Applicant's Submissions in Reply

REDACTED

Federal Court of Australia WAD 37 of 2022

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) The Applicant

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A. EXECUTIVE SUMMARY

1. The Applicant's case has always been that there are alternate paths to an entitlement to compensation under the NTA. They are, in sequence:

   (i) under s.24MD(3)(b) NTA (because the *Mining Act* does not provide compensation to native title holders for the grants of the FMG tenements);

   (ii) under s.10(1) RDA and s.45 NTA (in the scenario where the *Mining Act* does provide compensation to native title holders with the consequence that there is no entitlement under s.24MD(3)(b) NTA); and

   (iii) under s.53(1) NTA because the grants of the FMG mining leases resulted in a *paragraph 51(xxxi)* acquisition of property other than on *paragraph 51(xxxi)* just terms.

2. The principles or criteria to be applied to determine compensation are the same for each scenario, that is, the bifurcated approach in *Griffiths* HC of compensation for both *"economic loss"* and *"non-economic"* or *"cultural"* loss: see ACS [15]. Section 10(1) RDA, as reflected in s.51(1) NTA, necessitates that the assessment of just compensation for the infringement of NTRI include both a component for economic effects of the infringement and a component for non-economic or cultural loss: *Griffiths* HC at [84]. The compensation for economic loss is to be determined by the application of the *Spencer* test, adapted as necessary to accommodate the unique character of the NTRI and the statutory context: *Griffiths* HC at [66], [84]-[85]. Compensation for cultural loss is to be determined by what is *"appropriate fair or just"*: *Griffiths* HC at [237].

3. Because the First Respondent's Closing Submissions (**FRCS**) have deviated from the Agreed List of Headings, this Reply incorporates both the modified and agreed list of headings for clarity and consistency.

B. BACKGROUND

See Applicant's Opening Submissions (**AOS**) [1]-[~~11~~6]; Applicant's Closing Submissions (**ACS**) [27]-[~~43~~2].

C. FUTURE ACTS

See AOS [12]-[29]; ACS [43]-[47]; FRCS [33]-[43]; FMG's Closing Submissions (**FMGCS**) [28]-[60].

4. The Applicant adopts the submissions of YMAC [6]-[28] and the FRCS [3] that Subdivision M of the NTA applies to the grant of the Water Management Miscellaneous Licences (**WMMLs**). In short, Subdivision M applies to all of the compensable acts.

D. HOW IS COMPENSATION TO BE DETERMINED?

5. The Applicant agrees that grants of the FMG tenements were future acts to which ~~s.23MD(3)(b)~~ s.24MD(3(b) of the NTA applies. There are two interrelated issues for determination. The first is to determine the entitlement to compensation, the second is to determine how to assess the compensation.

D1 Entitlement to compensation under the *Mining Act* s.123

6. For the purposes of ~~s.23MD(3)(b)~~ s.24MD(3)(b) NTA, the Applicant accepts that the *similar compensable interest test*,[1] is satisfied, and that the relevant law is the *Mining Act*. The Applicant's first pleaded case is that the *Mining Act* does not provide compensation to native title holders with the consequence that ~~s.23MD(3)(b)~~ s.24MD(3)(b) entitles the Yindjibarndi people to compensation for the grants of the FMG tenements in accordance with Part 2 Division 5 of the NTA.

D1.1 Does the *Mining Act* provide compensation for Native Title Holders?

See AOS [31]-[42], [78]-[81]; ACS [50]-[67]; FRCS D2 [44]-[65]; FMGCS D.2 [64]-[96].

7. The State at [48]-[49] and FMG at [69] and [82], submit that the threshold condition in s.24MD(3)(b)(ii) NTA is not met because the *Mining Act* does *"provide for compensation to the native title holders for the* [compensable] *act*", being the grants of the FMG tenements.

8. Starting from AOS [39], the Applicant gave reasons why the provision for compensation under the *Mining Act* did not extend to native title holders. The first reason was that s.123 does not provide compensation for the *grants* of the FMG tenements and it is the grants which constitute the relevant *future acts* in respect of which compensation is sought. Instead, the compensation entitlement under the *Mining Act* is for *"loss and damage suffered or likely to be suffered ... resulting or arising from mining"*. The legislative history of the *Mining Act* supports this submission. The compensation entitlement in s.123(2) *Mining Act* as passed in 1978 was for all *"loss and damage suffered or likely to be suffered by them as a result of the grant of the mining tenement or the exercise of the rights conferred thereby"*. The reference to *"the grant"* was removed as part of the amendments made by the *Mining Amendment Act* 1985.

9. It is the grants, not the subsequent mining activities, which have caused the economic loss described in ACS [158]-[160] and [176]. The *Mining Act* does not compensate the native title holders for this loss. In this respect, s.123(1)(a),(b),(c) *Mining Act* states that no compensation shall be payable and no claim lies for compensation under that Act or otherwise: in consideration of permitting entry onto any land for mining purposes; in respect of the value of any mineral which is or may be in, on or under the surface of land; or by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral. The application of those principles would deny compensation for the loss of the economic value of the Yindjibarndi People's NTRI because they prohibit the assessment or the payment of compensation that is determined by reference to the very things which establish the economic value of their NTRI.

10. Similarly, the *Mining Act* does not compensate the Yindjibarndi People for the cultural loss occasioned by the grants of the FMG tenements. In this respect, not only does the *Mining Act* fail to expressly include cultural loss, s.123(1)(d) would prohibit a claim for cultural loss. This is because it states that no claims lie for compensation *"in relation to any loss or damage for which compensation cannot be assessed according to common law principles in monetary terms"*. There are no *"common law principles"* for the assessment of compensation for cultural loss.

11. The State does not respond to the ACS [52], and AOS [78]-[81], that it would have been unnecessary to amend the *Mining Act* by the inclusion of s.125A if the grantee of a mining tenement was already liable to pay compensation to native title holders under s.123(2) for the

[1] s.240 NTA.

effect(s) of the grant on their NTRI.

D1.1.1 Native title holders as "owners" or "occupiers"

12. Whether native title holders can be classified as '*owners'* or '*occupiers'* for the purposes of the *Mining Act* has been considered by the Respondents at FMGCS [67]-[84] and FRCS [51]-[~~64~~65] and by the Applicant in AOS [32]-[45] and ACS [53]-[56]. This issue was also raised in the *Native Title Act Case* where six Justices of the High Court considered whether the holders of s.7 rights under the *Land (Titles and Traditional Usage) Act 1993* (WA) could be *"occupiers"*. Generally, s.7 provided that any native title in Western Australia was extinguished and replaced with equivalent *"rights of traditional usage"*. The plurality (six Justices), said *"*[s]*ection 7 rights, being statutory, do not appear to bring the holders thereof within the definition of* 'occupier' *whose occupation* ***must be*** *under a* 'lawful title granted by or derived from the owner of the land'*"*.[2] (emphasis added)

13. In *Western Australia v Thomas* (1996) 133 FLR 124, the NNTT did not consider that native title holders were either *"owners"* or *"occupiers"* of land for the purposes of the *Mining Act*. In respect of *"occupiers"*, the NNTT concluded *"that the native title parties are not in actual occupation of the land, whether under any lawful title granted by or derived from the owner of the land or otherwise"*.[3]

14. In reply to FRCS [53], FMGCS [79]-[80], the Applicant says that in *Tisala Pty Ltd v Hawthorn Resources Ltd* [2022] WASC 109 at [53], [79], Hill J concluded that the definition of "*occupier*" in s.8 *Mining Act* narrows the ordinary and natural meaning of the word. It encompasses two elements, actual occupation and "*lawful title derived from the owner of the land"*, both of which must be present. In *Ward* HC at [559], McHugh J expressed the same view when he said that native title holders do not come within that definition because their title has not been *"granted by or derived from the owner of the land"*: AOS [33]-[34].

D2 Entitlement to compensation under s.24MD(3)(b) NTA

D2.1 Section 51(1) and 'just terms' compensation

See AOS [46]-[48]; ACS [56]-[58]; FRCS D3.2.3 [85]-[87]; FMGCS D.3. [97]-[105].

D2.2 Section 51(3) and the principles or criteria for determining compensation under the *Mining Act*
See AOS [49]-[51]; ACS [59]-[60]; FRCS D3.2.4 [88]-[90]; FMGCS D.4. [106]-[111].

15. If s.24MD(3) NTA entitles the Yindjibarndi People to compensation determined in accordance with Part 2 Division 5 of the Act then the Applicant accepts that s.51(3) applies: POC (A.02.002) at [41] and P28. The issue is *how* s.51(3) applies in the circumstances of this case.

16. Broadly, the Applicant has given three answers:

    (a) firstly:

        (i) any principles or criteria for determining compensation in the *Mining Act* must not be inconsistent with the NTA;

        (ii) to the extent that they are inconsistent, the relevant provisions in the *Mining Act* will be invalid by operation of s.109 of the *Constitution*; and

        (iii) s.123(1) of the *Mining Act* is invalid for this reason: POC [42] and AOS [52]-[56] and P31-34;

    (b) secondly, the application of s.51(3) NTA and/or the application of any principles or criteria for

[2] *Native Title Act Case* per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at p.~~466.~~446.
[3] *Western Australia v Thomas* (1996) 133 FLR 124 at pp.181 and 182.

determining compensation in the *Mining Act* engage s.10(1) of the RDA and s.45 NTA, with the result that, under s.51(1), compensation must be on just terms: POC [43] and [44];

(c) thirdly, s.53(1) NTA applies and the *"paragraph 51(xxxi) acquisition of property"* resulting from the grants of the FMG mining leases must be on "*just terms*": POC [43] and [45].

17. In reply the Applicant makes an additional submission and develops its RDA answer in reply in Section D3.2. This is prompted by the FRCS and FMGCS, particularly, the State's sustained attack on the operation of the RDA in this case. This is the Applicant's primary answer to how s.51(3) NTA applies in this case. The s.109 inconsistency answer is made in the alternative.

18. The Applicant's s.53(1) answer is a backstop if these two other answers are not accepted. It is important to keep in mind that the Applicant relies on s.53(1) NTA in other parts of its case. The section is advanced as an alternative source of the Applicant's entitlement to compensation in accordance with Part 2 Division 5 of the NTA. The section is also relied on if the Applicant's submissions in relation to s.51A NTA are not accepted. The Applicant's submissions on s.53(1) are also developed later in this reply.

19. The additional submission is that although s.51(3) may, on its face, apply, the requirement that the Court must apply *"any principles or criteria for determination compensation"* set out in the *Mining Act* will arguably have no practical effect, *first*, because the relevant *"act*[s]*"*, consists of the *grant* of mining tenements and the *Mining Act* does not provide any *"principles or criteria"* for determining compensation for those *"act*[s]*"*; rather it sets out principles and criteria for determining compensation for the *"act"* of mining. *Secondly*, s.51(3) does not say that *only* those principles or criteria are to be applied. Ultimately, the *"principles or criteria"* which should apply are those set out by the High Court in *Griffiths* HC. Finally, if the *Mining Act* does provide native title holders with a right of compensation, it does not provide them with parity of treatment with the holders of ordinary title.

D2.2.1 *Is there a s.109 inconsistency between s.123(1) of the Mining Act and the NTA?*

See AOS [52]-[56]; ACS [61]; FRCS D5 [294]-[303] (see also: FRCS D6 [304]); FMGCS D.4.1. [112]-[127].

D2.2.2 *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?*

See AOS [57]-[58]; ACS [62]-[70], [215], [222]-[223], [347]-[489], [501]-[505]; FRCS D3.2.4.1 [91]-[97]; D4.6.1.1 [264]; FMGCS D.4.2 [128]-[161].

20. At FRCS [93], the State submits that the *Mining Amendment Bill (No.2) 1985* (WA) and the *Aboriginal Land Bill 1985* (WA) provide insight into the legislative intent behind the term "social disruption" in the MA. However, as neither bill was enacted, no legislative intent can be inferred from them. Furthermore, when these bills were drafted, native title had not yet been recognised in Australian law, nor was cultural and spiritual loss considered compensable.

21. The Applicant has made detailed submissions on the social division and disruption within the Yindjibarndi community which has resulted from the non-consensual grants of the FMG tenements and the related non-consensual mining activities: AOS [57]-[58] and [86]; ACS [62]-[70], [215], [222]-[223], [347]-[489] and [501]-[505]. In any event, if this social division and disruption does not fall within the meaning of *"social disruption"* in s.123(4)(f) of the *Mining Act* then this is yet another reason why that Act does not adequately compensate the Yindjibarndi People. But irrespective of whether the social division and social disruption are compensable as *"social disruption"* under the *Mining Act*, it still falls within the meaning of *"cultural loss"* as described by the High Court in *Griffiths* HC and as such is compensable

under the NTA.

22. As the plurality noted in *Griffiths* HC at [158], the assessment of the effect of the compensable acts causing cultural loss cannot be divorced from the content of the traditional laws and customs acknowledged and observed by the relevant claim group. Here, as in *Griffiths* HC, the communal and collective nature of the NTRI is one of the facts or matters that must be taken into account in assessing the effect(s) of the compensable acts on the Yindjibarndi People's NTRI. Under those communal and collective laws and customs, the Yindjibarndi People, the ancestral spirits, the land and everything on it are *"organic parts of one indissoluble whole"*: *Milirrpum v Nabalco* (1971) 17 FLR 141 at p.167 (Blackburn J). The social division and disruption within the community over the development and the operation of the SHP has contributed to a significant impairment to this spiritual connection between the people, the spirits and the land.

