within the community. This allegation was made in relation to the specific roles of Elders' Liaison, Cultural Heritage Manager, Senior Projects Consultant and Project Consultants. It was alleged that at a TAC meeting on 23 September 2016, the names of the people who had already been chosen for these roles were presented at the same time the job descriptions were presented. It was further alleged that no conflict of interest was declared by relevant TAC members (three of whom had themselves been appointed to the new positions) and that no recruitment process was outlined. It is also alleged that there was no detailed accountability for outcomes of the roles.

It is correct that the minutes of the TAC meeting on 23 September 2016 record that the TAC 'authorised' the Trustee to appoint certain people in positions for an initial period of three months. It is also correct that the minutes do not record any conflicts of interest being declared (other than the minutes record that Ms Westerman abstained from voting).

However, according to minutes of a meeting of the ISPL Board on 25 May 2016, the Board had considered the roles of staff appointment following a TAC meeting on 23 May 2016. The minutes note that Mr Carter had spoken to a recruiter to fill these positions and that Ms McGann (Westerman) could be a candidate for a position.

Further, the Minutes of a TAC Meeting held on 6 July 2016 record:

Rod advised that following approval to advertise the following applications have been received:
- Office Manager: 2
- Liaison Officer: 2
- Causal (sic) Receptionist: 3

Rod is pleased with the quality of the candidates and is organising a selection panel.
These minutes suggest that the TAC meeting of 23 September 2016 was not the first time ISPL and the TAC had considered employment roles, but that they had been considered four months previously. Indeed, this must have been the case as the Njamal offices in South Perth and South Hedland (now in Port Hedland) had been staffed for some time before the meeting on 23 September 2016.

Further, many jobs (and the details of where and how to apply for ongoing job vacancies) have been advertised on the Trust's website, its Facebook page, and its newsletter. ISPL has also notified the Inquiry that TAC members are told of job vacancies and are encouraged and requested to pass this information to family members who might be interested in those opportunities. It may of course be that not all TAC members are passing on information about job opportunities to their family groups, with the risk that certain members of the community are not being informed by their respective TAC members about the opportunities, however that is somewhat beyond the control and responsibility of the trustee.

Before leaving this point it should also be noted that while advertising the positions is in the Inquiry's view a good practice which should generally be adopted unless there is good reason to depart from it, it is not something that is required by the Trust Deed or the general law of trusts or charities. The Trustee is also entitled to engage persons it considers are supportive of, and not acting contrary to, the objectives of the Trust.

Further complaints were received by the Inquiry in relation to alleged preferential treatment of certain TAC members and that the Trust's business opportunities for Njamal people were being given to TAC members. Further, it was alleged that potential contracts made available through mining companies were not being communicated through to the community to ensure that persons could themselves seek to avail themselves of the opportunity to tender, potentially in competition with other Njamal businesses.

Whilst many significant contracts awarded to Njamal businesses through NPJV have gone to TAC members or employees (for example, Mrs Eaton and Troy Eaton benefitted from a contract with Pilbara Minerals\(^{215}\) and Joanne Taylor benefitted from a contract with integrated services contractor MACA Ltd), the Inquiry accepts that the Trust and its related entity, Njamal Services Pty Ltd, as well as the NPJV, have all provided support and assistance to the Njamal people who wish to avail themselves of business opportunities. While there appear to have been issues from time to time about communication of information about contracting opportunities which might be available, the Inquiry accepts this has not generally been the case.

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Further, ultimately decisions in relation to awarding contracts are made by the mining companies themselves, on the basis of tenders made separately by, or in conjunction with, or the support of the NPJV or Njamal Services Pty Ltd.

When the Inquiry met with Mr Dryland of NPJV, he emphasised NPJV's priority of employing Njamal people and assisting genuine Njamal family businesses, for all of Njamal, not for any particular family. Mr Dryland explained that NPJV maintains a database of Njamal people to whom NPJV can look whenever opportunities arise. Mr Dryland said that the purpose of achieving gainful employment for Njamal people through NPJV is so that NPJV can train, manage and develop those people with the interest and ability so that, down the track, NPJV can step out of the process and the businesses can be self-sustaining. One of the difficulties of which the Inquiry was made aware is that many Njamal businesses do not yet have the capability and track record to successfully secure contracts and operate profitably in a highly competitive environment. That is why NPJV and Njamal Services Pty Ltd have assumed significant roles in supporting and fostering Njamal businesses.

A complaint was made to the Inquiry, which it did not have the opportunity to fully investigate, to the effect that the complainant received a letter from the Trustee in 2017 calling for tenders for business opportunities through NPJV. The complainant says he telephoned a particular liaison officer, to find out more about the opportunities and was told that he would be called back in a few weeks. As it transpired, the complainant was never called back and he later found out that the contracts he was interested in had been awarded to a business associated with that officer. He expressed some frustration that the TAC were supposed to be looking after the interests of all the Njamal people, but were entering into their own business opportunities. In his opinion, all the tender opportunities have gone to certain Njamal families, the letter calling for tenders was not genuine, and it had been done as a self-preservation exercise by the Trustee (the Inquiry infers that he meant for the avoidance of any appearance of conflict). While there may well have been a range of explanations as to what occurred in this case, a key message arising is again the importance of clear and rigorous procedures being maintained to avoid any conflicts or perceptions of conflicts.

As to a concern that some people receive preferential treatment in respect of business or employment opportunities, that was rejected by a number of TAC members, one of whom indicated that some people are more active in seeking work and those people were more likely to have employment opportunities. His sentiment was echoed by several other community members employed or engaged by the Trustee. The Inquiry accepts the position. While certain other persons interviewed by the Inquiry raised concerns about business opportunities not being afforded to them, it was apparent that they had either not availed of assistance to prepare and present a business case to the TAC, they had done so but not received TAC support, or had not actually actively taken steps to ascertain and pursue and such opportunities. The Inquiry is satisfied that the opportunities for employment and assistance are and have been generally made available by the Trust, its related entities and
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the NPJV to those who wish to avail themselves of those opportunities, although there are understandably a range of capability and suitability issues that might impact on decisions that are ultimately made.

Impact upon impartiality

A further potential issue in the employment or engagement of TAC members is that being employed or contracted by the Trustee may impact the member's impartiality in advising or making recommendations to the Trustee on the behalf of the community, for example out of fear of "biting the hand that feeds".

As Ms Westerman puts it, "with income streams in place, members of the TAC and other community groups are apprehensive about losing financial benefits if they challenge the Trustee's authority."

Similarly, the employment or engagement of TAC members and provision of associated benefits to them also carries the risk that it may conceivably be used, or at least be perceived to be used, by a Trustee in a nepotistic or preferential way, as a means of securing the support of TAC members for the proposed actions of, or retention of, the Trustee. This risk should be firmly in the mind of the Trustee and its officers to try and avoid such a consequence and points to the importance of complete transparency about any such appointments and when determining what, if any benefits are afforded.

The scope and delineation of benefits & loans provided to TAC members

A further issue arising in respect of TAC members, Trust employees and contractors (such as project liaison officers), is the lack of clear delineation between payments made in that capacity or on some other basis as a distribution under the Trust Deed.

Further, particularly in the first year or so of ISPL's term as Trustee, sometimes significant sums have been loaned or advanced to such persons (or the companies through which they are engaged), the names of whom are not identified here for privacy reasons.

The Inquiry sought information relating to payments made to various project officers after viewing payment entries in a trial balance supplied to the Inquiry by ISPL. The summary transaction lists provided by ISPL appeared to comprise a document created solely for supply to the Inquiry rather than an underlying account.

Based on the documentation and information provided to the Inquiry by ISPL, it appears to the Inquiry that it did not always properly and clearly and distinctly account for different types of benefits provided to Njamal people who were engaged in multiple roles and provided benefits that were not necessarily related to their engagement. This issue overlaps with the issue raised elsewhere in the Report about the at times unclear basis on which various advances, loans or other benefits were provided from time to time to some of those persons.
Transactions on the summary transaction lists which, on their face, do not appear to be payments for services rendered as employees or contractors included payment of rent where not apparently provided for in every case in the terms of the contract entered into, payment of court fees and fines, provision of loans or advances and payment of car maintenance and repair payments. A variety of, not always consistent, explanations were provided for many of those payments. In a number of instances it appears that approvals were given by Mr Carter for assistance on the basis of either necessitous circumstances or that it was related to the engagement of the person concerned. While it would seem that there are legitimate explanations for many of payments which appeared open to question, the fact remains that the basis advanced for such payments was not clearly and consistently recorded in materials provided to the Inquiry.

For example, while various project liaison officers received a rental allowance of $300 per week under contracts of engagement, in some cases payments were made although apparently not subject to any entitlement under the terms of the contract in the context where the person was residing in Perth. While it was suggested that this was provided for in the contracts, this was not apparent from the versions sighted by the Inquiry. Further, in some cases it appears that the explanation was that because some members themselves could not lease property in their own names in a lot of areas in Perth, ISPL had taken on the rental agreement, payed the lessor directly and deducted an equivalent amount from the employee or contractor's contractual entitlements (i.e.: wage garnishing).

As for various car repair and maintenance payments, in short, Mr White explained that project liaison officers use their car for work and that the service fees often relate to the cleaning and repair of cars, as the officers do not clean the cars and that heavy off-road driving in the Pilbara, which is required for the work being undertaken by the officers, takes its toll on the vehicles in a manner not seen by vehicles used on-road.

As for various fines and penalties that were recorded as having been paid, various explanations were advanced. One put forward by Mr Carter was that where the vehicles were Trust vehicles, notices were received by the Trust and to ensure they were paid and the vehicles could continue to be used, the Trust paid the fines and then recouped them from the driver. Another explanation offered was that on occasions TAC members or employees were advanced funds in advance of becoming entitled to receive them, to assist them meet their obligations which, in some cases may have included fines and penalties.

The Inquiry received complaints about the actions of a particular TAC member and how ISPL dealt with him, including to the effect that he had been "bought out" by the Trust; that the Trust had provided him with a house in Perth; and that he had stolen from the Trust. The involvement of that person with the Trust has been complex and full details are not disclosed here to protect various privacy issues. Suffice to say, there were issues with that member in relation to the historical use of funds for purposes other than for which they had been
provided by a previous trustee (lorette purposes), alleged billing of both a mining company and the Trust or one of its related entities for the same work performed, alleged unauthorised use of a credit card of Mr Carter or entity connected with him (not the Trust), the termination of his employment/engagement, as well as various personal issues.

That person was also provided considerable support by Mr Carter, including it appears by the provision of financial assistance at times through a company with which Mr Carter was connected. Earlier this year that TAC member and Mr Carter had a significant falling out which was in part connected with unsuccessful calls to remove the Trustee. That of itself resulted in a series of allegations and counter-allegations, which the Inquiry has been unable to form a clear view about. The Inquiry notes that the Trust and Njamal Services Pty Ltd also provided financial assistance for the operation of a business connected with this TAC member and accommodation assistance in Perth. It is in a sense therefore understandable why a perception arose amongst some that the Trustee was preferentially supporting this member. Each circumstance must however be considered on its own facts and the circumstances of this case were and continue to be complex. Undoubtedly however where a key person associated with the Trust takes measures outside the use of Trust Funds to support a person, that raises the real risk of adverse perceptions and it is important that any such arrangements be clearly and transparently documented and brought to the Trustee's attention. Further, while a Trustee has obligations in relation to the proper management of the Trust Fund, and where appropriate to recover misspent funds, a range of factors may influence what, if any action is taken in a particular case in relation to whether a Trustee acting prudently should pursue recovery.

In relation to issues raised by the Inquiry in relation to the scope of benefits paid, ISPL's legal representative advised by letter of 4 October 2018 that:

ISPL has conducted inquiries into these payments and while ISPL acknowledges that any recovery of payments incorrectly made to members of the Njamal community may be difficult or problematic, it will seek advice as to possible recovery.

We are instructed that all payments by the Trust are now clearly documented and there is a clear delineation between payments made by the Trust to persons for work undertaken by them for the Trust and distributions received by persons as beneficiaries of the Trust.

Adequacy of documentation

Under ISPL, agreements with staff and individuals engaged as contractors/consultants (generally via their chosen corporate entity) were frequently poorly documented (if at all in relation to contractors/consultants), and often undated and not signed, or not signed until after the contract had commenced.

The Inquiry sought details of employment information on 18 August 2017. Some contracts were provided on 25 September 2017, although others were only provided in February 2018 after a further request, and some remain outstanding.
A TAC member provided the Inquiry with a copy of a text message from 1 September 2017 from Mr Carter, which stated that Mr Carter required a contract signed so that he could pay the TAC member. Mr Carter's text provided that the contract was required because the "State Solicitor (sic) wants to see it." The contract provided to the Inquiry was:

a) unsigned and undated;

b) had an electronic date of 23 October 2016 below the space Mr Carter was to sign, nearly a year before it was requested from the TAC member; and

c) between ISPL as Trustee for the Trust and the TAC member personally, despite the fact that payments had been going from the Trust to that person's company.

This contract is indicative of many others provided to the Inquiry; contracts provided to the Inquiry were frequently documented as agreements with the individual who in fact provided the service rather than the corporate entity with whom the agreement to provide that service was supposedly entered into with (i.e. the corporate alter ego of the person concerned).

Recommendation 36 (Chapter 10)

1. While it is not necessary that positions be advertised, it is preferable that they are and that they are subject to a transparent, documented and accountable merit based selection process to avoid both the perception and reality of favouritism or cronyism.

2. Contracts of employment, alternatively contracts of engagement as independent contractors, be executed by ISPL and the prospective employee/contractor before the employee/contractor commences providing services to, and receiving remuneration from, the trustee.

3. ISPL cease providing advances or "loans" of any type to members of the Njamal community, regardless of whether any particular member is employed or engaged by the trustee (including as a TAC member) absent clarification of the nature and scope of any power under the Trust Deed to make loans or advances other than on prudent commercial terms with adequate security.

4. Accounting practices be reviewed and updated if appropriate so that the quantum and nature of benefits paid to TAC members, employees and contractors is clear, and are clearly delineated, on the face of ISPL's records.

The Trustee's Obligation to Consult with the TAC

As noted above, consultation is to be undertaken, unless otherwise agreed, at regular meetings convened for that purpose (TAC meetings) and arrangements for those meetings is required to be "as agreed" between the Trustee and the TAC.
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Under the Trust Deed, TAC meetings and consultation with TAC members may take place in person, by telephone, by teleconferencing or any other electronic medium.\(^{216}\) In situations of urgency, where the Trustee is not able to arrange a meeting to consult with the TAC, the Trustee may consult with the TAC members individually.\(^{217}\) Further, the Trustee is excused from consulting with any TAC member if the Trustee is not able to reasonably communicate with that member and the Trustee has consulted with at least 3/4 or more of other TAC members in relation to the matter. Instead of providing advice or recommendations to the Trustee at a TAC meeting, the TAC may instead decide to provide written recommendations or advice to the Trustee after the meeting. If it does so the recommendations or advice must be in writing, signed by at least 3/4 of the TAC members and provided within 60 days of the meeting.\(^{218}\) Where the Trustee does not receive advice or recommendations at a TAC meeting, or in writing as outlined above, the Trustee may act on those matters without further reference to the TAC.\(^{219}\)

In the Inquiry's view the obligation to consult carries with it an obligation to provide sufficient information so that genuine advice and recommendations can be given.\(^{220}\) It has been said that 'consultation', "is no empty term"\(^{221}\) and the "requirement of consultation is never to be treated perfunctorily or as a mere formality."\(^{222}\)

In respect of each Trustee it appears that practices were often adopted whereby, with the tacit agreement of the TAC, not all decisions were subject of specific consultation with the TAC. That is not surprising given the number of applications that were considered, many of which were routine and sometimes urgent in nature. In practice, where distribution policies were endorsed, Trustees would by arrangement consult with designated persons, sometimes on TAC subcommittees rather than the full TAC. On one view that breaches the consultation requirement under the Trust Deed on the basis that all investment and distribution decisions must be subject to full TAC consultation before being made. However, as a matter of practicality, in many cases it may be preferable that an alternative consultation procedure may be agreed.

\(^{216}\) Trust Deed, clause 9.6(b).
\(^{217}\) Trust Deed, clause 9.6(c).
\(^{218}\) Trust Deed, clause 9.6(e).
\(^{219}\) Trust Deed, clause 9.6(f).
\(^{220}\) Compare \textit{R v Secretary of State for Social Services; Ex parte Assn of Metropolitan Authorities} [1986] 1 All ER 164, 167 cited with approval in \textit{Fairfield City Council v Liquor Administration Board & Ors} [2001] NSWSC 870 (Kirby J).
\(^{221}\) \textit{T V W Enterprises Ltd v Duffy (No 2)} (1985) 60 ALR 687, 694.
\(^{222}\) \textit{Port Louis Corp v Attorney-General of Mauritius} [1965] AC 111, 1124.
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Recommendation 37 (Chapter 10)

ISPL review existing practices and procedures and consider whether it may and should make any amendments to the Trust Deed to provide for alternative consultation processes to be adopted in particular classes of cases with the agreement of the TAC to allow for flexibility in consultation practices, particularly in relation to routine applications the subject of established distribution policies.

The Inquiry is satisfied that ISPL generally engaged in consultation with the TAC about contemplated decisions in relation to the investment, significant distributions not otherwise dealt with by agreed levels of consultation where applications were routine applications covered by the endorsed distribution policy or (although not required) other expenditure of funds from the Trust Fund.

In many instances it has however been difficult to ascertain the nature and extent of the consultation that has occurred in relation to a proposed investment or distribution, the amount/limit of the investment or distribution and the means by which it was proposed to be effected, including whether it is via an investment or distribution to a related entity. That is important because it impacts on whether consultation complies with the Trust Deed requirements. Where, for example, expenditure is proposed by way of investment or distribution to a related entity (which itself will enter into a transaction or engage in a project), that is fundamentally different in nature to a transaction by which the Trustee expends funds on an investment or distribution directly. This should therefore be disclosed during consultation.

One reason for some difficulty in ascertaining the level of consultation is that various documents were handed out to TAC members and then retrieved at the end of TAC meetings and minutes did not always fulsomely record all issues discussed. That included due to confidentiality concerns, including concerns that certain sensitive information had been or may be communicated to Ms Westerman and others and used to compete against Trust sponsored activities (in respect of which the Inquiry makes no findings).

As indicated earlier in the Report, the Inquiry concludes that:

- ISPL either failed to adequately consult with the TAC prior to investing $1 million of Trust Funds in relation to the carbon farming project or failed to keep adequate records of that consultation. Given the sums involved that is highly unsatisfactory.
- In respect of funds loaned or advanced to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust and Njamal Heritage Pty Ltd, ISPL did not fully comply with its consultation obligations under the Trust Deed. Neither the TAC minutes nor other documents provided to the Inquiry appear to record, nor is the Inquiry satisfied based on its other enquiries, that ISPL
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consistently consulted with or obtained the recommendations of the TAC in respect of particular decisions to loan or advance particular amounts of funds, particularly to the significant extent to which that has occurred and continues to occur, to Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust and Njamal Heritage Pty Ltd.

Not infrequently the expenditure that has ultimately occurred on a project in respect of which consultation has occurred has been greater than the amount of expenditure that was originally budgeted. It is therefore important that the amount and limit of any proposed expenditure be specified and documented when consultation occurs to ensure that expenditure above the specified amount does not occur without the Trustee further consulting with the TAC. The referral of such matters back to the TAC for further recommendation appears to have occurred on some but not all occasions.

By way of response to a range of issues raised with ISPL it recently advised through its lawyers:

ISPL notes that the recommendations of the Inquiry in this regard have already been adopted by ISPL, with much tighter controls over distribution and requirements to consult with TAC. The level of communication between ISPL and TAC is increasing and they will now receive more information so that they are able to make better decisions.

ISPL intends to provide TAC members involved in corporate governance training so they better understand the importance of the various controls being put in place and to be better equipped to understand the information, including financial information, that is presented to them for their consideration.

Under a new policy, TAC is to be consulted regarding all investments and procedures have been implemented to ensure this occurs. Annual plans and budgets will be prepared for consideration by TAC and then approved with the ability to be revised quarterly. In respect of TAC meetings, agendas are provided to TAC members in advance of each meeting and every TAC meeting will present the financials of the Trust presented in plain language so that they can understand what is before them.

ISPL is also making a point to stress to TAC and all members that there will be fairness and equity across the entire pool of members and payments will no longer be made to without the proper processes being conducted.

Recommendation 38 (Chapter 10)

1. ISPL ensure that whenever money is proposed to be expended on such an investment or distribution that it has first been the subject of proper consultation, in particular in relation to the provision of funds by way of investment or distribution to a related entity. This should therefore be disclosed during consultation.

2. During consultation, the Trustee should disclose whether it is to expend funds on an investment or distribution directly, or whether expenditure is proposed by way of investment or distribution to a related entity (which itself will enter into a transaction or engage in a project).
3. The amount and limit of any proposed expenditure should be specified and documented when consultation occurs to ensure that expenditure above the specified amount does not occur without the Trustee further consulting with the TAC.

4. ISPL ensure that the consultation with the TAC in respect to any future investment decisions is properly and fulsomely recorded in minutes or other TAC endorsed documentation.

5. ISPL prepare and maintain a register of the details of any distributions or investments in respect of which TAC is consulted, which documents the nature and extent of the proposed distribution or investment, the amount/limit applicable to the distribution or investment, when the consultation occurred and the recommendation if any made by the TAC following the consultation. That is particularly appropriate in relation to investments or distributions for projects, economic development or business related activities including family businesses.

**Consultation other than by way of TAC meeting**

When Abbott was appointed consultation at a meeting did not occur. Rather, as previously noted, and as recorded in recital F to the deed by which Abbott was appointed, Mr Byers ‘consulted’ with the TAC by way of letter to the members of the TAC dated 1 May 2018. Mr Byers’ reason for this approach is set out at recital F to the deed:

> The terms of the Njamal People's Trust allow me to appoint an additional trustee as long as I consult with the Advisory Committee. One way to do that is to write to you, which means, that all Advisory Committee members know what I propose instead of just those who attend the meetings. Please let me know if you have any objections to this.

This raises a question as to whether the consultation requirements of the Trust Deed were properly complied with, given that it does not appear (at least from the recitals) that the agreement of the TAC was obtained for it to be consulted in this manner (see clause 9.3(a) of the Trust Deed) and it was not apparently a circumstance of urgency (see clause 9.6(b)). Possibly the absence of any objections being expressed was regarded as consent to consultation not occurring by way of meeting as ordinarily required.

As the appointment occurred in 2008, no objection appears to have been taken by the TAC to the appointment, that Abbott is no longer trustee and that Abbott has not been trustee for approximately four years, the Inquiry does not consider it necessary to further consider this matter.

**Confidentiality and Access to Information**

A common concern expressed by a number of Njamal people to the Inquiry concerned a suggested lack of transparency and communication of financial information by the Trust in relation to Trust activities. Mr Westerman has on more than one occasion demanded that each Trustee provide a wide range of information to her or others in the community regarding
the operations and finances of the Trust and its related entities. This has, in large measure, been based on a misconception as to her entitlement to receive such information. It has however then tended to feed into broader community concerns about disclosure.

Outside of disclosing information as may be reasonably necessary in the course of discharging its consultation obligation to the TAC in relation to proposed investments or distributions, TAC members and members of the Njamal community do not have a general right to financial information from the Trustee. Disclosure can also create issues on occasion including in relation to protecting the confidentiality of the private details of individuals who may receive distributions and sometimes, commercially confidentiality of information. By way of illustration of this tension, in the course of its meetings with various community members, at one point concerns were raised by certain members that they had heard certain people had received significant payments and they were concerned to understand why. When questioned however as to whether they would be comfortable, if they received distributions from the Trust to have the fact and circumstances of the distribution made available more broadly to others in the community, they candidly accepted that they would not.

In practice it is however desirable that Trustees keep the TAC and community well informed about its activities and financial position and performance. Absent this occurring it can rapidly feed into concerns of lack of transparency and rumours about the Trust's activities and position. That has occurred in this case under ISPL's watch, including due to the gap between the community annual general meeting in January 2017 and recent meeting on 22 October 2018.

ISPL generally adopted a position of voluntarily providing financial reports to the TAC on a quarterly basis and presenting information to the community at its annual general meeting and via its annual report (generally released at the meeting and then published in its website). It did not however consistently provide quarterly information to TAC, in some cases due to other commitments and timing issues in ensuring the information had been adjusted to be accurate. Further, due to concerns about possible misuse and inappropriate disclosure of certain financial information and commercially sensitive information about certain Trust related activities, the disclosure of information to the TAC often occurred by providing documents which were then collected at the end of the meeting. This at times caused

223 The ACNC requires certain information to be disclosed to it. Further, under reg. 5D.2.01 of the Corporations Regulations 2001 a licensed trustee company has an obligation to provide an annual information return if requested by certain persons. Relevantly for a charitable trust, a person may request an annual information return if a person who, under the terms of the trust, has power to appoint or remove a trustee of the trust. That information does not appear to extend materially beyond that which is generally provided annually to the ACNC by charities under its requirements.
difficulties for the Inquiry when trying to ascertain quite what information had been disclosed to and discussed with the TAC at certain meetings.

Ms Westerman has also called at times for full forensic audits of the Trust under different Trustees, even though there was no obligation on the trustees concerned to cause such audits to occur. As noted earlier, the Inquiry is not satisfied based on its inquiries that such a forensic audit of the Trust under ISPL is warranted, although it has made recommendations in relation financial audits being conducted of at least its key related entities whose shares are held on behalf of the Trust.

Another difficulty exposed in practice was the lack of clarity surrounding what information TAC members could or could not disclose to their family members or the broader Njamal community. TAC members also sometimes come under pressure to disclose such information.

The Inquiry notes that ISPL as part of a review of its practices and procedures is intending to increase its level of disclosure of financial information to TAC members and improve deficiencies in current practices such as in relation to consultation. The Inquiry also considers that ISPL should endeavour to prepare and provide a clear set of guidelines to TAC members, staff members and, ideally, Njamal community members, as to the nature and extent of information that will or will not generally be disclosed and any restrictions on TAC members or staff members in relation to disclosure generally or of particular information. This should hopefully reduce some of the difficulties and confusion that has at times arisen in relation to questions of release of information by TAC members and staff of ISPL and expectations of some community members about the level of information they should receive.

**Recommendation 39 (Chapter 10)**

ISPL prepare and provide a clear set of guidelines to TAC members, staff members and, ideally, Njamal community members, as to the nature and extent of information that will or will not generally be disclosed by it and any restrictions on TAC members or staff members in relation to disclosure of certain types of information generally or of particular information.

Having regard to the range of issues identified by the Inquiry in relation to the efficiency, effectiveness, adequacy and legal effectiveness of various rules and practices, the Inquiry makes the following recommendation in relation to review and possible amendment of the Trust Deed and TAC Rules.

**Recommendation 40 (Chapter 10)**

1. ISPL, in consultation with the TAC, urgently review whether any amendments should and can be made to the Trust Deed and if so, take steps to effect amendments, in particular in relation to:

   o more clearly defining the entitlements of TAC members for remuneration;
Clarifying the power of the TAC, or the TAC together with the Trustee, to implement rules to control or regulate the TAC's processes and procedures, including in relation to quorum for a meeting and conduct of TAC members, in a manner not inconsistent with the Trust Deed;

- the circumstances in and processes by which TAC members may be elected, suspended and replaced and their terms of appointment - in particular, whether the community may vote to elect or re-elect only some members of the TAC and whether, if an elected member dies or becomes incapable of performing their duties or fails to perform their duties for a period of time, provision is made for the removal and replacement of the TAC member, although this may itself become a matter of disputation if the criteria for such removal are not clearly satisfied;

- the ability to appoint/use, and the circumstances in which proxies may be appointed and act/be used; and what remuneration a proxy may receive (if any) including in lieu of remuneration that would otherwise be paid to the relevant TAC member;

- the frequency of community meetings to elect a TAC – including whether they should be held no more than a period such as 12 months apart, with provision made in exceptional circumstances for the period to be extended by up to a further period of say 3 or 4 months to accommodate unanticipated events, such as where flooding or ‘sorry business’ might justify deferring a scheduled meeting that would otherwise have been held within the period required by the Trust Deed;

- the specification of, or provision for, rules or procedures to be made, specifying the process by which voting at a community meeting is to occur; and

- alternative processes for consultation with the approval of the TAC.

2. ISPL and the TAC urgently review and amend the TAC Rules to remove inconsistencies with the Trust Deed.

Communicating with members of the TAC

In this section, three issues are addressed. The first is the community's experience, to the extent that it is divinable by the Inquiry, of communicating with the TAC. The second is the Inquiry's experience in communicating with the TAC. The third is whether adequate notification of TAC meetings has been given to TAC members by ISPL.

The Njamal community’s experience

Both ISPL and the TAC regard part of the TAC's role as communicating Trust developments and opportunities to the community. Community members spoken to by the Inquiry mentioned that they find out about Trust opportunities through their TAC member and that TAC members are the ones who approve their applications for assistance from the Trust.
While feedback about the role and level of communication performed by various TAC members was generally very positive, some concerns were expressed to the Inquiry that some TAC members can be difficult to contact, with one community member contacting the Inquiry to complain about her difficulties in contacting a particular TAC member. It was also alleged that the same member had approved an application for hardship, but that the Trust never processed it. Both complainants asserted that they had email evidence of their requests for assistance that were not actioned and that they would forward the evidence to Inquiry staff. However, such evidence was never provided. 224

The Inquiry was able to speak with the TAC member in question, who said that sometimes people grumble when they don’t have their applications approved. This member also spoke of the activities they had organised in the community (such as barbeques and beach trips for the children) to keep in contact with their family members.

Difficulty contacting TAC members was an issue for AET and was one of the factors which led to the implementation of family buckets. The fact that TAC members may be hard to contact is at least partly a function of living in remote environment as well as the common occurrence of changing phone numbers regularly. 225 This can create difficulties for trustees, particularly in relation to the obligation to consult, and can give rise to difficulties for family group members feeling engaged if a particular member is less proactive in communicating with their family group. ISPL’s positive initiative of providing mobile phones to TAC members was designed it would seem, at least in part, to ameliorate this issue. Further, the establishment by ISPL of Offices and contact persons in both Port Hedland and Perth provides community members with other avenues if they have difficulty contacting their family TAC member. The regular newsletters prepared and issued by ISPL also assist engage with the broader Njamal community, although their effectiveness may depend on the particular profile and remoteness of the member. Whilst laudable in its intent, appears not to have solved this problem. Ultimately, if a TAC member is not performing adequately, that may result in them not being re-elected to the TAC.

The Inquiry’s experience

The Inquiry’s experience in trying to get in contact with TAC members is that the official "NPT" emails were nearly all undeliverable, although some TAC members' alternative emails were not undeliverable. While the Inquiry did not receive any email response to its emails to TAC members inviting submissions to the Inquiry, it has spoken with all but one of the TAC members. Whilst some TAC members were not happy with the fact of an Inquiry and made

224 It is possible that the reason for this is lack of accessibility of computer services to forward the information, as the Elder spent a morning at a community legal centre in order to send the Inquiry a copy of a Notice for a community meeting (which Notice had already been provided to the Inquiry).

225 Some of the community members who were in contact with the Inquiry changed their phone numbers over the course of the Inquiry.
their concerns known, they were helpful and engaging, providing answers to the Inquiry's questions when asked.

Throughout the length of the Inquiry, Inquiry staff have not been able to contact one particular TAC member. This has been identified as an issue by the Trustee: the TAC minutes of 6 September 2017 (at 4) note that the member had missed 3 consecutive meetings and that the Trustee would follow up with him or her.

This in turn further highlights the difficulty of paying TAC members quarterly sitting fees in advance, and also for addressing circumstances where a TAC member does not adequately perform their role. As the Inquiry has observed earlier in this Report in relation to the purported suspension of Ms Westerman, the Trust Deed does not envisage the removal of a TAC member except in limited circumstances such as upon their resignation or as part of a re-election of the TAC at an annual community meeting.

