FMG Respondents' Consolidated Closing Submissions

WAD 37 of 2022

Federal Court of Australia

District Registry: Western Australia

Division: General

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

Filed on behalf of (name & role of party)	FMG Pilbara Pty Ltd, Pilbara Energy (Generation) Pty Ltd, Pilbara Energy Company Pty Ltd, Pilbara Gas Pipeline Pty Ltd and The Pilbara Infrastructure Pty Ltd
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A. EXECUTIVE SUMMARY

1. The applicant (**YNAC**) claims compensation as trustee of the Yindjibarndi People (**YP**).[1] YNAC's claim is properly under the *Mining Act 1978* (WA) (**MA 1978**) (s 123(2)) for loss and damage suffered or likely to be suffered from the mining pursuant to the grant under the MA 1978 of mining tenements (**FMG tenements**) by the 1st respondent (**State**) to the 2nd to 6th respondents (together **FMG**) (other than as to the Water Management Miscellaneous Licences (defined in FMG R [13(e)]) (**Water Ls**)).[2] The YP are "occupiers" under the MA 1978. Only failing that is YNAC entitled to claim compensation under Part 2, Div 5 of the *Native Title Act 1993* (Cth) (**NTA**) for the loss or other effect of the grant of the FMG tenements. As required (T210.9-16), these closing submissions consolidate FMG's written submissions.

2. The NTA (s 51(1)) provides for compensation on just terms for the loss, diminution, impairment or other *effect* of the grant of the FMG tenements on the YP's *native title rights and interests*. Because there were grants of rights to each part of the Determination Area by historical grants or past acts, which *extinguished* exclusive possession *before* the grant of the FMG tenements, the YP's entitlement to compensation must be assessed on the basis that the YP hold non-exclusive native title rights and interests. The NTA does **not** provide to the contrary (ss 47A and 47B).

3. The YP are not entitled to claim compensation by claiming a royalty or other amount calculated by reference to the value of iron ore at the FMG tenements or any rent or royalties paid by FMG to the State. The question that must be answered is: what is the value of the *native title rights and interests* held by the YP that have been lost, diminished, impaired or affected? The answer is not given by considering rent or royalties paid by FMG, or indeed by other mining companies for their mining of other mining tenements in other areas for different mineral resources owned by the State. A critical difference between negotiated *agreements* and a determination of compensation under the NTA (Part 2, Div 5) is that, with a negotiated agreement, the mining company gets a valuable right to develop its project sooner, is prepared to share risk and rewards with the native title holder, and is also prepared to agree to pay by reference to factors disconnected with the valuation of affected native title rights and interests.

4. In *Northern Territory v Griffiths* (***Griffiths HC***) [2019] HCA 7; (2019) 269 CLR 1 [84]-[85], Kiefel CJ, Bell, Keane, Nettle and Gordon JJ (together **CJ&JJ**)) referred to a hypothetical *Spencer* bargain for a native title holder to agree to an infringement of *their native title rights and interests*. The hypothetical bargain was not directed at a

[1] YNAC asserts its claim in its Further Amended Points of Claim (**PoC**). In these submissions, we refer to YP's submissions interchangeably with YNAC's submissions because YNAC acts for the YP.

[2] The State and FMG each defend the claim including on the basis that MA 1978 (s 123(2)) directly applies because the YP qualify as "occupier": State's Amended Points of Response (**WA R**); FMG's Second Further Amended Points of Response (**FMG R**). The 10th respondent (**YMAC**) appears to support YNAC's claim in YMAC's Amended Points of Response.

bargain that focuses on a mining company agreeing to share gains as to *minerals*, over which the *native title holder* has **no interest**.

5. Further, s 51(1) is expressly subject to s 51(3) of the NTA. Sec 51(3) applies here and requires the Court (it "must") to apply the principles or criteria for determining compensation set out in the MA 1978 (s 123). Sec 123 satisfies the ***similar compensable interest test*** in the NTA (s 240) because the grants of the FMG tenements, being future acts, concerned an onshore place and compensation would, apart from the NTA, be payable under the MA 1978 (s 123) if it were assumed that the YP instead held ordinary title to the land concerned. Sec 123(2) provides for compensation to be payable to an "owner" or "occupier"; and "ordinary title" includes a freehold estate in fee simple under the NTA (s 253) which falls within "owner" under s 123(2).

6. The principles or criteria in the MA 1978 (s 123) include in s 123(1) the legislative directive that no compensation is payable "in any case", and "no claim lies for compensation", whether under the MA 1978 "or otherwise" in respect of the value of any mineral in the land (s 123(1)(b)); or by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral (s 123(1)(c)). The principles or criteria in s 123 must be applied in determining compensation "*whether or not*" the determined amount is "on just terms" by the express force of s 51(3).

7. YNAC has adduced no evidence of the *value* of the YP's *native title rights and interests*, which are said to have been affected by the grant of the FMG tenements. The evidence as to economic loss focusses on the payment of a hypothetical royalty by FMG (or another miner) to YNAC. But, the YP's loss from the impairment of its native title rights and interests cannot be calculated by reference to a royalty, which does not reflect the loss *actually* suffered by the YP. The YP have no rights to the minerals that FMG mines. The minerals were and are owned by the State. Under mining leases granted to FMG (**FMG Mining Leases**), FMG was given the right by the State to mine for the minerals (MA 1978, ss 71, 85); and FMG must pay rent and royalties to the State (s 82(1)(a)).

8. YNAC points to the so-called right to negotiate in the NTA, Part 2, Div 3, Subdiv P, to aid its claim for compensation by reference to a royalty. The YP had a right to negotiate and *exercised* that right. FMG complied with its obligations under Subdiv P, to negotiate in good faith with a view to an agreement (s 31(1)(b)).

9. The National Native Title Tribunal (**NNTT**) or the Minister may permit a future act (ss 4(7)(b), 27(2), 36A, 38), even absent a negotiated agreement. Compensation is then determined under the NTA, Part 2, Div 5, particularly ss 51(1), 51(3) and 53(1). The entitlement to compensation in s 51(1) is an entitlement on just terms to obtain compensation for the impairment of native title rights and interests. The focus is not on what might have been agreed earlier in the process for the *mutual benefit* of FMG and YP, or what might have been agreed by other native title holders with other mining

companies. Compensation is incorrectly determined if made by reference to earlier and different agreements made for *mutual benefit*, when FMG will receive no such benefit.

10. Pursuant to the NTA (s 51A), compensation, if payable under Part 2, Div 5, must be capped at the amount that would be payable if the grant of the FMG tenements were instead a compulsory acquisition of a freehold estate in the land. From the expert evidence (Gregory Preston), the freehold value of the land the subject of the FMG tenements (disregarding overlaps between tenements) determined as at the time of the grant of the relevant tenements, is $800,873.

11. From the expert evidence (Wayne Lonergan & Martin Hall), it is possible to conceptualise how the impairment of the YP's native title rights and interests can be valued, by considering the YP's native title rights and interests, determining the annual economic benefits from them, determining the expected timing and extent of interruptions to native title rights usage, and calculating the present value of future benefits or "cashflows" that would otherwise have been obtainable from the native title rights and interests. This applies the principles from ***Spencer*** *v The Commonwealth* (1907) 5 CLR 418. The expert evidence explains why the underlying valuation concepts do not permit compensation to be determined by reference to something else, namely, the value of minerals in the land (not owned by the YP).

12. From the expert evidence (Campbell Jaski), the impairment of YP's native title rights and interests by the grant of the FMG tenements (where impairment differs depending on the nature of the grant, whether it is a mining lease, a miscellaneous licence for the railway or other FMG tenements), may be calculated by applying the principles from *Griffiths HC*. The impairment can be measured by reference to the impact on native title value by the particular grant and the extent to which native title rights and interests would be affected for the duration of the grant. This approach focusses on the upper limit of the value of the native title rights and interests, by allocating a value of the economic loss impact, accepting the principle that if there is total impairment, the economic loss would be the compulsory acquisition freehold value. The expert evidence (Campbell Jaski) is that the total economic loss for impairment of YP's native title rights and interests by the grant of the FMG tenements is at most **$95,197**, to which simple interest will need to be added. YNAC is not entitled to compound interest. The claim for loss as to the sites and Dreaming tracks cannot be determined as the maximum penal amount that would have been payable had there been a contravention. The actual economic loss as to the sites and Dreaming tracks has not been proved.

13. The YP are also entitled to compensation for non-economic or cultural loss. The task requires a number of separate but inter-related steps: identification of the compensable acts; identification of the native title holders' *connection* with the *land* or waters by their laws and customs; and then consideration of the particular and inter-related *effects* of the compensable acts *on that connection to land*: *Griffiths HC* [218].

14. YNAC's lay witnesses gave evidence of the exercise of their laws and customs on Yindjibarndi land, including within and outside the compensation application area, places of particular importance to the YP, and what they considered the effects of mining to have been. Opinions on broadly the same matters were also given by anthropologist, Dr Kingsley Palmer. Given the significant overlap between Dr Palmer's opinions and the evidence of the YP witnesses, there is a question about the utility of, and weight to be given to, Dr Palmer's opinions. There was also evidence from a psychologist, Dr Jeffrey Nelson, that psychological injury and trauma had been suffered by the YP. But, the evidence did not establish that the asserted "psychological harm" was properly attributable to the grant of the FMG tenements, nor was it clear how it was an effect on the YP's native title rights and interests.

15. Much of YNAC's evidence as to the purported non-economic loss was about "social division" or "social disharmony" **allegedly** caused by FMG when FMG was seeking to make agreements with the YP *in advance of*, or in the pursuit of, the grant of the FMG tenements or following their grant. Such "social division" or "disharmony" is not compensable under the NTA (Part 2, Div 5) or under the MA 1978 (s 123(4)(f)). The MA 1978 (s 123(4)(f)) gives an owner or occupier a right to compensation for "social disruption". Such "social disruption" refers to social dislocation or concepts akin to that; and does not refer to internal social division of the YP. The social division or disharmony did not arise as *an effect* of the grant of the FMG tenements; it is that effect that is the focus of the compensatory right in the NTA (s 51(1)). Also, s 51(1) gives a right to compensation for the effect on the YP's "native title rights and interests". The NTA (s 223(1)) defines native title rights and interests as rights and interests under traditional laws and customs "*in relation to land* or waters", recognised by the common law of Australia. The alleged social division is not an effect on the YP's native title rights and interests, as possessed under their traditional laws, connecting them with the land, and recognised by the common law (NTA, s 223).

16. In any event, social disharmony was not ***caused*** by FMG. The ***agreed*** facts include that disharmony arose from disagreements about the management of YNAC and the related Yindjibarndi Aboriginal Corporation (**YAC**) (Statement of Agreed Facts of 12 Feb 2024 (**SoAF**) [58], [61], [85]). Part of that dispute was about whether (and on what terms) the YP should agree with FMG to land access. Because different YP members within the YP had different views about whether an agreement should be made, it cannot be said that FMG caused the alleged disharmony.

17. The archaeological expert evidence about the age of sites, artefacts, their significance, and acceptable heritage surveys do not, without more, ground a claim for compensation for the *impact* on YP's *connection* to land caused by the grant of the FMG tenements.

18. YNAC's witnesses said that watercourses and YP country had dried up. But, the YP's native title rights and interests do not confer rights as to water taken by FMG. The YP have no right to compensation for any loss flowing from FMG's use of water. Also, no

compensation is payable for a loss that assumes incorrectly that FMG's dewatering activity has affected the water sources or has caused vegetative degradation around those water sources. FMG's dewatering activity did not cause such impacts.

19. In the end, compensation for non-economic loss involves a "judgment" of what would be accepted by the Australian community as appropriate, fair or just to be paid for the YP's loss of spiritual connection *to the land*. Such loss cannot be measured by reference to the rent or royalties paid by FMG to the State for the taking of iron ore which is (and always has been) owned by the State and over which the YP never held any native title as expressly determined in ***Warrie*** *(formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* ***(No 2)*** [2017] FCA 1299; (2017) 366 ALR 467. Applying a proper evaluative judgment, compensation for non-economic or cultural loss could be no more than **$8 million**.

20. YNAC's further or alternative claim that the MA 1978 treats the YP differently to ordinary title holders so that s 10(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**) applies is not sound. The MA 1978 does not discriminate against the YP on grounds of race, colour or national or ethnic origin. It confers a right to compensation for loss and damage from mining. If s 10(1) of the RDA is engaged (and s 45(1) of the NTA applies), s 45(2) provides that the State (not FMG) is liable for the compensation.

21. YNAC's claim for compensation under s 53(1) should not succeed. The grant of the FMG tenements is not an acquisition of property within the *Constitution* (par 51(xxxi)).

22. The MA 1978 (s 125A) is invalid by force of the *Constitution* (s 109) because it is directly or indirectly inconsistent with the NTA, ss 24HA(6), 45, 52A(4), and 53(1). On its plain words, s 125A does not distinguish between the provisions of the NTA allowing the State to pass on the liability to pay compensation to another person and the provisions which make only the State liable. Sec 125A does not differentiate between particular Subdivisions in the NTA, Part 2, Div 3 (esp. Subdiv M, which in s 24MD(4) expressly provides that a law of the State may provide that a person other than the Crown is liable to pay the compensation) and Subdivisions which do not (like Subdiv H, which does not provide that a person other than the Crown may be liable to compensation). The NTA (s 24AB(2)) provides that, if a future act is covered by Subdiv H, Subdiv M does not apply.

23. Regardless, if just terms compensation is payable under the NTA, s 53(1) provides that just terms compensation is relevantly to be paid by the State, not FMG. The NTA (s 51(3)) mandates the application of the MA 1978 (s 123) so that no compensation is payable by reference to the value of the minerals extracted from the FMG tenements. If it is thought that, regardless, there is an entitlement for extra compensation to make the compensation *on just terms*, the State is liable for such compensation.

B. BACKGROUND

24. YNAC claims compensation for the grant of various mining tenements (and their extension) under the MA 1978 by the State to FMG. Between 2006 and 2021, 36 mining tenements were granted to FMG. There is no dispute that the FMG tenements were granted in accordance with the terms of the NTA and the MA 1978. The FMG tenements are valid pursuant to the terms of the NTA and the MA 1978.

25. In the area of ***some*** of the mining tenements, FMG engages in mining operations at what is known as the "Solomon Hub mine" (**mine**). The Court visited the mine during the Aug 2023 on-country hearing. FMG does not conduct active mining operations on the entirety of the FMG tenements: Exhibit G1, Agreed Map 2(b). On much of the area covered by FMG's mining tenements (particularly the current exploration licences), FMG has carried out limited exploratory work: Badock 1[3] [42]-[50]. Despite claiming compensation as to the exploration licences, YNAC has focused its attention on the effect of the mine on the landscape and the effect of FMG's alleged actions in pursuit of the grant of the FMG tenements.

26. On 13 Nov 2017, Rares J determined (**Determination**) that the YP held native title over the Determination Area (being the compensation application area): *Warrie (No 2)*. The native title rights and interests held by the YP are set out in the Determination. The YP allege that the grant of the FMG tenements has caused loss, diminution, impairment or other effect to or on their native title rights and interests. Significantly, while YNAC seeks compensation to be assessed on the basis of a royalty on the minerals mined by FMG, Rares J expressly determined that the YP's native title rights and interests do not confer any rights in relation to minerals (including iron ore) as defined in the *Mining Act 1904* (WA) (**MA 1904**) and the MA 1978: Determination [5(c)].

27. It is apparent from the evidence led by YNAC that there were extensive negotiations between the YP and FMG as to the grants of the FMG tenements. No agreement was ever reached between the YP and FMG for the grants of the FMG tenements, but as explained below ([243]), agreement was not a pre-requisite for the grants.

C. FUTURE ACTS

28. ***Summary***: The NTA establishes different categories of future acts. Different future acts give rise to different procedural rights, and the NTA sets up different mechanisms for different future acts. The relevant Subdivisions of Part 2, Div 3 of the NTA are Subdiv H (as to the Water Ls) and Subdiv M (as to the other FMG tenements). Compensation for future acts falling within Subdiv H is payable by the State, not FMG.

[3] We identify affidavits and expert reports by referring to the witness's name and a number: e.g., "Badock 1" refers to the affidavit of Stuart Badock sworn on 10 July 2023; "Palmer 2" refers to the supplementary expert report of Dr Palmer filed on 16 Feb 2024. We identify joint reports by the experts' names and "JR": e.g., "Hall/Miles JR" refers to the joint expert report of Mr Hall and Mr Miles. We identify witness statements by the witness's first initial and surname: e.g., "J.Coppin" refers to Judith Coppin's witness statement.

Compensation for future acts falling within Subdiv M is only payable if the statutory pre-requisites are established. Here, compensation is not available under the NTA for the grant of the FMG tenements (other than the Water Ls) because the MA 1978 provides compensation (such that the criterion in s 24MD(3)(b)(ii) is not met). The Water Ls are, however, compensable through Subdiv H and the NTA, ss 51(1), 51(3) and 53(1).

C.1. The statutory scheme for compensation under the NTA for "future acts"

29. The NTA recognises and protects native title; and provides that native title cannot be extinguished contrary to the NTA (ss 3, 4(1), 11(1)). The NTA covers "acts" affecting native title; and provides for determining whether native title exists and compensation for acts affecting native title (ss 4(2), 4(7)). Basically, two kinds of "acts" affect native title: namely, ***past acts*** (mainly acts done before the NTA commenced on 1 Jan 1994 that were invalid because of native title); and ***future acts*** (mainly acts done after the NTA commenced that either validly affect native title or are invalid because of native title (s 4(3)).[4] The grants of the FMG tenements are future acts.

30. Part 2, Div 2 of the NTA:

(a) validates past acts attributable to the Commonwealth and provides that the past act extinguished native title wholly or to the extent of inconsistency or not at all, depending on the category (A, B, C or D) of the past act (s 15(1)); and gives the native title holders a right to compensation from the Commonwealth (s 17);

(b) as to past acts attributable to the State, relevantly envisages that the State may also validate past acts, provides for a similar extinguishment or non-extinguishment of native title, and provides for a right to compensation from the State (ss 19, 20).

31. Sec 5 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (**TVA**) provides that every past act attributable to the State is valid and taken to always have been valid. The TVA (ss 6, 7, 8 and 9) provides for the extinguishment of native title wholly or to the extent of inconsistency or not at all depending on the category (A, B, C or D) of the past act. The TVA (s 12) provides that compensation is payable (by the State) because of the validation of the past act attributable to the State; and compensation is determined under Part 2, Div 5 of the NTA.

32. It is common ground that the grants of the FMG tenements are *future acts* within the meaning of the NTA (s 233). The NTA, Part 2, Div 3, deals with ***future acts*** (s 24AA(1)). The NTA (s 233) relevantly provides that an act is a ***future act*** if it takes place after 1 Jan 1994 and is invalid to the extent that it affects native title if not validated by compliance with the NTA. Sec 24AA(2) states that Part 2, Div 3 provides

[4] The NTA also contemplates ***intermediate period acts***, but no such acts are relevant here.

that, to the extent that a future act affects native title, the act will be valid if covered by Div 3, and invalid if not. Part 2, Div 3, Subdivs B, C and D of the NTA validate future acts if permitted under an indigenous land use agreement (s 24AA(3)).

33. The NTA (s 24AA(4)) provides that a ***future act*** will also be valid to the extent covered by provisions falling within Part 2, Div 3, Subdivs F, G, H, I, JA, J, K, L, M and N. Relevantly, Subdiv H (including s 24HA) deals with future acts as to management of water and airspace; and Subdiv M (including s 24MD) deals with future acts that pass the "freehold test", subject to Part 2, Div 3, Subdiv P (s 24AA(4)(j)). The NTA (s 24AB(2)) provides that, to the extent that a future act is covered by an earlier provision in the hierarchy in s 24AA(4), it is **not** covered by a provision lower in the list. The note to s 24AB(2) states that it is important to know under which particular provision a future act is valid because the consequences in terms of compensation and procedure might be different. Save for one express exception (s 24AB(3)), the NTA does not permit a future act to be covered by more than one provision in the s 24AA(4) hierarchy. To suggest otherwise does not give sufficient meaning and effect to the explicit use of the word "*not*" in s 24AB(2). An argument that s 24AB(2) provides that a section lower in the list applies, even if a section higher in the list first applies, because the section higher in the list applies only "to the extent" it is applicable (if it deals with more subject matter within something lower in the list) is wrong because it ignores s 24AB(3). Sec 24AB(3) specifically addresses *one and only one* circumstance when "apart from" s 24AB(2), a section lower in the list is able to apply. That is, "apart from" this specific single circumstance, the Parliament was clear that only the section higher in the list applies if it is applicable to any extent.

34. The NTA (s 24AB(2)) thus provides that to the extent that a future act is covered by s 24HA, it is not covered by s 24MD. This point is relevant to the *State's* liability to compensate for the grant of the Water Ls (see [40]-[60] below), and to the s 109 invalidity of s 125A of the MA 1978 (see [580]-[593] below).

35. Sec 24AA(5) of the NTA relevantly provides that, in the case of future acts covered by s 24MD, for the act to be valid, it is also necessary to satisfy the requirements of Part 2, Div 3, Subdiv P (which provides a "right to negotiate"). The right to negotiate applies to lease renewals, (s 25(1)(a)), renewals and extensions that create a right to mine (s 26(1A)(c)) and the creation of a right to mine (s 26(1)(c)(i)), as the YP accept (YNAC's Closing Subs (**YP-CS**) [44]). Compliance with the NTA is required for a future act to be valid. But, the right to negotiate is a procedural right, not a native title right, and the assessment of compensation is not defined by matters about which agreement may be reached under s 33(1) (see [112]-[118], [194], [240]-[241] below; cf YP-CS [153]).

36. Part 2, Div 3 of the NTA provides that, in general, valid future acts are subject to the non-extinguishment principle (see ss 24AA(6), 238). Because s 11(1) of the NTA provides that native title is not able to be extinguished contrary to the NTA, relevantly,

Part 2, Div 3, in dealing with future acts, constitutes an exclusive code conformity to which is essential to the effective extinguishment or impairment of native title: *WA v Commonwealth (**Native Title Act Case**)* (1995) 183 CLR 373, 453; ***Fejo** v NT* [1998] HCA 58; (1998) 195 CLR 96 [15]-[16]. This means that if there is a valid future act under s 24MD(1), even if subject to the right to negotiate under Part 2, Div 3, Subdiv P, once the requirements of Subdiv P are met, there is no residual right to compensation for any failure to reach agreement under Subdiv P. No such residual right is given by the NTA. The point is important for compensation and relevant to the alleged s 109 invalidity of s 123(1) of the MA 1978: see [112]-[127] below.

37. Sec 24AA(6) of the NTA also states that Part 2, Div 3 deals with compensation for future acts. Sec 24AA(6) does not itself provide that compensation is payable. It is necessary to identify a relevant provision in the relevant Subdivision of Part 2, Div 3.

38. Each grant of the FMG tenements was a valid future act either by force of s 24HA(3) as to the Water Ls; or by force of s 24MD(1) as to the remaining FMG tenements. YNAC pleads and it is common ground that Subdiv M applies to the FMG tenements (other than as to the Water Ls): PoC [16]-[20], [27]-[28], [30]-[31A]; FMG R [16]-[20], [27]-[28], [30]-[31A]; WA R [198]-[211]. Subdiv M applies to each grant of the FMG tenements (other than the Water Ls) as future acts because:

    (a) the grant was not the making etc of legislation (s 24MB(1)(a));

    (b) relevantly, the grant could be done in relation to the land concerned if the YP instead held ordinary title to it (s 24MB(1)(b)(i)); and

    (c) relevantly, a law of the State (namely, the *Aboriginal Heritage Act 1972* (WA) (**AHA**) (see esp. ss 16, 17 and 18)), makes provision as to the preservation or protection of areas, or sites, that may be in the relevant area and may be of particular significance to Aboriginal peoples in accordance with their traditions (s 24MB(1)(c)).

39. The YP are entitled to compensation for the grant of the FMG tenements (other than the Water Ls) under the NTA (Part 2, Div 5) if (and only if) the conditions specified in s 24MD(3)(b) are satisfied. The conditions in s 24MD(3)(b) are **not** satisfied ([64]-[84] below) because the MA 1978 provides compensation to the YP for the grant of the FMG tenements.

C.2. What is the relevant future act subdivision validating the FMG tenements – Are the Water Ls covered by Subdivision H or Subdivision M of Part 2 Division 3 of the NTA? [Issue 10]

40. As explained, the FMG tenements that ***are not*** Water Ls are validated under the NTA, Part 2, Div 3, Subdiv M. The Water Ls are validated under Part 2, Div 3, Subdiv H.

41. Sec 24HA(2) relevantly provides that s 24HA applies to a future act consisting of the grant of a licence or authority under legislation that is valid (including because of the NTA) and ***relates*** to the management or regulation of surface and subterranean water. ***Water*** means water in all its forms; and ***management or regulation*** of water includes granting access to water, or taking water (s 24HA(2)). The connection must be between *the legislation* and the management or regulation of surface or subterranean water.

42. The Water Ls were granted under the MA 1978 (s 91) including for: "taking water" (L47/302 (expired), L47/361, L47/362, L47/697); "taking water" and "a water management facility" (L47/363, L47/367, L47/396 (expired), L47/472, L47/801, L47/813, L47/814); "taking water" and "search for groundwater" (L47/914); & "taking water", "search for groundwater" and "a water management facility" (L47/919).

43. As to each Water L, only L47/362 and L47/367 have any infrastructure located on them: FMG's mining tenements and infrastructure document filed on 13 Feb 2023, as required by the Court's order of 11 Oct 2022 (C.01.001). L47/362 has a laydown/hardstand area, access roads, powerline infrastructure and water pipeline(s). L47/367 has an access road.

44. In ***BHP*** *Billiton Nickel West v* ***KN*** *(deceased)* [2018] FCAFC 8; (2018) 258 FCR 521 [46]-[64] (North, Dowsett and Jagot JJ), the Full Court held that a miscellaneous licence granted under the MA 1978 (s 91) and the *Mining Regulations 1981* (WA) (**MR 1981**) (reg 42B(ia)) to search for groundwater is a future act relating to the management or regulation of water under s 24HA(2), even if the miscellaneous licence could be granted only if its purpose was "directly connected with mining" (as required by the MA 1978, s 91(6)). The Court held that "a direct connection with one purpose (mining) does not mean that the 'legislation', thereby, does not relate to the management or regulation of, in this case, subterranean water": [57]. Sec 24HA(2) is engaged, on its express terms, if there is a grant of a licence for the management or regulation of water, regardless of whether the grant is made under mining or water management legislation; and regardless of whether the licence gives rights other than as to water management or regulation. For s 24HA(2) to apply, there is no additional requirement that the right to manage water is given under legislation specific to water. Equally, there is no requirement in s 24HA(2) that the future act must relate only to the management or regulation of water.

45. The State and YMAC assert that, because the Water Ls were also granted for other prescribed purposes under reg 42B, s 24HA cannot apply: WA Opening Subs (**WA-OS**) [18]-[21]; YMAC's Closing Subs (**YM-CS**) [14]-[28]). This invites an assessment of the degree to which the legislation and the conditions of the grant relate to water management or regulation. That is inconsistent with the Court's view in *BHP v KN* that s 24HA(2) "is concerned only with whether the future act was granted under legislation (meaning the specific provisions which authorised the relevant grant) that relates to the identified matters": [63]. Because the MA 1978 and reg 42B enable the

grant of a licence authorising a search for groundwater and the taking of groundwater, s 24HA(2) is satisfied regardless of the other rights given by Water Ls.

46. Sec 24HA(2)(b) provides that Subdiv H applies if the future act "relates to" water management. It is unnecessary to qualify the language of s 24HA(2)(b) so that it includes the words "to any extent" after "relates to" for Subdiv H to apply when a future act is as to water management. A future act "relates to" even if it relates to other things. The reference to the words "to any extent" in other provisions in a different context focussing on a sufficient connection to a land area (ss 24JAA(1)(a), 24KA(1)(a) [i.e. "to the extent" of onshore place], 43A(1)(a)(ii) [i.e. if an alternative negotiation regime applies to an area "to any extent"] and 44A(2)(b) [i.e. inclusion in native title claim group if area relates "to any extent" to area covered]) does not assist the proper construction of s 24HA(2)(b) (cf YM-CS [18], [27]).

47. More on point is the fact that s 24AA(4) provides that a future act will be valid "to the extent" covered by, relevantly, first s 24HA (s 24AA(4)(e)) and then s 24MD (s 24AA(4)(j)). It is sufficient if the future act is covered to any extent by s 24HA by force of the use of the words "to the extent" in the chapeau to s 24AA(4). The position is made clearer and more emphatically in s 24AB(2). Sec 24AB(2) provides that "To the extent" a future act is covered by s 24AA(4)(e), it is not covered by s 24AA(4)(j).

48. Because s 24HA applies to the Water Ls, s 24MD does not apply. The NTA (s 24AB(2)) specifically provides that if a future act is covered by s 24AA(4)(e) (i.e., s 24HA), "it is not covered" by s 24AA(4)(j) (i.e., s 24MD) because it is lower in the s 24AA(4) list. It is not correct that a future act might be covered by both provisions. That does not give sufficient meaning and effect to the express use of the word "not" in s 24AB(2). The Water Ls are valid future acts pursuant to s 24HA(3). The *State* (not the grantee) is liable for compensation for these future acts (ss 24HA(5), 24HA(6)).

49. The State also asserts that, because the purposes of the Water Ls are not confined to water management purposes, a construction of the NTA that excludes the effect of Subdiv M will result in an avoidance of the obligation to negotiate as required by Subdiv P and s 24MD(1): WA-OS [23], [24]. But, the argument is based on the incorrect assumption that if a miscellaneous licence were granted for other purposes, such as those mentioned in the Water Ls, Subdiv P (and an obligation to negotiate) would necessarily apply. The assumption is incorrect because Subdiv P applies to a Subdiv M future act, relevantly, if the act is the creation of a right to mine, but *not* where the act is created for the sole purpose of the construction of an "***infrastructure facility***": NTA, s 26(1)(c)(i).

50. The point that Subdiv P does not oblige negotiation if the future act is granted for the sole purpose of the construction of an "infrastructure facility" is not affected by the High Court's confirmation that the definition of "***infrastructure facility***" in s 253 of the NTA is an inclusive definition: ***Harvey v Minister*** *for Primary Industry and*

Resources [2024] HCA 1; (2024) 278 CLR 116 [75]-[81] (Gageler CJ, Gordon, Steward and Gleeson JJ).

51. When the purposes referred to in the Water Ls are considered and the inclusive definition of "***infrastructure facility***" in s 253 of the NTA is considered, the described purposes of the Water Ls are, generally, for water management, or fall within the definition of "infrastructure facility" in s 253.

52. The purposes of the Water Ls are: a road (MR 1981, reg 42B(a)), which falls within (a) of the definition of "infrastructure facility" in s 253; an aerial rope way (reg 42B(c)), which falls within (f) of the definition; a pipeline (reg 42B(d)), which falls within (g) of the definition; a power line (reg 42B(e)), which falls within (d) of the definition; a conveyor system (reg 42B(f)), which falls within (f) of the definition; a tunnel (reg 42B(g)), which falls within (a) of the definition; taking water (reg 42B(i)), which falls within water management in Subdiv H; a search for groundwater (reg 42B(ia)), which falls within water management in Subdiv H; an aerodrome (reg 42B(k)), which falls within (c) of the definition; a communication facility (reg 42B(n)), which falls within (h) of the definition; a mine site accommodation facility (reg 42B(q)), which would be infrastructure facility in its ordinary sense (such that the inclusive definition does not affect the outcome); a bore field (reg 42B(s)), which falls within water management in Subdiv H; a water management facility (reg 42B(t)), which falls within water management in Subdiv H and also (g) of the definition; a power generation and transmission facility (reg 42B(u)), which falls within (d) of the definition; a storage or transportation facility for minerals or mineral concentrate (reg 42B(v)), which falls within (f) of the definition; and a workshop and storage facility (reg 42B(x)), which, at least for the storage facility, falls within (f) of the definition, and a workshop would fall within infrastructure facility in its ordinary sense.

53. As explained, there is no obligation to negotiate when an act creates a right to mine if the act is solely for the construction of an infrastructure facility (NTA, s 26(1)(c)(i)). Thus, it is incorrect to say, as the State does, that if Subdiv H applied to the Water Ls, any application for a miscellaneous licence for various other purposes (such as those described in the definition of "infrastructure facility" in s 253) could, through including "taking water" among the purposes, avoid procedural requirements in Subdiv P that would have otherwise applied: WA-OS [24]. Almost all purposes of the Water Ls are either for water management, or for infrastructure in which case there is no obligation to negotiate.

54. The State's argument does not compel a conclusion that Subdiv M applies to all of the FMG tenements. Rather, *Subdiv H* applies to the Water Ls because they grant water management rights, even if rights not related to water are also granted. An attempt to exclude Subdiv H completely when the relevant grant relates to the management of water, and also relates to other matters, is not permitted nor contemplated by the NTA (see [33]-[34] above).

55. The Water Ls were not granted for the "*sole* purpose of the *construction* of an infrastructure facility". They relate to water management (including a right to take water) or to items within the definition of "infrastructure facility" in s 253.

56. Sec 24MD(6B) does not apply to the Water Ls because s 24AB(2) specifically provides that s 24HA applies instead; and because the Water Ls cannot be characterised as granted *solely* for the purpose of the *construction* of any infrastructure facility: *Harvey v Minister* [73] (cf YM-CS [19]-[21]). The argument that the Water Ls are covered by s 24MD(6B) and that this is (apparently) a more desirable and precise result ignores the hierarchy prescribed by s 24AA(4) and s 24AB(2) (see *BHP v KN* [28]-[29]) and is incorrect (cf YM-CS [27]-[28]).

57. Sec 24HA(2) provides that s 24HA applies to a future act consisting of the ***grant*** of a lease, licence, permit or authority under legislation that relates to water management. Sec 91(1) of the MA 1978 provides that there may be a ***grant*** of a miscellaneous licence; and reg 42B of the MR 1981 provides that the miscellaneous licence may be granted for purposes including taking water, a search for groundwater, a bore field or a water management facility. This legislation permits the ***grant*** of water management rights; and falls within s 24HA: *BHP v KN* [46]-[64].

58. In contrast, the MA 1978 provides for the ***grant*** of:

    (a) a prospecting licence (s 40(1)) which gives a right to prospect for minerals (s 46), and authorises the taking of water (s 48(d));

    (b) an exploration licence (s 57(1)) which gives a right to explore (s 63)), and authorises the taking of water (s 66(d));

    (c) a retention licence (s 70B(1)) which gives a right to retain a prospecting licence or exploration licence or mining lease if mining is impracticable for the time being (ss 70A, 70C(2A), 70L), and authorises the taking of water (s 70J(d));

    (d) a mining lease (s 71) which gives a right to mine (s 85(1)), and authorises the taking of water (s 85(1)(c)).

59. The MA 1978, in providing for the ***grant*** of a prospecting licence, an exploration licence, a retention licence and a mining lease, does not provide for the grant of a lease, licence, permit or authority under legislation that relates to water management in that the ***grant*** relates to rights to prospect, explore, retain or mine and there is an authority given to take water. When the Water Ls were granted under MA 1978 (s 91(1)) and the MR 1981 (reg 42B), they were granted to give rights as to water management. Subdiv M applies to the ***grants*** of rights to prospect, explore, retain or mine. Subdiv H applies to the Water Ls that grant rights to water management (cf YM-CS [23]-[24]). The arguments in YM-CS [25]-[28] are inconsistent with the Full Court's judgment in *BHP v KN*, and cannot be accepted.

60. Sec 24HA(7) provides that, before the future act is done, notice must be given to native title claimants who might be affected, giving them an opportunity to comment. Here, notice was given by the State as to some but not all of the Water Ls. Even where notice was not given, Subdiv H applies (because the notice requirement is only a procedural requirement): *Native Title Amendment Bill 1997* (HR), Explanatory Memo (**EM 1997**) [10.20]; *Lardil Peoples v Qld* [2001] FCA 414; (2001) 108 FCR 453 [58] (French J), [72] (Merkel J), [117]-[120] (Dowsett J); *BHP v KN* [22]-[29], [34].

D. HOW IS COMPENSATION TO BE DETERMINED FOR THE EFFECT OF THE GRANT OF THE FMG TENEMENTS?

61. ***Summary***: The YP have an entitlement to compensation for the grant of the FMG tenements, and the effect of the tenements on the YP's native title rights and interests, *under the MA 1978*. There is thus no entitlement to compensation that arises under the NTA (other than for the grant of the Water Ls). If compensation is payable under the NTA (s 51) (which is denied as to the FMG tenements, other than the Water Ls), the Court ***must*** apply the MA 1978, s 123 (NTA, s 51(3)). In applying the MA 1978 (s 123(4)), no compensation is payable for the alleged social disharmony and division amongst the YP. The YP have no entitlement to compensation for discrimination under the RDA (s 10(1)) (as applied by the NTA (s 45)) because the MA 1978 is not discriminatory. Also, no additional compensation is payable under s 53(1) of the NTA.

D.1. The Part 2 Division 5 compensation provisions

62. Sec 48 of the NTA expressly provides that compensation payable under relevantly Part 2, Div 3 (dealing with future acts including the grant of the FMG tenements) as to future acts is "only" payable in accordance with Part 2, Div 5. Consistently, the NTA (s 50(1)) provides that a determination of compensation may "only" be made in accordance with Part 2, Div 5.

63. This means that the criteria for determining compensation for the effect of future acts on native title rights and interests must be found in Part 2, Div 5. It is not appropriate to cut across the criteria specified in Part 2, Div 5 by reference to other provisions of the NTA that apply to different steps in the process required by the NTA for valid future acts (including the requirement to negotiate under Part 2, Div 3, Subdiv P). The point is important as to the alleged s 109 inconsistency of s 123(1) of the MA 1978 because of s 33 of the NTA (see [112]-[127]). The critical provisions for determining compensation are ss 51, 51A and 53 of the NTA.

D.2. Does the *Mining Act* provide for compensation to native title holders? [Issue 2]

D.2.1. The provision made for compensation under the Mining Act [Issue 2]

64. Because there was no extinguishment of native title by compulsory acquisition or by surrender within s 24MD(2) or s 24MD(2A) of the NTA as to the FMG tenements (other than Water Ls), s 24MD(3) of the NTA applies.

65. Sec 24MD(3) provides that the non-extinguishment principle (see s 238) applies to the FMG tenements; and if, and only if, the following conditions are satisfied, the YP are entitled to compensation for the future acts (of the grant of the FMG tenements) in accordance with Part 2, Div 5:

    (a) the "similar compensable interest test" is satisfied in relation to the future acts (s 24MD(3)(b)(i)); and

    (b) the law mentioned in s 240 (which defines ***similar compensable interest test***) does **not** provide for compensation to the YP for the future acts (s 24MD(3)(b)(ii)).

66. Sec 240 provides that the ***similar compensable interest test*** is satisfied in relation to the future acts of the grant of the FMG tenements if the native title concerned relates to an onshore place; and the compensation would, apart from the NTA, be payable under any law for the future acts on the assumption that the native title holders (the YP) instead held ordinary title. On the assumption that the YP held "ordinary title" (in effect, a freehold estate in fee simple – s 253), the MA 1978 (s 123) is a law that provides for compensation for the future acts of the grant of the FMG tenements.

67. Sec 123(2) of the MA 1978 provides that *subject relevantly to s 123 itself*, the *owner* and *occupier* of any land where mining takes place are entitled according to their respective interests to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining. If the YP held a freehold estate in fee simple, they would qualify as an owner of the land within the compensation application area and would be entitled to compensation for loss or damage resulting from or arising from mining conducted pursuant to the grant of the FMG tenements.

68. This means that the first condition in s 24MD(3)(b)(i) is satisfied in relation to the future acts – the grant of the FMG tenements. In short, there is a State law, satisfying the ***similar compensable interest test***, that gives a right to compensation to ordinary title holders, namely, s 123(2) of the MA 1978.

69. The second condition in s 24MD(3)(b)(ii) is, however, **not** satisfied. For the second condition to be satisfied, the law mentioned in s 240 (namely, the MA 1978, s 123(2)) must **not** directly provide for compensation to the YP for the future acts. But, s 123(2) **does** give the YP a right to compensation as "*occupiers*".

70. Sec 8 of the MA 1978 does not define "***occupier***" but provides that occupier includes any person in actual occupation of land under any lawful title granted by or derived from the "***owner***". Sec 8 relevantly defines "***owner***" as the registered proprietor under the *Transfer of Land Act 1893* (WA) or the owner in fee simple or the person entitled to the equity of redemption. The YP do not fall within the inclusive description of "***occupier***" under the MA 1978, but they may yet qualify as "***occupier***" and be directly entitled to compensation under s 123(2): *WA v* ***Ward*** [2002] HCA 28; (2002) 213 CLR 1 [313]-[319] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

71. Sec 123(2) gives a right to compensation if loss or damage is suffered or likely to be suffered as a result of mining. ***Mining*** is inclusively and widely defined in the MA 1978 (s 8) to include all aspects of ***mining operations***. Secs 123(2) and 123(4) of the MA 1978 allow compensation to be claimed for *all* loss and damage caused by mining, by the grant of the FMG tenements, and include a claim for compensation for "social disruption", meaning dislocation (including of native title holders' connection to the land): *Ward* [316]. This means that, once the YP qualify as an "occupier", they are entitled to compensation to the same extent as under the NTA (s 51) for loss, diminution, impairment or other effect on their native title rights and interests.

72. YNAC's argument that it would have been unnecessary to insert s 125A into the MA 1978 if s 123(2) already provided native title holders with an entitlement to compensation as owners or occupiers (YNAC's Opening Subs (**YP-OS**) [78]; YP-CS [52]-[53]) is incorrect. If s 125A is valid, it is directed to impose on the tenement holder a liability to pay compensation which the NTA imposes on the State (see [581]-[586]). The insertion of s 125A for that purpose does not inform the proper construction of s 123(2).

73. Given the nature of the right to compensation provided by s 123(2), a person, who has a right to occupy; from time to time actually occupies; or who from time to time uses the land, would qualify as "occupier" and be entitled to compensation. There is no requirement that a person qualifies as "occupier" only if they continuously and actually occupy the land. A person may suffer loss from the mining of land they use from time to time, and not continually.

74. The description of owner or occupier identifies ***who*** may be granted compensation. It says nothing of ***what*** compensation may be payable. The compensation payable is to be assessed by reference to the loss and damage suffered caused by mining, which includes the wide concepts involved in "*mining operations*" (MA 1978, s 8).