23. In this case, again as in *Griffiths* HC, the compensable acts have impeded the ability of the Yindjibarndi People to continue to practice and observe their communal laws and customs. In particular, the acknowledgement and observance of the fundamental laws and customs which held this group together as a strong and viable traditional community are no longer being observed because they have been severely impacted by the social division engendered by both the direct and the indirect effects of the compensable acts. In this respect, *Galharra* and *Nyinyaard* are not being universally followed, as was formerly the case. The community no longer comes together every year to practice the important *Birdarra Law*. These fundamental laws and customs which held the community together and the equally important laws and customs which require them to care for their country are no longer able to be acknowledged and observed. This has fractured, and will continue to fracture, the Yindjibarndi People's connection to their country.

24. The detrimental consequences of the social division and disruption need not directly arise from the relevant acts.[4] If the *Mining Act* does not provide compensation for this cultural loss, then it will give rise to a right of compensation under s.10 RDA or, in the alternative, it will give rise to an entitlement to compensation or additional compensation under s.53(1) NTA.

D3 Entitlement to compensation under s.10(1) of the RDA

See AOS [59]-[61]; ACS [71]-[72]; FRCS D2.5 [66], D7 [305]-[346]; FMGCS D.5. [162]-[179].

D3.1 Operation of the RDA

25. In this part of its reply, the Applicant addresses the two RDA aspects of its case. The first aspect is that the Applicant relies on the RDA as a source of its entitlement to compensation in accordance with Part 2 Division 5 of the NTA. The second aspect is that the Applicant relies on the RDA for one of its answers about the application of s.51(3) of the NTA in this case. The first aspect is pleaded at [21]-[23] in the POC and it is addressed by the Applicant and FMG in their opening and closing submissions under the agreed heading "Entitlement to compensation under s.10(1) of the *Racial Discrimination Act 1975 (Cth)* (RDA) [Issue 11]". The second aspect is pleaded at [39]-[46] in the POC but it is not plainly visible in any of the agreed headings. The Applicant addressed this aspect in its opening and closing submissions under the agreed heading "Section 51(3) and the principles or criteria for determining compensation under the *Mining Act* [Issue 3]".

26. The State has addressed both aspects in its closing submissions at FRCS D7 [305]-[346]. FMG has addressed the first but not the second aspect in its closing submissions at FMGCS D.5.

[4] *Griffiths* HC at [218] and [164].

[162]-[179]. In summary, FMG submits that the *Mining Act* is not discriminatory and s.10(1) of the RDA is not engaged. The State makes a strong attack on the operation of the RDA in relation to future acts and, like FMG, submits that s.10(1) is not engaged. The operation of the RDA is a key part of the Applicant's case. Essentially, it operates to address the discriminatory treatment of native title holders under the *Mining Act* in the impairment of their NTRI and the compensation provided for that impairment in comparison to the holders of non-NTRI. The Applicant says that the RDA operates this way both as a source of the entitlement to compensation in accordance with Part 2 Division 5 of the NTA and on the operation of s.51(3) of the Act.

27. The consequence of accepting the State's and FMG's submissions is that the NTA will sanction the unequal treatment of native title holders in relation to the grants of mining tenements in Western Australia. The context here is important. Mining is a significant economic activity in the Pilbara, and it has a significant impact on native title holders.

28. The RDA issues that arise for determination are:

(a) whether s.10(1) of the RDA is engaged on either RDA aspect of the Applicant's case;

(b) whether the RDA operates in relation to Part 2 Division 5 of the NTA;

(c) the operation of s.45; and

(d) the consequences of s.10(1) of the RDA and s.45 of the NTA being engaged on both RDA aspects of the Applicant's case.

29. As in *Mabo (No.1*) and the *Native Title Act Case*, the relevant rights are the right to own property and the right not to be arbitrarily or unjustly deprived of property.[5] The Applicant submits that the right not to be arbitrarily or unjustly deprived of property extends to and includes the impairment of property.[6] In the *Native Title Act Case* the Joint Judgment states:

> Where, under the general law, the indigenous *"persons of a particular race"* uniquely have a right to own or to inherit property within Australia arising from indigenous law and custom but the security of enjoyment of that property is more limited than the security enjoyed by others who have a right to own or to inherit other property, the persons of the particular race are given, by s.10(1), security in the enjoyment of their property *"to the same extent"* as persons generally have security in the enjoyment of their property.[7]

30. The further operation of the RDA explained in that case is particularly relevant:

> If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or on prescribed conditions (including the payment of compensation), a State law which purports to authorise expropriation of property characteristically held by the *"persons of a particular race"* for purposes additional to those generally justifying expropriation or on less stringent conditions (including lesser compensation) is inconsistent with s.10(1)) of the *Racial Discrimination Act.*[8]

31. Under the *Mining Act* native title holders' security of enjoyment of their NTRI is more limited than the security enjoyed by the holders of non-NTRI. This extends to the regulation or the impairment of NTRI on less stringent conditions, including compensation under the *Mining Act* for the effect of *"mining"*. It is necessary to make out this proposition for each RDA aspect

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[5] *Native Title Act Case* at p.443 (including the relevant extract from *Mabo (No.1)*).
[6] *Griffiths* HC at [75]; *Yunupingu* at [460]-[462], [467].
[7] *Native Title Act Case* at p.437.
[8] Ibid.

of the Applicant's case.

32. The first RDA aspect is where the RDA is the source of the Applicant's entitlement to compensation in accordance with Part 2 Division 5 of the RDA. In this setting, it is necessary to examine the treatment of native title holders under the *Mining Act* on the assumption that they are entitled to compensation under that Act as *"owners"* or *"occupiers"*. Native title holders' security of enjoyment of their NTRI is more limited in this setting because:

    a) holders of exclusive native title are not accorded the same protections given to *"owners"* and *"occupiers"* of *"private land"*; and

    b) the impairment of NTRI (exclusive and non-exclusive native title) is done on less stringent conditions than the impairment of non-native title rights and interests, in that:

        (i) holders of exclusive native title are not accorded the same protections and benefits given to the *"owners"* or *"occupiers"* of *"private land"*; and

        (ii) the *Mining Act* is precluded from having regard to the unique character of NTRI in its provision for compensation – it is precluded from providing compensation for cultural loss and for economic loss (the negotiation or exchange value of NTRI).

33. Where they hold exclusive native title, the Yindjibarndi People are not accorded the protections and benefits provided to *"owners"* or *"occupiers"* of *"private land"* provided by ss.28, 29(2), 29(7), 30, 31, 35, 123(5) and (6) of the *Mining Act*. These provisions are addressed in the POC ~~[11.5]~~[21(b),(bb), (c), (d), (e), (f)] and in the AOS at [39], [40], [42]-[44].

34. Both the State and FMG submit that the *"private land"* provisions of the *Mining Act* are not relevant because, ultimately, s.123(2) provides *"compensation for all loss and damage suffered or likely to be suffered … resulting or arising from the mining"*[9]. However, this ignores the connection or overlap between the *"private land"* provisions and compensation. Section 35 of the *Mining Act* is a good example. Generally, it provides that the holder of a mining tenement shall not commence any mining on *"private land unless and until he has paid or tendered to the owner and the occupier thereof the amount of compensation"* determined or agreed. In a substantive sense, this and other *"private land"* provisions are very valuable.[10] It is artificial in the circumstances to counter that the provision of compensation by s.123 of the *Mining Act* treats native title holders and the holders of non-NTRI equally. This is reflected in the fact that there have been no determinations of compensation for native title holders under the *Mining Act*.

35. In *Griffiths* HC at [75] the plurality said that the point made in both the *Native Title Act Case* and *Ward* HC was that, although NTRI have different characteristics from common law land title rights and interests, and derive from a different source, native title holders are not to be deprived of their NTRI, or to have their NTRI impaired to a point short of extinguishment, without the payment of just compensation, any more than the holders of common law land title are not to be deprived of their rights and interests or to have those rights and interests impaired without the payment of just compensation. In *Griffiths* HC at [84], the plurality said that it is the equality of treatment mandated by s.10(1) RDA as reflected in s.51 NTA, which necessitates that the assessment of just compensation for the infringement of NTRI includes both a component for the objective or economic effects of the infringement *and* a component for non-economic or cultural loss. The inability of the *Mining Act* to provide compensation for either

[9] FRCS [6], [61]-[64]; FMGCS [67]-[83].

[10] Michael Hunt, Tim Kavenagh and James Hunt *Hunts on Mining Law of Western Australia*~~, 5th Edition, Hunt, Kavenagh and Hunt at 3.4.6.~~(The Federation Press, 5th ed, 2015) at 3.4.6 (pp.57-58)

economic or cultural loss[11] means that the Yindjibarndi People do not enjoy the right not to have their NTRI arbitrarily or unjustly impaired to the same extent as the holders of non-NTRI. For these reasons, the Applicant submits that s.10(1) of the RDA is engaged on the first RDA aspect of its case.

36. We turn to the second RDA aspect of the Applicant's case - the application of s.10(1) of the RDA to s.51(3) of the NTA. In this setting, it is not necessary to assume that the *Mining Act* provides compensation to native title holders as *"owners"* or *"occupiers"*. This is because this aspect of the case arises where s.24MD(3) entitles the Applicant to compensation in accordance with Part 2 Division 5 of the NTA. The Applicant accepts that s.51(3) of the NTA applies in this setting. To recap, s.51(3) of the NTA requires the Court to apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in section 240 (which defines *similar compensable interest test*). The relevant law is of course the *Mining Act*. A question posed by s.51(3) is whether the Court is required to apply any principles or criteria on the assumption that the native title holders instead held *"ordinary title"*, or if it is required to apply any principles or criteria in relation to the NTRI. It is not necessary to determine this question.

37. In circumstances where the FMG tenements have been granted and mining is well underway, the only principles or criteria for determining compensation that can be applied are those in s.123 of the *Mining Act*. Even if compensation is determined on the assumption that native title holders instead held ordinary title, native title holders will not for this reason get any of the valuable benefits and protections in the *"private land"* provisions of the *Mining Act*. This is an oddity of the *Mining Act* satisfying the *similar compensable interest test* in this case.[12] Holders of *"ordinary title"* as *"owners"* of *"private land"* are accorded these valuable benefits and protections, including in relation to compensation. However, these benefits and protections are not able to be accorded to native title holders through the application of s.51(3) of the NTA. Also, if compensation is determined on the assumption that native title holders instead held ordinary title, application of the principles or criteria in s.123 of the *Mining Act* will not compensate native title holders for cultural loss or for economic loss (the negotiation or exchange value of NTRI) in this case.

38. It is submitted that the reference to *"whether or not on just terms"* in s.51(3) is to a situation where the ordinary title holder and the native title holder are treated the same so that neither receives *"just terms"* compensation. Subject to the operation of s.53(1) NTA, there may be no difficulty in accepting a determination not on just terms if the relevant provisions or criteria in the *Mining Act* treat native holders and holders of non-native rights or interests equally. However, the expression *"whether or not on just terms"* is not a legislative sanction to treat native title holders less equally.

39. In its submissions about why the operation of the NTA is not discriminatory, the State submits that in supplying an entitlement to compensation, s.24MD(3)(b) of that Act operates similarly to how the RDA operated before the NTA was enacted.[13] This ignores the possibility of the RDA operating to invalidate acts before the NTA was enacted.[14] The State then refers to s.51(3) of the NTA and submits *"*[in] *other words, the NTA adopts the holders of ordinary title under the State law as the benchmark for its determination of compensation, thereby treating native title holders and non-native title holders equally"*.[15] For the reasons already explained, the

[11] See earlier herein under *"D1.1 Does the Mining Act provide compensation for native title holders?"*.
[12] s.240 NTA.
[13] FRCS [327].
[14] *Ward* HC at [309] and *James v Western Australia* [2010] FCAFC 77, 184 FCR 582.
[15] FRCS [327].

application of s.51(3) and/or the application of principles or criteria for determining compensation in the *Mining Act* will not compensate native title holders for their unique economic or cultural loss. For these reasons, s.10(1) of the RDA is engaged in this second RDA aspect of the Applicant's case. As for the first aspect, s.10(1) will supply a right of compensation to the Yindjibarndi people for economic and cultural loss.

40. The plurality in *Griffiths* HC drew on the RDA as the source of the right to compensation for both economic and cultural loss in that case. The Justices said at [84] that it is the equality of treatment mandated by s.10(1) of the RDA which necessitates that the assessment of just compensation for the infringement of NTRI include both a component for the objective or economic effects of the infringement and a component for non-economic or cultural loss. The implication of this part of the plurality's reasoning is that the RDA operates in relation to Part 2 Division 5 of the NTA. This is consistent with s.7 NTA:

> (1) This Act is intended to be read and construed subject to the provisions of the Racial Discrimination Act 1975.
>
> (2) Subsection (1) means only that:
>
> (a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
>
> (b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.
>
> (3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.

41. The plurality in *Ward* HC made the following important observations about s.7:

> One effect of this section is that, contrary to what otherwise might follow from the fact that the NTA is a later Act of the federal Parliament, the NTA is not to be taken as repealing the RDA *to any extent*. The significance of s.7(3) is to make it clear that, notwithstanding the continued paramountcy of the RDA stated in the earlier sub-sections, the effect of the validation achieved by the NTA is to displace the invalidity which otherwise flowed from the operation of the RDA.[16] (emphasis added)

42. We address some of the State's submissions on this issue below in turn. First, we acknowledge that the following submission is partially correct:

> … the question posed in this case is not whether the MA is inconsistent with the RDA but, rather, whether the NTA in making the entitlement to compensation for the Compensable Acts claimable under, or referable to, the MA is inconsistent with the RDA.[17]

43. The submission is correct where s.24MD(3) of the NTA is the source of the Applicant's entitlement to compensation in accordance with Part 2 Division 5 of the Act. It is incorrect if the *Mining Act* provides compensation to native title holders, with the result that there is no entitlement under s.24MD(3). That section does not make compensation claimable under the *Mining Act*. Assuming that the *Mining Act* does provide compensation for native title holders, the provision is by the force and operation of that Act and not the NTA.