**Did ISPL provide adequate notification of TAC meetings?**

A concern expressed to the Inquiry by a number of current and former TAC members is the short notice that has not uncommonly been provided of TAC meetings, which has led to difficulties for some members attending or preparing for the relevant meeting. Concern has also been expressed at the sometimes late provision to TAC members of agendas and detailed materials relevant to matters considered at TAC meetings.

In respect of TAC meetings, the Trust Deed does not itself specify minimum notice requirements, however it provides for arrangements for TAC meetings to be agreed between the Trustee and the TAC. In the Inquiry's view this extends to the length and means of providing notice to TAC members in relation to TAC meetings. This is reflected in the AET TAC Rules, endorsed by ISPL and the TAC, which require at least 2 weeks prior written notice to be given to the TAC.

Several TAC members have said that they have not received sufficient notification of meetings:

- On 24 October 2016, Ms Westerman complained that she had not been given sufficient notification for the TAC meeting to be held on 26 October 2016, at which she was purportedly suspended. Ultimately Ms Westerman was unable to attend that meeting and the endorsed minutes of that TAC meeting show that the TAC "consented to short notice" being given.
Concerns of short notice were then raised by TAC member Jonny Mitchell at the TAC meeting of 1 December 2016, where he complained that he had not received sufficient notification for the previous meeting.226

Travis McPhee has also provided evidence that he and other TAC members were given only 7 days' notice of the TAC meeting on 21 July 2017. He has raised concerns with Mr Carter about insufficient notice and Mr Carter asserted, amongst other things, that "We have never held a meeting without adequate notice".

These occasions are not isolated incidents. The Minutes of TAC meetings of 16 May 2017, 31 May 2017 and 5 July 2018 record that the TAC "consented to" short notice after the event. In the Inquiry's view that is not a satisfactory approach in that any agreement between the TAC and Trustee in relation to the provision of short notice should be reached before the meeting. The very members who may have been given short notice and may have been unable to attend may not have been present, and therefore the purported approval or ratification of the provision of short notice is not something that they would have had the opportunity to comment upon.

The TAC meeting of 5 July 2018 is significant, as it was the meeting in which the TAC resolved to suspend certain Njamal people from access to Trust Funds. Mr McPhee in particular was only given one day's notice, which, given he was in Perth and the meeting was in South Hedland, meant that he was unable to attend the meeting in person. The consequence of this was that the TAC passed the resolution shortly before he was connected to the TAC meeting on Skype.

If ISPL considers that a shorter period should be allowed for in certain circumstances, such as circumstances of urgency, and the TAC agrees, the TAC Rules should be amended to reflect the agreed arrangements.

Otherwise, ISPL should ensure that it provides TAC members with at least 14 days' notice of TAC meetings, and provides relevant materials to TAC members as far in advance as is practicable to ensure members have a reasonable opportunity to consider the materials before the meeting.

TAC members should also be reminded that they are not required to provide advice or recommendations to the Trustee at a TAC meeting in relation to any proposed investments or distributions. If such a decision is proposed to be made by the Trustee and if, for example, the TAC does not consider it has had adequate time to consider information relevant to the

226 At that meeting, Mr Carter apologised and advised that in future notices will be provided to Eileen (sic) as well. Aileen Mitchell has since become the TAC member for that group.
decision and to deliberate, it is open to it to make recommendations or advice in writing, signed by at least 3/4 of the TAC members and provided within 60 days of the meeting.

While specific details of the above examples were not provided to ISPL to comment on specifically, the above general potential findings were and its solicitor appeared to accept the generality of the some of the matters raised as being well-founded, while noting, amongst other things, that any debate regarding factual references made seems pointless (and noting given the lack of detail that they were not in a position to respond). It was again indicated that these issues would be addressed as part of its review.

**Recommendation 41 (Chapter 10)**

1. If ISPL considers that a shorter period should be allowed for in certain circumstances, such as circumstances of urgency, and the TAC agrees, the TAC Rules should be amended to reflect the agreed arrangements. Otherwise, ISPL ensure that it provides TAC members with at least 14 days' notice of TAC meetings, and provides relevant materials to TAC members as far in advance as is practicable to ensure members have a reasonable opportunity to consider the materials before the meeting.

2. TAC members be reminded that they are not required to provide advice or recommendations to the Trustee at a TAC meeting in relation to any proposed investments or distributions. If such a decision is proposed to be made by the Trustee and if, for example, the TAC does not consider it has had adequate time to consider information relevant to the decision and to deliberate, it is open to it to make recommendations or advice in writing, signed by at least 3/4 of the TAC members and provided within 60 days of the meeting.

**Improper influence of the TAC**

A range of serious allegations were made to the Inquiry in respect of alleged improper garnering of support. Those allegations include that certain persons sought to improperly influence members of the TAC or their proxies to support certain positions or resolutions, or to sign certain documents. Most such allegations were insufficiently precise to enable them to be effectively inquired into and were often unsupported by direct evidence. Ultimately, because of these deficiencies and bearing in mind the serious nature of the allegations made, the allegations have not been able to be substantiated by the Inquiry. However, to provide a flavour of the types of allegations made, a selection of them are considered below.

In the context of the removal of AET and subsequent appointment of ISPL as Trustee, several allegations were made against Ms Westerman, including that she acted inappropriately in securing a person's signature on what one TAC member described as a "petition" to remove AET. The allegation, made by a TAC member, was that Ms Westerman had requested that the person sign the document to remove AET. The TAC member alleges that the person Ms Westerman approached did not have advanced literacy skills and that he was "more or less
under duress" when he signed. Documents provided by Ms Westerman do evidence that she had approached the TAC member himself for his signature, and when he refused to sign, she said that "We will contact [his proxy] if we can find him and see if he can sign/attend". The Inquiry raised this allegation, of putting the TAC member's proxy under duress, to Ms Westerman, who indicated she had previously heard that allegation in the community. Her response was that there was no basis for the allegation, and that she never visited the TAC member's proxy on his property (some 100s of kilometres north of Port Hedland), but that a lawyer had obtained a statement from him in the course of the Supreme Court proceedings to remove AET. In view of Ms Westerman's denial of the allegation, and in the absence of any direct evidence of Ms Westerman imposing upon the TAC member's delegate, the Inquiry does not consider the allegation to have been substantiated.

Concerns were also raised with the Inquiry in relation to whether Ms Westerman and Mr Carter paid people to vote in a certain way at the February 2016 "TAC meeting", convened for the purpose of removing AET as Trustee. The allegation was not supported by any direct evidence and was unable to be substantiated by the Inquiry.

Further in an email from a TAC member to AET on 5 April 2016 it was alleged that:

…Rod Carter has been travelling around with Sharon throughout the north west to places such as Broome, Hedland, Roebourne and Carnarvon, with Ms Westerman canvassing support for the appointment of Mr. Carter. It is alleged that Rod has been financing the invalid meetings, by paying those TAC members as well as other Njamal community members cash in hand? This is a form of bribery and a breach of due process.

The circumstances surrounding payments that were made, including cash payments, in the period preceding the ultimate appointment of ISPL in May 2016 are separately considered in detail in Chapter 3 of the Report.

The Inquiry was also told of rumours that Ms Westerman had obtained signatures from some people who did not know what they were signing, and that the signatories thought they were signing for a Christmas payment. It was also suggested to the Inquiry that a particular Njamal Elder had been presented with a document by Ms Westerman and was told that it was for Christmas money, but that he was not permitted to see the front page. AET say that the document actually signed was the 19 August 2015 resolution to remove AET as trustee. Correspondence provided to the Inquiry suggests that some effort was made in 2015 to obtain a statement from the Elder, but no finalised statement has been provided to the Inquiry. In the absence of any contemporaneous evidence of such a serious allegation, the Inquiry does not consider the allegation to have been substantiated. However, staff of the Inquiry raised the allegation with Ms Westerman, who became quite indignant stating that she had never been a proponent of Christmas money due to the problems in the community that it caused. Her reaction is consistent with her views on Christmas money previously expressed to the Inquiry.
The Inquiry was also informed by a person that they saw Ms Westerman in the foyer at Central Park in 2016 talking to an elderly aboriginal man, saying "here, sign this, the money will be in the account". Without specifics, it is not possible for the Inquiry to make a finding as to whether this occurred, or what the signature or money was for. However, staff of the Inquiry raised the allegation to Ms Westerman who replied that the signature may have been in relation to a resolution for ISPL, but that the money did not relate to a meeting to remove AET. Ms Westerman said that there had been several trust meetings in early 2016 and that Mr Carter had paid her to pay sitting fees to participants.

**Other allegations of improper influence**

Ms Westerman has advanced an allegation against ISPL that the Trust's travel policy has been applied selectively so that people who would vote to support ISPL would be given a generous travel allowance. In particular, Ms Westerman alleged that $18,316 paid to a TAC member and his family for the Pilbara Minerals Limited Authorisation Meeting on 13 December 2016 was unjustified. Ms Westerman highlighted payments to that family in an ISPL document setting out travel expenses, saying that the costs should have been closer to $6,446 based upon three drivers. The Inquiry is not in a position to comment upon whether or not it would have been reasonable for the family members highlighted by Ms Westerman to share a car, given that neither the precise details of family relationships nor family member's habitual residences are known to the Inquiry. In any event, it is one thing to make excessive payments for travel allowances. It is another thing entirely to do so in order procure support or votes from a member of the TAC. No evidence has been provided to the Inquiry to support a finding of the latter type.

A series of allegations and counter allegations were made by both Ms Westerman and her supporters, and ISPL and persons supportive of it, in relation to a series of documents that were signed or purportedly signed. A difficulty with the allegations is that the basis for the assertions was generally unsupported by evidence and often based on supposition. While the Inquiry did not substantiate the allegations, they are thematic of the overall issues regarding documents being presented and signed by members of the Njamal community, sometimes in questionable circumstances where their understanding of what they were signing, and indeed whether they actually did sign the document being in doubt.

For example, in May 2016, whilst there were various meetings of TAC members and other community members purportedly to remove AET as Trustee, one TAC member emailed the TAC group requesting that his name not be placed on any documentation without his express consent and his own signature. That was apparently in response to a letter being sent to AET containing his name.

Ms Westerman also alleged that Mr Carter and Mr Parker manufactured director's resignations for Njamal Limited and Njamal Nation in November 2016. This is a very serious allegation. Ms Westerman alleges that the signatures of Travis McPhee, Michael Taylor and
Dean Snook are identical and that Terry Wilson's signature has been cut and pasted on one of the documents. However, evidence provided to the Inquiry suggests that many of the TAC members who were also directors of Ms Westerman's companies themselves intended to resign as directors from those companies. The TAC minutes of 26 October 2016 provide that:

Troy Eaton, Mark Walker and Travis McPhee intended to tender their resignations from the Njamal Nation group of companies. None of them could recall having consent to act as Directors in the first place.

Further, the minutes of the TAC meeting held on 20 June 2018 also record that Dean Snook, Travis McPhee, Tony Taylor and Thomas Geary had previously submitted their resignations as directors of Njamal Ltd to ASIC. The Inquiry finds that the allegation is not substantiated.

Issues in relation to the obtaining of support and signatures were also particularly prevalent in relation to resolutions to remove and appoint Trustees of the Trust, including by proxies. Given the recognised issues in terms of susceptibility of some members of the Njamal community to being influenced or pressured to sign documents, including which some may not fully understand, in the view of the Inquiry it is desirable that, where practicable, use of written circular resolutions by TAC members, as distinct from resolutions in properly convened meetings, be avoided. Further, where circular resolutions or other documents are circulated to be signed by members of the TAC, Applicants or Njamal community it is highly desirable that steps be taken to ensure the proposed signatory fully understands the nature of what they are being asked to sign, is not put under any pressure or inducement to sign and that the signature be witnessed, ideally by an independent person, and dated to ensure that if a dispute arises there is a greater ability to verify the circumstances of the signature.

**Recommendation 42 (Chapter 10)**

Where practicable, use of written resolutions by TAC members, as distinct from resolutions in properly convened TAC meetings, be avoided. Further, where resolutions or other documents are circulated to be signed by members of the TAC, Applicants or Njamal community steps be taken where practicable to ensure the proposed signatory fully understands the nature of what they are being asked to sign, is not put under any pressure or inducement to sign, and that the signature is witnessed, ideally by an independent person, and dated to ensure that if a dispute arises there is a greater ability to verify the circumstances of the signature.

**Retaliatory Behaviour**

One area of concern during the Inquiry was a series of allegations concerning retaliatory conduct, as well as an apprehension by a not insignificant number of persons who assisted the Inquiry by answering questions or providing documentation pursuant to requests, about the prospect of retaliation if their assistance was perceived to be adverse either to, in particular, ISPL and Mr Carter, or to Ms Westerman.
CHAPTER 10: TRUSTEE ADVISORY COMMITTEE

While the specific allegations of retaliatory conduct, individually were generally not sustained on the materials available to the Inquiry, the Inquiry accepts that there were genuinely held concerns by witnesses, which in some cases resulted in those persons being reluctant or declining to assist the Inquiry, even though in some cases it was suggested by those persons and others that they were aware of matters of significance.

Certain of the specific allegations made to, and considered by, the Inquiry are referenced below. A complaint was received that a TAC member signed a resignation for Njamal Limited at some point in time because ISPL had withheld his wages and would not pay him until he had signed a form resigning from Njamal Limited. The TAC member did not corroborate the allegation that his wages were withheld, saying instead that he had signed a form for his wages, but only in relation to which Trust entity (e.g.: ISPL or Njamal Services Pty Ltd) would be paying the wages. However, the TAC member also said that his resignation from companies including Njamal Limited was because ISPL made it clear to him that he could not be a TAC member and a director of one of those companies due to a "conflict of interest" (which he disputed). The ongoing nature of issues surrounding conflict of interest are evident from a recent record in TAC minutes of 20 June 2018, which provides (under the heading "Potential Conflict of Interest"):

The General Manager expressed his concern that a member of the TAC should not be a member of Njamal Ltd or its related entities.

The Inquiry was also advised on more than one occasion about Njamal people being apprehensive about speaking out or voting as they did not want to be "done for defamation" or subject to court action. The concerns were expressed against a backdrop of Mr Carter or ISPL having taken or foreshadowed taking legal action against a variety of persons, particularly in defence of reputational issues, and Ms Westerman herself having initiated or foreshadowed initiating a number of legal proceedings. While some Njamal people made it clear they were unaffected by such issues and felt they could still voice their opinions, others were more apprehensive. That was including in circumstances where the Charitable Trusts Act 1962 does not confer protection on witnesses in the same way that many other contemporary legislative regimes in relation to inquiries and investigations do.

While individuals are, of course, entitled to foreshadow or bring legal proceedings to vindicate their reputation and claims in respect of legal disputes, the resulting atmosphere which has permeated the Trust while the conflict with Ms Westerman has continued is unfortunate.

A related allegation against ISPL is that, when a TAC member questions ISPL or takes a position perceived to be politically opposed to ISPL, ISPL takes or threatens to take away benefits previously provided to that member.

This is most clearly seen in the suspension of access to Trust funds to certain persons perceived to be aligned with Ms Westerman. At the TAC meeting held on 5 July 2018, the TAC and Applicants requested that the Trustee be asked to not pay benefits to any Member
who supports the overlap claim. The draft Minutes suggest that this was on the basis of legal advice that the Trust is discretionary and that the Trustee is not obliged to pay any benefits. Of concern to the Inquiry is that there is evidence to support the fact that ISPL has acceded to the TAC’s request that payments be suspended to particular categories of people who would otherwise be eligible under the provisions of the Trust Deed to a distribution from the Trust:

1. On or about 10 July 2018, the Trust's General Manager in the Hedland Office sent a text to a TAC member in which he stated:

   In regard to your dad the TAC and Applicants recommended to the Trustee that all Nyamal Ltd supporters be suspended for three months and during this time they are not eligible to receive funds.

2. Similarly, a complaint has been made to the Attorney General by a Njamal community member that he too has been suspended from receiving any funds from the Trust. His evidence is to the effect that he was told on the phone that it was because he had attended a Njamal meeting regarding the new applicants. However, despite his request for a written explanation of the reasons for that suspension, he suggested that the Trustee had not provided him with a response.

3. The Inquiry has also been informed that other Njamal persons have had their access to Trust funds cut and that some members of the community have been told by the Hedland Office that in order to receive assistance from the Trust, they need to sign a statement that they voted "no" at the 11 June 2018 overlap claim meeting.

Whilst the Trustee has discretion regarding to whom it makes trust distributions, it is a charitable trust, not a private discretionary trust and a trustee must not unduly fetter its discretion to make charitable distributions on the basis of a factor extraneous to the trust's charitable purposes. Withholding payments from those not aligned with the Trustee would likely be an improper exercise of the Trustee's discretion.

It was also alleged to the Inquiry by one person that she had been advised by a senior Njamal person that Mr Carter had advised her that a potentially lucrative contract (which a member of her family was seeking to obtain the benefit of) would not go ahead if that senior Njamal person continued to work with the complainant. The allegation was not however corroborated by the senior Njamal person.

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227 The Inquiry infers this is in relation to application in Federal Court proceedings WAD289/2018.
228 Given the timing of receipt of the allegation the Inquiry did not investigate it and references it for illustrative purposes only.
Other specific accusations of retaliatory behaviour by ISPL have been advanced, which have been found to be without substance. For example:

- An allegation was received that a Njamal person was asked by a former General Manager of the Hedland office to return funds advanced to him for a basketball competition and that when the person asked about the reasons, he was told that it was because he was a member of Njamal Ltd. The Inquiry raised the allegation with the former General Manager who responded that he had indeed requested that the money be returned. However, he confirmed that it had nothing to do with Ms Westerman and her company. Rather, the office had been under the impression that the money was given to the recipient for sponsorship of the basketball competition, so when he learned that there was no Njamal branding on flyers, he requested that the money be returned. The Inquiry accepts that explanation.

- It was also alleged that a TAC member had not been allowed to do heritage work because he had become a member of Njamal Ltd in 2017. However, when asked in February 2018, representatives from mining companies have said that the TAC member continued to do heritage work. A former director of ISPL also confirmed that while Mr Carter had been angry with the TAC member that did not impact his employment. The TAC member himself has said that he did stop working with the Trust in early 2018, but this was his decision based upon the fact that a lot of information had been leaked from the Applicants to anthropologists and lawyers putting people on the wrong parts of the country.

- A TAC member informed the Inquiry that he had been given a car for Heritage-related work, but that it was taken off him when he started asking questions about Njamal Heritage. He acknowledged however that he has since been given use of another car for heritage related work, which is evidenced in the vehicle register provided by ISPL.

A former General Manager of the Hedland Office alleged that he was told by ISPL that he would not receive his final pay until he had signed a statement of what he had told the Inquiry. His evidence is that, in his handover to the present General Manager, on or about 24 October 2017, he was informed that, if he wanted his final pay, he would have to write up a statement about what he had told the Inquiry about ISPL. He refused to sign anything and called Mr Mack in the Perth Office, asking him if he was aware that ISPL was intending to hold back his pay. Mr Mack had not been aware of this. The Second General Manager did not sign any statement, but did receive his pay. The Inquiry has no reason to doubt the substance of the complaint.

In the Inquiry’s view it is important that both the TAC and ISPL ensure that in making recommendations and decisions, an impartial and balanced approach be taken, including in relation to community members with whom they might not share views. It is also desirable that there be an attempt to genuinely mediate and resolve concerns so that a more unified approach can be adopted moving forwards. Whether that is realistic given the deep divide
that has occurred between many is unclear. What is of concern to the Inquiry however is that steps be taken to ensure that no retaliation occurs in relation to any person who has made allegations to or assisted the Inquiry. The strength of reaction by Mr Carter, in particular, to various allegations, evidence and matters in respect of which his comment was invited, serves only to fortify the Inquiry in its view.

**Recommendation 43 (Chapter 10)**

ISPL and the TAC take steps to ensure that persons who have made allegations to, or assisted the Inquiry, are not subject to any retaliatory conduct as a result and use their best endeavours to promote a cohesive and less combative approach to their roles.
Distributions

One of the central responsibilities of the Trustee is to consider and decide whether or not to distribute, invest or otherwise expend Trust Funds, ensuring that it does so compliantly with the Trust Deed, in furtherance of its charitable objects and after requisite consultation with the TAC.

The Trustee has discretion to decide from time to time:

(a) when the Trust Fund is to be applied for the benefit of "beneficiaries" and in what quantities;
(b) how the Trust Fund is to be applied for the benefit of "beneficiaries"; and
(c) which individual "beneficiaries" are to benefit from any particular application of the Trust Fund.

Clause 4.1(c) provides that the objects of the Trust are however required to be carried out without purpose of private gain.

As explained in detail below, each of Abbott, AET and ISPL adopted various policies, practices and procedures in consultation with the TAC that have guided the exercise of its discretion, although have adopted varying general limits and approaches to the circumstances in which distributions have been made from the Trust Fund.

In this Chapter of the Report the Inquiry considers and compares the policies, practices and procedures of the various Trustees of the Trust, the nature and extent of distributions, considers whether distributions of the general nature of the categories adopted can properly be characterised as being for charitable objects and purposes, and reviews certain transactions engaged in by those Trustees, including transactions selected by the Inquiry or otherwise the subject of complaint to the Inquiry. Consideration is also given to the process of authorising distributions, documenting processes followed and decisions made and the level of disclosure to the broader Njamal community.

A range of complaints or concerns were raised with the Inquiry including:

- whether the Trust Fund may have been applied to uses that are not permitted under the Trust Deed, the Charitable Trusts Act 1962 or by the Australian Tax Office;
- whether discretion exercised by various Trustees had been exercised to favour particular individuals and particular Njamal families over others including where

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229 Trust Deed, clause 10.4.
CHAPTER 11: TRUST DISTRIBUTIONS

certain individuals appeared to have benefitted from unexplained large sums (greater than $10,000);

- excessive amounts may have been applied to "Lore & Culture" payments; and
- cash vouchers had been given to members of the community.

The issues raised, as well as a number of specific allegations, were considered by the Inquiry. The key areas of concern identified by the Inquiry, which are specifically considered below, are:

- the historical adoption of a bucket system for certain allocations.
- the making of cash payments and direct electronic transfer of funds to Njamil people, particularly in earlier periods and prior to ISPL’s formal appointment on 12 May 2016.
- the provision of funding for economic advancement and to related entities of ISPL.
- the provision of loans (see also Chapter 8).
- the consistency of application of certain policies.
- the adequacy of documentation of decision-making processes.

Various recommendations are made in relation to those issues and potential improvements in practices and procedures.

In reviewing these matters, the Inquiry has been conscious of the personal and confidential nature of many of the applications for assistance. It has therefore not generally identified the names of the applicants or detailed circumstances of the applications, except where and to the extent considered necessary or appropriate.

**Nature and Extent of Distributions**

A summary of the distributions made by Abbott, AET and ISPL is set out in the following table. The figures are not entirely consistent with various other summaries of distributions provided to the Inquiry by the Trustees. The differences were explicable by a number of reasons including in some cases differences in categorisation in the final audited financial statements and in earlier documents. In the case of Abbott, the difference in part is explicable by differences in classification, which led to a restatement of certain financial records once AET assumed trusteeship of the Trust.

<table>
<thead>
<tr>
<th>Distribution paid to beneficiaries</th>
<th>2017</th>
<th>2016</th>
<th>2015</th>
<th>2014 (Restated)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elders Distribution</td>
<td>349,781</td>
<td>137,107</td>
<td>115,800</td>
<td>-</td>
</tr>
<tr>
<td>Lore &amp; Culture</td>
<td>210,836</td>
<td>408,249</td>
<td>45,279</td>
<td>55,956</td>
</tr>
</tbody>
</table>
## CHAPTER 11: TRUST DISTRIBUTIONS

<table>
<thead>
<tr>
<th>Distribution paid to beneficiaries</th>
<th>2017</th>
<th>2016</th>
<th>2015</th>
<th>2014 (Restated)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distribution</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Funeral Distribution</td>
<td>77,513</td>
<td>32,364</td>
<td>36,305</td>
<td>24,202</td>
</tr>
<tr>
<td>Sports Distribution</td>
<td>73,659</td>
<td>23,766</td>
<td>32,412</td>
<td>37,471</td>
</tr>
<tr>
<td>Education Distribution</td>
<td>82,360</td>
<td>23,338</td>
<td>29,276</td>
<td>8,000</td>
</tr>
<tr>
<td>General Distribution / Hardship</td>
<td>241,632</td>
<td>340,833</td>
<td>27,429</td>
<td>123,745</td>
</tr>
<tr>
<td>Health Distribution</td>
<td>37,810</td>
<td>50,408</td>
<td>11,468</td>
<td>67,591</td>
</tr>
<tr>
<td>Economic Development/Business</td>
<td>171,066</td>
<td>11,091</td>
<td>-</td>
<td>14,756</td>
</tr>
<tr>
<td>Community Projects</td>
<td>394,155</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Carer's Assistance</td>
<td>13,660</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Project Liaison Officers</td>
<td>594,584</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Native Title Expenses</td>
<td>662,660</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Njalal Services Pty Ltd Funding</td>
<td>723,037</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Njalal Hortage Pty Ltd Funding</td>
<td>199,068</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Total Distribution paid to or for the benefit of Beneficiaries</td>
<td>2,820,969</td>
<td>1,027,176</td>
<td>297,969</td>
<td>331,721</td>
</tr>
</tbody>
</table>

As the table clearly demonstrates, there has been a marked increase in distributions under the trusteeship of ISPL, with a particularly high amount expended by reference to lore and culture during the 2015/16 financial year, principally overseen by AET.

In particular, the dramatic increase in distributions is largely accounted for by significant increases in the area of economic development and a range of new categories of distribution.

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A note to AET's financial year statements for the year end 30 June 2015 states: **These payments are made at the discretion of the Trustee, but are still based on meeting the charitable objects of the trust, but also in accordance with the distribution policy recommended by the Advisory Trustees. The majority of these payments are managed on an agreed, capped allocation of funds to individuals and/or family groups, aimed at ensuring the distribution of funds is made in a fair and equitable manner. Payments are typically made for items associated with general health and wellbeing and/or relieving poverty, and may include, but are not necessarily limited to the purchase of essential goods and services. Examples of payments include vehicle registration and repairs, purchase of whitegoods and assistance with rental, fuel, food and other household expenses. Typically speaking, these allocations of funds will not replicate other areas of existing distribution policy.**
by way of community projects, carer’s assistance, project liaison officers, native title expenses and funding of subsidiaries of ISPL; Njamal Services Pty Ltd and Njamal Heritage Pty Ltd. Those latter categories are largely considered in a preceding Chapter of the Report.

While finalised figures had not been provided to the Inquiry for 2017/18 distributions at the time of finalisation of the Report, detailed distributions are set out in the equity section of the unadjusted trial balance as at 24 May 2018 provided to the Inquiry by ISPL. Those reflect an apparent decline in expenditure in various categories including lore and culture. That is consistent with indications that ISPL had taken steps together with the TAC and Njamal Elders to tighten restrictions over eligibility for lore funds to ensure that they were being directed to appropriate persons who were participating in lore activities. It is also consistent with feedback that there had been a general tightening of availability of funds, which seems to have coincided with some of the issues raised previously about managing expenditure and cash flow given the wide range of other activities of the Trust.

Distribution Policies

Abbott Distribution Policies

Abbott was Trustee for nearly 6 years. During that period several versions of a distribution policy were adopted. The Inquiry has examined Abbott’s distribution policies from 2012.

In 2012 the Trustee created a written “Njamal People’s Trust Rules and Policies” document, which, amongst other things, included the Trust distribution policy (Abbott 2012 Distribution Policy) and TAC rules. Of note:

- the policy provided that “no further Loans due to non-payment of two current outstanding loans”;
- funding to support privately owned vehicles was prohibited;
- restrictions were imposed in relation to use of certain funds for hire vehicles and travel assistance;
- a prohibition existed on using lore funds for alcohol;
- explicit reference was made in relation to most designated categories of distribution that payments were not to be made by cash; and
- there was no provision for family buckets.

The policy contained an allocations guide in relation to funding received by the Trust under agreements with various mining companies. It appears that the funds were either provided under the agreements for particular purposes or determined by the Trustee to be allocated for that purpose, such as lore and culture, education/training and economic security. The policy identified a range of distribution programs or categories including funerals, lore and culture, preservation of language and culture, education, sporting and medical.
Abbott's 2012 policies were reviewed at a policy and procedures workshop in April 2013 after which a new "Njamal People's Trust, Policies and Procedures" document was created (Abbott 2013 Distribution Policy). The new document reflected many of the existing policies and procedures, although there were some changes. For instance, the Abbott 2013 Distribution Policy contained no explicit restrictions in relation to loans or funding in relation to private vehicles (although contained a restriction in relation to using funds for the preservation of language and culture for hire vehicles and travel assistance). The only explicit reference to payments not being made in cash was the reference retained in relation to the category of lore and culture. The policy noted that "Family corporations with similar objects to the Trust provide a way for cash payments to be made to each family corporation."\footnote{At 11.9.3. This was apparently a reference to the ability under clause 4.2(c)(viii) of the Trust Deed to distribute money for the objects and purposes of the Trust by "providing money, property or benefits to or for such persons, firms, companies, organisations, bodies (corporate or unincorporated), whether formed by statute or otherwise, which have similar objects to this Trust and provide similar programs, assistance or opportunities for the Beneficiaries." It is not clear which "family corporations" this is referring to, although at the time the only related entity still operating was NCCA Pty Ltd.}

In the Abbott 2013 Distribution Policy, no financial limit was imposed in respect of law and culture, but the policy made it clear that the Trustee was to consult with the relevant Elders through the TAC. The Trustee required the following:

- budget for the season;
- approved persons to assist;
- no cash payments;
- amount to be spent per person; and
- information regarding what the money was being spent on.

**AET Distribution Policies**

As a large professional trustee company, AET has standard distribution policies which were amended to specifically address the needs of the Njamal People. An example of AET's distribution policy was set out in a presentation to members of the Njamal community prior to AET’s appointment.\footnote{Presentation of 6 February 2014 by Mr Morgan.}

Several versions of a draft or finalised distribution policy operated whilst AET was Trustee. In an initial draft of the policy dated 5 August 2014, various comments were added, apparently to assist deliberations about the content of the policy, which was then revised and reflected in a substantially updated draft dated 25 August 2014. For instance, the initial draft included provision for continuation of the Abbott use of family buckets, however queries were noted including that there seemed to be a duplication with the hardship (wellbeing & emergency...}
CHAPTER 11: TRUST DISTRIBUTIONS

assistance) category and that, if that was the case, some form of assessment of hardship should have been occurring. It was however decided that family buckets would "no longer exist once existing funds held have been spent in full", as reflected in the 25 August 2014 draft, and subsequent versions of the distribution policy.

Aside from the abolition of family buckets, the main change under AET as compared with Abbott was the introduction of an "Old People's Bucket", a pool of funds available from which to make distributions to those over 60 years of age. Further, whilst the "Old People's Bucket" had an annual cap of $5,000, the policy made it clear that:

The purpose of creating this type of policy is not to provide a set entitlement to old people in a lump sum cash payment, rather to potentially provide money to assist older people over the age of 60 years to meet actual needs and purposes associated with everyday living…

Various categories of distribution were then identified including essential household bills, rent, car repairs and maintenance and items of furniture or whitegoods. The Distribution Policy set out that the money would be released only in quarterly instalments of $1,250.

In respect of economic development assistance, AET had a restrictive policy and did not support such distributions, as considered in more detail under that topic, below.

ISPL Distribution Policies

ISPL reviewed and amended the AET distribution policy and created further documents to assist the community in understanding the distribution policy and how to access support. In its 2017 Annual Report, ISPL informed the community of key changes to the policy as follows:

The TAC has discussed the Distribution Policy a number of times, and changes this year have included:

- Doubling the primary and high schooling amounts
- Removing family buckets
- Increasing and changing Funeral Benefits to include flowers and food/drinks.

In contrast to its predecessors, ISPL has distributed far more money generally, including for a much broader range of projects and economic advancement. At the same time, it has imposed tighter limits over some categories of distributions and in respect of distributions by way of cash. This initiative was soundly based and part of a number of measures taken by ISPL, in particular at the instigation of Mr Parker, to ensure that distributions were made and used consistently with the charitable objects of the Trust Deed. This of itself led to some dissatisfaction, at least to begin with, by persons accustomed to greater access to funds.