75. In *Warrie (formerly TJ) (on behalf of the YP) v WA* (***Warrie (No 1)***) [2017] FCA 803; (2017) 365 ALR 624, Rares J held that the YP occupied areas 1, 2, 3, 4 and the Reserve (area 5) of the compensation application area so as to satisfy the requirements of s 47B(1)(c) and s 47A(1)(c) of the NTA to permit the conclusion that these areas were

Exclusive Areas *for the purposes* of *determining* native title (not *compensation*): [231]-[302]; see [203]-[217] below.

76. In *Warrie (No 1)*, Rares J held (and the parties agree the Court should adopt the findings pursuant to s 86 of the NTA) that the YP occupied each area,[5] as each had been visited from time to time, and:

(a) there had been camping, hunting and gathering, and ceremonial activities in area 1 ([234], [243], [260], [263]-[265], [267], [289]-[291]);

(b) ochre and sacred stones had been collected from area 2 ([235], [238], [240], [242], [244], [245], [247]-[249], [251], [260], [263]-[265], [292]-[296]);

(c) area 3 had been used for hunting and fishing, and traditional spiritual rights had been exercised ([245]-[246], [260], [263], [265], [267], [297]-[298]);

(d) in area 4 and the Reserve (area 5), there had been camping and living off the land, fishing, hunting and walking ([238]-[239], [252], [260], [263], [265], [267], [299]-[302]).

77. In *Warrie (No 1)*, in short, Rares J held that "occupy" involves the exercise of some physical activity, but it need not be continuous and may be spasmodic or occasional ([270]). On appeal, in *Fortescue Metals Group v Warrie* [2019] FCAFC 177; (2019) 273 FCR 350 (***Warrie FC***), the Full Court also concluded that the YP occupied areas 2 and 3, the subject of the appeal: [398]-[526]. Robertson and Griffiths JJ (Jagot and Mortimer JJ ([1]) and White J ([529]) agreeing) rejected the argument that the YP had insufficient actual occupation under principles that were argued to have been established (esp. [431], [462], [483]). Under established principles, "occupy" is not confined, requiring actual and continued possession or legal possession; and the issue depends on context: *NSW Aboriginal Land Council v Minister Administering the Crown Land Acts* [2016] HCA 50; (2016) 260 CLR 232 [17]-[24] (French CJ, Kiefel, Bell and Keane JJ); [76]-[92] (Gageler J). Rares J's findings are consistent with the evidence: e.g., F.Cheedy [10], [18]; L.Cheedy [23]; M.Cheedy [49]; J.Coppin [7]; L.Coppin [7]; I.Guinness [5]-[6]; K.Guiness [12]; A.Mack [77]; M.Woodley [31].

78. Consistent with *Warrie (No 1)*, in *Warrie (No 2)*, Rares J ordered, declared and determined that the YP have a right to access and remain in the Determination Area

[5] The areas are depicted in the maps in Schedule 3 of *Warrie (No 2)*, by reference to areas described as unallocated Crown land (UCL). The UCLs are referred to in Schedule 4 of *Warrie (No 2)* and by Rares J in *Warrie (No 1)*. Area 1 consists of UCL 14, UCL 17, UCL 22, and UCL 24 (*Warrie (No 1*) [155]). Area 2 consists of UCL 6 and UCL 7 (except certain areas) (*Warrie (No 1)* [156]). Area 3 consists of UCL 1 (except a mineral lease), UCL 2 (except a mineral lease), UCL 8, UCL 9, UCL 10, UCL 11, UCL 18, UCL 19, UCL 23 and Water1 (except a mineral lease) (*Warrie (No 1)* [158]). Area 4 consists of UCL 4 (*Warrie (No 1*) [159]). Area 5 is Reserve 31428 (*Warrie (No 1)* [154]).

(Determination [3(a)]). *Warrie (No 2)* establishes that YP have a right as "occupier" within s 123(2) of the MA 1978.

79. In ***Tisala*** *Pty Ltd v Hawthorn Resources Ltd* [2022] WASC 109 [69]-[85], Hill J did not decide anything definitive about whether "occupier" as used in s 123(2) of the MA 1978 does not include any person in actual occupation without any "lawful title" granted by the "owner".

80. In *Tisala*, it was held that consent was not required under s 20(5)(c) of the MA 1978 from a person in actual occupation of a homestead on Crown land if they had no lawful derived title. Hill J's reasoning is open to question. It appears Hill J drew the conclusion that "occupier" does not include any person if they held no derived title from the "owner" only because this appeared to follow from the statutory purpose of promoting mining on Crown land: [64]-[70], [84]. Yet, Hill J said that the position may not be the same under other parts of the MA 1978 (including s 123(2)): [82]. Sec 123(2) is directed to conferring a right to compensation for loss and damage suffered by an "occupier" impacted by mining. The statutory purpose identified in *Tisala* of promoting mining on Crown land does not provide any reason for ignoring the definition of "occupier" which does no more than give a meaning as to what "occupier" "*includes*" (cf YP-OS [34]; YM-CS [31]). *Ward* [318] left the issue open for s 123(2).

81. In *Warrie FC*, Robertson and Griffiths JJ said that "occupy", in the context of the s 47B of the NTA, is consistent with a common law conception of occupation: [462], [482]-[483]. There is no reason that "occupier" as it is used in s 123 of the MA 1978 should be any narrower. The purpose of s 123(2) of the MA 1978 is beneficial, to give a right to compensation for loss and damage caused by mining to *any occupier* (cf YP-CS [54]).

82. This means that the second condition in s 24MD(3)(b)(ii) **cannot** be satisfied. The law mentioned in NTA, s 240, that defines ***similar compensable interest test*** (namely, the MA 1978, s 123) provides for compensation to the native title holders (YP) for the future acts.

83. Because the land the subject of the FMG tenements is unallocated Crown land or Crown land the subject of pastoral leases, s 123(3) is engaged if the YP "occupy" that land. YNAC's focus on the application of s 123(3) to private land (YP-OS [38]-[45]) overlooks the fact that s 123(3) applies to, and confers on, the ***occupier*** of ***crown land*** (as the YP are) a right to apply for compensation before the Warden's Court.

84. This means that s 24MD(3) does **not** give the YP a right to compensation under the NTA, Part 2, Div 5. The YP have a right to seek compensation before the Warden's Court under s 123(3). The YP have no right under Part 2, Div 5 as to the FMG tenements (other than the Water Ls).

85. Sec 123 is consistent with the compensatory principle in s 51(1) of the NTA. Sec 123(1)(a) provides that no compensation is payable in consideration of permitting entry onto land for mining purposes. Similarly, consent to mining by the native title holder is not required nor contemplated by the NTA: for the grant of a mining lease, if there is no agreement following good faith negotiations, the NNTT can decide that a mining tenement may yet be granted and mining may occur without the consent of the native title holder. Also, s 123(4)(a) confirms that the amount payable under s 123(2) may include compensation for an owner or occupier being deprived of the possession or use of their land.

86. There is no tension between the right to compensation given by the NTA (ss 51(1) and 51(3)) and by the MA 1978 (s 123). Even if the condition in s 24MD(3)(b)(ii) were satisfied, and the YP had a right to compensation for the grant of the FMG tenements in accordance with Div 5, the Commonwealth, by force of s 51(3) of the NTA, chose to require the application of s 123 of the MA 1978 (including s 123(1)), regardless of whether the State law gives compensation on just terms ([104], [106]-[111] below). In that context, the idea that the Commonwealth was seeking to cover the field or ensure there is no direct collision with the State law cannot be correct. The Commonwealth's purpose was to align the rights of native title holders with whatever rights and limits are conferred or created by the State law, on the premise that native title holders should be treated in the same way as ordinary title holders, not in a better or different way.

D.2.2. Consideration of the Mining Act's *compensation provisions* [Issue 2]

87. The above conclusion is not affected when consideration is given to the detail of the compensation provisions in s 123. They give the YP a right to compensation for all loss or damage suffered or likely to be suffered by the reason of the grant of the FMG tenements, and they give the same entitlement to compensation as the NTA (s 51).

88. Sec 123(1) is important and provides that, since the coming into operation of the *Mining Amendment Act 1985* (**MA Amendments 1985**) (on 31 Jan 1986),[6] in so far as the mineral is by virtue of s 9 of the MA 1978 the property of the Crown or the mining is authorised under the MA 1978, "no compensation shall be payable" and "no claim lies for compensation, whether under the [MA 1978] or otherwise: (a) in consideration of permitting on to any land for mining purposes; (b) in respect of the value of any mineral which is or may be in, on or under the surface of any land; (c) by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral; or (d) in relation to any loss or damage for which compensation can not be assessed according to common law principles in monetary terms".

89. The right to compensation given to an owner and occupier under s 123(2) is expressly subject to s 123 itself, including s 123(1). The principles or criteria for compensation

[6] *Government Gazette* (WA), 31 Jan 1986, 320. The MA Amendments 1985 (s 93) introduced s 123(1).

spelled out in s 123(1) are explicit and clear. No compensation is payable for the permission to enter land for mining; no compensation is payable in respect of the value of any mineral in the land; and no compensation is payable by reference to any rent, royalty or other amount assessed in respect of such minerals.

90. This is because, ever since 1 Jan 1899, all minerals in the land (including iron ore) belong to the State, and not to any owner or occupier of land where mining occurs. No owner or occupier is entitled to compensation for something they do not own. There is no discriminatory treatment of native title holders. In any event, here, in *Warrie (No 2)*, Rares J held that the YP had no right to the minerals: Determination [5(c)(i)].

91. The reason all iron ore from the FMG tenements belongs to the State, not to any owner or occupier, is apparent when the applicable legislation is considered.

92. Sec 3 of the *Western Australia Constitution Act 1890* (Imp) gave management and control of the waste lands of Western Australia and the proceeds of the sale and disposal of the waste lands (including all royalties, mines and minerals) to the legislature of the colony of Western Australia. Pursuant to the *Land Act 1898* (WA), which came into effect on 1 Jan 1899, the waste lands (relevantly being Crown lands) could be conveyed by Crown Grant but with a reservation relevantly for minerals, which continue to belong to the Crown (ss 3, 4, 15).

93. Under s 117 of the MA 1904, relevantly all minerals (including iron ore) on any land that had not been alienated in fee simple before 1 Jan 1899 was the property of the Crown. Pursuant to s 3(1) of the MA 1978, the MA 1904 was repealed but under s 9(1) of the MA 1978, relevantly, all minerals (including iron ore) on any land that had not been alienated in fee simple before 1 Jan 1899 are the Crown's property: *Ward* [165]-[168], [384]-[385].

94. As to the FMG tenements, there was no sale or disposal by the State of any of the land the subject of the FMG tenements before 1 Jan 1899. All of the land the subject of the FMG tenements remains unallocated Crown land or Crown land the subject of pastoral leases. When the State granted pastoral leases over some of that land, no right to the Crown's minerals was given to the pastoral lessee. There has been no grant of any fee simple estate in any land the subject of the FMG tenements. If there had been any such grant before 31 Oct 1975 when the RDA came into effect, native title would have been wholly extinguished with no right to compensation.

95. Sec 123(4) of the MA 1978 is also *expressly* subject to s 123(1). Sec 123(4) provides that the amount payable under s 123(2) may include compensation for being deprived of possession or use of the land (s 123(4)(a)); for damage to any part of the land (s 123(4)(b)); and for "social disruption" (s 123(4)(f)). There is an issue (see [128]-[130]) about the meaning of "social disruption". YNAC's argument, that because s 123(4) provides inclusive rights, the principles or criteria in s 123 are also an inclusive starting point (YP-OS [51], [53]), ignores the mandatory language of s 51(3) of the

NTA and the fact that s 123(4) is expressly subject to s 123(1). The statutory mandate, that compensation cannot be determined by reference to a royalty or agreements for a royalty, cannot be ignored.

96. Sec 123(2), which gives a right to compensation to an occupier for loss resultant from mining, and s 123(4), which gives a right to compensation for loss of use of land and damage to land, will give the YP compensation for the effect of the grant of the FMG tenements on their *native title rights and interests*. They have no separate right to seek compensation based on the value of the minerals in the land, which have always been owned by the State and to which the YP do not have any right.

D.3. Section 51(1) and "*just terms*" compensation [Issue 1]

97. If s 123(2) does not give the YP compensation, s 51(1) of the NTA provides that, subject to s 51(3), the entitlement to compensation under relevantly Part 2, Div 3 (including s 24HA(5) and, if its conditions are satisfied, s 24MD(3)(b)) is an entitlement on just terms to compensate the YP for any loss, diminution, impairment or other effect of the grant of the FMG tenements on their native title rights and interests.

98. Sec 51(1) is the "core provision": *Griffiths HC* [41] (CJ&JJ)). The YP are entitled to compensation because they "hold" native title (see s 224). The focus is on the effect *of the act* (here, the *future acts* of the grant of the FMG tenements) on the YP's *native title rights and interests*. The *act* and the *effect* of the *act* must be considered: *Griffiths HC* [41]-[46]. Sec 51(1) refers to the effect of the "act", dealing indiscriminately between *past acts* and *future acts*. Compensation under Part 2, Div 2 for *past acts*, for example, is claimable only under s 51(1) (NTA, s 48; *Griffiths HC* [40] (CJ&JJ); [261] (Edelman J)) as are claims for compensation for *future acts*. Thus, the principles established in *Griffiths HC*, even though it dealt with compensation for *past acts*, are directly applicable here.

99. Sec 223(1) defines ***native title rights and interests*** as rights and interests "in relation to land or waters" that are possessed under traditional laws and customs of, here, the YP, where by those laws and customs the YP have a connection with the land or waters, and the rights and interests are recognised by the common law of Australia. Sec 223(2) provides that, without limitation, ***rights and interests*** includes hunting, gathering, or fishing, rights and interests. Sec 51(1) recognises the *existence* of two aspects of native title rights and interests identified in s 223 – both the physical or material aspect (the right to do something in relation to land) and the cultural or spiritual aspect (the connection with the land): *Griffiths HC* [44] (CJ&JJ). The effect on both aspects may be different but it is still necessary to focus on the *effect* of the *future acts* on the native title rights and interests. It is inappropriate to shift the focus to anything gained by the grantee of the future act.

100. Sec 51(1) provides that the entitlement to compensation for the effect of the future acts on the YP's native title rights and interests is an entitlement to compensation on "just terms".

101. Even though the concept of "just terms" is "somewhat general and indefinite", it ultimately requires the compensation for the *loss* to be fair and just (***Nelungaloo** Pty Ltd v Commonwealth* (1948) 75 CLR 495, 569 (Dixon J)) and the standard is one of fair dealing (*Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, 600 (Kitto J); *Griffiths v Northern Territory (No 3)* [2016] FCA 900; (2016) 337 ALR 362 [97]-[98] (***Griffiths TJ***)).

102. "Just terms" compensation is "[t]he value to the [owner] of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired": *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 293 (Dixon J, quoting *Fraser v City of Fraserville* [1917] AC 187, 194 with approval). Recourse to "just terms" compensation does not expand the YP's entitlement to get payment for something they do not own.

103. The focus remains on the effect of the grant of the FMG tenements on the YP's native title rights and interests and resulting loss: *Griffiths HC* [42], [44], [45] (CJ&JJ). The YP have no rights to the iron ore, mined by FMG pursuant to the State's authorisations. Revenue earned by FMG from mining is not money the YP might ever have derived from exercising their native title rights and interests.

104. Further, s 51(1) is expressly subject to s 51(3). This means that, although the entitlement to compensation for loss or other effect is specified in s 51(1) (the "core provision"), s 51(1) expressly specifies that the principles or criteria referred to in s 51(3) are to be applied in determining that loss or other effect. This also means that when the principles or criteria in s 123 of the MA 1978 are applied (by force of the mandate in s 51(3)), the enquiry remains about compensating for the *loss* or other *effect* on native title rights and interests. The required connection to land or water to permit compensation particularly for cultural loss remains. In truth, the compensation payable according to s 51(1) and the principles in *Griffiths HC*, or according to s 123 of the MA 1978 is the same. The focus of both is to compensate the YP for their ***loss***.

105. The position is made clear by s 44H of the NTA. Secs 44H(c) and 44H(e) make it clear that, "To avoid doubt", a future act, consisting of the grant of a right to do an activity, includes the exercise of the right; and native title holders are not separately entitled to compensation for the doing of the activity. Just as s 123(2) of the MA 1978 confers a right to compensation for the consequences of mining (activity post the future act), s 44H confirms that this is the entitlement under s 51(1) – this is made explicit in Note 1 to s 44H. Hence, s 44H assimilates the concepts underpinning s 51(1) of the NTA and

s 123(2) of the MA 1978. There is no independent entitlement to compensation for the doing of the activity (s 44H(e)): EM 1997 [6.23], [6.27].

D.4. Section 51(3) and the principles or criteria for determining compensation under the Mining Act [Issue 3]

106. Sec 51(3) of the NTA requires that if the grant of the FMG tenements is not the compulsory acquisition of any native title rights and interests and the ***similar compensable interest test*** is satisfied in relation to the grant of the tenement, the Court **must** apply any principles or criteria for determining compensation set out in the law mentioned in s 240 of the NTA.

107. The *future act* of the grant of the FMG tenements was not the compulsory acquisition of any native title rights and interests. This is true whether or not there is an acquisition within par 51(xxxi) of the *Constitution*. There is a difference between an acquisition regulated by par 51(xxxi) and a compulsory acquisition within s 51(2) of the NTA.

108. No native title rights and interests were extinguished by the grant of the FMG tenements. The non-extinguishment principle applies to the grants under Subdiv H (s 24HA(4)) and under Subdiv M (s 24MD(3)(a)). Sec 238 of the NTA provides that, once the grants of the FMG tenements cease to operate, the YP's native title rights and interests will again have full effect. This is subject to the earlier permanent extinguishment of any part of their native title rights and interests (see s 237A) which would have occurred if (for example) an act extinguished native title before the grants of the FMG tenements and before the enactment of the NTA or the RDA.

109. The similar compensable interest test is met here, and the relevant law mentioned in s 240 is s 123 of the MA 1978. It appears to be common ground that s 51(3) has been satisfied: PoC [41], FMG R [41], WA R [245]-[248].

110. Sec 51(3) expressly provides that when s 51(3) applies, the principles or criteria relevantly under s 123 of the MA 1978 "must" (not may) be applied. This means that the principles in s 123(1), which do not permit a claim for compensation by reference to the value of minerals, rent for mining tenements, or royalty paid by reference to minerals obtained, must be applied. YNAC's argument that the only criteria in s 123 of the MA 1978 that are to be applied are those in s 123(4) should not be accepted. Sec 123(4) is expressly subject to ss 123(1) and (2). The principles in s 123(4) do not confer any right to compensation based on a royalty or the value of the minerals.

111. Sec 51(3) requires s 123 of the MA 1978 to be applied regardless of whether s 123 gives compensation on just terms. Meaning and effect must be given to the words "*(whether or not on just terms)*" as they appear in s 51(3). Consistently, the *Native Title Bill 1993* (HR), Explanatory Memo (**EM 1993**) Part B explained that, "If the native title act involves the grant of an interest which can be granted over ordinary title land, such as a mining interest, subclause (3) provides that compensation is to be assessed

under the same regime as that for the holders of ordinary title. This is the exception to the entitlement to just terms compensation" (p29).

D.4.1. Is there a s 109 inconsistency between s 123(1) of the Mining Act and the NTA? [Issue 3]

112. Despite accepting that s 51(3) is applicable here (PoC [41]), YNAC contends that s 123(1) of the MA 1978 is invalid because it is inconsistent with the NTA, particularly ss 33(1), 86G(1)(b), 87(1)(c) and 87(1A).

113. Sec 33(1) provides that, without limiting the scope of any negotiations, there may be an agreement for payments to be made by reference to profits, income derived or any things produced by the grantee as a result of doing anything in relation to the land or waters concerned after the future act is done. This does not mean that the loss or effect on native title is properly determined by reference to such profits, income derived, or any things produced. The negotiation parties can negotiate any commercial agreement, without limit, on whatever terms they choose and agree. The NTA does not confuse the commercial agreements that may be made with the compensable value of native title rights and interests. The NTA deals with them separately.

114. This was confirmed in ***Brownley*** *v WA (No 1)* [1999] FCA 1139; (1999) 95 FCR 152. In *Brownley*, Lee J held that a matter on which a registered native title claimant is entitled to negotiate, provided for in s 33, is not to be confused with the entitlement of a native title holder to obtain compensation under the NTA (then provided by s 23 of the NTA) for the doing of a future act (169).

115. The *Parliamentary Debates*, Senate, 16 Dec 1993, p5301-5302, show that s 33 was proposed [as cl 31A] as an insertion by Greens' Senator Chamarette as "a fairly weak statement" to prevent s 38(2) [then cl 36(2)] being treated as the Parliament agreeing to any "limits" to any "negotiation aspects relating to mining and other developments so that there is no possibility of negotiating profit sharing". The aim was not to identify a basis for compensation but rather to facilitate negotiations about anything, well beyond what the NNTT could order. Given the reason for s 33's enactment, it does not support the view that s 33 has anything to do with a native title holder's rights to compensation under s 51 of the NTA (cf YP-OS [55]).

116. The reasoning of the NNTT in ***Santos*** *NSW Pty Ltd v Gomeroi People* [2022] NNTTA 74, and of the Full Court of the Federal Court on appeal in ***Gomeroi*** *People v Santos NSW Pty Ltd* [2024] FCAFC 26; (2024) 303 FCR 153, supports the conclusion that there is no inconsistency between the NTA, Part 2, Div 3, Subdiv P (including s 33(1)) and the principles to be applied in assessing compensation (such as s 123(1) of the MA 1978). The NNTT said that Subdiv P is not concerned with compensation as such ([309]); determining compensation by reference to levies or royalties based on alleged comparable transactions does not value the impact on native title rights and interests; and it followed that Santos had not failed to negotiate in good faith ([430]-[431]).

117. In dismissing a ground of appeal, which asserted an erroneous conflation of "payment" under s 33(1) of the NTA and "compensation" under s 53 of the NTA, Mortimer CJ in *Gomeroi* said that, "the ability of native title holders, or registered claimants, to pursue payments as part of their statutory right to negotiate serves a different and wider purpose from the ability to seek compensation for the doing of certain acts under Division 2 of Part 5 of the NTA" ([112]; Rangiah J ([244]) and O'Bryan J ([317]) agreeing). The Court allowed the appeal on an unrelated ground.

118. The permission to make an agreement as contemplated by s 33(1) cannot be treated as a mandatory requirement for all negotiations in any event. Negotiation under Subdiv P is not required for every future act (NTA, s 26); here, negotiation under Subdiv P was required for only 12[7] of the 36 future acts for which YNAC seeks compensation.

119. In *Fejo*, the High Court rejected an argument that the NTA gave rise to a general obligation to negotiate: [18]-[25]. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said "neither the value of the right to negotiate nor the possibility of its exercise before determination of a native title claim are matters that affect in any way the strength of the claim to native title that lies behind the right to negotiate": [25]. Again, the difference between the requirement to negotiate under Subdiv P and the value of loss or other effect on native title rights and interests is evident. Any failure to negotiate is not compensable as a loss or other effect on native title rights and interests. The matters permitted to be the subject of an agreement in s 33(1) do not define the nature of compensation to be awarded under NTA, Part 2, Division 5: cf YP-CS [153] (see [193] below).

120. Sec 35(1) of the NTA permits an application to the NNTT, in effect, if no agreement is made within 6 months. Sec 36(2) provides that if any negotiation party satisfies the NNTT that any other party (other than a native title party) did not negotiate in good faith, the NNTT may not make a determination permitting the future act. Here, despite applications under s 36(2), the NNTT did not find that FMG had failed to negotiate in good faith.[8]

121. Sec 38 of the NTA relevantly provides that the NNTT must determine either that the future act must not be done or that it may be done subject to compliance with conditions. Importantly, s 38(2) provides that the NNTT may not impose a condition that has the effect that native title parties are entitled to payments worked out by reference to profits, income derived, or any things produced by the grantee as a result of doing anything in relation to the land or waters concerned after the future act is done. The Parliamentary Debates make it plain that under s 38(2) "while the parties are free to negotiate profit-sharing arrangements, such arrangements should not be imposed by

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[7] SoAF [177], [181], [185], [189], [193], [197], [201], [205], [210], [283], [295], [299].

[8] *FMG Pilbara / Ned Cheedy and ors on behalf of the YP / WA* [2009] NNTTA 38; *FMG Pilbara / Wintawari Guruma Aboriginal Corporation; Ned Cheedy and ors on behalf of the YP / WA* [2009] NNTTA 63; *FMG Pilbara / Ned Cheedy and ors on behalf of the YP / WA* [2011] NNTTA 107.

tribunals": *Parliamentary Debates*, Senate, 16 Dec 1993, p 5264. The Greens proposed changes to s 38(2). They were rejected by the Parliament because it would "get around the fact that all royalties belong to the Crown", and would discriminate against holders of freehold land (who are not entitled to such royalties): *Parliamentary Debates*, Senate, 18 Dec 1993, p 5192.

122. It is apparent that the NTA does not correlate native title rights and interests with profits, income or any things produced by the grantee party. Instead, the NTA specifically provides that compensation for loss or other effect of native title rights and interests may only be determined under Part 2, Div 5, relevantly if there are valid future acts. The NTA does not conflate and confuse what might be the subject matter of a commercially negotiated agreement effected in compliance with Subdiv P with the compensatory right specified by the core provision in s 51(1).

123. The NTA (s 39) sets out the matters that the NNTT had to take into account before it determined that the FMG tenements could be granted on conditions. Those matters include the effect on native title rights and interests, the opinions and wishes of native title parties as to the management, use or control of the land or waters, the economic or other significance of the future act to Australia and the State, and any public interest. Sec 42 of the NTA permits a determination of the NNTT to be overruled by the Minister but only in the national interest or the State's interests and only within 2 months after the NNTT's determination. The NNTT makes valid the relevant future acts.

124. Sec 33(1) of the NTA deals with what may be the subject of negotiations required under Part 2, Div 3, Subdiv P. Div 5 deals (relevantly) with an entirely different subject matter, namely, when and for what compensation may be obtained for the loss or other effect of a future act on native title rights and interests. Hence, the argument that the principles or criteria in s 123(1) of the MA 1978 (mandated to be applied by force of s 51(3)) are inconsistent with the NTA (esp. s 33(1)) should be rejected.

125. Sec 123(1) does not "alter, impair or detract from" the full and complete operation of Subdiv P, including s 33(1): *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J). There is no conflict between s 33(1) of the NTA and s 123(1) of the MA 1978. They can operate concurrently in different fields bearing in mind the text, operation, policy and purpose of the NTA and s 123(1) of the MA 1978: *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33; (2011) 244 CLR 508 [36]-[45] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ); *Native Title Act Case*, 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). As demonstrated by the expert evidence as to economic loss, mining companies and native title parties may make agreements under the right to negotiate process to cover a range of matters ***other*** than compensating the native title party for the impact on native title rights and interests ([319] below).

126. If parties to a proceeding reach an agreement, including for the payment of a royalty to native title holders, the Court may order that it is effective only if the Court is satisfied that an order as to it is within the Court's power: NTA, s 87(1)(c). That the parties may by agreement *negotiate any outcome* including an agreement to pay a royalty to native title holders and the Court would act within its power to order that the agreement may be effected does not permit the conclusion that compensation can be ordered by the Court under s 51(3) that includes such a royalty payment. The Court has power to order that such a negotiated agreement, if agreed, may be effected. This is because the NTA does not preclude the Court from making such an order. Sec 4(7)(ab) of the NTA provides that the Court may make orders to give effect to the terms of agreement reached by parties "including terms that involve matters other than native title". Sec 4(7)(ab) makes clear that an agreement condoned by the Court can relate to any subject matter, which might not relate to native title. There is nothing inconsistent with that power and the constraint on ordering compensation, without agreement, by reference to a royalty, which is expressly precluded by s 123(1) (where s 123(1) is required to be applied by force of s 51(3)).

127. *Duke of Wellington Gold Mining Company v Armstrong* (1906) 3 CLR 1028 demonstrates the difference between the Court condoning a negotiated agreement and the ambit of the Court's ability to determine what is appropriately payable, absent agreement. The *Mines Act 1897* (Vic) (s 74) provided that the holding of a miner's right or the granting of a lease did not confer a right of entry on the land unless compensation was determined in accordance with that Act or agreement had been reached with the landowner. The previous tenement holder and the landowner had entered into an agreement which included the payment of a royalty. A subsequent tenement holder argued that this agreement was invalid because the Act (s 74) required any payment of compensation to be by way of a lump sum. But, s 75 provided that the parties could agree the amount of money to purchase the land or as to the amount of compensation. Griffith CJ said people "may make an agreement in any terms they choose … in any way the parties think fit, except so far as their liberty is constrained" (1043). As Griffith CJ said, "there is absolute liberty to contract" and nothing unlawful in making an agreement on the basis of a royalty (1044). Equally, here, the parties' ability to *negotiate* a payment of a royalty (under the NTA, s 33(1)) does not render invalid the preclusion on compensation being determined by reference to a royalty (under the MA 1978, s 123(1)).

D.4.2. Does "social disruption" in s 123(4)(f) of the Mining Act extend to and include social disharmony and/or the alleged division and conflict within the Yindjibarndi community? [Issue 3 and 3A]

128. Sec 123(4)(f) of the MA 1978 provides that an owner or occupier may be entitled to compensation for "social disruption". In context, when the words "social disruption" are used to found a claim of an owner or occupier, the words connote and refer to dislocation of the owner or occupier from the land the subject of the mining. The words

do not, in context, refer to social disharmony or "social division" amongst a number of owners or occupiers who may have differing views about whether mining tenements should be granted, and mining should occur, as to the owners or occupiers' land. The words "social disruption" refer to something that disrupts the occupiers' ability to use and connect with the land according to the occupiers' social or societal entitlements. The words "social disruption" do not refer to differences of view or disputes the occupiers might have as between themselves.

129. Sec 123(4) of the MA 1978 was repealed and re-enacted including with the insertion of s 123(4)(f) by the MA Amendments 1985, s 93. The MA Amendments 1985 arose after an inquiry into aspects of the MA 1978. In *Western Australia Report on the Inquiry into Aspects of the Mining Act (1983) to the Hon Minister for Minerals and Energy of the State* by Michael W Hunt (Chairman Mining Act Inquiry Committee), the genesis of and the reasons for the insertion of s 123(4)(f) is explained. That supports the proper construction of "social disruption" in s 123(4)(f).[9] The report states (100):

> In addition to the value of the land, the farmer must also be compensated for social disruption to him and his family, for costs of relocation and any interim loss of earnings. Compensation should bear in mind the fact that the farmer may need to relocate in a district with which he is not familiar.

130. On the proper construction of "social disruption" in s 123(4)(f), the words do not refer to internal "social division" or social disharmony among a group of owners or occupiers if they disagree about whether mining should occur and about what, if any, commercial agreement should be made with the proposed grantee of mining tenements. In *Ward* ([316]), Gleeson CJ, Gaudron, Gummow and Hayne JJ said that it was significant that the MA 1978 provides for compensation that includes "for the loss of use of the land and for 'social disruption', which may be particularly apposite in respect of any compensation for native title holders" (s 123(4)(f)). It is apposite that native title holders get compensation for being dislocated from their land. The High Court's observation in *Ward* was not directed to social disharmony caused by mining; disharmony caused by mining is more than one step removed from the issue to which the High Court was directed.

131. The YP's claim for compensation for the alleged social division is not a claim for loss or damage arising *from the grant of the FMG tenements* but rather a complaint about *FMG's alleged conduct* in ***pursuit*** of its development of its mining operations. YNAC was refused leave to amend its PoC to include such a claim (2 June 2023; T47.7-49.45); thus, YNAC cannot persist with it. The question is whether the ***grant*** of the FMG tenements cause any relevant loss or damage. Matters alleged as to FMG's alleged conduct in supporting the Wirlu-Murra Yindjibarndi Aboriginal Corporation

[9] See Hansard (WA), Legislative Assembly, 13 Mar 1985, 885, 887.

(**WMYAC**) are irrelevant to the question of the compensation payable for the ***grant*** of the FMG tenements.

132. YNAC led evidence of harm alleged to have been suffered by the alleged social division. This included an alleged breakdown in relations between the YP, disruption in the exercise of culture and law, and psychological harm said to have potentially been suffered by some members of the YP.

133. Witnesses gave evidence that before FMG's arrival in Roebourne, there were some fights from time to time,[10] but the YP were, as a whole, united.[11] Some witnesses said that a split emerged because WMYAC wanted to accept a deal offered by FMG, which YAC did not think was good enough.[12] Other witnesses gave more general evidence that the split started when FMG arrived in Roebourne.[13] Several witnesses explained the division by reference to meetings of the YP that occurred between 2008 and 2011.[14] Reference was made to a meeting held at the 50 Cent Hall in Roebourne on 16 Mar 2011.[15]

134. Witnesses gave evidence as to alleged impacts of the split. Some said there had been violence in Roebourne between members of YAC and members of WMYAC.[16] Evidence was also given that the rules pertaining to the *wurruru* (godmother) relationship had in one instance been broken by Stanely Warrie's *wurruru* taking him and Michael Woodley to court over a dispute between YAC and WMYAC (T586.9-31 (Stanley Warrie); K.Warrie [20]-[21]; T358 (Kaye Warrie)).

135. Limited evidence was given about the *gudjeru* or *gajardu* (godfather) relationship (M.Cheedy [5]; T587.14-43 (Stanley Warrie)), although there was no evidence that such relationships had been impacted in any way: cf YP-CS [253]; see [471] below. Some also said that the *Galharra* (the YP's traditional kinship system[17]) and *nyinyaard* (a system of rules for sharing and an aspect of *Galharra*[18]) had been affected,[19] and that WMYAC and YAC now did their own separate Law ceremonies.[20] But, there was

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[10] E.Guinness [35], [36]; J.Maddison [6], [8], [20], [27]; A.Mack [105]-[106]; L.Coppin [9]; T323-324 (Estelle Guinness); T518.10-25 (M.Woodley).

[11] I.Guinness [17]; E.Guinness [25], [30]; M.Cheedy [20]-[21], [51]; S.Warrie [27], [58], [61], [67], [77]; S.Wilson [12]; M.Woodley [345]-[350], [354]; T230.45 (Lyn Cheedy); T560.17 (Angus Mack).

[12] L.Cheedy [48]-[49]; K.Guiness [65]; J.Norman [30]-[31]; K.Warrie [7]-[9], [25]; S.Wilson [7]; J.Coppin [47]; T368 (Kaye Warrie).

[13] E.Guinness [25]; M.Ranger [15]; R.Smith [28]; T322 (Estelle Guinness).

[14] E.g., L.Cheedy [45]-[46]; F.Cheedy [36]-[38]; S.Warrie [50], [51]; S.Wilson [6].

[15] L.Cheedy [55]; M.Cheedy [14]; J.Norman [30]; M.Nikakis [24]; M.Ranger [9]; S.Wilson [7].

[16] L.Cheedy [63], [70]; J.Coppin [53]-[67]; I.Walker [16], [18]; W.Woodley [88]-[94]; J.Maddison [21]-[22], [26]; M.Nikakis [39]; S.Wilson [14]; M.Woodley [333], [338]-[349], [351]-[362].

[17] SoAF [125].

[18] SoAF [140].

[19] K.Guiness [65]-[71]; S.Warrie [76], [86], [106]; W.Woodley [79]-[80]; L.Cheedy [36]-[37]; K.Guiness [64]; M.Cheedy [32].

[20] L.Cheedy [38]; K.Guiness [72]; K.Warrie, [17]; I.Walker [17]; W.Woodley [60]-[61]; S.Wilson [13].

evidence that obligations prescribed by *Galharra* still existed, and were still observed by some.[21] Also, several witnesses identified the importance of *gumawarri* ("coming together"), and considered that reconciliation was desirable and possible.[22] Witnesses also gave evidence that members of YAC continue to maintain close relations and friendships with members of WMYAC.[23]

136. YNAC's anthropology evidence as to social division is considered at [466]-[477]. YNAC's psychology evidence as to social division is considered at [491] and [501]. In essence, for present purposes, the evidence is that there was social division and dysfunction among the YP for many years before, including because of their dislocation to Roebourne in the late 1960s.

137. FMG objects to evidence as to social division, on the basis that social disharmony is not compensable. The issue was left to final judgment. Having regard to the true meaning of s 123(4)(f) of the MA 1978, YNAC's claim for compensation insofar as it relates to the alleged social disharmony should be rejected. There is no basis in ss 51(1) and 51(3) of the NTA, and s 123(4)(f) of the MA 1978, for compensation for the alleged social disharmony.

138. The structure of s 51 of the NTA and the way in which s 123 of the MA 1978 is required to be applied is important and should be considered. The "core" compensatory provision in the NTA is s 51(1) (*Griffiths HC* [41]). Sec 51(1) provides the entitlement to compensation, which is an entitlement for just terms compensation for the impact of the future act on native title rights and interests. Sec 51(1) is expressly subject to s 51(3). Sec 51(3) provides that it ***must*** be applied if the act is not an act of compulsory acquisition and the similar compensable interest test is satisfied. Because of the mandatory terms of s 51(3), s 123 of the MA 1978 must be applied. However, when s 123 is applied, including s 123(4)(f), the core compensatory concept remains applicable because s 51(3) does not provide otherwise. And, s 51(3) maintains the compensatory principle in s 51(1) save that it expressly excludes a need for compensation on just terms (if principles or criteria required to be applied by s 51(3) do not provide for just terms).

139. The chapeau to s 123(4) refers to an entitlement to compensation subject relevantly to s 123(1) and refers to the amount payable under s 123(2). Sec 123(2) provides that the owners and occupiers are entitled according to their respective interests to compensation for all loss and damage suffered as a result or from mining activity. Sec 123(4)(f) targets compensation flowing from the grant of tenements, not flowing from disharmony among native title holders.

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[21] L.Cheedy [38]; T338.8-18 (Estelle Guinness); S.Warrie [237]; T357.29-33 (Kaye Warrie).

[22] S.Wilson [11]; J.Coppin [49]-[50]; F.Cheedy [43]; K.Warrie [19]; T339.01-15 (Estelle Guinness); T273.35-274.22 (Sonya Wilson).

[23] W.Woodley [33], [95]; J.Norman [22]; R.Smith [28]; K.Guiness [57]-[60].

140. Sec 51(1) of the NTA gives a right to compensation for the effect of the future act on "native title rights and interests". The alleged social disharmony was not caused by the future acts, and is not an effect on YP's native title, as possessed under their traditional laws, connecting them with the land, and recognised by the common law (NTA, s 223). Because native title is held communally does not change the focus (cf YP-CS [69]).

141. Regardless, any division or disharmony was not *caused* by the *grant* of the FMG tenements - this is the relevant compensable future act. Compensation is not payable under the NTA for any alleged misconduct by, or actions of, FMG. YNAC's complaints as to the conduct of FMG do not relate to the loss, impairment or other effect of the grant of the FMG tenements on the YP's native title rights and interests.

142. The parties have agreed the following facts, which, absent leave, the parties may not seek to contradict or qualify: *Evidence Act 1995* (Cth) (***Evidence Act***), s 191(2).

143. From late 2010, there were *genuine* and strongly held opposing views within the YP about entering an agreement with FMG: SoAF [66]. The dispute between WMYAC and YAC/YNAC also arose from concerns about YAC's management (including its financial affairs) and the role and conduct of Michael Woodley: SoAF [58], [61], [85]. Those concerns contributed to a decision by some YAC members to establish or join WMYAC, and have continued to contribute to the dispute: SoAF [57]-[59]. It is also agreed that YAC engaged in oppressive conduct and its directors exercised their powers for improper purposes by taking steps to exclude members of WMYAC from YAC, or to exclude them from being able to express their views in relation to matters on which there was disagreement. This included cancelling memberships, formulating membership requirements which would have prevented those who supported WMYAC from joining YAC, and not considering membership applications of YP who supported WMYAC: SoAF [74]-[75], [79]-[84].

144. Despite the agreed position that the cause of the alleged division is multi-faceted, and in part arose because of concerns as to YAC's management and the conduct of Michael Woodley, YNAC's case is premised on the division being caused by disagreement over the entry into a land access agreement with, and provision of heritage services to, FMG: YP-CS [347], [441]. It cannot be said that the alleged division is "properly understood as arising from the development and operation" of the mine (YP-CS [348]) because the disharmony arose *before* the future acts and continues *after* the future acts. The disharmony is not connected with the future acts, the *grant* of the FMG tenements.

145. The agreed facts make clear that the *grant* of the FMG tenements did not cause the disharmony. YNAC's case as to the alleged social disharmony does not confront the agreed position that the disagreement within the YP related to a genuinely held view, and related to matters other than about FMG. Also, YNAC disregards the fact that YAC engaged in oppressive conduct directed to people who held contrary views. The fact

that different views were genuinely held by the YP cannot support a conclusion that FMG caused those differences and should compensate for the disharmony.

146. The agreed facts are consistent with the findings made by Pritchard J in ***Sandy*** *v Yindjibarndi Aboriginal Corporation RNTBC (No 4)* [2018] WASC 124; (2018) 126 ACSR 370 (which the parties seek to be adopted by the Court under the NTA (s 86) if social disharmony is relevant to compensation: A.09.017.01). Pritchard J found as follows.

147. Support for an agreement with FMG cannot properly be characterised as a position which was inimical to the objects of YAC: [700]-[701]. Michael Woodley, then YAC's CEO and acting on behalf of YAC, prevented two members of YAC, Ms Sandy and Ms Allan, from attending YAC's annual general meeting held on 15 Dec 2010 (which was oppressive, contrary to s 166-1(1)(e) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**)): [242]-[251]; [252]-[254].

148. At the YAC AGM held on 15 Dec 2010, the membership of 26 members of YAC were purported to be cancelled on the basis that they were members of WMYAC (but due to non-compliance with the CATSI Act and YAC's Rule Book, the cancellation was ineffectual): [262]-[269]. YAC's purported cancellation of the memberships on the basis that the members were also members of WMYAC was oppressive conduct within the meaning of the CATSI Act, s 166-1(1)(e): [274]-[275].

149. YAC did not give notice of the YAC annual general meeting proposed to be held on 30 Nov 2011, which was found to be oppressive for the purposes of the CATSI Act, s 166-1(1)(e): [288], [305]. The YAC directors did not intend to permit persons whose membership were purported to be cancelled at the YAC AGM held on 15 Dec 2010 to attend the YAC AGM to be held on 30 Nov 2011: [289]. (The Supreme Court of Western Australia injuncted the AGM from proceeding on 30 Nov 2011: *Pat v Yindjibarndi Aboriginal Corporation* [2011] WASC 354.)