44. The submission that the RDA does not have a residual operation in relation to matters with

[16] *Ward* HC at [99]. The plurality in the *Native Title Act Case* made the same observation at p.483.
[17] FRCS [316].

which the NTA deals[18] is too blunt. It does not have regard to s.7 of the NTA or the reliance on the RDA by the plurality in *Griffiths* HC. The State relies on the following passage from the *Native Title Act Case*:

> … even if the *Native Title Act* contains provisions inconsistent with the *Racial Discrimination Act*, both Acts emanate from the same legislature and must be construed so as to avoid absurdity and to give to each of the provisions a scope for operation. The general provisions of the *Racial Discrimination Act* must yield to the specific provisions of the *Native Title Act* in order to allow those provisions a scope for operation.[19]

That passage from the plurality's reasons was part of a response to the State's submission in that case that:

> The *Native Title Act* was said to discriminate in favour of Aborigines and Torres Strait Islanders and thus to offend the *Racial Discrimination Act*. As s.7(1) preserved the operation of the *Racial Discrimination Act*, so the argument ran the offending provisions of the *Native Title Act "must be regarded as inoperative"*.[20]

45. The passage was the last of several reasons the plurality gave for rejecting the submission. The High Court was considering an earlier version of s.7 NTA. Section 7(1) then provided that *"Nothing in this Act affects the operation of the Racial Discrimination Act 1975."* The current form of s.7 (which contemplates that the RDA will apply to the performance of functions and the exercise of powers under the NTA) and the reliance on the RDA by the plurality in *Griffiths* HC in relation to determining compensation under Part 2 Division 5 of the NTA, mean that this passage cannot be relied on as the State seeks to do.

46. The State relies on s.8(1) RDA and the NSW Court of Appeal decision *Durham Holdings v State of NSW* [1999] NSWCA 324, 47 NSWLR 340 to establish that s.10(1) RDA is excluded in relation to the NTA. The *first* point in reply is that in the setting where the *Mining Act* provides compensation to native title holders and the issue is whether that Act attracts the operation of s.10(1) RDA, s.8(1) RDA can have no operation. The *second* point in reply is that Spigelman J was careful to confine his findings to the case at hand. His Honour found:

> In my opinion, the *Native Title Act* is a *"special measure"* and, accordingly, s.8 operates to deprive s.10 of the *Racial Discrimination Act* of any relevant effect ***for purposes of this case***".[21] (emphasis added)

47. The NTA was raised in novel circumstances in that case. The corporate plaintiff owned coal in NSW. The coal was the subject of an expropriation and compensation scheme legislated in 1981 and amended in 1985. The plaintiff challenged the scheme. One of the challenges (identified at [54]) was:

> [the legislative scheme] is inconsistent with s.10 of the *Racial Discrimination Act*, by reason of the combined operation of that Act and the *Native Title Act 1993* (Cth). The submission was based on the proposition that, as just terms were made available to Aborigines under the *Native Title Act*, to deprive coal owners of just terms would be inconsistent with the operation of s.10 of the *Racial Discrimination Act*. Accordingly, s.109 of the Commonwealth Constitution would render the relevant provision of the

[18] FRCS [317].
[19] *Native Title Act Case* at p.484.
[20] *Native Title Act Case* at p. 483.
[21] *Durham Holdings v State of NSW* [1999] NSWCA 324, 47 NSWLR 340 at [85].

inconsistent State Act inoperative.

48. Accepting that the NTA is a *"special measure"* within the meaning of s.8(1) of the RDA, it does not necessarily follow that the section operates to deprive s.10(1) of the RDA of the effect the Applicant submits it has in relation to s.51(3) of the NTA. It would be an odd result if s.8(1) of the RDA operated to permit the discriminatory treatment of native title holders. It is certainly not the result posited by the plurality in *Griffiths* HC at [53], [75], [84].

D3.2 Operation of s.45 NTA

49. We turn to address s.45 NTA. The State submits that s.45 applies only to an entitlement that arises outside the NTA.[22] We repeat the point that where the *Mining Act* provides compensation to native title holders then the entitlement to compensation does arise outside the NTA. According to the State's submission then, there is no problem with s.45 operating in relation to the first RDA aspect of the Applicant's case. However, the State's submission should not be accepted. The words *"as if the entitlement arose under this Act"* do not exclude the possibility of s.45 applying where the RDA operates within the NTA to provide a right of compensation.[23] The words are facilitative, as the extract from *Ward* HC in the State's submissions demonstrates. Where the RDA provides a right to compensation within the NTA, for cultural loss, for example, then s.45 can apply so that the compensation is determined in accordance with s.50 NTA.

D3.3 The consequences of s.10(1) RDA and s.45 NTA being engaged

50. The final issue to address is the consequences of s.10(1) RDA and s.45 NTA being engaged on both RDA aspects of the Applicant's case. The State addresses this issue under the heading *"D7.4 RDA not capable of conferring compensation on just terms"*. To recap, the Applicant's case is that when s.45 of the NTA is engaged then, under s.51(1), the determination of compensation must be on just terms. We have referred also to s.51(4) in the Applicant's closing submissions. We have referred to this subsection only because it applies if ss.51(2) and (3) do not apply. It is not advanced as a separate or different approach to determining compensation.

51. The Applicant does not challenge the plain meaning of s.45 in that it provides for compensation *"to be determined in accordance with section 50"*. The Applicant accepts that the effect of s.45 is to require any determination of compensation to be made in accordance with Part 2 Division 5 of the NTA. In other words, the Applicant accepts that it is necessary to confront ss.51(1) and (3). The State submits that this is *"hopelessly circular"*.[24] The Applicant has two submissions. *First*, in its closing submissions at [60] the Applicant submits that s.51(1) NTA *always* applies, because it supplies the entitlement to compensation. This is consistent with it being the core provision: *Griffiths* HC at [41]. To round out that submission:

a) if s.10 of the RDA is engaged by either:
   (i) the *Mining Act*; or
   (ii) the application of s.51(3) and/or the application of any principles or criteria for determining compensation in the *Mining Act*,

   then s.51(3) *cannot* apply,

b) because it *always* applies s.51(1) provides that the entitlement to compensation is an entitlement

[22] FRCS [338]-[341].
[23] FRCS [339].
[24] FRCS [345].

on just terms; and

c) s.51(4) is the only subsection that applies in the circumstances (because s.51(2) and (3) do not apply).

52. *Second*, in the alternative:

a) if s.10 of the RDA is engaged by either:

(i) the *Mining Act*; or

(ii) the application of s.51(3) and/or the application of any principles or criteria for determining compensation in the *Mining Act*;

b) the Court must apply those principles or criteria for determining compensation in the *Mining Act* which it can; and

c) then the RDA will itself provide a right of compensation for both economic and cultural loss.

D4 Entitlement to compensation under s.53(1) NTA

See AOS [65]-[72]; ACS [73]-[76]; FRCS D.8.1 [347]-[352]; D.8.2 [353]-[369]; FMGCS D.6 [180]-[195].

53. The State at FRCS [347]-[351] submits that s.53(1) NTA is confined to providing a "*top up*" to achieve *paragraph 51(xxxi) just terms*. In reply, it is submitted that s.53(1) is not so limited. Where the doing of a future act or the application of any of the provisions of the NTA would result in a *paragraph 51(xxxi)* acquisition of property other than on *paragraph 51(xxxi) just terms*, s.53(1) provides an entitlement to *"**such compensation**, or compensation in addition to any otherwise provided by this Act"* (our emphasis). As such, it provides a standalone entitlement to compensation where NTRI have been acquired other than on just terms. There can be no question that the grant of the FMG mining leases has resulted in an *acquisition* of the Yindjibarndi People's NTRI (see below), and bearing in mind that *no* compensation has been paid to the Yindjibarndi People, the acquisition was not made on 51(xxxi) just terms. Alternatively, the Court can determine the compensation to be paid by adding to the amount(s) conceded by the Respondents as being due by way of compensation such further amount as may be required to provide just terms.

D4.1 Not a "*paragraph 51(xxxi) acquisition"*

54. The State submits at [353]-[358] that although NTRI may be understood as *"property"* in the *paragraph 51(xxxi)* sense, there has been no *"acquisition"* of property to enliven s.53(1) NTA. In making that submission it relies *first*, upon the fact that the grants of the FMG mining leases have not extinguished native title. *Second*, it says that, in any event, the extinguishment of native title is not capable of amounting to an *"acquisition"* in the *paragraph 51(xxxi)* sense, due to its inherent susceptibility to a valid exercise of the Crown's sovereign power to grant interests in land.[25] In raising those arguments, the State says that it is adopting the position taken by the Commonwealth before the Full Court in *Yunupingu*.[26] The State seeks to distinguish this case from both *Yunupingu* and *Griffiths* HC because those cases are said to have been concerned with acts that *extinguished* native title.[27]

55. In reply, the Applicant says *first,* in *Griffiths* HC, the plurality acknowledged that NTRI can be *"acquired"*, and that compensation must be assessed to provide *"just terms"* for their

[25] FRCS [355].
[26] Ibid.
[27] FRCS [358].

"acquisition": *Griffiths* HC at [53]. The plurality said that native title holders are not to be deprived of their NTRI or to have their NTRI *"impaired"* to a point short of extinguishment, without the payment of just compensation: *Griffiths* HC at [75]. They then set out at [84] what would constitute just terms compensation for the extinguishment or *"impairment"*, of NTRI.

56. *Second*, not all of the acts considered in *Yunupingu* extinguished native title. The compensable acts there included the grants of 5 special mineral leases issued between 1958 and 1963.[28] The applicant submitted that although the grants had not extinguished native title they had *"diminished and impaired"* the NTRI, which constituted an *acquisition* of property within the meaning of *paragraph 51(xxxi)*.[29] The Full Court accepted that submission, saying that laws which *diminish* native title confer an identifiable proprietary benefit on others and thus constitute an acquisition of property within *paragraph 51(xxxi)*.[30] The Full Court said that the existing authorities and in particular, *Griffiths* HC, support that conclusion.[31] The Full Court declined what it described as the government respondents' invitation to extend the conceptual tool of inherent defeasibility or inherent susceptibility from some statutory rights to native title.[32] Their Honours specifically rejected the Commonwealth's contention which is now relied upon by the State, that the relevant grants were not capable of amounting to an acquisition of property within the meaning of s.51(xxxi) because native title was *"inherently susceptible to a valid exercise of the Crown's sovereignty power – derived from its radical title – to grant interests in land"*.[33]

57. FMG also submits that no property has been acquired by FMG or the State from the Yindjibarndi People by the grants of the FMG mining leases.[34] In support of that submission, it relies upon the statement made by Brennan J in *Mabo v Queensland (No.2)* (1992) 175 CLR 1, 60, that native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge and observe their laws and customs. In reply, the Applicant says that the Court is not dealing here with a voluntary assignment of NTRI. Native title can be *"acquired"* by the Crown through the exercise of the same sovereign power that is used to compulsorily acquire a person's freehold title in land.[35] The whole framework of the NTA, not just the compensation provisions, is built on the premise that native title is understood as proprietary in character and as capable of being acquired and its acquisition is assumed to be compensable in monetary terms.[36] The High Court in *Griffiths* HC had no doubt that native title could be *"acquired"* by the Crown and that the acquisition would give rise to an entitlement to just terms compensation.[37]

58. FMG further submits at [182]-[183], that the grant of a right to mine under the FMG Mining Leases for 21 years did not affect an *"acquisition"* within *paragraph 51(xxxi)* because the *"temporary impairment"* of the native title *firstly*, would not produce a corresponding benefit or advantage to the State or FMG and *secondly*, by reason of the *non-extinguishment principle*, the native title would not be extinguished. In reply, the Applicant says *first,* the grant of those

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[28] *Yunupingu* at [37], [39] and [54].
[29] *Yunupingu* at ~~[260]~~ [39] and [460].
[30] *Yunupingu* at [460], [461], [462] and [467].
[31] *Yunupingu* at [462], [467] and see too *Griffiths* HC at [53], [75] and [84].
[32] *Yunupingu* at [468]-[469].
[33] *Yunupingu* at [478]-[479].
[34] FMGCS [181].
[35] *Yunupingu* at [455].
[36] *Yunupingu* at [467].
[37] *Griffiths* HC at [53].

tenements and the consequential suppression of the NTRI provided FMG with a valuable benefit and one which attached directly to the land. *Second*, FMG's reliance upon *Yunupingu* in support of its submission that because there was no *permanent* extinguishment of the NTRI, there was no acquisition of property, is untenable. *Yunupingu* is authority for the directly opposite proposition. The Full Court said there that laws which merely *diminish* native title confer an identifiable proprietary benefit on others and thus constitute an acquisition of property within *paragraph 51(xxxi)*.[38]

59. FMG submits that even if there is an acquisition within *paragraph 51(xxxi)*, that does not involve a *compulsory* acquisition, which they say only occurs when the State, *"by compulsion"*, acquires property, eg under the *Land Administration Act 1997* (WA): FMGCS [188]. They say it follows that s.51(2) NTA deals with compulsory acquisitions, not acquisitions within *paragraph 51(xxxi)*.[39] The Applicant submits that if there has been a *paragraph 51(xxxi)* acquisition of the NTRI on other than *just terms*, s.53(1) will apply according to its own terms. That is, the Court will determine compensation on just terms and will not need to have recourse to s.51(2). In the alternative, if, s.53(1) does not provide an entitlement to compensation on its own terms, then, arguably, s.51(2), and not s.51(3), will apply. In this respect, the State *has* acquired the Yindjibarndi People's NTRI *"by compulsion"* because it has done so without their consent, indeed, over their strong objections. If s.51(2) rather than s.51(3) applies, the Court *may,* not *must*, have regard to any *"principles or criteria"* for determining compensation set out in the *Mining Act*. It is submitted that the principles or criteria which the Court should apply in determining just terms compensation under s.53(1) are those set out in *Griffiths* HC at [84].