The ISPL distribution policy has also undergone a number of changes during the course of the Inquiry. The policy provided by ISPL to the Inquiry in July 2017 differed from that on their website in January 2018, although both documents were titled as at July 2017. The discrepancies were largely, although not entirely, cosmetic. The distribution policy initially provided to the Inquiry is more detailed, particularly in relation to criteria to take into account in approving or denied an application for assistance (ISPL Initial July 2017 Distribution
CHAPTER 11: TRUST DISTRIBUTIONS

Policy.\textsuperscript{233} The distribution policy on the website entitled "Njamal People's Trust Final Distribution Policy July 2017" (and related "Guidelines Njamal People's Trust\textsuperscript{234}") (ISPL Final July 2017 Distribution Policy) was prepared by the then General Manager in Hedland primarily for the benefit of the community. It is shorter, easier to read, and contains less information. It also reflects certain updates to the policy including an increase of the hardship cap, following a TAC resolution, from $500 to $1,000. As of 14 August 2018, the current distribution policy is the 2018/2019 policy (ISPL 2018/2019 Policy). The Hardship cap is now $1,500 and the cap for medical assistance has been increased from $500 to $1,000.

Distribution Limits

The broad distribution categories, limits and budget/allocation for each type of distribution under the Abbott 2013 Distribution Policy,\textsuperscript{235} the AET February 2016 Distribution Policy\textsuperscript{236} and the ISPL Final July 2017 Distribution Policy\textsuperscript{237} and 2018/2019 Distribution Policy are summarised in the table below.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Type & Limit & Notes \\
\hline
Hardship & $1,500 & Increased from $500 to $1,500 \textsuperscript{233} \\
Medical Assistance & $1,000 & Increased from $500 to $1,000 \textsuperscript{233} \\
Lore and Culture & & No monetary limit specified \textsuperscript{235} \\
Culture and Language & & No monetary limit specified \textsuperscript{235} \\
Lore and Heritage & & No monetary limit specified \textsuperscript{235} \\
Community & & No monetary limit specified \textsuperscript{235} \\
Indigenous Education & & No monetary limit specified \textsuperscript{235} \\
Research & & No monetary limit specified \textsuperscript{235} \\
The Arts & & No monetary limit specified \textsuperscript{235} \\
Housing and Community Services & & No monetary limit specified \textsuperscript{235} \\

\hline
\end{tabular}
\end{table}

\textsuperscript{233} Clause 7B of the Distribution Policy sets out the "Procedures for Assistance".
\textsuperscript{234} The guidelines document contains the information formerly contained in the distribution policy.
\textsuperscript{235} Contained in part 11 of the 2013 Policies and Procedures document.
\textsuperscript{236} In relation to AET, the caps were the same under all other distribution policies, with the exception that the initial draft distribution policy for Lore and Culture did not specify a monetary limit.
\textsuperscript{237} The amounts were exactly the same under the Detailed Distribution Policy, with the exception of the cap for hardship, which previously was $500.
Table: Distribution Policies under Abbott, AET and ISPL

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Hardship (AET, ISPL)</td>
<td>Financial limit: $500 per person pa, only if no funds in family bucket.</td>
<td>Financial limit: up to $500 per person pa</td>
<td>Financial limit: up to $1,000 per person pa, unless extenuating circumstances (to be approved by Trustee)</td>
<td>Financial limit: up to $1,500 per person pa. Food to be capped at $100 per voucher, unless living in remote location (ie Marble Bar)</td>
</tr>
<tr>
<td></td>
<td>Total liability: $20,000</td>
<td>Total liability: Not specified</td>
<td>Total liability: $500,000 (indicative budget for 2018)</td>
<td>Total liability: $500,000 (Annual budget for 2018/2019)</td>
</tr>
<tr>
<td>Funerals</td>
<td>Financial limit: up to $8,000 per funeral.</td>
<td>Financial limit: up to $8,000 per funeral</td>
<td>Financial limit: up to $10,000 per funeral</td>
<td>Financial limit: up to $10,000 per funeral</td>
</tr>
<tr>
<td></td>
<td>Total liability: $60,000</td>
<td>Total liability: Not specified</td>
<td>Total liability: $100,000 (indicative budget for 2018)</td>
<td>Total liability: $100,000 (Annual budget for 2018/2019)</td>
</tr>
<tr>
<td>Lore and Culture</td>
<td>Financial limit: to be determined. No cash to be paid.</td>
<td>Financial limit: up to $1,000 per person involved with lore</td>
<td>Financial limit: Up to $500 per application.</td>
<td>Financial limit: Up to $500 per application.</td>
</tr>
<tr>
<td></td>
<td>Total liability: to be determined.</td>
<td>Total liability: Not specified</td>
<td>Total liability: $200,000 (indicative budget for 2018)</td>
<td>Total liability: $200,000 (Annual budget for 2018/2019)</td>
</tr>
<tr>
<td>Preservation of Language and Culture (Abbott) (AET)</td>
<td>Financial limit: to be determined on actual project.</td>
<td>No cap itemised, submissions received</td>
<td>Each application is based on its individual merits and will be decided upon by the Board of Trust.</td>
<td>Each application is based on its individual merits and will be decided upon by the Board of Trust.</td>
</tr>
<tr>
<td></td>
<td>Total liability: Not specified</td>
<td>Total liability: Not specified</td>
<td>Total liability: $50,000 (indicative budget for 2018)</td>
<td>Total liability: $50,000 (Annual budget for 2018/2019)</td>
</tr>
<tr>
<td>&quot;Old People's Bucket&quot; (AET)</td>
<td>n/a (see &quot;Family Buckets&quot;)</td>
<td>Age limit: those above 60 years</td>
<td>Age limit: those above 60 years</td>
<td>Age limit: those above 60 years</td>
</tr>
<tr>
<td></td>
<td>Age limit: those above 60 years</td>
<td>Financial limit: up to $5,000. No requirement to be paid in instalments</td>
<td>Financial limit: up to $5,000. No requirement to be paid in instalments</td>
<td>Financial limit: up to $5,000. No requirement to be paid in instalments</td>
</tr>
</tbody>
</table>
## CHAPTER 11: TRUST DISTRIBUTIONS

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(ISPL)</td>
<td></td>
<td>quarterly instalments</td>
<td>Total liability: $300,000 (indicative budget for 2018)</td>
<td>Total liability: $300,000 (Annual budget for 2018/2019)</td>
</tr>
<tr>
<td>Family Buckets</td>
<td>&quot;Money is occasionally distributed to each family group when there is a need to alleviate financial hardship.&quot;</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td></td>
<td>Total liability: to be agreed with TAC and Trustee.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Education</td>
<td>Financial limit: $250 per child at primary school, $500 per child at secondary/tertiary, $1,000 max per family</td>
<td>Financial limit: primary school up to $250 per child; high school $500 per child</td>
<td>Financial limit: primary school up to $500 per child; high school and tertiary: $1,000 per student</td>
<td>Financial limit: primary school up to $500 per child; high school and tertiary: $1,000 per student</td>
</tr>
<tr>
<td></td>
<td>Total liability: $30,000</td>
<td>Total liability: Not specified</td>
<td>Other requirements: attendance of at least 65% for the calendar year</td>
<td>Other requirements: need to provide up to date enrolment and attendance details</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Total liability: $100,000 (indicative budget for 2018)</td>
<td>Total liability: $120,000 (Annual budget for 2018/2019)</td>
</tr>
<tr>
<td>Medical Assistance</td>
<td>Financial limit: $500 per person pa, up to $50 per day to support a patient and carer while away from home (max 10 days)</td>
<td>Financial limit: up to $500 per person pa + $50 per day (max 10 days) living away from home allowance</td>
<td>Financial limit: up to $500 per person pa + $50 per day (max 10 days) living away from home allowance</td>
<td>Financial limit: up to $1,000 per person pa + $50 per day (max 10 days) living away from home allowance</td>
</tr>
<tr>
<td></td>
<td>Total liability: $20,000</td>
<td>Total liability: Not specified</td>
<td>Total liability: $70,000 (indicative budget for 2018)</td>
<td>Total liability: $80,000 (Annual budget for 2018/2019)</td>
</tr>
<tr>
<td>Critical Illness/Support also called Carers (Patient Support)</td>
<td>n/a (But note that &quot;Medical Assistance&quot; also applied to carer.)</td>
<td>Financial limit: up to $500 per person pa $ Can be increased in special circumstances</td>
<td>Financial limit: up to $500 per person pa $ Can be increased in special circumstances</td>
<td>Financial limit: up to $500 per person pa $ Can be increased in special circumstances</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Total liability: $20,000 (indicative budget for 2018)</td>
<td>Total liability: $20,000 (Annual budget for 2018/2019)</td>
</tr>
<tr>
<td>Sport</td>
<td>Financial limit: $500 per person pa</td>
<td>Financial limit: up to $500 per person pa</td>
<td>Financial limit: up to $500 per person pa</td>
<td>Financial limit: up to $500 per person pa</td>
</tr>
</tbody>
</table>
### CHAPTER 11: TRUST DISTRIBUTIONS

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic Development</td>
<td>Total liability: $20,000</td>
<td>Total liability: Not specified</td>
<td>Total liability: $80,000 (indicative budget for 2018)</td>
<td>Total liability: $80,000 (Annual budget for 2018/2019)</td>
</tr>
<tr>
<td></td>
<td>Financial limit: Up to $5,000 per person pa</td>
<td>Financial limit: No financial support given, assistance with business set up</td>
<td>Financial limit: Each application is based on its individual merits and will be decided upon by the Board of Trustees.</td>
<td>Financial limit: Each application is based on its individual merits and will be decided upon by the Board of Trustees.</td>
</tr>
<tr>
<td></td>
<td>Total liability: $20,000</td>
<td>Total liability: Not specified</td>
<td>Total liability: $80,000 (indicative budget for 2018)</td>
<td>Total liability: $50,000 (Annual budget for 2018/2019)</td>
</tr>
</tbody>
</table>
CHAPTER 11: TRUST DISTRIBUTIONS

Categories of Distribution

The general categories in respect of which the Trustees allocated and distributed Trust Funds are fairly similar, sometimes using different labels to cover similar areas.

The Inquiry has considered, and is satisfied that, the provision of payments within the categories adopted was generally consistent with the advancement of the Trust’s charitable objects. Certain areas of possible concern identified are highlighted later in this Chapter.

By reference primarily to the rationale advanced by Abbott in relation to the Abbott 2013 Distribution Policy (which has in turn been reflected and amplified in other documents the Inquiry received from AET and ISPL), the Inquiry makes the following comments in relation to the link between the following categories of distribution and advancement of charitable objects.

Wellbeing/Emergency Assistance/Hardship

This category was established with the objective of having a fund available for emergency assistance to assist people in times of hardship. The Inquiry is satisfied that payments of this nature are charitable under the recognised first head of charity. Further, the Trust Deed specifically provides that one of the ways in which the Trustee may apply the Trust Fund to achieve its objects is to improve the economic position, self-reliance and independence of the Beneficiaries as well as advancing the condition and welfare of the Beneficiaries.

Funerals

According to the Abbott 2013 Distribution Policy, this category was established to assist in reducing the financial burden on family when they have lost a member and to ensure that deceased Njamal people are buried with dignity and respect and in the appropriate cultural manner requested by the family.

At general law, funerals are regarded as a purpose beneficial to the community. This may extend to the maintenance of aboriginal traditional practices and custom, transportation of relatives of the deceased and food for visitors to the funeral.

In any event, the Trust Deed specifically provides that one of the ways in which the Trustee may apply the Trust Fund to achieve its objects is by way of distributions for funeral expenses of the Beneficiaries.

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238 Commissioners for Special Purposes of Income Tax v Pemsel [1891] 1 AC 531, 580.
239 Trust Deed, clauses 4.2(c)(i) and 4.2(c)(iv).
242 Trust Deed, clause 4.2(c)(viii).
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Lore and Culture
This category was established with the objective of supporting and assisting the continuation of lore business.

The lore ceremony is culturally significant to Aboriginal people, in the Pilbara and elsewhere. Lore ceremonies are carried out at specific lore grounds that have cultural importance. Njamal Elders and the Njamal People more generally see traditions such as lore and cultural ceremonies as central to the welfare and success of the Njamal People.243

The "Lore Time" for the Njamal People runs between October and February of consecutive years. During Lore Time members of the Njamal community travel to traditional lore grounds for lore and culture. Not everyone in the community attends the traditional lore grounds but people may attend if their family is affected (for example, a family member is being initiated).

Through the Trust, lore and culture payments are paid to meet various associated costs such as for food and travel costs (eg petrol) incurred in relation to lore matters. Non-Njamal people are not permitted to visit the lore grounds. This has led to practical difficulties for Trustees to ensure that Trust funds paid for the purpose of lore and culture have in fact been applied for that purpose.

Culture/Preservation of Language and Culture
This category was set up with the objective of recording and maintaining the Njamal language, stories and culture, which is consistent with the charitable objects of the Trust.

The Trust Deed specifically provides that one of the ways in which the Trustee may apply the Trust Fund to achieve its objects is by maintaining the cultural and spiritual heritage of the beneficiaries.

Old People's Bucket/Elders
Neither the Abbott 2012 Distribution Policy nor the Abbott 2013 Distribution Policy made specific provision for funds to be paid to the elderly in the community. In May 2012, the TAC resolved however to add a new category of distribution, an "Elders Fund" and endorsed a sum of $2,900 being distributed to each Elder. As a large proportion of the family buckets were distributed to Elders, it appears that these payments may have been distributed through the family bucket system, although the Inquiry has not been able to confirm this as they were made at a time before the current management at Abbott.

More recently, under AET and ISPL, distributions to elderly members of the Njamal community have formed a significant part of the Trust's distributions.

243 Jolly Read, Peter Coppin, Kankushot: The Life of Nyamal Lawman Peter Coppin (Aboriginal Studies Press, 1999m, Canberra), 155.
CHAPTER 11: TRUST DISTRIBUTIONS

A distribution to a person on the basis of advanced age is a recognised charitable purpose. The relief of "aged, impotent and poor" is one of the established categories of charity as set out in the preamble to the Statute of Elizabeth.\(^\text{244}\) It is now regarded as well settled law that this category is be read disjunctively notwithstanding the word "and", so that aged people need not also be poor to come within the purpose.\(^\text{245}\)

As to whether it is necessary for each recipient of a distribution on the basis of age to demonstrate that they were in need: the courts have found that a disposition for the benefit of persons who exceed a specified age is for the purpose of relieving the needs of advancing age. This is on the basis that the disabilities of old age are too well known to require proof.\(^\text{246}\)

The burdens of the aged, including the well-to-do and wealthy aged are many: loneliness, inability to usefully employ their superannuated leisure, being but a few.

The age above which it will be assumed that relief of the disabilities of age was intended is not set in stone, but depends upon temporal and social construction: for example, gifts to persons aged 70 and above carry a strong inference that the gift is for the relief of needs stemming from advanced age;\(^\text{247}\) as are gifts for those over the usual age of retirement (65 years).\(^\text{248}\) In the late 1800s, when life expectancies were significantly lower, 50 years was considered an advanced age.\(^\text{249}\)

Taking this into account, and given that the average life expectancy for an indigenous person in this country is estimated to be 10 years lower than a non-indigenous person,\(^\text{250}\) a distribution to an indigenous person over the age of 60 years to assist with the burdens of age would likely be considered, on the face of it, a charitable distribution.

**Family Bucket Distributions**

This category is subtitled "on the basis of financial hardship", the apparent intent being to bring distributions of this type within the recognised poverty head of charity. In practice

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\(^{244}\) Charitable Uses Act 1601, see also Income Tax Special Purposes Commissioners v Pemsel [1891] AC 531.

\(^{245}\) Re Glyn's Will Trusts; Public Trustee v Attorney General [1050] 2 All ER 1150, applied in many cases including WA in West Australian Baptist Hospital & Homes Trust Inc v City of South Perth [1978] WAR 65; cf Martin CJ in Flynn v Mamarinka (1996) 130 FLR 218 where he held that the relief of the aged comes within the fourth head of charity (other purposes beneficial to the community). This finding has been criticized in commentary, Dal Pont (Law of Charity, 2nd Edition, [8.27]) arguing that this view must be incorrect, as under the fourth head the element of 'benefit' to the community must be affirmatively provided, under the other heads the 'benefit' is presumed.

\(^{246}\) Trustees of Church Property of the Diocese of Newcastle v Lake Macquarie Shire Council (1975) 33 LGRA 11, 19 (Hutley JA), followed in WA Baptist Hospital, above.

\(^{247}\) D V Bryant Trust Board v Hamilton City Council (1997) 3 NZLR 350 (Hammond J).

\(^{248}\) Re Cottam’s Will Trusts [1955] 3 All ER 704, 705.

\(^{249}\) See Re Wall (1889) 42 Ch D 510, 512.

CHAPTER 11: TRUST DISTRIBUTIONS

however the use of Family Buckets has been fraught with difficulty as discussed later in this Chapter of the Report, particularly from page 585 and following.

Education

This category was set up with the objective of supporting Njamal children in attending school, which in the Inquiry's view is consistent with the Trust's charitable objects. The advancement of education is a recognised head of charity. Further, the Trust Deed specifically provides that the Trustee may apply the Trust Fund to achieve its objects by:

...  
(ii) providing assistance to the Beneficiaries to undertake training or other further education or personal advancement programs;  
...  
(vi) promoting and advancing vocational and career orientated education and training to the Beneficiaries.

Medical Assistance and Critical Illness / Support / Carers (Patient Support)

These categories were established with the objective of assisting Njamal People with health care costs that fall outside normal health insurance or standard health care benefits.

The Trust Deed specifically provides that one of the ways in which the Trustee may apply the Trust Fund to achieve its objects is by distributions for medical expenses of the Beneficiaries.

Sporting

This category was established with the objective of supporting Njamal people in the pursuit of sporting activities. The Inquiry is satisfied that, in the context of the Njamal People, the object of this distribution category is ultimately to advance charitable objects. While generally the promotion of sporting activities would not, of itself, be considered to be a charitable purpose, such activities may, in an appropriate context, be properly characterised as advancing such purposes.

Whether sports and recreational grants (including funding for travel to and from events) for Aboriginal people were for "charitable purposes" was considered by Martin CJ in Flynn v Mamarika, Martin CJ considered held:

If the promotion of sport and recreation is for the benefit of the community it may be for a charitable purpose. They may be regarded as for the advancement of education, particularly physical education or the enhancement of physical proficiency and efficiency. For a member of the community, the ability to visit other places may be an important aspect in the

251 Commissioners for Special Purposes of Income Tax v Pemsel [1891] 1 AC 531, 580.  
252 Trust Deed, clauses 4.2(c)(ii) and 4.2(c)(vi).  
253 Trust Deed, clauses 4.2(c)(viii).  
254 Flynn v Mamarika, 227-228.
advancement of education. The enhancement of physical wellbeing could be for a charitable purpose.

Further, provision of facilities for recreation or other leisure-time occupation is deemed to be charitable, if the facilities are provided in the interests of social welfare and the requirements of section 5(2) of the Charitable Trusts Act 1962 are met.

**Economic Development – Business Assistance**

This category was established with the objective of assisting Njamal People to have the opportunity to go into business. Payments under this category are potentially problematic: on the face of it, distributions to individuals for the purposes of those individuals establishing small businesses, from which they will derive personal income and profit, are difficult to characterise as charitable.

This topic is considered separately below.

**Trustee Distributions**

The Inquiry has also reviewed distributions made by the Trustees generally, as well as reviewing in greater detail selected distributions made by each Trustee. A greater focus has been placed on distributions made by ISPL for reasons including that the current Trustee has continuing control over the Trust Fund and distributions have significantly increased under ISPL, including in categories such as economic assistance where there is greater uncertainty about the boundaries within which such distributions are permissible.

**Abbott Distributions**

**2012/2013 and 2013/14 Distributions**

According to the 2012/13 financial statements, Abbott expended in the vicinity of $1 million. Given issues in relation to the manner in which distributions were then accounted for and classified in the financial statements for the Trust, it is difficult to comment on the actual amount expended by way of distribution rather than other trust expenditure and to compare with subsequent financial years, hence the reported figures in the Abbott financial statements are not included in the preceding comparative table. During the 2013/2014 financial year, Abbott made distributions of approximately $330,000. This significant decrease in distributions from 2012/2013 reflects the fact that the Trust was in caretaker mode for half of that financial year from late October 2013 to June 2014.

The Inquiry requested that Abbott provide the documentation associated with the 5 largest distributions and at least 3 other distributions made during each of the 2012/2013 and 2013/2014 financial year, as well as documentation associated with at least 3 applications or requests which were refused during each financial year. Additional detailed information was sought and provided in relation to a range of related matters including in relation to the circumstances in which cash payments, lore payments and family group payments were made.
CHAPTER 11: TRUST DISTRIBUTIONS

Most of the distributions were considered and approved in accordance with Abbott's distribution policies including payments for funeral assistance that were below the cap in the distribution policy.

A number of the largest distributions reviewed were reflective of a pattern that emerged in the course of the Inquiry: high amounts being distributed to more senior members of the Njamal community and large cash or direct payments being distributed through the family bucket system and for lore and culture.

An analysis of Abbott's distributions shows that almost one third of distributions were made from pooled funds allocated to each family group, called “family buckets”. The use of family buckets is common in indigenous charitable trusts and can be problematic. A significant proportion of funds distributed under Abbott by way of family buckets were distributed to Elders in the community. ISPL and AET both have a separate distribution category for older people, Abbott did not have such a category of distribution. For a period of time AET also adopted an emergency bucket system, at the request of TAC, which had similarities to the family bucket system.

These topics are considered separately below, as well as certain transactions that illustrate the Inquiry’s concerns.

Although not always the case, the level of documentation provided by Abbott in support of the transactions reviewed was generally of a good standard to enable the nature and circumstances of the request for assistance and process followed in considering and approving it to be readily ascertained. The transactions in respect of which there was less documentation and explanation of the precise circumstances for a proposed distribution tended to be in the context of family bucket payments and certain lore and culture payments.

Many payments in respect of lore and culture and family buckets were made by direct transfer. In some circumstances the documentation was incomplete (including in the context of a payment by Ms Westerman where she was requested to provide a statutory declaration but no record was provided by Abbott of this having been returned).

Where applications were refused the reason for the refusal was documented and reasons were within the policy and Trustee’s discretion including based on the applicant not being a beneficiary, the application being for a reimbursement where the supplier had been paid directly.

**AET Distributions**

**2014/2015 and 2015/16**

The financial statements for the Trust for the year ended 30 June 2015 record that approximately $300,000 in distributions were made that year. The financial accounts provided to ISPL in May 2016 from AET record a total of $862,508 in distributions for that financial year by AET.
CHAPTER 11: TRUST DISTRIBUTIONS

The Inquiry requested that AET provide the documentation associated with the 10 largest distributions and at least 5 other distributions made during each of the 2014/2015 and 2015/16 financial years, and at least 5 applications or requests which were refused during each financial year. Additional relevant information and documentation was also sought and provided.

Based on the Inquiry’s review it is apparent that AET strictly applied its distribution policies. Invoices had to be provided and the supplier was then paid directly. Where applications were for amounts that exceeded the cap in the Distribution Policy, AET consistently refused to pay the amount over and above the cap and distributions were made in accordance with the distribution policy. The TAC Minutes from AET’s period as Trustee also reflect that significant distributions were specifically considered by the TAC before being approved.

Where applications were refused the reason for the refusal was documented and reasons were all within the policy and Trustee’s discretion, such as the applicant in question having already had assistance in that category during that financial year.

One area of some concern however concerned distributions made during the 2015/16 financial year under the emergency bucket system, reintroduced at the request of TAC during the period that AET’s trusteeship was being questioned (see below on page 585).

ISPL Distributions

Consistently with its general pattern of being highly engaged in the community, ISPL has been active in providing distributions to the Njamal community, with a twofold increase in distributions since its appointment. This increase in distributions has occurred in the context of the Trust’s membership increasing by 20%\(^{255}\) and the Trust taking on a more active role in native title, liaising with mining companies and promoting business and employment opportunities for Njamal People.

In 2016/2017 approximately 1,600 distributions were approved, as summarised below.\(^{256}\)

<table>
<thead>
<tr>
<th>Distribution Type</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elders</td>
<td>$349,781</td>
</tr>
<tr>
<td>Lore &amp; Culture</td>
<td>$210,836</td>
</tr>
<tr>
<td>Funeral</td>
<td>$77,513</td>
</tr>
<tr>
<td>Sports</td>
<td>$73,659</td>
</tr>
<tr>
<td>Education</td>
<td>$82,360</td>
</tr>
</tbody>
</table>

\(^{255}\) 2017 Annual Report: membership in 2016/2017 increased from 498 families to 615 families.

\(^{256}\) Table taken from audited Financial Report at Note 3. Note that payments for Project Liaison Officers, Native Title Expenses and subsidiary funding accounted for as distributions are all included in the financial report, giving a total of approximately $2.82m. These amounts are considered elsewhere in the Report.
CHAPTER 11: TRUST DISTRIBUTIONS

<table>
<thead>
<tr>
<th>Distribution Type</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hardship</td>
<td>$241,632</td>
</tr>
<tr>
<td>Health Distribution</td>
<td>$37,810</td>
</tr>
<tr>
<td>Economic Development</td>
<td>$171,066</td>
</tr>
<tr>
<td>Community Projects</td>
<td>$394,155</td>
</tr>
<tr>
<td>Carer’s Assistance</td>
<td>$13,860</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$1,652,472</strong></td>
</tr>
</tbody>
</table>

In its July 2017 submission to the Inquiry, ISPL provided a graph setting out these distributions as a proportion of total distributions, as is set out below:

![Community Funding NPT 2016/17](image)

On 10 November 2017, Ms Guo from ISPL’s Perth office emailed a copy of a spreadsheet listing all distributions made to date in the 2017/2018 financial year. Based on that spreadsheet, the distributions made in the first four and half months of this financial year follow a similar pattern to the previous financial year. The Inquiry has not undertaken a specific further examination of routine distribution transactions that have been entered into during the 2017/18 financial year. However, some information provided to the Inquiry relates generally to the nature and extent of such distributions. Further information regarding 2017/2018 distributions is set out in the unadjusted trial balance as at 24 May 2018. The trial balance accounts for distributions as equity and as such, includes the total distributions made in each category by ISPL since May 2016.

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These graphs were based upon the unaudited figures, the audited amounts do not materially change the proportions of distributions paid.
CHAPTER 11: TRUST DISTRIBUTIONS

These figures, compared with the amounts spent in the 2016/2017 financial year are summarised below.

<table>
<thead>
<tr>
<th>Category</th>
<th>Total equity (May 2016 to May 2018)</th>
<th>2016/2017 FY 269</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carer’s Assistance</td>
<td>20,503</td>
<td>13,660</td>
</tr>
<tr>
<td>Economic Development</td>
<td>330,223</td>
<td>171,066</td>
</tr>
<tr>
<td>Education</td>
<td>141,288</td>
<td>82,360</td>
</tr>
<tr>
<td>Elders/Old People</td>
<td>488,576</td>
<td>349,781</td>
</tr>
<tr>
<td>Funerals</td>
<td>114,290</td>
<td>77,513</td>
</tr>
<tr>
<td>Hardship</td>
<td>353,332</td>
<td>241,632</td>
</tr>
<tr>
<td>Lore &amp; Culture</td>
<td>32,187</td>
<td></td>
</tr>
<tr>
<td>Lore &amp; Culture 2016</td>
<td>185,261</td>
<td>210,836</td>
</tr>
<tr>
<td>Lore &amp; Culture 2017</td>
<td>14,367</td>
<td></td>
</tr>
<tr>
<td>Medical / health</td>
<td>55,793</td>
<td>37,810</td>
</tr>
<tr>
<td>Sports</td>
<td>96,057</td>
<td>73,659</td>
</tr>
<tr>
<td>Total (excluding Projects)</td>
<td>$1,831,877</td>
<td>$1,258,317</td>
</tr>
</tbody>
</table>

Nearly 70% of total distributions made by ISPL between May 2016 and May 2018 were made in the 2016/2017 financial year, 260 with only 32% of distributions being made collectively in the periods of May to June 2016 and July 2017 to late May 2018.

A more detailed analysis of individual distributions, by distribution category, is set out below, noting that not all information that the Inquiry has been given by ISPL has been entirely consistent and complete and classification of some distributions has varied between initial internal records and final audited financial statements.

Emergency Relief from Financial Hardship

Policy: The cap for hardship has steadily increased: under the 2016 Distribution Policy, hardship distributions were capped at $500 per Njamil person per year. Under ISPL’s 2017 Final Distribution Policy, the cap was increased to $1,000 per Njamil person per year and, under the 2018/2019 Policy, the cap has increased to $1,500 per Njamil person per year. 261

The amounts distributed under this category totalled nearly $190,000 for 2016/2017. The summary provided to the Inquiry by ISPL and ISPL’s 2017 Annual Report record that 690

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260 24 May 2018 unadjusted trial balance.
260 $1,258,317 / $1,831,873 = 68.7%.
261 2017 Policy.
CHAPTER 11: TRUST DISTRIBUTIONS

applications were approved, 89 declined and 18 lapsed. The number is materially greater than the number of applications in a distribution spreadsheet provided to the Inquiry, suggestive that the spreadsheet was incomplete or numbers overstated. That is also supported by the 2016/17 audited financial statements which record distributions in this category totalling $241,632. That may also, in part, be explained by the reclassification of various payments that had been recorded as loans, as distributions.

Given the cap for hardship in the ISPL 2016 Distribution Policy was $500 unless extenuating circumstances applied, this policy was either not consistently applied, or there were many instances of extenuating circumstances in 2016/2017: at least 20 hardship distributions over $1,000 were made that year, with many more over $500. ISPL’s policy that distributions over $500 were permitted, when approved by Mr Carter, was explained at the Roeburn Community meeting on 25 March 2017. The repeated exceedence of the hardship cap, together with the fact that the cap was later increased to $1,000 and, more recently, $1,500, suggests that the cap may have been too low. The budget for distributions in cases for hardship has also been increased: the 2017 Distribution Policy includes an indicative financial budget for 2017/2018 of $500,000, an increase of over $300,000.

A selection of the hardship distributions was identified and specific further information obtained to better understand the basis of the payments, as summarised below:

<table>
<thead>
<tr>
<th>Date</th>
<th>Amount</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>01.12.16</td>
<td>$3,113.00 Retravision $3,243.00 Emporium</td>
<td>Recipient had recently been released from Prison and these costs were incurred in setting up a house.</td>
</tr>
<tr>
<td>05.12.16</td>
<td>$9,005.14 N &amp; L Mechanical</td>
<td>Amounts relate to repairs to car, which broke down during Lore &amp; Culture. Although this has been accounted for as &quot;hardship payments&quot;, it was accounted for as a loan and the documentation suggests that it will be repaid from TAC fees: A &quot;TAC Service Agreement&quot; was entered into by the recipient on 9 December 2016.</td>
</tr>
<tr>
<td>21.07.16</td>
<td>$2,500 Rent</td>
<td>Loan to a TAC member/Project Liaison Officer for rental bond (not clear if paid back)</td>
</tr>
<tr>
<td>28.07.16</td>
<td>$3,000 Loan</td>
<td>Loan to same TAC member/Project Liaison Officer for rental bond (since paid back by instalments)</td>
</tr>
<tr>
<td>26.09.16</td>
<td>$1,469 Vet</td>
<td>Recipient's dog was bitten by a Gwarda (brown snake) whilst protecting her young child. The vet would not start treatment until payment was confirmed and her pay date was later on in the month. The payment from the trust saved the dog's life.</td>
</tr>
<tr>
<td>04.10.16</td>
<td>$8,090 Freshstart</td>
<td>This amount covered costs associated with rehabilitation of recipient.</td>
</tr>
</tbody>
</table>

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262 Classified as a "loan" in accounts.
CHAPTER 11: TRUST DISTRIBUTIONS

<table>
<thead>
<tr>
<th>Date</th>
<th>Amount</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$5,000</td>
<td>This amount was to assist above recipient in his initial rent ($2,000) and furniture ($3,000) in establishing himself after completing rehabilitation.</td>
</tr>
<tr>
<td></td>
<td>Rent &amp; Furniture</td>
<td></td>
</tr>
<tr>
<td>18.07.16</td>
<td>$1,303.90</td>
<td>Money needed to transport vehicle from Perth to Port Hedland so that recipient (a school leaver) could attend new job with mining company.</td>
</tr>
<tr>
<td></td>
<td>Vehicle Transport</td>
<td></td>
</tr>
</tbody>
</table>

Many of the amounts significantly exceeded the usual hardship cap. In several cases the payments raise questions as to the making of loans or advances to TAC members and employees or Project Liaison Officers as discussed in Chapters 8 and 10 of the Report.