150. The YAC directors sought to introduce a requirement of loyalty for all YAC members and to permit disqualification of YP who had different points of view from being members: [312]. The deferral of issues relating to Korda Mentha's investigation into YAC's financial affairs, and payments from YAC to Juluwarlu Aboriginal Corporation (**JAC**) by Mr Woodley and the Chairperson (Middleton Cheedy) until the end of the YAC AGM held on 10 Sep 2014 was conduct which was oppressive to YAC members who had raised these issues within the CATSI Act, s 166-1(1)(e): [752]-[790].

151. Pritchard J's findings in *Sandy* are consistent with Rares J's view in *Warrie (No 1)* ([391]) that "a deep and unfortunate internal division" emerged among the YP over "whether, and, if so, on what terms, they should cooperate with FMG developing and operating what is now the Solomon Hub mine". The alleged division within the YP was found to be a result of a disagreement about whether the YP should cooperate with FMG. Division was not caused by the ***grant*** of the FMG tenements.

152. YNAC's attempts to recast and explain the earlier Court cases as cases where WMYAC attempted to "take over control of YAC" (YP-CS [420]-[421]) should not be accepted. The plaintiffs were *successful* against YAC in those cases. Those cases were about YAC's improper conduct towards its members, particularly those who disagreed with Michael Woodley and YAC. YNAC cannot now defend the oppressive and improper conduct of YAC, Mr Woodley and others as found in those cases on the basis that WMYAC was trying to take control of YAC. It is apparent that YNAC is seeking to relitigate arguments run by YAC in them: YP-CS [422]. This case is about the compensation to which YP are entitled for the impact of the grant of the FMG tenements on their native title; it is not the occasion for YNAC to attempt to relitigate conclusions drawn in other Court cases for other reasons.

153. Adopting the practical, common-sense test for causation from ***March v Stramare*** *(E & MH) Pty Ltd* (1991) 171 CLR 506, the ***grant*** of the FMG tenements was not a cause of the social disharmony. Having regard to the agreed facts, the findings sought to be adopted pursuant to s 86 of the NTA and the evidence of the YP, it cannot be concluded that the grant of the FMG tenements ***caused*** the alleged social disharmony.

154. In *Griffiths HC*, the CJ&JJ explained that the task under s 51(1) requires a number of separate but "inter-related steps" to be considered. It is necessary to identify the compensable acts, to identify the native title holders' connection with the land or waters by their laws and customs, and then to consider the "inter-related effects" of the compensable acts on the native title holders' connection with the land or waters: [218], [224]. YNAC seizes on the use of the word "inter-related" (required by the process of determining compensation) and confuses the concepts, to draw the incorrect conclusion that the alleged "division and social disruption" are inter-related effects of the grants of the FMG tenements: YP-CS [63]-[68]. There is no support for the conclusion that compensation is payable for the alleged social "division" because it is inter-related with the grant of the FMG tenements; there is no such relationship, least of all a relationship that demonstrates loss arising from the YP's connection with the land or waters.

155. It is true that "s 51(1) does not in its terms require that the detrimental consequence directly arise from the compensable act": *Griffiths HC* [218]. But, it is still necessary for a connection to be drawn between the compensable act and the impact on the native title holders' connection with land or waters. That is precisely what the High Court said was a necessary step after saying that the consequence need not directly arise: *Griffiths HC* [218], [224].

156. In *Griffiths HC*, the CJ&JJ endorsed the view in *Griffiths TJ*. Mansfield J said that s 51(1) does not require the detrimental consequence to arise *directly* from the compensable act but this does not mean there is no need to show any causative connection. It is still necessary to determine a causative connection by applying the practical test of causation explained in *March v Stramare* that the non-economic loss was caused by the compensable act and the native title holders' connection to land has

been impacted: *Griffiths TJ* [321]-[326]. Mansfield J said, "Any sense of loss generally derived from a loss of access to country in the town of Timber Creek and the inability to exercise native title rights on that country lies outside the parameters of s 51(1)".

157. The need to show a causative effect and an impact on the native title holders' *connection to land or waters* is different from the separate point made by Mansfield J (*Griffiths TJ* [324]-[326] and *Griffiths HC* [205], [219]) that it is unnecessary to pin down each item of non-economic spiritual loss (as it impacts the native title holders' connection to land) to a particular parcel of land because this separate task is more holistic. That does not deny the need to show that the compensable acts practically impacted the native title holders' *spiritual connection to the land or waters*. Nothing said in *Griffiths HC* (or *Griffiths TJ*) supports a construction of s 51(1) that would permit a claim such as that being advanced by YNAC as to division.

158. To support its case that FMG caused the alleged social "division", YNAC relies on some documentary evidence and invites inferences to be drawn. The documents do not show the required causative connection with the alleged conduct (which, in any event, is not a compensable or future act at all) and do not show any spiritual loss that connects to any of YP's land or waters.

159. The documents include an affidavit of Michael Woodley sworn on 2 Sept 2015 (**MW 2015**) filed in the Supreme Court of WA in CIV2072/2011, minutes of WMYAC meetings from 2012, agreements between other mining companies and other native title parties, and various invoices said to be paid by FMG (YP-CS [216(e)-(h)], [222]-[223]). The argument is that FMG encouraged the "breakaway group" (WMYAC) and fostered division in the community by funding WMYAC (YP-CS [397], [459]). But, that is not the case. At most, the evidence as to FMG's involvement is evidence of FMG's permissible, legitimate and lawful attempts to progress its mine project, including by taking steps to comply with the AHA and to obtain Ministerial consent to mining. FMG made lawful commercial arrangements with WMYAC to progress its mine project and to provide services for the mine project; none of this conduct is properly causative of any impact on YP's spiritual connection to land or waters.

160. Also, the evidence does not permit the inference that FMG funded all litigation between WMYAC and YAC (cf YP-CS [375], [399], [412], [417]). There is no evidence that FMG paid the legal fees of the Todd Respondents in *Warrie (No 1)*. An inference cannot be drawn as to payment because the evidence "must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture": *Luxton v Vines* (1952) 85 CLR 352, 358, quoting *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1, 5.

161. It is apparent that any social disharmony emerged from a disagreement as to whether the YP should enter into an agreement with FMG. FMG cannot be held responsible for members of the YP exercising autonomy and freewill in forming the view that the YP

should enter into an agreement with FMG. As Pritchard J found, such a position was not inimical to the objects of YAC ([146]-[151] above). Nor can FMG be held responsible for the actions of members of YAC who engaged in oppressive conduct towards YP who disagreed with them. YNAC's case as to the alleged "division" (YP-CS [347]-[450]) makes clear that it was not caused by *the grant* of the FMG tenements. YNAC's case is that it was FMG's conduct *in pursuit* of the grant (or pursuit of a land access agreement) that caused the alleged "division". YNAC cannot advance that case: 2 June 2023, T47.7-49.45.

D.5. Entitlement to compensation under s 10(1) of the *Racial Discrimination Act 1975* (Cth) (RDA) [Issue 11]

162. Assuming the MA 1978 does provide for compensation to the YP for the grants of the FMG tenements (because the YP are "occupiers" under s 123(2)), YNAC asserts a further or alternative claim that the MA 1978 does not provide the YP with parity of treatment when compared to holders of *ordinary title* and does not provide compensation having regard to the "unique character" of the YP's native title rights and interests, engaging s 10(1) of the RDA to fill the void: PoC [21]-[23]. The claim is founded on alleged disparity of treatment under the MA 1978 (namely, by s 8 ["private land"], s 29(2), s 29(7)(c), s 35(1), s 38, s 123(3), s 123(5), s 123(6)).

163. Sec 45(1) of the NTA provides that if the RDA has the effect that compensation is payable to native title holders in respect of an act that validly affects native title to any extent, the compensation in so far as it relates to the effect on native title, is to be determined in accordance with s 50 as if the entitlement arose under the NTA. Sec 226(2)(a) of the NTA provides that an "***act***" includes the making, amendment or repeal of any legislation. The "act" to which YNAC makes reference is the provisions of the MA 1978 that give rise to the alleged disparity.

164. Sec 10(1) of the RDA relevantly provides that if, by reason of a provision of a law of the State, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that State law, the first-mentioned persons shall, by force of s 10(1), enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

165. In ***Gerhardy*** *v Brown* (1985) 159 CLR 70, the issue was whether s 18 of the *Pitjantjatjara Land Rights Act 1981* (SA) (which gave unrestricted rights of access to certain land to the Pitjantjatjara people) and s 19 of that Act (which prohibited any non-Pitjantjatjara person from entering the land without permission) discriminated so that s 10 of the RDA was engaged to give a non-Pitjantjatjara person a right of access without committing an offence. It was held that these provisions were a "special measure" within s 8(1) of the RDA and, therefore, s 10 of the RDA did not apply. In

that context, Mason J said if a State law gives a right only to people of a particular race, s 10 would operate to confer that right on people of other races so that they may enjoy an equal right (98). Mason J also said that if a State law prohibits only people of a particular race from enjoying a human right or fundamental freedom, s 10 would again operate so that the prohibition would not apply because the prohibition under the State law would be invalid under s 109 of the *Constitution* (98-99). The approach taken by Mason J has been adopted in subsequent cases.

166. In the *Native Title Act Case*, the High Court held that s 7 of the *Land (Titles and Traditional Usage) Act 1993* (WA), which extinguished native title to land and created a statutory right of traditional usage, was inconsistent with s 10(1) of the RDA because the holders of s 7 rights did not enjoy the same security of enjoyment of rights as did holders of "title", and s 7 was invalid to the extent of the inconsistency because of s 109 of the *Constitution*. Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said (438), "If, by virtue of the WA Act, Aborigines on whom s 7 rights are conferred do not enjoy the same security of enjoyment of those rights as do the holders of 'title', there is an inconsistency between the WA Act and s 10(1) of the [RDA]. And, if there be such an inconsistency the WA Act is invalid to the extent of the inconsistency".

167. In *Ward*, the High Court considered the meaning and effect of s 10(1) of the RDA in the context of a claim for a determination of native title over about 7,900km^2 in the East Kimberley. The Court considered several pieces of legislation that regulated WA land law to determine whether native title had been extinguished by that legislation. In that context, Gleeson CJ, Gaudron, Gummow and Hayne JJ ([104]-[134]) held:

(a) s 10(1) is directed to the "*enjoyment*" of rights by people of one race but not others and, in that event, s 10 gives that right, and it is incorrect to consider merely the purpose of the law that deprives people of one race from the enjoyment of the rights, so as to give s 10 a narrower effect ([105], [115]);

(b) (i) if a State law forbids the enjoyment of a human right without differentiating between racial groups, s 10(1) does **not** operate because there is **no** discrimination ([108]); (ii) if a State law provides for the extinguishment of land titles but provides for compensation only in respect of non-native title, the extinguishment remains but s 10(1) will give a right to compensation to native title holders ([108], [124]); (iii) if a State law extinguishes only native title, this discriminatory burden of extinguishment is removed by force of s 10(1) and the State law is rendered invalid by s 109 of the *Constitution* ([108]).

168. In ***James*** *v Western Australia* [2010] FCAFC 77; (2010) 184 FCR 582, the question was whether mining leases etc granted under the MA 1978 before 1 Jan 1994 (when the NTA commenced) but after 31 Oct 1975 (when the RDA commenced) were "past acts" within s 228(2) of the NTA. Sec 228(2) relevantly defines ***past act*** as an act that took place before 1 Jan 1994 when native title existed in relation to particular land or

waters and where, apart from the NTA, the act was invalid to any extent but would have been valid to that extent if native title did not exist. In essence, something is a ***past act*** if it would have been invalid, for example, because of s 10(1) of the RDA apart from the operation of the NTA. The Full Federal Court held that the grants of the mining leases were ***past acts*** because they would have been invalid by force of s 10(1) of the RDA.

169. The point is that under the NTA, an act is a ***past act*** if it occurred before 1 Jan 1994 if it would have been invalid regardless of the NTA. Relevantly, an act that affected native title between 31 Oct 1975 and 1 Jan 1994 would have been invalid under the RDA (s 10(1)) if it discriminated, regardless of the NTA, so that such a discriminatory act is a ***past act***. If that act would have been valid even applying the RDA (s 10(1)) and if it occurred between Oct 1975 and Jan 1994, it is not a ***past act***.

170. In *James*, Sundberg, Stone and Barker JJ said, by applying *Gerhardy* and *Ward*, that s 10(1) operates in two kinds of cases involving State laws: (1) where a State law omits to make the enjoyment of rights universal, in which event, the State law is not invalid but s 10 will confer a complementary right; (2) where a State law imposes a prohibition forbidding the enjoyment of a human right or fundamental freedom enjoyed by persons of another race or deprives them of a right or freedom previously enjoyed by all, in which event, s 10(1) confers a right on the persons prohibited or deprived, rendering the State law invalid under s 109 of the *Constitution* to the extent of the inconsistency.

171. Because s 123(1) of the MA 1978 gives the YP a right to compensation as "occupiers" for all loss or damage suffered or likely to be suffered from mining pursuant to the grant of the FMG tenements, there is no disparity or differentiation in any sense, so as to engage s 10(1) of the RDA. The provisions of the MA 1978 to which YNAC refers do not give rise to any disparity, based on race etc, of treatment as between native title holders and ordinary title holders to trigger s 10(1). Sec 10(1) of the RDA is not engaged by the provisions of the MA 1978 on which the YP rely.

172. There is no disparity of treatment in s 123(3) of the MA 1978. The YP qualify as an "occupier" of Crown land so that they may agree compensation and, failing that, compensation will be determined by the Warden's Court on their application. Further, the express rights in s 123(4)(a)-(b) of the MA 1978 to obtain compensation for being deprived of possession or use and damage to any part of the land are rights given to ***all*** occupiers. These rights will compensate the YP, in the same way as any other owner or occupier would be compensated if relevant loss is shown. Nothing in the MA 1978 provides that a claim for non-economic or cultural loss cannot be made.

173. The conferral of the right on an owner of private land alienated before 1 Jan 1899 under s 38 of the MA 1978 to royalties received by the Crown from minerals (except gold, silver and precious metals) does not give rise to any disparity of treatment, discriminating on *racial* grounds. The YP do not have, and never had, any right to

minerals as expressly determined in *Warrie (No 2)*. The particular right given to owners of land that obtained title by alienation from the Crown before 1 Jan 1899 is not a right that is relevant to the YP. ***All*** people, not just native title holders (to the extent to which they had native title rights and interests in the minerals), lost rights to minerals as of 1 Jan 1899 by force of the legislation referred to at [92]. As recognised in *Ward*, this is a situation where a State law forbids the enjoyment of a right without differentiating between racial groups, such that s 10(1) of the RDA does not operate.

174. Even though ***private land*** is defined in the MA 1978 (s 8) to include relevantly an estate of freehold and even though the definition does not include native title land, that is insufficient to trigger s 10(1) of the RDA when s 123(2) of the MA 1978 gives native title holders, as "occupiers", a full right to compensation. The "unique character" of native title is not ignored by s 123(2) in that it gives a right to "compensation for all loss and damage suffered or likely to be suffered". These are words of width. They are words that have a similar effect to the words used in the s 51(1) of the NTA which entitles compensation for "any loss, diminution, impairment or other effect" on native title rights and interests. An occupier with native title rights and interests may claim all loss or damage suffered from mining; this would compensate for any loss said to arise from the unique character of the occupier's connection, interests or rights. The true issue is about the quantum of such loss; the true issue is not about any disparity of treatment.

175. The fact that certain rights are given to the owner or occupier of private land under ss 123(5) and 123(6) of the MA 1978 does not mean there is any disparity of treatment of the YP. There is no differentiation on *racial* grounds and the right to compensation under s 123(2) remains intact.

176. Similarly, the fact that s 35(1) of the MA 1978 provides that a mining tenement holder cannot commence mining on any "private land" unless and until compensation has been paid to the owner or occupier does not mean there is any disparity of treatment of the YP on racial grounds. Nor does the fact that ss 29(2) and 29(7)(c) of the MA 1978 require the consent of the owner and occupier of private land in specified circumstances mean that the YP are treated differently on racial grounds. The YP have a right to compensation, like all owners and occupiers, under s 123(2).

177. Furthermore, if there *is* any disparity and s 10(1) of the RDA operates, s 45(2) of the NTA provides that the State (not FMG) is liable for any compensation arising.

178. Also, if s 45 of the NTA applies because there is discrimination under s 10(1) of the RDA, compensation must be determined under Part 2, Div 5 of the NTA (s 50). That means s 51(3) must be applied and there would be no compulsory acquisition within either s 51(2) or s 51(4), even if there is any para 51(xxxi) acquisition of property within the *Constitution* ([187]-[190] below) (cf PoC [22]-[23], [43], [44]; YP-CS [12], [18(a)(ii)], [25]).

179. It is incorrect to assert that the MA 1978 does not have regard to the unique character of native title rights (because it does not compensate for cultural loss, for the loss of the right to negotiate or for what can be negotiated under s 33(1) of the NTA) and that this means that s 10(1) of the RDA and s 45(1) of the NTA are triggered (cf YP-CS [72]). The MA 1978 does not discriminate on racial grounds. Sec 123(2) of the MA 1978 and s 51 of the NTA each provide the same entitlement to compensation ([85]-[86] above)

D.6. Whether the grants of the FMG Mining Leases resulted in an acquisition of property which gave rise to an entitlement to compensation under s 53(1) of the NTA [Issue 9]

180. In *Ward*, the High Court held that "it cannot be said that the grants of mining leases are necessarily inconsistent with the continued existence of all native title rights and interests" ([296]); and "it does not follow that all native title rights and interests have been extinguished" ([308]); see also *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* [2010] HCA 49; (2010) 241 CLR 576 [34]-[35]. The non-extinguishment principle in s 238 of the NTA means that the YP's native title rights and interests continue to exist over the area of the FMG Mining Leases.

181. No property has been acquired by FMG or the State from the YP by the grant of the FMG Mining Leases. Native title cannot be acquired by the State or FMG as they are not members of the YP, nor do they observe the YP's traditional laws and customs: ***Mabo*** *v Queensland* ***(No 2)*** (1992) 175 CLR 1, 60 (Brennan J).

182. While the Crown can accept the ***surrender*** of native title, where the Crown's radical title is expanded to absolute ownership (*Mabo (No 2)*, 60 (Brennan J)), that does not involve an acquisition. The grant of the FMG Mining Leases affects the YP's ability to exercise their native title rights and interests but this is until the FMG Mining Leases expire, when the YP's rights will revive in full because of the non-extinguishment principle (NTA, s 238; esp. s 238(8)). The relevant question is whether this grant of a right to mine under the FMG Mining Leases for 21 years effected an acquisition within par 51(xxxi) of the *Constitution*.

183. The answer to this question is no. For there to be an acquisition of property, within par 51(xxxi), there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of the property: *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 184-185 (Deane and Gaudron JJ). The temporary impairment of the YP's native title does not produce a corresponding benefit or advantage to the State or FMG. Because of the non-extinguishment principle, the FMG Mining Leases did not involve any acquisition within par 51(xxxi).

184. ***Wurridjal*** *v The Commonwealth* [2009] HCA 2; (2009) 237 CLR 309 and ***Yunupingu*** *on behalf of the Gumatj Clan or Estate Group v Commonwealth* [2023] FCAFC 75; (2023) 298 FCR 160 do not assist YNAC.

185. *Wurridjal* involved property rights that were fee simple estates granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which were impacted by the Commonwealth's intervention including by the grant of a lease interest in those fee simple estates. The case did not address whether the temporary impairment of native title rights and interests did or did not involve an acquisition within par 51(xxxi).

186. In *Yunupingu*, Mortimer CJ, Moshinsky and Banks-Smith JJ explained that if there is an extinguishment of native title, as an interest in land, there could be an acquisition of property because it "necessarily results in the enhancement of [radical] title which was subject to the interest extinguished": [373] (citing Brennan CJ in *Commonwealth v WMC Resources Ltd* [1998] HCA 8; (1998) 194 CLR 1 [20]).[24] Here, because there was no *permanent* extinguishment of the YP's native title rights and interests by the grant of the FMG tenements, there was no acquisition of any property.

187. Regardless of whether there is or is not an acquisition within par 51(xxxi) of the *Constitution*, the difference between such an acquisition and a compulsory acquisition referred to in the NTA (esp s 24MD(2), s 51(2)) needs to be emphasised. Even if there is an acquisition within par 51(xxxi), that does not involve a *compulsory acquisition* – the two concepts are different.

188. A compulsory acquisition occurs when, relevantly, the State, *by compulsion*, acquires property (under e.g., the *Land Administration Act 1997* (WA) (**LAA 1997**), Part 9), and pays compensation to the acquiree if that is provided for by the State's legislation (under e.g. LAA 1997, Part 10). Depending on how the appeal from *Yunupingu* is decided in the High Court, there may or may not be an acquisition within par 51(xxxi) depending on whether the High Court decides that an acquisition may arise even if nothing is transferred because the value of radical title to land is enhanced when native title is extinguished. Yet, such an acquisition, if found by the High Court, *will not involve any compulsory acquisition*.

189. It follows that s 51(2) of the NTA which deals with compulsory acquisition, not an acquisition within par 51(xxxi) of the *Constitution*, is not engaged in this case, even if the grant of the FMG Mining Leases involved an acquisition within par 51(xxxi). YNAC's contention as to any relevant applicability of s 51(2) (PoC [45]) is misplaced. The grant of the FMG tenements under the MA 1978 is not a compulsory acquisition for the purposes of ss 24Md(2) and 51(2) of the NTA. Whether or not there is an acquisition within par 51(xxxi) of the *Constitution*, there is no suggestion that the grant of the FMG Mining Leases involved some form of *compulsory* acquisition by the State under, relevantly, the LAA 1997, Part 9. Because YNAC pleads that s 51(3) of the NTA applies (PoC [41]), the YP must accept, and appear to accept (cf PoC [45]), that s 51(2) of the NTA does not apply.

[24] An appeal to the High Court from the Full Court of the Federal Court's decision in *Yunupingu* was heard on 7-9 Aug 2024, with the decision reserved.

190. Sec 24MD(2)(a) of the NTA refers to the compulsory acquisition of native title rights and interests under a law of the Commonwealth, a State or a Territory that permits both (i) the compulsory acquisition of native title rights and interests, and (ii) the compulsory acquisition of non-native title rights and interests in relation to land and waters. Subject to the satisfaction of the preconditions in ss 24MD(2)(b)-(ba), the compulsory acquisition extinguishes native title: s 24MD(2)(c). Sec 24MD(2)(e) of the NTA provides that if compensation on just terms is *not* provided under a law of the Commonwealth, a State or Territory to the native title holders for the acquisition, there is an entitlement to compensation for the acquisition in accordance with Div 5.

191. The fact that s 51(2) of the NTA deals with a compulsory acquisition not an acquisition within par 51(xxxi) of the *Constitution* is confirmed by the legislative history of s 51(2). Before the 1998 amendments to the NTA, s 51(2) referred to an act which was "the compulsory acquisition under a Compulsory Acquisition Act". "Compulsory Acquisition Act" was then defined in s 253 in wording that is now found in s 24MD(2)(a) (introduced by the *Native Title Amendment Act 1998* (Cth)). EM 1997 confirms that the definition of "Compulsory Acquisition Act", which was repealed by the *Native Title Amendment Act 1998* (Cth), was re-enacted in, relevantly, Subdiv M; and the consequential amendments made to other provisions (such as s 51(2)) to reflect the removal of the definition were not intended to alter the substance of the provisions: [15.10] (Table 15.2), [24.5]-[24.7].

192. Thus, the grant of the FMG tenements under the MA 1978 is not a compulsory acquisition under ss 24MD(2) and 51(2). Sec 51(2) has no application to this case.

193. In any event, YNAC has not identified how "just terms compensation" is not otherwise provided for by the NTA. "Just terms" compensation is compensation for the *loss* that is fair and just, reflecting the *loss* suffered. YNAC cannot rely on an asserted entitlement to "just terms" compensation, to further assert that compensation must be paid by reference to a royalty in respect of minerals over which the YP have never held any rights. If there is an entitlement to "just terms" compensation determined by reference to a royalty in respect to minerals, such an entitlement is explicitly disallowed by force of s 51(3) and s 123(1) of the MA 1978 (which must be applied). If the Court considers that there is any entitlement by reference to a royalty in respect to minerals, it can only be an entitlement that is required by force of s 53(1) of the NTA, in which case, the State must pay.

194. YNAC's argument (YP-CS [74]) that what will constitute "just terms" compensation appears from s 33(1) of the NTA is unsubstantiated and incorrect. Sec 33(1) deals with what may be the subject of a *negotiated* agreement under Part 2, Div 3, Subdiv P. Div 5 gives a right to compensation for the impact on native title rights and interests, which may not reflect what a mining company might have *negotiated* and *agreed* for mutual benefit ([113]-[118], [124] above). Sec 33(1) is not directed to describe compensation on just terms. Sec 33(1) was inserted expressly to permit *negotiations* that could be

wider than anything that might be determined as compensatory ([115] above). There is no entitlement for compensation on "just terms" for something to which a person never had any entitlement. A payment by reference to the value of minerals is not a payment on just terms to the YP who have no right to the minerals.

195. It follows that there is no right to compensation under s 53(1) of the NTA. Importantly, if there is a right to compensation under s 53(1), it is payable by the State ([593] below).

D.7. The construction and operation of s 49 NTA [Issue 6]

196. Sec 49(a) of the NTA precludes YNAC from seeking compensation for the effect of the grant of the FMG tenements where they overlap with other FMG tenements. The evident statutory purpose of s 49 is to ensure compensation is not payable as to each act "where a series of acts has an effect on native title" because "compensation is payable only once for that series of related acts": EM 1993 Part B, p28.

197. Because s 49(a) of the NTA provides that compensation is only payable once for "acts that are essentially the same", if the future act involves the grant of overlapping tenements, there cannot be compensation for the same consequence that flows from the grant of the separate future acts. To the extent that YMAC suggests otherwise, it misunderstands and overstates FMG's argument (YM-CS [40]-[44]). Compensation is determined holistically where the impact of one future act may be considered by reference to the impact caused by more than one future act. But, if it is the same impact, compensation should not be paid twice.

198. The effect of overlapping tenements was considered by Mr Jaski in his analysis as to compensation payable for the future acts: Jaski 1 [274]-[288]. Mr Jaski's calculations ensured that compensation is only paid "once for acts that are essentially the same". In contrast, YNAC's expert evidence as to the amount of compensation payable made no allowance for overlapping tenements.

E. THE CLAIMED LOSS, DIMINUTION, IMPAIRMENT OR OTHER EFFECT ON THE NATIVE TITLE RIGHTS AND INTERESTS [ISSUE 7]

199. ***Summary***: Compensation is payable for any loss, diminution, impairment or other effect on the YP's native title rights and interests. The YP's rights and interests are described in the Determination. The YP are entitled to compensation for both economic and non-economic or cultural loss for the effect of the grants of the FMG tenements on those native title rights and interests.

200. As to rights of exclusive possession in the Exclusive Areas granted to the YP because of the operation of ss 47A and 47B of the NTA, those areas were the subject of earlier extinguishment by past acts or earlier acts which involved grants that had extinguished the YP's right to control access. Secs 47A and 47B allowed the *determination* of native title to be made in the Exclusive Areas but ss 47A and 47B do not give a right to

compensation on the supposition that the State or FMG should now compensate for the earlier loss of the YP's right to control access. There is no entitlement to *compensation* as if the YP had and continue to have exclusive rights to any part of the compensation application area; exclusive control was lost long ago.

201. The economic value of the YP's native title rights and interests is to be assessed by reference to the freehold value of the land. It is not to be assessed by reference to a hypothetical royalty. There is no basis to measure the YP's loss by reference to the value of the minerals, which are owned by the State. The economic loss is at most $95,197 (excluding interest).

202. Compensation for cultural loss is to reflect the impact on the YP's spiritual connection to land. Other mining companies' preparedness to pay an amount connected to the production of the minerals from their mining tenements because they wished to benefit themselves by starting their project earlier cannot be used to value appropriately, fairly or justly the YP's economic loss or non-economic loss of spiritual connection to land. Sharing (by agreement) in FMG's *gains* can never be a measure of compensation for YP's *loss* of their native title rights and interests, which do not include mineral rights. In this case, applying Australian standards, compensation for cultural loss can be no more than $8 million, taking a very generous approach.

E.1. Is there an entitlement to compensation for the effect of the grants of the FMG tenements on a native title right of exclusive possession in the Exclusive Area? [Issue 5]

203. At common law, prior to the commencement of the RDA on 31 Oct 1975, native title rights and interests were able to be extinguished by a valid exercise of sovereign power inconsistent with the continued enjoyment of native title, and the pre-eminent criterion for extinguishment of native title rights is inconsistency: *Mabo (No 2)*, 64 (Brennan J), 110-111 (Deane and Gaudron JJ); *Native Title Act Case*, 439 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Fejo* [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Ward* [78]; [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); ***Akiba*** *v Commonwealth* [2013] HCA 33; (2013) 250 CLR 209 [35] (French CJ and Crennan J), [50]-[52], [61]-[63] (Hayne, Kiefel and Bell JJ); *Brown* [31]-[39] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); ***Ward*** *v Western Australia* ***(No 3)*** [2015] FCA 658; (2015) 233 FCR 1 [108]-[151] (Barker J).

204. The grant of pastoral leases and other rights before 31 Oct 1975 was inconsistent with "a native title right to control access to land (for any purpose or no purpose)": *Ward* [309] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Brown* [46] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); *Ward (No 3)* [179], [200] (Barker J). Once a pastoral lease or other right was granted over the Determination Area (which occurred over all parts of that area), the YP lost and could never regain exclusive control as to access.

205. "Extinguishment" does not mean that the native title rights and interests are extinguished for the purposes of the traditional laws and customs. "Extinguishment" means that the native title rights and interests cease to be recognised by the common law and cease to then be native title rights and interests within s 223 of the NTA: *Akiba* [10] (French CJ and Crennan J).

206. A native title determination is binding (YP-CS [80]) but only as to what it determines. It was not in dispute before Rares J in *Warrie (No 1)* and *Warrie (No 2*) that there had been tenure reserved or granted before the grant of the FMG tenements (including Crown reserves, pastoral leases, temporary reserves, oil licences and permits to explore) that had the effect of extinguishing the YP's rights of exclusive possession or their right to control access to any part of the area.[25]

207. Exhibit A shows that the entirety of the compensation application area was covered by historical pastoral leases and oil exploration permits. This previous tenure extinguished the YP's right to control access to the area. OPA 20H was granted on 13 Sept 1921 pursuant to s 6 of the *Mining Act Amendment Act 1920* (WA) and it covered the entire Determination Area: SoAF [173]. It has been held that OPA 20H had the effect of extinguishing, at common law, exclusive native title rights and interests: *Banjima v WA (No 2)* [2013] FCA 868; (2013) 305 ALR 1 [1945]-[1946], [1948]; ***Daniel** v WA* [2003] FCA 666 [850]-[852].

208. In *Warrie (No 1)* and *Warrie (No 2)*, Rares J concluded that the YP had exclusive possession rights over the Exclusive Areas by reason of ss 47A and 47B. The Court disregarded prior extinguishment in the Exclusive Areas because of ss 47A and 47B. Rares J did not decide that the earlier pastoral leases and oil exploration permits had not affected the YP's native title rights and interests. Rares J did not decide that the earlier pastoral leases and oil exploration permits did not extinguish native title at common law. Rather, Rares J decided that ss 47A and 47B permitted the Court to ignore the effects of those historical acts to recognise the YP's native title rights in the Determination of YP's claim. That is, ss 47A and 47B permitted the Court to ignore the extinguishment that had occurred at common law. Rares J was not dealing with any issue or application related, in any way, to compensation.

209. EM 1997 makes it plain that ss 47A and 47B were enacted to allow native title claimants *who are currently in occupation* of the land subject to a "land rights" type entitlement or who are in *occupation* of vacant Crown land to overcome the effect of extinguishment, so that their then *current* occupation could be recognised: [5.45]-[5.61].

210. The statutory purpose was narrow and is reflected in the language of ss 47A and 47B. Secs 47A(2) and 47B(2) provide that for all purposes under the NTA "*in relation to the application*", prior extinguishment must be disregarded, and ss 47A(1)(a) and

[25] C.02.001, C.02.002, C.02.003, C.02.004. See Marzsal 1, XPM4 for copies of extinguishing past tenure.

47B(1)(a) provide that ss 47A or 47B may apply if a "*claimant application*", defined in s 253 as a native title *determination* application, is made. The provisions do not refer to a *compensation* application. It would be incongruous for *compensation* to be paid by a present grantee of the land by reference to exclusive control rights claimed by the native title holders when such exclusive rights were long extinguished under the common law.

211. Consistently, it has been held that prior extinguishment for inconsistency with the prior historical grants is **not** to be disregarded on an application for *compensation* (even where ss 47A and 47B might apply to ignore prior extinguishing acts in determining native title).

212. In *Griffiths v Northern Territory of Australia*[26] (***Griffiths 47B***) (an earlier decision relating to the townsite the subject of *Griffiths HC*), Mansfield J held that s 47B did not apply to the claimants' *compensation* application. This followed from the text of s 47B itself, as s 47B(3) refers to the outcome of the determination and its effect on earlier interests, and is not expressed in terms which accommodate a compensation determination. It also followed from the reference to "claimant application" in s 47B(1) (defined in s 253 to mean "a native title determination application that a native title claim group has authorised to be made") and the statutory context of s 47B: namely, the distinction between a determination application and an application for compensation, as appears relevantly in the NTA itself (esp. ss 13, 61, 61A & 62). The distinction also appears from Div 5 (which provides for an application to the Court *for compensation*), Div 1 (which provides for an application to the Court *to determine native title*) and Divs 2 to 4 (which provide for how particular potentially extinguishing events may be addressed *in determining the existence of native title*): [67]-[72].

213. Mansfield J said that a claim group might recover twice for the one loss if, in a determination, extinguishment was ignored, and then ignored again in an application for compensation for the effect of acts on native title rights and interests unaffected by any prior extinguishing acts through the operation of s 47B: [73]. That is, a person who has not been responsible for the prior extinguishment (which is required to be ignored), should not be required to compensate for something that the person did not do.

214. Nothing in the NTA provides that compensation for a future act is determined by considering impacts from earlier acts on native title. The focus is on the impact or effect of the relevant *future act(s)* (here, the grant of the FMG tenements). FMG cannot be liable to compensate for acts for which it was not responsible. Contrary to YMAC's assertion (YMAC's Opening Subs (**YM-OS**) [79]), Mansfield J's analysis involved the proper statutory construction of s 47B and the manifest difference between a *determination* application and a *compensation* application. His analysis did not involve

[26] [2014] FCA 256 [63]-[81] (Mansfield J). See also *Northern Territory v Griffiths* [2017] FCAFC 106; (2017) 256 FCR 478 [229]-[231] (***Griffiths FC***) (North ACJ, Barker and Mortimer JJ).

any assumption that, in a *compensation* application, s 47B had to be applied afresh, whatever that means.

215. Mansfield J said that, for these reasons, s 47B permits claims for determination of native title by claimants in occupation of vacant Crown land to proceed despite past extinguishment of their native title rights and interests in specific circumstances, but limited to obtaining a determination of native title. The qualifying words in ss 47A and 47B were carefully selected; and ([74]-[77]) "[w]hilst [ss 47A and 47B] may create rights by the application of their terms once the statutory pre-conditions are met (as Selway J said in *Gumana v Northern Territory* (2005) 141 FCR 457 at [268]), the statutory pre-conditions are not met where the application is for compensation as distinct from an application for a determination of native title" (cf YM-OS [83]).

216. It follows that the YP's claim for *compensation* cannot be determined on the supposition that they have the exclusive right over the Exclusive Areas and a right to claim a loss of the ability to control access because of the grant of the FMG tenements. In *Griffiths FC* [231]-[233] decided that there was no right to interest once the claim group had a determination of native title under s 47B. The issue was not about whether there was a right to compensation as if the group had exclusivity (cf YM-OS [80]).

217. Also, ss 47A(4) and 47B(5) expressly provide that the creation of any prior interest that would otherwise have extinguished native title rights and interests which should be disregarded in determining native title does not include the creation of an interest that confirms ownership of natural resources by the Crown, and the Crown's ownership is not to be disregarded. Thus, the State's rights to minerals were never to be disregarded.

218. Furthermore, in *Griffiths HC*, the CJ&JJ recognised that the trial judge (Mansfield J) had correctly proceeded on the basis that the native title rights and interests were non-exclusive and that compensation "had to be assessed by reference to the loss or diminution of the native title rights and interests from the compensable acts and not from earlier, or subsequent, acts, events or effects" ([162]); and earlier acts since European settlement "would have led to the Claim Group being partly impaired from enjoying their traditional lands – before the compensable acts – and the current claim for compensation had to take into account the extent to which spiritual attachment to the land had already been impaired" ([163]). This is the footing on which it is correct to proceed because ss 47A and 47B do not, and were not intended to, permit a claim for compensation on the incorrect assumption that compensation should be paid for conduct preceding and unrelated to the relevant compensable future acts.

219. YNAC's argument that FMG cannot raise the above because of *res judicata*, issue estoppel or abuse of process (YP-OS [90]; YP-CS [81]) is without merit. In *Warrie (No 2)*, Rares J rejected an argument that there should be a note in the Determination as to the effect of ss 47A and 47B "reviving" native title. Rares J said this was because native title is not created by the Court but is simply recognised by the Court ([3]-[9]);

"extinguishment" by way of previous inconsistent acts only had the effect of withdrawing recognition at common law of the native title rights and interests. The issue raised by FMG here is as to the proper construction of the NTA as to YP's application for *compensation* for the grant of the FMG tenements. This was not the issue before Rares J.

220. The common law, the NTA and the TVA recognise that native title, including the right to control access, could be extinguished by acts and past acts occurring before 31 Oct 1975: FMG R [34A]. There is no issue estoppel, cause of action estoppel or abuse of process in FMG relying on prior extinguishment to resist the claim for compensation.

221. The issue decided in *Warrie (No 2)* is not the same as the issue to be decided here: *Blair v Curran* (1939) 62 CLR 464, 531-533 (Dixon J); ***O'Donel*** *v Road Transport and Tramways Commissioner* (1938) 59 CLR 744, 759 (Latham CJ); *Kuligowski v Metrobus* [2004] HCA 34; (2004) 220 CLR 363 [40], [45]-[47] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); ***Tomlinson*** *v Ramsey Food Processing* [2015] HCA 28; (2015) 256 CLR 507 [22]-[22], [25] (French CJ, Bell Gageler and Keane JJ); *UBS AG v Tyne as trustee of Argot Trust* [2018] HCA 45; (2018) 265 CLR 77 [1] (Kiefel CJ, Bell and Keane JJ); [62] (Gageler J).

222. The need for the issue previously decided to be identical was made clear in *O'Donel*. The High Court held that there was no issue estoppel as to a prior determination that the applicant had become blind through an injury that occurred on 19 Mar 1933 in the course of employment, on the basis that the prior determination related to the period between 14 Sep 1934 and 15 Feb 1935, and the issue as to the cause of the injury after 15 Feb 1935 had not been previously determined. The issues were not identical: 757-760 (Latham CJ); 762-763 (Evatt J); 768 (McTiernan J).

223. Given the issue raised is not the same as the one dealt with by Rares J, it cannot be unjustifiably oppressive, nor can it bring the administration of justice into disrepute: *Tomlinson* [25] (French CJ, Bell, Gageler and Keane JJ).

224. It is true that a native title determination is commonly described as a judgment *in rem* that is binding on all of the world (***Starkey*** *v South Australia* [2018] FCAFC 36; (2018) 261 FCR 183 [198]; ***Stuart*** *v South Australia* [2023] FCAFC 131; (2023) 299 FCR 507 [68(1)]) (cf YP-CS [80]; YM-OS [81]). But, this is a consequence of the NTA, not common law principles (*Starkey* [198]).

225. It is also true that there is an abuse of process amounting to an issue estoppel for a party to seek to re-litigate a fundamental matter expressly or necessarily encompassed within an earlier determination (*Stuart* [69]). FMG does not seek to re-litigate the YP's determined *in rem* native title rights over the Determination Area. The YP's entitlement to *compensation* has not been the subject of any earlier judgment. It stands to reason and expressly provided by the NTA (ss 47A and 47B) that despite the *in rem* determination of YP's native title rights, they are not entitled to *compensation* from

FMG for the consequences of acts that occurred before FMG was granted its mining tenements. FMG cannot be liable to compensate for past acts or earlier acts that deprived the YP of the exclusive right to control access.

E.2. The effect of the grants of the FMG tenements on the native title rights and interests [Issues 3A, 4 and 7]

226. Sec 51 of the NTA requires the Court to determine what effect the grant of the FMG tenements had on those native title rights and interests to determine the entitlement to compensation. The YP's rights include rights of access, camping, fishing, foraging, hunting, taking and using resources, taking water for drinking and domestic use, cooking including lighting a fire, protecting and caring for sites and objects of significance, and engaging in ritual and ceremony (Determination [3]). Those rights expressly do *not* confer rights as to minerals (Determination [5(c)]).

227. To obtain compensation for the effect on their native title rights and interests, the YP need evidence that these rights and interests have been impacted. The identification of native title rights and interests is an objective inquiry, and it is the legal nature and content of the rights and interests that must be ascertained, not the way in which they have been exercised: *Griffiths HC* [96]. But, if they were rarely exercised in the impacted area, that may suggest that the sense of connection to country would not be as strong as if the native title rights and interests were regularly exercised, and thus compensation for non-economic loss should be less (*Griffiths HC* [98]). Compensation is for actual loss suffered.

228. There was limited evidence of the YP visiting or accessing the area of FMG's mining operations before the grant of the FMG tenements. The evidence was vague, and imprecise, describing visits to either the broad region in which the mine sits or to an area far to the west of the FMG tenements. While the YP may now not be able to access the area of the mine as easily as before (for health and safety and operational reasons), the evidence does not show that the YP visited the area of the FMG tenements or mining operations frequently or regularly before the future acts ([407], [410] below).

229. The YP did not address the impact of the grant of the FMG tenements on each of their specific native title rights and interests. There is no evidence, e.g., that YP regularly camped, fished or hunted in the area of the FMG tenements, and/or that they can no longer do so. The grant of the FMG tenements, particularly as to the area where the mine has been developed, affects the ability of the YP to exercise their rights in that area. But, there is little evidence of any impact or impairment of their specific rights and interests. Any impairment or effect on native title rights and interests in areas outside of the mine is not significant compared to the area within the mine.

230. Each of the different types of tenements granted has had a different effect on the YP's native title rights and interests. For example, an exploration licence or a prospecting licence is unlikely to have significantly impacted the YP's native title rights and

interests. This is because the activities that FMG is permitted to undertake and, in fact, undertook in exploring or prospecting were limited, and did not prevent the YP from continuing to access the land and to exercise their rights and interests. This is consistent with the unchallenged evidence of Stuart Badock (Senior Manager Exploration). Three exploration drilling campaigns were undertaken in the area of FMG's exploration licences in the compensation application area (Badock 1 [45]). This sporadic exploration over small areas (following which, rehabilitation occurred, Badock 1 [37]) would not have had a significant impact on the YP's rights and interests.