D4.2 Acquisition was on *"paragraph 51(xxxi) just terms"*

60. The State at FRCS [359]-[369] submits that if there has been a *paragraph 51(xxxi) acquisition* of property, the determination of compensation under s.51(3) NTA is on *paragraph 51(xxxi) just terms*, such that s.53(1) NTA is not engaged. As submitted above at [15]-[19], the Applicant says that s.51(3) does not provide just terms compensation, because the application of the *"principles or criteria"* in s.123(1)(a)-(d) of the *Mining Act* would deny compensation for the Yindjibarndi People's economic and cultural loss.

61. The State says at FRCS [364] *fn* 713, that the Yindjibarndi People have not been denied an entitlement to compensation because the parties agreed that the Applicant has an entitlement to compensation. Neither the State nor the FMG Respondents have paid *any* compensation. The State says at FRCS [365], that the determination of compensation by the application of the principles and criteria under s.123 *Mining Act* is on *paragraph 51(xxxi) just terms*, such that s.53(1) is not engaged, and that compensation should be assessed under the *Mining Act* using the same principles and criteria which apply to the ordinary title holder under State law. Again, as discussed earlier above, that approach fails to take account of the unique features of native title or to provide just terms compensation for the infringement/acquisition of NTRI.

D5 Construction and operation of s.49 NTA

See AOS [73]; ACS [77]; FRCS D9 [370]-[372]; FMGCS D7 [196]-[198].

62. It is submitted that, as was the case with the assessment of cultural loss in *Griffith*s HC at [165], it is not appropriate to assess economic loss in this case on an act-by-act approach. *First*,

[38] *Yunupingu* at [460], [461], [462] and [467].

[39] Referring to POC [45] which says that if s.53(1) NTA applies then under s.51(2), the Court may, not must in making the determination of compensation on just terms, have regard to the principles or criteria for determining compensation under the Mining Act.

because it is not possible to establish the comparative significance of each of the future acts. The economic loss has been *"necessarily incremental and cumulative"* with each successive grant: see *Griffiths* HC (*supra*). *Second*, because the evidence in this case establishes that the negotiations between miners and native title parties focus on reaching agreement on a single land access and compensation agreement that will cover the entirety of a proposed mining project to the extent to which that project will encroach upon the native title party's traditional country. There is not a series of separate negotiations and separate agreements in respect of the grant of each individual tenement. *Third*, the Applicant has pleaded, and the Respondents have agreed, that the FMG tenements *collectively* underpin and provide the legal basis for the SHP.

E. CLAIMED LOSS AND EFFECT ON NTRI

E1 Entitlement to compensation for grants of FMG tenements

E1.1 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?

See AOS [2], [5], [88]-[91]; ACS [78]-[81]; FRCS E2 [374]-[391]; FMGCS E1 [199]-[225].

63. This issue is addressed in AOS [2], [5], [88]-[91] and in ACS [78]-[81]. The Applicant adopts and repeats the YMAC Opening Submissions at [74]-[84] and Closing Submissions at [49]. For the reasons given in those submissions, the Yindjibarndi People possess, and have always possessed, a right of exclusive possession in the Exclusive Area. See too *Western Australia v Ward* (2000) 99 FCR 316 at [190]. Further, it is an abuse of process for the Respondents to seek to re-litigate what was decided and determined in *Warrie (No.2)*: *Starkey* at [198], [202] and *Stuart* at [69].

64. The State says at FRCS [381] that *Griffiths (No.1)* is the only authority on this issue. That is not strictly correct. *First*, as submitted in AOS [89], in *Warrie (No.2)* at [~~6~~ 3-9], Rares J rejected the submission that the determination should identify what the NTRI would have been, were it not for the effect of ss.47A and 47B. His Honour said at [5] that there are no situations in which anyone can have any rights or interests in the ss.47A and 47B areas prior to the determination of native title that are inconsistent with the NTRI recorded in the Determination. *Second*, in ACS [80]-[81], reference is made to the Full Court decisions in *Starkey* and *Stuart*, which are authority for the proposition that a determination of native title recognises as a fundamental matter that the NTRI the subject of the determination have existed continually in that form, at all times since sovereignty.

65. FMGCS [208] says that Rares J did not decide that the earlier pastoral leases and oil exploration permits had not extinguished or otherwise affected the Yindjibarndi People's NTRI, and instead decided that ss. 47A and 47B *"permitted"* the Court to ignore the effects of those historical acts. That submission is clearly wrong. Rares J held that the earlier pastoral leases and oil exploration permits had *not* extinguished any NTRI in the Exclusive Area: see *Warrie (No.2)* at [3]-[11]; ss. 47A(2)(c), 47B (2)(c); AOS [78]-[81]. This is the very same issue which FMG and the State again seek to raise in this proceeding.

66. Unlike the situation in *Griffiths (No.1)*, the Applicant is not claiming compensation for a *past act* which extinguished native title and there can be no suggestion that the native title holders would be recovering twice for the one loss: ~~FRCS~~FMGCS [213] citing *Griffiths (No.1)* at [73]. The arguments advanced by the State and FMG are not consistent with a purposive approach to the interpretation of what is clearly beneficial and remedial legislation. As noted in ACS [49], in circumstances where native title which had been wholly extinguished is recognised in a determination by reason of the application of ss.47, 47A and/or 47B, the arguments advanced by the State and FMG would, if correct, have the result that *no* compensation would ever be payable for any subsequent act. This would deny native title holders the full enjoyment of their

rights which the Preamble identifies as *"particularly important"* and permit the re-acquisition and re-extinguishment of those rights and interests without any compensation.

67. The State's submission at FRCS [384] that *"it is clear"* that Exclusive NTRI in relation to the Exclusive Area existed only on and from the Determination date is inconsistent with Rares J's rejection of that argument and with the terms of the *Warrie (No.2)* Determination. The State submits at FRCS [388] that Rares J's conclusion that, *"by force of ss.11(1), 47A(2) and 47B(2) no extinguishment of NTRI ever occurred …"*,[40] is no more than *"dicta"*. In reply, it is submitted, *first*, the ruling was not *dicta*. His Honour's rejection of the submission that the Determination should identify what the NTRI would have been in the Exclusive Area had ss.47A and 47B not applied was part of the *ratio* because it determined a matter that was in issue in the proceeding. *Second*, FMG and the State did not appeal that finding. The State submits that the rejection of the submission was not a matter which would sensibly have founded an appeal because it would be directed only at challenging the reasons but not the order or the result. With respect, the appeal would have challenged the content of the orders ultimately made in the *Warrie (No.2)* Determination. It would have asserted that his Honour erred in failing both to make and to include in the Determination, findings as to the status of the land in the Exclusive Area if ss.47A and 47B had not been applied. The appeal would not have been appealing the reasons; it would have been appealing the orders made (or in this case, not made) in the Determination.

E2 COMPENSATION FOR ECONOMIC LOSS

68. The State submits at FRCS [12]-[17] that the Applicant is maintaining three alternative cases with respect to the assessment of economic loss. That is not correct. The Applicant's claim is for compensation for economic loss to be determined by what a reasonable miner or Government party, acting fairly and justly, would have been prepared to pay the Yindjibarndi People to obtain their assent to the grants of the FMG tenements, or what the Yindjibarndi People could fairly and justly have demanded for their assent to the infringement of their NTRI.[41]

69. The Applicant does not claim compensation for economic loss determined by reference to a freehold estate in the land covered by the FMG tenements. The purpose of the Applicant's submissions in relation to s.51A NTA is to demonstrate that the amount of economic loss claimed by the Applicant does not exceed the value of a hypothetical freehold estate in the land. However, if s.51A does cap compensation for economic loss to Mr Preston's valuation, then the Applicant is entitled to additional compensation under s.53(1) NTA to ensure that the acquisition of the Yindjibarndi People's NTRI is made on just terms.

E2.1 Proper construction and effect of s.51A NTA and the freehold cap

See AOS [62]-[64]; ACS [103]-[106]; FRCS D4.2.2 [130]-[138]; FMGCS E4 [245]-[266].

70. The Applicant does not claim compensation for economic loss determined by reference to a freehold estate in the land covered by the FMG tenements. That is the case which is advanced by the State and FMG.

71. If, as the State submits[42] the economic value of NTRI is to be determined by reference to the objective economic value of an *unencumbered* freehold estate in the land, an *unencumbered* freehold estate would include the minerals: see ACS [105]-[107]. Mr Hall accepted that if

[40] *Warrie (No.2)* at [6].
[41] POC at [33], [35] and [46(a),(aa),(aaa),(aaaa)]; *Griffiths* HC at [84]-[85].
[42] FRCS [9~~8~~9(d),(e)] and [100(b)].

this land was valued as freehold including minerals, then there would be a vastly different valuation to one that did not include the minerals.[43] He accepted that a cash flow model would be the appropriate way to value the land if it included the minerals, and he also accepted that a royalty would be a reasonable and appropriate basis upon which to determine compensation. Mr Preston gave evidence which was to a similar effect.[44] However, if s.51A does cap compensation for economic loss to the valuation in Mr Preston's report, then the Applicant is entitled to additional compensation under s.53(1) NTA to ensure that the acquisition of the Yindjibarndi People's NTRI is made on just terms.

72. The State says that *Griffiths* HC is binding authority for the proposition that the economic value of NTRI is determined by reference to the objective economic value of an *"unencumbered"* freehold estate in that land.[45] What the plurality said is that the objective value of exclusive NTRI in land *"in general"* equates to the objective economic value of an *"unencumbered"* freehold estate in that land.[46] They did not say that this must always be the case.[47] Further and in any event, an *"unencumbered"* freehold estate would include the minerals: see ACS [104]-[106]. As the State acknowledges at FRCS [204], at common law, a *"landholder"* owns all minerals in the land other than the *"royal metals"* (gold and silver) and at FRCS [205], that early freehold grants in Western Australia conveyed to the grantee the property in all minerals in the land, save for the royal metals.

73. In *Griffiths* HC, the plurality noted at [100] that the alienability of a freehold estate is a relevant consideration in the determination of its economic value, and that valuation cases involving inalienable freehold land disclose a range of discounted values, according to the extent of the inalienability. Their Honours said at [101] that although NTRI are inalienable, s.51A equates the economic value of full exclusive native title to the economic value of *"unencumbered, freely alienable"* freehold title and thus, in practical terms, deems the inalienability of full exclusive native title to be irrelevant to the assessment of its economic value. It is submitted that just as the inalienability of the Yindjibarndi People's native title is irrelevant for the purposes of s.51A, so too is the fact that their NTRI do not include any rights in the minerals. Section 51A is not directed to the value of the NTRI in the land; it is directed to the value of a hypothetical *unencumbered* freehold estate in the land.

74. In *Griffiths* HC at [66] and [84]-[85], the plurality stated that compensation for economic loss is to be determined by the application of an *"adapted" Spencer* test. They said (at [85]) that there is a degree of artificiality about applying an adapted *Spencer* test where *"it may be assumed"* that the claim group would not have been at all interested in selling their NTRI *"and it is plain that no one could lawfully have bought them"*. There is no such artificiality in applying an adapted *Spencer* test to the facts in this case.

75. The evidence here establishes that native title claimants and native title holders in the Pilbara – and indeed elsewhere in Australia – are willing to negotiate and enter into agreements with miners to permit mining on their traditional country in return for the payment of compensation, and consultation over the protection of country and of culturally significant sites. The evidence also establishes that miners in the Pilbara and elsewhere in Australia, are similarly willing to negotiate and enter into mining compensation agreements with native title holders and native title claimants. In those circumstances, there is no artificiality about applying an adapted *Spencer* test to determine the Yindjibarndi People's economic loss. The evidence clearly

[43] (ZA.07.021) T1179-T1180.
[44] (ZA.07.021) T1126-T1127.
[45] FRCS [130].
[46] *Griffiths* HC at [3(1)].
[47] *Griffiths* HC at [86].

establishes that there is a market value (negotiation or exchange value) for the Yindjibarndi People's assent to mining on their land.

E2.2 Proper valuation of economic loss in relation to 'negotiation or exchange value'

76. The State submits at FRCS [126] that the fundamental flaw with what it misleadingly describes as the Applicant's *"first case"* on economic loss is that it is not tied to the scheme for compensation under the NTA. It says that, relevantly, a native title holder's entitlement under the NTA is an entitlement to *"compensation for the effect of a compensable act on their* [NTRI]*"* (*ibid*). In this respect, the State says that the right to negotiate under Subdivision P or the NTA more generally, are statutory rights and do not form part of the bundle of NTRI: FRCS [127].

77. In reply, it is submitted that although the right to negotiate is not itself a native title right or interest, it is an economic benefit, indeed, a *"valuable right"*,[48] that accrues to the native title holders from the possession of their NTRI. Further, the "*negotiation or exchange value*" of the Yindjibarndi People's NTRI is not just the result of the right to negotiate in Subdivision P. It is the *"market value"* of the NTRI, being the sum which a reasonable miner or Government party, acting fairly and justly, would have been prepared to pay to the Yindjibarndi People to obtain their assent to the grant of the FMG tenements: *Griffiths* HC at [84]. The *Mining Act* does not compensate the Yindjibarndi People for this economic loss.