**Education Assistance**

**Policy:** Under each of the ISPL Distribution Policies an upper limit of $500 per child in primary school and $1000 per secondary and tertiary students has applied.\(^{263}\)

ISPL has placed a focus on assistance for education, with an increase in amounts being offered, together with increased assistance to apply for scholarships. In 2017, approximately $82,000 was distributed in respect of 117 applications for Education Assistance.\(^{264}\) 28 applications were declined and 13 lapsed. Further, ISPL’s office assisted Njamal students with seeking out and applying for external scholarships, with one young Njamal woman being awarded a Madalah scholarship to study in Perth in January 2018.\(^{265}\)

It is not immediately obvious from the 2016/2017 spreadsheet provided by ISPL whether the policy is being applied, as it is not clear how many students each distribution applied to. The distributions reviewed are all clearly for the purpose of education, however the cap in the Distribution Policy was exceeded in some cases without any documented basis as to why the cap was exceeded.

**Carers**

**Policy:** Under all of ISPL’s Distribution Policies, carer’s distributions have been capped at $500 per registered Njamal person per year.

In 2016/2017, approximately $13,000 was distributed in respect of 30 applications for Carer’s Assistance. With the exception of one flight ticket for $802, all distributions in 2016/2017 were within this cap.

**Sport**

**Policy:** Under all of ISPL’s Distribution Policies, sport distributions have been capped at $500 per registered Njamal person per year.

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\(^{263}\) 2017 Policy, 8F; 2016 Policy.

\(^{264}\) Annual Report, 19.

CHAPTER 11: TRUST DISTRIBUTIONS

In 2016/2017 according to a summary response from ISPL dated 18 September 2017, approximately $150,000 was distributed in respect of 87 applications for Sport and Recreation Assistance and 12 applications were declined and 3 lapsed. In the 2016/17 audited financial statements the amount distributed under this category is however recorded as $73,659, reflecting apparent differences in categorisation, the explanation for which is not clear to the Inquiry. The distribution spreadsheet records payments to some individuals significantly in excess of $500. However, it appears that these individuals were responsible for a Njamal sports team. For example, on the application of one TAC member $18,300 was distributed over several distributions (each in excess of $500), in relation to basketball related expenditure. These amounts do not all relate to him personally, with significant amounts relating to the Halls Creek Basketball competition in November 2016 and food and fuel in relation to a basketball ball team that month. Further, publically available information suggests that the TAC member is involved with the Njamal basketball team.

Economic Development/Business Assistance//Language & Cultural Assistance

Approximately $171,000 was recorded in the summary provided to the Inquiry as having been expended in respect of 21 applications supporting the "economic development of Njamal individuals and family businesses". No applications were recorded as being refused however the minutes of TAC meetings recorded that various applications for support were not supported by the TAC. In response to further requests for clarification, it was later advised to the Inquiry that approximately $33,000 in fact related to Language and Cultural Assistance projects. Further, most the expenditure accounted for in this category related to charges incurred for time spend by Mr Green and his daughter in providing assistance or attending to project work.

The nature of these payments are considered in a later section of this Chapter concerning economic development/business assistance.

Language and Cultural Assistance Projects

This category of distributions has been included in distribution policies since 2013. In the audited 2016/2017 annual report, expenses relating to this category were reported under the "Economic Development" head of distribution. According to the breakdown provided by ISPL, just over $33,000 of the Economic Development distribution is attributable to "Language and Cultural Assistance projects". These projects have been listed as:

1. Cultural Awareness for Mining Companies;
2. Miscellaneous costs Language Project (of the $16,000 listed under this project, most money was spent between a recording for Barry Taylor Jnr's band and tickets to the Parkerville Charity lunch);
3. Pilbara Foundation – Eaton's Project;

See for example, 2013 Distribution Policy, 11.3.
CHAPTER 11: TRUST DISTRIBUTIONS

4. Pippingarra Community Development Retention of Identity;
5. Walker Cultural Language and Lore Documentation and Recordings;

With the exception of the first two projects, these projects have been separately accounted for under the "Community Projects" head of distribution, discussed below. As best the Inquiry could ascertain, it appears that for such projects, only Mr and Ms Green's time was categorised under the Economic Development head of distribution, the remainder of costs being accounted for separately under "Community Projects".

Funeral Assistance

Policy: Under the 2016 Distribution Policy, a cap applied of $8,000 per Njamal person's funeral, which was increased in 2017 to $10,000 per Njamal person's funeral.267

In 2016/2017 approximately $85,000268 was distributed in respect of 11 applications for Funeral Assistance.269 5 applications were declined and 2 lapsed. An examination of the distribution spreadsheet reveals that the cap was exceeded on two occasions: total costs associated with two funerals exceeded $8,000, but not significantly. One of these distributions, a headstone which cost $12,600, was for a person whose funeral had been paid by the Trust under AET the previous financial year.

Medical Assistance

Policy: Under the 2016 Distribution Policy, a cap applied of $500 per person per financial year.

In 2016/17 approximately $41,000 was expended in respect of 81 applications for medical assistance. 13 applications were declined and 3 lapsed.

Elders / Old People's Fund

Policy: Under all of ISPL's Distribution Policies, this has been capped at $5,000 per financial year per registered Njamal person over 60 years of age ("Elder"), "or as deemed necessary".270 Historically, distributions were capped at $10,000 per Elder. The 2018/2019 Policy contains no express provision for exceeding the cap.

In 2016/17 approximately $370,000 was distributed in respect of 163 applications for the "over 60s" program. This averages approximately $2,300 per application. However, some individuals received amounts significantly in excess of the average and of the cap.

The highest amounts disclosed included amounts of approximately $17,100, $15,500, $13,900 and $16,600 to four Elders who were either Applicants or TAC members. The basis for this classification of these payments is not entirely clear on the materials provided to the

268 The 2017/17 audited financial statements record a slightly reduced amount of $77,513.
269 2017 Annual Report, 11.
270 2016 and 2017 Distribution Policies, 8.e.
CHAPTER 11: TRUST DISTRIBUTIONS

Inquiry. For example, in the case on one recipient the funds also appeared to include funds for a liaison role that person had been engaged to perform. Significant amounts expended included in relation to vehicle repairs and in two cases, second hand vehicle acquisitions, in one case for a recipient who could not herself drive, to assist with her transportation needs.

Lore and Culture

Policy: Under all of ISPL’s Distribution Policies, this has been capped at $500 per Njamal Person, with a total cap of $200,000.

In 2016/2017, approximately $210,000\(^{271}\) was distributed in respect of 128 applications for Lore and Culture. 37 applications were declined and 5 lapsed. An examination of the distribution spreadsheet provided to the Inquiry reveals that the cap was exceeded on almost every occasion, with many distributions in excess of $2,000, although the payments may on many occasions have been to assist more than one eligible Njamal person rather than just the applicant named in the spreadsheet.

A range of explanations are identified in the spreadsheet for the payments including car service, car repairs, food and fuel, Lore & Culture, L&C Meeting and Pilbara Sport. A number of entries were incomplete. It is not immediately clear how payments made for vehicle repairs at a time of year when it was not usual lore season, were for the purpose of furthering lore and culture in the community.

Many entries were recorded in the accounts on or around 13 October 2016 for a lore and culture meeting, so it appears that many of the above entries relate to a meeting in mid-October 2016.

Concerns have been generally raised about the approach of distributing funds for law and culture, particularly by way of cash payments or direct electronic distributions. These are considered below in a section considering issues associated with these types of payments.

In the case of ISPL, it has been suggested that ISPL has endeavoured to adopt a far more rigorous approach to distributing funds for law and culture to ensure that they are appropriately distributed and used for those purposes and to reduce the scope for abuse of the system as has previously occurred. The Inquiry encourages such steps to be taken to ensure funds are being disbursed consistently with the Trust Deed requirements and that they are used for their intended purpose.

Community Projects

The 2016/2017 audited financial report, records a total distribution of $394,155 for Community Projects for the financial year ended 30 June 2017.

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\(^{271}\) The Annual Report records however $201,352.47 for 128 applications approved.
CHAPTER 11: TRUST DISTRIBUTIONS

The total amounts (before any adjustments) expended on Community Projects between May 2016, when ISPL was appointed Trustee, and 24 May 2018 are disclosed in the unadjusted trial balance report provided to the Inquiry.

Table: Total spent on Projects as per unadjusted trial balance as at 24 May 2018

<table>
<thead>
<tr>
<th>Project</th>
<th>Amount ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barry Taylor – South Hedland Football (sic) Project</td>
<td>21,440.28</td>
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<tr>
<td>Carbon Tree Farming Project</td>
<td>47,294.01</td>
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<tr>
<td>Community Recreation Project</td>
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<tr>
<td>Education for Children Project</td>
<td>2,546.05</td>
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<tr>
<td>Homeswest Housing Proposal Project</td>
<td>28,936.64</td>
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<tr>
<td>Mark Walker Return to Country Project</td>
<td>65,871.94</td>
</tr>
<tr>
<td>Njmal Christmas Food Vouchers Project</td>
<td>94,460.00</td>
</tr>
<tr>
<td>PBC Country Meeting Project</td>
<td>4,243.98</td>
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<tr>
<td>Perth Community Carer Units Project</td>
<td>52,887.36</td>
</tr>
<tr>
<td>Pippingarra Drugs &amp; Aged Care Project</td>
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<td>Pippingarra Language and Culture Camping project</td>
<td>275,109.83</td>
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<td>Pippingarra School Holidays Project</td>
<td>4036.46</td>
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<tr>
<td>Road-mapping Project</td>
<td>29,942.00</td>
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<tr>
<td>South Hedland Football Club Sponsorship</td>
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<td>Training – Security Project</td>
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<tr>
<td>Training – Work Ready Project</td>
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<tr>
<td>ED Project - Carnarvon Work Ready</td>
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<tr>
<td>ED Project - Community Bus - Carnarvon</td>
<td>5,286.79</td>
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<tr>
<td>ED Project – [redacted] Loan for child</td>
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</tr>
<tr>
<td>ED Project – [redacted] Horse Training Loan</td>
<td>150.00</td>
</tr>
<tr>
<td>ED Project - Members Housing Policy</td>
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</tr>
<tr>
<td>ED Project - Minoo Malgoo Child Care &amp; Njmal Office</td>
<td>1,100.00</td>
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<tr>
<td>ED Project- PBC and Rule Book</td>
<td>2,325.00</td>
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<tr>
<td>ED Project - Perth Short Stay Accommodation (B)</td>
<td>600.00</td>
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<td>ED Project - PHE office</td>
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<td>ED Project - Pippingarra Facilities</td>
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<tr>
<td>ED Project - Redbank/South Hedland Public Health Building</td>
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<tr>
<td>ED Project - Renting of P&amp;E- CMB Resources</td>
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<td>ED Project- [redacted] FHOG</td>
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<tr>
<td>ED Project - Vehicles for Law People</td>
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<td>ED Project - Youth Boxing</td>
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<tr>
<td>ED Project-Determination Celebration for L&amp;C</td>
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<tr>
<td>ED-Project Community (sic) Bus Hedland &amp; Roebourne</td>
<td>7,370.04</td>
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## CHAPTER 11: TRUST DISTRIBUTIONS

<table>
<thead>
<tr>
<th>Project</th>
<th>Amount ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>$897,262.94</td>
</tr>
</tbody>
</table>

Details of projects supported by ISPL are set out in the next Chapter of the Report in relation to the Trust’s involvement in the community.

Like its predecessors, ISPL did not simply approve every application. An examination of records produced to the Inquiry establishes that over 100 applications were refused for a variety of recorded reasons, which appeared to be consistent with the policy and the Trustee's discretion, including that applicants were over their cap, did not meet the criteria or were made by non-beneficiaries. The Inquiry has also reviewed TAC minutes which record many larger applications being put before the TAC for its consideration. For example, on 11 April 2017 applications for car repairs and for $30,000 towards helicopter training were not supported by the TAC on the basis that the applicants were employed and were not in need of financial assistance.

### ISPL practices and issues of concern

After its appointment as Trustee in May 2016, significant steps were taken by ISPL in a short period of time to develop and implement a distribution system that was accessible to the Njamal People and ensured that their applications were promptly dealt with, via the Hedland or Perth office. Mr Carter, in particular, was available at all hours to assist persons seeking assistance. Given the number of activities engaged in, increasing requests for recognition as beneficiaries and challenges in establishing and training new staff, it is unsurprising that there were a number of teething problems.

Some issues however were more enduring and symptomatic of broader issues in relation to the management of distributions within ISPL.

One issue of which the Inquiry was made aware by a number of persons was that, in 2017 in particular, there was a degree of disconnect between the Perth and Hedland offices and issues in relation to a lack of clear communication and clarity surrounding roles and responsibilities and decision making.

The then General Manager had a range of concerns including in relation to inconsistency of approach by the Perth office as compared to the Hedland office, which dealt with most routine applications, and lack of consistent communication in relation to such matters. He referenced expressing a degree of frustration that applications he had refused or only approved up to a certain limit, particularly those relating to large items such as cars, were later overridden by or on the instructions of Mr Carter in the Perth Office. People were seen to be going the decision making at the Hedland office and approaching Mr Carter, who had delegated authority from the ISPL Board to make such decisions. That concern was also reflected in an email of 28 August 2017 from ISPL director, Mr Aird, shortly before he resigned, to the recently appointed
director, Mr White, in which he set out a note of their meeting on 17 August 2017. Regarding Mr Carter, he stated, amongst other things:

> Within the Njamal group there remains the perception that he is 'the man' and the 'go to' person for approval of financial assistance – even if this means overturning a negative decision made by the Hedland office in line with the Trust Distribution Policy.

The former General Manager was also concerned that distributions were approved by the Perth office which did not meet the criteria in the policy and in some cases may not have been permissible given charitable objects of the Trust. That was in part based on his strong sense of responsibility for ensuring payments were compliant with the Trust's objectives and policies and experience working at another indigenous charitable trust where some distributions made by ISPL would not have been allowed in his previous employment.

Concerns of the former General Manager included:

(i) payment of cash or bank transfer directly to members;
(ii) cars being purchased via programs under the charitable trust;
(iii) using multiple programs to assist members (ie, accounting for the one transaction partially in Emergency Relief and partially in Old Peoples fund);  
(iv) loans to members; and
(v) reimbursements being paid to members (the concern being that, if the person could afford to pay in the first place, they would not be in genuine financial hardship).

A number of these areas of concern are considered separately in the Report; see, for example discussion on cash payments in this Chapter at page 575 and following and the discussion of loans in Chapter 8.

The Perth Office's approach to distributions, particularly approving an application previously refused by the former General Manager was one of the factors influencing his eventual departure from the Trust.

The Inquiry accepts that morale at the Hedland office was also impacted by such matters. It was also contributed to by the approach Mr Carter at times took to issues of concern being raised, responding in what he regarded as an appropriate manner, but which at times was fairly confrontational in nature. Mr Carter suggests that morale was never an issue. The Inquiry rejects that suggestion but accepts that following the appointment of a new General Manager and various other changes that there have been overall improvements in relation to a number of the issues identified.

The Inquiry also observes that the difficulties were not entirely one way, they were also contributed to by the at times strict approach adopted by the then General Manager at Hedland and at times communication issues emanating from that office too. The strict approach to the policy was no doubt borne out in part by the former General Manager's

272 A particular example provided was of one Elder using $5,000 from his Elders’ fund and $3,500 from Lore and Culture (total $8,500) to purchase a car.
experience working for other trustees of charitable trusts who prohibited a number of the types of payments that were approved by ISPL from being made. Some staff in the Perth Office expressed concern that he, in turn, was too restrictive in his interpretation of the policy and that he refused worthy applications, resulting in delay and the need for Mr Carter to intervene. Further under the Final July 2017 Distribution Policy (that he himself drafted) it provided that the General Manager was to confer with the Trustee on above-limit applications. Mr Carter suggested to the Inquiry that in part the issues reflected a difference of philosophy – his actions were consistent with a philosophy that people were individuals with particular needs and necessitous circumstances, looking at people as people rather than numbers. In the Inquiry's few that to a degree unfairly diminishes the efforts of others who were genuinely concerned to ensure proper process was being followed.

Mr Carter also says, and the Inquiry accepts, that:

As per policy, the Port Hedland office hires, trains and develops community members to process requests and other activities, with a view to the community taking control of their own activities in the future.

Staff often come up against verbal abuse among other issues, which makes it very difficult to maintain them. It is going to take time and patience to create the supportive and culturally understanding environment required.

Literally thousands of requests have been received from community members over the last 18 months and processing in such large numbers is challenging.

If a request is refused at Port Hedland, or there is an issue with communication between community and staff, there must be an opportunity for a community member to appeal a decision.

These types of appeals can be received by a Perth member of staff 24 hours a day and need to be resolved quickly, and when dealing with urgent or unusual circumstances a certain amount of autonomy is required. The is particularly the cases that involve sensitive cultural disputes and domestic violence. Sometimes the “shame” factor will mean some people will only ring Mr Carter to discuss.

Dispute resolution is part of the Perth office responsibility, as are decisions surrounding domestic violence, sexual abuse and drugs.

I was previously heavily involved in taking these types of calls and listening to community concerns.

The issue of communication and inconsistency in approaches between the Perth and Hedland offices was discussed at the TAC meeting of 6 September 2017, where it was agreed that all applications would be assessed by the Hedland office, which would then liaise with Perth. ISPL would also develop an appeals mechanism whereby consistent criteria would be applied to determine appeals. It was also agreed that the second Port Hedland General Manager would relax his strict approach and reduce the details/evidence required for hardship applications.

That the Perth office and Mr Carter took a different, at times less conservative and more robust approach to approving various distributions does not, of itself, establish that such distributions were not open to ISPL as Trustee to make. It does however raise concerns about the governance of such matters and in part informs the concerns held by not only the former
CHAPTER 11: TRUST DISTRIBUTIONS

General Manager, but also other current or former directors in the organisation, as to the approach adopted by Mr Carter.

Those broader concerns are tellingly revealed in an email from a former director of ISPL, Mr Parker, to then directors, Mr Aird and Mr White, on 18 August 2017 as follows:

Gents,

Further to my discussion with Wesley earlier today I repeat my advice to Wes – Rod’s reckless authorisation of payments to the likes of Kevin Allen, distributions for motor vehicle registration being paid under the Medical Assistance category of the Distribution Policy etc etc are:

1. exposing the Directors of ISPL to claims of breaching the terms of the Trust Deed.
2. creating confusion amongst the Port Hedland and South Perth office staff and leading to a drop in morale.
3. very much responsible for why Craig Mack has not signed his Employment Contract and, in my opinion, he will resign within the next 4 weeks.

I’m trying to watch your backs here because I feel some guilt in resigning from the ISPL Board. Unless you can reign Rod in (I thought my resignation would, but who was I kidding?) then you should consider your options also.

Kind Regards,

Greg Parker

The email references concerns about Mr Carter suggested "reckless" authorisation of payments. It points, by way of apparent examples of the broader concern of Mr Parker, to payments "to the likes of Kevin Allen" and to distributions for motor vehicle registrations being paid under the Medical Assistance distribution category. It does not limit the concerns to those examples and reflects a significant concern about a need to 'reign Rod in', which Mr Parker apparently thought his resignation as a director would.

Mr Carter disputes these views. He suggests that urgent and unusual circumstances are dealt with on an individual basis by the management team, that sometimes these are outside policy, and when this necessitates a change in policy, it is recorded and actioned.

He considers that the payment of motor vehicle registration was justified because the recipient had sought assistance with taxi fares as she did not have a vehicle licence and it was decided that it more pragmatic to simply pay the licence so that the particular community member could obtain dialysis treatment. He also indicated that he did not make the decision to classify the payment under the Medical Assistance category of the Distribution Policy. He also indicated that he only overrode Port Hedland decisions when serious issues warranted his intervention.

In respect of the payments to Mr Allen, it is unclear which payments Mr Parker was alluding to in circumstances where Mr Allen received a variety of payments from ISPL as Trustee. In response to this assertion, Mr Carter referred to the payment made by ISPL of $900 to Mr Allen's lawyers to facilitate the amendment of a violence restraining order taken out against him by Ms Westerman to permit Mr Allen to attend TAC meetings (as considered in further detail in Chapter 5 of the Report). The Inquiry notes that the payment occurred more
CHAPTER 11: TRUST DISTRIBUTIONS

than 9 months prior to the concerns expressed by Mr Parker about payments to the likes of Mr Allen.

In respect of this payment, as already noted earlier in the Report, Mr Allen's lawyers indicated that Mr Carter had mentioned that Indigenous Services would like to place $5,000 into trust to cover further work that will be required for Mr Allen and sought payment of that amount or at least $990 for the following day's appearance to vary the restraining order. Mr Carter suggested to the Inquiry that the directors met and determined that ISPL would only pay to have the violence restraining order reduced.

A further example where the concerns held by Mr Parker were revealed involve a proposal to provide $30,000 conditional funding to assist a Njamal person and his partner to purchase a house.

In respect of the proposed deed, Mr Green indicated, by email dated 19 October 2017, that it was "on Rods desk, he is recently back from Hedland so hopefully will authorise the changes tomorrow". Mr Carter in turn indicated by email that "I will sort tomorrow Andrew needs to sign". Ms Green forwarded the deed to Mr White on 20 October 2017 under cover of email in which she, inter alia, requested Mr White sign the deed and that if Mr White had any questions to "please give me or Rod a call". Mr White, by reply to Ms Green stated, inter alia, that he was not aware "of the TAC recommendation". Ms Green, by reply to Mr White on 20 October 2017 stated, inter alia, that "Richard has noted that he believes this to be against policy." Mr Parker became aware of the matter and by email to Mr White on 21 October 2017 stated:

The NPT cannot fund this. How in the hell did it get this far?
All this has been going on while the CIT has been conducting its inquisition. When will we ever learn.

He later that day, by email to Mr White and Mr Carter, copied to Mr Aird, at 5:38pm on 21 October 2017, stated:

Gents,

ISPL has come within a bee's dick of being exposed to allegations of a Breach of Trust. In this was the case, the Directors of a Trustee company may be held personally liable.

I strongly advise the Board that there appears to be an urgent need to educate ALL staff and the TAC in what the Trust can and can't fund. If there was a TAC meeting where it was resolved that each family was entitled to a $30,000 grant on the terms set out in the Deed of Agreement, and there was no advice from ISPL at that meeting that this was not permitted under the terms of the Trust Deed, then it's clear we have some serious governance issues.

Mr Carter explained by way of background that this application involved a family with children with special needs and that despite Mr Carter providing a personal guarantee the family could not obtain accommodation. He indicated that he recommended that support be provided and that it was discussed at a TAC meeting that we look at support for each family [group] if needed for necessitous circumstances. He supported the proposal but others did not. His
view was that Mr Parker was being unduly conservative but that at the end of the day you have to accept that people have differing opinions.

Mr Carter said that under the proposed program it was contemplated that funding would be provided to people with a job who met both Trust requirements and Keystart requirements and referenced many other trusts providing home ownership grants and that the policy had been adopted by two other trusts he identified. With respect to the question of necessitous circumstances, Mr Carter referenced the importance of home ownership and evidence of greater difficulties experienced by Aboriginal people with saving due to a wide range of issues including demands on disposable income, family size, and lack of security of employment.

While Mr Carter suggested to the Inquiry that the proposal was rejected, the Inquiry notes that in the unadjusted trial balance as at 24 May 2018 an amount of $30,000 is recorded as a distribution by way of loan in relation to this family. As previously noted in the Report, the Inquiry understands that it related to the provision of assistance to a family with a child with special needs, who requires completely different education and processes, including in relation to housing. The loan was apparently secured over the property by way of a mortgage, but Mr White has suggested that over time this loan may be waived. It therefore appears that, in substance, the assistance contemplated by the Deed has been provided by ISPL.

The Inquiry observes that, while there is an area of grey in relation to where the boundary ends between taking permissible steps to further charitable objects and taking impermissible steps involving conferral of private gain or benefit, it does not suggest that charitable trusts may not establish programs under which financial assistance to assist with housing is made available in appropriate circumstances to members of particular indigenous communities. As always, careful consideration of the facts of a particular matter is required and considerable care ought be taken to ensure that any such program has appropriate terms and conditions and objects to ensure it complies with the requirements applying to the particular charitable trust. The main issue of concern arising from the above email exchanges is that somehow the proposal proceeded all the way to the stage of signature by Mr White before he was made aware of the TAC position and before other members of the management committee such as Mr Parker were made aware of the proposed housing assistance program. Whether the proposed funding in this case was open to the Trustee is one thing, whether the broader program as discussed with TAC is another. It reflects once again what the Inquiry considers to be Mr Carter's greater focus on outcome rather than necessarily the process by which that occurs, despite legitimate reservations of others trying to ensure that the Trust followed proper process and complied with its obligations. Mr Carter's approach did not align with the approach and direction which his former co-directors were comfortable with, so much so that it generated serious concerns about the risk faced, including to other directors.

Mr Carter's response generally to a number of the above emails and others recounted in the Report is that the Inquiry has been made privy to the type of robust emails that are essential to any organisation. He suggested that in Mr Parker's case, it was his way or the highway,
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having come from an environment where he was in charge of people and they did exactly what they were told. That was in contrast to ISL where Mr Parker was not in charge and was part of a team, and there were robust conversations. He indicated that when Mr Parker resigned from ISPL, Mr Carter told him no one was holding a gun to his head and that he understood he had concerns, but that everything we were doing was so that we could start to move the pendulum. He noted that Mr Parker was not in favour of the Hedland Harbour Café, cars and very other decisions but that his input was very valuable and Mr Parker cared a lot. The fact that he has forthright views is great. Mr Carter did not take those views personally and neither did Mr Parker. He also suggested that when Mr Carter’s disqualification came up Mr Parker said he would come back on as a director but that Mr Carter said that he was doing a good job being external, helicopter view, not being involved in the day to day decision making. While the Inquiry accepts that, Mr Parker adopted a cautious approach to the limits of the Trustee’s authority to provide support that involved the conferral of private benefits and what actions it should prudently engage in, it considers on the whole of the evidence before it that his concerns about ‘reigning in’ Mr Carter were legitimately based.

Adequacy of Documentation

The importance of trustees properly documenting decisions is self-evident.

ISPL’s system of filing application documentation has been a work in progress. When Inquiry staff visited the NPT office in South Hedland in October 2017, the source documentation for distributions (application forms and relevant supporting materials) were not filed, but kept in boxes without discernible order. Despite this, employees were easily able to locate the information requested. Further, the Inquiry has been informed that, following the move to the Port Hedland office, applications are now kept in filing cabinets.

ISPL has also adopted a cloud-based accounting system, Xero. The Inquirer and officers of the Inquiry were invited by Mr Parker to see how the system works in relation to how underlying invoices can be accessed or reports produced for certain periods.

Early on in the Inquiry, the Inquiry became concerned that the documents provided for the 2016/2017 financial year did not necessarily give a completely accurate picture of distributions. The ISPL office in Perth provided the Inquiry with a spreadsheet of the Trust distributions, but taking into account all distributions, both Perth and Hedland, for 2016/2017 (2016/2017 spreadsheet). The 2016/2017 spreadsheet was apparently the document used to arrive at amounts in the Annual Report.

The 2016/2017 spreadsheet contains incomplete entries which list the distribution amount, date and recipient, but do not record the purpose of the distribution. Furthermore, some entries do not consistently indicate invoice numbers/receipts. Another concern with the spreadsheet is that the status of a particular application is not always clear from the spreadsheet. To indicate whether or not a particular application resulted in a distribution, the spreadsheet contains a column that indicates whether a particular application was approved.
CHAPTER 11: TRUST DISTRIBUTIONS

or not. There are ten different possible entries: 'approved', 'processed', 'paid', 'refused', 'lapsed', 'declined', 'expired', blank (ie, no entry), 'unknown' and 'loan'. Some of the entries marked 'unknown' as to whether the distribution had been made have been included in arriving at the total amount distributed for that category.

The characterisation of some distributions as 'loans' forms part of a much larger issue of the use of loans, discussed in more detail in Chapter 8.

In respect of specific transactions reviewed by the Inquiry, the standard of documentation of distribution decisions approved at the Hedland office was generally of a good standard. In contrast, the documentation provided by ISPL in relation to Perth office decisions, particularly in relation to loans (as noted earlier in the Report), was generally poorer, incomplete or not provided at all. Decisions in the Perth office generally involved Mr Carter as he had delegated authority on behalf of the Board in relation to distribution decisions, including where caps in the distribution policy were to be exceeded.

As of September 2017, ISPL introduced a new client relationship management system to assist track applications. This system links application documentation to the account entry, which hopefully will go some way to reducing some of the documentation issues identified by the Inquiry.

Recommendation 44 (Chapter 11)
ISPL review its documentation practices in relation to distribution decisions to ensure that appropriate records are maintained in relation to each decision including full copies of supporting documentation, together with all approvals, authorisations and refusals and the grounds for the decisions.

Cash Payments and Direct Transfers

A general concern raised with the Inquiry in the administration of charitable trusts is the practice by some trustees of giving distributions by cash or bank transfer directly to beneficiaries ("cash payments"). The provision of vouchers and gift cards has also generated considerable issues, particularly in the Christmas period where issues have arisen in relation to their exchange or use to acquire alcohol, contributing to social issues during that period.

Whilst some deeds in relation to charitable trusts restrict cash payments, the Trust Deed for the Trust itself does not.\(^\text{273}\) It does however prohibit the making of payments with a 'purpose of private gain', consistent with the charitable nature of the Trust.

The making of distributions by cash payments raises a number of potential concerns including:

\(^\text{273}\) See for example, Plan B Trustees Ltd v Parker (No 2) (2013) 11 ASTLR 242; (2013) WASC 216 [140] or the Trust Deed discussed in ATO private ruling Authorisation Number: 1012579850256.
it potentially exposes trustees to issues as to whether the payments are properly characterisable as being carried out 'without purpose of private gain' and for charitable purposes for the benefit of the community or relevant section of the community as required by the terms of the instrument governing the trust;

whether cash payments (or vouchers or gift cards) made with the intention or condition that they be used for particular purposes are then properly used for those purposes, rather than other purposes not in furtherance of charitable objectives;

where the funds are used for unintended purposes, such as alcohol acquisition, with consequent social issues; and

whether such payments might have been made to procure support, or have that effect, such as concerns raised about cash payments made prior to AET's removal.

Cash Payments, Private Gain and Charitable Objects

The risk of contravening the requirements of the Trust Deed by not carrying out its charitable objects 'without purpose of private gain' is heightened where payments are made to individuals in cash. In *Flynn v. Mamarika*, Martin CJ of the Northern Territory Supreme Court said:

> It is fundamental to the concept of a charitable trust that it be for a purpose not a person, and that must be kept steadily in mind by the trustee at all times. It would be a breach of trust for any of the trust funds to be paid to any person or persons within the community having the effect of only increasing the property of that person or persons. It is inconsistent with the notion of a charitable trust that payment be made out of the trust fund to a person for no reason other than that he or she is one of the community for whose benefit the trust was established. Any such payment must be for a charitable purpose, for the benefit of the community, not just the person who receives the money. For the same reasons, the trustee would be failing in a duty to properly discharge the obligations placed upon them by the trust deed if they simply paid money to a person who intended to distribute it, or a portion of it, amongst other members of the community for no charitable purpose. Payment of money to a person, either directly or through another, without the object of achieving a charitable purpose would be a breach of the trust. Conferring a benefit on an individual or individuals within the community by providing money out of the trust funds for any use to which that individual or individuals may think fit to use it, is not to apply the funds for a charitable purpose. (emphasis added)

Along similar lines, in *Plan B Trustees Ltd v Parker*, when considering whether certain payments made by an indigenous charitable trust were within the objects of the trust deed, Edelman J observed:

> It may also be relevant that a distinction should be drawn between "ends, means and consequences". The ends must be exclusively charitable. But if the non-charitable benefits

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are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost.