231. In any case, the effect on the YP's native title rights and interests does not give rise to compensation by reference to a royalty referable to mining production or minerals. In *Griffiths HC*, the CJ&JJ emphasised that compensation is for the *effect of the act on native title rights and interests*: [42], [45]. The focus is not on the gains made by the mining company in selling the minerals, owned by the State, not by YP.

E.3. Have the grants of the FMG tenements diminished, impaired or otherwise affected the economic value of the native title rights and interests [Issue 7]

232. The YP's entitlement to compensation for economic loss is determined by valuing the YP's native title rights and interests that have been affected by the grant of the FMG tenements.

233. The grant of the FMG tenements may have diminished, impaired or otherwise affected the *economic* value of the native title rights and interests. But, YP made no attempt to give a value to this loss, instead making a claim for economic loss measured as a 1% royalty on iron ore sold.

234. There are two aspects to the YP's real loss caused by the impairment to their native title rights. First, there is a question as to the level or extent of impairment caused by the relevant future acts. Secondly, there is a question as to the duration of that impairment.

235. Jaski 1 examines the economic impairment of the YP's native title rights and interests from the grant of the FMG tenements. Mr Jaski opines that the level of impairment of the native title rights and interests depends on the nature of each tenement. Mr Jaski approaches the issue by assessing the relevant impairment by considering the nature of the tenement and the extent to which activities permitted and done as to the different types of tenements might affect economic value, starting with the premise that the maximum economic value is capped at the compulsory acquisition freehold value of the land.

236. The grant of an exploration licence, which permits sporadic exploratory activities has significantly less impact than the grant of a mining lease which permits the development of an open pit mine. The YP are (other than the occasional inconvenience from the sporadic exploration activities) still able to enjoy their rights and interests as to the area of the exploration licence. In contrast, an open pit mine on a mining lease

will prevent the YP from exercising most, if not all, of their rights and interests for the duration of the mining activity. Mr Jaski's view is that the economic value of the impairment is at most as follows (Jaski 1, p40, Table 7):

(a) L1SA (described by Mr Jaski as the "Railway Licence") – 90-100% impairment of the highest possible *economic* value;

(b) mining leases – 90-100% impairment of the highest possible *economic* value;

(c) mining tenements on which power plant infrastructure has been constructed – 90-100% impairment of the highest possible *economic* value;

(d) mining tenements on which water management infrastructure has been constructed – 20-40% impairment of the highest possible *economic* value;

(e) exploration licences – 0-25% impairment of the highest possible *economic* value; and

(f) prospecting licences – 0-10% impairment of the highest possible *economic* value.

237. The duration of the impairment is limited to the term of the relevant mining tenement. There is no permanent deprivation of the YP's rights and interests as to the areas of the FMG tenements. Because of the non-extinguishment principle in the NTA (s 238), the YP's rights and interests continue for the duration of each of the FMG tenements. On the surrender of the relevant tenement, the YP will still be able to exercise their native title rights and interests. What has been lost, at most, is the ability to exercise those rights and interests during the term of the relevant tenement.

238. Even in the areas where largescale land disturbance has occurred (i.e., where mining has occurred from open pit mines), the FMG tenements include conditions requiring FMG to rehabilitate the land. The conditions, e.g., attached to M47/1409 require, "all disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated… [b]ackfilling and rehabilitation being required no later than 6 months after excavation…" (condition 3), that a Mine Closure Plan be submitted (condition 63), and that "[m]anagement of mine closure to be undertaken in accordance with the latest, relevant, approved Mine Closure Plan" (condition 56): Marzsal 1, annexure XPM4.

239. Similarly, there are obligations, which were imposed on FMG initially by Ministerial Statement 862 (**MS 862**) and then Ministerial Statement 1062 (**MS 1062**) (issued under the *Environmental Protection Act 1986* (WA)): Oppenheim 1, annexures CILO-3; CILO-4. MS 1062 replaced MS 862. It requires FMG to manage the development of the mine to ensure that it is rehabilitated and decommissioned in an ecologically sustainable manner, and requires a mine closure plan that ensures mine pits are

backfilled following completion (cl 15). FMG has prepared this mine closure plan (D.01.002). FMG is required to review and update the plan every 3 years: MA 1978, s 84AA. FMG is required to comply with its obligations under the conditions of the FMG tenements or MS 1062. There is no claim that FMG has not or will not comply.

240. Central to YNAC's claim for economic loss is the YP's argument that the grant of the FMG tenements diminished, impaired or otherwise affected the economic value of the YP's right to negotiate provided for in the NTA, Part 2, Div 3, Subdiv P: PoC [35]; YP-CS [101], [158], [174]-[176]. It seems that, on YNAC's case, the entirety of the YP's native title rights and interests is to be assessed by reference to the right to negotiate.

241. But, the right to negotiate is not a native title right and interest for which compensation is payable. In *Qld v Central Qld Land Council Aboriginal Corp* [2002] FCAFC 371; (2002) 125 FCR 89 [151]-[153], Kiefel J (Beaumont & Lee JJ agreeing) held that the removal of the right to negotiate in Subdiv P (by replacing it with an alternative procedure by Ministerial determination under the NTA, s 43) could not be described as an act which "affects native title" within s 227. To do so would treat the *procedural rights* under the NTA (defined in s 253) as if they were native title rights which is not correct. See [112]-[127] above, including *Fejo* [18]-[25].

242. *Native title rights and interests* is defined in s 223 of the NTA. The rights and interests must be in relation to land or waters and must be possessed under the traditional laws acknowledged, and the traditional customs observed by the YP: NTA, s 223(1)(a). The right to negotiate is not a native title right and interest in relation to land nor is it a right or interest possessed under the traditional laws and customs of the YP. Compensation is not payable for any economic impairment or diminution of the right to negotiate.

243. Regardless, YAC, YNAC (and the YP) have had the benefit of the right to negotiate. YNAC appears to suggest that FMG did not act "fairly and reasonably" when it engaged in the right to negotiate process: YP-CS [101(b)]. But, the right to negotiate was *exercised* and the negotiation procedure was followed. The NNTT did not find, when it was alleged, that there was a lack of good faith in the negotiations in relation to the FMG tenements (see [120] above). The only obligation imposed by the NTA is to negotiate in good faith for a period of not less than 6 months: NTA, s 35; *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49; (2009) 175 FCR 141 [21]-[22], [28]-[29] (Spender, Sundberg and McKerracher JJ). There is no obligation for agreement, let alone an agreement for the payment of a royalty, to be reached.

244. YNAC has led no evidence of the value of the right to negotiate. The value of the right cannot be treated as what might have been agreed by reference to agreements made in other contexts for other reasons by other mining companies. One reason why mining companies make agreements is to accelerate mine production; FMG did not obtain such a benefit and proceeded as required by law under the NTA, the MA 1978 and the AHA.

E.4. Proper construction and effect of s 51A of the NTA and the freehold cap [Issue 8]

245. Sec 51A(1) of the NTA, provides that the total compensation payable under Div 5 for relevantly a future act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the future act were instead a compulsory acquisition of a freehold estate in the land or waters.

246. On its proper construction, s 51A(1) provides a cap or limit on the "total compensation" payable under s 51(1) or s 51(3) for an act that extinguishes native title. The amount payable cannot exceed what would be payable if the act were instead a compulsory acquisition of a "*freehold estate* in *the* land". The focus is not on the *land*, but on the *freehold estate* in that land (cf YP-CS [105]). The definition of "land" as including corporeal hereditaments in the *Acts Interpretation Act 1901* (Cth) (s 2B), even when corporeal hereditaments include minerals, does not advance the issue of whether the freehold estate in land in WA includes minerals; a freehold estate in WA does not include minerals, as further submitted below.

247. The cap is determined by assuming there would have been a compulsory acquisition of a *freehold estate* in *the* land the subject of the native title. Focus is required as to *the subject* land not hypothetical land. In WA, a freehold estate in any land alienated by the Crown from 1 Jan 1899 could not include a right to minerals in the land. The land the subject of YP's compensation claim is unallocated Crown land or Crown land the subject of pastoral leases where no land has been alienated. A freehold estate in the land, if ever allocated or alienated by the State, will not include a right to minerals in *the subject* land. Native title holders (and YP in particular) do not have and never had a freehold estate in the land. They cannot be treated as hypothetical freeholders who had an estate in the land as if alienated to them by the Crown before 1 Jan 1899.

248. The assumption required by s 51A(1) is not land that is hypothetically a freehold estate that includes an interest in the minerals in the land. Such minerals are owned and will always be owned by the State or Crown. They could never form part of any alienated freehold estate in the subject land. The cap refers to the value of a hypothetical compulsory acquisition of the only possible freehold estate in *the subject* land. On its proper construction, s 51A requires an assumption about the compulsory acquisition of the *subject native title land*, not an assumption about the nature of a hypothetical freehold estate in the land that (impossibly) includes mineral rights in the land. Such a freehold estate can never exist in WA post 1 Jan 1899.

249. The relevant freehold estate cannot be treated as a pre-1899 freehold in WA when any land alienated from the Crown would have included minerals (cf YM-CS [55]).

250. The cap in s 51A(1) is identified as a cap for compensation payable for a compensable "act". Because the cap is for the future "act" of the grant of the FMG tenements, the requisite focus is the compulsory acquisition value of a freehold estate in the land the

subject of the future "act", considered as at the date of the grant (being the date on which compensation is calculated as payable (*Griffiths HC* [43])).

251. There can be no freehold estate in the land the subject of the grants of the FMG tenements that could ever include any right to minerals. The idea that a freehold estate that includes minerals (which is not possible in WA) is the appropriate cap because it is the "most valuable form of freehold" misunderstands the focus of the cap, which was to cap compensation so that it would be no greater than what would be paid to a hypothetical freehold estate owner in WA, the relevant land area of the future act.

252. There is a conflation of ideas when it is suggested that, because native title existed pre-sovereignty, it follows that the reference to the freehold estate in the land must be to an estate that might have been alienated by the Crown pre-1899 (cf YM-CS [55]). If a freehold estate in the subject land is equated with pre-1899 freehold, the private land owner would have the right to the minerals (other than gold, silver and precious metals) (MA 1978, ss 37, 38 and 39). Equating native title with the owner of private land would result in conclusions that are inconsistent with the Determination ([5(c)(i)]) – the YP have no right to minerals.

253. The authorities that have dealt with the valuation of a freehold estate in the context of land tax payable on the unimproved, unencumbered value of land are consistent with the above analysis. The authorities draw a distinction in the land tax valuation context between the applicability of the operation of State legislation that has "general application" (which applies in determining value) and the inapplicability of any legislation that limits the ability to use land in a particular context. The authorities do not permit a conclusion that a State law that applies generally (so that the State always holds and retains the mineral rights in land) may be ignored in determining the compulsory acquisition value of a freehold estate that may be granted as to the land.

254. In ***Royal Sydney Golf Club*** *v FCT* (1955) 91 CLR 610, the High Court held that the effect of the *County of Cumberland Planning Scheme Ordinance* (that restricted the use to which the land may be made and which applied generally) could not be ignored in determining the fee simple value of the land for land tax purposes. Dixon CJ, McTiernan, Webb, Fullagar and Kitto JJ said, "if the law has a general application to all fee simples and is not concerned specifically with the particular land or the title to it, it surely must be taken into account" (621.8). They continued, "it is one thing to say that a hypothetical fee simple unencumbered and subject to no condition restricting enjoyment or use must be taken and another to say that laws of the State which affect the value of the land are not to be taken into consideration. The federal Act adopts the hypothesis of an estate in fee simple to which State law attaches a *fasciculus* of rights. What those rights are, how far they extend and what measure of enjoyment they give must depend on the law of the State. This would hardly be denied in the case of a general law governing all fee simples in land throughout the State" (624.1). The Court then explained that the *Scheme* in that case was a restriction that applied to a part of the

land which thus affected value, and this was "not something altering the hypothesis upon which the Federal statute requires the land to be assessed. It must be taken into account in ascertaining the unimproved value of the land" (624.9-625.1).

255. In ***Gollan*** *v Randwick Municipal Council* [1961] AC 82, the Privy Council held that particular restrictions contained in the original Crown grant to permit the resumption of the racecourse land and to permit the taking of stone, gravel and timber should not be taken into account in land tax valuation. Lord Radcliffe accepted the argument that, in *Royal Sydney Golf Club*, the restrictions on land use had become "part of the general statutory law of the State" and, as such, had to be accounted for in land tax valuation (98.6). But, Lord Radcliffe rejected the parallel in *Gollan* because "the source of the obligation and conditions binding the trustee holders was not the Act of the legislature but the original Crown grant" and so this was not relevant for land tax valuation (98.8).

256. In *Valuer-General v* ***Perilya*** *Broken Hill Ltd* [2013] NSWCA 265; **(2013)** 195 LGERA 416, s 284 of the *Mining Act 1992* (NSW) provided that a mining lease holder as to privately owned minerals was liable to pay royalties to the Minister but seven-eighths of the royalties were then payable to the private owner of the minerals. The NSW CA held that the value of the royalty stream to the private owner of the minerals should be accounted for in the value of the land for land tax valuation purposes. In NSW, unlike WA, minerals can be privately owned.

257. In WA, ever since the *Land Act 1898* (WA) (s 15), minerals cannot form part of the grant of a fee simple estate ([91]-[93] above). The NSW CA's reasoning supports the analysis. There is a distinction between an obligation or restriction deriving from the original Crown grant as opposed to a State Act (*Perilya (2013)* [21] (Leeming JA)). The *Mining Act 1992* (NSW) was a State law of general application to which regard had to be had in considering the hypothetical fee simple (*Perilya (2013)* [23] (Leeming JA)). But, unlike WA, in NSW, a distinction is drawn between minerals that are privately or publicly owned (*Perilya (2013)* [23], [74]-[75] (Leeming JA)).

258. In ***Perilya*** *Broken Hill Ltd v Valuer-General* **[2015]** NSWCA 400, the NSW CA explained: "The general principle that the determination of land value (formerly, unimproved value) is subject to laws of general application is not in doubt. In order to apply that principle, it is necessary to distinguish between the actual title vested in the land owner, and laws of general application. The hypothetical fee simple contemplated by s 6A disregards limitations in the former but has regard to limitations from the latter. I do not agree that planning statutes are the *only* example of generally applicable statutes to which regard must be had" ([88] (Leeming JA)). Thus, YP-CS [106] is incorrect to assert that the hypothetical freehold estate would exclude the reservation of the minerals. YNAC focuses on the statutory regime in New South Wales that was considered in *Perilya [2015]*, but ignores the statutory regime in WA. In WA, no grant of freehold title after 1 Jan 1899 can include any rights to the minerals because the minerals ***are owned by the State***.

259. Secs 51 and 51A are to be read together as providing that the compensation payable is to be measured by reference to, and capped at, the compulsory acquisition value of a freehold estate in the subject land (its ordinary exchange or negotiation or surrender value) together with compensation for cultural loss: *Griffiths HC* [54] (CJ&JJ); [240]-[250] (Gageler J); [271] (Edelman J).

260. Sec 51A provides a cap on compensation as to the economic value of the native title rights and interests because s 51A equates full exclusive native title rights and interests with freehold for the purposes of compensation: *Griffiths HC* [50]-[52].

261. In *Griffiths HC*, the CJ&JJ said that a fee simple estate has the greatest economic value, and lesser estates confer lesser rights, and that similar considerations apply to native title: [67]-[68]. They said that, consistently with the aim of the NTA that the economic value of full exclusive native title in land be equated to the economic value of a freehold title in that land, the economic value of *non-exclusive* native title in land is determined by making an evaluative judgment of the percentage reduction from *full exclusive native* title which represents the comparative limitations on the *non-exclusive* title relative to a *full exclusive* native title and then applying that percentage reduction to the economic value of a freehold estate in the land as a proxy for the economic value of a *full exclusive* native title in the land: [70], [91]. They rejected an argument that approaching valuation using freehold value as a proxy and making percentage reductions contravened the RDA: [71]-[76].

262. The argument (YP-CS [169]-[171]) that the High Court in *Griffiths HC* "left the door open" for the economic value of exclusive native title to be equated to something other than the economic value of an unencumbered freehold estate in the land misunderstands the Court's reasoning (*Griffiths HC* [70], [74], [76], [87], [90]-[91]). The reason why the CJ&JJ said that this was the position "in general" ([3(1)]) is that the analysis as to the equation between the unencumbered freehold estate land value and *exclusive native title* involved a conclusion that exclusive native title could be valued at no higher than the economic value of an unencumbered freehold estate, leaving open the possibility that with certain kinds of *exclusive* native title, the value may well be less than a full unencumbered estate held in fee simple in land under the Torrens system.

263. As is made clear by EM 1997, s 51A "equates native title with freehold title for the purpose of the compensation provisions but … it does not mean that compensation would be payable at the capped level … [and the] compensation needs to be assessed on a case-by-case basis having regard to the nature of the native title rights and interests affected": [24.8]. In *Griffiths HC*, the claim group's native title rights and interests were essentially usufructuary, ceremonial and non-exclusive. The CJ&JJ held that, as the native title was devoid of rights of admission, exclusion and commercial exploitation, the non-exclusive native title rights and interests, expressed as a percentage of freehold value, could be no more than 50 per cent: [106]. Compensation for an effect on

non-exclusive native title cannot be set at an amount higher than the compensation for the loss of exclusive native title.

264. A construction of s 51A that asserts that it is silent and does not apply at all where there is a partial extinguishment or no extinguishment of native title should not be accepted (cf YM-OS [38]). On the proper construction of s 51A, the maximum compensation payable if all native title were extinguished is the amount payable if there were a compulsory acquisition of a fee simple estate in the land. That the grant of the FMG tenements does *not* extinguish the YP's native title rights and interests cannot permit the conclusion that the YP are entitled to a greater amount than if the compensable act *did* result in a complete extinguishment of those rights and interests.

265. This is consistent with the focus of compensation being on the *effect* or impact on native title rights and interests. Where the rights and interests are suppressed, not extinguished, such that the native title holders will be able to exercise their rights again in the future (as here), there is a lesser *effect*. Thus, the amount of compensation should be assessed by applying reductions from the amount of the freehold estate value, used as proxy for full exclusive native title, to value the YP's rights and interests that have been temporarily impaired and not extinguished. Sec 51A remains the cap.

266. Regardless, if s 51A is inapplicable to a case where there is no extinguishment, the High Court's logic in *Griffiths HC* [67] that freehold ownership or an estate in fee simple is the most ample estate that can exist in land means that if there is a claim for compensation for the impairment of native title rights and interests (which necessarily must be less than the value of an estate in fee simple), the amount of compensation cannot exceed that value. That is, the limit to the amount of compensation is the land's exchange value plus special value *to the native title holder*, not to the *mining company*, as explained further below.

E.4.1. What is the value of a hypothetical freehold estate in the land the subject of the FMG tenements? [Issue 8]

267. As submitted, the "hypothetical freehold estate" in the land the subject of the FMG tenements is a fee simple estate in the land the subject of the YP's compensation claim. The value of that land for the purposes of s 51A is the value obtainable from a compulsory acquisition of a freehold estate in that land where that freehold estate cannot include minerals in that land.

268. The purpose of compensation, whether for the compulsory acquisition of land or otherwise, is to "place in the hands of the owner expropriated the full money equivalent of the thing which he has been deprived … the object is to find the money equivalent of the loss or, in other words, *the pecuniary value to the owner contained in the asset*": *Nelungaloo*, 571 (Dixon J) (italics added). As compensation is concerned with the *loss* suffered by the YP, it cannot be awarded on the basis of the gain or benefit received by the State or FMG. Compensation for *loss* within s 51(1) and s 51(3) is not

restitutionary. Secs 51(1) and 51(3) do not permit a claim for an account of profits. Sec 123(1)(c) of the MA 1978 disallows a claim based on mineral sale revenues.

269. The amount that would be payable if the future act were instead a compulsory acquisition of a freehold estate is determined by valuing the freehold estate at its ordinary exchange value and adding to that value any extra value to the native title holder, including compensation for special value and other non-economic loss. Native title holders are to be compensated for the cultural loss arising on and from the extinguishment or impact on their native title rights and interests: *Griffiths HC* [51]-[54] (CJ&JJ); [240], [246] (Gageler J); [304]-[317] (Edelman J). The special value is the special value that the *acquiree* has *in the land*; it is not any value to the hypothetical *acquirer*: *Griffiths HC* [53]-[54], [84], [97]-[98] (CJ&JJ); [304]-[312] (Edelman J).

270. When applying the *Spencer* test in acquisition cases, it must be assumed that the hypothetical purchaser would be purchasing the land for the most advantageous use for which it is adapted: *Spencer*, 441 (Isaacs J). This "most advantageous use" is commonly referred to as the "highest and best use" of the land: ***Boland** v Yates* [1999] HCA 64; (1999) 167 ALR 575 [271] (Callinan J).

271. In *Griffiths HC*, the CJ&JJ confirmed that, "with the *valuation* of native title rights and interests in land, the *value* of the *native title rights and interests* is not ordinarily to be confined to the benefit of their past uses but should be extended to their highest and best use" ([97]), citing ***Turner** v Minister of Public Instruction* (1956) 95 CLR 245, 264, 268 (italics added). The focus was on *valuing* the *native title rights and interests*, not something else. In *Turner*, Dixon CJ's focus was on determining the "*value to the owner*" including potential advantages to the *owner*, without assuming that the *potential* value already existed, without expenditure. The YP, as native title holder, or as the "*owner*" of the native title rights and interests, do not have and never had any *potential* right to exploit minerals in the subject land.

272. YNAC appears to claim that "special value" should reflect the benefit conferred on the acquirer: YP-OS [62]-[63], [71]. But, "special value" is the special value *to the YP*.

273. ***Pastoral Finance** Association v Minister* [1914] AC 1083, 1088 does not support any conclusion that special value may reflect the value to the State or FMG as the hypothetical acquirer. In *Pastoral Finance*, the Privy Council held that the site that was compulsorily acquired in that case "had special suitability for the use to which the [dispossessed owners] propose to put it" (1086). But even then, Lord Moulton made it clear that what the owners "were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them" (1088).

274. Any special value *to the State or FMG* is not relevant to YP's claim for compensation for their own special value arising from their connection to the land. The special value cannot be what royalty payments YNAC might have received from a hypothetical

royalty agreement (cf YP-CS [101]). The premise of the YP's argument is that special value attaches to the right to negotiate. But there is no obligation to reach an agreement under Subdiv P ([113]-[127] above). Whatever expectation the YP may have had, as part of the required negotiation under Subdiv P, is irrelevant to the assessment of compensation: cf YP-CS [102].

275. In ***Cedar*** *Rapids Manufacturing and Power Company v Lacoste* [1914] AC 569, two islands were compulsorily acquired by a statutory corporation to develop a hydroelectricity power house, and the compulsorily acquired land was not permitted to be valued by reference to the value it might have if used to produce hydroelectricity.

276. In *Cedar*, Lord Dunedin said (1) the value to be paid is the value to the owner as it existed at the date of the taking, not the value to the taker; and (2) the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that are to be determined (576). Lord Dunedin said that the evidence about the potential value of producing hydroelectricity "is based on the fallacy that the value to the owner is a proportional part of the value of the realized undertaking as it exists in the hands of the [statutory corporation]" (577); and explained that it was fallacious to assume that the owner of the islands had a right over the river bed to produce electricity (which they did not) (578). The fallacy in the YP's approach is similar. They have no rights to the minerals in the land and yet assert special value by reference to the value of the minerals to the State and FMG.

277. In *Boland*, the High Court held that lawyers had not been negligent by apparently failing to argue that the appellants were entitled to an extra amount of compensation on the compulsory acquisition of land because they had given a hypothetical purchaser a "head start" and had "special value" by preparatory work done to develop the land as a retail market place, when that was its highest and best use. In that context, the Court considered the relevant principles. The Court rejected an entitlement to any such extra value. Market value means "exchange value" based on the hypothesis that there would be an arm's length sale between a vendor and purchaser, but in some circumstances the land may have a special value to the selling *owner* that exceeds this market value, where the focus is on the value to the *vendor/owner*: [78]-[83] (Gleeson CJ).

278. In *Boland*, Callinan J said that special value "arises in circumstances in which there is a conjunction of some special factor relating to the land and a capacity on the part of the *owner* exclusively or perhaps almost exclusively to exploit it… The special quality must be a quality that has an economic significance to the *owner*": [292] (italics added). The concept of "special value" is confined because the hypothetical bargain contemplated by *Spencer's* case would usually accommodate the position of the "special" hypothetical vendor or owner: [274], [292], [350]-[359]. There is no principle that supports extra compensation for giving the purchaser a "head start": [298], [326]-[349].

279. YNAC also asserts, relying on ***Sellars*** *v Adelaide Petroleum NL; Poseidon Ltd v Adelaide Petroleum NL* (1992-1994) 179 CLR 332, 348, that "special value" apparently includes a "valuable opportunity" the YP could have exploited by entering into a mining agreement with a miner or government party: YP-OS [93]; YP-CS [85]. *Sellars* was not concerned with any concept of "special value". *Sellars* involved the valuation of an *actual* lost opportunity to obtain a commercial advantage or benefit: *Sellars*, 339 (Mason CJ, Dawson, Toohey and Gaudron JJ). YAC/YNAC had the opportunity to negotiate, and exercised that statutory right, but did not reach an agreement with FMG. Compensation for the impact on the YP's native title rights and interests cannot be assessed by valuing what might have been gained if an agreement had been made with someone else. The claim cannot be characterised as a loss of a commercial opportunity in any way connected with the analysis in *Sellars* (348, 355).

280. *Griffiths HC* does not support YNAC's claim for economic loss based on a hypothetical royalty that FMG (or another mining company) might have agreed to pay to the YP (cf YP-CS [101], [102], [152], [161]). The CJ&JJ ([66], [70] and [74]) said that conventional economic principles and tools of analysis are to be applied including by applying the *Spencer* test, adapted as necessary, to determine the objective economic value of the claimant's native title rights and interests. The application of those principles means that the YP's loss cannot be assessed by reference to rights and interests they never held, including any right or interest in the minerals in the land.

281. In *Griffiths HC*, the CJ&JJ said, as to economic loss, that the economic effect of the infringement is, in effect, the sum which a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to obtain the vendor's assent to the infringement or, put differently, what the claim group could *fairly and justly* have demanded for their assent to the infringement: [84]. This is no more than the application of the *Spencer* test adapted to accommodate the nature of native title rights and interests and the statutory context, where native title holders do not have legal title and would not agree to the infringement of their rights and interests: *Spencer*, 432 (Griffith CJ), 440-441 (Isaacs J).

282. But, the *Spencer* approach contemplates a *hypothetical* agreement between buyer and seller. In the same way, it is possible to consider the hypothetical bargain that would be made between the State and the YP for YP to agree and permit an infringement of their native title rights and interests. The hypothetical bargain is about the exchange value, and any special value, *of the YP's native title rights and interests*. What could "fairly and justly" be demanded by the YP in a *Spencer* hypothetical bargain can never be a demand for a price for the State's mineral rights. The hypothetical bargain is not about the mineral rights; that is not the right or asset to which the CJ&JJ referred.

283. The plurality in *Griffiths HC* recognised there was a degree of artificiality about applying the *Spencer* test when the claim group would not be prepared to assent to the extinguishment of their native title rights and interests, but held that the *Spencer* test is

applicable, as it is when there is a compulsory extinguishment of a general law easement or profit à prendre: [85].

284. Consistent with the application of the *Spencer* test, as modified, the plurality confirmed that the only way to achieve the precision required by s 51A is by the determination of economic value according to established principles for land valuation: *Griffiths HC* [86]. Further, there must be economic equivalence between the value of what is lost and the compensation which is paid and, therefore, the economic value of the property that was lost must be assessed according to the rights and interests that were held: *Griffiths HC* [87]. That cannot include compensation to the YP for the minerals in the subject land, which were always owned by the State.

285. The CJ&JJ addressed the Full Court's finding that Mansfield J had erred in the assessment of economic value by considering the economic value to the *Northern Territory* of achieving the extinguishment of the native title rights and interests ([104]). The CJ&JJ doubted that error was made, but confirmed that the benefit of extinguishment to the Northern Territory "was relevant only in so far as it would have informed the amount that the Northern Territory, as the sole, hypothetical willing purchaser, would have been prepared to pay *for the consensual extinguishment of the native title rights and interests*" (italics added). That reasoning further confirms the application of the conventional valuation principle that compensation is concerned with value to the owner, here the YP, and not value to the acquirer, here the State.

286. Applying the *Spencer* test, it is necessary to determine the objective economic value of the impairment to the YP's native title rights or interests. It is not appropriate to determine what the State would hypothetically pay for *its* mineral rights. Once there is proper focus on the rights and interests that are the subject of the hypothetical bargain contemplated by *Spencer*, it is misguided to consider a hypothetical bargain as to the State's mineral rights. The hypothetical bargain can only be about YP's native title rights and interests.

287. The hypothetical bargain is about the YP's notional assent to the infringement of their native title rights, never about the State's mineral rights: *Griffiths HC* [84]-[85]. The assertion that agreements to pay mineral royalties to other native title holders by other mining companies may be used as a comparator is incorrect. Such an agreement cannot be a comparator because the agreement does not deal with the compensatory value of the native title rights and interests. Contrary to YMAC's assertions (YM-OS [30], [89]), the idea that a determination of a "specified amount" does not fall foul of the s 123(1)(c) of the MA 1978 misunderstands its effect. Sec 123(1)(c) disallows compensation to be paid "*by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral*". Calculating compensation as a "specified amount" if the calculation involves considering the amount of mineral royalites payable for mining is not a calculation of the value of the native title rights, and falls foul of s 123(1)(c).

288. Contrary to YP-CS [155]-[156], compensation is to be assessed as at the date of the relevant compensable act: *Griffiths HC* [43]. As s 49 of the NTA makes clear, compensation is only payable once, such that compensation ought to be what amount should have been paid at the time of the act to compensate for the loss caused. It is unclear from YP-CS what is said to be the relevant date for the assessment of compensation if not the date of the grant of the relevant tenement.

289. What is required is an assessment of the impact of the grant of the FMG tenements, as at the date of grant, on the YP's native title rights and interests; and the grant has an "effect" on native title if, relevantly, it is inconsistent with the continued enjoyment or exercise of the YP's native title rights and interests: NTA, s 227; *Griffiths HC* [41]-[43], [46], [264].

290. In determining compensation, the Court may consider the doing of activity permitted by the future act; but the compensation remains to be assessed by determining the impact caused by the grant, not by (e.g.) considering profits made by the grantee. This gives proper and full effect to s 44H (Note 1); see also EM 1997 [6.23], [6.27]; [105] above. If, when the Court assesses compensation, the relevant permitted activity under the grant has already occurred, that may inform the computation of the compensation because "where the facts are available they are preferable to prophecies" (*Willis v Commonwealth* (1946) 73 CLR 105, 116 (Dixon J)). But, nothing in s 44H supports a conclusion that compensation is calculated based on FMG's or the State's profits or income (cf YP-CS [156]-[157]).

291. Mr Preston, an expert land valuer, gave expert evidence. Mr Preston opined on the freehold value of the land the subject of the FMG tenements on the assumption that instead of the grant of the FMG tenements, there had been a compulsory acquisition of a freehold estate in the land. YNAC led no evidence as to the value of the land the subject of the FMG tenements, whether on a compulsory acquisition basis of the freehold estate or otherwise. In Preston 1 (p10), Mr Preston opined on the freehold value of the land the subject of each FMG tenement (disregarding overlaps in area) as at the date of grant. Contrary to YP-CS [133], Mr Preston adopted a permissible conventional valuation methodology. *Griffiths HC* requires such an approach ([86]), even if the valuation involves a "novel scenario". The CJ&JJ said economic value should be determined "according to established precepts for the valuation of interests in land", avoiding an "holistic approach" based on "idiosyncratic notions of what is fair and just", which is contrary to the "precision envisaged by s 51A" ([86]).

292. Preston 1 sets out the assessment of the freehold value of the land the subject of the FMG tenements. While the land the subject of the FMG tenements is unallocated Crown land or Crown land the subject of pastoral leases, Mr Preston applied a methodology to determine the value of a freehold estate in the land. Mr Preston's methodology focussed on transactions involving the sale of pastoral stations in the Pilbara and consideration of the State's leasehold interest.

293. Mr Preston's expert view is that the subject land's highest and best use is pastoral use. The land is permissibly zoned for that purpose. It is not relevant to consider whether the land is zoned for other uses including for extractive industry (cf YP-CS [131]). Whether the land may be used for the purpose of extractive industry, the *freehold estate* in the *land*, because it does not include a right to minerals, cannot be valued as if it is being used in the extractive industry, to exploit minerals in the land. In WA, a person with a mining lease under the MA 1978 has that right, not native title holders, least of all YP (who have no such right under the Determination).

294. YNAC appeared to make two challenges to Mr Preston's evidence in cross-examination: first, to challenge Mr Preston's methodology in not considering the value of any minerals located within the boundaries of the FMG tenements; and secondly, to challenge Mr Preston's methodology for not considering special value or severance.

295. The essence of YNAC's position was that when valuing the freehold of the area of the FMG tenements, any "reservation" of minerals to the Crown should be disregarded: T1125. As explained ([90]-[94], [248]-[258]), there is no basis to assess the freehold value of the land as including the minerals. Also, even if a hypothetical freehold *did* include the value of the minerals (which is not the case), the YP have no rights to any minerals contained within the compensation application area: Determination [5(c)]. Thus, when assessing the value of the YP's loss arising from the grant of the FMG tenements, the loss cannot include the value of the minerals.

296. YNAC's suggestion that the value of land containing minerals could be determined by the "present value of the cashflow that the mine would generate" is also flawed: T1126.28. As Mr Preston made clear, such an approach values the ***mining business***, of which the value of the land "would only be a part": T1127.8.

297. As to Mr Preston not considering issues of severance and special value (T1127.24-46), YNAC led no evidence to demonstrate that compensation is required for severance or special (economic) value. There is no evidence as to the consequences of any severance of the land the subject of the FMG tenements. This is not a case, e.g., where the acquisition of a part of land renders other parts of the land economically sterile. As to special value, Mr Preston was asked to opine on the exchange value of the land, not its special value including the cultural value to YP of the land. In *Griffiths HC*, the High Court bifurcated exchange value and cultural loss value: [50]-[54], [70], [81], [84]-[87], [101], [154], [271]-[274], [304], [327]-[328], [332]. Mr Preston addressed exchange value only.

298. Further matters are raised in YP-CS [130]-[132] that were not put to Mr Preston directly (namely, the land does not overlap as much with pastoral lease land ([130]); Mr Preston did not consider other discretionary uses ([131]); and Mr Preston did not consider any natural or heritage values of the hypothetical freehold estate ([132])). It is not

appropriate that they be raised now when Mr Preston was not given an opportunity to comment.

299. Regardless, as to the alleged economic value of the land because of its natural or cultural value, there is a further difficulty. No evidence has been adduced about any such economic value. While it is not disputed that, e.g., Bangkangarra is a culturally important place, the relevant question is what *economic* value would the market (adopting the *Spencer* test) give for its natural or heritage value. The Court cannot affix an economic value, on which the YP bear the onus, by being asked to doubt, without evidence, Mr Preston's conventional valuation methodology.

300. The YP's calculations and process of reasoning to assert that they are entitled to economic loss of about [redacted] are flawed (YP-CS [4], [23], [134]-[186]). The essence of the YP's reasoning is that s 51A should not be a starting point for valuation but is a cap ([23]); regardless, the compulsory acquisition value of the freehold estate in the land should be determined by assuming the land includes minerals ([104]-[128]). The YP assert that a hypothetical freehold estate in the land on the "first scenario" equates to about $4.5 billion based on past and projected royalties and rentals paid or payable to the State on the assertion that the value equates to 9/10ths of the totals ([135]-[144]). On the "second scenario", the asserted special value to the YP (apparently flowing from their right to negotiate) has been calculated at about [redacted] because the YP assert that they would have negotiated royalties at 1% of free on board (**FOB**) mining revenues of that amount (YP-CS [145]-[186], esp [164], [177]-[178]).

301. The calculations and reasoning in determining a value of about $4.5 billion in the "first scenario" are flawed. The land does not include a right to minerals and cannot be valued on that basis. The highest and best use of a freehold estate in the subject land (being unallocated Crown land (that, if alienated by the Crown, will not include minerals), or Crown land the subject of pastoral leases) is pastoral use. This is because the land is in an isolated location in the North-West of Australia and land in that area is used for pastoral purposes. Mining leases are granted over the land but a freehold estate in the subject land does not give a right to mining.

302. Further, the calculations as to what might be the value of a freehold estate in the land appear to be based on some flawed understanding of the discounted cash flow methodology, which was not the subject of any evidence from YP. The calculations are incorrect and if the YP wished to postulate a freehold estate land value using a discounted cash flow method, that should have been the subject of expert evidence, not based on "back of the envelope" calculations (that involve a misunderstanding of the method).

303. In ***Albany*** *v Commonwealth of Australia* (1976) 12 ALR 201, 206, Jacobs J explained that, by a discounted cash flow method, an estimate is made of the period of years

during which a development will occur and sales would be effected where for each year, the cash inflow by sales and the cash outflow by development costs is estimated and a net figure of cash inflow or outflow for the year is determined for the first year and, thereafter, the net flow for each year is discounted at an appropriate rate; and the discounted net flow in each year is then computed for the period of the development, resulting in an estimate of the value of the land that might be paid by a purchaser. Jacobs J said (206) that "the rate per cent of discount for the future cash flow reflects the amount of profit and the degree of risk involved in the venture". No judgment as to risk nor as to an appropriate discount rate has been made by the YP's calculations.

304. The YP have calculated a percentage of the net flow each year by reference to royalties and rent paid or payable to the State but have erroneously failed to apply any discount rate as to the future royalties and rent and have erroneously not modelled projected costs and revenue (cash outflow and cash inflow) to make good an assumption that the future royalties and rent would be able to be paid (YP-CS [135]-[144]). The assumption is that future royalties and rent are part of the net cashflow that may be used to value the land, without any analysis that demonstrates the veracity of the assumption. A further flaw in the calculations is that they are made on the assumption that 9/10ths of the rent and royalties will be paid to the land owner (by force of MA 1978, s 38). But, the freehold estate in the subject land will never be private land within s 38 of the MA 1978. The calculated amount of about $4.5 billion is not, by reason of these flaws in reasoning, the value of the freehold estate in the subject land.

305. The reasoning (YP-CS [147]-[148]) used for the "second scenario" to determine "a component for the special value of the land to the [YP], being the negotiation or exchange value of the NTRI" (YP-CS [147(b)]) is also flawed. YP-CS [147] is confusing. In the chapeau to YP-CS [147], there is a reference to "compensation for a compulsory acquisition of hypothetical freehold estate" but the calculation of the claimed compensation of about [redacted] is made by determining the so-called special value for negotiation or exchange. This so-called special value for negotiation or exchange is confused with the so-called compulsory acquisition of a hypothetical freehold estate value.

306. Regardless, the land (more precisely, the YP's native title rights and interests in connection with the land) does not have a "special value" that equates to the YP's "negotiation or exchange value". A right to negotiate and agree compensation for the impact on native title rights and interests is not a right that attaches to their native title rights and interests; it is not native title (NTA, s 223) but a procedural right given by the NTA to native title holders ([35], [36], [112]-[118], [194], [240], [242] above).

307. Also, there is no evidence that gives any value for the "scientific, natural and cultural values" of the subject land (cf YP-CS [147(c)]). Prof Veth and Dr Bird do not provide any valuation and they disclaimed any ability to determine a value: Veth & Bird 1 [49]-[50].

308. YNAC misunderstands Gageler J's analysis in *Griffiths HC* [242]-[250]: YP-CS [160]-[161]. Gageler J said that the economic value of a native title right has two components, namely, (1) the value, if any, of the commercial exploitation of the native title right in perpetuity; and (2) the value of the native title holders' capacity voluntarily to surrender *that* right to facilitate the grant to someone else of a form of ordinary title which would allow the land to be put to its highest and best commercial use ([243]). Gageler J described the first component as the "usage" value, and the second component as the "exit" or "negotiation" value ([244]).

309. Gageler J said that the "negotiation" value is found by applying *Spencer* to hypothesise what a willing but not anxious native title holder would negotiate for the surrender of their *native title rights* (knowing they will be separately compensated for cultural loss) ([245]-[246]). The "negotiation" value to which Gageler J referred is the hypothetical bargain value of the subject *native title rights*. It is not the negotiation or exchange value determined by reference to a negotiated agreement made between a native title holder and a mining company in exchange for *mutual* rights and benefits *in advance* of a mining project, to facilitate the progress of the project, where the parties can agree to share *profit* and *risk* relating to the *minerals* that may be extracted, where the negotiation may relate to the minerals not *native title rights*. A negotiation about sharing profit and risk as to the *minerals* is not a negotiation that involves a hypothetical agreement about what would be paid for the surrender of *native title rights*. The highest and best use of the freehold title to which Gageler J referred does not refer to the use of the land for mining purposes because the freehold estate in the subject land does not include a right to minerals.

310. The YP misunderstand Mr Hall and Mr Lonergan's analysis (YP-CS [181]-[185]). Mr Hall and Mr Lonergan rely on the concept of "usage" value, which they equate with "negotiation" value because determining a value by adopting a discounted cash flow method involves determining the value of usage and then discounting that value appropriately; and that value will ordinarily equate to the amount that would be paid in a hypothetical *Spencer* negotiated sale (Lonergan/Hall 1 [39], [98]-[116]). It is incorrect to suggest that the YP retain a separate right and a separate negotiation value equal to the value they might have agreed to permit a mining project to proceed where the mining company and the native title holder may agree to share profit and take risk together; that negotiation, if it did not result in an agreement, does not have an extrinsic value that remains and, in any event, it is not a native title right or interest that may be the subject of compensation for the impairment or effect on native title rights and interests caused by the grant of future acts.

311. There is no basis in principle that supports a conclusion that the YP are entitled to compensation for economic loss of about [redacted]. The premise that compensation should be determined by a would-be negotiation about some other subject matter, not about the surrender of native title rights, is incorrect so that the conclusion is unsound.

312. Further, the bases on which the YP assert (YP-CS [178]) that the entitlement is to a royalty of 1%, as opposed to 0.5%, are unsound. The YP do not have a right to *compensation* on the assertion that they have exclusive native title in any area ([203]-[219] above).