78. The State further submits at FRCS [139] that a fundamental element of the Applicant's *"negotiation or exchange value"* approach is to equate the permission given by s.33(1) NTA for parties in the right to negotiate under Subdivision P to negotiate about payments based on profit, income or other things produced, with the entitlement to compensation under Part 2, Division 5 NTA. It says at FRCS [140] that this is a misreading of the NTA and that the *"payments"* referred to in s.33(1) NTA are not synonymous with the *"compensation"* referred to in Part 2, Division 5 NTA, citing the observations of Mortimer CJ in *Gomeroi People v Santos NSW Pty Ltd* [2024] FCAFC 26 (***Gomeroi v Santos***) at [112]:

> While the distinction may not be quite as binary as the submissions suggest, it can be accepted 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, *although the two purposes are not mutually exclusive and there may be some overlap.* (our emphasis)

79. Her Honour's comments were in response to the submission that:

> Right to negotiate payments, like consent, are agreed prior to and in anticipation of the doing of an act. They are prospective. This is what Santos's proposed Production Levy seeks to do[.] By contrast, compensation requires the quantification of actual damage, after the fact. It is retrospective.[49]

80. Her Honour's responsive comments at [112], acknowledged, therefore, that those two purposes are *not* mutually exclusive. Further, as O'Bryan J explained at [419]:

> Although compensation for acts affecting native title may be sought under Division 5, it is not inaccurate or inappropriate to use the word 'compensation' to describe payments that may be negotiated between parties under para 31(1)(b). … Ordinarily, it would be expected that the

[48] *Fejo v Northern Territory of Australia* (1998) 195 CLR 96 (***Fejo***) at [25], [33].
[49] *Gomeroi v Santos* at [111].

negotiations would include compensation (in the ordinary meaning of that word) for the effect of the proposed act on the NTRI concerned. The fact that native title claimants (in addition to native title holders) have a right to negotiate does not mean that agreed payments are not appropriately described as compensation for the anticipated effects of the proposed future act.

81. The State's submissions under FRCS D4.2.3 *"Compensation under Part 2, Division 5 NTA is not determined by the requirements of Subdivision P"* are misconceived in that they focus on the obligation under s.31(b) NTA to negotiate in good faith when there is no such issue before this Court. It is not simply the right to negotiate provisions in the NTA which go towards establishing the economic value of the Yindjibarndi People's NTRI. That value is established by what miners in the Pilbara commonly and routinely agree to pay native title parties and native title parties commonly and routinely agree to accept, for their assent to mining on their country. The value of that economic loss is described in the Applicant's List of Heads of Compensation in the following terms:

a) loss of the economic value of the Yindjibarndi People's native title rights and interests including the special value of the land to the Yindjibarndi People, being the sum which a reasonable miner or Government party, acting fairly and justly, would have been prepared to pay the Yindjibarndi People to obtain their assent to the grants of the FMG tenements, or what the Yindjibarndi People could fairly and justly have demanded for their assent to the infringement of their native title rights and interests.

b) the related loss of the opportunity of securing commercial benefits through their right to negotiate under Subdivision P of Pt 2, Div 3 of the NTA.

82. At FRCS[143], the State cites Mr Jaski's evidence in respect of the negotiation of agreements between mining companies and native title parties that he has been involved with that, *"there was no attempt to look at the value of the rights and interests by either party"*.[50] That is consistent with what the plurality said in *Griffiths* HC at [84], that the component of compensation for the objective or economic effects of the *"infringement"* of the NTRI 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 latter's assent to the infringement or, to put it another way, what the native title party could fairly and justly have demanded for their assent to the infringement.

83. Further, in answer to the State's submissions at FRCS[139]-[143], if what the State describes as *"s.31 Agreements"* have nothing to do with compensation, one must ask why the State's standard s.31 Deed provides for the parties to agree that the State is not liable for any compensation? The State's witness, Mr Moore, gave evidence about this being one of the main purposes of the State's standard Deed: see [21(b)] of Mr Moore's Affidavit (Ct Book E 01.007). The State also submits at FRCS[150] that the loss suffered by the Applicant in respect of the compensable acts was not a loss of the right to negotiate *"in respect of **those** acts"*. So much is accepted. But what has been lost is the economic value of the NTRI in the country now covered by the FMG tenements. That is to say that if the FMG tenements had not been granted, the Yindjibarndi People would still have the valuable procedural rights which attach to their NTRI, as well as the reasonable expectation that a miner who wished to develop an iron ore mine on their country would agree to pay compensation of the kind commonly paid by iron ore miners to native title parties in the Pilbara, to obtain their assent to mining on their country.

84. In short, the Yindjibarndi would have the ability to negotiate with other miners who wished to mine the iron ore resource on their country. As mentioned above, the Applicant is not saying that the Yindjibarndi had a *right* to an *agreement* before the FMG tenements were granted.

[50] (ZA.07.023) T1335.

They had no such right and nor could they prevent the State from making the grants of the FMG tenements over their opposition. But that is not the issue. The issue is, those grants having been made, what should the Yindjibarndi People now be paid to compensate them for their economic loss? The Applicant says that this is the sum which a willing but not anxious miner/State would have been prepared to pay to the Yindjibarndi People to obtain their assent to the grants or, to put it another way, what the Yindjibarndi People could fairly and justly have demanded for their assent to the grant of the FMG tenements: *Griffiths* HC at [84]~~,~~ and [85].

E2.2.1 *Quantum of valuation in relation to 'negotiation or exchange value'*

See AOS [92]-[100], ACS [151]-[186].

85. At FRCS [153], the State submits that there is no basis to assume that any *"reasonable miner ... acting fairly and justly would have been prepared to pay the Yindjibarndi People"* the amounts advanced by them in their negotiations with FMG. The Applicant is not seeking a determination of compensation based upon any offer advanced during those negotiations. The Applicant is seeking compensation for economic loss calculated on the basis of a percentage royalty payment that is within the range of percentage royalties commonly paid by other iron ore miners in the Pilbara. Mr Meaton gave expert evidence about those royalty rates that was neither objected to nor contested.

86. The industry standard of 0.5% and above of FOB revenue as part of a package of benefits was established by Mr Meaton's evidence[51] and the several extracts of agreements in evidence.[52] Mr Jaski, who has experience with land access and compensation agreements, negotiated in the Pilbara, agreed with Mr Meaton on that issue. His evidence was that in those negotiations, there was no attempt to look at the *value* of the NTRI *per se*, by either party; rather, the starting point for the negotiations was the royalty of 0.5% Rio Tinto is known to pay:

> The basis of the negotiations came down to, I think first and foremost, centred around the Rio Tinto royalty. So, I think that is the only royalty that has been published … and so that is the only guideline that anybody has, is 0.5%. And so naturally, the starting point, based on my experience, has been 0.5% … It is really a negotiation around, *'Well, how might this mine be different to another?'*, depending on which side of the – the table you're sitting on, as to whether or not that 0.5% could be increased or what grounds there would be to decrease.[53]

87. In circumstances where the Yindjibarndi People:

a) are native title holders as opposed to simply being native title claimants;

b) have been found following a contested hearing to possess a native title right of exclusive possession under their traditional laws and customs;

c) most of the SHP is located in the Exclusive Area where that right of exclusive possession is recognised;

d) have not agreed to the presence of the SHP on their country; and

e) do not have an agreement with the miner which provides them with any form of other financial benefit or with a right to be consulted or heard about the protection of their sites or about the minimisation of damage to their country,

[51] MM (E.03.002) [33].
[52] See ACS [177] and *fn* 98.
[53] (ZA.07.023) T1335.

the royalty rate should be at least 1%.[54]

88. In the case of exclusive native title, the rights which the miner seeks to suppress include the right to exclude others for any reason or for no reason at all.[55] The economic value of that native title right is what a reasonable, willing but not anxious miner would pay to obtain a native title party's assent to the suppression of their native title rights for the life of a mine, on the basis of a hypothetical negotiation in which the miner could not enter the land and mine without the native title party's consent to the grant of mining tenements.

89. The practice of first entering into a land access and compensation agreement with the native title holders/claimants before mining commences is a uniform practice in the Pilbara. Mr Meaton gave evidence that there have been *no* iron ore projects commenced in the Pilbara since the commencement of the NTA where the miner has not first obtained a land access and compensation agreement with the native title party.[56] Mr Jaski said that this was consistent with his understanding.[57]

E.2.2.1.1 Relevance of evidence of 'comparable' mining agreements

90. The State at [158]-[159] seeks to draw some precedent value from factual findings made by the NNTT in *Santos v Gomeroi* on the question of whether the grantee party there had failed to negotiate in good faith under Subdivision P. With respect, factual findings made in other proceedings, let alone factual findings on a different issue, can have no precedent value in these proceedings. Both Mr Meaton and Mr Jaski have considerable experience in and knowledge of the negotiation of land access and compensation agreements between iron ore miners and native title parties in the Pilbara. Their evidence clearly establishes that:

    a) there have been no iron ore projects commenced in the Pilbara since the commencement of NTA where the miner has not first obtained a land access and compensation agreement with the native title party;[58]

    b) in those negotiations, there was no attempt to look at the value of the native title rights and interests *per se* by either party, rather the basis of the negotiations came down to the percentage royalty that was to be paid by way of compensation;[59]

    c) the starting point in those negotiations has been a royalty of 0.5% that Rio Tinto is known to pay;[60] and

    d) the negotiations are lengthy, far exceeding the 6-month *"right to negotiate"* period.[61]

91. Mr Adrian Murphy is another person with considerable experience negotiating native title agreements in the Pilbara. He provided an affidavit in this proceeding and was not required for cross examination.[62] Mr Murphy worked with numerous native title groups, including the Yindjibarndi People, from June 2003 in relation to negotiations with Rio Tinto. These groups formed a central negotiating committee to achieve consistent outcomes in negotiations with

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[54] See ACS [177]-[178].
[55] *Western Australia v Brown* (2014) 253 CLR 507 at [36].
[56] (ZA.07.022) T1297.17-T1297.25.
[57] (ZA.07.023) T1335.36 – T1135.45
[58] (ZA.07.022) T1297.17-T1297.25; (ZA.07.023) T1335.40.
[59] (ZA.07.023) T1335.11-T1335.35.
[60] (ZA.07.023) T1335.16-T1335.35; (ZA.07.022) T1297.17-T1297.25.
[61] (ZA.07.023) T1336.07-T1336.21; (ZA.07.021) T1172.15-T1172.25, (ZA.07.022) T1214.40-T1215.21, T1295.41-T1296.09.
[62] Affidavit of Adrian Murphy CB Vol. 5 "April 2024 Hearing" (E.06.003.010).

Rio Tinto and with a view to establishing an agreed percentage royalty on iron ore sales. Mr Murphy said that *"binding ~~initial~~ interim agreements"* were concluded with Rio Tinto in 2005 and 2006: (E.06.003.010) [5]. Mr Murphy has remained active in the negotiation of native title agreements in Western Australia since 2006. He said that the *"binding ~~initial~~ interim agreements"* have been accepted as a reasonable benchmark.

92. [redacted] This evidence undermines the foundation of the views expressed by Mr Hall that miners negotiate with native title groups to enable mining to commence earlier.[63]

93. In the Joint Report of the Conference (E.05.002) between Mr Hall and Mr Meaton, Mr Meaton said at M11 that although Pilbara iron ore agreements with native title claimants/holders reflect a broad range of conditions, he took that into account by using the average of a large sample of 39 agreements negotiated between 2004 and 2022 and further restricted his choice of the royalty rate to *"large"* projects comparable in size to the SHP.[64] All of those agreements are for iron ore mined from open cuts and exported from the Pilbara.[65]

94. [redacted]

95. At FRCS [185], the State refers to the objects of a mining company in negotiating an agreement with a native title party [redacted] This misses the point that a proponent's priorities in seeking an agreement, and the value to a proponent of securing certain obligations from a native title party towards itself, is only part of the story. Just because being able to impose an obligation on a native title party is of value to a proponent does not mean that the native title party places any weight on that obligation, or that the incurring of that obligation has any significant impact on what price it will seek for the overall impact of permitting mining to take place on its traditional country.

E2.2.1.2 Irrelevance of confidentiality of Subdivision P agreements

96. The State contends that the fact that *compensation* agreements between miners and native title parties (which it calls *"Subdivision P Agreements"*) are confidential somehow prevents knowledge of the contents of those agreements, when it is disclosed, being used to objectively

[63] See for example the extract of Mr Hall's evidence in the FRCS at [160].
[64] (ZA.07.021) T1172.27-T1172.33.
[65] (ZA.07.021) T1172.27-T1172.33.

calculate compensation for economic loss.[66] In this respect, it argues that a party should not be liable to compensate native title holders for the grant of a mining tenement if it has no basis upon which to calculate that compensation liability by reference to other compensation agreements.[67]

97. In reply, it is submitted, *first* that, Mr Meaton's evidence was that there is a surprising degree of commonality across Pilbara iron ore agreements.[68] At their joint expert conference, Mr Meaton and Mr Jaski agreed that the industry standard in the negotiation of those mining agreements has been to base compensation on a small share of the revenue produced by the extraction of minerals from the area.[69] As submitted earlier above, the starting point for those negotiations is the 0.5% royalty rate that Rio Tinto is known to pay. *Secondly*, the State's or any other party's *subjective* knowledge as to what others have paid is not relevant in determining the *objective* value of the economic component of compensation. What is relevant is evidence of what has commonly been agreed to be paid under mining compensation agreements in the Pilbara. That evidence can establish the objective economic value of the native title party's assent to mining on their land. Any professed ignorance of what others have paid by way of compensation to native title claimants/holders, cannot excuse a miner or a government party from paying fair compensation.

98. In this respect, Mr Meaton has extensive experience in and specialised knowledge of the negotiation of native title mining access and compensation agreements in the Pilbara and elsewhere in Australia. His evidence that 0.5% is the most common percentage royalty paid by miners in the Pilbara under those agreements was corroborated and confirmed by the evidence of Mr Jaski.[70] Mr Jaski's evidence was that both miners and native title parties are well aware of the Rio Tinto royalty of 0.5% as the guideline and starting point for negotiations.[71] That evidence is, of course, entirely inconsistent with the State's submission that the negotiation parties to native title mining compensation agreements in the Pilbara are ignorant of any common or standard royalty paid by way of compensation, not for individual *future acts*, but collectively for all of the *future acts* required for the development of a major mining project.