In *IBN v Banjyma* an observation was made that a second trust was "used for non-charitable purpose, such as cash distributions".\(^{276}\)

While in the Inquiry's view the making of cash payments (including electronic payments) to members of the Njamal community will not necessarily breach the charitable objects of the Trust Deed, and it will depend on the particular circumstances of the case, a charitable trustee should be very cautious before making such payments, and should generally consider reasonable means by which it can ensure payments are used for their intended purpose. Direct payments to suppliers are a common means by which this is done, as is the provision of vouchers in some cases.

**Abbott Cash Payments**

A significant portion of Abbott's distributions were made in cash or by direct transfer to a beneficiary's bank account ("cash distributions"). For example, during the 2013/2014 financial year approximately $300,000 was expended in this way. The distributions broadly comprised:

- cash distributions at Christmas time (in December 2012 and December 2013, of approximately $132,000 and $64,000);
- direct bank transfers to senior lore men for lore and culture; and
- general distributions by way of cash.

The Inquiry asked Abbott to explain the basis upon which cash payments were made, whether any difficulties were experienced with the distribution of cash and if so, what steps were taken to address those issues and what (if any) steps it took to ensure that a cash distribution was used for the purpose for which it was provided.

Abbott responded that the basis of the payments made was under clause 4.1(a) of the Trust Deed for the relief of poverty, misfortune and destitution:

> The majority of beneficiaries need assistance during summer for the payment of high power bills, high water bills and rent. Once all of these bills have been paid there is very little if anything left for food and fuel and clothing. In addition, this time of year children have an expectation of presents at Christmas. The cash payments from the Trust are made to assist in all of these expenses.

Abbott also responded that there were no difficulties experienced with the distribution of cash and that no steps were taken to restrict the cash from being used to acquire alcohol or to limit the use of the cash to the person to whom it was distributed:

> Once cash is distributed it would be impossible for the Trustee and or its staff to monitor who spent it and on what. In later years in other trusts the Trustee now has a policy of distributing Myer/Coles gift cards or fuel cards in place of cash. This measure is very unpopular and still

\(^{276}\) [2009] WASC 279 [64].
does not stop a resourceful person from purchasing alcohol or exchanging the card (not with Myer/Coles) for cash. Practically speaking this cannot be monitored or stopped if someone really wants to abuse the process. However, having said that it is the Trustee's experience is that the majority of beneficiaries do not abuse the process and use the money or gift cards for its intended purpose. Communications with Coles/Myer with respect gift cards distributed in another trust in December 2016 show that less than 15% of the value of the cards were used to purchase alcohol.

The Inquiry finds Abbott's assertion that no difficulties were experienced with giving cash somewhat surprising, including in circumstances in which:

- the TAC Minutes from 2013 reveal that new procedures would be put in place for lore season distributions (see below);
- Abbott accepted that "Once cash is distributed, it would be impossible for the Trustee and or its staff to monitor who spent it and on what"; and
- Abbott's current policy (for other trusts of which it is Trustee) is to give gift cards or fuel cards in the place of cash.

It accepts that use of vouchers and gift cards is unpopular amongst some Njamal people and can have negative connotations, however they are an important means by which charitable trustees can take steps to try to ensure that trust distributions are used for the intended purpose, particularly where other methods such as direct supplier payments may not be feasible.

**AET Cash Payments**

AET had a strict policy with regards to cash payments. This policy was largely upheld in practice with AET generally paying suppliers directly or providing vouchers for food/fuel rather than providing cash or making direct bank transfers to applicants. However, AET reluctantly acceded to a resolution passed by the TAC on 6 January 2016 in support of a payment of $1,000 being made to each member for lore and culture. The amount actually distributed by AET totalled $360,500.\(^{277}\)

The Inquirer asked AET for its view on the basis upon which cash payments were made, whether any difficulties were experienced with the distribution of cash and if so, what steps were taken to address those issues and what (if any) steps the Trustee took to ensure that a cash distribution was used for the purpose for which it was provided. AET's response is set out below:

AET did make the specific point that we generally viewed the operation of trusts such as this that they would not generally be paying out assistance from the trust in the form of cash in most instances.

The trust did not typically operate on a basis that cash would be provided to beneficiaries. In some cases it did pay mileage to people within the ceilings of the applicable distribution policy item and as per applicable ATO rates for mileage (based on a per km rate), but also within

\(^{277}\) Being two payments: one of $238,000 and another of $122,500.
limits as imposed by distribution policy. For example, if a beneficiary had a need to travel to Perth for specialist medical treatment (with supporting documents provided to evidence the need) and had to travel from Port Hedland to Perth, the beneficiary would be provided with mileage at applicable ATO prescribed rates, but capped at $500.00. The distance from Port Hedland to Perth is approximately 1,643km. When the ATO rate (at the time of $0.75 / km) is applied, that would amount to a payment of $1,232.25, so was then capped at the rate of $500.00.

A Trustee could provide assistance via purchase orders at various places, albeit provision of fuel and food is sometimes required out of regular business hours. The administrative cost of providing assistance in this manner is greater than simply attending to a mileage payment, and so we did in such cases pay cash for such needs, as the amounts provided are aligned to a baseline figure and generally used and accepted.

Following resolutions of the TAC, AET reluctantly agreed to provide funding for Lore & Culture based funding on the premise that it would enable people to attend and participate in ceremonial and other cultural activity which spreads across the Pilbara and down through the Central Desert. It would also enable people to use the funds for travel related purposes general over end of year period, when Lore & Culture is typically running.

It was considered that it is extremely difficult for a Trustee to ensure that funds in respect of this activity can be verified, as it is impossible for a Trustee to attend these Lore Grounds and ensure that people are attending and using the funds for purpose. Trustee staff are not considered culturally appropriate people to be in attendance at such meetings. Likewise, there is reluctance from within the appropriate beneficiaries to provide any formal oversight or attendance registers, often linked to no payment for service.

**ISPL Cash Payments**

The Inquiry asked ISPL in what circumstances and how often cash payments have been given to beneficiaries. It responded:

For many reasons, the issuing of cash and/or providing direct debit deposits to applicants is generally avoided. However, cash is made available under the following circumstances:

1. Where the Elders are approved for needs assistance and do not have established banking facilities. Sometimes this is a function of isolation and utility, other times it is due to a lack of confidence. Their family member and TAC representative plays a guiding role to ensure the money is used as intended. We are working with TAC to try to alleviate this and to help all members to have bank accounts or a lack of banking facilities in their environs.

2. Where there is attendance at a remote location for Lore and Culture Meetings, and there are no banking facilities available. In this instance, cash is paid to individuals: a. Who were crucial to these proceedings; b. As there are no alternative arrangements on lore ground for use of e vouchers, bank facilities etc; c. In a process rigidly, proudly, and strictly controlled by the Elders; and, d. All distributions are carefully accounted for.

Documentation provided by ISPL reveals that cash or direct deposit transfers have also been paid to Njamal people for attending a range of meetings, as discussed in the financial analysis section in Chapter 8. Also, as considered in detail in that Chapter, prior to ISPL’s appointment in May 2016 significant sums were expended including by cash or direct transfer to many Njamal people with funding provided via Mr Carter/Esplanade Holdings Pty Ltd.

Evidence given by members of the Njamal community, who consistently said that they had received cash in the past (compared with vouchers in the present) and that the amounts given were higher, is consistent with the amounts that Abbott and AET distributed in cash and the adoption under ISPL of a voucher system for Christmas payments (discussed further below).
CHAPTER 11: TRUST DISTRIBUTIONS

Under ISPL’s distribution policies, the making of cash payments and reimbursements has been restricted. For example, the initial July 2017 Distribution Policy provides in relation to a range of categories of distribution that:

No cash payments or other reimbursements will be made to a Njamal person unless there are exceptional circumstances that warrant cash being the only method of providing assistance.

It also provides in relation to lore and culture that there was no provision for cash to be paid to an individual due to the risk of it not being used to assist the intended beneficiary or program.

Mr Carter strictly followed this policy on at least one occasion of which it is aware: Ms Westerman sent him an email querying the Hedland office’s decision to refuse her son’s application for a reimbursement and Mr Carter replied saying that the guidelines say that a payment of receipt was not allowed and that he should apply in advance like everyone else.

*Christmas payments*

It is common practice for many trustees of charitable trusts to make payments to relevant community members around the Christmas period to assist them, particularly where they have families, during that period. The Christmas period is a time of increased financial pressure, particularly for those people already in poverty, and those with children. Furthermore, in the Pilbara, it coincides with the higher electricity requirements associated with the hotter weather in cyclone season and lore season, which, for those actively involved in lore, may mean no income during that period.

These payments, unless carefully managed, can be problematic both from the point of view of a charitable trustee trying to comply with its obligations and further charitable objects, but also given the social cost if funds or vouchers are used for unintended purposes such as alcohol.

Before the Inquiry was announced, police in Port Hedland expressed concern that money distributed as cash or vouchers by charitable trusts in the Pilbara had been spent directly on alcohol, with a resulting sharp increase in domestic violence. Two newspaper articles in January 2017 referenced the distribution of vouchers over Christmas by charitable trusts with a spike in domestic violence. This in turn was apparently a factor relevant to the Department of Racing, Gaming and Liquor giving particular consideration in early 2017 to the impact of alcohol related harm in Port and South Hedland and potential placing of restrictions on the sale of liquor in that area.

It appears that the police were also approached with allegations including what they understood to be a concern that a substantial sum in cash payments had been provided by the Trust to community members in the Christmas period. In fact ISPL had implemented a Christmas gift voucher distribution at that time. The vouchers were restricted so that they

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278 See, for example, *Christmas is one of the worst times of the year for the less fortunate*, Gerry Georgatos, National Indigenous Television, 19 December 2017.
CHAPTER 11: TRUST DISTRIBUTIONS

could not directly be used to purchase alcohol. Further, Mr Carter was quoted in an article for WA Today condemning the decision to give out unrestricted cards, saying: "his trust providing similar $250 Coles e-vouchers to around 1000 recipients in Port Hedland, but with a clause they could not be used to purchase alcohol or exchanged for gift cards."

An internally prepared unadjusted balance sheet for ISPL as at 30 June 2017 provided by ISPL records that $72,275 was paid in Christmas Food Vouchers in 2016. The Inquiry asked ISPL about the provision of gift cards over Christmas 2016. ISPL’s responded that cards were provided to 294 recipient families (about 60% of Njamal people) and the maximum received was $250. ISPL indicated that:

The system was a carryover from the same program operated by the previous Trustee (AET), and administered and marshalled through the Port Hedland branch office and through the family knowledge and assistance provided by TAC members.

The granting of Christmas vouchers did not extend to all families. The applicants were also prioritised by the family earnings and income, and real need for this gesture. They were issued upon application, and to families with children, as a means of goodwill and helping the families through the expenses of the Christmas break and increased food costs

I. Limits on its transfer?

All Food vouchers were restricted in the use, and were bar coded and stamped with restrictions that (a) Limited the use of the voucher to the family named (b) Could not be used for alcohol, tobacco, phone cards, or to purchase other gift cards, or credits.

II. Limit the on-sale to others?

Through the supervision of TAC members in the selection and allocation processes and their knowledge of individual family circumstances, there is very high confidence that NO Christmas food vouchers were used by non-Njamal People or used by anyone other than the family to whom they were allocated and whose name appeared written on the vouchers.

III. Other restrictions etc?

ISPL and the Njamal People respected and treated this program with the goodwill and caution it deserved. It was a means of helping families through the demands of Christmas food costs. In contrast, other Trustees freely handed out large, and unrestricted vouchers of around $1200 each. These were abused by their recipients and used for alcohol etc. This caused massive social problems in the South Hedland region. To endeavour to get others to be responsible, as well as to distance the Njamal People from any unwarranted accusations, ISPL made several media announcements and statements in the press:

• Expressing disappointment at how the unthinking actions of these Trustees had brought disrespect upon all Aboriginal people of Port Hedland region; and,

• how in the eyes of NPT and ISPL these Trustees had placed their communities in jeopardy and set them up for social problems and difficulties, instead of being of any real help to them.

ISPL also submitted that:

It is worth emphasising that the "Christmas E-voucher" system that the Trust delivered was:

• Controlled, so that it was for food only. No smokes, No alcohol, No exchanges, No Transfers;

• Well managed and directed at families with children; and,

279 Balance sheet as at 30 June 2017.
CHAPTER 11: TRUST DISTRIBUTIONS

- Fair, needs based, and monitored to ensure it was only directed to Njamal members on the Njamal Members register lists.
- It was initiated, issued, managed, controlled and monitored by the elected TAC representatives, who are Njamal People.
- It was directed to the families with children who would benefit from the gesture.

It was a success; and its success was the outcome of Njamal People being empowered and pride driven to attain positive outcomes for their people. This is the very essence of the approach ISPL is taking with the direction and future of the Njamal People's Trust.

Also, the minutes of meeting 6 July 2016 suggest that ISPL had considered setting up a direct order with Coles/Kmart/etc so that persons in need could directly purchase food or clothing:

"Rod advised the office is in the process of setting up accounts with Coles and Woolworths to replace the food vouchers as some are being onsold at a discount."

This was raised with ISPL, which responded that it could not establish an account at shop system that could provide the same controls it had under the Food Only Gift Cards program. Further, Coles and Woolworths would no longer accept the issue of purchase orders to initiate the processes.

It appears from the 24 May 2018 unadjusted trial balance that $103,885 was spent on Christmas food vouchers in 2017. The TAC minutes of 23 November 2017 provide that John (presumably the then Port Hedland General Manager, John Van Der Ende) would work with the family representative on the number and value of vouchers required, the family representative to then distribute the vouchers. The increase in this area of expenditure from 2016 may be partially due to the fact that the membership of Njamal People increased from 498 families in 2016 to 615 families in 2017, a rise of 20%. ISPL also gave consideration to organising food hampers instead but the Inquiry understands this idea was ultimately not pursued last Christmas.

The Inquiry recognises the positive efforts ISPL, in particular, has taken to address challenging issues associated with Christmas distributions.

**Lore & Culture Cash Payments**

The application of trust funds to lore season has been problematic for all Trustees of the Trust, particularly due to restrictions on Njamal people entering lore grounds and being made privy to secret lore business.

**Abbott**

In the context of lore and culture payments, at times large sums were paid to individuals, although those individuals tended to be persons who had been identified by the TAC or Njamal community as being responsible for organising lore and culture activities. Explanation as to the proposed use of funds was documented, and sometimes statutory declarations sought in relation to the agreed use of the funds, and attempts made to verify the subsequent use and acquittal.
CHAPTER 11: TRUST DISTRIBUTIONS

In 2012, significant sums were expended on lore and culture. In one case drawn to the Inquiry's attention money was directly transferred to two senior lore men, both currently TAC members, for the lore season. The first recipient received $20,000 in two instalments of $10,000 to cover fuel and food costs associated with a second round of lore meetings. The other recipient received $49,000 in 12 separate payments.

The recipient of $20,000, as appeared to have been the practice, signed a document titled "statutory declaration" (which was unwitnessed and undated) to declare that money received would be used for specified purposes in relation to law and culture (it also referenced additional amounts however Abbott ended up paying some of those amounts direct). The recipient did not however subsequently provide a breakdown or receipts, although requested to do so by Abbott (Mr Phil Drayson). Following the lore season, there were rumours that funds had not been spent in accordance with what had previously been agreed and doubts existed as to whether the funds were acquitted for the purpose to which they were distributed. The allegations were raised with the recipient by the Inquiry, who admitted that the funds were not properly acquitted, saying that they were ultimately used by him to purchase Christmas toys for his children.

The recipient of $49,000, when requested, provided receipts for approximately 40% of the money paid to him and provided copies of his bank statement to Abbott which he said showed withdrawal of money he made to individuals for lore.

One of the broad complaints brought by Ms Westerman against the Trustees of the Trust (Abbott, AET and ISPL) is that they were all aware of a "past theft" of Trust funds and did not do anything about it.

The Inquiry asked Abbott whether it was aware of any allegations that the funds were misused and if so, what steps were taken by them to ensure that any misuse would not recur. Abbott (June Kenny) responded saying:

During the 2012-13 Lore Season I became aware that the funds paid to ... may not have been spent in accordance to what had been agreed previously. This is reflected in discussion about Lore and Culture in the Advisory Committee minutes dated 7th March 2013 clause 3.3, page 5. In these same minutes in Clause 3. there is discussion about establishing a new process to deal with Lore Business in a more structured manner the next year.

The minutes of the 7 March 2013 TAC meeting record that when Abbott (Phil Drayson) had requested a breakdown of the $20,000 paid to the TAC member, a break down was not provided. The TAC agreed that, for the next lore and culture season, a subcommittee would be set up to agree a budget and to consult with the Trustee. Although the TAC Minutes of March 2013 suggest that a subcommittee for lore and culture was to be formed, it is unclear if

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280 The following year $9,000 was paid for lore and culture: $3,000 paid to each of three senior law men, one of whom signed a statutory declaration the money would be used to assist with food and fuel for lore and culture that year.

281 One on 20 December 2012 and one on 2 January 2013.
CHAPTER 11: TRUST DISTRIBUTIONS

that occurred. In a formal notice to Abbott, the Inquiry requested that details of subcommittees formed be provided: no details of a lore and culture subcommittee were provided.

Mr Carter of ISPL later became aware of this issue after ISPL was appointed Trustee. It understands that he broadly adopted a position to the effect that it was not warranted for ISPL to try to pursue the matter further with the individual concerned for a number of reasons including that person's personal circumstances.

The above highlights the problems associated with large sums of cash being distributed to individuals and the importance of clear and appropriate systems being adopted in conjunction with the TAC and Njamal Elders to ensure the appropriate distribution, use and acquittal of funds in this area.

**AET**

As already noted, although contrary to its usual practices, which required payments to be made direct to suppliers, AET reluctantly acceded to a resolution passed by the TAC on 6 January 2016 in support of a payment of $1,000 being made to each member for lore and culture. The amount actually distributed by AET totalled $360,500.\(^{282}\)

**ISPL**

In 2016/2017, ISPL expended approximately $210,000\(^{283}\) in relation to the lore and culture category of distribution.

Under its policies a range of limitations were imposed. Assistance was generally restricted to food and fuel and the program was not available for a range of matters including vehicle repairs. The policies also set out requirements to assist it confirm eligible persons to whom funding would be provided.

In practice however the Inquiry notes that many concerns were raised with the Inquiry in relation to distribution of funds by all Trustees under this head and the actual or potential abuse by some of the system (including persons who did not attend lore and culture activities receiving payments).

Under ISPL in particular the Inquiry understands that in recognition of these issues there has been a significant attempt to tighten its approach and involve a number of Njamal Elders who have assumed responsibility for verifying who is involved in law activities and to whom funding provision may be appropriate. The amount appears to have significantly declined in the 2017/18 year, however the Inquiry does not have final figures to verify the actual ISPL expenditure during that period.

\(^{282}\) Being two payments: one of $238,000 and another of $122,500.

\(^{283}\) The Annual Report records however $201,352.47 for 128 applications approved.
A number of specific complaints were received which were also considered by the Inquiry in this area which were generally not able to be verified or found to be substantiated. The Inquiry notes, by way of one such example, a complaint received in relation to the provision of significant funds by ISPL to a current TAC member in relation to a field trip or survey in mid-2016. The essence of the complaints were: (i) that the funds paid were excessive (the complaints alleging $15,000 or $30,000 for a three day trip); and (ii) that the recipient did not spend the trust funds on the field survey, but on himself and that Mr Carter was aware of this and did not press charges. The assertions were not substantiated by the Inquiry. Information provided to the Inquiry suggested that on 19 June 2016 the person received a distribution from Trust Funds in connection with a field trip from 16-19 May 2016. The Inquiry sought clarification from ISPL as to what this amount related to and was provided documentation evidencing the following:

- On 25 May 2016, YMAC sent a letter to the person confirming that the Njamal community authorised YMAC to continued native title research on country in the form of a field trip on 2 March 2016. Two trips were conducted with two groups of Njamal people between 9 and 17 May 2016. The second trip comprised five senior Njamal people, including the recipient of the funds.

- On 9 June 2016, the recipient of the funds (through his business entity) invoiced ISPL for $15,000 to pay for the same five senior Njamal people to each attend a 6 day field trip ($3,000 each).

The letter from YMAC asserts that the field trip had already occurred before the Trust paid the person. In the circumstances the Inquiry does not consider the complaint to be substantiated.

**Family Buckets**

*Background*

The phrase "buckets" is commonly used in various contexts, including in relation to a range of trusts, to refer to pools of funding allocated for various purposes. Depending on their use, the use of "buckets" can be problematic, if not carefully managed, and can have negative connotations and perceptions that funds allocated to buckets may then be used for private or other non-permissible purposes. In the context of this Trust, a bucket model was first established under Abbott and ceased being used under AET, except in a limited respect towards the end of its tenure. ISPL ceased its use completely due to concerns including that the practice may have been non-compliant with obligations of a charitable trustee and potentially endangered the charitable status of the Trust for purposes such as taxation purposes. The Inquiry endorses the decision of ISPL to cease this practice. In this section the practices in relation to the use of "buckets" as well as some concerns with those practices is considered.
CHAPTER 11: TRUST DISTRIBUTIONS

The use of family buckets provides part of the context in which some senior members of the community became accustomed to having a degree of control over distributions from the Trust Fund.

Abbott

Introduction of Family Buckets

Historically, under Abbott, the Trust Fund was notionally allocated into various sub accounts or "buckets" or groupings to reflect the allocation of those funds for different proposed uses to reflect the overall view of the Trustee and TAC as to the objects for which the funds should be distributed and limits of distributions for particular objects.

In 2008 a decision was made to allocate funds to "Family buckets", also called "Emergency buckets", in which an amount of Trust money was set aside for each family group, from which certain payments could then be made to that family group from time to time. While, at a certain level, the process for allocating funds was under the direction of family members in the case of “family buckets”, Abbott says that it retained the final decision as to which distributions would be made.

The minutes of the 26 November 2008 TAC meeting which endorsed the family bucket model recorded that the intention was to give each family a better say in how it utilised funds allocated to it. Further, the motion to establish the family bucket system endorsed distributions allocated to each family bucket being based on a percentage formula based on the head count per family and total royalties received for that year.

Quarantining Funds

At about this time a significant dispute also arose in relation to entitlements under a mining agreement with Consolidated Minerals Ltd and whether proper authority had been received for the entry into that agreement. In particular, concerns had been raised about the significant preferential benefits potentially flowing to the Taylor family, in preference to other members of the Njamal community. In an attempt to resolve that dispute it was proposed that the amounts in dispute that had previously been quarantined would be paid to the Trust and that the Trustee, Abbott, would then allow funds to be set aside for the benefit of different family groups, with the dominant proportion being set aside for the Taylor family.

To resolve the impasse it was proposed that the quarantined funds would be paid to the Trust and $700,000 of approximately $1.2m of quarantined funds would be distributed to the Taylor family bucket, with the balance distributed to other family buckets and for other specified purposes such as lore and culture, education, funerals and meetings and administration.

284 Abbott 2013 Policy, 11.9.
A resolution to implement the bucket family bucket model was passed at a community meeting dated 16 December 2008. The minutes of that community meeting evidence that consideration was given to the Trust's charitable status and the potential impact of the buckets upon its charitable status:

KA advised that the Trustee has sought direction and assistance from the solicitor who drafted the original Njamal Trust Deed in amending the deed to reflect the family bucket distribution process. These amendments would then be presented to a Magistrate for review and endorsement.

Albert Pianta and Darren Geary raised the issue in regards to a Family group who may not comply with the objects of the Trust in distributing their Family's allocation in accordance to the Charitable objects and how this may impact on the whole of the Njamal community and its Charitable status. KA stated that if funds from the Trust were not utilised in accordance to the Deed then the Trust could lose its Charitable status meaning that those funds would be exposed to an ATO audit and taxed accordingly.

The meeting requested that the Trust quarantine an agreed percentage of funds for Lore & Culture, Education, Sports and Medical. These funds to remain and be administered by the Trust and not be made available for Family group distribution. This would assist with most mining company agreements to supporting social programs ensuring compliance and benefitting the Njamal community as a whole.

The buckets were further discussed at a TAC meeting on 17 February 2009, where it was agreed that:

(i) the Njamal Family Bucket Distribution model as presented at the 2008 Community Meeting be approved; and

(ii) that $700,000 (58.5%) of the Consolidated Minerals Limited funds would go the Taylor family bucket, with the balance of $500,000 to be allocated back into the Trust.

The minutes of that meeting also provide that Abbott was providing the Trust's then lawyer, Dwyer Durack, with information to enable the Trust to make an application to the Court to confirm that the Trust was legally permitted to distribute funds in the Trust to the nominated family buckets. However, as it eventuated, Abbott did not provide instructions to make such an application. That is, on its face, surprising. In the Inquiry's view the ability and appropriateness of the Trustee segregating funds from the Trust Fund for allocation to particular persons within specified family groups is open to serious doubt.

While it is understandable that the Trustee might in its discretion allocate funds available for distribution for different objects or purposes, up to specified limits, the division of funds between particular families, where the basis does not appear to have any connection to the particular fulfilment of the objects, and therefore involves preferential access to funds based on membership of a particular family group, gives rise to questions as to whether that exceeds the scope of the Trustee's discretion. This decision making process has certain parallels with the issue that has arisen in relation to the payment of "signing fees" to certain Applicants and Elders under the trusteeship of ISPL.

Underpinning the decisions appear to be concerns in some way to reflect the broader wishes of the Applicants and, ultimately, the Njamal community. After all, it is the Applicants as
representatives of that community who enter into the relevant agreements conferring benefits in the first place. Where the mining is proposed to occur on lands traditionally associated with one or more of the constituent family groups, it is also understandable why families from those areas may wish to receive, directly or indirectly, additional benefits and recognition. In the Inquiry's view, that of itself can be very problematic given the fiduciary duties of applicants. Further, if not reflected in the mining agreement, it is even more problematic to then indirectly reflect those sentiments via purported discretionary trustee decisions once the funds have flowed to the Trust. That is so in circumstances where a Trustee is generally under an obligation to act impartially and under the Trust Deed no individual Beneficiary or group of Beneficiaries has a vested interest in, or entitlement to, any of the Trust Fund. A decision by the Trustee that, on its face, fetters its discretion, and confers a preferential ability on certain persons to benefit from the exercise of the Trustee's discretion, with no apparent connection to the Trust objects, is highly questionable and likely to exceed the Trustee's power.

Given the high disputation that had occurred, and the evident, justified, concern identified by the Trustee as to the course proposed, in the Inquiry's view Abbott ought to have applied to the Court for directions before proceeding as it did.

**Policy and Practice**

Abbott informed the Inquiry that it applied the following policies in using the family buckets:

- funds distributed under family buckets were to be for a charitable purpose;
- each family representative on the TAC advised Mr Drayson about any updates to the family list and how much should be paid to each person (older people were sometimes paid more). In some cases, the family representative would consult with elders before advising Mr Drayson;
- money was allocated to each bucket based upon the number of people in each family list; and
- any family group who had miscalculated the number of people in their family group, or had missed a person in their family group could add a person which would mean that technically they could exceed the amount distributed to their bucket.

In practice however, based on the Inquiry's review of relevant materials, there appeared to be a large degree of deference to the view of the family representative and reliance on that member distributing the funds to other family members for proper purposes and, in some cases, discretion conferred on that member as to whom and for what specific purposes it was provided. Ensuring proper use of funds was also, in practice difficult as a large proportion of amounts distributed under family buckets by Abbott was given in cash.

285 The Inquiry reviewed selected distribution transactions and other documents in relation to the 2012/13 and 2013/14 financial years while Abbott was trustee as well as other documents and information including a distribution summary provided to it identified amounts distributed, including under family buckets, but did not specify to which family group each person and distribution related.
In respect of family bucket payments, under Abbott, generally a statutory declaration was required to be signed by the relevant senior family group member to verify that the funds either would be distributed within the family group for reasons such as hardship or that they should be made to particular family group members for that purpose. Detailed explanation does not appear to have been required, or necessarily acqittal of the funds.

Further, while Abbott seemed to generally seek that the recipient of the funds sign a statutory declaration to confirm that the funds would be passed on to family members for specified uses permitted under the Trust Deed, this did not always occur and detailed explanation does not appear to have been required or, necessarily, subsequent acqittal of the funds. A key example involved Ms Westerman herself. A payment is recorded as having been made to Ms Westerman of $21,930 on behalf of her family group. While Abbott advised the Inquiry that it requested Ms Westerman sign a statutory declaration that the money be passed on to members of her family group for charitable purposes, neither Abbott nor Ms Westerman were able to provide any evidence that the statutory declaration had ever been signed and returned. Further, it appears that it was left to Ms Westerman to decide to whom and in what amounts and what particular purposes (albeit they needed to be charitable purposes) they were applied within her family.

A further concern relates to the reasoning as to why particular persons were nominated by their family representative to receive payments. The spread sheets provided by Abbott are consistent with Abbott’s explanation that sometimes the amount given to each person depended upon their seniority.

The above matters highlight the dangers of using such a bucket system, as Abbott did, and the risk of some payments potentially falling outside the scope of the Trust Deed and potentially involving an impermissible delegation of discretion. As already indicated in the legal principles section of Chapter 1 of the Report, it is arguable that the Trustee’s discretion cannot be delegated and, in any event, reasonable care still needs to then be taken in the oversight of a person to whom a delegated is made. Further, the potential difficulties are highlighted by the observations of Martin CJ in *Flynn v Mamarika*.

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286 “To assist 40 (??) number of family members (name them if possible) to alleviate financial hardship, pay bills, lore time and other”.
287 *(1996) 130 FLR 218.*
unfettered discretion of the individual (referred to as the "clan grants" scheme).\textsuperscript{289} Chief Justice Martin identified the relevant duties of a trustee as including:\textsuperscript{290}

Not to delegate any of the trustees' powers or discretions to any person unless in accordance with the provisions of the trust deed.

After commenting in relation to the distinction between a trust and for charitable objects and a trust for persons (previously quoted above), Martin CJ observed:

For the same reasons, the trustee would be failing in a duty to properly discharge the obligations placed upon them by the trust deed if they simply paid money to a person who intended to distribute it, or a portion of it, amongst other members of the community for no charitable purpose. Payment of money to a person, either directly or through another, without the object of achieving a charitable purpose would be a breach of the trust. Conferring a benefit on an individual or individuals within the community by providing money out of the trust funds for any use to which that individual or individuals may think fit to use it, is not to apply the funds for a charitable purpose.

Accordingly, Martin CJ found the clan grants scheme would not be for charitable purposes.\textsuperscript{291}

**AET**

AET inherited the family bucket system from Abbott. In the first TAC meeting in which AET was Trustee, the TAC resolved that all existing policies would still apply,\textsuperscript{292} although made it clear that family buckets would not be replenished when the existing buckets had been emptied. The use of buckets ceased early on during AET’s tenure and were not used during the 2014/15 financial year, as reflected in the Trust's accounts.

The minutes of the TAC meeting of 22 October 2015 reveal that the TAC asked AET why they did not have family buckets any more. AET's response was that "the family [buckets] would not be continuing due to most of the family bucket being in negative at the time". The TAC then asked for the buckets to be brought back. This did not occur at the October 2015 meeting. However, family buckets were re-established as an emergency measure in December 2015. The Minutes of the TAC meeting of 21 December 2015, record that AET was invited by the TAC to comment upon distributions in emergency situations, following a case where the TAC could not be consulted to approve an emergency application. The minutes of that meeting record:

R Eaton mentioned the requirement in the Trust Deed to consult and obtain a recommendation from the Committee on distributions, including consulting a minimum 75% of TAC members. AET applies that policy strictly. There was some discussion around the exact nature of the requirements in the Trust Deed regarding consultation.