313. The assertion that an uplift to 1% is justified (because, if an agreement had been made, the YP could have been involved in protecting their cultural heritage) was not raised by Mr Meaton, was not the subject of any evidence, and does not provide a sound basis for the uplift.

314. Compensation is properly for the *impact* on native title, not to double the amount otherwise (apparently) payable on the supposition that, had an agreement been reached, there would have been less of an impact. Also, if there is an uplift, there would be over compensation where compensation is also claimed separately for cultural loss. Where the YP sought an agreement for a royalty rate of 1.5% (YP-CS [377]), and where they assert the going rate was 0.5% (which is denied), the suggestion that compensation should now be determined at an uplifted rate of 1% (to apparently compensate for the YP's now lost ability to protect cultural heritage) is more than hollow. The YP did not negotiate to protect that cultural heritage but acted for obvious commercial reasons.

E.5. Compensation for economic loss [Issue 7]

315. The principles that the High Court described and applied in *Griffiths HC* in determining compensation are authoritative and apply here. YNAC's submission that *Griffiths HC* is somehow inapplicable to the present case because the High Court was not addressing future acts involving the grant of mining tenements ought to be rejected.

316. YNAC seeks compensation to be assessed by reference to a royalty that FMG (or another mining company) might have agreed with YNAC for the grant of the FMG tenements: YP-CS [101]. A royalty calculated by reference to a percentage of mining revenue (on a FOB basis) cannot be the measure of compensation under the NTA, s 51(1), s 51(3) or the MA 1978, s 123.

317. It is inappropriate to use as a relevant comparison what other mining companies or the State have been prepared to pay or what the State has received by way of rent or royalties (cf YP-CS [176]-[177]; YM-CS [53]). Other mining companies with respect to other native title rights and interests would have made commercial agreements for the parties' mutual benefit, including the valuable right to advance their mining project earlier, without having to seek approval from the NNTT.

318. There is no applicable market rate for the surrender of native title rights. In *Santos*, the NNTT rejected arguments that there was a "market" and an applicable royalty rate (derived from alleged comparable agreements) that Santos was apparently required to propose to the Gomeroi People, when negotiating in good faith under s 31 of the NTA for the grant of petroleum leases: [266], [277]-[352], [373]-[450], [465]-[467]. The

appeal from *Santos* in *Gomeroi* did not challenge this conclusion. In *Gomeroi*, the Full Federal Court remitted the case to the NNTT but precluded the parties from making any claim that any other party did not negotiate in good faith (*Gomeroi People v Santos NSW (No 2)* [2024] FCAFC 49 (Order 3)).

319. It was common ground between the experts that agreements between mining companies and native title parties are made for many reasons and the parties did not negotiate by attempting to value the impact on particular native title rights and interests.[27] These reasons included [redacted] nd the mining company's desire to develop good relations between it and the native title party (e.g. Hall/Meaton JR [M10]).

320. Compensation should not be ordered by reference to any royalty because none of these kinds of negotiated benefits will be received by FMG. Agreements made for the *mutual benefit* of the mining companies and different native title holders are not relevant in determining compensation for the impact on YP's native title rights and interests.

321. [redacted] Mr Meaton was still of the opinion that such agreements are "agreements that ensure a harmonious and sustainable working relationship between the parties" (Hall/Meaton JR [M10]). They are not concerned with compensation for impairment of native title.

322. A further difficulty with relying on royalty agreements is the statutory distinction between the right to negotiate and the right to compensation. Mr Meaton confirmed that all the projects he considered as part of his report were agreements entered into under the right to negotiate process provided for in the NTA (T1288.11-16). YNAC erroneously conflates agreements reached pursuant to the right to negotiate with compensation payable under the NTA, s 51(1) ([113]-[127] above).

323. [redacted] The fact that the agreements do not turn on the existence of determined native title rights and interests confirms that these agreements are not made to compensate for loss of or impairment to native title rights and interests.

[27] Hall/Meaton JR [H20], [M18]; Hall/Miles JR [H9], [M10]; T1205.20-24, 1375.1-12.

324. Without considering the particular native title rights and interests of other native title holders the subject of their agreement with other mining companies, there is no basis to assert that YP's native title rights and interests should be treated as if they are the same as the native title rights and interests of other native title holders. There is no basis to assume that there is a standard amount payable by mining companies to native title holders, regardless of the particular native title rights and interests involved.

325. Further, it was accepted by the experts that agreements between mining companies and native title parties address both economic and non-economic loss.[28] No attempt was made by Mr Meaton or Mr Miles to separate out what proportion of any royalty payment is for the economic and non-economic loss suffered by the YP. In contrast, Mr Lonergan, Mr Hall and Mr Jaski sought to value the YP's *economic loss*.

326. The YP also claim $34.85 million for *economic loss* for loss of damage to country and Dreaming sites. The YP assert that compensation ought to be assessed by reference to the maximum statutory penalties for offences committed under the AHA and the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (YP-CS [148(b)], [193]-[195]). The claim is made as to 288 sites, 6 Dreaming tracks and one *jinbi* (spring). There is no justification for the claimed compensation of $34.85 million. Calculating the claim by reference to the maximum penal amount that would have been payable for a contravention of legislation, which was not contravened, is an inappropriate basis to value the compensation.

327. Statutory penalties are imposed to penalise a person for a contravention of the law. Criminal and civil penalties are imposed for the purpose of punishment, deterrence, retribution and rehabilitation. Compensation under the NTA is provided for acts that are lawful (William Isdale, *Compensation for Native Title*, [4.2.4]). Compensation should not be calculated by reference to the maximum statutory penalty on the unproved assumption that there was any contravention of the AHA or other legislation. FMG has not been prosecuted for any offence under the AHA; and there is no suggestion that FMG should be prosecuted. The Minister gave FMG consent under s 18(3) of the AHA for its mining activities. There is no proper basis to measure compensation on an assumption that s 17 of the AHA was contravened and applying the maximum penalty under s 57.

328. Once it is accepted that any claim for economic loss as to the sites, Dreaming tracks and the spring cannot be determined by making calculations by reference to penalties imposed under legislation for different purposes, there is no evidence as to the value of the claimed loss. Assuming such a value is compensable and calculable, no attempt has been made to determine a value of the "actual and objective loss experienced by all"

[28] Hall/Meaton JR [H21], [M19]; Jaski/Meaton JR [J13], [M12]; Hall/Miles JR [H9], [M10]; Jaski/Miles JR [J21]; T1205.11 (Mr Meaton); T1375.23 (Mr Hall).

(YP-CS [190]; the Hon J Jagot, "Compensation for Economic Loss" (2022) 96 ALJ 832, 843).

329. Regardless, YNAC is not entitled to compensation for the "285" sites that it asserts have been "salvaged by the FMG Respondents" (YP-CS [193(b)]). As submitted below ([534]), only 249 heritage places have been salvaged and it is unclear how the "285" figure has been derived.

330. In 2007, JAC (by, among others, Michael Woodley) and FMG agreed $25,000 as an appropriate amount for any heritage sites that were "significantly disturbed in the process of clearing land for drill lines" (SoAF [169]; M.Woodley, MW-17 (A.05.022), PDF224). Comparing this $25,000 (that was agreed as an amount that would be paid for the impact on sites found to be significant and important under the AHA) with the claims now made by the YP of $100,000 for each of 288 places without considering their significance or importance under the AHA would suggest that the claim is inflated. There are only 129 sites that were evaluated by the ACMC as of significance and importance ([529]-[534] below).

331. Also, there is no basis to claim extra compensation for the "destruction of Dreaming tracks" by reference to Northern Territory legislation that is inapplicable and is penal. Exactly how the YP have determined that the penal amount is $1 million, as opposed to $350,000 (YP-CS [192], referring to *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 34) is not apparent. It is not clear why there should be extra compensation for the economic loss caused by the "destruction of Dreaming tracks" when there is a claim for cultural loss which will include the consequences of any destruction: *Griffiths TJ* [234], [323].

E.5.1. Economic and valuation evidence

332. YNAC and FMG both led evidence as to the quantification of economic loss for the purposes of assessing the compensation payable for the grant of the FMG tenements. Mr Meaton and Mr Miles, called by YNAC, both assessed compensation by reference to a hypothetical royalty that might have been agreed between YNAC and FMG (or another mining company). In contrast, Mr Lonergan, Mr Hall and Mr Jaski sought to value compensation by reference to the loss arising from the impairment of the YP's determined native title rights and interests.

Mr Meaton's evidence

333. Mr Meaton opined on the hypothetical royalty that might be agreed between a native title party and a mining company. [redacted]

334. Mr Meaton's company, Economic Consulting Services (**ECS**), was subpoenaed to produce "All documents (or copies of documents) from which Mr Meaton derived the financial details of 44 iron ore projects, as mentioned in paragraph 29 of his report dated 21 March 2023": Orders of 17 Oct 2023 [1]. 60 documents were produced.

335. Mr Meaton's evidence in cross-examination exposed several difficulties, casting doubt on the validity of his opinion. [redacted]

336. [redacted]

337. [redacted]

338. [redacted]

339. There are further matters which undermine Mr Meaton's opinion.

340. Compensation is for impact on native title rights and interests: Mr Meaton accepted that compensation for the grant of the FMG tenements should focus on the value of that impact on the native title rights and interests: T1214.18-21. However, Mr Meaton was of the view that "compensation is not assessed on a but-for scenario, and it's not about

[redacted]

damages caused, it's about mutual benefits for each party": T1205.29-32. That is contrary to s 51(1) of the NTA. Compensation is to be awarded for the impact or effect of the future acts on the YP's native title rights and interests (*Griffiths HC* [41], [46], [55], [84]), not to determine an amount that would be for the mutual benefit of each party.

341. Mr Meaton did not consider the value and nature of the impact of the grant of the FMG tenements on the native title rights and interests held by the YP: T1208.41-43, 1209.4-8. This is not the proper approach. The assessment of economic loss must begin with a valuation of the native title rights and interests which have been impacted: *Griffiths HC* [96]-[97].

342. No consideration of other payments: Mr Meaton's report considered only royalty payments, and not the other payments that may be made under agreements between native title parties and mining companies: Meaton 1 [27]-[32]. [redacted] These payments focus on (i) the grant of the mining tenure, and (ii) the consequences and effects of any mining on the land and native title rights and interests. No explanation is given by YNAC for why a royalty is appropriate rather than these other payments, which appear more connected to the impact on native title rights. A royalty payment referable to a mining company's revenue or gain does not focus on the *effect* on the native title holders' rights and interests. Compensation is payable for that loss.

343. Application of the wrong date of assessment: Compensation is assessed at the time of the grant of the FMG tenements: *Griffiths HC* [43]. Mr Meaton's revised calculations are on the basis that the compensable date is each year in which the mining and sale of iron ore took place. This is a departure from his evidence that the compensable date is the grant of the tenement (T1358.40-42).

344. Erroneous doubling of royalty rate: Mr Meaton doubled the applicable royalty to 1% because he said the YP have determined exclusive rights. As explained ([203]-[217]), compensation is to be assessed on the basis the YP have non-exclusive rights and interests. [redacted]

[redacted]

[redacted]

345. Mr Meaton accepted that there was no connection between mining revenue and exclusive possession: T1212.31-35. If there is no connection between the revenue derived from the FMG tenements and the exclusive rights held by the YP, again, there is no basis for an increased royalty rate for areas of exclusive possession.

346. Mr Meaton's assumptions: Mr Meaton's analysis was based on assumptions that: (i) the right to negotiate process was not followed (e.g. T1159.23); (ii) the YP have a right to a share of the economic value of the minerals (e.g. T1188.5); and (iii) FMG required the YP's consent to access the land the subject of the FMG tenements (e.g. Jaski/Meaton JR 1 [M24], [M38]).

347. *Right to negotiate process followed*: Having failed to reach agreement with the YP, Mr Meaton assumed that FMG avoided the NNTT by reaching agreement with a "subset" of YP: e.g. T1159.23, 1165.23. Mr Meaton accepted that if this assumption was wrong, it would undermine his opinion: T1292.10-12. There was no avoidance of the right to negotiate procedure (when it applied), and each grant is a valid future act.

348. *The YP have no right to the share of the minerals*: Mr Meaton asserted that native title parties claim a right to "a very small share in the revenue generated by the future act": Hall/Meaton JR [M30]. [redacted] There are several difficulties with this.

349. The Determination does not include a right to a share in revenue generated by mining in the area over which the FMG tenements have been granted. A right to negotiate is not a right to a share in revenue. A native title party may try and insist on a royalty for their consent. But, if negotiations fail, the grantee party may request the NNTT to determine whether the future act may occur. Within that framework, there is no "right to a share of revenue". The NNTT may impose conditions on the doing of a future act (s 38(1)(c)), but this may *not* include a condition requiring a royalty payment to the native title parties (NTA, s 38(2)). There is no space within this regime for a "right to a share of revenue". Such a "right" is expressly excluded by the NTA, s 38(2).

[redacted]

350. *Access required approval by the YP*: Mr Meaton's assumption that approval was required from the YP before FMG could access the land the subject of the FMG tenements is incorrect ([346] above). The YP's approval to give access was not required under the NTA for the grant of the FMG tenements; and a person is entitled to enter land if they have been granted a prospecting licence, exploration licence or mining lease under the MA 1978 (ss 28(b), 48(a), 66(a), 85(2)).

351. Mr Meaton's view (Meaton 1 [29]-[30]) that it is appropriate to use a royalty paid by mining companies mining iron ore, as opposed to other minerals, exposes the reason why his approach is disconnected from the true task of determining the value of the impact on native title rights and interests.

352. Exactly why native title rights and interests should be valued by reference to the value of the relevant minerals in the land is not explained. The curious conclusion that would follow, namely, that native title rights and interests would have different values depending on the minerals involved is not confronted nor explained. It is incorrect to value the impact on native title rights by reference to royalties paid for minerals because it would result in the value of the impact being different by reason only of the accident that different minerals are in the relevant area.

Mr Miles's evidence

353. Mr Miles opined that a royalty of 0.55% FOB was the appropriate measure of compensation. That opinion does not withstand scrutiny.

354. Mr Miles's opinion was based on a belief that the YP have rights to the minerals: Hall/Miles JR [M2]; Jaski/Miles JR [M4]. During Mr Miles's concurrent evidence, Senior Counsel for YNAC sought to clarify from Mr Miles that he understood and now accepted that the YP have no such rights, but that this did not affect his opinion: T1370.1-15. However, when asked to clarify the basis of his opinion given his change of position, Mr Miles focussed on the exploitation of the minerals within the compensation application area: T1374.12-18. Mr Miles's opinion came to be based on a view that the YP could have mined the minerals. This appears to be based on a belief that the YP have a right to the minerals. Mr Miles's approach was confused and confusing.

355. A similar erroneous assumption Mr Miles made was that the YP did not have a proper opportunity to negotiate: T1413.36-40. FMG negotiated in good faith. Despite YAC's applications, the NNTT did not find otherwise, on each occasion application was made (see [120] above). There is no basis for any assumption of a loss of opportunity to negotiate.

356. Mr Miles opined that the owners of freehold land might receive a premium of 1.5 times the freehold value of the land from mining companies: Miles 1, p16.[35] This is because the freehold landowner has no rights to the minerals: Miles 1, p16. But Mr Miles asserted that the YP are entitled to greater compensation on the erroneous assumption that the YP could exploit the minerals: T1432.26-30. Mr Miles opined that the highest and best use of the land is as the traditional country of the YP: Miles 1, p14. The YP's use of their "traditional country" is not to mine iron ore. Like a freehold landowner, the YP have no rights to the minerals and no right to compensation assessed by reference to those minerals. Mr Miles did not explain, with any cogency, why the YP are entitled to greater compensation than a freehold landowner.

357. Mr Miles attempted to explain why the traditional country of the YP is more valuable than pastoral land: "the ability of the [YP] to be able to be aware that mining could take place and could add great value to the land, so it would be quite different to what could be derived as a pastoral enterprise": T1391.4. That same (erroneous) logic could apply to pastoral landholders. A pastoralist would "be able to be aware that mining could take place and could add great value to the land". Neither a native title holder nor a pastoralist, who may be aware that mining could take place, has any right to, or opportunity to exploit, minerals. Mr Miles also did not identify the distinction between the rights of a person owning or occupying pastoral land compared to the YP to justify the greater compensation entitlement.

358. A native title holder, just like a pastoralist, does not have any right to leverage or extract a payment from a mining company by attempting, without a basis, to hold up mining by the mining company pursuant to rights given to the mining company by the MA 1978. Sec 123(1)(a) of the MA 1978 is directed to stop any such attempt.

359. Mr Miles said that a possible rationale for his royalty-based assessment of compensation was that the YP have rights similar to those held by people who had freehold title granted prior to 1 Jan 1899: T1379.29-41. In Miles 1, he disclaimed any expertise to make a comparison between the rights of the YP and those who hold freehold title granted before 1 Jan 1899: Miles 1, p17. No explanation was offered for why Mr Miles later suggested that he had sufficient expertise. There is no analogue between native title rights and the rights of a pre-1899 freeholder ([245]-[258] above).

360. Mr Miles derived his 0.55% royalty from a so-called "benchmark" rate of 0.5%, sourced from hearsay in a Business News article: Miles 1, p32. Mr Miles agreed that the royalty agreements identified in Miles 1 provided no basis for the so-called "benchmark" rate: T1400.31-40, 1401.13-17, 1401.32-42, 1402.44-47, 1404.1-5, 1405.30-39. Mr Miles accepted that the description "benchmark" was inappropriate: T1398.22-24. Mr Miles agreed he could not rely on the Business News article:

[35] Mr Miles also gave evidence at the hearing that freehold land might receive up to 4 times its "normal value" and pastoral property might receive at least 1.5 times: T1380.24. In either case, the value of the compensation payable by the mining company is not determined by reference to the value of the minerals.

T1394.44-1395.1. Mr Miles relied on other, undisclosed materials: T1385.7-36,1398.4-12. It is not clear what other material could have been relied on by Mr Miles. Mr Miles accepted that he could not have relied on the materials subpoenaed by YNAC: T1412.23-26. Mr Meaton gave evidence that there is no benchmark: T1184.8.

361. The royalty rate of 0.55% is a 10% uplift on the "benchmark" rate: Miles 1, p44. The only basis Mr Miles provided for that 10% uplift was his "subjective judgment" as a land valuer: T1439.21-43. It is unclear the basis on which Mr Miles had expertise to make that assessment as an "outsider" with no familiarity with the negotiations or the agreements: T1428.41-44. It is curious that Mr Miles's rate of 0.55% is the same as the average royalty identified by Mr Meaton (Meaton 1 [33]). At the Oct 2024 hearing, YNAC's Senior Counsel said that "Mr Miles based his … opinion on the royalty calculations in Mr Meaton's report" (T1616.3-5), but this was not disclosed in Mr Miles's report. It seems that Mr Miles has simply parroted Mr Meaton's opinion without attribution.

362. Mr Miles acknowledged that he had not considered the nature of the YP's native title rights and interests: T1406.22-32. While Mr Miles accepted that "compensation should be taking into account all possibilities of what the value is of that suppression of rights" (T1430.40-44), he did not attempt to value the suppression of the YP's native title rights and interests.

363. Given that compensation is for the impairment of the YP native title rights and interests caused by the grant of the FMG tenements, the starting point must be a consideration of those rights and interests, and the impact of the grant of the FMG tenements has had. Mr Miles's analysis (like Mr Meaton's) ignored the fact that compensation is valued as the amount payable for the impact on YP's native title rights and interests. It is necessary to consider the value of those rights and interests and compare that with how they have been diminished by the grant of the FMG tenements. If the FMG tenements had not been granted, the YP would not be deriving revenue from the exploitation of iron ore, to which they have no rights.

<u>Mr Lonergan and Mr Hall's evidence</u>

364. Lonergan/Hall 1 set out a framework to assess compensation. Their methodology involved assessing compensation by reference to the cash flows the YP could derive from their native title rights and interests. This approach is to put the YP in the same position they would have been in but for the grant of the FMG tenements: T1163.18-20. The "but for" scenario is not assessed on the basis that YNAC would enter into an agreement with another mining company, but rather what reduction in value between the development of the mine and as if the mining had never occurred: T1163.18-23.

365. During cross-examination, it was put to Mr Hall that, by the grant of the FMG tenements, the YP lost the ability to "leverage their native title rights and interests to

negotiate a compensation agreement with a miner": T1172.43-46. Mr Hall did not accept this: T1173.1. At the time the FMG tenements were granted, the good faith negotiation period had expired and then the tenements were granted: T1173.1-42. It made "no sense" that another mining company would negotiate with the YP following the failure of the YP to reach agreement with FMG when the tenement is about to be granted: T1174.23-27. No opportunity has been identified that was lost as a result the State granting the FMG tenements. Such an opportunity is not a native title right, in any event.

366. Mr Hall's approach is consistent with the NTA and the MA 1978. There is no issue as to whether the NTA was complied with before the grant of the FMG tenements. The MA 1978 creates a regime of priorities for the grant of mining tenements: MA 1978, s 105A. Each of FMG's mining leases was a conversion of an existing exploration licence held by FMG.[36] Pursuant to the MA 1978, s 67 FMG had priority for the grant of their mining leases as conversions of existing exploration licences.

367. Mr Hall said that it made "no sense" to have gone through the negotiation process to reach an agreement that would cover a range of matters only for compensation to later be awarded on the same basis: T1165.1-7. This is because compensation assessed now based on a royalty would relate to benefits that were never provided.

368. Mr Hall disagreed that agreements for the payment of royalties between other mining companies and native title parties were relevant comparators for assessing compensation for the grant of the FMG tenements: T1176.26. Such agreements are focussed on "mutual benefits where the miner gets significant benefits to their mining operation", while the focus of compensation is on the loss suffered with the object of putting the YP back to their position but-for the impairment: T1176.30-39.

369. Lonergan/Hall 1, and Mr Hall's evidence, is consistent with *Griffiths HC*. The aim is to identify what has been impaired or impacted by the grant of the FMG tenements and devise a method by which the loss can be quantified. The only challenge to this methodology was to suggest that agreements between mining companies and native title parties for the payment of royalties was a comparator from which the loss suffered by the YP could be derived. However, as made clear in Lonergan/Hall 1, and Mr Hall's evidence, those agreements offer no useful comparative analysis to determine the value of the YP's loss.

Mr Jaski's evidence

370. Mr Jaski assessed compensation by reference to the freehold value of the land as at the date of the grant of the relevant tenement. In essence, Mr Jaski's approach (Jaski 1 [21]-[54]) was (i) to identify the freehold value of the land as at the date of the grant of the relevant tenement (adopting the values identified by Mr Preston); (ii) for areas of

[36] SoAF [174], [178], [182], [186], [190], [194], [198], [202], [206].

non-exclusive rights, to apply a 50% discount to the freehold value to reflect the approach taken in *Griffiths HC*; (iii) to apply an "impairment factor" reflecting the impact of the tenement on the YP's native title rights and interests; and (iv) to apply a "deprival factor" to reflect the duration of the deprivation of the YP's native title rights and interests. This approach is properly focused on identifying the value of the impairment on the YP's native title rights and interests.

371. Mr Jaski applied the approach in *Griffiths HC*. On Mr Jaski's analysis (Jaski 1, p12), the compensation payable (excluding interest) is $91,424 or $95,197 on the high case (depending on whether a 5% or 10% rate of return is adopted) assessed on the basis of non-exclusive native title (as already submitted [203]-[217]).

372. Mr Meaton criticised Mr Jaski's opinion on the basis that the mining tenements will permanently affect the land, so the impact cannot be considered as temporary for the purposes of compensation: T1328.32-45. The effect of Mr Jaski's approach was that for the mining leases, compensation equivalent to the freehold value of the land would be paid: T1325.45-1326.3; Jaski 1 [329]. In such cases, the YP would receive the freehold value of the land.

373. Mr Jaski's own experience with negotiating agreements between mining companies and native title parties (for both mining companies and native title parties) was that there was no attempt to look at the value of the native title rights and interests: T1335.1-12. This was consistent with Mr Meaton's evidence, who did not suggest that the negotiation is in any way focussed or concerned with the value of the native title rights and interests. In Mr Jaski's experience, 0.5% is a starting point in negotiations, and the parties move up or down from there: T1335.16-35. Mr Jaski's evidence cannot be taken as being that 0.5% is the "standard" or "market" rate. Importantly, it is not a measure of the amount payable for the impairment of YP's native title rights and interests by the grant of the FMG tenements.

374. When asked about the value of the "ability to leverage their possession of native title rights and interests to negotiate with iron ore miners in the Pilbara for access to their land to mine from their land" (T1354.34-1355.31), Mr Jaski explained, "there may be an expectation, but I don't know how you reflect that expectation in the value": T1355.23-25. There is no basis for the Court to conclude that YNAC would have entered into an agreement with another company. The issue is not relevant and does not assist in determining the value of YP's loss caused by the grant of the FMG tenements.

Conclusion as to economic and valuation evidence

375. The Court should accept the opinions of Mr Lonergan, Mr Hall and Mr Jaski. The compensation payable for economic loss (excluding interest) is $91,424 or $95,197 on the high case (depending on whether a 5% or 10% rate of return is adopted) assessed on the basis of non-exclusive native title. The Court should not accept the evidence of

Mr Meaton and Mr Miles that the payment of a royalty is the appropriate measure of compensation.

E.6. Compensation for non-economic or cultural loss [Issues 3A, 4 and 7]

376. YNAC claims compensation for non-economic or cultural loss (PoC [37], [46(b)], [46(c), [46(cc)]]; Heads of Compensation (**HoC**) [7]-[9]). YNAC pleads that the component for non-economic or cultural loss should include compensation for:

(a) the denial of the YP's dominion over their country, and the denial of their rights to access, use, protect and manage their traditional country (PoC [34A], [37]-[38]; HoC [9(a)]);

(b) damage to and destruction of country and of ancient occupation, cultural and Dreaming sites and Dreaming tracks (PoC [34A], [46(c)(i)]; HoC [9(b)]);

(c) social disruption and resulting damage to and impairment of important cultural practices and norms (PoC [14], [36], [46(c)(ii)]; HoC [9(c)]); and

(d) feelings of deep cultural loss that relate to identity, autonomy and personal status (PoC [37], HoC [9(d)]).

377. YNAC asserts that cultural loss is "significantly greater than would have been the case if FMG and the State had first obtained the YP's agreement to the grant of the FMG tenements and development of the mine" (YP-CS [205]). It is also asserted that an aspect of exclusive native title is the right to speak for country and this right is (apparently) infringed where a mining tenement is granted without agreement; and that non-exclusive native title includes a right to protect and care for sites and artefacts which is (apparently) infringed when mining occurs without agreement (YM-CS [60]).

378. It appears YNAC no longer makes the untenable contention that compensation for cultural loss should be determined by considering what a mining company would have agreed in a negotiated agreement to pay a royalty to enable its early progress of its mining project (cf PoC [46(ccc)]; HoC [8]). The contention was untenable because cultural loss needs to be determined, according to the standards of the community, for the intangible sense of loss felt by a disconnection to land or waters. It cannot be measured by reference to a mining company's tangible right to obtain revenue from selling the minerals in the land.

<u>Precis of how non-economic or cultural loss should be quantified</u>

379. YNAC claims the YP are entitled to $1 billion for cultural loss. There are no submissions that support this quantum save for the assertion that the entitlement is held "in view of the immensity of loss suffered by the Yindjibarndi community… and the particular facts in this case": YP-CS [617]. The claim is a disproportionate ambit claim

that would appear to suffer from a view that the repeated statement about hurt should result in a magnification, many, many times over, of what should be the measure and quantum of the cultural loss, according to Australian standards. FMG accepts there is an entitlement to cultural loss. The difficult task is to attribute a monetary value to the sense of loss felt by the YP *because of their disconnection to land and waters*.

380. Disentangling the issue from an inapposite vantage point (namely, the money paid and payable to the State as royalites and rent and the profit made by FMG from the sale of the minerals belonging to the State), the issue needs to be determined by considering the area of land involved, the connection of the YP to that land (viewed holistically) and the impact of the grant of the FMG tenements on the YP's spiritual connection to the land or waters.

381. When the task is approached that way, including by reference to the particular issues relating to the sites, Dreaming tracks and other intangible connections to the land, the quantum attributable to cultural loss cannot be seen to be any more than $8 million, adopting a seriously generous calculus of the relevant Australian standards of value. Such a sum is significant and attempts to quantify that which is not capable of easy quantification.

382. In *Griffiths HC* [196]-[237], the CJ&JJ considered the evidence and concluded that the award of $1.3 million for cultural loss was appropriate. In that case, compensable acts had extinguished native title in an area that had become a township. The CJ&JJ summarised Mansfield J's factual conclusions (*Griffiths HC* [167]-[207]). In essence, the native title holders were linked to the claim area, observed rituals and ceremonies, respected and protected Dreaming sites and felt a duty and concern to look after country (*Griffiths HC* [168]). Dreaming was regarded as an absolute force and its requirements had the immutable quality of law ([170]). Dreamings had been affected by the building of a causeway ([177]-[180]), a bridge ([181]), scraping of gravel ([182]), and a proposal to mine for diamonds, regarded under traditional law as dangerous ([183]). There was evidence of diminution in spiritual connection which could not be treated merely as a loss of enjoyment of life; it was much more than that ([186]-[189]). There was evidence of destruction or damage of significant sites ([190]). There was evidence that the Aboriginal spiritual relationship to land encompasses all of the country, not just sacred sites ([199]). The construction of water tanks on the path of the Dingo Dreaming caused significant distress and concern ([200]).

383. The evidence described in *Griffiths HC* about the impact of the compensable acts on spiritual connection is evidence that has parallels with the evidence given by the YP in this case. The proper judgment about the quantum attributable to cultural loss cannot be based on some form of compare and contrast with the facts of *Griffiths HC*. However, the ultimate judgment, according to Australian standards, that cultural loss in that case should be given a value of $1.3 million gives the Court some sense of the nature of the task that is required. Taking all of the evidence into account, the cultural

loss in this case cannot be measured as sounding in tens of millions or as equalling $1 billion.

384. A claim of $1 billion is an exaggerated ambit claim. It does not seek compensation for cultural loss but, in truth, is a masked claim for the YP to share in profits or revenue made by the State and FMG in mining for and selling iron ore, always owned by the State, for which FMG is required to pay and has paid and will pay economic rent to the State. A sum of no more than $8 million would reflect Australian standards that are appropriate, fair and just. The ambit claim for a round $1 billion is an impermissible claim that seeks to enable the YP to share in profits and revenue, to which they are not entitled.

385. The fact that YNAC asserts that the claim for $1 billion would give each member of the YP only $1 million highlights why the claim is a claim that camouflages the true nature of the ambit claim (YP-CS [617]). In *Griffiths HC*, the CJ&JJ warned against any determination of cultural loss by reference to the finite number in the native title group, emphasising that the entitlement is a "communal or group entitlement" ([229]).

Principles as to non-economic loss; further reasons why entitlement should be no more than $8 million

386. The applicable principles support an approach that measures cultural loss at no more than $8 million, erring on the very generous side. In *Griffiths HC*, the CJ&JJ endorsed the bifurcated approach to assessing compensation. Just compensation for the infringement of native title rights and interests in land is to include a component for the objective or economic effects of the infringement, and a component for non-economic or cultural loss. The assessment of cultural loss requires a fair and just assessment, in monetary terms, of the sense of loss of connection to country suffered by the claim group by reason of the infringement: [84]. The "connection is spiritual", meaning something over and above and separate from "enjoyment", in the sense of the ability to engage in activity or use, and spiritual connection identifies and refers to a defining element of life and living: [187].

387. Compensation for cultural loss is not just about hurt feelings, but the strength of feeling may have evidentiary value in determining the extent of it: [153]-[154]. Edelman J said, the "hurt feeling" is professed by a group in recognition of damage to country; it is a description of the injustice rather than the mental state after the impact on native title rights and interests: [313]. This form of loss is distinct from and thus does not include "pain and suffering" as might be consequent on, e.g., a tortiously inflicted injury, including suffering arising from the sense of injustice ([314]-[316] (Edelman J)).

388. The award for cultural loss is not equivalent to "solatium" as that term is used in the law relating to compulsory acquisition. In *Griffiths HC*, the CJ&JJ warned against allowing words like "solatium" to deflect attention from the nature of the native title rights and interests that had been affected and the compensation that must be assessed

to provide just terms. What the NTA requires to be compensated is the cultural loss arising on and from the effect of the compensable acts on the native title rights and interests: [53]-[54]; also [317]. The award for cultural loss is for "that aspect of the value of the land to native title holders which is inherent in the thing that has been lost, diminished, impaired or otherwise affected by the compensable acts": [154].

389. In *Griffiths HC*, the CJ&JJ said that s 51(1) recognises that the consequences of a compensable act are not and cannot be uniform: the act and the effect of the act must be considered; and the way the native title rights and interests are affected by the act will vary according to what rights and interests are affected and according also to the native title holders' identity and connection to the affected land: [46]. That is, evaluation of the compensable effects requires an understanding of the relevant effects of the acts on the claimant group; the task is to determine the essentially spiritual relationship with the country and to translate the spiritual hurt caused by the compensable acts into compensation: [166], [216].

390. Compensation is thus assessed having regard to the spiritual significance and the area of the land affected, but relative to other land that remains available to the claim group for the exercise of native title rights and interests. While the loss should not be reduced, it is the consequences of the collective compensable acts on native title rights which need to be compensated. Those consequences do not exist in a vacuum, uninformed by the whole of the claim group's determination area where they hold and enjoy native title rights: *Griffiths TJ* [319]; *Griffiths HC* [164], [223]. Also, there may be a different effect of the act on native title rights and interests depending on the native title holders' connection with the land or waters, and the "sense of connection to country may have declined in developed areas", such that the amount to be awarded for non-economic loss will be less: *Griffiths HC* [217]. The duration of the effect of the compensable acts is also a factor that is properly considered: *Griffiths HC* [230].

391. In the end, a monetary figure for cultural loss is to be assessed by considering what would be accepted by the Australian community as appropriate, fair or just compensation for the loss of the spiritual connection to country: *Griffiths HC* [237]. The YP's entitlement to cultural loss is thus an entitlement to an amount that reflects what, according to Australian community standards, is appropriate, fair or just compensation for the loss of connection to country that has been caused by the grant of the FMG tenements. The assessment of such compensation requires a value judgment, which should not be coloured by questions as to the preparedness of mining companies in other cases to share gains from taking minerals from the land, by agreeing to pay a royalty. An agreement to pay a royalty cannot be analysed as an agreement that values cultural loss, by reference to society's respect for spiritual connection to land.

392. Compensation is claimed by YNAC to be payable for various asserted non-economic or cultural losses. Given the overlap between the losses described in the anthropology evidence, lay witness evidence, "s 86 evidence" and agreed facts, they are analysed

together in section E.6.5 below. Broadly, the types of cultural losses identified in that evidence and the agreed facts included the following (each of which falls broadly within the losses pleaded by YNAC and summarised above ([376])):

(a) loss of access to country within the mine site (described by YNAC as an aspect of a "loss of dominion"[37]);

(b) loss of the right to control who enters the land (described by YNAC as a further aspect of "loss of dominion"[38]), and of the right to be asked by others for permission to enter and conduct activities on the land;

(c) loss arising from damage to and destruction of country, including loss of the right to teach younger generations about country and places of cultural significance, and loss of the right to look after country;

(d) loss arising from damage to or destruction of "sites" or significant places;

(e) loss arising from an impact on song lines; and

(f) loss arising from alleged division within the Yindjibarndi community.

393. Evidence adduced by YNAC, asserting psychological injury and trauma said by YNAC to be compensable, is considered separately (section E.6.6). The evidence as to archaeology is also considered (section E.6.7). Evidence as to the hydrogeology of the area of and surrounding the mine is then considered (section E.6.8).

E.6.1. Agreed facts and s 86 evidence [Issues 3A, 4 and 7]

394. The facts agreed by the parties (*Evidence Act*, s 191) as to YNAC's cultural loss claim relate principally to the YP's connection to country, YP beliefs, laws and customs, access to YP country and the mine and the control of such access, and YP sites.

395. The parties also seek to rely on "s 86 evidence", pursuant to s 86(1) of the NTA. This evidence comprises parts of the reasons from other court proceedings, parts of NNTT determinations concerning the grant of the FMG tenements, and parts of the transcript from *Warrie (No 1)*. The agreed facts and the s 86 evidence as they relate to YNAC's claim for cultural loss are analysed in E.6.5 below.

E.6.2. Documentary evidence [Issues 3A, 4 and 7]

396. YNAC relies on four affidavits filed in the NNTT when FMG applied for the grant of mining leases (namely, the affidavit of Philip Davies sworn on 4 Mar 2014 (A.05.029) (**Davies 2014**) and Michael Woodley's affidavits sworn on 25 May 2009 (**MW 2009**)

[37] YP-CS [319], [321], [327]-[328].

[38] YP-CS [318], [321]-[324].

(ZA.05.040) and 14 Feb 2011 (**MW 2011**) (ZA.05.041)), and an affidavit filed in the *Sandy* proceedings (MW 2015, see [158] above), in support of its claim for cultural loss (YP-CS [216(a)-(d)], [218]-[221]).

397. This evidence is analysed in E.6.5 below. In many cases, YNAC does not identify the specific paragraphs or parts of the material on which it relies. Much of the material is irrelevant and/or seeks to prove the existence of, or to contradict or qualify, the agreed facts (cf *Evidence Act*, s 191(2)). Thus, Davies 2014, MW 2009, MW 2011 and MW 2015 are, in the main, irrelevant and/or inadmissible, insofar as they are relied on to support YNAC's claim for cultural loss. The documentary evidence supporting the YP's claim for compensation for "social disruption" was dealt with above ([158]).

E.6.3. The YP's evidence as to the impact on their native title rights and interests [Issues 3A, 4 and 7]

398. YNAC relied on evidence from 19 YP.[39] All, except 2 of them, belonged to YAC and/or YNAC (Wimiya Woodley and Isiah Walker are not members of YAC, YNAC or WMYAC). Three were members of YAC *and* WMYAC (Isaac Guinness, Margaret Ranger and Sonya Wilson).[40] There were also statements from 5 non-YP witnesses.[41]

399. The witnesses gave evidence of the YP's connection to land, their traditional laws and customs, the exercise of their laws and customs on Yindjibarndi land, including within and outside the Determination Area, locations of particular importance to the YP, and how they considered mining had affected them. This evidence is analysed in E.6.5. The witnesses also gave evidence as to the alleged social disharmony ([132]-[135] above).

E.6.4. Anthropology evidence as to impact on YP's native title rights and interests [Issues 3A, 4 and 7]

400. Opinion evidence was given by anthropologist, Dr Kingsley Palmer. Dr Palmer attended the court hearing in August 2023, including the tour of the mine site, and gave evidence in April 2024. Dr Palmer's evidence is analysed in E.6.5 below. There is a question about the utility and weight of Dr Palmer's evidence. This arises, in part, from the nature of anthropology evidence and the evidential foundation for Dr Palmer's opinions. It also arises out of concerns as to Dr Palmer's credit and impartiality as an independent witness.

401. The relevance and weight that should be given to anthropology evidence (premised on hearsay accounts of the native title group, including Court witnesses) has been

[39] Jean Norman, Lorraine Coppin, Sonya Wilson, Stanley Warrie, Wimiya Woodley, Estelle Guiness, Isaac Guiness, Kaye Warrie, Lyn Cheedy, Middleton Cheedy, Judith Coppin, Kevin Guiness, Angus Mack, Isiah Walker, Fabian Cheedy, Michael Woodley, MR (Deceased), Tootsie Daniel; Margaret Ranger.

[40] Exhibit E, Tabs 2, 3 and 4 (ORIC general reports for FY ending 30 June 2023 for YAC, WMYAC and YNAC).

[41] Christine Halls, Joan Maddison, Janet Kapetas, Michael Nikakis, Ricky Smith.

questioned in several cases,[42] and extra-judicially.[43] Such evidence is prone to result in unnecessary duplication of witnesses' accounts and their interpretation, and inconsistencies between the accounts given to the anthropologist and accounts given to the Court. Here, the anthropology evidence is of limited utility. Dr Palmer agreed that most of his informants were YNAC's own Court witnesses: T757.10-12. The Court should assess the testimony of YNAC's witnesses as given to the Court, without the overlay of Dr Palmer's own enquiries and assessments.

402. The above concerns are exacerbated in the context of Dr Palmer's investigation of the issues, which was a one-sided investigation into certain important matters. Dr Palmer was instructed to assume that the Yindjibarndi community was divided because of the ongoing agreements and relationships between FMG and some common law native title holders (members of WMYAC): Palmer 1 [12]. But, Dr Palmer claimed that he did not in fact adopt any assumption that the cause of the split was the mine. He said he had formed that view himself based on the data he had collected and evidence he had heard during the August 2023 hearing: T791.40-45.

403. Dr Palmer did not make any meaningful attempt to contact WMYAC representatives to obtain their perspective. The only effort was a letter written at Dr Palmer's behest by Philip Davies (a senior figure in YAC/YNAC's management) on YNAC's letterhead, addressed to WMYAC (Palmer 1, Appendix C) and inviting contact with Mr Davies (not Dr Palmer), should they "wish to be a part of [Dr Palmer's] research process". This was not a realistic attempt to obtain a wider view: T758.15-19. Dr Palmer accepted that he did not "knock on any doors or make any phone calls to the Wirlu-Murra people", despite his previous contact with them in the native title determination case: T761.07-08. Dr Palmer's explanation for not taking any meaningful step to obtain the Wirlu-Murra view was evasive. He said, "Could I have worked harder? I think that's true of all of us in most of our endeavours": T761.16. Dr Palmer's unwillingness to acknowledge the limitations of the selective pool of evidence that he was using for his opinions suggests he lacked sufficient impartiality.

404. Dr Palmer's dismissal of the relevance of views expressed by anthropologist, Professor David Trigger, as to the causes of division in Aboriginal communities affected by mining projects, also calls into question his impartiality. Dr Palmer did so apparently on the basis that Professor Trigger's views applied only to the specific population Professor Trigger had studied: T823.39-824.14. This is despite Professor Trigger's express "aim is to build upon the analyses that have begun to address the nature of Aboriginal politics… [and his] general point is that social relations among an

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[42] *Jango v Northern Territory (No 2)* [2004] FCA 1004 [15] (Sackville J); *Miller v State of South Australia (Far West Coast Sea Claim) (No 3)* [2022] FCA 466 [22]-[23] (Charlesworth J).

[43] Justice Mortimer, *Re-evaluating the Role of Expert Reports in Native Title Proceedings* (Conference Presentation, Centre for Native Title Anthropology (CNTA) conference, 4 February 2021) [12].