E.2.2.1.3 Evidence of Mr Meaton

99. The State says at FRCS [164] that Mr Meaton was briefed, *inter alia*, to provide his opinion as to what it would be *"reasonable to expect"* in a Subdivision P Agreement, had one been reached between the FMG Respondents and the Applicant, and cites Mr Meaton's report at [28] in support of that assertion. That paragraph of Mr Meaton's report (E.03.002) is set out below:

> Again, based on my industry experience, it is my opinion that it would be reasonable to expect that a negotiated mining agreement in respect of the *Warrie (No.2)* Determination Area would have included a mix of all of these benefits.[72]

100. What the State asserts at FRCS [164] is not an accurate reflection of what Mr Meaton was asked to do. Mr Meaton sets out in the introduction to his report (E.03.002) at [2] what he was asked to do:

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[66] FRCS [189]-[193].
[67] FRCS at [191].
[68] (ZA.07.021) T1172.33.
[69] MJ Joint Report (E.05.001) J12, M11.
[70] (ZA.07.023) T1135.16-T1135.35.
[71] (ZA.07.023) T1135.
[72] MM (E.03.002) (Set out at [27] – fixed cash payments, royalties on the value of minerals sold, employment and training, and business development assistance.)

> Economics Consulting Services was asked to provide advice on the royalty rates that other mining companies pay as a matter of course to Indigenous groups in the Pilbara and elsewhere to obtain their consent to mining activities on land where those Indigenous groups either possess or assert that they possess, native title rights and interests. In particular, Economics Consulting Services was asked to provide an expert report for use in Federal Court proceedings, which addresses and considers:
>
> (a) How much revenue FMG has been deriving from the SHP and the proportion of the Project which is on the *Warrie (No.2)* Determination Area, and how much further revenue it could expect to derive from the SHP in the life of the Project; and
>
> (b) In the event that FMG had reached an agreement with the Yindjibarndi People … for the payment of royalties in accordance with any common or standard practice for such agreements in the Pilbara, what would the approximate value of the royalty component of that agreement be to the Yindjibarndi People in monetary terms.

101. Although the brief for his report was confined to a consideration of royalty payments, his evidence was that miners in the Pilbara commonly pay a mix of other economic benefits to native title claimants/holders, over and above the royalty payments.[73]

102. The State says at ~~FTCS~~ FRCS [165] that Mr Meaton's ultimate opinion was that, based on the 38 mining projects he had reviewed, a revenue share of 1% was an appropriate measure of compensation for compensable acts within the Exclusive Area and 0.5% within the non-Exclusive Area, citing the report at [35] and Appendix C at p.24. The opinion expressed by Mr Meaton in his report (E.03.002) was that the royalty rate should be 1%:

> Compensation using a 1% royalty on revenue to December 2022 is estimated at $339m. This study uses a royalty rate of 1% on the basis that the Yindjibarndi have a determination of native title as opposed to simply having a registered claim and their determined rights and interests include a right of exclusive possession. A detailed explanation in support of this royalty rate is set out in Appendix C. (at [35]).
>
> Given the relationship assumed between exclusive and non-exclusive rights, Economics Consulting Services considers that the 0.5% royalty rate most commonly used in the iron ore sector should be increased to 1% for Traditional Owners who have firstly, had their rights recognised in a determination and secondly, those determined rights include a right of exclusive possession. (Appendix C, p.24).

103. The State at FRCS [178] identified errors in Mr Meaton's spreadsheet and submits that "Mr Meaton's opinions as to the existence and content of a standard or common Subdivision P Agreement in the Pilbara **are wholly unreliable**."[74] (emphasis added)

104. In reply, the Applicant submits that as per [99]-[100] above, Mr Meaton expressed no opinion "*as to the existence and content of a standard or common Subdivision P Agreement*": FRCS [178]. Rather, in MM and in his oral evidence, Mr Meaton provided expert opinion evidence on a common or industry standard royalty rate in native title land-access negotiations in the Pilbara, and on what in his opinion is an appropriate rate that ought to apply in the Applicant's circumstances. This opinion is based on:

a) Mr Meaton's industry experience and in particular, his involvement in native title negotiations since 2004;[75] and

[73] MM (E.03.002) at [27]-[28].
[74] FRCS [166]-[178]. See also the same criticisms of Mr Meaton's evidence set out in FMGCS [333]-[352].
[75] MM (E.03.002) at [27]-[29]. In his curriculum vitae at Appendix B to MM, Mr Meaton details that he has experience in over 200 native title land access negotiations and lists those negotiations at pages 21-22.

b) accumulated financial details of over 100 future act mining agreements.

105. Mr Meaton makes clear that he is drawing on his extensive experience in negotiations when he expresses his opinion at [32] of MM (E.03.002) that "*the most common rate by far in the Pilbara is 0.5% of FOB sale revenue*." He goes on to say at [33], "*Rio Tinto has publicly announced that it uses this rate and* ***I am aware from my experience in this area that many other producers have adopted this precedent***." (emphasis added). Mr Jaski's experience with native title mining agreement negotiations is not as extensive as Mr Meaton's. Nevertheless, Mr Jaski said that this rate was adopted by Rio Tinto and that Rio Tinto had published this rate.[76] Mr Jaski further gave evidence that in his experience, 0.5% is the "*starting point*" for native title mining negotiations and that such negotiations are "*centred around*" this royalty rate.[77] In other words, the spreadsheet, and comparison of 38 mining agreements is not the source of Mr Meaton's opinion on the standard royalty rate in the Pilbara being 0.5%. Rather, Mr Meaton drew on his knowledge of the 0.5% standard rate, and his comparison of the 38 mining agreements, to provide his opinion on the royalty rate that ought to apply to the Yindjibarndi people in this case.

106. The State's submission that Mr Meaton's opinions *"are only as good as the data on which he relies, namely the spreadsheet and the supporting documents used to produce the spreadsheet"*[78] does not account for Mr Meaton's extensive experience and specialised knowledge of the standard industry royalty rate.[79] [redacted]

107. [redacted]

[76] (ZA.07.023) T1333-T1334.
[77] (ZA.07.023) T1335.23, T1355.29
[78] FRCS [166].
[79] The Applicant notes that the State took no objection to MM. Further, the State did not cross-examine Mr Meaton on his qualifications or experience.
[80] ~~(ZA.08022R)~~ (ZA.07.022R) T1220.24-T1221.24.
[81] ~~(ZA.08022R)~~ (ZA.07.022R) T1224.01-T-1224.16. In each of the other examples listed at the State's *fn* 308, Mr Meaton provides an explanation for how he adjusted different formulas such that the agreements/negotiations could be compared. The State omits references to some of Mr Meaton's explanations in its submissions. See eg. (ZA.07.022) T1279.46 – T1230.7.

[redacted]

108. In response to the State's submission at FRCS [172] that some of the native title holding groups whose agreements were included in Mr Meaton's spreadsheet in fact were ultimately determined to hold exclusive native title, the Applicant replies that, as conceded by the State, the land the subject of those exclusive possession determinations is small. As Mr Meaton explains, "*most of the Pilbara was allocated for pastoral land*,"[85] as is clear in the maps included in the determinations referenced by the State.[86] Mr Meaton explains his rationale for a "*doubling of the rate*" to 1% due to the fact that Yindjibarndi people hold exclusive native title over a large part of the compensation claim area (**CCA**) as being because this right carries with it the right to exclude others.[87] [redacted]

109. The State's submission (in relation to the timing of the negotiations *vis a vis* the making of a native title determination) at FRCS [173] is a legal submission. It has and had no bearing on Mr Meaton's evidence. [redacted]

110. In its submissions at FMGCS [340] to [341], FMG criticises Mr Meaton for not considering *"the value and nature of the impact of the grant of the FMG tenements on the NTRI"* relying on *Griffiths* HC. FMG refers to Mr Meaton's evidence at T1205.29-T1205.32 in which he says, *"it's about mutual benefits for each party"*. However, Mr Meaton also said, *"the compensation reflects the impact on country, but also reflects the value of the project, and its – I can – I cannot untangle those two"*.[89] Further, the exercise of exclusive NTRI, being the right to exclude others, (and accordingly, the impact on that right), is clearly relevant to Mr Meaton's uplift from the industry standard 0.5% rate to 1% in the case of the applicable rate for the Yindjibarndi people:

MR DHARMANANDA: May I suggest to you there's no connection between mining revenue and exclusive possession.

MR MEATON: There is a connection, in terms of the – the value of the area to the people.

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[82] (ZA.07.021) T1172.27-T1172.33.

[83] FRCS [171].

[84] (ZA.07.022) T1206.1-T1206.11. See also (ZA.07.022R) at T1225.36-T1225.43 (omitted from the State's reference).

[85] (ZA.07.021)T1161.09-T1161.10 ~~T1206.1-10~~.

[86] See references included in FRCS *fn* 324.

[87] ~~(ZA.07.022.26-36.)~~ (ZA.07.022R)T1211.26-T1211.36 The exclusive native title is described in the Yindjibarndi People's determination over the CCA as the "right to possession, occupation, use and enjoyment of the Exclusive Area to the exclusion of all others" (see *Warrie (No.2)* at Order 4).

[88] FRCS [177].

[89] (ZA.07.022) T1206.13-T1206.22. Mr Meaton repeats his view that the impact on country is a relevant factor when considering an appropriate compensation package further on at T1206.23-T1206.34. Mr Meaton also highlights the difficulty with valuing hunting as a recreation or way of life at ZA.07.022 at T1207.1-T1207.12.

> The people holding exclusive rights consider that they have a control over access to the land and, therefore, they have a significantly greater influence on what activities can take place. Non-exclusive native title rights do not allow any – any influence over entry to the land. So, in my experience, there are very few examples around the state where there are exclusive rights, but when they – where there are exclusive rights, the traditional owners expect a higher form of – of control and access, and I have been involved in some agreements out Wiluna way where the people have said to the exploration companies, *"You may drive along existing tracks, but you may not leave any of those tracks without our approval."*[90]

111. In any case, *Griffiths* HC [96]-[97] is not authority for the proposition that *'the assessment of economic loss must begin with a valuation of the NTRI which have been impacted'*.[91] Contrary to this submission, those passages from *Griffiths* HC provide authority for the economic valuation of rights and interests being *"an objective exercise ... of how much a willing but not anxious purchaser would be prepared to pay to a willing but not anxious vendor to obtain the latter's assent to their extinguishment.* ***Plainly enough, a willing purchaser would be likely to pay more to achieve the extinguishment of native title rights and interests over high-value land in a developed area (given that the economic potential of that kind of land is likely to be greater) than for the extinguishment of native title rights and interests over low-value land in a remote area (where the economic potential of the property is likely to be sparse). Consequently, it is neither irrational nor surprising that the economic value of native title rights and interests in developed areas should, in many cases, prove to be greater than the economic value of comparable native title rights and interests in a remote location****."*[92] (emphasis added). Mr Meaton's evidence is entirely consistent with these passages.

112. FMG also submits that Mr Meaton's revised calculations[93] include the *"wrong date of assessment",* and that compensation is to be *"assessed at the time of the grant of the FMG tenements"*: FMGCS [343]. FMG relies on *Griffiths* HC [43] as authority for this proposition. In reply, the Applicant submits that *Griffiths* HC was a case in which native title was extinguished as at the date of the grants of the tenure in that case. In this matter, the Applicant relies on s.44H of the NTA. Note 1 to that section states, *"Any compensation to which the native title holders may be entitled under this Act for the grant of the lease, license, permit or authority* ***may take into account the doing of the activity****."* (emphasis added). Accordingly, the assessment of compensation is not limited to that which could or would be calculated as at the date of the grant, but may take into account compensation for the mining activities that have actually occurred *subsequently*. The Applicant submits that the revised calculations set out by Mr Meaton in MJ RC (G.01.001) are accordingly consistent with the NTA and are appropriate.

113. Finally, FMG is critical of Mr Meaton considering that native title parties claim a right to *"a very small share in the revenue generated by the future Act"*.[94] [redacted]

[90] (ZA.07.022) T1212.10-T1212.22.
[91] FMGCS [341].
[92] In the Applicant's submission, FMG's complaint at FMGCS [352] is on foot with the concerns expressed by the Northern Territory and the Attorney-General of South Australia which the High Court is responding to in these passages. See also similar concerns expressed in the FMGCS with respect to Mr Miles' evidence at [362]-[363] of those submissions.
[93] That is, those set out in MJ RC Joint Report (G.01.001).
[94] FMGCS [348].

[redacted] The Applicant submits that Mr Meaton's evidence is consistent with the High Court in *Fejo*[96] characterising the right to negotiate as a *"valuable right"* and that there is nothing improper with Mr Meaton's approach.

E.2.2.1.4 Evidence of Mr Miles

114. In opening his oral evidence, Mr Miles provided the following explanation for his approach to valuing the economic rights and interests of the Yindjibarndi people:

> So looking at what has been said in opposition, I feel that – that I'm looking at what the owners of the land are losing in terms of their rights, their abilities. It's – obviously, their rights and abilities are being suppressed. What is the value of that? It's basically what another person may say that land is worth with its – its mineral rights, the potential to be a substantially worth or may not be. But in this case, it has turned out to be substantial. However, the rights of the owners really has been lost by what has happened, and I believe that they – they've been severely handicapped by what has occurred and should be appropriately compensated.[97]

115. The Applicant submits that this approach is consistent with Mr Meaton's approach and its submissions above at [74]-[75]. At FRCS [181], the State says that Mr Miles' opinion was informed by a belief that Yindjibarndi people have a native title right in the minerals.[98] The State says that Mr Miles was unable to coherently explain why, when he accepted that this was not correct, his opinion was not changed. However, Mr Miles does refer to the impact of the mining activities on the land and the loss of opportunity to negotiate an agreement.[99] These are matters not influenced by the existence or non-existence of native title rights in minerals.