AET recommends that the Committee today establish an emergency policy to provide for urgent relief.

\textsuperscript{289} Flynn v Mamarika (1996) 130 FLR 218, 226 (Martin CJ).
\textsuperscript{290} Flynn v Mamarika (1996) 130 FLR 218, 224 (Martin CJ).
\textsuperscript{291} Flynn v Mamarika (1996) 130 FLR 218, 226 (Martin CJ).
\textsuperscript{292} Meeting 28 July 2014.
CHAPTER 11: TRUST DISTRIBUTIONS

The Committee agreed to establish one bucket for each family group, with the TAC member as the person authorised to approve distributions for their family. The buckets (called "emergency buckets") were confirmed as a good initiative by the TAC.

When the Inquiry asked AET about the reintroduction of the buckets, it replied that:

… in instances where the distribution policy did not apply, the process of attempting to obtain required approvals via circular resolutions was convoluted and often not a quick process to obtain, and so AET agreed to re-implement this as a mechanism to enable distributions to be made in a quicker manner.

The period during which the buckets were reintroduced was during Supreme Court proceedings by some of the TAC members to remove AET as Trustee. During this period, due to a dispute as to the correct composition of the TAC, as a matter of practicality, AET needed to obtain the approval of at least 75% of members of the TAC (as AET considered it to be comprised) and the approval of at least 75% of members of the TAC (as it was alleged to be comprised by the plaintiffs). This process is said to have taken months and resulted in much needed hardship applications, by their very nature urgent, not being approved in time. The re-introduction of the buckets was seen as a solution to this problem.

Upon reintroduction of the bucket system, $20,000 was allocated by AET to each family group (irrespective of membership numbers), to be applied in the 6 months until June 2016.

The Inquiry reviewed a range of documentation and summary provided by AET in relation to family group. In contrast to the approach under Abbott, the resolution worksheets for each family bucket show that AET generally paid the supplier directly or provided vouchers for food/fuel, rather than giving cash to the recipient. This provided greater certainty that payments were being distributed and used in furtherance of the charitable objects of the Trust.

Nevertheless, for some families, the TAC member who authorised payments, or their immediate family members, received significant payments themselves compared to other family members, although sometimes those persons were Elders and that influenced the decision. For example, Ms Westerman confirmed to the Inquiry that larger payments were made to three particular Elders in her family as confirmed by AET’s records.

ISPL

ISPL abolished the use of family buckets. In an email to the TAC members from Mr Parker dated 2 July 2016 it is stated in the context of a revised distribution policy to be discussed at a TAC meeting:

… The Family Bucket no longer exists because, up until 30 June, 2016 much of the money spent from these buckets breached the Objects of the Trust and therefore placed the Trust in grave danger of losing its Charitable status and tax exemption.
CHAPTER 11: TRUST DISTRIBUTIONS

Further, in the minutes of a TAC meeting held on 6 July 2016 it is stated that:

Greg advised that following general discussions with the Australian Tax Office and the Australian Charities and Not for Profits Commission (ACNC), a number of payments have clearly breached the Trust Fund rules, which could lead to the loss of its charitable status.

**Recommendation 45 (Chapter 11)**

Trustees of charitable trusts proceed with caution in relation adopting distribution systems which involve distributions being paid to family representatives to then disburse, particularly where discretion is then conferred on that person in relation to the distribution of the funds (e.g.: the ‘family bucket’ system).

**Economic Development/Business Assistance**

The provision of funding to support economic development and provide business assistance to Njamal People is one of the more controversial areas of funding provided by certain of the Trustees, particularly ISPL. Largely however it sought to effect this through its related entity Njamal Services Pty Ltd, as well as the NPJV.

On the one hand, as previously noted, clause 4.2(c)(i) of the Trust Deed (with its chapeau) provides:

> Without limiting the generality of the foregoing, the Trustees, may pay and apply the capital and income of the Trust Fund for the objects and purposes set out in sub-clause 4.1 in the following ways:
> (i) improving the social position, economic position, self esteem, self reliance and independence of the Beneficiaries;

In that regard it has been suggested to the Inquiry that promotion of individual Njamal people’s businesses leads to overall community benefit in the form of creating economically successful leaders in the community; in turn encouraging increased self-esteem, self-reliance and independence of the beneficiaries, which in turn can combat poverty and destitution. Further, it is generally accepted that Aboriginal people as a group of people are disadvantaged and impoverished, and are a “class which, generally speaking, is in need of protection and assistance”. 293

However, the potential difficulty with this category of funding comes back to the essential character of a charitable trust as being to advance charitable objects for the benefit of the community or a significant section of the community (in this case the Njamal People), not the private interests of particular persons. As already noted, the Trust Deed explicitly recognises this in its requirement that the objects of the Trust be carried out ‘without purpose of private gain’. Accordingly, a trustee ought be cautious to ensure that in developing any programs this

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limitation is appropriately reflected and, if in doubt, particularly if significant funds are concerned, obtain legal advice and potentially the direction of the Supreme Court.

In that regard, in Plan B Trustees Ltd v Parker, when considering whether certain payments made by an indigenous charitable trust were within the objects of the trust deed, Edelman J observed:

> It may also be relevant that a distinction should be drawn between "ends, means and consequences". The ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost.

At times a fine line exists between actions which are for the purpose of charitable objects but provision of non-charitable benefits is the means or incidental consequence of taking such actions. That is apparent in relation to the provision of economic or business assistance to Njamal people. Much turns on the precise nature and extent of any such assistance, the criteria by which such assistance is made available and what is being sought to be and might reasonably be anticipated being achieved. In the Inquiry's view this can involve degrees of judgment and must be considered in the context of the particularly community concerned and its needs and ways in which the charitable objects might reasonably be advanced. That said, provision of funding to assist a private business operate with resulting private gain of the operator of the business is particularly open to being characterised as being outside the objects of the Trust Deed unless very carefully approached.

**Policies and Practices**

**Abbott**

The genesis of this category of funding was the provision of funds specifically for this purpose by BHP Billiton Iron Ore Pty Ltd (BHP) under an undated agreement in 2010. Under that agreement BHP agreed to pay $200,000 over four years to assist the "Native Title Party" (defined as the then group of applicants in their own right and on behalf of the Njamal People) to obtain investment and business planning advice. The money was accounted for by Abbott as "BHP ED" funding and was used to provide assistance to business start-ups for the limited purpose of obtaining investment and business planning advice. By letter of 10 February 2010, BHP set out that $155,327.84 remained to fund "agreed cultural, business and community development purposes".

In September 2011, the TAC agreed upon criteria for applying for Economic Development funds, including:

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(i) a detailed application for expenses;
(ii) a registered business plan;
(iii) the purpose for which money is required and itemise the manner in which the money will be spent;
(iv) approved by TAC according to Trust's objects; and
(v) provide a written status report to the Trust after the first 6 months of business set up to enable to the Trust to report this at the following Trust Meetings.

**AET**

AET's position, as reflected in the distribution policies it adopted, was as follows:

Unless otherwise specified by a commercial agreement, the trust deed itself does not include "economic development" of (sic) "business promotion" as a charitable object, therefore the trustee cannot provide large sums of money to set up and start a business. Such costs would be considered as being purely commercial and so are not considered to be charitable purposes. The trust can however:

- Provide costs to have a business plan prepared or altered;
- Advice or services associated with tax, accounting and bookkeeping fees;
- Professional mentoring and support after commencement; and
- Legal fees such as to assist with structuring, creating constitution (at the discretion of the trustee)

Funds cannot be used for these purposes:

- Payment of taxes or BAS
- Any other compliance related matter

All such applications will be considered at meetings of the Advisory Trustees. In assessing who receives funds, the committee will use their best efforts to fairly distribute funds to different family groups, so as to be fair and equitable as possible in their approach.

AET's policy recognised the tension between provision of funding for economic development or business promotion and ensuring that only charitable objects were pursued. It obviously tried to draw a balance between assistance which, if made available to Njamal people in need of such assistance, would potentially further objects such as alleviating poverty and improving the overall future for the Njamal People, by encouraging them to become self-sufficient and develop valuable employment and business skills. As such, in the Inquiry's view it can be seen why provision of assistance, particularly within recognised areas that comprise barriers for many Njamal people to access such opportunities and enter into business, may be seen to be in furtherance of charitable objectives. In particular, assistance in areas such as mentoring, support and assistance with planning and preparation of business plans are understandable areas where assistance may overall result in greater participation by Njamal people in business activities with resulting broader community benefit. It is however far more problematic if funds are effectively provided for such businesses to be operated with resulting private gain, in the absence of very clear criteria directed to achieving community benefit rather than private gain through commercial activity.

The AET policy recognises that payments might otherwise be made in relation to supporting economic development where provided for under a commercial agreement (an example of which appears to be the BHP agreement referred to above). That itself gives rise to a
complex question which a trustee should be alert to in relation to the precise basis on which any such funds have been received by it, whether the funds are part of the Trust Fund and subject to the limitations of charitable objects of the Trust, or whether they are received outside of the terms of the Trust and may be used for other broader purposes.

In any event, as far as the Inquiry is aware, AET did not make any distributions from the Trust Fund under this head of distribution.

**ISPL**

ISPL re-commenced making distributions under the Economic Development category, not limited to use of funds that may have been provided by a mining company for a particular purpose. Its policy in relation to funding under this category has broadly remained the same. As expressed in its initial July 2017 policy it provided:

> Applications may be made for assistance in the development of micro-businesses (nominally 4 or less employees). However, the Trustee will only fund the enhancement of business skills of the entrepreneur. The Trustee will not provide working capital. Costs for which applications can be made include: Business plans to be prepared or altered; General process advice associated with tax, accounting and book keeping; Professional mentoring and support.

> Please note: Applications will only be considered after the applicant has unsuccessfully applied for assistance for the above services from Indigenous Business Australia. These are offered to indigenous Australians free of charge.

In the final version of the policy published on its website the caveat about seeking assistance from Indigenous Business Australia was not referenced, however in its 2018/19 policy it is. While that requirement is specified, it is not clear whether it has at all times been enforced.

**Economic Development Distributions**

Under Abbott's trusteeship, during 2011/12 and 2012/13 funds were allocated to a number of Njamal people, several payments being approximately $10,000 and three being in the vicinity of $20,000. Several of the recipients, including Ms Westerman, were or are TAC members.

As noted above, under AET it appears that funding was not distributed under this head of distribution.

Under ISPL, significant expenditure had been incurred in relation to economic development and business assistance and development of Njamal family operated businesses has been a real focus. At the community meeting held on 31 January 2017 it was resolved that every of the 14 family groups be identified for a business opportunity.

While initially ISPL and the Trust were directly used to facilitate such opportunities, it appears that soon changed, with Njamal Services Pty Ltd and the NPJV then and presently being used as the vehicles to provide such assistance outside of economic development assistance available under the above distribution policy. That in turns raises a question about whether ISPL can properly fund those related entities, particularly where their objects are on one view not limited to similar objects to the Trust and activities potentially extend beyond those which the Trust may engage in. This is considered previously in Chapter 8 of the Report.
Returning to the actual expenditure by ISPL recorded under this category, a distribution spreadsheet for 2016/2017 records that approximately $121,000 was expended on the services of Mr Green and his daughter. About $108,000 relates to the services of Mr Green, paid both personally and through a company connected with his daughter, Greenco Holdings Pty Ltd (and about $13,000 relates to the services of Ms Green (also paid personally and through Greenco Holdings Pty Ltd)). ISPL says that Mr Green has been responsible for helping Njamal people set up their own businesses with a view to becoming economically independent. Providing all Njamal people with "a substantial, real, and sustainable future that will be independent of relying on the welfare programs available from the State Government" is one of the current endeavours of ISPL.

The Inquiry asked ISPL to further explain these amounts and ISPL provided a further breakdown. It was identified that while approximately $138,000 related to Economic Development, approximately $33,000 in fact related to Language and Cultural Assistance projects. Of the Economic Development amount:

- Approximately $51,000 related to assistance with established Njamal family businesses, the significant majority of this amount being for Mr Green's time in assisting with the businesses. ISPL also provided the Inquiry with brochures and capability statements for several family businesses, showing the result of Mr Green's assistance and provided the Inquiry with a "Family Business Register" of businesses managed by Njamal people. The Inquiry is aware that issues have arisen in relation to whether, in fact, a number of the businesses for which such capability statements were prepared actually had the requisite capabilities, as distinct from desire to gain such capabilities. It is therefore suggested that ISPL review its past approach to ensure resources are being effectively targeted and used in this area.

- The Inquiry notes that distributions under this and other heads included funds to assist with various costs associated with a Njamal band involved in promoting Njamal culture. It has reviewed expenditure and the reasons advanced for its approval and is satisfied that the expenditure was reasonably incurred in order to advance charitable objectives. In particular, the particular band was supported to assist with a range of matters including performing at a charity ball, video and sound recording (some of which were accounted for as part of Language and Culture), playing free concerts for children on drug and alcohol awareness, such as during NAIDOC week, and necessary equipment

This is corroborated by pictures on the band's website of performances at primary schools during NAIDOC week 2017.
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including a trailer to ensure that when the band travels on-country the kit is protected.

- Approximately $88,000 related to "Njamal Core Projects, not yet allocated". About $80,000 of this amount relates to Mr and Ms Green's time assisting the Trust further various projects, listed as:
  
  (a) Home Ownership concept properties from state government;
  
  (b) Indigenous Carbon/ Indigenous Enterprises opportunities;
  
  (c) Medical Assistance Apartment Community Concept;
  
  (d) Njamal Heritage;
  
  (e) Njamal Security;
  
  (f) Njamal Services;
  
  (g) Miscellaneous economic development expenses and purchases;
  
  (h) Regional economic forum and seminars;
  
  (i) Solar power concept for boutique enterprise;
  
  (j) Youth in crises, JV, work ready youth.

It therefore seems that this category has been used to account for expenditure extending well beyond the distribution category in the distribution policy to cover significant expenditure incurred for Mr Green's services, in particular. It is not immediately clear why such amounts have been recorded as distributions rather than expenses incurred in the course of trust operations. A similar question arises in relation to other expenditure such as in respect of the engagement of project liaison officers.

Recommendation 46 (Chapter 11)

1. ISPL review its approach to expenditure in relation to economic development assistance to ensure that resources are being effectively targeted and best utilised in this area.

2. ISPL review and take advice if appropriate in relation to the appropriate classification of expenditure such as fees incurred for Mr Green's services and expenditure associated with the engagement of project liaison officers, which is currently classified as distributions.
ISPL and its related entities have been highly involved in the community by planning for and providing various projects, seeking out and providing job and family business opportunities for Njamal people and taking a proactive approach in seeking grants at a Commonwealth and State level to assist Njamal people.

A significant number of the Njamal people approached by the Inquiry spoke of the positive impact that ISPL had created in the community, that the new opportunities and projects had given them hope and provided encouragement. Some of these people expressed frustration that the Inquiry was hindering progress with some of the projects and grant applications.

This Chapter of the Report focuses on the work done by ISPL in the community, starting with ISPL’s stated philosophy and direction. Then considering the types of projects initiated by the TAC and ISPL, and ISPL’s involvement in supporting and applying for grants on behalf of Njamal people.

**ISPL’s Philosophy & Direction**

ISPL has taken a different approach to managing the Trust to previous Trustees of the Trust, In its submission to the Inquiry, ISPL set out its philosophy and how it differs to that of previous Trustees. Its submission provides an insight into its approach and has been reproduced below:

Past Trustees for Njamal People’s Trust and for Aboriginal communities in general, have typically defined their task in terms of financial reports and compliance statements; and while these aspects are important and report the (sic) legal framework, they are only part of the equation,

The real issue is the people, the Aboriginal People. The oldest race on the planet. It’s about their circumstances and needs today, and what sort of life will they have tomorrow.

There is a momentary opportunity for the wrongs of the past to be remedied through the recognition of their history and in the utilisation of native title processes, and to then try to properly utilise the benefits that can flow to these communities from the proceeds received from Native Title negotiations.

In the instance of the Njamal People, their Indigenous-owned home lands of the Pilbara must deliver lasting benefits for future generations.

They are the traditional owners of 3.8 million hectares of mineral laden lands of the Pilbara, but to date have received little recognition or compensation for their history with this land.

Native title claims exist at the intersection of culture and economics, the past and the future.

Properly managed, native title can serve to close the gap between indigenous and non-indigenous Australians. It can and must create opportunities through wealth creation for this generation and future generations, to drive intergenerational change, in health standards, housing ownership, recognition and respect, and in employment and training opportunities.

With that view, ISPL has approached all tasks with the Njamal people in mind and endeavoured to ensure NPT can generate the employment opportunities and the financial benefits necessary from projects and contracting that will flow through the Njamal community and out to all Njamal families and their futures.

Through developing new business opportunities and additional revenue streams the Njamal people can create a wider scope of benefits and obtain economic independence, and accrue assets that will prevent intergenerational poverty, and enjoy higher health standards and health care.
CHAPTER 12: ISPL’s INVOLVEMENT IN THE COMMUNITY

The Trust’s Key Areas under ISPL

ISPL has implemented its philosophy by seeking to advance six key areas or objectives agreed at an early stage with the TAC and broader Njamal community, to achieve the Trust's charitable objectives under the Trust Deed. These key areas were presented to Njamal people at regional meetings and forums before ISPL was appointed as Trustee. According to ISPL’s July 2017 submission to the Inquiry, the key areas (sometimes called “Objectives” in ISPL’s submissions) were discussed with the TAC to arrive at the Trust’s draft 2017 to 2020 Strategic Plan. No finalised plan has been provided to the Inquiry. Whilst there is no requirement at law for a charitable trustee to devise a strategic plan for the Trust, it is a potentially valuable tool and the Inquiry encourages ISPL and other Trustees to prepare such plans and routinely review and monitor progress in achieving identified goals, whether financial or social.

The “Objectives” in the draft Strategic Plan are:

1. Promote the financial development of the Njamal people;
2. Support and promote the maintenance of Njamal law and culture, the cultural education of young Njamal People, and programs involving young and old Njamal people going out to country;
3. Protect the well-being of the Njamal people by assisting Njamal People to obtain life’s essentials like accommodation and promoting pride in one’s self and self-care;
4. Help Njamal people work together, respect and listen to each other, respect and listen to Elders, and respect the people who work with and for the Njamal people;
5. Work to improve the physical health, mental health and well-being of both young and old Njamal people through programs such as suicide prevention, dialysis, and drugs and alcohol abuse treatment and education; and
6. Provide Njamal people access to education and training, assisting with school attendance, early childhood financial training and life skills.

These key areas are referred to in some of ISPL’s project management documentation.

Projects

Pippingarra

One of the largest overall projects implemented by ISPL comprises several component projects, all occurring on Pippingarra station and is now known as “Pippingarra”. Pippingarra is a pastoral lease owned by the Aboriginal Lands Trust and is subleased to the traditional owners, including Njamal. It is some 40 minutes’ drive from Hedland.

The Pippingarra Community was developed with a view to:

- Provide a safe place for children and adults from substance abuse;
- Maintain cultural orientation and preservation on the country;
- Provide self-determination and self-empowerment;

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296 ISPL’s 5 July 2017 submission, 5.4.
• Individuals to be a positive bridge between both societies Western/Aboriginal Communities.

The Trust currently has three projects in place at Pippingarra, all of which are currently managed by the Eaton family, who come from that part of the country and can speak to the land.

Given the amount of expenditure on this project, and concerns raised with the Inquiry, the Inquiry gave particular consideration to this project.

**Youth at Pippingarra**

Initial funding for a youth camp at Pippingarra was approved at the September 2016 TAC meeting. A paper was circulated, setting out that the proposal was to create basic infrastructure in a camp environment for some 20 boys, 5 girls and accommodation for 5 supervisors and Elders, with the purpose of providing an environment for the youth to re-establish connections with other youth, Elders and the land.

It was proposed that this would be achieved by living in dormitory style accommodation, encouraging dialogue around the camp fire and undertaking activities such as hunting, art, design, making of artefacts such as spinifex weaving and boomerangs, and time spent talking in Njamal.

**Stage 1** of the project was the Shower and Toilet block, which includes a camp kitchen, water paper, sewerage and sporting area.

**Stage 2** of the project was to provide non-tent accommodation for both the Elders and the youth, suggested to be three 40' transportable accommodation units (“dongas”).

**Project Advancement & Budget**

The budget for Pippingarra was originally approved for $184,000, however costs quickly surpassed this amount.

In the first half of 2017, work had commenced on this initiative, with the solar water pump and caravan style temporary accommodation on site.\(^{297}\) As of August 2017, $150,000 had already been spent and the remaining cost of the project was estimated to be $227,000, bringing total costs to complete the project to be $377,000, $190,000 over budget. The budget blow out was identified by Mr Mack, who, after liaising with NPJV who were to complete the works\(^{298}\), emailed ISPL senior management saying:

> Without having looked into the detail of this, my guess is that there has been a combination of possible underestimates when the budget was prepared, costs being booked to this project that don’t relate to it and a significant increase in scope that has resulted in what is likely to be this project doubling in cost.

\(^{297}\) 2015/216 Annual Report.

\(^{298}\) Mr Mack’s email dated 23 August 2017.
As we have already committed to this project (and as advised below, committed somewhat to the additional work), we could probably not just walk away now. Now that we have the attached info, we can gain a bit of control over the remaining works and work with Scott to make sure there are no further cost blowouts.

From the information available to the Inquiry, it appears that Mr Mack's concerns were not immediately acted upon. By early 2018, six modules providing 24 youth accommodations were supplied and installed and the bore water system, power and sewer system were upgraded. The costs of these installations were such that, as at 24 May 2018, $275,109.83 had been expended on the project.

Mr Carter indicated in April 2018 that the expected expenditures of the project would likely be a further $300,000 and that budgets were being reviewed. Mr White confirmed in June 2018 that the original budget may not have been followed and that, whilst the first stage was complete, the project is still in construction, with some unassembled kitchen units on site. He confirmed that the project has currently been mothballed whilst redoing budgets.

As at 16 June 2018, eight accommodations units had been provided with appropriate power, water and sewerage systems in place and being maintained. However, the kitchen dongas and further accommodation donga were yet to be installed. Mrs Eaton confirmed that current work on the project has stopped and whilst further work is required on the project, she was not aware of any further plans or budgets for the remaining work.

**Partnerships/Grants**

ISPL has advised that it has formed a partnership with Centrelink which enables it to operate as a Third Party Provider which will allow it to extract Rental and Utilities Payments from residents at some future time. It has also commenced negotiations with both Hedland offices of the Education Department and the Department of Communities (Child Protection) on possible uses of the Pippingarra facilities for things such as school holiday camps as well as respite care for carers.

The consultation with government bodies answers, at least in part, a complaint about ISPL's projects: Ms Westerman has said that local agencies are not aware of this facility which was funded to assist at risk youth. The consultation with Centrelink, the Hedland Education Department and the Department of Communities (Child Protection) demonstrates that some of the larger agencies are aware of the program.

ISPL has also assisted a family to apply for a grant from the Dream it Forward Foundation to implement a youth program, with funding for an officer to take small groups on the land. An application for $7,000 was submitted in March 2018.299

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299 Grants status report attached to Mr White's email dated 17 May 2018.
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School Holidays Project

The Pippingarra school holidays project is a 7 day program for up to 30 youth during the school holidays that runs on country at Pippingarra. The program involves hunting, exploring areas and talking about heritage with Elders. The program is run by Troy Eaton and by all reports has been popular and successful and a credit to the Eaton family.

The project was discussed by the TAC at its meeting on 6 September 2017, where a motion was carried to allocate $3,900 to the project (for food, petrol and a first aid kit), one of the trailers to be used, and the opportunity to be circulated on the Facebook page, web page and newsletter.

This project is in operation, with school holiday programs at Pippingarra being run about twice a year and a picture of a 2017 camp appearing in the 2016/2017 Annual Report.

The actual cost so far to the Trust has been $4,036.46. The 2017/2018 Annual Report also suggests that FMG funded some of the Youth on Country expenses.

According to Mrs Eaton, whilst the Trust did not provide funding for the July 2018 school holidays, the Elders continue to run a school holiday program with their own money.

Pippingarra Drugs & Aged Care Project

In the Trust's draft but incomplete Strategic Plan for 2017 to 2020, one of the means it identified to obtain Objective 5 (Work to improve the physical health, mental health and wellbeing of both young and old Njamal people through programs) was by encouraging Pippingarra to be a substance abuse refuge.

The Inquiry has spoken with a senior Njamal woman, who confirmed that Njamal people who want to give up things are able to visit Pippingarra. Senior community members visit the camp and sit on the ground to speak on health aspects of the dangers of drugs and alcohol. Support is also given to family members of those visiting Pippingarra, to let them know that they are not alone.

Another Njamal woman who contacted the Inquiry praised this project, saying that a relative of hers had been an alcoholic and after going through the program was no longer an alcoholic, had become active in the community, being involved in Heritage surveys and leading younger community members. She used this project as an example of the good done in the community by ISPL and Mr Carter and the hope that had been created when ISPL became Trustee.

Complaints/Allegations

Concerns have however been expressed to the Inquiry that Pippingarra really is a family run block that only benefits the Eaton family and that many of those family members now live at the block. Mrs Eaton broadly confirmed that she and many of her extended family members
reside at the block and that the projects at Pippingarra are currently limited to her broader family, with the apparent exception of school holiday programs run for Njamal youth.

With regard to the availability of the project to the wider Njamal community, Mrs Eaton informed the Inquiry that the current drug and alcohol projects at Pippingarra have been targeted at her broader family members as opposed to the whole Njamal community. This is on the understanding that the project will start with immediate family members before opening to the larger community. Regarding projects for children, she has said that other family groups might have different cultural protocols and if something happened to a child from a different group, that would be 'on her head'.

It is unclear from information provided to the Inquiry whether it was contemplated that the use of facilities at Pippingarra would, at least in the first instance, be generally restricted to members of Mrs Eaton's extended family, or whether it was anticipated that they might end up living there. While it is understandable to start the ambitious project with a small group, before expanding it to the wider community in a staged approach, it is unclear whether there is or has been any plan by which this is proposed to occur so as to ensure benefits flow for the benefit of the broader Njamal community rather than primarily one family group.

Trust funds may only be expended for Trust charitable objects 'without purpose of private gain'. There is a risk that establishment of facilities that largely or exclusively benefit only one family group may fall outside the objects of the Trust. It is therefore important that ISPL review the current and future use and funding to ensure it is of broad Njamal community benefit.

The Inquiry also comments below on certain other concerns raised with it during the Inquiry.

A complaint was received to the effect that TAC members approve their own projects and in particular reference to this project that Mrs Eaton/the Eaton family have received a large amount of money, one allegation referencing $200,000 being paid from the Trust. The Inquiry is satisfied however that to the extent any complaints might be understood as suggesting that significant payments of this nature were paid directly to Mrs Eaton or other members of her family in respect of the project, the complaints are misconceived. ISPL has responded to the effect that the family members do not expend the money, it comes from the Trustee. The Inquiry accepts that while significant funds were expended in respect of Pippingarra projects, ISPL essentially did so by making payments directly to contractors and suppliers.

A former director expressed concerns as to whether the people involved in assisting at Pippingarra substance abuse programs may not be the right people for the job, suggesting that perhaps people with qualifications in the area would be better suited to the task. He had not been informed of any analysis done on the rehabilitation project, whether it was a safe environment or whether it provided broader community benefit. He also was not aware of whether it was monitored or whether any alternatives had been canvassed. Of course, differences of view are inevitable as to how a Trustee should expend charitable funds and those differences do not mean that the choice made by one trustee is necessarily imprudent.
or a breach of its duties. However, the concerns raised were genuinely held and in the Inquiry's view warrant consideration by ISPL in conjunction with the TAC in relation to any review and future planning for the facility, to optimise the benefit to the Njamal community from the facilities.

In its response to an invitation to respond to possible findings and recommendations that may be open, ISPL indicated that:

The full extent of this project is under continuing consideration.

The project was commenced very soon after ISPL's appointment. Planning was undertaken but present management considers it poorly executed, mainly due to changing requirements identified on site not being properly managed. The previous management's view was to continue the project works to achieve a point at which the facility has been usable, albeit only partially developed compared with the original concept.

When the costs associated with the project were reviewed by present management, it became apparent that capital costs and operating costs were not correctly identified and separated resulting in the capital costs and their comparison to the original budget being skewed. An example of this are the costs associated with power generation, fuel and water which are significant ongoing operating costs and should not be included as part of capital expenditure.

All works at Pippingarra are currently on hold pending further review of what, if any, essential work needs to be completed. The purpose and use of the facility overall has had a positive outcome and ISPL wishes to continue to deliver the final vision at an agreed budget within an agreed timeframe.

ISPL’s newly appointed CEO will be attending the facility in the next few weeks to review the works and ascertain exactly what is happening at the facility. The Inquiry is also welcome to review, at the same time, these facilities on site to assist with its understanding.

As part of its overall review process, ISPL is also developing clear guidelines for all future projects so that proper planning and costing will implemented every time.

Findings

The Pippingarra project was approved and funded from Trust Funds, in order to further the objectives of the charitable trust by providing a safe place for children and adults from substance abuse; to maintain cultural orientation and preservation on the country; provide self-determination and self-empowerment and for individuals to be a positive bridge between both societies Western/Aboriginal Communities.

The project has received praised for a range of benefits to a number of Njamal people, and has involved a significant contribution by the Eaton family which should be recognised and applauded. At this stage its use has however largely been restricted to use by members of the Eaton family and there is a risk that payment of significant sums for facilities that largely or exclusively benefit only one family group may fall outside the objects of the Trust. It is therefore important that the current and future use of the facilities be reviewed to ensure broad Njamal community benefit.
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The Pippingarra project proceeded and evolved over time without clear accountability, governance structure, or management controls being established over the project including:

- clear assessments not being conducted to ensure that the feasibility, risks, benefits and costs of the project were properly assessed, before the ISPL, as Trustee, approved significant expenditure on the project; and

- poor project planning and management. The budget blow-out and subsequent stalling of the project has meant that significant Trust funds have been spent on infrastructure, some of which is still unable to be used.

ISPL has however indicated a range of measures directed to improving future project management for this and other projects and to address achieving the original vision for the project are being taken.

**Recommendation 47 (Chapter 12)**

1. ISPL carefully review the ongoing use of, and funding in relation to, the Pippingarra facilities, including ensuring that there is appropriate governance over the project and that its use meets Trust objects and is not solely for the benefit of one extended family group.

2. ISPL prepare and implement clear guidelines for all material projects which it contemplates funding from Trust Funds to ensure that they are properly planned, assessed and costed before funding is approved and that they are subject to appropriate ongoing governance, controls and periodic reviews to assess their effectiveness.

**Home Ownership & Project Homes/ Pilbara SHINE Program**

A significant project envisaged by ISPL and the Njamal Elders is to assist Njamal people to purchase properties from the Housing Authority to provide socially appropriate housing and provide financial independence to Njamal people.

The idea behind this project arose before ISPL was appointed as Trustee of the Trust. ISPL has submitted to the Inquiry that, before its appointment was finalised, it was required to submit an implementation plan that included ventures in housing to improve the stability, health and wellbeing of Njamal people.\(^{300}\)

The initiative was developed with Njamal Elders after ISPL’s appointment and has been called the Pilbara Special Housing Initiative by Njamal Elders (SHINE) Program.\(^{301}\)

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\(^{300}\) ISPL’s 4 July 2017 submission, 45.

\(^{301}\) Draft Business Case Njamal People’s Trust House Proposal.
CHAPTER 12: ISPL’s INVOLVEMENT IN THE COMMUNITY

This project, if it proceeds, is intended to be run by the Njamal People’s Benevolent Trust rather than the Trust due to its status as a public benevolent institution.

ISPL and its consultants assisted the Njamal Elders in preparing a detailed, 106 page business case for the Minister for Housing and the Housing Authority in July 2017, setting out details of this project. ISPL is also trustee of the Njamal People’s Benevolent Trust. The executive summary of the business case sets out the background to and purpose of the proposal:

Background

The Njamal people are the traditional owners of the land stretching from South Hedland through to Marble Bar, but to date they have very little to show for the many years of managing their lands.