Aboriginal population drawn into dealing with a new large-scale resource development are a major determinant of outcomes": Trigger, p111 (Exhibit F, Tab 7). Dr Palmer also suggested that Professor Trigger's study could apply only to disputes between different groups (T824.7-9), despite references by Professor Trigger to "social relations among an Aboriginal population", "intra-community disputes" and divisions between close kin: pp111, 121, 122.

405. Also, Dr Palmer's flawed analysis of the parties' agreed maps to calculate an estimate for the number of damaged/destroyed sites in the mine area (see [457], [460] below) raises questions about the diligence with which Dr Palmer prepared this part of his evidence. Dr Palmer maintained that his exercise was an attempt to give an "indication of a likely figure" of apparently damaged/destroyed sites, and despite its shortcomings, concluded that the figure he came up with was "quite useful" as a "very close match" with the number of sites subject to applications under s 18 of the AHA: T832.19-34. But, Dr Palmer's approach suffered from obvious shortcomings and apparent bias. As was put to him (T833), the maps he selected as his sample set contained a much higher density of sites compared to others. Dr Palmer was evasive in his response, claiming "I don't know that there's more yellow in [enlargement map] 8 than there is in [enlargement map] 1, for example" (T833.25), and that he selected the maps that he did because they were the first three (T833.41).

E.6.5. Analysis of E.6.1, E.6.2, E.6.3 & E.6.4 (agreed facts and s 86 evidence, documentary evidence, YP's evidence and anthropology evidence)

Loss of access to country within mine site

406. ***Agreed facts and YP's evidence***: The YP need to visit country regularly, reflecting their spiritual and emotional connection to their country and their duty under their Law: SoAF [154]-[155]. YP witnesses gave evidence about now needing to obtain permission to access the area of the mine; there had been occasions when they had not been permitted entry.[44] The evidence was that having to ask permission to enter the area of the mine had made some people feel angry and hurt.[45]

407. But, most of the evidence referred to visits having been made to Garlawinji,[46] which referred to either a broad area covering most of the lower half of the Determination Area,[47] or a specific location to the extreme west of the area (T530.45-531.33 (Michael Woodley)) where Rares J heard evidence in *Warrie (No 1)* and which is not

[44] S.Warrie [124]-[128]; L.Coppin [70]; I.Walker [13]; J.Coppin [26]; M.Woodley [12], [42]-[47], [306]-[312].

[45] S.Warrie [125]; I.Guinness [35]; J.Norman [16]; E.Guinness [43]; K.Warrie [48]; T600.45-601.09 (Stanley Warrie); T508.43-509.03 (Michael Woodley).

[46] L.Coppin [67]-[69]; T440.09-20; I.Walker [15]; K.Guiness [12]; T662.05-663.36 (K.Guiness).

[47] Exhibit 8, Annexure MC-1 to M.Cheedy, being map of Yindjibarndi Ngurra (see area shaded in green and identified with the number 10); T533.35-40, 534.01-534.33 (Michael Woodley).

near the mine.[48] There was little evidence that the YP visited the area of the mine with frequency before the FMG tenements were granted.[49]

408. Also, YP witnesses gave evidence about visiting Yindjibarndi country *outside* the Determination Area and feeling happiness when doing so. Isaac Guinness appeared to have visited Ngurrawaana and the Chichester Ranges (both on Yindjibarndi country but outside the Determination Area) more frequently, and said this made him feel happy (T298.15-27). Lorraine Coppin gave evidence that she felt rejuvenated living in Ngurrawaana and visiting Millstream, both some distance north of the Determination Area (T429.23-430.12). Isiah Walker gave evidence that he had been on trips to Millstream, and that he was "happiest when … out on Yindjibarndi country" (I.Walker [6], [9]). Lyn Cheedy said that she had gone on a flora and fauna survey in October 2013, and felt "happy and peaceful being back on [her] country" (L.Cheedy [34]).

409. Evidence was also given about the move of the YP from their land into Roebourne (S.Warrie [7]; I.Guinness [5]). Lyn Cheedy gave evidence that the move had a significant effect on the YP and made it difficult to visit country (T252.20-36). This dislocation occurred in the late 1960s, before the grant of the FMG tenements.[50]

410. ***Documentary evidence and s 86 evidence***: The NNTT has considered the impact on the YP's native title rights and interests that might be caused by restricting access to areas, the subject of mining.

411. The YP rely on MW 2009 (YP-CS [220]); and also relied on it in *FMG Pilbara Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia* [2009] NNTTA 91 (A.09.008) (***Ned Cheedy 2009***) (which decision is also relied on here: YP-CS [209]-[211]).

412. In *Ned Cheedy 2009*, Member O'Dea considered the potential impact of M47/1413 on the YP's ability to access *Gandi* (sacred stones) and ochre used in initiation and other ceremonies. He said that MW 2009 had referred to the YP accessing the area of the proposed lease yearly to gather *Gandi*; but also observed that evidence of access and use was "sketchy", and there was no specific reference in Mr Woodley's evidence as to whether the ceremonies themselves were conducted within the area of the proposed lease: [59], [67]. Member O'Dea found that: (i) it appeared that *Gandi* stones were found *throughout* Yindjibarndi country ([69]); (ii) there was no evidence of any specific ochre sites or places where *Gandi* stones were collected, within the proposed mining lease area ([72], [74], [79]); and (iii) with the exception of the *Maliya Thalu* ceremony conducted in the area the subject of proposed mining lease M47/1409, there was no

[48] T440.9-20 (Lorraine Coppin); *Warrie (No 1)* [154]-[155]; Exhibit G1 Map 3 – Regional Overview Map.

[49] T.Daniel [30]; K.Warrie [35]; J.Coppin [7]-[8]; I.Guinness [22]; L.Cheedy [18], [24]; F.Cheedy [11], [20]; T377.01-377.10 (K.Warrie); T296.31-40 (Isaac Guinness); T565.36 (Angus Mack); T675.11-29, 689.33-690.01 (Fabian Cheedy).

[50] Palmer 1 [118]; A.09.006 *Daniel v WA* [2003] FCA 666 (s86 NTA) [180]-[198]; A.09.016.01 *Warrie v WA* (2017) 365 ALR 624 (s86 NTA) [45].

evidence suggesting that there were any particular ceremonies that needed to be conducted within the area of the proposed lease or requiring the use of ochre from that area for those ceremonies ([74]). Also, Member O'Dea found ([79]) that interference with four specific ochre sites would have an injurious effect on the YP (YP-CS [211]). The grant of M47/1409 was subject to a condition to protect those sites by requiring FMG to serve on the native title party any notice under s 18 of the AHA (SoAF [185(e)(ii)]). FMG complied with that condition (B.04.005; B.04.017; B.04.021).

413. YNAC also relies on MW 2011 as to the use of the area within proposed lease M47/1431 (YP-CS [221]). MW 2011 was sought to be relied on by the YP in *FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia* [2011] NNTTA 107 (A.09.010) (***Ned Cheedy 2011***), which concerned the application for E47/1398, E47/1399 and M47/1431.

414. In MW 2011, Mr Woodley deposed to the practice of taking *Gandi* from the area in or around the proposed leases (but he could not say precisely where they were located), and to four ochre quarries in the area ([6.5]-[6.13], [7.2]). Member O'Dea considered Mr Woodley's evidence to be "uncorroborated, contested, and potentially unauthorised": *Ned Cheedy 2011* [84]. Otherwise, YNAC has not identified any specific paragraphs of MW 2011. Much of MW 2011 covers matters the subject of agreement under the SoAF, and to that extent is not admissible: *Evidence Act*, s 191(1)(2) (see SoAF [12], [95] & MW 2011 [3.1]-[3.7], [6.1]; SoAF [115] & MW 2011 [6.3]).

415. In *Ned Cheedy 2011*, Member O'Dea was "unable to find, on the balance of probabilities, that *Gandi* or ochre are collected in the area the subject of the three tenements, or that initiation ceremonies were conducted in those areas" ([103]). As he was unable to find that there was any significant ceremonial activity conducted in the area, the YP's submissions as to the very great interference to the exercise of their registered native title rights and interests were not accepted ([103]). He said there was unlikely to be any significant impact on areas of particular significance to the YP in the areas the subject of the proposed tenements ([109]).

416. In *FMG Pilbara Pty Ltd v Yindjibarndi #1* [2014] NNTTA 79 (A.09.012), Member Shurven found ([76]) that there was little to no evidence that the YP used or enjoyed resources from, or lived or erected shelters, regularly camped, or taught the children on, the land covered by then proposed leases M47/1475 and M47/1473. There was limited information that ceremonies were conducted on the land; the evidence suggested that when this occurred, ochre was taken from the land, but there was evidence this occurred across the claim area. There was also little or no evidence that other resources were taken from the area of the particular leases.

417. It is appropriate to take account of the historical dispossession of the YP in assessing the impact on native title rights and interests caused by the grant of the FMG tenements.

418. In *Daniel* [157]-[201] (A.09.006), Nicholson J considered the historical background to the dislocation of the YP from Yindjibarndi land. Nicholson J found that, through the 1950s, 1960s and 1970s, there was a general migration of the YP away from their country, including due to closure of ration camps, a Government desire for Aboriginal people to be educated at State Schools, and a decline in the economy on pastoral stations ([179]-[180]). The accelerated drift into Roebourne was possibly influenced by the Pastoral Workers' Award in 1968, and a decision in January 1973 to move people from the Old Reserve in Roebourne to an area of the town known as The Village (a State Housing Commission project), which was implemented in 1975, intensified the processes of social dislocation that had been established over the previous decade ([181], [186]).

419. ***Dr Palmer's evidence***: According to Dr Palmer, "the seeming impossibility of gaining access to the area of the mine, informs feelings of cultural loss that relate to identity, autonomy and personal status". According to Dr Palmer, a consequence of "inability to access and use the country of the [mine]" was "diminishment of culturally related activities" (Palmer 1 [220]-[221]; see also Palmer 1 [245]-[248], [253]-[254]).

420. But, Dr Palmer accepted that the YP were still able to engage in ceremonial activities on Yindjibarndi country, and that his field data indicated that ritual ceremonies do still occur and sustain and perpetuate Yindjibarndi culture (T816.5-6, 816.28-29). Dr Palmer had himself observed an elaborate YP ritual performed about 2.75km away from the mine during his field work (Palmer 1 [325]), and accepted that conducting these ceremonies was of value to the YP (T816.8-9). Dr Palmer also gave evidence about having camped with some of the YP at Buminjinha (on Yindjibarndi country,[51] 63km north-west of the mine and not affected by mining), where MR (now deceased) told him it "felt like we were coming home" (Palmer 1 [272]). Dr Palmer's evidence was that "there is emotional and spiritual satisfaction in trips to country [but] the pleasure is tempered by both the reality of what has happened to [the YP's] country and the physical impediments to access".[52]

421. Dr Palmer accepted that the YP had experienced earlier displacement. He referred to the YP having moved from the compensation application area to Roebourne in the late 1960s (Palmer 1 [118]). He said that around that time "a lot of Indigenous Australians who had been working on stations moved into the towns. Some went to Roebourne, and… others went to Onslow and some went to Port Hedland… that's… the general view about what was happening at the time" (T802.7-14, 805.1-7).

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[51] A.09.006 *Daniel* (s86 NTA) [169].

[52] Palmer 1 [216]; T810.4-8; T815.4-9; see also T813.4-12, 815.34-38.

422. When asked whether he agreed that a cultural loss by a loss of access was not permanent, Dr Palmer responded, "I agree that if the mine were to be closed and the conditions of the mining lease revoked or… resolved in some way, then presumably the native title holders would under the native title determination have… the ability to return to their country freely. So yes, I think in terms of the right of access to country, people could return there assumedly, whenever that happened" (T814.8-15).

423. ***Consideration***: In considering the effect on the YP's spiritual connection, it is relevant that the area the subject of the FMG tenements represents only part of the country on which the YP's native title rights have been recognised ([390] above).

424. The area the subject of all FMG tenements (782 square kilometres[53]) represents 31.67% of the compensation application area (2,469 square kilometres[54]). Excluding the area the subject of tenements that do not wholly prevent the YP's access to the land ([427] below)), the impacted area represents 6.09% of the compensation application area. The YP also hold native title rights in the Moses/Daniel determination area, as recognised in *Moses*. That area includes locations of cultural significance to the YP, including Millstream, Woodbrook and Bilin Bilin.[55]

425. The assessment of compensation for cultural loss for a loss of access should properly take this into account, together with the evidence from YP witnesses that they still go onto areas of Yindjibarndi country and feel happiness when they do so, and that they still go out and perform cultural activity on areas of Yindjibarndi country which have not been impacted by the mine ([408] above). The consequences of the grant of the FMG tenements need to be considered in the context of the wider area in which the YP hold and enjoy native title rights: *Griffiths TJ* [319]; *Griffiths HC* [164].

426. Further, compensation for cultural loss needs to be assessed by considering the fact that the YP are not excluded from accessing the whole of the area the subject of the FMG tenements. The task required by s 51(1) involves considering the *particular effects* of the compensable acts on the YP's connection to the land: *Griffiths HC* [216]. Not all of the FMG tenements prevent or restrict access. In the area of the 8 exploration licences and the 3 prospecting licences, the YP may be prevented from accessing specific parts of the land when intermittent exploration activities are being conducted.[56] This area (489.28 sq km[57]) represents 19.82% of the compensation application area. In the area

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[53] SoAF [176(a)], [180(a)], [184(a)], [188(a)], [192(a)], [196(a)], [200(a)], [204(a)], [208(a)], [218(a)], [222(a)], [226(a)], [230(a)], [234(a)], [238(a)], [242(a)], [246(a)], [250(a)], [254(a)], [258(a)], [262(a)], [266(a)], [270(a)], [274(a)], [278(a)], [282(a)], [286], [290], [294], [298], [302(a)], [306(a)], [314(a)], [322(a)].

[54] SoAF [5]; Marzsal Affidavit [24(b)(iii)], Annexure XPM4, "*WAD37_2022_Bdy_asat_20230123 Map*".

[55] Exhibit G1 Map 3 – Regional Overview Map (these sites are marked on that map with black squares, save for Millstream which is located near Ngurwanna (marked with a purple triangle); T429.36-44 (Loraine Coppin)); A.Mack [85]-[86]; F.Cheedy [13]; T430.21, 529.19-37.

[56] MA 1978, ss 48, 66; Jaski 1 [222]-[229], [232]-[235]; Badock 1 (see [229] above).

[57] SoAF [282(a)], [286], [290], [294], [298], [302(a)], [306(a)], [314(a)], [322(a)].

of the 13 Water Ls, the YP are unlikely to be prevented from accessing the land.[58] This area (142.16 sq km[59]) represents 5.76% of the compensation application area.

427. In the area of the 9 Mining Leases and 3 of the miscellaneous licences, access would be prevented for exploration or mining activities, or for safety or security reasons relating to those activities.[60] This area (150.47 sq km[61]) represents 6.09% of the compensation application area.

428. It is also relevant that the evidence did not demonstrate that, before the grant of the FMG tenements, the YP visited the area of the mine with any frequency ([227] above). The assessment should take into account the findings of the NNTT to the effect that in respect of the proposed tenements concerned in those determinations, there was limited information about ceremonial or other activity conducted within the tenement area ([410]-[416] above).

429. Further, the determination of compensation payable for the loss of spiritual connection to the land, attributable to the grant of the FMG tenements, should account for loss of connection that was caused by the YP's earlier move away from their country in the late 1960s ([409], [410], [421] above). The appropriate level of compensation must take account of the pre-existing state of affairs (*Griffiths TJ* [301], [323], [376]; *Griffiths HC* [163]) as it is the effects of *the compensable acts* on the connection with the land that s 51(1) requires to be assessed (*Griffiths HC* [216]).

430. Finally, it is relevant that cultural loss arising from a loss of access is not permanent: *Griffiths HC* [230]. The non-extinguishment principle applies, so that native title continues to exist as against the compensable act, and so that when the act or its effects are removed or otherwise cease to operate, native title rights and interests again have full effect (NTA, s 238(6)-(7)): cf YP-CS [204]. It is an agreed fact that there is no fixed date for the mine closure, but currently the mine is expected to have an operational life until 2045: SoAF [20]. Following mine closure and rehabilitation, access may be returned.

Loss of right to control who enters land, loss of right to be asked

431. ***Agreed facts and YP's evidence***: It is agreed that the YP observe traditional customs requiring *manjangu* (strangers) to seek permission to enter Yindjibarndi country; and that according to traditional laws and customs, the YP have the right to control access

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[58] Jaski 1 [237]-[240].

[59] SoAF [222(a)], [226(a)], [230(a)], [234(a)], [238(a)], [242(a)], [246(a)], [250(a)], [254(a)], [258(a)], [262(a)], [274(a)], [278(a)].

[60] Marzsal Affidavit, Annexure XPM4 (Mining Tenement Register Searches in respect of M47/1409-I, M47/144-I, M47/1413-I, M47/1431-I, M47/1453-I, M47/1473-I, M47/1475-I, M47/1513-I, M47/1513-I, M47/1570); MA 1978, s 85. See also Jaski 1 [210]-[213], [215]-[217], [219]-[220].

[61] SoAF [176(a)], [180(a)], [184(a)], [188(a)], [192(a)], [196(a)], [200(a)], [204(a)], [208(a)], [218(a)], [266(a)], [270(a)].

to country and a responsibility to protect it from unauthorised access: SoAF [145]-[150]. Witnesses expressed hurt, sadness and frustration about FMG coming onto Yindjibarndi land without the YP's permission.[62] But, the YP are not entitled to compensation for this inability to control access ([435] below; also [203]-[223]).

432. ***Documentary and s 86 evidence***: YNAC relies on evidence given by Michael Woodley in earlier NNTT proceedings about protocols and beliefs associated with *manjangu* (MW 2009 [4.14]-[4.18]): YP-CS [220]. But, again, the YP are not entitled to compensation for an asserted loss of exclusivity.

433. ***Dr Palmer's evidence***: Dr Palmer gave evidence that an "inability to comply [with the traditional customs pertaining to *manjangu*] is a keenly felt and negative emotion", and is believed to have resulted in confrontations with Yindjibarndi spirits.[63] YNAC relies on evidence of Dr Palmer that the YP perceive that the granting of the mining leases, and subsequent mining and related activities, contravene Yindjibarndi Law, in that *manjangu* are present without permission and conducting themselves in an unauthorised and destructive manner; and that this is theft and breaks *nyinyaard* (the Yindjibarndi system of rules for sharing (SoAF [140])): YP-CS [326].[64]

434. In Dr Palmer's view, loss of dominion runs contrary to Yindjibarndi religious belief, has resulted in deep hurt and a significant personal loss for senior Yindjibarndi men in particular, and has informed feelings of loss of identity, autonomy and personal status.[65] Dr Palmer confirmed that the loss he described relied on the notion of exclusivity (T783.14-33).

435. ***Consideration***: The YP's loss of exclusivity is not a compensable cultural loss. Rights of exclusive possession over the whole of the compensation application area were extinguished before the grant of the FMG tenements ([203]-[223] above), and that extinguishment is not to be disregarded on an application for compensation: *Griffiths 47B* [63]-[81].[66] The YP cannot assert a loss arising from the effect of *the grant of the FMG tenements* on a right that was lost by *a previous act of extinguishment*.

436. Also, no compensation is payable in consideration of permitting entry on to any land for mining purposes: MA 1978, s 123(1)(a). This principle must be applied here: NTA, s 51(3). Further, the NTA recognises and gives full force and effect to the extinguishment of native title (s 237A), when that occurred before the non-extinguishment principle became applicable (s 238). The YP cannot get compensation for their already permanently lost right to control access because of the

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[62] M.Cheedy [31]; F.Cheedy [19]; A.Mack [102]-[103]; K.Guiness [23], [25], [32], [36]; J.Coppin [22]-[23]; I.Guinness [35], [42]; W.Woodley [73]; S.Warrie [89]; T243.41-244.11 (Lyn Cheedy); T508.15-30 (Michael Woodley).

[63] Palmer 1 [96], [237]-[239], [241], [243], [244]; T782.30-783.07.

[64] Palmer 1 [202]-[215], [222]-[236].

[65] Palmer 1 [218]-[221], [235], [242], [244]; Palmer 2 [169], [170], [176].

[66] See also *Griffiths FC* [229]-[231] (North ACJ, Barker and Mortimer JJ).

earlier grant of pastoral leases or oil exploration permits over the Determination Area (*Ward* [190]-[194], [309]; [203] above).

Loss from destruction of country, ability to teach younger generations about country and places of cultural significance, and loss of the right to look after country

437. ***Agreed facts and YP's evidence***: It is agreed that the YP believe they are spiritually and physically connected to their country, and have a responsibility to protect it (SoAF [96], [143]). It is also agreed that YP go onto country for healing and believe that going back to *ngurra* (country) revives their *wirrard* (soul) (SoAF [98]).

438. The YP witnesses gave evidence that the mining caused some of them to feel sad, and made some feel that their connection to their land and their *wirrard* had been broken.[67] But, the evidence was that the places most significant to them for their practice of Law and culture included places outside the Determination Area, or areas unaffected by the mine,[68] such as Millstream, Bilin Bilin, Bangkangarra and Woodbrook.[69]

439. The YP believe that they would be punished or harmed for failing to protect the land and stop the mine.[70] The YP believe that spirits have started visiting YP and non-Indigenous mine workers, including at the accommodation camps (located on Eastern Guruma country, south of the Determination Area), and that the spirits have been telling people to stop destroying the *ngurra*.[71] But, the YP go onto country for healing and believe that going back to *ngurra* revives their *wirrard*. The evidence is that when the YP witnesses return to country, they feel happy ([408] above).

440. ***Dr Palmer's evidence***: Dr Palmer said that cultural loss is felt in respect of country as a totality.[72] According to Dr Palmer, there is no divide in spiritual terms between one part of country and another.[73] Dr Palmer said that personal pain and loss had been caused by the country having been unalterably changed or destroyed, with loss of country resulting in loss of the spiritual relationship between a person and country.[74] Dr Palmer described the loss as manifesting in "epic emotions" that were strongly felt,

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[67] S.Warrie [117], [120], [122]; A.Mack [44]-[45], [81]-[82]; I.Guinness [24], [26], [30], [33]; I.Walker [11], [14]; J.Norman [10]; L.Coppin [13]; T.Daniel [24], [31]; L.Cheedy [23]; M.Cheedy [11], [13], [37], [50]; J.Coppin [6], [28]; E.Guinness [13]; K.Guiness [32], [48]; S.Wilson [16], [18]; W.Woodley [23]; K.Warrie [48]; T245.12-40 (Lyn Cheedy), 525.04-17 (Michael Woodley), 566.11-24 (Angus Mack); T600.20-34 (Stanley Warrie).

[68] Exhibit G1 Map 3 – Regional Overview Map (these sites are marked on that map with black squares, save for Millstream which is located near Ngurwanna (marked with a purple triangle)): T429.36-44 (Lorraine Coppin)).

[69] A.Mack [48], [80], [85]-[86], [118]; F.Cheedy [8], [10], [13]; K.Guiness [14], [17], [27]-[28]; W.Woodley [54], [83]; I.Walker [12], [17]; M.Woodley [10], [70], [430]; J.Coppin [7]-[8]; K.Warrie [41]; E.Guinness [9], [24]; S.Warrie [92]; L.Cheedy [38]; T430.21 (Lorraine Coppin).

[70] M.Woodley [13], [317]; M.Cheedy [25]; K.Guiness [32]-[33]; S.Warrie [120]; T249.28-31 (Lyn Cheedy); T292.6-14 (Isaac Guinness).

[71] SoAF [144].

[72] Palmer 2 [159]-[161], [185]; Palmer 1 [85], [93]-[98], [392].

[73] Palmer 1 [95], [97]-[99].

[74] Palmer 1 [264]-[265], [269]-[285]; Palmer 2 [151]-[152], [156]-[161], [179]-[182], [185]; T772.29-47.

acutely experienced, and posed a threat to individuals' self-worth, autonomy and identity (T785.1-3; Palmer 1 [94], [101]-[105], [285]). Also, cultural loss was experienced through the YP's belief that spirits and spiritual integrity of the land had been diminished (Palmer 1 [89], [286]-[300], [302]-[303]).

441. Cultural loss was also said to arise from the YP's belief that the YP must "look after [country]" or face consequences[75] (also, YP-CS [341]-[346]). Also, Dr Palmer said that the destruction of country was associated with a loss of the right to teach younger YP by reference to the landscape (Palmer 1 [98]-[100], [243]-[250], [254]; Palmer 2 [178]; T777.14-27).

442. The YP also seek to rely on indirect evidence, in the form of statements said to have been made by various YP to Dr Palmer, about an alleged drying up of country surrounding the mine and watercourses believed by the YP to be due to mining (YP-CS [343]; Palmer 1 [56]-[57]). As submitted ([541], [550]-[579] below), no compensation is payable for such alleged impacts.

443. Dr Palmer accepted that events before the grant of the FMG tenements would have already had the effect of diminishing the totality of Yindjibarndi country (T775.45-46), and that there had been transgressions, other than the mine, onto Yindjibarndi country historically (T785.11-12, 787.7-8, 787.24-29). But, Dr Palmer did not accept that quantifying cultural loss would need to grapple with those earlier events, with a somewhat unsatisfactory assertion that "the Yindjibarndi, characterise their loss in relation to a particular set of circumstances, and by reference to their own particular beliefs" (T788.4-5, 788.18-25).

444. ***Consideration***: FMG does not dispute that mining has impacted the land within the mine footprint. But, in assessing cultural loss arising from damage to country, it is relevant that very large areas of the Determination Area have not been impacted at all by the grant of the FMG tenements ([424] above). The assessment of compensation should take into account the evidence that the YP still go out and perform cultural activity on areas of country not within and not impacted by the mine ([420], [438], [439] above). As submitted, compensation is to be assessed relative to the land that remains available to the YP for the exercise of their native title rights and interests: *Griffiths TJ* [319]; *Griffiths HC* [164] (CJ&JJ).

445. The assessment of compensation for cultural loss should also reflect that, as accepted by Dr Palmer under cross-examination ([443] above), events before the grant of the FMG tenements would already have had an impact on the totality of Yindjibarndi country. Between the 1980s and early 2000s, various exploration licences and miscellaneous licences were granted over the Determination Area to mining companies

[75] Palmer 1 [47]-[48], [58]-[59], [96]-[97], [255], [258]-[261], [263]; Palmer 2 [150], [152]-[155].

other than FMG.[76] There is also evidence of pastoral leases being granted and historical oil prospecting occurring within Yindjibarndi country.[77]

446. Further, as submitted ([421]), the determination of compensation payable for the loss of spiritual connection to the land, attributable to the grant of the FMG tenements, should account for any loss of connection caused by the YP's earlier move away from Yindjibarndi country in the late 1960s.[78] There was evidence from the YP that this historical dispossession caused trauma and hurt, which was still being felt by the YP today,[79] and also evidence as to the infrequency of the YP accessing the area of the mine before the mine was built ([407] above). Where a sense of connection to country has already declined by developments or events before the relevant act, the amount to be awarded for non-economic loss will be less: *Griffiths HC* [98], [217].

447. Also, the determination of compensation should reflect the fact that the loss is not permanent, in that the excising of the land will stop when mine closure occurs, and the land will be rehabilitated following closure of the mine ([238]-[239] above).

448. No compensation for a loss asserted to have been suffered by the YP due to an inability to protect against the use of water is payable (cf YP-CS [343]). The YP do not have a right to control water access under the Determination [11], Schedule 5.

Damage to and destruction of sites

449. ***Agreed facts and YP's evidence***: It appeared that a reference to "site" in the YP's evidence was either to (i) a site within the meaning of s 5 of the AHA ([509] below), or (ii) a place of cultural significance to the YP, even if not so assessed. It is an agreed fact that the YP believe that, all through YP country, there are places "loaded with power": SoAF [129]. The YP do not think of one site or area as more important than another, with sites being connected and inseparable from the whole of country: M.Cheedy [9]-[10]; T532.10.

450. YP witnesses raised concerns about the destruction of places within the mine area, including that caves and burial grounds had been destroyed.[80] But, this evidence appeared to be based largely on what those witnesses had been told.[81] Also, the only burial site specifically identified by the YP witnesses was YIN10-004. Some of the YP

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[76] Marzsal Affidavit, Annexure XPM4 ("*Current_and_Historical_Land_Mining_and_Petroleum_Tenure*"; Mining Tenement Register Searches in respect of E47/54, E47/473, E47/474, E47/475, E47/585, E47/656, L47/47, L47/48).

[77] Exhibit A; A.09.006 *Daniel* (s86 NTA) [167]-[179], [184]-[187].

[78] Palmer 1 [118]; S.Warrie [7]; I.Guinness [5]; L.Cheedy [17]; A.09.006 *Daniel* (s86 NTA) [180]-[198]; A.09.016.01 *Warrie (No 1)* (s86 NTA) [45].

[79] T252.10-26 (Lyn Cheedy), 373.45-374.08 (Kaye Warrie), 679.19-679.27 (Fabian Cheedy).

[80] S.Warrie [118]; L.Cheedy [20]; T255 (Lyn Cheedy); K.Warrie [36]-[37]; L.Coppin [48], [51]; T.Daniel [33].

[81] T256.1-9 (Lyn Cheedy); T377.17-21 (Kaye Warrie); T435.04-31 (Lorraine Coppin); T32.15-20 (Tootsie Daniel).

visited YIN10-004 in 2011/2012 to conduct a smoking ceremony.[82] YIN10-004 has not been impacted by ground disturbance work, has not been salvaged, and is in a heritage restriction zone.[83] The Court went to YIN10-004 in August 2023 (T493.1-495.17).

451. General evidence was given by YP witnesses that *thalus* ("increase sites", which the YP believe help multiply food and other resources (SoAF [129])) in the mine area have been destroyed,[84] but, for the most part, there was no evidence about the number and location of these *thalus*.[85] The YP rely on Mr Woodley's evidence that the salvage of one specific *thalu* at site YIN10-095 involved "unauthorised rituals" (YP-CS [244]). But, a report prepared by FMG's archaeological consultants records that a *maban* (medical) man was invited by senior YP men to move the *thalu* from the tailings dam and thereby preserve it, and that ceremony was undertaken before the site was salvaged with Ministerial consent under the AHA (B.05.064, pp 187-188).

452. Evidence was also given that ochre sites and other resources or locations of cultural significance within the mine had or may have been destroyed, but again they were not identified by number or location.[86] Mr Woodley said that the heritage surveys had identified many sites, and before then, they were unknown to him (T537.34-538.17).

453. Significant ceremonial places and other places identified in the evidence have not been damaged or affected by the mine. Millstream was said to be a very important place for the YP,[87] and Bilin Bilin (which is near Millstream[88]) was the first place that the *Bundut* was held (SoAF [112]). Neither Millstream nor Bilin Bilin are within the Determination Area.[89] Woodbrook, where the YP go through their Law, is on Ngarluma country, and not within the compensation application area.[90]

454. ***Documentary evidence and s 86 evidence***: Relying on MW 2009 [5.6]-[5.10], the YP assert that *Ganjingarringunha wundu* (creek) ran through the area of the proposed mining tenement M47/1413; overlooking the creek's riverbed were some *yamararra* (caves) (sung about in the *Bundut*); and there were physical remains of elders in the caves (YP-CS [220]). In his evidence, Mr Woodley did not identify these caves.

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[82] M.Woodley [40]; K.Guiness [34]; T493.4-8.

[83] B.06.001 FMG Archaeological Heritage Places Database; Exhibit G2 Statement of Agreed Facts (Maps) (**SoAF – Maps**) [15(a)(i)].

[84] S.Warrie [91]; J.Norman [20]; L.Cheedy [20]; W.Woodley [47]-[49]; M.Cheedy [24].

[85] M.Cheedy [24]; S.Warrie [25]; L.Coppin [48]; T255.32 (Lyn Cheedy), 435.9-435.31 (Lorraine Coppin), 612.25 (Stanley Warrie).

[86] S.Warrie [129]; A.Mack [77]-[78], [92]; M.Woodley [37], MW-1, [39], MW-2, [41], MW-5; T255.44-256.9 (Lyn Cheedy), 614.11 (Stanley Warrie), 298.44-299.2, 299.25 (Isaac Guinness).

[87] A.Mack [85]-[86]; F.Cheedy [13]; T430.21 (Lorraine Coppin).

[88] L.Cheedy [10]; F.Cheedy [13]; K.Guiness [17]; T240.42 (Lyn Cheedy).

[89] Exhibit G1, Map 3 – Regional Overview Map (Bilin Bilin is marked with a black square on the map, and Millstream is located near Ngurwanna (marked with a purple triangle): T429.36-44 (Lorraine Coppin)).

[90] Exhibit G1, Map 3 – Regional Overview Map (Woodbrook is marked with a black square on the map); T307.36 (Ricky Smith).

455. Also, the YP rely on Davies 2014 (YP-CS [216]-[219]). Davies 2014 was relied on in *FMG Pilbara Pty Ltd and Another v Yindjibarndi #1* [2014] NNTTA 79 (concerning then proposed leases M47/1475 and M47/1473). Davies 2014, Annexure 1, identified 17 heritage places. But, 13 of those places have *not* been impacted by FMG's mining.[91]

456. ***Dr Palmer's evidence***: Dr Palmer said that the area of the mine had within it many places of cultural significance, and that at least some of those places had been destroyed (Palmer 1 [320]). He said it was not "[his] purpose here to document the places that have been recorded during multiple 'heritage surveys' as being significant to the Yindjibarndi people in terms of their cultural values" (Palmer 1 [319]). Dr Palmer did not describe specifically each culturally significant place or s 5 site said to be destroyed or damaged. In fact, Dr Palmer considered there to be "limitations of a site-based approach to evaluating heritage values and any subsequent assessment of the diminution of those values through site destruction": Palmer 1 [334]. He said that it was the destruction of the country understood as a whole, albeit comprising different component parts, including sites, that "lies at the core of Yindjibarndi feelings of cultural loss" (Palmer 1 [335]-[337]). Dr Palmer said, by reference to some places visited by the Court in Aug 2023, the YP considered the mine had diminished their cultural heritage and had caused them emotional and spiritual distress (Palmer 2 [112]).

457. Dr Palmer attempted to count the number of places of significance in the mine area arriving at his figures in Exhibit 10 ("Anthropologist's Supplementary Report – Revised Tables 2.1 to 2.4") (cf YP-CS [295]). Dr Palmer did this by considering the aerial maps that had been agreed by the parties.[92] The agreed maps included a Heritage Overview Map and Enlargements E1 to E14, with each of the enlargement maps E1 to E14 showing particular enlarged parts of the Heritage Overview Map. Dr Palmer looked at only 3 enlargement maps (E1, E2 and E3), and, by counting the locations asserted by YNAC to be Yindjibarndi places of significance[93] and locations from FMG's Heritage Database[94] marked on those maps, identified places he considered to be "intact" and places he considered to have been "damaged/destroyed" (Palmer 2 [30]-[31]). Dr Palmer assumed that the 3 enlargement maps "broadly" represented the incidents of "cultural significant places" across the area of the 11 enlargement maps that were each available for analysis (Palmer 2 [34]; T831.33-38). Dr Palmer could have counted but did not count the sites in each of the enlargement maps.

458. ***Consideration***: FMG does not dispute that some sites (assessed as such under s 5 of the AHA) in the area of the mine have been impacted by mining. But, the evidence does

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[91] Exhibit G1, Agreed Map 3, Enlargement 1, Enlargement 14.

[92] Palmer 2 [20]-[26], [164]; T752.42-752.46, 829.41-829.44; Exhibit 10 ("Anthropologist's Supplementary Report – Revised Tables 2.1 to 2.4"); Exhibit G1 ("Agreed Maps").

[93] SoAF – Maps [7]-[9].

[94] The locations from FMG's Heritage Database include various categories of heritage or potential heritage sites, sites or heritage places recorded as being active or having been salvaged, "FMG Heritage Place Buffers" (representing heritage buffers around active Aboriginal sites), other heritage places, and Heritage Restriction Zones: Exhibit G2 SoAF – Maps [13]-[14].

not establish the *cultural* significance of such sites to the YP. Indeed, there was evidence that witnesses' understanding of sites in the area of the mine came from what they had been told and/or had learned about those sites through the heritage survey process ([451] above). As submitted ([523]-[525] below), an impact on specific places said to be of particular *archaeological* significance was not the subject of evidence and does not provide a separate basis to claim *cultural* loss.

459. Also, the lay witness evidence did not identify with specificity the places said to be culturally significant to the YP which had been impacted ([451]-[452] above). The places of cultural significance identified in YNAC's lay evidence tended to be located outside the area of the mine ([453] above). YNAC emphasised that the "loss to Yindjibarndi country occasioned by the physical impacts of the [mine] cannot be singularly defined in terms of individual sites": YP-CS [268]. This is consistent with the evidence that the YP view country as a totality ([449], [456] above; see YP-CS [260], [268]-[270]). In view of this evidence, destruction of or damage to such sites should not sound in any compensation over and above any amount of compensation that may be payable for damage to the country.

460. As to Dr Palmer's assertions about the number of sites in the area of the mine, the assertions are unreliable and cannot be given any weight. His extrapolation process cannot be accepted as providing a reliable picture of the extent of impact. That exercise was, by Dr Palmer's own concession, subject to limits which warranted "serious reservations" as to the approach (T832.7-8, 832.28-30).

Impact on song lines

461. ***Agreed facts and YP's evidence***: It is agreed that the YP have different sacred song lines connected to the first Law ground at Bilin Bilin, which is in YP country outside and to the north-west of the Determination Area (SoAF [111]). One of these is the *Bundut* (SoAF [111]) which is one long song in an ancient language (F.Cheedy [13], [100], [103]-[104]). The *Bundut* was first performed at Bilin Bilin (SoAF [112]), near Millstream, the capital of YP country (K.Guiness [17]-[26]; L.Cheedy [10]; F.Cheedy [13]; T240.42 (Lyn Cheedy)). *Jowis* are also part of the song lines but separate to the *Bundut* (A.Mack [47]-[48]).

462. Evidence was given that the mine had affected the *Bundut*, including because one of the song lines could no longer travel through the mine (S.Warrie [87]), the mine had destroyed part of the Hamersley Ranges (L.Coppin [47]; K.Guiness [23]), and young people could no longer be shown places in the *Bundut* (A.Mack [50]). But, evidence was given that there are over 100 songs in the *Bundut* (M.Woodley [22]), and not all of them were affected by mining with the *Bundut* still being performed (T241.1-42; 512.28-32). Michael Woodley performed part of the *Bundut* during the August 2023 hearing (T487.45-488.07).

463. Also, there was evidence that knowledge about locations in the *Bundut* that *have* been affected, including the Hamersley Ranges and Ganyjingarringunha Creek, has been retained (K.Guiness [17]; I.Guinness [8], [27]; L.Coppin [47]; I.Walker [12]; T567.27-36). *Jowis* are also still performed, and one, called *Warlu* (serpent) *jowi* about *Barrimirndi* (the creative being which is believed to have created all watercourses in Yindjibarndi country) was performed by Michael Woodley during the August 2023 hearing (SoAF [115], [133]).

464. ***Dr Palmer's evidence***: Dr Palmer said that partial destruction of the *Bundut* had occurred, and this had resulted in cultural loss. The loss was partial in that the *Bundut* had been devalued and diminished by the degree to which its component parts had been destroyed or damaged. According to Dr Palmer, this "loss or partial loss" threatened the fundamentals of the YP's social, cultural and religious systems and the mechanisms by which the YP legitimised and perpetuated rights to country. This is said to have caused emotional issues (Palmer 2 [132], [145], [148]; Palmer 1 [373]). Dr Palmer also said that the track of the *Barrimirndi* and the *jowi* associated with it had been diminished (Palmer 1 [376]-[378]). The impact on the song lines had affected the integrity of teaching future generations about Yindjibarndi Law (Palmer 1 [363]-[367]).

465. ***Consideration***: Any loss asserted by an impact on the *Bundut* song line (YP-CS [272]-[283], [286]-[292]) is, as Dr Palmer characterised it (Palmer 2 [132], [145], [148]), a partial loss. That the *Bundut* continues to be performed and knowledge of the places in it has been retained is relevant to assessing the extent of the impact on native title rights and interests. As to the impact on other song lines (YP-CS [283]-[285], [288]), *jowis*, including the *jowi* about *Barrimirndi*, are also still performed ([462] above).

Social division

466. ***Agreed facts, YP's evidence and s 86 evidence***: The agreed facts and evidence as to alleged social division are discussed at [132]-[135], [142]-[152] above.

467. ***Dr Palmer's evidence***: As discussed ([402]), Dr Palmer was instructed to assume that division in the YP community was a consequence of agreements and relationships between FMG and some common law native title holders without the consent of YNAC (Palmer 1 [109], Appendix A [6]). Consistent with that assumption, Dr Palmer said that he proceeded on the basis that one of the "particular effects" of the development of the mine had been a division in the Yindjibarndi community (Palmer 1 [113]).

468. In cross-examination, Dr Palmer said he had not adopted the assumption uncritically (T793.39-40), and that after conducting his field work it seemed to be a reasonable one (T790.38-39; T794.8-9). According to Dr Palmer, disagreements related to FMG's offer for an agreement with the YP, FMG's close relationship with WMYAC, and attempts by WMYAC to gain control of YAC. Dr Palmer said that the "root cause" of these things was the mine and other developments at the mine (Palmer 1 [180]-[183]).

469. For these conclusions, Dr Palmer relied on oral accounts he said he was given by 7 YP (6 of whom were members of YAC, 4 of whom were Court witnesses, and none of whom were members of WMYAC). Those accounts were generally to the effect that WMYAC formed as a "breakaway" or "splinter" group, separate to YAC, with WMYAC wanting to accept FMG's proposed agreement, but YAC "wanting more" (Palmer 1 [120]-[131]). YNAC appears to rely on these accounts, as recited by Dr Palmer (YP-CS [454]-[456]). But, Dr Palmer said that "it is evident that the division developed from differing views as to how native title rights, recognised by the Court, were to be exercised" (Palmer 1 [112]). He accepted that different views among native title holders could occur (T818.46-47). He accepted that people could disagree on what should occur on their land, including "the development of the Fortescue Solomon Hub" (T825.24-31).

470. Dr Palmer was also instructed to assume that "social disruption" was a matter that would be relevant to the compensation application (Palmer 1 [107], Appendix A [8(c)]) (cf [128]-[153] above). Broadly, Dr Palmer's evidence as to losses arising from "social disruption" (on which the YP rely (YP-CS [461]-[474])) asserted losses in the forms of, (i) "social loss" and physical violence, (ii) impact on cultural practices and norms, and (iii) loss of cultural knowledge. As to (i), Dr Palmer collected stories of fights between members of YAC and WMYAC, and views from the YP that this would not have occurred if not for the community division. He said that social media played a role in perpetuating divisions and negative feelings, and it was possible that the use of social media had exacerbated physical violence (Palmer 1 [164]-[170]).