116. Further, whilst Mr Miles' (incorrect) initial view was that Yindjibarndi people had a native title right to the minerals, this view was not *central* to his opinions. Immediately following the exchange relied upon by the State in making this submission, Mr Miles confirmed that his opinion as to *"what is fair and reasonable compensation to be calculated for the particular land"* was not affected by this belief.[100] Indeed, ultimately, Mr Miles' opinion is "*the best available measure of the value of the* NTRI *is* ***what other native title holders have agreed to accept for the impact of mining on the exercise and enjoyment of equivalent native title rights and interests****…"*.[101] (emphasis added). In other words, it is irrelevant whether Mr Miles believed that the Yindjibarndi people had rights in minerals because Mr Miles' opinion is that the Yindjibarndi people's compensation ought to be informed by what other native title holders have negotiated.[102]

E2.3 Proper valuation of hypothetical freehold estate in the land

See AOS [107]-[150]; ACS; FRCS E3.2 [395]-[399]; FMGCS E.4.1 [267]-[314].

117. At FRCS [231], the State submits that the Applicant has put forward a *"second economic loss case"*, to the effect that the economic value of the NTRI are to be determined by reference to the objective economic value of an unencumbered freehold estate in the land. There is no such second economic loss case. The paragraphs in ACS which the State cites in support of its

[95] (ZA.07.022R) T1271.11-T1271.18.
[96] *Fejo* at [25].
[97] (ZA.07.023) T1368.01-T1368.09.
[98] FMGCS [354].
[99] (ZA.07.023) T1369.28-T1369.36.
[100] (ZA.07.023) T1370.11-T1370.15.
[101] BM (E.03.005) p.14.
[102] See [114] above.

submission regarding this putative alternative economic loss case appear in a section which deals with the construction and effect of s.51A NTA: ACS [103]-[150]. There the Applicant submits that on its proper construction, the words, *"a freehold estate in the land"*, in s.51A, would extend to and include the minerals in the land, and that the quantum of the economic loss component of the Applicant's compensation claim would not exceed the value of a hypothetical freehold estate that included the minerals.

118. Mr Preston was instructed to *assume* that the hypothetical freehold did not include the minerals. That assumption was wrong in law. He was cross-examined, without objection, as to the ordinary or common meaning of *"freehold"* (although, again, this is strictly a question of law) which he agreed is the largest concept of the ownership of land and that in both legal and common parlance, a freehold estate is seen as the *"ownership"* of the land.[103] Whilst maintaining that minerals are *"usually"* reserved to the Crown, he accepted that there are cases where freehold titles are granted without any reservation of minerals to the Crown.[104] Mr Preston also accepted that, in those circumstances, the word *"freehold",* without reference to any encumbrances or reservations, means the *"ownership"* of the land and the minerals that are in it.[105]

119. Mr Preston agreed that it would have been unnecessary for the solicitor's letter of instruction to ask him to assume that the freehold estate in the land does not include any rights or interests in any minerals, if his understanding of a freehold estate did not include the minerals.[106] He is aware that in Western Australia and in other States as well, there are freehold grants which do not reserve minerals to the Crown[107] and agreed that this would lead him to conclude that when the word *"freehold"* is used in relation to a hypothetical freehold estate in Western Australia, it is a reference to a freehold estate which does include minerals.[108] Mr Preston said that he accepts that if he was to value a hypothetical freehold estate in this land without a reservation of minerals, he would have to value the iron ore in the land.[109] The Respondents did not adduce any evidence to establish that the freehold value of the land, if it includes the minerals, would exceed the value of the economic component of the Applicant's claim for compensation.

120. If the hypothetical freehold estate referred to in s.51A includes the minerals, there is no expert evidence which purports to value that hypothetical estate. Mr Preston was the only economic expert witness who was asked to calculate the value of a hypothetical freehold estate in the land, but he was instructed to assume that the freehold estate does not include any rights in the minerals: GP (E.04.002) at [22], p.14. What s.51A requires to be valued is a *hypothetical* unencumbered freehold estate in the land rather than the interests of the Yindjibarndi People, the Crown, or of anyone else, in the land. The Crown's ownership of the minerals is irrelevant. It is not the value of the Crown's or any other person's interest in the land that is being valued but, rather, the freehold *simpliciter* in the land, which would includethe minerals (see *Perilya Broken Hill Ltd v Valuer-General* (2015) 10 ARLR 235 at [10], [23], [28], [29], [37], [61], [79], [82] and [85]). Where, as here, the relevant land contains minerals, the value of a hypothetical unencumbered freehold estate in that land can be calculated by reference to s.38 of the *Mining Act*: see ACS [138], [157]; *Perilya (2013)* at [7], [9], [13], [14], [33], [39], [73] and [74].

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[103] (ZA.07.021) T1124.43-T1124.46.
[104] (ZA.07.021) T1125.10-T1125.24.
[105] (ZA.07.021) T1125.26-T1125.28.
[106] (ZA.07.021) T1125.30-T1125.35.
[107] (ZA.07.021) T1125.42-T1125.44.
[108] (ZA.07.021) T1125.46-T1126.02.
[109] (ZA.07.021) T1126.13-T1126.18.

121. Contrary to FRCS [233], there is no prejudice to the Respondents. As stated above, the Applicant is not running a *"second economic loss case"*. Further, whether the relevant *"hypothetical"* freehold estate in the land does or does not include the minerals is a question of law, not fact. It is the State's and FMG's case on economic loss that compensation must be calculated or assessed by reference to the objective value of a hypothetical freehold estate in the land.

122. In response to the State's submission at FRCS [250], the Applicant says the fact that the Yindjibarndi People do not have a native title right to minerals is irrelevant for the purposes of determining their economic loss. In this respect, as discussed above, the plurality in *Griffiths* HC said at [3(1)] that the objective economic value of exclusive NTRI *in general*, equates to the objective economic value of an *unencumbered* freehold estate in that land. Then at [101], they said that although NTRI are inalienable, s.51A NTA equates the economic value of full exclusive native title to the economic value of an unencumbered *"freely alienable"* freehold title, and deems the inalienability of the exclusive native title to be irrelevant to its economic value. The same logic must apply in relation to the Crown's ownership of the minerals.

E2.3.1 *Proper valuation by reference to s.38 Mining Act*

123. The State says that the Applicant's claim to compensation assessed by reference to a percentage value of minerals obtained or to the royalties which a person may be entitled to under s.38 of the *Mining Act* in respect of the value of minerals obtained is wrong, in that it seeks to compensate the Yindjibarndi by reference to or for a right to minerals which the Yindjibarndi People do not hold. The State acknowledges at FRCS [204] that at common law, a *"landholder"* owns all minerals in the land other than the *"royal metals"* (gold and silver). Early freehold grants in Western Australia conveyed to the grantee the property in all minerals in the land, save for the royal metals. The State says that the private ownership of minerals was subsequently abolished in Western Australia and replaced with the statutory reservation of all minerals in the Crown. Upon the commencement of the *Mining Act 1904* on 1 March 1904, s.117 provided that minerals were made property of the Crown. The State says that in *Ward* HC at [302]-[383], the High Court held that if any NTRI to minerals had existed, they had been extinguished by virtue of s.3 of the *Western Australian Constitution Act* and s.117 of the *Mining Act 1904*. The State says therefore that the Yindjibarndi People's NTRI do not include any rights in relation to minerals.[110]

124. The State acknowledges that the Crown has only limited ownership of minerals on a pre-1899 freehold, as the *Mining Act* only applies to pre-1899 freehold in relation to the mining of gold, silver and precious metals.[111] The owner of a pre-1899 freehold is, therefore, able to mine or deal with other minerals as he or she wishes. In reply, the Applicant notes that the Yindjibarndi People's right of exclusive possession of the land in the compensation application area also pre-dates 1899. If the *Mining Act* does not provide native title holders, whose title predates 1899, with parity of treatment with the holders of ordinary title that pre-dates 1899, s.10(1) RDA will supply a right of compensation, in which case s.45 NTA will apply and the native title holders will have an entitlement to compensation under the NTA.

125. The State also says that, consistent with the Crown's ownership of minerals, the right to compensation under s.123(2) of the *Mining Act* is expressly subject to s.123(1)(b) and (c), which provide that, *"No compensation shall be payable"* and *"no claim lies for compensation"* (whether under the *Mining Act* or otherwise) *"in respect of the value of any mineral which is or may be in, on or under the surface of any land"*, or *"by reference to any rent, royalty or*

[110] FRCS [204]-[210].
[111] FRCS [212].

other amount assessed in respect of the mining of the mineral" (FRCS [213]). That is, as discussed earlier under D1.1 and D3, the Yindjibarndi People are not compensated for the loss of the economic value of their NTRI because s.123(1)(a),(b),(c) of the *Mining Act* prohibit the assessment or the payment of compensation that is determined by reference to the very things which establish the negotiation or exchange value of their NTRI. As such, they do not have the same security of enjoyment of their rights as do the holders of ordinary title: *Native Title Act Case* at pp.437-438; *Ward* HC at [113], [116], [121] and [122].

126. The economic value of the NTRI is to be determined by what a fair and reasonable miner or alternatively, what a fair and reasonable government party, would have been prepared to pay to obtain the Yindjibarndi People's assent to the infringement of their NTRI: *Griffiths* HC at [84]-[85]. In this respect, there is ample evidence of what a fair and reasonable miner would have been prepared to pay. As regards the State, the amount of royalties received and the percentage of those royalties which it would have had to pay under s.38 if the minerals were privately owned, can inform the amount which the State, as the sole, hypothetical willing purchaser, would have been prepared to pay for the Yindjibarndi People's assent to the grants of the FMG tenements: *Griffiths* HC at [104] and [280]. As submitted above, if the assessment or payment of compensation determined in that manner is precluded by s.123(1) of the *Mining Act* then native title holders do not have the same security of enjoyment of title as do the holders of other forms of title, hence there is an inconsistency between s.10 of the RDA and the *Mining Act*. Alternatively, s.53(1) of the NTA is engaged and compensation on just terms requires that the Yindjibarndi people are compensated for this economic value.

E2.3.1.1 Quantum of s.38 Mining Act valuation

127. The State says that this is a calculation that can only be done by an expert economist. The *example(s)* provided in FRCS [221] of why it is an exercise to be conducted by an expert economist is that it requires an evaluation of an opinion on:

a) future production and pricing;

b) assumptions about the future form in which any ore will be sold;

c) future discounting required (to reflect additional risk); and

d) future State royalty policy.

128. FRCS [221] to [227] is critical of the Applicant's calculation at ACS [138]-[144] of the quantum of compensation which would be applicable pursuant to s.38. We respond to each of those criticisms in turn. In response to the first criticism (FRCS [222]), the Applicant says that as per fn 78 of the ACS, the Applicant relies on agreed fact 19 for its assertion that FMG has, up to 30 June 2023, paid to the State [redacted] in royalties from the compensation claim area. [redacted]

129. The Sharman Affidavit[112] defines "*Relevant Tenements*" as mining leases M47/1409-I,

[112] Affidavit of John Sharman (F.02.001).

M47/1411-1, M47/1413-I, M47/1431-I, M47/1453-I and M47/1475-I).[113] Mr Sharman deposes that all but two of the *"Relevant Tenements"* fall wholly within the CCA.[114] The two that fall partly outside of the compensation claim area are M47/1409-I and M47/1411-I. Contrary to the State's assertion, the Applicant has **not** included any royalty paid in relation to M47/1411-I. So much is clear, given that its submission refers to the amount at agreed fact 19(b) rather than the total in the body of agreed fact 19. With respect to M47/1409-I, the Applicant agrees that 22.1% of that tenement falls outside of the compensation claim area and accepts Mr Meaton's evidence to the effect that 55% of the disturbed area, representing the land which has been mined from the pits in M47/1409-I, falls within the CCA.

130. The State asserts that expert evidence is required to calculate the proportion of royalties received by the State in the CCA with respect to those royalties received from M47/1409-I.[115] MJ RC Joint Report is in evidence. It is a report prepared by Mr Meaton and Mr Jaski, both of whom are economists. In that report, they relied on production data produced by FMG to the parties (including the State) in April 2024 (**production data**) which included calculations of ore taken from the CCA and forecasts of ore to come from the CCA. Messrs Meaton and Jaski then apportioned those amounts on a tenement by tenement basis using Mr Sharman's methodology – that is, by way of percentage overlap.[116] [redacted]

131. The Applicant submits that expert evidence would not assist the Court given the above and that the Court is well placed to decide which is a more accurate or appropriate approach to determine the royalties accrued by the State from the CCA. It is the Applicant's submission that the latter approach is more accurate.

132. Regarding the second criticism, that the Applicant erred in applying an average royalty rate from the historic payments, the Applicant says it is reasonable to apply an average royalty rate in the circumstances where no forecasts of beneficiated versus crushed or screened ore are available. As the State knows, the forecast production data is not broken down into beneficiated and screened/crushed ore. In these circumstances, the Applicant submits that expert evidence would not assist the Court and that it is reasonable to apply the average royalty rate to the forecast production data.

133. The Applicant accepts the State's third criticism and agrees that the future royalty figure ought to be [redacted] for the reasons set out in the State's submissions at fn 440. The Applicant

[113] (F.02.001) at [11].
[114] (F.02.001) at [10(a)].
[115] FRCS [222].
[116] See [15] and [17] of the (CB G.01001) MJ JR Calculations Report.
[117] See Map 2(b) of ExG2 and FRCS *fn* 435.

apologises for this error.