Very few own land and most are public housing tenants. Generally, they struggle with the high costs of power consumption in the Pilbara, and often inappropriately sized and located housing makes it difficult for them to obtain social support through their extended families.

The Njamal People’s Benevolent Trust (Trust) has as one of its main aims to improve the health and wellbeing of the Njamal people. Key outcomes of the Trust include the provision of socially appropriate housing and providing opportunities for financial independence.

To help achieve this the Trust is seeking to acquire vacant Housing Authority owned houses in South Hedland to use as the foundation stock to conduct an integrated community development and housing initiative. The initiative will be especially designed for the traditional land owners of the Pilbara region, and will focus upon creating and providing to Aboriginal families in the region, new education, training and employment opportunities that are designed to increase their home ownership opportunities.

The initiative is to be known as the Pilbara Special Housing Initiative by Njamal Elders Program or in-short the Pilbara Shine Program.

The program is an interactive and self-help initiative developed by the Trust, with the objectives to:

- provide indigenous families with the opportunity and means to attain homeownership, that is provided in a multi-layered and self-help model not available from any current government or community sources;
- integrate home ownership with training and employment opportunities;
- conduct pre-occupancy upgrade works on the houses to make maximum use of solar power technology and water conservation systems, to reduce ongoing costs to the families allocated these houses;
- ensure these families can remain in the region where they have traditional ownership and a deep affinity;
- showcase the success of these families as role models to other families, and to community perceptions;
- build upon the successes this pilot program delivers, to offer similar programs in other regions of Western Australia; and,
- conduct the program and all sub programs in a highly efficient and transparent business model measured against stringent financial and social key performance measures.

Central to the project was the proposed acquisition of 20 Housing Authority properties in the South Hedland Environs to be used exclusively by Njamal towards the attainment of the stated objectives set out in its Trust Deed and towards the well-being and housing needs of local Aboriginal families. It provided that the properties were proposed to be used for short term emergency housing needs, short to medium term rental housing programs and long term home ownership programs with individual home ownership by Njamal people and/or other Aboriginal families from the region being the end objective sought by the Njamal People’s Benevolent Trust in undertaking the project.
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ISPL has indicated to the Inquiry that this project is also intended to use solar power to significantly reduce electricity costs and water-wise gardens and systems for potable water to reduce water consumption costs. It has identified many additional social benefits to the project, including less social issues as families are more appropriately located and the path to ownership will encourage pride. It is proposed that a Njamal business will undertake the renovations and maintenance will provide long term employment.\(^{302}\)

ISPL has apparently had several meetings with the Minister and the Department of Housing regarding this project and has also made an application for $1.75m funding to renovate 24 houses for "solar power, water conservation, security and home ownership". ISPL previously advised the Inquiry that the application was stalled whilst the Inquiry is ongoing. ISPL has also provided information to the Inquiry asserting that a large volume of applications for funding from other agencies have been stalled (or put on hold) whilst the Inquiry is ongoing.

Mr Carter informed the Inquiry that ISPL was entering a joint venture for a program for aboriginal families to own their own properties. In May 2018 he said that it was still 6 months away and would require cooperation with other trusts. While it is unclear what the current status of these proposals is, given the recognised central importance of stable housing and home ownership to welfare it is understandably a central focus of the vision of the Trust and the Njamal community.

**Hedland Harbour Café Business**

Njamal took over the operations of the Hedland Harbour Café in November 2017. The Hedland Harbour Café is apparently operated on land owned by BHP.\(^{303}\) The opportunity to purchase the café business was raised with the TAC at its 17 May 2017 meeting, the minutes of which provide:

- Rod advised the owner of the Café next to the new Hedland office is retiring, and the business will shortly be for sale. He believed it would suit a family with experience in food, and a track record in working the long hours required.
- The premises are large enough to provide a training facility for Njamal people interested in developing skills to work in food services at the mining camps- we should know the results of the Pilbara Minerals Camp Services contract next week.
- Barry advised there is the opportunity to provide catering services at the Swans new clubrooms.

A business précis for the purchase of the café was attached to the 17 May 2017 TAC meeting agenda. That document, dated September 2016, but updated May 2017 suggests that the asking price for the café was $590,000 (of which $405,000 was goodwill).

ISPL has submitted that the Hedland office has worked very hard to change the "vibe and the menus" at the café and that they have doubled the daily traffic without the operation. It

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\(^{302}\) ISPL's 4 July 2017 submission, 7.15.3.

\(^{303}\) Business précis for purchasing Hedland Harbour Cafe.
advised that, whilst the Njamal family which was initially keen withdrew their interest due to the project being too difficult, ISPL has been able to put a Njamal trainee into the café and has recently employed their first Njamal person. So far, 3 jobs have apparently been created and ISPL hopes over time to develop a capability to train Njamal people into the hospitality industry. The acquisition of the Harbour café included three food trucks for the café for remote site delivery and sales, which are now included on the Trust's vehicle register. It is unclear how far this has been able to progress.

The café featured in the North West Telegraph as an example of a successful program that encourages members in work that they are passionate about. The articles were circulated to the community as part of the community news.

ISPL has informed the Inquiry that it had commenced discussions with BHP with a view to increasing floor space so that it was able to provide better service to customers and Mr Carter initially asserted that it "makes $10,000 profit a week". Mr Carter subsequently informed the Inquiry that there is a contractual dispute with the seller of the café regarding the equipment not being in good working order and levels of profit not being as bargained for.

Whilst the café is run through Njamal Services Pty Ltd as trustee for the Njamal Charitable & Benevolent Unit Trust, funding to make the investment was ultimately provided by the Trust. According to the trial balance as at 24 May 2018, the café owed $7,795 to Njamal Services Pty Ltd in respect of a loan and Njamal Services Pty Ltd had also invested $100,000 in the café business.

An accountant and former member of the ISPL management team expressed disappointment that this investment decision had been made without consulting him; the lack of consultation being unusual given his position and background and the fact that it was a significant investment. As related earlier in the Report, another current and former director also expressed concerns about the investment. Mr Carter recounts however that the proposal was originally not supported but that later in the year an opportunity arose to acquire the business at a substantially improved price and that a decision was made to acquire the business. This issue is addressed elsewhere in the Report in the context of the role Mr Carter assumed after his disqualification from managing corporations.

The Inquiry is unable to meaningfully comment on the actual profitability of the café. It observes that in a document provided to the Inquiry in relation to cash flow and ISPL's achievements the projected profitability of this and other enterprises was recorded as $x. Despite request, the actual projected information was never provided to the Inquiry.

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304 Robert Dougherty, Café Culture right recipe for Trainee, North West Telegraph, 21 March 2018.
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South Hedland Health Campus

This ambitious project, currently in its embryonic phase, is aimed at respite care and aged care beds. In May 2018, Mr Carter informed the Inquiry:

This is a very large project that is designed to create Aged Care beds and Respite Care. At present cost to Government is enormous as the only place in Hedland and surrounds is the Hospital. This is a $15m project that will be funded by the various Port Hedland Trusts, Federal Health Minister and Medicare. Below is the email from Landcorp. These are the real projects Government needs experienced people to implement.

The status of the project was that early discussions had been made with a proposed tenant, ISPL has informed the Inquiry that the proposed tenant was Redimed. When questioned as to whether this was Redimed Respite Care Pty Ltd, the secretary of which was Mr Carter and a former director of which was Clinton Wolf, or Redimed Pty Ltd, of which Dr Hanh Huu Nguyen is a director, Mr White responded that he was not sure which entity it was with, but negotiations were with Dr Hahn Nguyen, suggesting that the proposed tenant is Redimed Pty Ltd. What, if any, role Redimed Respite Care Pty Ltd has had or may contemplated have is unclear.

An expression of interest was also lodged to purchase the former South Hedland Community Centre. This building was identified as the ideal building as it was large, in good condition, and close to the hospital.

Negotiations commenced with the Health Department, which apparently advised that Landcorp had the mandate to dispose of land in South Hedland. The Trust sent an Expression of Interest to Landcorp in December 2017, offering to acquire the land. ISPL informed the Inquiry in May 2018 that Landcorp had recently advised that the Trust was the preferred proponent. It is not clear what stage this project has since reached.

Training - Security

The aim of the training - security project was to train Njamal individuals to form a Njamal security workforce which could then be employed by the various mining companies and provide security services on site.

Initially, the training was coordinated by a TAC member, through the Trust's wholly owned subsidiary, Njamal Security Pty Ltd. According to ASIV records the TAC member was appointed a director of Njamal Security Pty Ltd on 31 August 2017 and removed that same day. His allocated security vehicle was subsequently used by the Hedland office as a pool vehicle. The training itself was conducted by Mr Andrew Leahy, who has a background in security training. Mr Leahy worked for Njamal Security Pty Ltd in November 2016 until mid-2017 and recommenced working with the company in 2018.

In July 2017, ISPL informed the Inquiry that 15 Njamal people had undergone training in readiness for the contracts soon to be announced in the South Hedland region for security/first aid. Another source completed the picture by providing the Inquiry with a report from May 2017 which set out that whilst 14 Njamal youths had participated in the Njamal security
program, none at that point in time had been successful in obtaining a licence. Various reasons were provided as to why individuals failed:

1. Poor participation levels as several individuals commenced the Security Officer’s Course but dropped out when they finished or did not participate in the First Aid Course or sit the final SAIWA examination;
2. Prior criminal histories preventing individuals from being able to obtain the Security Officer licence despite passing all the courses; and
3. Lack of numeracy and literacy skills as several individuals failed the final examination despite repeated attempts.

The initial failure of this program to achieve its intended outcome appears to primarily be the result of systemic problems faced by Aboriginal people in remote communities and is not necessarily a reflection on the Trust or the program itself.

The disappointing early results of this program were discussed at the TAC meeting on 11 April 2017, where Mr Carter raised the issue of the written examination, saying that he was going to have a meeting with police regarding making the test a verbal test. Mr Carter has indicated to the Inquiry that he has since met with police and had been told that a verbal test was now available. In May 2018, Mr Carter indicated that one member had passed the program and was then working through labour hire firm Ashburton Aboriginal Corporation.

Mr White informed the Inquiry in June 2018 that there has been some progress on this venture: now there is another standard in acceptance for indigenous people applying for a licence, more Njamal people are expected to get through the training. Further, as Mr Leahy is back in the mix it was hoped that a broader range of security services would be offered. The Inquiry notes that in the recent 2018 Annual Report published on the Trust website it is reported that 3 Njamal people have now successfully completed the course and been employed.

**Training - Work Ready**

The Work Ready project was commenced after the TAC and ISPL determined that the lack of skills in relation to jobs was a significant factor in Njamal job seekers failing to be ready to take on jobs that had been offered through mining companies subject to mining agreements with Njamal. The project assists Njamal youth in getting out of the home environment, developing work skills and spending time in a safe, positive environment.

The Trust’s Youth Liaison Officer started the program in early 2017. He first advised the TAC at the 25 March 2017 meeting that several initiatives were being developed for Hedland youth to give them employment skills and at the 11 April 2017 meeting he further advised that

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305 According to Mr Carter, one did pass. According to Mr Leahy, no one passed, but one participant was going to re sit an exam in May 2017 so it is possible that participant has since passed.
306 As described in the 2016/2017 Annual Report.
participants would receive formal training from the Bloodwood Tree Association to be work ready.

Since then, the Trust has entered into agreements with both Ashburton Aboriginal Corporation (a labour hire firm) and North Regional TAFE to assist them to deliver the program. As of June 2018, the Trust’s office in Port Hedland is establishing Work Ready Teams to undertake:

- Home Gardening and Clean Up Services;
- Construction Services; and
- Home Service.

The first formal program (the Community Development Program) commenced on 22 May 2018 with 11 participants and was to continue for 6 months. The Community Development Program began with a 5 week block where the participants were involved in a five week TAFE Program. The participants were then to be separated to undergo rotations through the groups set out above.

According to the 2016/2017 Annual Report the program also involves helping other Njamal people with grounds-keeping and recently involved remodelling of the old Commonwealth Bank for the Port Hedland Njamal Office.

The program has acquired three trailers (including a lockable tool trailer) and has off hired a 12 seater bus. As at 24 May 2018, approximately $44,000 had been expended on the program.

The program has been praised by a community member who says that the program allows Njamal people to work for the dole at the Njamal Port Hedland Office or in the field, with other Njamal people in an environment in which participants feel comfortable.

Further, whilst a paid Work Ready project had not yet commenced in Carnarvon when last the Inquiry enquired, an informal Work Ready program is currently in place for Njamal people, with a TAC member and other members of the community using the Trust’s bus and their own vehicles to take people to work on various projects such as cleaning out yards, getting wood for old people and general cleaning. Such projects are apparently not paid, the Work Ready volunteers receive food vouchers. A senior Njamal person involved in running the informal program has said that the program encourages people into a healthier life style than lazing about on the couch and for giving people pride in themselves and in being Njamal.

*Mark Walker Return to Country*

This project involves gathering and recording information relating to Njamal culture from Elders and disseminating the information amongst the community, in particular the younger generation.
It was first put before the TAC at the meeting of 6 July 2016, where it was agreed that Mr Carter and Mr Walker would prepare a budget. A budget and project proposal was subsequently prepared and it appears that it was presented to the TAC, along with other projects, at the 23 September 2016 TAC meeting. According to the project proposal, this project builds on the core of Elders' oral histories to provide the resource for a range of initiatives aimed to increase the Njamal People's understanding of their culture, in particular among the younger generation.

This is a three-staged project: the information gathering stage, the recording stage and the dissemination stage. The budget for stage one was $85,150, which provided for Mr Walker's flights and time ($13,800) as well as Elders' time, transport and venue hire ($16,359) as well as an initial capital outlay on a community trailer ($25,000), video cameras, vehicle hire, food and an anthropologist ($30,300).

ISPL was unable to explain the details regarding the current status of this project to the Inquiry as it is a return to country project with cultural sensitivity. However, whilst the Inquiry has not been provided with a breakdown of the project's incurred costs, the trial balance as at 24 May 2018 recorded that approximately $66,000 had been expended to date. The project was outlined in the 2016 Annual Report. According to the 2017 Annual Report, a trailer was purchased. That is consistent with the June 2018 vehicle register, which records that ISPL has four trailers in its use, including a community trailer for on country visits.

**Barry Taylor Football & South Hedland Sponsorship**

According to the Trust's website, the South Hedland Swans FC, which currently has 12 Njamal players, has a strong connection with the local community and Njamal Services Pty Ltd is working closely with the Swans, providing sponsorship which included training gear for young Njamal people.

The trial balance as at 24 May 2018 shows that $4,400 of Trust funds had been spent on sponsorship of the club and $21,440 has been on Barry Taylor's South Hedland Football project. The president of the club is Barry Taylor.

The provision of facilities for recreation or other leisure-time occupation, if provided in the interests of social welfare is deemed to be a charitable purpose under the Charitable Trusts Act 1962. However, this does not mean that all payments made for recreational purposes will be charitable. From the information made available to the Inquiry, it is not clear what the funds have been directed to and it is known that membership of the football club is not limited to Njamal or even indigenous persons. Payments of Trust Funds to sponsor the club, and payments for "Barry's project", would not be permissible under the Trust Deed unless such

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307 Section 5 of the Charitable Trusts Act 1962.
payments were for, and only for, charitable objects for the benefit of the broader Njamal People and not for a purpose of private gain.

Road-Mapping

The minutes of the TAC meeting of 23 September 2016 record that Mrs Eaton and Jodie Neale gave a presentation in support of a "Roadmap Trip". The purpose of this proposal was to (1) prepare a map showing agreed areas of country for each family group; and (2) for senior women to suggest the structure and decision making process of the PBC, proposed to be on 16-21 October 2016.

The roadmap for family estates was set out in the 2016 Annual Report and was also covered in brief at the Community meeting of 31 January 2017. The project name was changed to "PBC mapping" at the TAC meeting of 11 April 2017.

The 2017 Annual Report informed the community that meetings had occurred that year as part of the determination process, that there had been a series of meeting with Applicants, Elders and interested family groups to identify areas where there was uncertainty of who spoke for that country. The information was compiled as part of the final determination submission. Whilst the Inquiry has not been provided with a breakdown of this project's costs, there have been no complaints made to the Inquiry about this project and nothing to suggest that the money was not applied to further this project.

Mr Carter informed the Inquiry that this project has been stalled due to the death of a senior member in the community.

Perth Community Carer Units Project

This project refers to the two apartments being rented by the Trust in South Perth to accommodate Njamal members and their carers who need to come to Perth for medical care. This project was endorsed by the TAC at the meeting of 11 April 2017 and was brought to the attention of the Njamal community in the July 2017 newsletter, which provided:

> Carers Accommodation is now available for beneficiaries of Njamal People’s Trust as an extension of the Community Programs, on a 12-month trial.

> The accommodation is centrally located on Lyall Street, to provide convenient access Perth’s major hospitals for carers of family members receiving medical treatment.

This project was one of the matters that community members have brought to the Inquiry’s attention as an ISPL initiative that Njamal people are grateful for and proud of and something that was not available under previous Trustees.

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CHAPTER 12: ISPL’s INVOLVEMENT IN THE COMMUNITY

**PBC Country Meeting**

This is not a project as such, but rather the $4,244 entry in the trial balance is the costs of meetings on country associated with the drafting of a Prescribed Body Corporate Rule Book.

A PBC Rule Book was approved by the Office of the Registrar of Indigenous Corporations in early 2018, as was communicated to the TAC at its meeting on 14 February 2018.

**Other Projects**

Under ISPL funds have also been distributed for other projects including an Education for Children Project ($2,546), Carbon Tree Farming Project ($46,844) and a Community Recreation Project ($16,232).

**Complaints about projects**

Concern has been voiced over some of the community projects including that not all resolutions were passed at a TAC meeting, that TAC members ‘approve’ their own projects and that the TAC was not given Trust balance sheets before approving projects.

Based on its review of various documents provided by ISPL including TAC minutes and associated documents, discussions with TAC members and responses from ISPL, the Inquiry is satisfied that the TAC has generally been kept reasonably well informed about projects, being provided with business cases for many proposed projects. For example, a budget of potential costs associated with a contemplated determination celebration was presented and discussed at the 14 February 2018 TAC meeting. The issue of TAC members being present or voting at TAC meetings in relation to matters in respect of which they may have an interest is considered above in Chapters 9 and 10 and the level of information required to be disclosed to the TAC is respectively considered in Chapter 10.

**Other Impacts ISPL has had in Community**

A recurring theme in meeting with Njamal people who receive payments for services from the Trust, or who are directly related to those receiving payment for services by the Trust, was that ISPL has helped increase hope and pride in the community. This sentiment was not shared by all of those engaged by the Trust and was not echoed by Njamal people not employed by or directly related to those employed by the Trust.

Those that spoke positively of ISPL and the increased pride and hope in the community said that the increased sense of pride is due to the achievements including the following:

**Office**

The creation of the Njamal Offices in both Perth and Port Hedland has been very significant in the eyes of the community, as the office creates a focal point for people to meet and to create a sense of identity and feeling of progress towards self-governance.
CHAPTER 12: ISPL’s INVOLVEMENT IN THE COMMUNITY

Employment

As ISPL rightly emphasise in correspondence with the Inquiry, it has been responsible for increasing the number of Njamal people in gainful employment, a matter about which ISPL should properly be congratulated.

Most recently, ISPL has in a letter from its solicitor dated 10 October 2018, explained that ISPL has created employment opportunities for the Njamal People and increased the uptake of these opportunities. A number of those opportunities have been, as discussed throughout this Report, the result of direct employment by ISPL in roles like projects liaison officers and an Elders’ liaison, plus employment in administrative roles within the Port Hedland office. The Inquiry can attest to apparent success of this endeavour as, whenever the Inquiry had cause to visit one of the Trust's offices (either in Perth or Port Hedland), many of the staff were Njamal.

In addition, ISPL also explain that a number of local family run businesses, which have been supported by ISPL, have achieved a significant level of Indigenous employment. The businesses highlighted by ISPL include Glacier Resources (hydrology and mining services business), Jukawalyi (courier business), Cunderline (labour hire business) and Wolli Bolli Mining (land survey business).

The employment of TAC by the Trust and its related entities is dealt with in Chapter 10 above, particularly from page 516 and following.

Grants

ISPL has been active in identifying Commonwealth, State and other grants that may be available for Njamal projects or people. It has also assisted individual Njamal people in applying for grants and has facilitated meetings with the Federal Prime Minister & Cabinet's Office which administers the Indigenous Entrepreneur Fund.

The availability of grants was raised with the TAC at a TAC meeting on 6 September 2017, at which point a list of potential projects and family businesses was circulated. Two days later, a separate meeting was had with Project Liaison Officers and the Indigenous Enterprise Fund.

ISPL then engaged the services of Graeme Stevens through his then business Tessaract Services Group to assist with grants applications. On 6 June 2018 Mr Stevens provided the Inquiry with a large volume of materials relating to grants, many of which (such as job descriptions for grants positions) were not relevant to the Inquiry, but the volume of which does reflect his hard work in assisting Njamal people to apply for grants.
Mr Stevens also provided a summary document, setting out that there are 45 projects currently contemplated relating to grants and attaching a copy of the Njamal Funding Support Register, detailing information about each grant.

Summary Table of current Projects in Register:

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<tr>
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Broadly, Mr Stevens has submitted that collectively the projects have funding support or grant funding applications proposed to be sought with an estimated value of $88.71 million.

His submission does not however set out how much money in grants has currently been received, and an examination of the supporting documentation suggests that none have been received to date (as at 6 June 2018). The partial explanation for this is said to be that:

62% of these projects are under deferment or have stalled or are being held in abeyance due to the reactions of Funding Agency to the continuance of the Inquiry. This is particularly evident where State Government Agencies are involved in this process.

ISPL has submitted that, in light of State projects being stalled, an increased focus has been upon trying to progress projects through the available programs of the Department of Prime Minister and Cabinet. According to Mr Green, there are 19 projects currently intended for that source with a collective request of approximately $46.5 million worth of funding assistance.

Examples where ISPL has assisted Njamal people make applications to the Indigenous Entrepreneurship Fund include:

- plant, equipment and operations hire services to provide for equipment and operator needs of the carbon sequestration projects;
- bush foods projects; and
- production of fresh fruit and vegetables for the Pilbara region.

As set out above, ISPL has also assisted Njamal people in applying for grants relating to existing projects and has been in discussions with the Department of Housing regarding its SHINE program.

Promotion of Njamal Culture

ISPL has sought to promote Njamal culture and sense of community through a variety of measures.
Specific examples of ISPL promoting Njamal culture include:

1. Creating an identifiable "Njamal" logo;
2. Regular community newsletters and Annual Reports;
3. Njamal Culture at NAIDOC 2017: In July 2017, the trust raised awareness of Njamal culture by promoting the "Njamal Train Song", a collaborative multimedia exhibition showcasing Njamal traditional songs by Elders. According to the Trust's website, the exhibition captured and preserved the true spirit of Njamal culture and demonstrates how Njamal people still have and use their Njamal language and songs;
4. Njamal Culture at Schools: Barry Taylor Junior's band played at schools during NAIDOC 2017, with songs promoting drug awareness; and
5. Promoting awareness of Njamal people's achievements and involvement in Indigenous Leadership, such as circulating information about how Mrs Eaton was invited to a morning tea at parliament house to speak with Minister for Women's Interests Simone McGurk as part of the Create Ranger Parks campaign.\(^{309}\)

It is apparent from the matters identified above that many steps have been taken under the trusteeship of ISPL to promote the objectives of the Njamal people and the Trust in partnership with the Njamal people. This has been welcomed by, and helped engender a strong sense of optimism in, many Njamal people, although that has, in some cases begun to wane as some of the predicted economic benefits from the commercial activities funded by the Trust via Njamal Services Pty Ltd are yet to come to full fruition. While it is difficult to measure the social success of the initiatives, and desirable that attempts be made to monitor and report about such matters, the seeming significant increase in employment of Njamal people is itself a very important indicator and achievement. The challenge remains however to continue the progress while ensuring that Trust Funds are expended in accordance with the Trust Deed and obligation of ISPL as Trustee.

Overview

During the course of the Inquiry various difficulties and delays were occasioned, and issues arose, both for the Inquiry and persons requested or volunteering to assist the Inquiry, due to the current scope of the powers of the Inquiry and protections afforded. Issues were also identified in relation to the existing scope of powers to regulate or respond to circumstances where it is considered appropriate that a person's involvement in the administration of a charitable trust ought be limited or precluded.

In view of this, a number of areas for possible legislative reform have been identified by the Inquiry with a view to enhancing the efficiency and effectiveness of inquiries or examinations by or on behalf of the Attorney General and in relation to the administration of charitable trusts more generally. They are considered, in turn, below. In short however, in the Inquiry's view, relevant legislative provisions, being more than 50 years old, would benefit from modernisation.

Inquiries and examinations

Preliminary inquiries and examinations

The Charitable Trusts Act 1962 does not empower the Attorney General to require that a trustee of a charitable trust or any other person provide information, documentation or assistance to the Attorney General to assist decide whether or not to exercise his or her supervisory powers (whether under the Charitable Trusts Act 1962 or otherwise) and, in particular, to decide whether or not to conduct (himself or herself or through an appointee) an examination or inquiry under section 20.\(^\text{310}\)

In practice, this is usually addressed through the voluntary co-operation of the trustee in response to a request made to the trustee the subject of a complaint or concern, by the Attorney General, usually through the State Solicitor's Office. If a trustee does not comply with such a request there is no consequence, other than the potential for the Attorney General to decide to conduct or cause to be conducted an examination or inquiry into the trust or to take action including applying to the Supreme Court for directions. It can also be a lengthy process corresponding with, and assessing responses made by, trustees.

Further, given the negative connotations that are associated by some with the establishment of an inquiry or examination in relation to a trust (which were vocally expressed by many Njamal people in relation to the establishment of this Inquiry), the ability to exercise such powers at a preliminary stage may well assist to ameliorate such concerns in some cases.

\(^{310}\) Other examples include whether to make an application to the Supreme Court of Western Australia under section 21 of the Charitable Trusts Act 1962; or whether to make an application for the removal and appointment of a trustee in the Supreme Court's inherent jurisdiction.
In the Inquiry's view it is desirable for the Attorney General to have a power to obtain information or documentation or to obtain assistance for the purpose of deciding whether to proceed to exercise a power of examination or inquiry under section 20 of the Charitable Trusts Act 1962 or otherwise to discharge his or her role and responsibilities in relation to charitable trusts. Section 9A Charities Act 1978 (Vic) is example of this type of power.

Recommendation 48 (Chapter 13)
The Charitable Trusts Act 1962 be amended to give the Attorney General (or his or her appointee) the power to require the trustees and other persons involved in the management and administration of a charitable trust to provide information that the Attorney General considers necessary to determine whether or not the Attorney General should exercise his or her supervisory powers. The failure to comply with such a requirement within a stipulated time period could be an offence with a penalty the same as the penalty for non-compliance with a request under section 20(3) of the Charitable Trusts Act 1962.

The scope of section 20(3) of the Charitable Trusts Act 1962
Presently, the power in section 20(3) of the Charitable Trusts Act 1962 to request a person to produce documents, answer questions or provide assistance can only be exercised in relation to "every trustee, and every person acting or having any concern in the management and administration, of a trust for a charitable purpose, or of the property or income thereof, into which an examination or inquiry is being made under" the section. In the Inquiry's view that power is too narrow. It has the potential to impede the effectiveness of an examination or inquiry. It also gives rise to a degree of uncertainty as to whether a person might properly be said to be acting or having a concern in the matters specified. While it is understandable why the coercive power should not be at large, in the Inquiry's view its scope should be expanded to ensure that relevant information and documentation may be obtained from third parties who may not at present fall within the scope of that section. It is quite likely in a number of circumstances persons not presently within the scope of s 20(3) may have highly material information or documentation that would be relevant to an inquiry. In the Inquiry's view it is preferable if the power (at least in relation to answering questions or providing documents) be extended to any person who the Inquiry considers may be able to provide information or documentation relevant to the examination or inquiry.

Recommendation 49 (Chapter 13)
Section 20(3) of the Charitable Trusts Act 1962 be amended to expand the scope of the power to require persons to answer questions or provide documentation to extend to any person whom the Attorney General, examiner or inquirer considers may be able to provide information or documentation relevant to an examination or inquiry.
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**Time period to respond to compulsory request**

The approach of the Inquiry was generally to specify a time period for compliance, and consider any request to extend that time period if a person sought an extension of the period due to difficulties in compliance. Despite making clear on more than one occasion the process that it considered should be followed, in relation to seeking extensions of time, ISPL routinely did not comply with time frames set and did not, or did not until after the time frame specified had expired, seek that time for compliance be extended. That was highly unsatisfactory and contributed to the delays in the conduct of the Inquiry.

**Recommendation 50 (Chapter 13)**

Section 20 of the *Charitable Trusts Act 1962* be amended to require a person to comply with a request to produce information, answer questions and give assistance within the time period specified by the Attorney General, examiner or inquirer, or such extended time period as specified by the Attorney General, examiner or inquirer.

**Penalty for contravention of, or non-compliance with, a request under section 20(3) of the Charitable Trusts Act 1962**

The Inquiry has serious concerns at times with the timeliness, completeness and accuracy of responses by ISPL to compulsory requests issued by the Inquiry under section 20(3) of the *Charitable Trusts Act 1962*. It also had concerns with responses from others including Esplanade Holdings Pty Ltd and Esplanade Consultancy Pty Ltd and certain individuals. That impeded and, at times, significantly delayed the Inquiry.

The penalty for a contravention of, or non-compliance with, section 20(3) of the *Charitable Trusts Act 1962* is a fine not exceeding $5,000.\(^{311}\)

In the Inquiry's view the penalty may not be commensurate with the potential seriousness of such an offence and is unlikely to act as sufficient deterrent to persons who may deliberately contravene or disregard their obligations. The range of penalties for non-compliance with compulsory requests by different entities varies significantly under a range of statutes. An example of a provision that may provide a useful guide for any revised penalty is section 34(4) of the *Auditor General Act 2006*\(^{312}\) under which a maximum penalty of $50,000 applies for failure to comply with a direction given by the Auditor General to produce information under that section.

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\(^{311}\) See section 21(3) of the *Charitable Trusts Act 1962*.

\(^{312}\) Section 34(4) of the *Auditor General Act 2006*. That section may be used in relation to the audit of funds collected or raised for charitable purposes by reason of the operation of section 20(4) of the *Charitable Collections Act 1946*.  

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Recommendation 51 (Chapter 13)
The penalty for non-compliance with section 20(3) of the Charitable Trusts Act 1962 be reviewed and, if appropriate, increased.

Misleading Inquiry
The Inquiry recommends that consideration be given to introducing an additional offence provision for misleading the Inquiry.

Recommendation 52 (Chapter 13)
Consideration be given to introducing an additional offence provision for misleading the Inquiry.

Powers to require witnesses to attend and be examined on oath
The powers of the Inquirer are limited to requiring the production of materials, answering questions and giving all assistance that a person is reasonably able to answer or give. They do not extend to the ability to require a person to attend and give evidence on oath or affirmation. That significantly impeded the ability of the Inquiry to test the veracity of evidence of witnesses and distil the truth. A power of this type could also have reduced the delay associated with extensive written requests and responses.

The powers conferred in relation to the conduct of inquiries in relation to charitable trusts varies between jurisdictions. An example of a jurisdiction conferring such as power is New Zealand, where the provisions of the Commissions of Inquiry Act 1908 (NZ) apply as if the Attorney General or other person conducting an inquiry or examination under a provision similar to section 20,313 were a commission of inquiry appointed under that Act, whose powers extend to summoning witnesses and receiving and taking evidence on oath.314

Recommendation 53 (Chapter 13)
The Charitable Trusts Act 1962 be amended to expand the powers of the Attorney General or other person conducting an inquiry or examination under section 20 of the Charitable Trusts Act 1962 to include a power to require a person to attend and give evidence and be examined on oath or affirmation.