471. As to (ii) (impact on cultural practices), Dr Palmer said that the YP had become unable or unwilling to observe rules of kinship and social organisation, in particular *Galharra and nyinyaard* ([134] above), because of division.[95] Dr Palmer also said that there had been cultural loss occasioned by breaking rules applicable to the *wurruru* (godmother or midwife) relationship, including, e.g., through court action taken by Sylvia Allen, *wurruru* to Stanley Warrie, against him and Mr Woodley over a dispute between YAC and WMYAC.[96] Dr Palmer referred also to the *gajardu* (godfather) relationship, but he was ultimately not satisfied that the evidence supported a conclusion that there had been a loss, if any, which was attributable to the mine or otherwise to FMG's conduct: Palmer 2 [244]-[245], [254]; cf YP-CS [253], [462]. Dr Palmer referred to "*yulbu*" relationships (relationships between boys who had gone through initiation together) and said he had been told of an instance where a YP man could no longer talk to his *yulbu* (who was a member of WMYAC): Palmer 1 [163]; see YP-CS [469]. The *yulbu* relationship was not mentioned in any direct evidence given by the YP witnesses.

[95] Palmer 1 [38]-[49], [73]-[77], [82]-[84], [132]-[143], [147]-[155], [157]-[159]; Palmer 2 [191]-[192], [194], [199], [203]-[204], [239], [247]-[250], [253].

[96] Palmer 1 [82]-[84], [157]-[159].

472. Dr Palmer said cultural loss had been occasioned by the YP no longer sharing in certain rituals together (Palmer 1 [160]-[163]). He also said there had been cultural loss due to diminishment of *gumawarri* (Palmer 2 [203]-[204]; T755.01-755.19) (meaning to "reunite": Palmer 2 [191]-[192], [194]). But, whilst diminished, *gumawarri* was still observed, and there was "some feeling that, in some instances, it was no longer being done, particularly in the context of the rituals of initiation" (T754.42-754.47). Dr Palmer said the alleged division had been a significant source of pain and suffering, going to the core of being Yindjibarndi: Palmer 1 [174]-[179], [184], [186], [189]-[191]; Palmer 2 [188]-[189], [217]-[218], [253].

473. As to (iii) (cultural knowledge), Dr Palmer said that loss had occurred by an asserted loss of cultural knowledge, which was attributable to division among the YP. This included because elders would not come together to take younger people out on country, inhibiting learning and passing on of knowledge (Palmer 2 [210], referring to I.Guinness [41]). He referred to an unfinished project, described by Lorraine Coppin, to record YP history and culture, that had been put on hold because the YP had to "focus more on the struggle of FMG" (Palmer 2 [206], [208]-[209], [211]-[212]). But FMG did not cause social division. Different views were held by different YP, causing division.

474. ***Consideration***: Evidence as to social disharmony is irrelevant and inadmissible ([137] above). A claim for the fighting and division described by Dr Palmer is not compensable loss under the NTA or the MA 1978. Compensation under the NTA is an entitlement to compensate the YP for any loss, diminution, impairment or other *effect of the future acts* on the YP's *native title rights and interests*. Social division is not an effect on the YP's native title rights and interests (as possessed under their traditional laws, connecting them with the land, and recognised by the common law of Australia (NTA, s 223)). Nor is the alleged division "social disruption" that is compensable under the MA 1978: [130], [137], [153] above.

475. In any event, the evidence does not demonstrate that division has been caused by the grant of the FMG tenements ([141]-[153] above), and Dr Palmer's "one root cause" (as to social division having been caused by the mine) should not be accepted. Dr Palmer did not undertake any "baseline" enquiry as to the well-being of the group which accounted for the YP's history and the state of harmony or otherwise, before issues arose with the mine. The evidence reflects that tensions and disagreements may arise among native title holders about a mining project on traditional country. But, even if it were accepted that division had been caused by *disagreements among the YP as to the terms on which the mine might acceptably proceed*, it does not follow that the grant of the FMG tenements caused the alleged social disharmony. Social disharmony is a feature of human relationships (Palmer, T819.27-30). The relevant effect on native title rights and interests must have been *caused* by the compensable act to found a right to compensation: *Griffiths HC* [226].

476. Further, Dr Palmer's analysis of social disruption was one-sided. Dr Palmer did not speak with any individuals associated with WMYAC ([405] above). There is no evidence to support his assertion that the hurt felt "likely applies to all members of the Yindjibarndi community whether they owe their first allegiance to WMYAC or the YAC" (Palmer 1 [15], [114], [117], [181]).

477. If, contrary to the above, the asserted losses are compensable, the assessment should consider the evidence that the social rules described are still recognised and observed, at least by some, within the Yindjibarndi community (T338.08 (Estelle Guinness); S.Wilson [12]; T754.42-754.47). Further, the loss is not properly regarded as permanent. There is evidence from YP witnesses as their desires and expectations that the YP will come back together ([135] above). The prospect of reunification of the community, and the healing of the division asserted to give rise to the cultural loss, is relevant to assessing any compensation amount: *Griffiths HC* [230].

E.6.6. Psychology evidence as to impact on YP's native title rights and interests [Issues 3A, 4 and 7]

478. Dr Jeffrey Nelson, a psychologist, gave his views based on interviews of some YP. His first report, Nelson 1, was filed on 23 Mar 2023. Dr Nelson was present during the hearings in August 2023. Dr Nelson prepared a supplementary report, Nelson 2, filed in Feb 2024; amended in Apr 2024. He gave evidence in Apr 2024.

479. In Nelson 1, Dr Nelson said that he sought to understand "the psychological injury caused by the experience with FMG" ([17]). For that purpose, Dr Nelson met and spoke with 21 YP over a period of 3 weeks (Nelson 1 [12]). In Nelson 2, Dr Nelson's stated focus was on "the non-economic psychological injuries expressed in terms of cultural and/or spiritual loss and its effects on the Yindjibarndi's spiritual connection to country, capacity to adhere to cultural and familial expectations, and to restore the community back to its previous state" (Nelson 2 [9]) (cf HoC [4]).

480. Dr Nelson's evidence needs to be approached with caution. He did not undertake his role as an expert witness in an impartial manner. Dr Nelson's true objectives in giving evidence for the YP are clear from his own audio recording of his call with Mr Woodley, excerpts of which are in evidence (Exhibit M).

481. YNAC initially refused to provide the audio file (T719.1-12). Although an attempt was first made by Senior Counsel to justify this on legal professional privilege grounds (T719.27-30), Senior Counsel then claimed the privilege arose from Dr Nelson's status as a psychologist, and the conversation was "confidential… based on him being an allied medical practitioner" (T720.27-29). The privilege claim was then not pressed.

482. Dr Nelson's notes of other conversations were discovered. The initial attempt to withhold the audio recording on an assertion of privilege and confidentiality was unsatisfactory. The conversation was initially sought to be kept secret. It now appears

because it exposed a lack of impartiality. The excerpts show that Dr Nelson wanted to be YNAC's advocate, willing to be guided by Mr Woodley. Dr Nelson said: [97]

> *Yeah. Michael what I'm going to do is I'll write this, I'll send it to you, umm, feel free to edit as big as you want to edit, I don't mind eh, umm, just so you keep me on track, because I think, I really want this to be important, I want this to be so strong in the fact that the damage that's been done, and this is abstract right, so for those who understand culture they realise there is injury, for those who are money bean counters like the Government and Forrest, they, they don't want to understand it. Umm, this'll be, this will obviously be highly publicized so it's also an opportunity to say "this is what you bastards are doing to us you know, each time you do this".*

483. Dr Nelson compounded his inappropriate conduct by stating in cross-examination that his comment (in the recording), that he would send his draft report to Mr Woodley (Exhibit M, [5]), was a reference to providing his notes of the interview to Mr Woodley to check for accuracy (T897.35-41). He further said that nothing was in fact sent to Mr Woodley (T897.43-898.3). This explanation is implausible; as Dr Nelson had the recording, there was no need for Mr Woodley to check anything. The words spoken by Dr Nelson in his conversation with Mr Woodley should be taken for precisely what they say: Dr Nelson's intention was to give Mr Woodley the chance to embellish or maximise the claimed injury, and to present those claims through Dr Nelson.

484. There is reason to doubt the credibility of other aspects of Dr Nelson's evidence. For instance, Dr Nelson's proposal ([502]-[505]), involving costings of new buildings and support services, was an unsophisticated attempt to calculate some costs without much analysis. When the construction costs were raised with him in cross-examination, Dr Nelson distanced himself from this evidence, readily admitting that an existing building could be used for the centre (T904.1-2).

485. Further, Dr Nelson's account of certain younger YP men describing "an experience of being doubled over by a level of somatic symptomology that made them vomit and have to leave the mine site" (Nelson 1 [39]) did not reflect Dr Nelson's field notes (which did not record the young men having described such an experience). Dr Nelson's notes *did r*efer to the young men saying, "mining equals money and toys", that it was a "pretty good life", and that they did not seek to be too involved in community division (Exhibit J), but none of this was described in Dr Nelson's report. These unbalanced accounts cast doubt on the veracity of Dr Nelson's evidence.

486. There is also reason to question the thoroughness and professionalism with which Dr Nelson approached the preparation of his reports. Dr Nelson said in cross-examination that there were various places in his reports where he had based his

[97] Exhibit M, Dr Nelson Audio – Transcript (excerpts 1-5) [5].

opinions on interviews or draft witness statements that he had either mis-referenced or not referenced at all (T888.32-40, 891.12-13, 878.35-879.06, 880.28-31).

487. Dr Nelson appeared to have selected source material to support his opinions without considering whether they were actually relevant. For instance, Dr Nelson opined that the people with whom he spoke were seeking positive change in their community (Nelson 1 [47], fn 21), and posited that "people who will volunteer are less affected [psychologically]" (T891.44-45). For that proposition, Dr Nelson relied on the statement in a document, from Volunteering Australia (Nelson 1 [47]; T891.39-41, 893.15-16). But, the Volunteering Australia document is not apposite to the conduct that Dr Nelson sought to describe (T893.29-894.5).

488. Also, when asked why he had relied on a definition of "psychological injury" taken from a publication by Safe Work Australia titled, "Taking Action: A best practice framework for the management of psychological claims for the Australian workers' compensation sector" (Nelson 1 [18]), which was intended to "raise awareness of work health and safety" (T877.23-33), Dr Nelson said that the term, "psychological injury" was not common or normally used, and he wanted to provide "a conceptualisation of what it was seen as" (T877.41-878.04). But, it is reasonable to expect that, for a definition of "psychological injury", a qualified psychologist such as Dr Nelson would not rely on guidance developed to deal with workers' compensation claims, something removed from the present context. Further, if the phrase is not one used in psychological discourse, Dr Nelson should have made this clear; he should not have used the phrase if it is not a phrase used and understood within his expert discipline.

Alleged psychological injury

489. Leaving aside the difficulties with "psychological injury" (as it applies to a group of people) being an appropriate criterion, it is necessary to consider what Dr Nelson said. When Dr Nelson's approach is accepted, his opinions cannot found a claim for compensation.

490. Dr Nelson said that the YP had suffered psychological injury and inter-generational trauma, including "collective trauma" (Nelson 1 [22]-[26], [33], [41]-[45], [49]-[50]; Nelson 2 [18], [21]-[22], [43], [57]). Dr Nelson said he had observed "diagnosable" clusters of symptoms in "more than 65% of people [he] spoke with" (Nelson 1 [20]) (13 of the 21 people with whom he spoke (T878.24)). Dr Nelson said that a lack of formal diagnoses did not speak fully to the extent of "psychological injury" (Nelson 1 [20]), and that the level of trauma and "psychological injury" remained to be accurately assessed (Nelson 2 [55]).

491. Dr Nelson referred to distress, grief and trauma having been caused by loss of important places featured in song lines, and damage to country generally (Nelson 1 [22], [35], [38]; Nelson 2 [15], [17], [50]). He said the Court's visit of the mine in Aug 2023 provided an opportunity to appreciate the severity of the impact of mining operations

on the country and on elders responsible for its care and protection (Nelson 2 [27]-[28], [46], [48]), but that the formality of court processes meant emotions were often muted (Nelson 2 [44], [46]-[47]). Dr Nelson also said that trauma and distress had been caused by FMG having divided the YP (Nelson 1 [22]; Nelson 2 [21], [55]). He said that the disagreement had resulted in the breaking of cultural protocols, breakdowns in relationships, and ceremonies being held separately (Nelson 1 [29], [44]; Nelson 2 [11], [35], [57]).

492. The injury described by Dr Nelson is not a compensable loss. Compensation for non-economic loss is about valuing the loss of spiritual connection to country: *Griffiths HC* [152]-[154] (CJ&JJ). The "hurt feeling" professed by the YP in recognition of damage to country, and which may be compensated for under the NTA, is *a description of the injustice, rather than the mental state following the impact on native title rights and interests*: *Griffiths HC* [313]-[314] (Edelman J).

493. In any event, the sample of the YP with whom Dr Nelson spoke was not sufficient for Dr Nelson to draw the conclusions that he did. Dr Nelson's conclusions were based on interviews, of between 60 and 150 minutes, with 21 YP and undisclosed members of the YAC Board, from a community that on Dr Nelson's evidence numbered between 1,000 and 1,200 people (Nelson 1 [12]-[13], [25]-[32]; T866.8-22). To decide who to contact for interviews, Dr Nelson used a list he received from Phil Davies of "some of the more important leaders in the side" (it was not clear whether this referred to the YNAC/YAC "side" or WMYAC "side") (T866.42-867.07). Ultimately, Dr Nelson spoke with only 3 people associated with WMYAC, namely, Rodney Adams and John Sandy (Nelson 1 [12]) and Allery Sandy (T903.18, 920.25-27). Otherwise, most people with whom Dr Nelson spoke were YP witnesses or their immediate family.

494. Dr Nelson's opinions were, by his concession, based "on a relatively small sample" (Nelson 1 [47]). Dr Nelson accepted that he could not opine on the mental health of the people with whom he did not speak (T895.11-12) and the small sample group could not statistically reflect the position of the entire community (T909.43-45, 910.1-16). Indeed, Dr Nelson said that he felt as if he had failed at one level, because "the more representation you have, the better" (T920.15-18). And, as put to Dr Nelson in cross-examination (T894.41-44), it would be reasonable to infer that among the YP with whom Dr Nelson did not speak, there would be many people who were less upset and aggrieved than those motivated to speak with Dr Nelson.

495. Also, the timeframe over which Dr Nelson conducted interviews – about 7 different days over 3 weeks (T865.29-36; Nelson 1 Appendix 1, [20]) – was unlikely to have been adequate for him to have undertaken research and formed views as to the state of mental health at the community-wide level, assuming such a "community" mental state could be determined.

496. Regardless, the evidence did not establish that the grant of the FMG tenements (or FMG) was the cause of the alleged trauma and injury. Dr Nelson's evidence was that the incidence of "psychological injury" post-FMG was difficult to establish (Nelson 1 [20]), as it was difficult to establish whether the incidence of trauma occurred only after the arrival of FMG (T911.17-20). Dr Nelson also agreed that the proportion of the population affected before and after FMG was difficult to ascertain (T911.31-32).

497. Indeed, Dr Nelson's evidence was that factors tending to cause "community" trauma, such as racism, poverty, oppression and systematic dismantling of cultures and communities, existed in the community "pre-FMG", and this had created widespread vulnerability (Nelson 1 [25]). He accepted the YP were forcibly moved to Roebourne in the 1960s and 1970s, away from their country to live in conditions that broke cultural protocols and caused ongoing distress, and they had been prevented from having visits from family who lived away (Nelson 1 [14], [27]; T911.1-8).

498. Dr Nelson also said that "[t]he increased drinking and intoxication [in the 1960s and 1970s] was accompanied by a failing in the structures that had maintained the community and their culture for so long: addiction was increasing exponentially, and families were breaking at the seams. This was a time of great regret for many of the people that were interviewed for the current report" (Nelson 1 [15]). For these opinions, Dr Nelson cited the book, *Enough is Enough* (2007), by Noel Olive (Nelson 1 [15]; T871.9-14). In a passage Dr Nelson was shown, Mr Olive describes Roebourne as, "a run-down, battered, community of houses and people loaded with emotional and historical trauma" (T872.6-7). Dr Nelson said that he did not disagree with that passage, "over the period that [Mr Olive] writes up 'til 2007 or it was published" (T872.39-43). Dr Nelson's evidence did not take the earlier trauma among the YP into account.

499. Contrary to YNAC's assertion (YP-CS [496]-[497], [509]), Dr Nelson's evidence as to pre-existing trauma does not attract the application of the "egg-shell skull" principle, which has been recognised in claims for tortiously caused psychiatric injury. In this case, compensation is sought for the effect of the future acts on native title rights and interests. The egg-shell skull rule is irrelevant to assessing cultural loss. That the egg-shell skull principle is one of compensation and not liability (YP-CS [496]) is no answer to the fact that the evidence does not establish the required causative connection. Where liability to compensate for the asserted injury has *not* been made out, the egg-shell skull rule cannot be relied on; it goes to quantification of damages only "once duty, breach and some damage are established" (*Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317 [117] (McHugh J)).

500. Compensation is given for the effects of the compensable acts on spiritual connection with the land. Dr Nelson's evidence does not establish any effect on the YP's spiritual connection to the land due to the grant of the FMG tenements. Dr Nelson does not have the required qualifications and expertise to opine on such loss. Under cross-examination, Dr Nelson referred only to his experience in many communities,

working with indigenous people, and they spoke about spiritual loss and spiritual pain (T899.31-35). YNAC seeks to rely on Dr Nelson's opinions as to the impact on the YP's spiritual connection (YP-CS [501]-[502], [513]). But, Dr Nelson's experience does not qualify him to give opinions as to that impact (cf YP-CS [494]). Also, as explained, any feeling of loss flowing from a feeling that the YP's consent was needed (Nelson 1 [22]) is not compensable ([85] above).

501. Dr Nelson's evidence as to social division and social disharmony is irrelevant and inadmissible ([137] above). According to Dr Nelson, "the division can be conceptualised as a product of a disagreement about mining on Country and the compensation for such" (Nelson 1 [29]). Under cross-examination, Dr Nelson agreed that different YP had, and have, different views about whether mining should proceed and appropriate compensation (T912.14-16). If (which is denied) the injury said by Dr Nelson to arise from social division is compensable, the assessment should take into account the possibility that, in the future, divisions will heal, as Dr Nelson himself acknowledged (Nelson 1 [34], [36]; Nelson 2 [32]-[33]; T905.37-45). The evidence given by YP witnesses was that they had a desire to come back together and believed the community will reunite (e.g., T273.35-274.22 (Sonya Wilson), T339.1-15 (Estelle Guinness); K.Warrie, [19]; F.Cheedy, [43]; S.Wilson, [11]).

Proposed measures to address psychological harm

502. Dr Nelson gave evidence of a proposed "intervention" to address impacts on the YP's health and well-being (Nelson 2 [57]-[58], Attachment B). The intervention involved a "five-year structured approach to community rebuilding and individual recovery" (Nelson 2, Attachment B). Excluding yearly ongoing costs, total costs were estimated to be $4.4 million. Dr Nelson agreed the implementation of his remedial plan would mean trauma would be significantly reduced or alleviated (T913.19-21).

503. YNAC claims a total of $112,140,000 for "the estimated cost of psychological and other services required to treat social disruption/division and related psychological trauma" (HoC [4]; YP-CS [4]). But included in that figure is a component of $6.6 million for the construction of the wellbeing centre. This is twice the amount of Dr Nelson's estimated $3.3 million for construction. The reason for the duplication is unexplained and unclear. Also, Dr Nelson's evidence in cross-examination was that construction of a new building was in fact unnecessary, and he would prefer that the project be carried out in one that already existed (T904.1-6, 908.24-26). Accepting that evidence, there is no basis for YNAC having included the construction costs at all in the estimated $112,140,000 on which they base their claim. Further, the claim is said to be a claim for economic loss (HoC [4]; YP-CS [4], [196]-[198]). It appears to be a bad claim for non-economic loss. Either way, there is no basis for the claim.

504. YNAC's claim also includes ongoing costs of $1.74 million per year for 60 years. There is no basis for applying estimated annual costs across a 60-year period. Dr Nelson said

that a timeframe for recovery could not be accurately estimated: Nelson 2 [58]. In any event, Dr Nelson's intervention outlined "a proposed *five year* structured approach to community rebuilding and individual recovery" (Nelson 2, Attachment B (point 1)). Also, no attempt has been made to discount the estimated $112,140,000, to take account of the fact that a payment is sought for alleged future costs.

505. Regardless, Dr Nelson's evidence regarding the nature of the proposed intervention and his estimate of costs should be given no weight. Dr Nelson had no previous experience in establishing a centre and a program such as the intervention he outlined (T904.8-10). Also, there is no proper basis for Dr Nelson's estimated cost figures. His figures as to the forecast costs of the intervention were based on hearsay evidence (Nelson 2, Attachment B [6(c)]; T908.16) as to estimated construction costs (an estimate which Dr Nelson described as "very rough"), and numbers reflecting salaries on job advertisements (not in evidence) found on Seek.com (T908.8-10).

E.6.7. Archaeology evidence [Issue 7]

506. The YP relied on evidence as to the archaeology of the area of the mine to support a claim for non-economic loss. The evidence does not establish such an entitlement to compensation. Evidence as to archaeological value is not, without more, evidence of claimable cultural loss.

507. YNAC asserts that the archaeological significance of the area of the mine is "likely underestimated" in the materials before the Court (YP-CS [523]-[528]). This is speculation. There is no precise evidence of other particular sites having had significance.

508. The suggestion that the level of excavation at the YG-02 site at Bangkangarra (**YG-02**) (which Prof Veth is undertaking under an Australian Research Council funded programme) compares unfavourably with FMG's salvage programmes does not permit a conclusion that the YP are entitled to extra compensation for cultural loss. FMG's approach was subject to the AHA, considered by the ACMC, and was the subject of Ministerial consent under the AHA. This point applies also to the criticism that FMG's approach to heritage surveys was not "best practice". YNAC's archaeological experts accepted that FMG and its consultants complied with the regulatory requirements, undertook numerous heritage surveys in a systematic way to locate archaeological sites and places in the area of the mine, and made a substantial effort to mitigate the loss of cultural materials by salvage: [526] below.

Statutory framework

509. The AHA[98] provides for the preservation or protection of Aboriginal sites. Part IV provides for the protection of "Aboriginal sites", which is defined in s 4 to mean a place to which the AHA applies by the operation of s 5. Sec 5 identifies potential categories of a "place" or "site", which the AHA regulates. They are:

(a) places of "importance and significance" where any object which was used for any purpose connected with the traditional cultural life of the Aboriginal people was found (AHA, s 5(a));

(b) any sacred or ceremonial site which is of "importance and special significance" to persons of Aboriginal descent (AHA, s 5(b));

(c) any place which, in the opinion of the ACMC, is associated with Aboriginal people and which is of historical, anthropological, archaeological or ethnographical significance and should be preserved "because of its importance and significance to the cultural heritage of the State" (AHA, s 5(c)); and

(d) any place where objects *to which the AHA applies* are traditionally stored (AHA, s 5(d)).

510. Central to the AHA's operation are the ACMC and the Minister: *Abraham v The Hon Peter Charles Collier MLC* [2016] WASC 269 [15]; ***Wintawari** Guruma Aboriginal Corporation RNTBC v Wyatt* [2019] WASC 33 [26]. The ACMC is an advisory body, the members of which have "special knowledge, experience or responsibility which in the opinion of the Minister will assist … in relation to the recognition and evaluation of the cultural significance of matters" coming before the ACMC (s 28). The ACMC evaluates the significance and importance of Aboriginal sites (ss 18(2), 39(1)(c)).

511. The AHA (s 15) requires that any person with knowledge of, among other things, any place to which the AHA applies to report it to the Registrar. The AHA (s 17) makes it an offence for a person to excavate, destroy, damage, conceal or alter an Aboriginal site or object on or under an Aboriginal site unless the person is acting with (1) the Registrar's authorisation under s 16, or (2) the Minister's consent under s 18(3).

512. Under the AHA (ss 18(1), 18(2)), an owner of land (which includes a mining tenement holder) may obtain the Minister's consent to use land for a purpose that would otherwise be likely to contravene s 17. The owner is to provide written notice to the ACMC that they require to use the land in that way (s 18(2)). The ACMC is then required to form an opinion as to whether there is an Aboriginal site on the land, evaluating the importance and significance of the site (s 18(2)). In making this evaluation, the ACMC must have regard to, among other things, any existing use or

[98] Reference is made to the AHA as in force up to 22 Dec 2021. After 22 Dec 2021, substantive amendments were made to the AHA, which are inapplicable here.

significance attributed under Aboriginal custom, any former use which may be attributed by historical association, any potential anthropological / archaeological / ethnographical interest, and aesthetic values (s 39(2)).

513. The ACMC is then required to inform the Minister of their recommendation as to whether or not the Minister should consent to the use of the land for the required purpose, and any conditions on which the Minister's consent should be given (s 18(2)). The Minister is required to consider the ACMC's recommendation and either consent to the use of the land for the required purpose, subject to any conditions, or wholly decline to consent (s 18(3)). Although the AHA gives no *statutory* right of review against the Minister's decision (*Wintawari* [29]), there was always a constitutional right to seek judicial review of the Minister's decision (*Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 [98]-[100]).

514. A claim for compensation under the NTA or under the MA 1978 (s 123) cannot involve revisiting the Minister's consent under the AHA (s 18(3)) to permit land use that would otherwise have contravened the AHA (s 17). This case is not the place for differences of view about significance and importance of places and sites to be re-ventilated: such differences do not ground a claim for compensation for economic or cultural loss.

515. YNAC's criticism and speculation about places that FMG's heritage consultants considered, in their professional opinion, were not likely to meet the AHA's definition of an important or significant Aboriginal site (s 5) is not to the point: cf YP-CS [519]. Also, despite the AHA not having application, where such places were drawn to FMG's attention, steps were taken to record, preserve and mitigate any impact at such places.

Expert evidence

516. YNAC relied on the opinions of two archaeologists: Prof Peter Veth, who had been carrying out an excavation at YG-02 at Bangkangarra, as part of an Australian Research Council Laureate Fellowship program; and Dr Caroline Bird, who was engaged to assist Prof Veth to complete a written report. FMG adduced expert archaeology evidence of Mr Douglas Williams in response.

517. YNAC and FMG identified 6 key topics arising from the experts' reports. Following conferral, the experts reported that there were no substantial archaeological issues on which they disagreed as to those topics (with one of either Prof Veth or Dr Bird addressing each topic, and Mr Williams addressing all topics): Veth & Bird/Williams JR [2], [6], [10], [13], [18], [23]. Given the agreement between the experts, there was no oral evidence on archaeology.

518. The 6 topics fell largely within one of 3 primary issues: the archaeological significance of places within the mine; impact on archaeological places and sites; and the archaeological processes employed by FMG and its consultants. The agreed positions of the experts as to these issues do not advance YNAC's claim for cultural loss.

519. Topics 1, 3 and 4 were directed, broadly, to the archaeological significance of places within the mine. As to topic 1 (the age of human occupation within the area of the mine and at Bangkangarra), following Mr Williams' report which questioned the reliability of the dating of some of the oldest claimed occupation dates (such as 53,000 ka) (Williams 1 [19]-[41]), Prof Veth and Mr Williams agreed that the age of human occupation within the area of the mine and at Bangkangarra was between 40-45 thousand years ago: Veth & Bird/Williams JR [1]. Mr Williams opined that an age of occupation of 42,500 years ago is consistent with the earliest occupation of a number of other sites in the Pilbara region (Williams 1 [24]). This conclusion was not challenged in Veth & Bird 2 or in Veth & Bird/Williams JR. YNAC's submissions (YP-CS [520], [525]) as to significance based on contentious occupation dates older than the range of 40-45,000 years should not be accepted.

520. As to topic 3 (significance of the archaeological sites located within the area of the mine), Prof Veth and Mr Williams agreed that the body of sites within the mine area was, collectively, regionally significant and able to contribute to nationally important issues in First Nations archaeology, but none reached a threshold of "National Significance" under the *Environmental Protection and Biodiversity Act 1999* (Cth): Veth & Bird/Williams JR [7], [9]. On topic 4 (whether inferences could be drawn that the area of the mine contained archaeological sites or places equally as archaeologically rich as YG-02 at Bangkangarra), Prof Veth and Mr Williams agreed that YG-02 was a "deep and old site", and by reference to the range of raw materials used to make artefacts found at YG-02 and their density, there was some similarity between YG-02 and archaeologically richer sites within the mine. But, they agreed, it was unlikely that sites of similar qualities to Bangkangarra had gone unrecorded: Veth & Bird/Williams JR [11]-[12]. YP-CS [531] overreach by equating YG-02 and Juukan 2 with sites within the mine area, and erroneously criticises FMG for not undertaking a comparable level of investigation.

521. As to the damage to archaeological places and sites as a result of FMG's mining activities (topic 2), it was said by Dr Bird and Mr Williams that within the mine:

(a) 249 sites had been subject to s 18 consents under the AHA, and that the majority of those had been destroyed (Veth & Bird/Williams JR [3]); and

(b) many (more than 285) archaeological places had been salvaged in whole or in part, representing a substantial effort to mitigate the loss of cultural material (Veth & Bird/Williams JR [4]).

522. YP-CS [518]-[519] repeats the above, but there is no evidentiary foundation for the conclusions as to these numbers ([529]-[534] below). Prof Veth and Dr Bird were not briefed with the s 18 applications and consents so as to be able to calculate the number themselves. The number of sites said to have been subject to "s 18 consents" appears to have been based on an assumption provided by YNAC's solicitors to Prof Veth and

Dr Bird (Veth & Bird 1 [24] (p22), Annexure 1 (p105) (Letter of instruction from Blackshield Lawyers to Prof Veth and Dr Bird of 7 June 2024) [6] p107).

523. Whatever the number of archaeological sites or places impacted by the mine, YNAC did not adduce evidence as to *the spiritual significance to the YP* of the sites impacted by mining. As submitted ([459]), YP witnesses did not identify with specificity the impacted places that were culturally significant to them and the places of cultural significance identified in the evidence tended to be located outside the area of the mine.

524. Further, there was evidence that the process of the mine and heritage surveys had identified many sites, that had not been previously identified as sites at all by the YP and had not previously been places where the YP had often gone ([450]-[451] above). Also, the effect of the evidence was that it was impact on country understood as a whole that informed feelings of cultural loss ([449], [456] above). An impact on *specific places said to be of archaeological significance* was not the subject of evidence and does not provide a separate basis to claim *cultural* loss.

525. Also, the expert opinions as to the archaeological significance of places (topics 1, 3 and 4) do not establish how the places are *spiritually or culturally significant* to the YP. The assessment of compensation for non-economic or cultural loss requires an assessment, in monetary terms, of *the sense of loss of connection to country* suffered by the YP by reason of the impact on native title rights and interests. The connection is "spiritual", such that compensation is to be assessed having regard to the *spiritual significance* of the land affected. The task is to determine the *spiritual relationship with the country* and to translate the spiritual hurt caused by the compensable acts into compensation: *Griffiths HC* [84], [155], [166], [187], [216].

526. As to the processes employed by FMG and its consultants, Dr Bird and Mr Williams agreed that the methods adopted to identify, investigate and mitigate archaeological sites within the mine (topic 5) were comparable to those widely employed in the Pilbara, and that heritage consultants appeared to have complied with regulatory requirements: Veth & Bird/Williams JR [14]. Dr Bird and Mr Williams said that more detailed investigation could have been done to mitigate the loss of *some* sites (Veth & Bird/Williams JR [17]), but they did not specify which sites could have been the subject of additional investigation, nor did they say what should then have occurred. Importantly, Dr Bird and Mr Williams agreed that a substantial effort had been made to mitigate the loss of cultural material (Veth & Bird/Williams JR [4]).

527. Dr Bird and Mr Williams also agreed that there was no requirement for results of archaeological investigations undertaken at the mine to be published (topic 6): Veth & Bird/Williams JR [19]. They agreed this was a deficiency in the regulatory system: Veth & Bird/Williams JR [20]. It follows that neither FMG nor its consultants can fairly be criticised for not having disseminated more widely the results from heritage surveys of the area of the mine.

528. Regardless, no entitlement to compensation can be said to arise from the suggestion that there might have been additional investigations of some (unspecified) sites, or from a failure to publish archaeological results. The evidence does not establish any effect on the YP's spiritual connection with the land. It is not evidence of an impact on native title rights and interests that may be compensated under the NTA/MA 1978.

Applications made by FMG under s 18 of the AHA

529. FMG issued 25 notices for ministerial consent under the AHA (s 18) between 17 Mar 2011 and 10 Dec 2019, under which FMG sought consent to impact a total of 212 potential sites.[99] The ACMC evaluated that only 129 of these potential sites were of importance and significance. The Minister consented to FMG impacting this land. Under the AHA, no consent was required for potential sites the ACMC did not evaluate as of importance and significance.

530. FMG caused detailed heritage surveys to be made by consulting archaeologists along with, in almost all cases, members of the YP. From 2007, YAC adopted a policy of refusing to engage in heritage surveys with FMG (SoAF [25]-[26], [168]). The YP who were affiliated with WMYAC assisted with these heritage surveys. YAC was given notice of each of the s 18 applications and was invited to participate in heritage surveys.[100] YAC did not seek to be heard in the s 18 process for 16 of the total 25 applications.[101]

531. As to Phase 23 (2017/2018), YNAC undertook its own survey and identified 23 places that were not part of FMG's s 18 application in a report provided to the ACMC.[102] The 23 places are shown as "2018 YNAC sites" on Agreed Map 1, Enlargement Maps 10 and 11. FMG modified its s 18 application to excise 3 of the YNAC-identified places. The ACMC considered the remaining 20 potential sites identified by YNAC.[103] The ACMC evaluated that only one of these 20 sites were of importance and significance within the AHA (s 5).[104] Veth & Bird 1 does not account for these points, in asserting that some 15 of these "2018 YNAC sites" were sites within the AHA (s 5). The assertion (YP-CS [535]) that there is "no telling how many unidentified sites of cultural

[99] Each of the applications pursuant to s 18 AHA are at B.03.001.01 to B.03.025.01.

[100] For each s 18 application, YAC was given notice by letter or email and invited to participate. See e.g. B.04.005; B.04.017; B.04.021.

[101] This conclusion is drawn from a review of the s 18 materials (contained in folders B.03.001 to B.03.025). YAC did participate in in respect of nine s 18 applications by sending submissions or correspondence to the ACMC: see B.03.001.03, B.03.009.02, B.03.010.02, B.03.011.02, B.03.018.04, B.03.023.06, B.03.024.02, B.03.025.02.

[102] B.03.023.04 Yindjibarndi Aboriginal Corporation, 'Report for the Yindjibarndi Ngurra Aboriginal Corporation (YNAC), Yindjibarndi Cultural Heritage Inspection conducted within Fortescue Metals Group (FMG) Section 18 'Phase 23' Application Area. On other occasions, third parties (including YNAC) asserted that potential sites were within the area the subject of the s 18 application, however those sites were either (a) already the subject of other s 18 applications; or (b) not identified with particularity so as to be considered by the ACMC.

[103] B.03.023.07 Letter from Minister Wyatt to Michael Woodley dated 23 October 2019; B.03.023.06, PDF9-10 Letter from Registrar of Aboriginal Sites to George Irving dated 25 February 2019.

[104] B.03.023.05 Solomon Mining and Infrastructure Phase 23 Ministerial Consent.

and archaeological significance have been destroyed" to promote a conclusion that there must have been more sites that were destroyed is unfounded speculation.

532. Thus, the ACMC has evaluated 232 potential sites as part of FMG's applications under s 18. Of those 232, the Minister gave consent for 129 sites to be impacted.[105] The ACMC did not evaluate the remainder of the potential sites to be of importance and significance. FMG did not contravene the AHA (s 17) by impacting them (without salvaging artefacts from them). Yet, FMG salvaged artefacts from the majority of these places and recorded the position in its heritage database of "Salvaged Heritage Places", even when the ACMC (the specialist body tasked with the obligation of assessment under the AHA) had not determined that they were sites of importance or significance. Twenty of the places that were not evaluated by the ACMC as of significance or importance but were the subject of FMG's s 18 applications have, in fact, not been impacted or salvaged and are designated as "active" in FMG's heritage database.[106] Fourteen of the places that *were* evaluated by the ACMC as sites of significance or importance are also designated as "active". That is, they have not been salvaged and are intact.

533. FMG maintains a database of "Salvaged Heritage Places". The term "Salvaged" is used to designate that the site or heritage place has been subject to archaeological or cultural salvage, and may not necessarily have been impacted by ground disturbance work.[107]

534. The maps in Exhibit G1 designate 249 places as "FMG Salvaged Heritage Places". The 249 refers to salvaged places, not the potential sites the subject of FMG's s 18 applications. The true position is as explained above: in short, FMG made s 18 applications for 212 sites; YNAC identified a further 23 sites; FMG modified its application so that 232 sites were evaluated by the ACMC; the ACMC evaluated that 129 of them were of importance and significance; but, regardless, FMG salvaged the majority of the 232 sites (and, of them, 55[108] have not otherwise been impacted by mining), and 34 remain intact and are unsalvaged.

Consultation as to heritage and sites

535. YNAC contends that "archaeological assessment of the mine would have benefitted from consultation with a wider range of Yindjibarndi people and, in particular, with YAC": YP-CS [532]-[536]; PoC [34A(b)-(c)].

536. Compensation is not payable for a loss asserted to arise from FMG's engagement with WMYAC as to sites and cultural heritage matters. All members of YAC, YNAC and

[105] Each of Ministerial consents are at B.03.001.04 to B.03.025.06.

[106] SoAF – Maps [15(a)(i)]; B.06.001 FMG Archaeological Heritage Places Database.

[107] SoAF – Maps [15(a)(ii)]; B.06.007 FMG Salvaged Heritage Places Database.

[108] I.e., The sites which were evaluated by the ACMC, and which have 0% ground disturbance at the mine (Costello 6, SNC-17).

WMYAC are YP, with WMYAC having a significant number of members (approximately the same number as YAC, and substantially more than YNAC, which has only 9 members). Some YP are members of WMYAC *and* YAC, including two witnesses ([398] above): Exhibit E, Tabs 2, 3 and 4.

537. Also, it is not correct that after 2010, FMG engaged only with WMYAC as to heritage (cf PoC [34A(b)]). It is an agreed fact that *YAC* suspended surveys in around July 2007 and adopted the position that it would not participate in the surveys until a land access agreement was reached with FMG (SoAF [25]-[26], [168]). It is also an agreed fact that in 2021, YAC and WMYAC members attended heritage surveys at the mine together (SoAF [87]). Mr Woodley's evidence was that the surveys stopped again when it became clear to YNAC that an agreement would not be reached (M.Woodley [240], [318]). But, Mr Woodley gave evidence that YAC and JAC had, separately, done lots of field trips, including to collect their own information that YAC could present to the ACMC to oppose the s 18 applications (M.Woodley [298]).

538. As explained ([509]-[512]), Ministerial consent is required under the AHA (s 18(3)) before a person is permitted to alter any Aboriginal site. Although the procedures changed over time,[109] s 18(2) required the ACMC to form an opinion, based on its expert knowledge, about whether an Aboriginal site was important and significant and to make recommendations to the Minister about whether the land may be used.

539. Although there was no express legislative requirement for information to be provided about the traditional owners' view and involvement in heritage surveys, the ACMC, a specialist body, would often obtain input from the traditional owners. FMG applied for Ministerial consent, complied with the ACMC's requirements, and the ACMC made recommendations, which were accepted by the Minister. FMG thereby obtained a right to alter Aboriginal sites the subject of its applications. Heritage surveys were done including with the assistance of WMYAC but YAC and YNAC were not precluded from participation and sometimes provided information to the ACMC (M.Woodley [298]; T550.4-551.1). Compensation for the grant of the FMG tenements cannot be based on revisiting the ins-and-outs of the process of obtaining Ministerial consent under the AHA (s 18(3)).

540. The ACMC assessed whether a place is a "site" within the meaning of the AHA (s 5) and made recommendations to the Minister to consent to FMG's use of the land with Aboriginal sites. YAC and JAC conducted numerous field trips to collect their own information which YAC presented to the ACMC. Now is not the occasion to revisit the ACMC's deliberations and recommendations. There is no basis for any suggestion that the Ministerial consents provided to FMG under s 18 were granted other than in accordance with the procedure set out in the AHA, under the ACMC's scrutiny. There is no compensable claim that would require the Court to re-visit these issues.

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[109] *FMG Pilbara Pty Ltd v Yindjibarndi #1* [2014] NNTTA 79 (A.09.012) [45]-[46].

E.6.8. Hydrogeology evidence and its relevance to compensation for the grant of the FMG tenements [Issue 7]

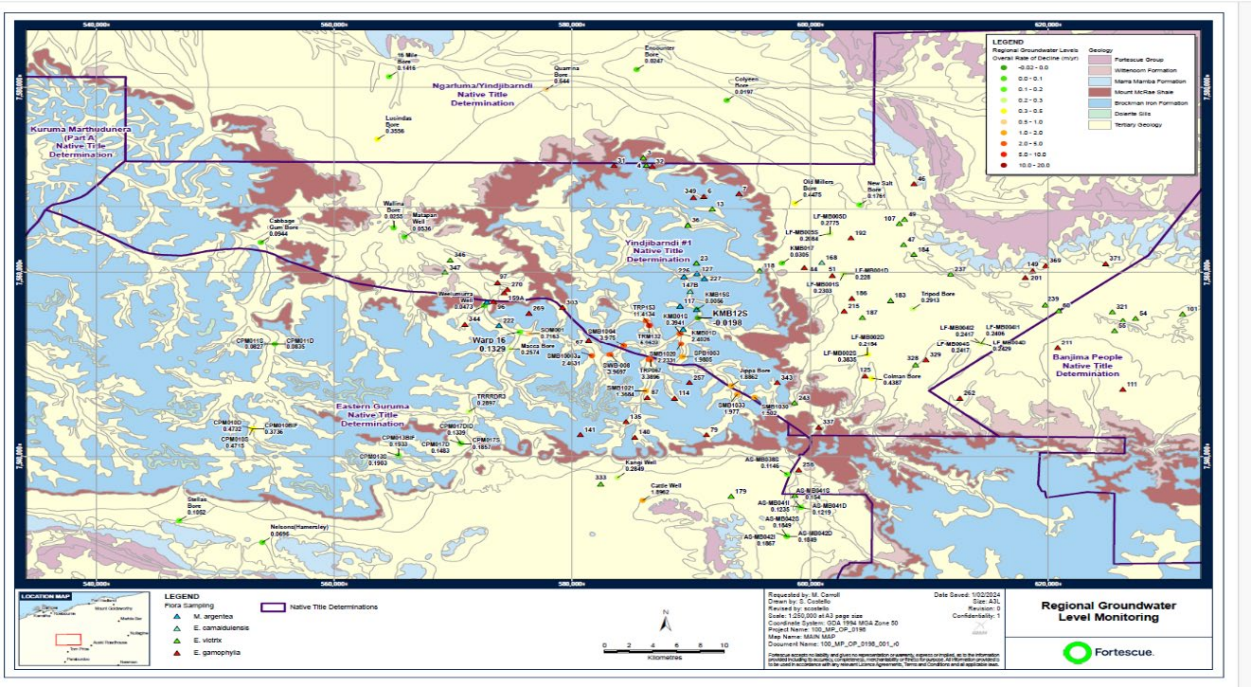
541. *Warrie (No 2)* determined that the YP's native title rights and interests do not confer exclusive rights in relation to water in any "watercourse", "wetland" or "underground water source" as defined in the *Rights in Water and Irrigation Act 1914* (WA) (Determination [5(b)]). That Act defines "watercourse" widely to include any river, creek, or stream in which water flows (s 3(1)); "wetland" to include a natural collection of water, whether permanent or temporary on the land's surface (s 2(1)); "underground water source" to include water that percolates from the ground into a well (s 2(1)).