The Auditor General and audits of the accounts of charitable trusts
As in this case, many of the complaints about the operation of charitable trusts relate to issues of financial management and controls. It is of course open to the Attorney General to

313 Section 58 of the Charitable Trusts Act 1957 (NZ).
314 Sections 4B and 4D of the Commissions of Inquiry Act 1908 (NZ). See also, in the context of the Auditor General's powers in Western Australia in section 34 of the Auditor General Act 2006.
appoint a person with auditing or other financial expertise to conduct an inquiry or examination under section 20 of the Charitable Trusts Act 1962, or for such a person to be engaged to assist an examiner or inquirer. It seems to the Inquiry that a person who in an appropriate case may (either directly or through his or her staff) be a suitable appointee to conduct an inquiry or examination, or assist in that process, would be the Auditor General. That is particularly so having regard to the nature of the functions, powers and expertise of the office of the Auditor General. For example, the Auditor General:

- under the Charitable Collections Act 1946 may inspect, examine and audit accounts of moneys raised or collected for charitable purposes and report to the Minister for Commerce and may use powers conferred upon him or her by the Auditor General Act with respect to the auditing of public accounts to do so; and

- under section 22(1) of the Auditor General Act 2006, may enter into an arrangement with any person or body to carry out an audit for or in relation to the person or body or to provide services to a person or body that are of a kind commonly performed by auditors. The arrangement may provide for the payment of fees to the Auditor General.\footnote{Section 22(2) of the Auditor General Act.} If such an arrangement is entered into then the Auditor General may carry out those audits and provide those services.\footnote{Section 22(3) of the Auditor General Act.}

Given the terms of the Auditor General Act 2006 and the Auditor General’s functions, it is however open to debate as to whether the Auditor General may be appointed or engaged to conduct an inquiry or examination under section 20 of the Charitable Trusts Act 1962, or assist in that process, in the absence of amendment to the Auditor General Act or the Charitable Trusts Act 1962 to make that clear.

Over and above whether the Auditor General should be able to perform such a role, a further issue arises as to whether, in any event, it may be useful for the Auditor General to be conferred additionally, or alternatively, with power to perform audits and reviews in relation to charitable trusts in Western Australia generally, or by arrangement with the Attorney General.

Submissions have been made to the Inquiry about the desirability of trustees of charitable trusts being accountable for their stewardship of trust funds, not merely from a financial and compliance perspective, but from the point of view of their effectiveness in achieving social outcomes and the charitable objects for which the trusts are established. Of course, such reviews may impose additional cost and burdens both on government and on trusts the subject of such audits or reviews. Consideration should however be given to the existence and scope of powers of other bodies such as the ACNC in particular, to avoid duplicating roles. That said, having the ability for such reviews and audits to be conducted may be a
useful tool for the Attorney General to have available to call upon in appropriate circumstances.

**Recommendation 54 (Chapter 13)**

1. The Charitable Trusts Act 1962 and/or the Auditor General Act be amended to enable the Auditor General or a delegate to be appointed by the Attorney General to make an inquiry or examine under section 20 of the Charitable Trusts Act 1962 or to assist in such process.

2. Consideration be given to also amending those Acts to confer power on the Auditor General or a delegate generally, or by arrangement with the Attorney General, to perform audits or audit like services in relation to trustees of charitable trusts. The powers of the Auditor General or a delegate be at least as extensive as those conferred upon him with reference to the auditing of public accounts by the Auditor General Act.

3. Additionally, or in the alternative, the Attorney General, or an examiner or inquirer appointed under section 20 of the Charitable Trusts Act 1962 be empowered to require that the trustee of a charitable trust:
   - cause the accounts of the charitable trust be audited by an appropriately qualified auditor (including the Auditor General); and
   - provide the audited report to the Attorney General, examiner or inquirer.

**Reasons for non-compliance**

Section 20 of the Charitable Trusts Act 1962 does not identify the grounds, if any, on which a person who is subject to a compulsory request to answer questions, provide documentation or provide other assistance to the Attorney General, examiner or inquirer may refuse to do so except insofar as the obligation to answer questions or give assistance (as distinct it would seem to the obligation to produce documents) is only that which the person “is reasonably able to give or answer”.

In the Inquiry's view it is preferable that the grounds on which a person may refuse to comply be clearly specified and that there be a requirement to specify those grounds to the inquirer or examiner. If a contest then arises as to whether a person may refuse, it could potentially be resolved by application to the Supreme Court for directions in relation to this aspect of the conduct of an examination or inquiry or, potentially, if a person were prosecuted for refusing to comply, at that stage.

Absent a clear statutory indication that recognised rights to refuse to respond to coercive powers of the State, refusals on the grounds of recognised privileges such as the privilege against self-incrimination/exposure to a penalty and legal professional privilege, those privileges still apply. It is preferable however that consideration be given to whether these
basic and substantive common law rights should be abrogated, in order to facilitate the public interest in the proper administration of charitable trusts and inquiries or examinations into them. However, were such a step to be taken, appropriate safeguards ought then also be included to provide some protection to the person who otherwise would have been entitled to assert the privilege.

Slightly different considerations may apply in this context.

In the case of the privilege against self-incrimination/exposure to a penalty, where a person (particularly one involved in the management or administration of a charitable trust) may object to responding to a compulsory request to answer questions or produce documents, it has the real potential to impede an inquiry or examination and its ability to get a true understanding of the facts of a matter. In this case, as noted earlier in the Report, the Inquiry was impeded due to Mr Carter exercising that right in relation to certain requests to answer questions and provide documents. It is to be noted that it is not an uncommon phenomenon for this privilege to be abrogated in respect of certain inquiries and exercise of coercive powers. An example is section 70-25(1) of the ACNC Act under which a person or other entity is not excused from giving information, or producing a document or a copy of a document, under Division 70 of Part 4-1 on that ground.

If however the privilege is abrogated, it is recommended that limits be placed on the use to which compelled information or documents may be put. Certainly that should extend to the use of the information or documents produced in criminal proceedings against the person who would have been entitled to rely on the privilege, except, for example, for contravening section 20 or any proceeding relating to the giving false or misleading evidence during an examination or inquiry. In the Inquiry’s view the protection should not extend to use in civil proceedings including, for example, proceedings under section 21 of the Charitable Trusts Act 1962 and proceedings in relation to the management and administration of the trust.\(^{317}\)

In respect of legal professional privilege, it may be highly material to an inquiry or examination to be made aware of the contents of legal advice, particularly where obtained by a trustee and where it relates to the decision/s of the trustee in relation to the management and administration of the charitable trust. It may also be that a trustee or other person is amenable to disclosing otherwise legally privileged communications to the inquirer or examiner but without otherwise waiving the privilege to which it attaches.

**Recommendation 55 (Chapter 13)**

1. Section 20 of the *Charitable Trusts Act 1962* be amended to:

   o clearly specify the grounds on which a person may refuse to comply with a compulsory request to answer questions or produce documents;

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\(^{317}\) Compare and see section 70-25(2) of the ACNC Act.
require that if a person so refuses, they must specify the ground of their objection;

expressly abrogate the right to privilege against self-incrimination/exposure to a penalty, with certain safeguards to prevent those answers or documentation being used against the person who otherwise would have been entitled to assert that claim of privilege.

2. Consideration be given to whether in making any such amendments the right to claim legal professional privilege:

be abrogated in the case of a trustee where the communication relates to or concerns the management and administration of the trust and its property, and what safeguards should be imposed in relation to the use of the information or documentation disclosed;

be otherwise protected in the event that a person elects not to maintain objections to answering a question or producing a document to an inquiry or examination on that ground but indicates that they otherwise seek to maintain the benefit of that privilege.

Recovery of costs of examination or inquiry

At present, there is no provision by which the costs associated with the conduct of an examination or inquiry under section 20 of the Charitable Trusts Act 1962 may be recovered by the Attorney General. In certain other jurisdictions, provision is made under which this may, in appropriate circumstances, occur. For example, section 84C(3) of the Trustee Act 1936 (SA) provides:

The Supreme Court may make orders for the payment of the whole or part of the costs of an investigation under this Part—

(a) by the applicant for the investigation; or

(b) by a trustee or beneficiary of the trust; or

(c) out of the trust estate.

By way of further example, section 15 of the Charities Act 1978 (Vic) provides:

(1) Where an inquiry has been carried out under this Part the Attorney General may determine the costs of conducting that inquiry (including any expenses incurred and payable by the Attorney-General in any proceedings brought by him) and may—

(a) apply to the court for an order that those costs or any part of them be paid by any trustee of the charity or any executor of the charitable estate which was the subject of the inquiry;

(b) direct that the costs or any part of them should be paid from the funds of the charity or charitable estate which was the subject of the inquiry; or

(c) direct that, in the case of a person who has given security for costs under section 9(2)(b), the costs or any part of them be paid by that person.

(2) Where an application has been made under subsection (1)(a) the court may—

(a) make an order in the terms sought by the Attorney General; or

(b) where it considers it just and equitable to do so vary the order as it sees fit.
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Further support for introducing such a provision is to be found in the provision for the Attorney General to charge a trustee reasonable fees for the costs and expenses (including legal costs and disbursements) incurred by the Attorney General in considering a scheme under Part III of the Charitable Trusts Act 1962 and preparing a report on it.\(^{318}\) Further, as a general rule, where the Attorney General is a party to proceedings involving a charitable trust, his or her costs will be paid out of the trust fund on an indemnity basis except to the extent that any costs were unreasonably incurred or of an unreasonable amount.\(^{319}\)

Depending on the circumstances, it may be that it should be the trustee itself that pays or contributes to defraying such costs, rather than being sourced from the Trust Fund itself.

**Recommendation 56 (Chapter 13)**

The Charitable Trusts Act 1962 be amended to introduce a provision by which the Attorney General may recover costs and expenses associated with an inquiry or examination under s 20 of that Act (and by which the Auditor General may recover reasonable costs of an audit if provision is introduced for the Auditor General to conduct compulsory audits as recommended above) from the trustee, charitable estate or a person who requested that the inquiry or examination be conducted, by application to, and at the discretion of, the Supreme Court.

**Disclosure of information and documents**

The ability of the Attorney General to perform his or her role as the guardian of charitable trusts is, to a great extent, dependent on the provision of allegations, information and documents from members of the community.

A person who makes a voluntary allegation or disclosure of information or documents to the Attorney General may be exposed in certain circumstances to potential civil liability or even, at least in theory, criminal liability for such a disclosure. That includes the possibility of a claim of breach of confidence if confidential material is disclosed (and possibly related claims of unprofessional conduct, breach of professional ethics or standards or principles of conduct applicable to a person’s employment). Exposure to a claim of defamation (to which there may be defences such as qualified privilege or truth) or other civil claims, can also not be excluded depending on the circumstances.

Similar issues arise in the context of making allegations or the provision of information or documentation to the Attorney General, an examiner or inquirer in respect of an examination or inquiry, particularly if it is not done in response to a compulsory request. The general practice of the Inquiry was therefore to request that information or documentation be provided

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\(^{318}\) Section 10(1a) of the Charitable Trusts Act 1962.

\(^{319}\) See the cost orders sought in Ngarluma Aboriginal Corporation RNTCB v The Attorney General of Western Australia [2014] WASC 245 (S).
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by witnesses (by informal exercise of its power to request). Further, even when compelled, a witness may still be exposed to the spectre of litigation in some cases.

The potential legal consequences arising from making allegations and the disclosure of information or documents, and not having any form of statutory protection in respect of doing so, may inhibit a person from making such a disclosure. Indeed, the knowledge of the willingness of Ms Westerman and Mr Carter to pursue litigation to vindicate their rights where they felt it appropriate, appeared to have an inhibiting effect on a number of persons to whom the Inquiry spoke.

The Inquiry too is afforded no statutory protection in respect of the conduct of an Inquiry, nor are the Attorney General or others protected in relation to the use and disclosure of any report or other materials provided to the Attorney General, particularly from any proceedings for defamation.

In the Inquiry’s view, such protections should be provided by amending the Charitable Trusts Act 1962. Examples of the types of protections which it is considered would be appropriate are those contained in sections 219 to 222 of the Corruption, Crime and Misconduct Act 2003.320

Recommendation 57 (Chapter 13)

1. The Charitable Trusts Act 1962 be amended to:
   o permit a person to make allegations and provide information and documents about a charitable trust to the Attorney General, an examiner or inquirer, notwithstanding other duties such as a duty of confidence that may apply on respect of the allegations or disclosure;
   o protect such a person from civil or criminal liability and proceedings for breach of professional ethics or standards or any principles of conduct applicable to a person’s employment in respect thereof;
   o protect the Attorney, an examiner and inquirer and associated staff from liability in respect of performance of their roles, responsibilities and duties in respect of inquiring into and examining issues in relation to charitable trusts;
   o provide statutory protection in relation to defamation actions.

2. In determining the scope of the amendments regard be had to sections 219 to 222 of the Corruption, Crime and Misconduct Act 2003.

320 See further, for example, section 13 of the Public Interest Disclosure Act 2003; sections 23(5), 28B(6) and 129 of the Children and Community Services Act 2004; section 577(3) of the Mental Health Act 2014 and section 220(3) of the Health Services Act 2016.
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Use and further disclosure of information and documents obtained by the Attorney General or an inquirer or examiner

An issue relevant to the conduct of examinations and inquiries concerns the limitations that apply in relation to the subsequent use and disclosure of information or documentation that may be required to be provided to the Attorney General, an examiner or inquirer. The Charitable Trusts Act 1962 is silent in that regard. However, it is well-established that where a coercive statutory power is exercisable for a particular purpose that limits the use to which the information or documents may be put and otherwise a requirement of confidence arises: see Johns v. Australian Securities Commission.321

That nevertheless leaves room for debate as to the limits that apply to an inquirer or examiner, or the Attorney General, further using or disclosing the material. It would seem clear that the material could be used in support of relevant applications to the Supreme Court, however the scope to disclose those materials to other persons or entities is less clear, depending on the circumstances of the proposed disclosure. Disclosure to the ACNC, for example, to assist its related regulatory functions in relation to charities, may be quite different to disclosure to other entities not having such functions or powers.

Commonly, modern statutes explicitly define the limits in respect of which compulsorily obtained information or documents may be used or disclosed and the obligations in respect of protection of its confidentiality. To avoid doubt, explicit provision is often included to facilitate the sharing of the information or documents with other people, subject to appropriate safeguards. In the Inquiry's view, it is preferable that the Act be amended to explicitly deal address such matters. In respect of disclosure to other bodies, it is considered that the ACNC, ORIC, ASIC and the police are logical bodies in respect of which matters in connection with charitable trusts may be relevant to the exercise of their functions and powers.

Recommendation 58 (Chapter 13)

The Charitable Trusts Act 1962 be amended to impose a duty of confidentiality in respect of compulsorily provided information or documentation (or such information or documentation voluntarily provided on the explicit basis that the same protections apply) subject to appropriate exceptions in relation to its use and disclosure including, if considered appropriate:

- in the course of the performance of any function and exercise of any power of the Attorney General, an inquirer or an examiner in relation to charitable trusts;

- for the purpose of the conduct of an inquiry or examination or audit (if such a power is included in that Act);

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- for the purpose of obtaining or providing legal advice;
- to a trustee of a charitable trust;
- to a person or persons with a recognised advisory role in relation to a charitable trust;
- to a person or class of persons intended to benefit from the application of trust funds to the charitable objects of the trust or a body representing such a class of persons;
- in respect of any legal proceedings instituted by the Attorney General, an examiner or inquirer or to which the Attorney General, an examiner or inquirer is or may become a party relating to the charitable trust;
- as directed by the Supreme Court on application by the Attorney General, an examiner or an inquirer;
- as required by law including an order or direction of a court, tribunal or other entity;
- for the purpose of notifying or referring a matter related to a charitable trust to the Western Australia Police, ACNC, ORIC, ASIC or another prescribed person or body; and
- subject to the recipient of the disclosed information or documentation being able to use or disclose the disclosed information and documentation for the purpose for which the disclosure was made.

Publication of report on the results of an examination or inquiry

The Charitable Trusts Act 1962 does not explicitly restrict or permit the publication of a report about the results of an examination of inquiry into a charitable trust under section 20. The Attorney General presumably could make such a report public in an appropriate case, such as by tabling the report in Parliament. There is a public interest in such a report being able to be made public in its entirety or in part, or for it to be disclosed to particular persons, in appropriate cases. Many other statutes explicitly permit publication or reports prepared following investigations or inquiries.

Recommendation 59 (Chapter 13)

The Charitable Trusts Act 1962 be amended to explicitly permit the Attorney General to publish a report in relation to an examination or inquiry.

Regulation of persons involved in the administration of charitable trusts

As previously discussed in Chapter 4, in the Inquiry's view it is desirable that more explicit restrictions and powers be conferred by statute to facilitate greater regulation of the persons who may be a trustee, or in a position of management and control of a trustee, or otherwise
be engaged or employed in relation to the management and administration, of a charitable trust.

One approach which the Inquiry considers has merit is to amend the Charitable Trusts Act 1962 to explicitly empower the Supreme Court on the application of the Attorney General to make orders including precluding or restricting the employment or engagement of a person in the affairs of a charitable trust in specified circumstances. A guide as to the potential scope of such powers and the circumstances in which they may be exercised is provided by section 7 of the Charitable Trustees Act 1993 (NSW) which provides that:

(1) If the Court, in charitable trust proceedings, is satisfied that:

(a) there has been any misconduct or mismanagement in the administration of a charitable trust, and

(b) it is necessary or desirable to act for the purpose of protecting existing or future trust property or securing a proper application, for the purpose of the charitable trust, of existing or future trust property,

the Court may, without limiting any other powers of the Court, make one or more of the orders specified in subsection (2).

(2) The orders which may be made by the Court are as follows:

(a) an order removing any or all trustees of the charitable trust,

(b) an order appointing a person as a trustee of a charitable trust,

(c) an order precluding the employment or engagement of a person in the affairs of the charitable trust,

(d)-(f) …

(g) an order which is necessary or convenient to be made for giving effect to an order referred to in this subsection.

(5) In this section and section 8, misconduct or mismanagement includes the remuneration of persons acting in the affairs of the charitable trust concerned, or for other administrative purposes, by payments which are excessive in relation to the duties of the persons so acting.

However, while section 7(1) requires that both paragraphs (a) and (b) must be satisfied before an order may be made, in the Inquiry's view it is preferable that an order may be made if either of those paragraphs are satisfied. In other words, it is considered that it should not necessary to establish that there has been misconduct or mismanagement in the administration of a charitable trust before the specified powers may be exercised. It should be sufficient that the order is considered necessary or desirable for the purpose of protecting existing or future trust property or securing a proper application, for the purpose of the charitable trust, of existing or future trust property.

In this context, it is recommended that consideration also be given to whether a provision, like section 13 of the Charities Act 1978 (Vic), should be incorporated into the Charitable Trusts Act 1962. That section provides:

**Court may order removal of trustee or executor**

In addition to any other powers which the court has with respect to charities or charitable estates the court may where an inspector has reported that a trustee of a charity or the
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executor of a charitable estate should be removed from his position as trustee or executor
order the removal of the trustee or executor.

While this provision speaks of the removal of a trustee or executor, it is suggested that a
reframed provision be considered which extends to the removal of a trustee, an executor or a
person involved in or employed by the trustee or executor.

In either event, if a provision of this type is considered warranted, careful consideration should
be given to whether the findings of an inquiry like this Inquiry should trigger, without more, the
removal of a trustee, executor or relevant person, or whether the findings should trigger, not
the removal itself, but a discretion in the Supreme Court to then make relevant orders. If the
latter, the evidentiary changes proposed below could form part of the same framework.

An alternative or supplementary measure to the above is to introduce a regulatory regime
under which certain circumstances such as bankruptcy, insolvency, disqualification from
managing corporations and conviction of certain types of criminal offences (particularly
financial or dishonesty offences) may preclude a person from being a trustee, or being
involved in the affairs of a charitable trust, absent the Attorney General or a body such as the
State Administrative Tribunal or the Supreme Court being satisfied on the application of the
person who would otherwise be disentitled, and who would bear the onus of proof, that the
person is a suitable or fit and proper person to be so involved and that there are exceptional
circumstances such that the person ought be allowed to perform such as role, with or without
such restrictions as may be specified. Such a regime would serve to protect the strong public
interest in ensuring the proper management and administration of charitable trusts, while
balancing the private interests of persons who may wish to be involved in the affairs of such a
trust notwithstanding the existence of an otherwise disentitling circumstance.

Finally, another alternative or supplementary measure may be to introduce a more detailed
regulatory regime in relation to those persons who may act as trustees of charitable trusts (or
possibly a particular prescribed category of charitable trusts) or be involved in the affairs of a
charitable trust. This of course may give rise to additional considerations, beyond the scope of
this report, in terms of the broader need for such a system, potential regulatory cost and a
question of who would be responsible for enforcing such a regime. While perhaps somewhat
novel in a trust context, there are however already numerous examples of regulatory regimes
in which minimum standards are set in relation to participants in particular professions or
industries, involving positions of trust or responsibility, such as law, real estate, security and
liquor.\(^\text{322}\)

\(^{322}\) Similar regimes exist in many regulatory frameworks, as disclosed by a search of the State's
legislation database for the phrase "fit and proper":
ch&acts=y&subs=y&database=Text&if=y&exactphraseinput=%22fit+and+proper%22&exactphrase
=%22fit+and+proper%22&allwordsinput=&allwords=&anywordsinput=&anywords=&woutwordsinput
=&woutwords=&pdfsearchstring=%2522fit+and+proper%2522&day=22&month=10&year=2018

631
For example, under section 37(1) of the Liquor Control Act 1988, an application to the licensing authority for the grant of a licence, for approval to the transfer of a licence, or for a permit to be issued, shall not be granted by the licensing authority unless the licensing authority is satisfied, where the applicant or one of the applicants is a body corporate, that each person who occupies a position of authority in the body corporate is a fit and proper person to occupy that position in a body corporate that is a licensee of the premises to which the licence relates. By section 33 of that Act, when the licensing authority is considering whether approval should be given to a person seeking to occupy a “position of authority” in a body corporate that holds a licence, the following are said to be relevant and amongst the matters to which consideration may be given:

(a) the creditworthiness of that person; and
(b) the number and nature of any convictions of that person for offences in any jurisdiction; and
(c) the conduct of that person in respect to other businesses or to matters to which this Act relates; and
(d) any report submitted, or intervention made, under section 69

There seems no reason in principle why a similar regime could not be implemented in respect of charitable trusts, with the phrase (or a phrase similar to it) of “position in authority” being defined with sufficient breadth to capture people employed or engaged by the trustee in something other than an executive or managerial capacity, and the relevant factors being similarly framed.

**Recommendation 60 (Chapter 13)**

The Charitable Trusts Act 1962 be amended to:

- empower the Supreme Court, on the application of the Attorney General or a person authorised by the Attorney General or with the leave of the Court, in circumstances such as where the Court is satisfied that there has been misconduct or mismanagement in the management and administration of a charitable trust or it is necessary or desirable to act for the purpose of protecting existing or future trust property or securing a proper application, for the purpose of the charitable trust, of existing or future trust property, to make orders including to remove a trustee, appoint a new trustee and preclude the employment or engagement of a person in the affairs of a charitable trust;
- if considered appropriate, empower the Supreme Court to make such orders in its discretion where the Attorney General, an examiner or an inquirer following an examination or inquiry under section 20(1) of the Charitable Trusts Act 1962 reports that a trustee should be removed or that a person should be precluded from being employed or engaged in the affairs of a charitable trust;
as an alternative or supplementary measure, prescribe certain circumstances such as bankruptcy, insolvency, disqualification from managing corporations and conviction of certain types of criminal offences that preclude a person from being a trustee, or being involved in the affairs, of a charitable trust, absent the Attorney General or a body such as the State Administrative Tribunal or the Supreme Court being satisfied on the application of the person who would otherwise be disentitled, and who would bear the onus of proof, that the person is a suitable or fit and proper person to be so involved and that there are exceptional circumstances such that the person ought be allowed to perform such as role, with or without such restrictions as may be specified;

in addition, or in the alternative, introduce a more detailed regulatory regime in relation to those persons who may act as trustees of charitable trusts (or possibly a particular prescribed category of charitable trusts) or be involved in the affairs of a charitable trust, including potentially specifying requirements in relation to suitability, such as a "fit and proper person" test, similar to that used in other regulatory regimes, for persons seeking to be involved in the affairs of a charitable trust.

**Evidentiary requirements**

In general, proceedings brought in the Supreme Court by the Attorney General in relation to charitable trusts rely on affidavit evidence. For interlocutory applications, such evidence may be based on knowledge, information or belief, but not for substantive final hearings in respect of which the ordinary rules of evidence apply. That can create difficulties in advancing applications which might be meritorious but in some circumstances depend, at least in part, on hearsay evidence. In the Inquiry's view there is a sound justification for relaxing the usual evidentiary standard in respect of such applications, recognising that it will still be a matter for the Court what weight may be given to evidence based on information or belief. That will facilitate the public interest in protecting and ensuring the due administration of charitable trusts. In a number of other cases involving a significant public interest element evidence of that nature is permitted.323

It is also recommended that consideration be given to specifically providing for the decisions and findings of other relevant regulatory bodies, such as ASIC in deciding to disqualify a person from managing corporations, be admissible in evidence (albeit not determinative) on such an applications.

323 See, for example, section 13 of the *Dangerous Sexual Offenders Act 2006*. 
Recommendation 61 (Chapter 13)

The *Charitable Trusts Act 1962* or other relevant legislation be amended to:

- permit evidence on applications in relation to a charitable trust brought by the Attorney General or a person authorised by the Attorney General, or otherwise with leave of the Court, to be given other than in accordance with the ordinary rules of evidence, and be based on information or belief; and

- if considered appropriate, make the decisions and findings of other relevant regulatory bodies, such as ASIC in deciding to disqualify a person from managing corporations, admissible in evidence (albeit not determinative) on such applications.
APPENDICES

Appendix A: Inquirer's Instrument of Appointment
INSTRUMENT OF APPOINTMENT MADE UNDER SECTION 20 OF THE CHARITABLE TRUSTS ACT 1962 (WA)

I, John Quigley MLA, Attorney General for the State of Western Australia, hereby appoint Alan John Sefton, Deputy State Counsel, to examine and inquire into the Njamal People's Trust and to examine and inquire into the nature and objects, administration, management and results thereof, and the value, condition, management and application of the property and income belonging thereto.

This appointment is made under section 20(2) of the Charitable Trusts Act 1962 (WA).

Signed:

JOHN QUIGLEY, MLA
ATTORNEY GENERAL

Date: 3.5.2017
Appendix B: Chronology of events in relation to requests by AET for information in relation to Njamal Mining Pty Ltd

<table>
<thead>
<tr>
<th>Date</th>
<th>AET’s actions related to obtaining information from, and the removal of the Board of, Njamal Mining</th>
<th>Ms Westerman's actions related to obtaining information from, and then the removal of, AET</th>
</tr>
</thead>
<tbody>
<tr>
<td>01.12.14</td>
<td>Email request from AET to Ms Westerman: requests report on Njamal Mining activity.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Ms Westerman responds with a summary of certain joint ventures, contracts and goals and says a more detailed update will be provided in 2-3 weeks once outcomes of negotiations with mining contract with FMG.</td>
<td></td>
</tr>
<tr>
<td>13.01.15</td>
<td>Email from AET requests update on timing.</td>
<td>Ms Westerman responds about issues with JV with ICRG and other issues and that once they were clearer she expects to provide reports in the next few weeks once accurate information available.</td>
</tr>
<tr>
<td>26.02.15</td>
<td>Email from AET further following up and also requests copies of Njamal Mining Minutes. Deadline for information 13.03.15.</td>
<td></td>
</tr>
<tr>
<td>30.04.15</td>
<td>Formal request from AET in letter.</td>
<td>Ms Westerman responds by email that financial reports are prepared but have not been sent because of a number of issues that directors have been concerned about and which, once resolved, they could then proceed with the requests. Lawyer Robyn Ferguson requested to write to AET.</td>
</tr>
</tbody>
</table>

Auxilium Partners engaged by Njamal Mining Pty Ltd to investigate whether various payments were in accordance with a joint venture agreement.

On 13 May 2015 Njamal Mining Pty Ltd issued a default notice to ICRG in relation to alleged breaches of agreement (including in respect of alleged payments made to
Barry Taylor) which were disputed by ICRG.

With effect from 22 June 2015 Mrs Doris Eaton resigns as a director of Njamal Mining Pty Ltd.

On 23 June 2015 Ms Westerman indicated that a financial auditor (Bob Jacobs, Auxilium) had been appointed to audit all Njamal mining company accounts for the 2013/14 financial year and all Njamal JV accounts, requesting if anything else is required.

A notice dated 25 June 2015, signed by Mr Allen and Mrs Eaton as directors (who according to ASIC records had ceased to be a director that week) was prepared in respect of a proposed meeting of directors the following day for the purpose of considering and resolving various matters in relation to revoking the appointment of Ms Westerman as managing director, her authority to authorise transactions and commit the company to company to contracts and other matters and that her remuneration package as managing Director cease. It appears the meeting did not proceed although it is unclear why.

Due date for formal request, AET emails Ms Westerman reminding her audited financial report and the directors’ report is due that day.

No documents are provided. Ms Westerman replies she has requested auditor to provide an update direct and did not anticipate it would take much longer.

On 2 July auditor (Butler Settineri) wrote to clarify terms of audit required by AET as
shareholder.

On 6 July AET advise auditor it reserves its rights and it is Njamal Mining’s responsibility to comply with s 295 and prepare and arrange audit of the financial report.

On 8 July the auditor provides a copy of 2014 accounts prepared by RSM which did not match the format required under the Act and querying AET requirements.

6.08.15 AET conduct ASIC search and discover Mrs Eaton has resigned as director.

12.08.15 Ms Westerman emails AET saying that the TAC wished to meet on 19 August 2015 and that while it was agreed meetings would be quarterly, the last meeting was 22 Dec 14. Also requests a copy of minutes from the last meeting and updated financial statements.

17.08.15 AET meets three possible candidates for role of sole director of Njamal Mining Pty Ltd.

19.08.15 Ian Taylor informs AET of a Njamal meeting held in Port Hedland, that he was concerned family members had been excluded from the meeting and that he wished to resign as a director and hand delivered his resignation to AET, indicating he no longer trusted his co-directors.

24.08.15 Some members of TAC and proxies purport to meet and terminate the appointment of AET by written resolution and discussions with Perpetual commence about their appointment in place of AET.

24.08.15 Hopgood Ganim advise AET that AET’s services have been terminated by TAC for reasons including allegedly having no meaningful consultation with Njamal people since November
2014, no formal report to them as to the financial state of the trust since that point in time and rigid application of trust policies and exercises of discretion without reference to need or the views of the Njamal people being first properly considered.

AET approves new constitution for Njamal Mining Pty Ltd and resolves to remove Ms Westerman and Kevin Allen as directors and appoint Simon Coad as director effective immediately. AET also disputes validity of their purported removal, noting that the community meeting had been delayed due to Njamal Mining Pty Ltd's failure to provide information.

31.08.15

Hopgood Ganim write to AET asserting that a further TAC meeting was held that day confirming its decision to remove AET and asserting that AET therefore had no authority to call a general meeting of Njamal Mining Pty Ltd and purport to remove its directors. Those propositions were understandably contested by AET.

1.09.15

Ms Westerman writes to AET setting out her concerns with AET, including that they did not provide financial information as requested for the 19 August 2015 meeting.

07.09.15

Ms Westerman and others bring action in Supreme Court to remove AET as Trustee.

25.09.15

Email from Ms Westerman to AET requesting financial information.

15.10.15
APPENDICES

19.10.15  
Response from AET, attaching bulk of the financial information requested.

22.10.15  
Further email from Ms Westerman to AET requesting financial information.

19.11.15  
Ms Westerman resigns employment.

11.02.16  
Ms Westerman writes to AET making a series of allegations about its conduct and providing information sheet for provision with meeting notices.

29.02.16  
Community resolution for forensic audit of Trust.
Appendix C: The ASIC Delegate’s Reasons for the Issue of the Disqualification Notice