542. *Warrie (No 2)* determined that the YP's native title rights and interests do not confer rights in relation to water captured by the holders of the Other Interests (including, relevantly, the Water Ls: Determination [5(c)(iv)], [11], Schedule 5). The YP have no right to compensation for FMG's capture of water pursuant to the Water Ls. Nor is it clear how, or by what measure, the claimed impact on groundwater is said to result in compensation for non-economic or cultural loss.

543. Regardless, there is insufficient or no evidentiary foundation for a conclusion that any decline in water levels away from and outside the mine area was due to dewatering as part of FMG's mining operations. To reach the conclusion that FMG's dewatering had or has an impact on such far-away water levels, an established mechanism must be identified. The two possible mechanisms are: (i) through aquifers beneath the alluvial geology; or (ii) through paleochannels.

544. On the evidence, neither mechanism can explain how dewatering at the mine area could result in a decline in groundwater levels beyond the mine. Aquifers that may exist below the alluvial geology are "hydraulically disconnected" by two layers of low permeability bedrock (Mt McRae Shale and Brockman Iron Formation), which will not transmit the impacts of dewatering any significant distance: T985.45-986.25; Evans 1 [4]. The paleochannels are supported by FMG's supplementation program, and the unchallenged evidence establishes that supplementation is effective to maintain water levels in the key watercourses at the levels they enjoyed before mining: E.09.002.016, PDF69-70; E.09.002.020, PDF18 (3.2.1-2), PDF84 (13 Conclusions).

545. JAB4 (E.02.008.004) is a map that depicts the bedrock and the paleochannels, which may assist in understanding the essential points, from a bird's eye view. Set out below is a copy of the map.



546. The Mt McRae Shale bedrock is depicted in maroon in the map. The Brockman Iron Formation bedrock is depicted in slightly darker blue. The Wittenoom Formation is depicted in light pink. The Mt McRae Shale bedrock and the Brockman Iron Formation bedrock is at a higher level than the Wittenoom Formation bedrock. The Mt McRae Shale bedrock and the Brockman Iron Formation bedrock have low permeability so that water at these higher levels do not go down to the level of the Wittenoom Formation bedrock, permitting water to then move away from the mine. Leaving aside the impermeability of the Mt McRae Shale bedrock and the Brockman Iron Formation bedrock, there are distinct paleochannels that exist across the bedrock. The paleochannels are depicted in cream/yellow in the map. The Kangeenarina Creek and Weelumurra paleochannels are the subject of FMG's supplementation program, which ensures that movement of water in the paleochannels does not affect water levels away from the mine because water is supplemented by the program.

547. FMG accepts the propositions in YP-CS [583] (i.e., the mine is a recharge zone; FMG takes water from the zone; the zone is connected to Kangeenarina Creek, Weelumurra Creek via paleochannels; and the paleochannels can transmit water easily). But, these propositions need to be understood in the following context.

(a) Water cannot flow down through the Mt McRae Shale or Brockman Formation bedrock. Groundwater can *only* flow through the Kangeenarina Creek, Weelumurra Creek or Zalamea Gorge paleochannels ([551], [558]).

(b) FMG supplements and reinjects water into the paleochannels to stop the impact of dewatering from propagating through those paleochannels ([560]).

548. ***The YP's evidence and agreed facts***: Several witnesses said that water is important to the YP in all its forms.[110] The most important bodies of water are *Jindawarrana* (Millstream, outside the claim area), which was described as the "heart" and "capital" of Yindjibarndi country;[111] and *Yaandanyirra* (Fortescue River).[112] In the vicinity of the mine, the key watercourses are *Ganyjingarringunha wundu* (Kangeenarina Creek); *Wirlu-murra wundu* (Weelumurra Creek); and *Bangkangarra*, located to the immediate north of the mine.[113]

549. Some witnesses said that, since the commencement of the mine, there had been less water in streams and creeks across Yindjibarndi country.[114] Some witnesses sought to attribute this to dewatering at the mine,[115] but those (non-expert) views are not supported by the expert evidence and the evidence of FMG's witnesses.

550. ***FMG lay evidence***: Christopher Oppenheim and Jordin Barclay, both experienced hydrogeologists, gave evidence. YNAC did not challenge their credibility, and advanced no evidence to contradict them. Mr Oppenheim explained the steps FMG has taken to understand and model the hydrogeological context of the mine and to prevent potential impacts to groundwater levels outside the mine area. Mr Barclay gave consistent evidence as to the hydrogeological context of the mine. He also explained the provenance of rainfall and groundwater monitoring data gathered by FMG. This data was provided to Dr Richard Evans, an independent expert hydrogeologist (Barclay 1 [7]-[9]; T999.13-1000.33, 1001.26-40).

551. Mr Oppenheim and Mr Barclay explained that, in the vicinity of the mine, beneath the alluvial geology, there are three geological units or rock formations. Mt McRae Shale sits above the Brockman Formation, which sits above the Wittenoom Formation.[116] The Mt McRae Shale and Brockman Formation operate as "aquitards": each is "hydraulically disconnected" from the Wittenoom Formation and thus prevents "drawdown impacts going out or from the unit" (T985-986). The effect of the two "aquitards" is to prevent the downward movement of water, so that water cannot reach the Wittenoom Formation. The fact that the Wittenoom Formation may be an aquifer

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[110] MR (Deceased) [20]; L.Cheedy [19]; S.Warrie [24]; M.Cheedy [9], [37].

[111] MR (Deceased) [20]; L.Cheedy [10]; K.Guiness [26]; A.Mack [88]; W.Woodley [37], [42].

[112] L.Cheedy [10]; L.Coppin [51]; W.Woodley [37]; SoAF [130], [134].

[113] K.Guiness [27]-[28]; J.Norman [15]; M.Woodley [8]-[10].

[114] L.Coppin [53]; E.Guinness [21]; K.Guiness [26], [47]-[51], [54]; I.Guinness [34]; J.Norman [15]; K.Warrie [28]; S.Warrie [25], [128]; W.Woodley [42], [48]; M.Cheedy [24].

[115] F.Cheedy [23]-[24]; L.Cheedy [19]; E.Guinness [21]; K.Guiness [26], [47]-[51], [54], [59]; I.Guinness [34]; A.Mack [51], [88]; J.Norman [15]; S.Warrie [100], [128]; W.Woodley [46], [48].

[116] T983.45-984.40, 985.45-986.25, 1002.05-1003.20; Exhibit N, Tab 7, PDF10-11, Figures 2-7 to 2-9; E.09.002.0016, PDF21-23, Sections 2.3 and 2.4; E.09.001.005, PDF20, under the heading Mount Slyvia Formation and Mt McRae Shale.

permitting the movement of water away from the mine area cannot explain how any decline of water at the mine area could result in a related and causative decline in water farther away.

552. The YP do not deal with the evidence of the presence and effect of the Mt McRae Shale and the Brockman Formation. Nor do they address FMG's modelling, supported by the results of resource drilling of 20,000 to 30,000 holes, which has informed an understanding of weathering profiles in the vicinity of the mine (T986.25-987.30). Instead, the YP advance the speculative theories addressed below.

553. ***Expert evidence***: YNAC's expert hydrologist, Dr Huade Guan, and Dr Evans, approached the issue of whether dewatering activities had or could have resulted in declining water levels from different perspectives.

554. Dr Guan's approach was to identify areas where there had been a decline in the condition of groundwater-dependent vegetation species since 2015 as a proxy for groundwater decline, using an "NDVI" (Normalised Difference Vegetation Index) analysis (T1045.01-1046.18; T1073.06-20). Dr Guan's investigation of the hydrogeology of the mine was limited to reviewing one summary report (Guan 1 [16]-[18]; T1069.35-1070.09; T1076.01-05). He did not consider the extensive modelling conducted by FMG or its third-party consultants (T1076.13-29) nor did he conduct any alternative hydrogeological assessment (T1076.25-29; 1078.07-35).

555. Dr Guan and Dr Evans agreed that the data collected by Dr Guan as to vegetation decline was correct (T1095.5-29). But, Dr Guan did not engage with the anterior issue of whether groundwater-dependent vegetation decline was, or could have been, a result of dewatering at the mine. At most, Dr Guan suggested possible avenues by which there might be a causal connection, without testing and determining whether any causal connection existed (T1080.13-1082.31, T1569.03-1570.04).

556. Dr Evans reviewed the documentary record to understand the hydrogeology of the mine and the surrounding area (Evans 1 [14], [24]). In contrast to Dr Guan, Dr Evans reviewed most of the documentary record since 2010, including reports from independent consultants and other records kept by FMG (Evans 1 [24]-[28], [41], [51], [60]-[65], [74]-[80]); considered whether that record was consistent with third-party sources (Evans 1 [29]-[30]); reviewed FMG's hydrogeological modelling (Evans 1 [35]-[38]); and concluded that his assessment of the hydrogeological context was supported by the documentary record and modelling (Evans 1 [24], [31], [35], [38]; T1065.01-31).

557. ***The first mechanism and the hydrogeological context***: The experts agreed that the mine is located in a series of paleochannels (high-permeability valleys of alluvial matter carved into solid bedrock but above the Mt McRae Shale and the Brockman Formation) (Guan/Evans JR, questions 1 & 2; Evans 1 [25]). They agreed that there were three paleochannels connecting the mine to the surrounding area, at Kangeenarina Creek to

the north, Weelumurra Creek to the west, and Zalamea Gorge to the south-east (Guan 1 [18]; Evans 1 [60]). As no obvious degradation was observed at Zalamea Gorge outside the mine, the area was not discussed (Guan 1 [43]; Evans 1 [68]).

558. The experts disagreed as to whether water could also flow through the underlying bedrock. Dr Guan asserted that the bedrock was Wittenoom Formation which, when weathered and fractured, might act as an aquifer (Guan 1 [16]-[18]; T1055.01-05). Dr Guan formed this opinion solely by reference to the summary version of a CSIRO report, which made general comments about the Pilbara as a whole (Guan 1 [16]-[18], Appendix 4a (p66); T1069.35-1073.14).

559. Dr Evans' opinion was that the Wittenoom Formation was irrelevant, because it sat underneath low-permeability Brockman Iron Formation and/or Mt McRae Shale, through which water could not flow (Evans 1 [25], [29]-[30], [32]; T1055.34-1057.03). Dr Evans' position was supported by extensive modelling done by FMG and third-party consultants,[117] and by the full version of the CSIRO report, which specifically referred to the hydrogeological conditions at the mine area.[118] Dr Evans' position is consistent with the evidence given by Mr Oppenheim and Mr Barclay in cross-examination (T983.45-984.40, 985.45-986.25, 1002.05-1003.20). Dr Evans' evidence was that the effects of dewatering would occur locally at the mine and could not have caused any decline in the groundwater levels outside and away from the mine: Evans 1 [4], [34], [38].

560. ***The second mechanism – paleochannels and FMG's supplementation schemes***: Mr Oppenheim and Mr Barclay gave evidence of FMG's supplementation and monitoring programmes at both Kangeenarina Creek and Weelumurra Creek to prevent any impacts of dewatering affecting water levels in areas away from the mine - the paleochannel aquifers are replenished with water despite dewatering caused by the mining. Each of the supplementation programmes is comprised of lines of bores which reinject water into the paleochannel aquifer.[119] FMG reinjects water in line with seasonal trends so that water levels at Kangeenarina Creek and Weelumurra Creek are kept consistent with pre-mining levels at all times (T979.16-29; 980.27-30; 1006.31-1008.06).

561. The effectiveness of this supplementation is assessed by several groundwater monitoring bores located downstream from the mine.[120] Groundwater levels are assessed against strict "trigger levels" determined by reference to pre-mining water

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[117] Exhibit N, Tab 7, PDF18, 19; Evans 1 [24]-[28], [41], [51], [60]-[65], [74]-[80]; T962.04-26, 985.46-987.29 (Mr Oppenheim).

[118] Exhibit N, Tab 6 PDF7, 8; T1071.46-1072.46 (Dr Guan).

[119] Oppenheim 1 [53]-[55], annexures CILO-5, CILO-6; Evans 1 [75] (Kangeenarina Creek); Evans 1 [77], T946.19-28, 987.44-988.16 (Mr Oppenheim) (Weelumurra Creek).

[120] Oppenheim 1 [56]; Evans 1 [76]; T976.01-06 (Mr Oppenheim) (Kangeenarina Creek); Evans 1 [77], T976.1-6, 978.21-23, 979.27-29 and 987.39-988.23 (Mr Oppenheim); T1596.22-41 (Dr Evans) (Weelumurra Creek).

table levels.[121] FMG is also installing a 1.5km-long, 100m-deep hydraulic barrier wall and grout barrier (at the boundary between the Queens pit and Weelumurra Creek, outside the Determination Area) to improve the efficiency of the supplementation programme and to minimise water flowing back from the supplementation into the mine pits.[122]

562. FMG's monitoring results show that the programmes have been successful.[123] At Kangeenarina Creek, water levels have been maintained above all trigger levels for almost all of the operating period.[124] On the whole, groundwater levels at Kangeenarina Creek have, in fact, slightly *increased* downstream of the supplementation programmes, rather than decreasing.[125] Although one minor trigger breach did occur at Kangeenarina Creek in 2020,[126] and isolated minor trigger breaches have occurred at Weelumurra Creek (including due to a different mining company using the monitoring bore for water supply purposes),[127] each of these was quickly rectified by increasing reinjection levels.

563. ***The alternative mechanisms proposed by YNAC:*** In YP-CS [588]-[593], YNAC advances three hypothetical mechanisms by which dewatering within the mine may have impacted groundwater levels outside the mine through the paleochannels. YNAC has not led any evidence that such mechanisms have operated as to the mine, and has failed to explain how any of those mechanisms *could* occur in circumstances where the supplementation programmes are proven to be working.

564. The first suggested mechanism is that less water has flowed downstream from the mine through the paleochannels. But, as explained, FMG's supplementation programmes are designed to ensure that the flow of water through the paleochannels is consistent with pre-mining flow rates (T979.16-29; 980.27-30; 1006.31-1008.06), in order to maintain pre-mining water levels downstream. The evidence is that they have achieved that objective ([562]). YNAC has led no evidence to the contrary.[128]

565. The second suggested mechanism is that the hydraulic gradient had been altered so that water now flows into the mine, because the groundwater levels within the mine are

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[121] T976.06-08 (Mr Oppenheim); Oppenheim 1 [57]; Evans 1 [76] (Kangeenarina Creek); Evans 1 [77]; T946.30-46 (Mr Oppenheim) (Weelumurra Creek).

[122] T946.04-08, 947.07-948.06, and 978.40-979.03 (Mr Oppenheim); T1591.24-37 (Dr Evans).

[123] E.09.002.020, section 9.2 (PDF45-46, Queens and Trinity) section 10.22 and 10.2.3 (PDF67-68), and the conclusion at section 11.1.1 (PDF75, Kangeenarina and Weelumurra).

[124] Evans 1 [76] and Figure 10-1.

[125] T1008.08-27 (Mr Barclay); Exhibit N, Tab 5 ("Annexure JAB-4 to the Barclay Affidavit at bore KMB12S"); E.02.008.003 ("Annexure JAB-3 to the Barclay Affidavit"), at cells A76 to I76.

[126] Evans 1 [76] and Figure 10-1. See also Oppenheim 1, annexures CILO-2, PDF65.

[127] Evans 1 [77] and Figure 10-2; T976.10-44, 977.13-17, 987.31-42 (Mr Oppenheim).

[128] For completeness, YP-CS [601] refers to the disappearance of semi-permanent pools at Kangeenarina Creek, by reference to E.09.002.016 p 24. The pools referred to in that document are located ***within*** the mine area, upstream of the point where the supplementation programme begins to take effect: see E.09.002.016 at p 93.

lower than outside the mine. FMG's supplementation program raises the groundwater levels at the reinjection points, so that this suggested mechanism cannot be correct.[129] YNAC attempts to sidestep this by identifying that supplemented water is recirculating into the dewatered pits rather than flowing downstream: YP-CS [596]-[597].

566. It may be accepted that some water recirculates into the pits (although the grout wall will minimise the rate at which this occurs).[130] But FMG increases supplementation rates to account for the recirculation of some water,[131] and monitors the water levels *downstream* to ensure that sufficient water travels downstream such that water levels remain within the historical range (Oppenheim 1, [56]; T979.27-29, T988.18-22). The evidence is that downstream water levels have been maintained ([562] above). YNAC has led no evidence to the contrary.

567. The third suggested mechanism is "mountain front recharge": that the mine has reduced the catchment area and reduced the opportunity for surface runoff to enter Kangeenarina Creek during heavy storms. No evidence has been provided to support this mechanism: Dr Guan advanced only a *theoretical possibility* that had not been modelled or tested to assess its application to the hydrogeological conditions of the mine and its surrounds (T1597.25-1598.20). In any event, as Mr Barclay explained, FMG has constructed infrastructure to divert and maintain the flow of water across the mine so that it can still reach the downstream area (T1021.01-40), and increases supplementation volumes during storm events meaning that the water flows through to the creeks at the rate that it would if the mine did not exist (T1007.05-1008.06).

568. ***Rainfall as cause of groundwater decline***: The decline in groundwater levels in the area surrounding the mine has occurred independently of FMG's activities. The decline is consistent with a decline in rainfall in the mine area. Without a proven mechanism that causatively connects a decline in water at the mine area and an impact on water levels in surrounding areas, it cannot be concluded on the evidence that FMG's mining activities caused groundwater to decline in the surrounding areas. Further, Dr Evans provided *two separate reasons* to explain groundwater decline in the surrounding areas (T1047.39-1048.30, 1538.18-1539.20).

569. The *first* reason was the readjustment of the groundwater level to historical levels, after a wet period where the groundwater level rose (for a short period). The experts agreed that there was an exceptionally wet period across the Pilbara region between 1995 and 2006.[132] Dr Evans said this wet period was then, after a few years, followed by a period

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[129] T987.44-988.16.

[130] T947.07-31, 978.40-979.04 (Mr Oppenheim); T1587.39-46 (Dr Evans).

[131] T1590.23-1591.37 (Dr Evans); E.009.002.016 p 4 ("A proportion of the increase in flows is due to mining at Queens approaching the Weelumurra injection borefield, resulting in increased recirculation. *Because these volumes are re-injected back into the aquifer*, this is not considered to be a net loss to the aquifer system although it is understood it would account towards total abstraction volumes.")

[132] Evans 1 [5], [41], [52]; T1047.46-1048.06 and 1089.45-1090.05 (Dr Evans); T1090.30-32 and 1104.37-1105.11 (Dr Guan).

of above-average rainfall between 2011 and 2013.[133] Dr Evans opined that the exceptionally wet period between 1996 and 2006 had produced artificially high groundwater levels across the region, and that a return to average conditions from 2014 had caused groundwater levels to re-adjust to historical levels.[134]

570. As Dr Evans explained (Evans 1 [33]-[34], T1088.27-36, cf. YP-CS [564]), the response of groundwater levels in response to rainfall trends is cumulative over time and can take years or decades to manifest. For that reason, rainfall trends must be considered over a long period, due to the time lag between a change in rainfall and impact on groundwater levels. Dr Evans performed his analysis using the Cumulative Deviation from the Mean (**CDFM**) method, which is the industry-standard practice for assessing groundwater response to rainfall over time (Evans 1, [40]; T1098.22-27). Dr Guan accepted that, although CDFM was not useful for measuring short-term vegetation response to rainfall, it was suitable for assessing groundwater recharge (Guan 2 [8]; T1091.18-36).

571. Dr Guan asserted that if the readjustment of groundwater levels to historical levels had occurred, "we would see a gradual groundwater level decline after the wet period" (Guan/Evans JR, p9, lines 8-10). He identified that a decline had not occurred at three bores: Warp 16, Quarrina Bore, and Wallina Bore (Guan 2 [8]). However, as Dr Evans explained, Dr Guan selectively reviewed bores that were located within creekbed recharge zones, where groundwater decline would be counteracted by recharge occurring through the creek.[135] Dr Guan accepted that numerous bores in the region surrounding the mine (not located in creekbeds) showed a gradual groundwater decline after the wet period, consistent with a readjustment occurring.[136] Dr Guan's evidence was that he had not considered the data showing a similar trend before and after mining activity, because he could not tell what happened at those bores (T1565.26-32). That data should not have been disregarded, and the conclusion to be drawn from it is that the readjustment of the groundwater level was due to a factor other than mining activities (T1570.09-15 (Dr Evans)).

572. The *second* reason (see [568]) was that the period between 2014 and 2023 was a drier-than-average period in the surrounding region, which would have separately resulted in decreasing groundwater levels over time. Dr Evans relied on data gathered by FMG

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[133] Evans 1 [5], [41], [45], [52]; T1097.42-1098.14 (Dr Evans).

[134] Evans 1 [5], [41], [51]-[52]; Guan/Evans JR, p9, lines 13-23; T1090.04-09, 1099.18-22, 1538.18-1539.20 (Dr Evans).

[135] T1518.01-11 (Dr Evans). Dr Evans was referring to Warp 16, which is located within Weelumurra Creek. It can be seen from Barclay 1, JAB-4 that Wallina Bore is also located within Weelumurra Creek, and Quarrina Bore is located on the Fortescue River.

[136] Dr Guan was taken to the evidence gathered at the Tripod Bore, located in the alluvial fan of Kangeenarina Creek (T1563.10-1564.08; Exhibit N, Tab 14); the Old Millers Bore, also located at the alluvial fan (T1564.10-31; Exhibit N, Tab 15); bore TRRRDR3, located upstream of the mine on Weelumurra Creek (T1564.33-1566.41; Exhibit N, Tab 16); and bore CPM010S, located approximately 20km to the southwest of the mine (T1567.13-1569.01; Exhibit N, Tab 17).

between 2010 and 2024 in the vicinity of the mine, which showed that a clear drying trend over the period 2014 to 2023 (Evans 1 [45]-[47]; T1088.13-25, 1099.04-08). Dr Evans also relied on data from the Bureau of Meteorology (**BoM**), which tended towards a drying trend between 2014 and 2019, but was insufficiently conclusive for him to draw conclusions from it alone (T1097.16-37). Dr Evans' CDFM analysis compared the results from each station against the mean annual rainfall of that station over the period (Evans 1 [42]-[43], Figure 6.3; cf YP-CS [565], which incorrectly refers to a graph that was not relied upon and was excluded from Dr Evans' report).

573. Dr Guan did not consider FMG's data at all (T1111.15-18). Dr Guan's basis for excluding the FMG data was that he said there were data gaps in the Solomon data (T1090.20-22; Guan/Evans JR, p5, line 30); and that he trusted the BoM's quality control (T1090.38-41, 1111.26-31). However, neither was a logical basis for excluding the FMG data.

574. First, although no single gauge recorded data for the entire duration of the mine, FMG recorded rainfall data from at least three gauges in every month between December 2010 and January 2024 (T1031.01-35 (Mr Barclay)), allowing a comprehensive and clear data set to be obtained (T1094.04-06, 1099.13-14 (Dr Evans)). Dr Guan had no issue relying on BoM data, which also contained data gaps, and addressed those data gaps by using a combination of data points from multiple stations (T1102.26-1103.22). Dr Guan accepted that his process was analogous to that used by FMG and Dr Evans to reconcile the gaps in FMG's data (T1103.24-1104.05).

575. Secondly, no evidence was advanced regarding either the BoM's or FMG's quality control. Mr Oppenheim gave general evidence that standardised equipment was used across the industry to gather rainfall data (T956). The veracity of FMG's data was not challenged, save for a suggestion, rejected by Dr Evans, that FMG's data might be less "neutral" than the BoM's (T1093.17-1094.01).

576. Dr Guan based his conclusions on BoM rainfall data from Yalleen and Newman Aero (Guan 1, p21, Figure 12; Guan 2 [5]). But, that data is not a useful indicator of rainfall trends at the mine. Yalleen is 180km away from the mine, whilst Newman Aero is 250km away (Evans 1 [47]; T1106.36-47 (Dr Guan)). The experts agreed that rainfall and the impacts of that rainfall on vegetation are highly variable from place to place, depending on local conditions such as topography, elevation, location, soil type and depth, and microclimates (T1521.22-41 (Dr Evans); T1558.21-27 (Dr Guan)). That variation is apparent in Dr Guan's own analysis, which shows that Yalleen had a relatively constant rainfall trend between 2015 and 2023, whilst Newman Aero had a consolidated drying trend in those years (Guan 1 Figure 12). This variability in rainfall and its impacts also explain Dr Guan's concern that the impacts on vegetation between 2019 and 2023 have been variable, rather than showing uniform declines across the entire region (Guan 2 [7]; T1515.46-1516.07 (Dr Guan)).

577. ***Bangkangarra, Fortescue River and Millstream***: Although the issue is not pleaded, to the extent it is suggested that FMG's mining activities have affected the water levels at Bangkangarra, the Fortescue River and Millstream, there is no basis to conclude that any causative connection exists.

578. As to Bangkangarra, Mr Oppenheim's unchallenged evidence is that Bangkangarra's geological position is 20m above the highest level of the Trinity mining area, which isolates it from any potential dewatering impacts. Bangkangarra is recharged by rainfall rather than by input by any other catchment system (Oppenheim 1 [77]-[78], [79(c)-(e)], [80]-[81]; T958.29-41). To the extent that water levels have declined at Bangkangarra, it cannot be due to the mining activities. Mr Oppenheim also gave evidence that, because the Bangkangarra sub-catchment was barren of mineral resources and has clear heritage significance, FMG has (and had) no reason to go into that area or dewater that sub-catchment (T988.24-32) (cf YP-CS [550]).

579. As to the Fortescue River and Millstream, both of these areas are substantially further away from the mine than the areas assessed by Dr Guan, and are highly unlikely to have been affected by the mining activities.[137] Also, Dr Guan accepted that significant vegetation decline at the Fortescue River had occurred in areas unconnected to the mine or Kangeenarina Creek (T1549.15-1552.05). Declines in groundwater levels and vegetation quality have also occurred in areas unconnected to the mine. This suggests that a conclusion that the mining activities were the cause of any decline is incorrect.

F. COMPENSATION PAYABLE BY STATE OR FMG RESPONDENTS [ISSUE 10]

580. ***Summary***: If compensation is payable under the NTA, that compensation is payable by the State, not FMG. The entitlement to compensation for the grant arises under s 24HA(4) (as to the Water Ls); s 24MD(3) (as to the rest of the FMG tenements); s 45 (if the entitlement arises because of the RDA, s 10); or s 53(1) (as to any "top up" just terms compensation). Other than under, relevantly, s 24MD(4), the NTA expressly provides that it is the State that is liable to pay compensation. Only (relevantly) s 24MD(4)(b) allows the State to pass on the liability to another person. On its plain terms, the MA 1978 (s 125A) purports to pass on to FMG *any* and *all* liability of the State to pay compensation, even as to the State's liability under ss 24HA(5), 45(2) and 53(1). That is impermissible, directly inconsistent with ss 24HA(5), 45(2) and 53(1), thus invalidating s 125A by force of s 109 of the *Constitution*.

F.1. The construction and operation of s 125A of the *Mining Act* [Issue 10]

581. Sec 125A(1) of the MA 1978 provides that if compensation is payable to native title holders for or in respect of a mining tenement, the person liable to pay the compensation is, relevantly, the holder of the mining tenement at the time a determination of

[137] See Exhibit G1 Map 3, Regional Overview Map: Millstream is located at approximately 21°37'S, 117°05'E.

compensation is made. Sec 125A does not differentiate between the grant of a mining tenement covered by s 24HA and by s 24MD. Also, s 125A does not limit its operation so that the holder of a mining tenement is not liable to pay compensation required to be paid by force of s 10(1) of the RDA and s 45 of the NTA, or of s 53(1) of the NTA.

582. On the plain words of s 125A, giving meaning to each of the words used and having regard to its statutory purpose, it provides that the grantee of a mining tenement is liable to pay any and all compensation payable to native title holders "for or in respect of" the future act of a grant of a mining tenement. The words "for or in respect of" are wide and cannot be read down, without imputing a contrary intention to the Parliament other than impermissibly by reference to extraneous material or apparent subjective intent.

583. Even though the Court may, by reference to statutory purpose, depart from the language used in a provision, the change in language cannot be "too far reaching"; and the "inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the *Constitution*": *Taylor v The Owners-Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 [35]-[40] (French CJ, Crennan and Bell JJ). Gageler and Keane JJ (dissenting only in the result, not as to principle) said, "The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy legislative inattention. Construction is not speculation, and it is not repair" ([65]).

584. Consistently, in *HFM043 v Republic of Nauru* [2018] HCA 37; (2018) 359 ALR 176, 180, Kiefel CJ, Gageler and Nettle JJ said, "The task of construction of a statute is of the words which the legislature has enacted. Any modified meaning must be consistent with the language in fact used by the legislature. Words may be implied to explain the meaning of its text. The constructional task remains throughout to expound the meaning of the statutory text, not to remedy gaps disclosed in it or repair it" ([24]).

585. If the Parliament intended to deal with compensation payable only where the NTA permits the State to provide that a person other than the State is liable, that intention is not apparent from the words used in s 125A; the Parliament appears to have ignored the application of the NTA, s 24HA(6), s 45 and s 53(1), which all explicitly provide that the State (and no-one else) is liable for the compensation; and do not permit a State law to provide that someone else would be liable.

586. On the proper construction of s 125A, it provides that FMG is liable for compensation "for or in respect of the grant of" each of the FMG tenements, even when compensation is claimed to be payable under s 45 and s 53, or is payable under s 24HA(6) (as to the Water Ls). The State is liable for such compensation and s 125A disregards this.

587. Also, s 125A does not address the fact that ss 52(5) and 52A(4) of the NTA provide that, if a condition that security by bank guarantee be given, or money be held on trust, was imposed under Subdiv P by the NNTT in permitting a grant under Subdiv M (see

ss 36A, 36C(5)(b), 38, 41(5), and 42(5)(B)(b)), and there is then a determination of compensation, where there is a shortfall in the amount required for compensation, the *State* is required to pay that shortfall. Sec 125A ignores the requirement for the *State* to pay the shortfall in compensation if money is held in trust. Instead, s 125A(1)(a) provides, in direct collision with s 52A(4), that the mining tenement holder must pay. That is not contemplated nor permitted by s 52A(4).

F.2. Is s 125A inconsistent with the NTA and therefore invalid because of s 109 of the Constitution? [Issue 10]

588. As mentioned ([125]), if a State law would alter, impair or detract from the operation of a Commonwealth law, then it is invalid to that extent: *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J). The issue is whether s 125A is inconsistent and invalid because it refers indifferently to mining tenements that might be granted under s 24HA or s 24MD and does not address the fact that only the State is liable to compensation under s 45 or s 53(1) of the NTA.

589. The issue of inconsistency turns on what the State Parliament intended by the enactment of s 125A. "The question whether a State or Territory law is inconsistent with a Commonwealth law is to be determined as a matter of construction. In a case where it is alleged that a State or Territory law is directly inconsistent with a Commonwealth law it will be necessary to have regard to both laws and their operation": *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2; (2019) 266 CLR 428 [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). "Further, there will be what Barwick CJ identified as 'direct collision' where the State law, if allowed to operate, would impose an obligation greater than that for which the Federal law has provided": *Telstra Corp Ltd v Worthing* [1999] HCA 12; (1999) 197 CLR 61 [27] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ), citing *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253, 258.

590. In ***Wenn*** *v Attorney-General (Victoria)* (1948) 77 CLR 84, the question was whether a State law (*Discharged Servicemen's Preference Act 1943* (Vic)) was invalid because it was inconsistent with the *Re-Establishment and Employment Act 1945* (Cth). In effect, the Commonwealth Act provided for the reinstatement of members of the Forces in civil employment but did not deal with promotions thereafter, whilst the Victorian Act provided that promotions should be given to suitable and competent discharged servicemen. The High Court held that the Commonwealth Act, in effect, covered the field and invalidated the Victorian Act which had a rule for promotions excluded by the Commonwealth Act. Dixon J (Rich J agreeing) also held that no part of the Victorian Act was saved because the Victorian Parliament's intention was that it would operate as a whole and not to the extent consistent with the Commonwealth Act. Dixon J said that, if the intention of the State legislation, ascertained by interpreting it, was that it was intended to apply as a whole, s 109 would operate to make the whole provision invalid (122).

591. *Wenn* was applied in *Bell Group NV (in liq) v WA* [2016] HCA 21; (2016) 260 CLR 500. It was held that the so-called Bell Act was wholly invalid because the Parliament did not intend for it to operate piecemeal and the Bell Act was inconsistent with the *Income Tax Assessment Act 1936*: [70] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ). Gageler J said ([77]) that s 109 "does not render an inconsistent State law invalid to the extent that the State law has an operation consistent with a Commonwealth Law *provided that the State law operating to that more limited extent remains an expression of the legislative will of the State Parliament*" (italics added). Where, as here, the legislative will of the State Parliament was to pass on any and all liability to the mining tenement holder, s 109 renders s 125A invalid.

592. There can be "direct inconsistency", or "indirect inconsistency" if the Commonwealth law covers the field: e.g., *Dickson v The Queen* [2010] HCA 30; (2010) 241 CLR 491 [13]-[17]. This is a case where there is a direct inconsistency between s 125A and ss 24HA(6), 45, 52A(4) and 53(1) of the NTA. The Commonwealth law (the NTA) obliges the State to pay the compensation; the State law (s 125A) purports to oblige FMG to pay. This is also a case that can be analysed as one of "indirect inconsistency" in that the Commonwealth law covers a field of the circumstances when compensation is payable either by the State or, if the State so enacts, another person but the Commonwealth law has given permission for the State to so enact only in specified circumstances (relevantly, under s 24MD(4)), not more generally.

593. As submitted ([581]-[586]), the State Parliament intended the mining tenement holder to pay compensation whenever compensation "for or in respect of the grant of a mining tenement" is payable under the NTA. The legislative will of the State Parliament was for s 125A to operate in this broad way. There is nothing capable of being saved in s 125A. It is invalid by force of s 109 because it provides that a mining tenement holder is liable for compensation when the NTA expressly provides that the State is liable for the compensation (under ss 24HA(6), 45 and 53(1)).

594. Further, if s 125A is to be read down (in some way to save it from invalidity) so that, for example, s 125A applies only as to compensation payable under s 24MD(4), the compensation **cannot** include an amount calculated by reference to a royalty based on a percentage of iron ore revenue.

595. This is because as to future acts covered by s 24MD, s 51(3) expressly requires s 123 of the MA 1978 to be applied *whether or not this results in compensation on "just terms"*. Sec 123(1) prohibits compensation to be paid by reference to a royalty based on a percentage of iron ore revenue.

596. If YP contends that "just terms" compensation requires a royalty to be paid as compensation or the calculation of the amount payable to be determined by reference to such royalties, that will trigger a compensation right under s 53(1) (if YP is correct to contend that there is an acquisition of property within par 51(xxxi) of the

Constitution as to the FMG Mining Leases). No such compensation can be paid under s 51(3) of the NTA and s 123(1) of the MA 1978. If such compensation is payable to satisfy the requirement for just terms under s 53(1) of the NTA, there is no escape from the conclusion that any royalty-based compensation is payable *by the State*. That is expressly what s 53(1) requires; there is no permission given to the State to pass on the just terms obligation to any other person.

G. INTEREST [ISSUE 12]

597. ***Summary***: The YP have no entitlement to compound interest.

598. YNAC claims pre-judgment interest, on the economic loss component of compensation, on a compounding basis: PoC [46(d)]; YP-CS [624]; Meaton 2.

599. The *Federal Court of Australia Act 1976* (Cth) (s 51A) provides for simple interest on pre-judgment interest, precluding a statutory right to claim compound interest. Compound interest is not claimable in equity for the impairment of native title rights and interests: *Griffiths HC* [118]-[138]. In *Griffiths HC* ([133], [341]-[342]), the High Court expressly did not decide and left open the issue of whether compound interest could be awarded even if there was evidence that compensation, if paid earlier, would have been invested (cf YP-CS [621]). In ***Hungerfords*** *v Walker* (1989) 171 CLR 125, damages were awarded for the loss sustained because the plaintiffs had been deprived of money that would otherwise have been invested; i.e., interest was awarded as damages, not as interest payable on damages (cf YP-CS [622]).

600. The requirement that the entitlement to compensation under the NTA (s 51) is on "just terms" imports a power to award interest, but that power does not extend to awarding compound interest on an award of compensation: *Griffiths HC* [359]. Simple interest can be awarded because of a delay in the receipt of compensation, but this is different from an award of damages for any lost opportunity to invest the compensation: *Griffiths HC* [132], [150], [343]-[344], [355]. An award of simple interest is not part of the compensation for the effect of the compensable acts on native title: *Griffiths HC* [151].

601. In rare cases where a plaintiff is awarded damages for loss flowing from an inability to invest money that should have been paid earlier, the award is made because the plaintiff has foregone investment opportunities, not because they have been deprived of the money. The NTA (s 51(1)) gives a right to compensation "*for*" the impact on *native title rights and interests*. There is no right to compensation for damages flowing from a lost opportunity to invest money that is properly payable as the measure of that impact on native title rights and interests. This means there is no right to claim compound interest: *Griffiths HC* [150], [341]. Because of the cap in the NTA (s 51A), damages for a lost opportunity to invest is not economic loss that is claimable: *Griffiths HC* [151].

602. Even if it were possible to claim for a loss of opportunity to invest, the YP's evidence does not support any such claim. YNAC must establish that the YP would have invested any compensation without any expenditure, accumulating interest year by year, or that they would have used the compensation to undertake commercial activity that would have been profitable to the same or greater degree: *Griffiths TJ* [275]-[277] (Mansfield J); *Griffiths HC* [110], [341].

603. The evidence that YNAC would have invested compensation-money if paid earlier is nothing but assertion (cf YP-CS [623]). The evidence is that the YP intended or wished for any compensation to be used to benefit the community directly and immediately, including in training and education, housing, health projects, purchasing cars, and facilitating trips to country.[138] Mr Woodley's explanation of the business structures and operations of YAC/YNAC (M.Woodley [244]-[246], [249]-[255], [259]-[265]) does not demonstrate that any compensation-money would have been put to work at a profit. In fact, YAC and YNAC spend most of their income, rather than investing it (Exhibit E, Tabs 2 and 4).

604. Meaton 2 is nothing but a calculation of compound interest using the Federal Court pre-judgment simple interest rate (adopted from GPN-INT). No subtraction is made, for example, for the use of any compensation to benefit the YP, for community and other purposes. The evidence of Mr Meaton and the YP does not address the issue of whether any money would have been invested at the Federal Court pre-judgment simple interest rate. How the YP would have invested, or been able to invest, at the Federal Court pre-judgment simple interest rate of 4% above the RBA cash rate is also not demonstrated on the evidence.

605. As in *Griffiths TJ* ([276]-[277]), here, there "is no evidence that … [any commercial] activities have been profitable … in a way that generates profits at levels equivalent to the sorts of outcomes which would justify the imposition of compound interest"; nor is there evidence that if the YP had received compensation, they would have invested the money, or alternatively used the money to undertake commercial activity which would have been profitable to the same or a greater degree, which could justify the claim for compound interest "from the date of the first compensable act" (cf PoC [46(d)]).

H. CONCLUSIONS

606. The YP are entitled to claim compensation for the grant of the FMG tenements (other than the Water Ls) under s 123 of the MA 1978; and should have properly claimed before the Warden's Court.

607. If that is incorrect, the YP are entitled to compensation under the NTA for the loss or other effect on their native title rights and interests caused by the grant of the FMG

[138] E.g., E.Guinness [38], [40]; L.Cheedy [11]; L.Coppin [44], T431.20; A.Mack [16]-[19], [22]-[28]; J.Norman [7]-[8]; K.Warrie [53]; W.Woodley [9]-[13]; S.Wilson [26]-[28].

tenements. No amount of compensation is payable for any inability to control access to the Exclusive Areas. Compensation to which the YP are entitled under the NTA is payable by the State, not FMG.

608. The economic component of the YP's loss is not measured by reference to a rent or royalty paid for the iron ore obtained from the FMG tenements nor by reference to rent or royalty rates paid by other mining companies with respect to other projects. The assessment of the economic component must focus on what a hypothetical reasonable purchaser would pay to a hypothetical reasonable vendor for the YP's hypothetical surrender of their native title rights and interests. Valuing the impairment adopting such a hypothetical bargain cannot result in a value by reference to minerals in the land, never owned by the YP. The maximum value of the impairment of native title rights and interests is $95,197. The YP are entitled to simple interest on the economic component of any compensation awarded.

609. Compensation for the non-economic effect of the compensable acts is measured by determining, according to Australian community standards, what is appropriate, fair or just to be paid for the effect on the YP's spiritual connection to the land. "Social division" or "disharmony" is not compensable as such an effect. What is required is a consideration of the effect of the future acts (the grant of the FMG tenements) on the particular native title holders' (the YP's) particular native title rights and interests. YNAC's claim for non-economic loss does not confront this task. YNAC's claim for $1 billion is a disproportionate ambit claim, transparently aimed at enabling the YP to share in profits and revenue derived by FMG or the State, to which the YP have no entitlement. A sum of no more than $8 million for the YP's non-economic loss would reflect Australian standards that are appropriate, fair and just. Such a sum involves a very generous assessment.

Dated: 17 December 2024

Brahma Dharmananda SC

Tim Russell SC

Stefan Tomasich

Essie Dyer

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