134. In relation to the fourth criticism, the Applicant notes that State has had access to the production data since April 2024. The State has had ample opportunity to raise any issue it sees with the accuracy of that data, or the appropriateness of the assumptions underlying that data and the other sources referred to in the MJ RC Joint Report. Those other sources were provided by the FMG Respondents to the State on 2 and 4 October 2024.

135. Fifthly, in relation to the forecast rent calculated, the Applicant provided an explanation for its calculations at ACS [140]-[142]. It is open to the State to verify these calculations by reference to Mr Veilhaur's evidence and the SOAF. Nevertheless, the Applicant has attached its worksheet showing these calculations as "Attachment A" to these reply submissions. Otherwise, in reply to the State's submissions about rents changing in the future, the Applicant agrees that this is the case, but equally observes that that is a matter of speculation and that it is accordingly unlikely that expert evidence would assist. In any event, if rents were to change, they would increase. Accordingly, in the Applicant's submission it is reasonable to conclude that the forecast in rent included in its calculations is conservative.

136. In summary, the Applicant submits that it remains open to the Court to accept the Applicant's submission on compensation which would arise applying s.38 *Mining Act* for the life of the mine. The Applicant admits that some adjustment should be made to its calculations as to royalties received by the State in relation to the CCA to account for the fact that 22.1% of M47/1409-I falls outside of the CCA and/or 45% of the mined pits falls outside the CCA. The Applicant further admits that its forecast royalty figure ought to be adjusted to reflect the figure in the State's submissions. Accordingly, the Applicant submits the following alternative calculations apply:

    (i) ~~A~~applying a reduction by way of percentage of tenement overlap with the CCA:

    (ii) or alternatively, applying a reduction by way of percentage of pits on M1409-I overlapping the CCA:

E2.3.2 *Proper valuation in relation to 'highest' and 'best' use of the land*

137. At FRCS [234], the State submits that none of the evidence given by the economic experts supports the conclusion that the highest and best use of the land is *"mining"*. In reply, the Applicant says, *first*, that the Shire of Ashburton's zoning of the land as *"rural"* permits its use for *"industry extractive"*, which Mr Preston accepted is a reference to mining: ~~P1128.43-.46~~ (ZA.07.021) T1128.43-T1128.46. In cross-examination, Mr Preston also accepted that if the mineral resource is part of the freehold title, then the highest and best use of the land would be mining: (ZA.07.021) ~~P1129.24-.28~~ T1129.24-T1129.28. Here, the fact that the land is being mined demonstrates that mining is a use which is *"legally permissible, physically possible and financially feasible"*: ~~FRSC~~ FRCS [235].[118]

138. *Second*, the zoning of the land is not directed to what a freeholder can or cannot do with the land; it is directed to what uses of the land are permissible. Hence it is legally permissible for a miner to apply for and obtain a mining lease over the land. In the MJ Joint Report, Mr Meaton states that the highest and best use of the land is based on what the land can be used for in the generation of economic value (at M38). In his opinion, the land's value is not its pastoral value when it is located within one of the world's premium mining fields (at M39). He said that a valuation of the land as pastoral land is misleading (at M41). In his oral testimony, Mr Meaton said that the highest and best use of the land is as a mining project.[119]

139. The decision in *Cedars Rapids Manufacturing and Power Company v Lacoste* [1914] AC 569 (see FMGCS [275]-[276]) does not assist the Respondents. In that case, it was legally impossible for the owners of the islands in question to use that land for the purpose of developing a hydroelectric scheme, as using the land for that purpose depended on powers which had been solely conferred on the Appellants under a statute of the Canadian Parliament to develop a hydroelectric scheme in and adjacent to part of the St James river, and to expropriate lands required for that scheme: *Cedars Rapids* per Lord Dunedin at [573]. By contrast, s.71 of the *Mining Act* allows for a mining lease to be granted to "any person". An illustrative example of the potential for a registered body corporate using its native title land for mining is provided by the joint venture provisions in the FMG & Njamal Glacier Valley & North Star Project Area Agreement.[120]

140. The State submits at FRCS [239] that Mr Preston's valuation of a freehold state *"is unchallenged by any contrary evidence"*. In reply it is submitted, *first*, that his valuation is based on an erroneous view of the law because he was instructed to assume that the hypothetical freehold estate would not include the minerals. *Second,* Mr Meaton's evidence in the joint conference report with Mr Jaski was that the freehold value of the land should

[118] See Mr Preston's evidence at (ZA.07.021) T1129.14-T1129.19 where he accepted that because this land has been mined, we know that any regulatory requirements necessary to allow the land's permissible use as mining to proceed were satisfied.
[119] (ZA.07.023) T1328.01-T1328.02.
[120] (F.04.022) Ex 14 (extract).

take into account the mineral potential of the land (at M2). He said at M29 that the market value of the land is as mining land and the mining benefit will be considered by both buyer and seller in any negotiation.

141. FRCS [244] submits that none of the judges in *Griffiths* HC suggested the relevant *"freehold"* was a hypothetical or *"pure freehold"*. This has been addressed earlier in these submissions at [117]-[122].

E2.3.3 *Proper construction of 'special value'*

142. Just terms compensation is based on the value to the owner. What this recognises is that land (or an interest in land) may have a value to a current owner over and above its market value. This special value is what a willing but not anxious buyer, pays for the land rather than fail to attain it.[121] This special value to the owner is confined to economic value only and not, for example, *"sentimental value"*. Special value is described as the particular potentiality of the land which the current owner alone can exploit for monetary gain, or the additional economic advantage an owner obtains by reason of ownership.[122]

143. FRCS [76] provides a short extract from *Director of Buildings v Shun Fung Ltd* [1995] 2 AC 111 at p.~~[~~125~~]~~ in support of its submission that the person being compensated must not be awarded more than they have lost. What the State does not say is that on that same page, the Privy Council went on to say that:

> Land may, of course, have a special value to a claimant over and above the price it would fetch if sold in the open market. Fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority. As already noted, this is well-established. If he is using the land to carry on a business, the value of the land to him will include the value of his being able to conduct his business there without disturbance … So the claimant loses the land and, with it, the special value it had for him as the site of his business … If, exceptionally, the business cannot be moved elsewhere, so it simply has to close down, *prima facie* his loss will be measured by the value of the business as a going concern.

E2.4 Proper valuation of economic loss not on 'act-by-act' basis

144. FRCS [194] submits that the Applicant's approach lacks coherence and is unprincipled because it is predicated on:

a) the procedural rights attaching to *each* compensable act i.e. the right to negotiate;

b) *each* compensable act relating to iron ore mining in the Pilbara; and

c) *each* compensable act generating revenue so that compensation can be assessed by reference to a revenue share.

The State says that in circumstances where one or more of those assumptions is incorrect *"in respect of a particular act"* that act cannot be dealt with under the Applicant's approach (*ibid*).

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[121] *Pastoral Finance ~~Corporation~~ Association v The Minister* [1914] AC 1083, 1088 (Lord Moulton).

[122] *Vyricherla Narayana Gajaptiraju (Raja) v Revenue Divisional Officer, Vizagapatam* [1939] AC 302, 312 (Lord Romer); *Housing Commission (NSW) v Falconer* (1981) 1 ~~NSLWR~~ NSWLR 547, 572-573 (Mahoney JA); *Boland v Yates Property Corp Pty Ltd* (1999) 167 ALR 575 at [292] (Callinan J); [80] (Gleeson CJ); *Land Acquisition, 6th Edition, Douglas Brown [3.15].* The reference in Griffiths HC at [84] to special value being a *"subjective or non-economic component"* of compensation was made in circumstances where *"special value"* as an economic value was not raised.

145. *Firstly*, the Applicant's approach is not simply predicated on the right to negotiate *per se* let alone the right to negotiate in respect of *"each"* compensable act (the State's (a)). It is predicated on the negotiation or exchange value of the NTRI, which is what miners commonly agree to pay, and native title parties commonly agree to accept, as compensation for the grant of *all* the tenements necessary for the development of a major iron ore mining project in the Pilbara. This is demonstrated by the agreement extracts in evidence. There are not a multiplicity of separate agreements in respect of the grant of individual tenements. *Secondly*, it is clear that each of the compensable acts here relate to iron ore mining in the Pilbara (the State's (b)) and therefore each must have a part to play in contributing to the revenue generated by the SHP (the State's (c)). In *Griffiths* HC, the Hight Court was dealing with a factual situation where there had been various unconnected *past acts* which had extinguished native title over small discrete portions of the native title holders' land. That is not the situation here. As pleaded by the Applicant and as admitted by the Respondents, each of the *future acts* here consisted of the grant of mining and related tenements which collectively underpin and provide the legal basis for a single major mining project (SHP).

146. FRCS [197] again makes the mistake of assuming that economic loss is claimed only in respect of those future acts which attracted the right to negotiate in Subdivision P. The claim for economic loss is for the *effect*(s) collectively, of the grants of the FMG tenements, because those grants together underpin the development and the operation of the SHP. Whether the grant of a particular FMG tenement did or did not attract the procedural right to negotiate, it is agreed by the parties that each of those grants was a *"future act"* and therefore an *act* (s.226 NTA) which *affects* (s.227) the Yindjibarndi People's NTRI and they are therefore entitled to compensation for the effect of the entirety of those grants on their NTRI. The collective effect of those grants was to reduce to zero the negotiation or exchange value of those NTRI.

147. Relevantly, the State submits at FRCS [201] that the evidence establishes that the benefits received under *"Subdivision P Agreements"* of the kind relied upon by the Applicant are in full and final satisfaction of any and all compensation liabilities including both economic and non-economic (cultural) loss. It says that the Applicant has not explained how or why it can sustain additional claims of economic loss (the *"Heritage Amount"* and the *"Psychological Amount"*) together with $1 billion for cultural loss: FRCS [202]. Those two criticisms are responded to *seriatim* below.

148. *First*, an enquiry into the *effect* of the relevant acts upon NTRI vary according to the compensable act(s), the identity of the native title holders, the native title holders' connection with the land or waters by their laws and customs and the effect of the compensable acts on that connection.[123] Accordingly, what might be an appropriate award of compensation will vary according to the results of those separate but inter-related enquiries.[124]

149. *Second,* contrary to the State's assertion at FRCS [119]-[120], the Applicant has pleaded as part of its claim for economic loss in the List of Heads of Compensation, compensation for the loss of or damage to, country and to ancient occupation, cultural and Dreaming sites and Dreaming tracks and for the estimated cost of psychological and related services.[125]

123 *Griffiths* HC at [217].
124 *Griffiths* HC (supra).
125 Applicant's List of Heads of Compensation A.02.014 at ~~[3] and~~ 3-4. See also POC A.02.002 at [46(aaaa)(v)].

E3 COMPENSATION FOR NON-ECONOMIC OR CULTURAL LOSS

E3.1 Proper assessment of non-economic loss

See AOS [84]-[87], [101]-[106]; ACS [200]-[619]; FRCS D3.4 [109]-[118], D4.6 [260]-[293], E4 [441]-[445]; FMGCS E6 [376]-[579].

150. The Applicant has made detailed submissions regarding compensation for non-economic, or cultural loss at AOS [84]-[87], [101]-[106] and ACS [200]-[619].

151. In *Griffiths* HC at [224], the High Court held that the proper assessment of non-economic or cultural loss under the NTA requires the *"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*".

152. Consequently, in the context of the specific traditional laws and customs of the claim group in *Griffiths* HC at [223], the plurality found that quantifying cultural loss, *inter alia*, necessitated consideration that: the consequences of acts can be incremental and cumulative; the people, ancestral spirits, and land form an "*indissoluble whole*"; the effects on connection are understood through the "*pervasiveness of Dreaming*," rather than individual parcels of land; damage to sacred sites affects a person's engagement with Dreamings, which extend across larger areas; and connection to country carries obligations of care, creating a sense of failed responsibility when the land is harmed.[126]

153. At [226] the High Court went so far as to explicate that failing to account for these 'inter-related effects', as they vary from case-to-case, would have ignored critical aspects of the 'overall picture' and resulted in legal error. Relevantly, in evaluating non-economic loss compensation, the plurality considered in *Griffiths* HC at [166] that:

> As ~~T~~the trial judge correctly noted, not all groups will be the same and it is not sufficient to assess the effects of compensable acts by reference only to a statement of what would be the native title rights and interests were it not for extinguishment. Instead, the trial judge considered that evaluation of the compensable effects requires an understanding of the relevant effects of the acts on the Claim Group and that, in that respect, evidence about their relationship with country and the effect of the acts on that relationship is paramount.

154. The Applicant's evidence in this proceeding crucially establishes that the laws and customs of the Yindjibarndi people and the inter-related ramifications of the compensable acts do not just encompass the effects on the claim group considered in *Griffiths* HC, but extend far beyond their scope. There are many differences that exacerbate the extent of the loss in this proceeding that are distinguishable from *Griffiths* HC (**distinguishing factors**), including that:

(i) the SHP is almost 100 times larger than the relevant areas in *Griffiths*;[127]

(ii) the acts in *Griffiths* were compulsory acquisitions in a town, in separate blocks;

(iii) the acts in *Griffiths* were infrastructure projects or essential public works established over 30 years;

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[126] See *Griffiths* HC at [226].

[127] *Griffiths* HC [295]; ACS ~~[204].~~[205].

(iv) no right to negotiate process was available or entered into;

(v) the parties agreed that the value of the exclusive NTRI was equivalent to the value of unencumbered freehold;

(vi) there was no evidence of the diminution of social relationships that affected the laws and customs of the claimant group by jeopardising the ~~system~~ practice of *Nyinyaard*, ~~and~~ *Galharra* relationships and *Birdarra Law* ceremonies or the like;

(vii) there was no evidence of the abstraction of groundwater that was part of the rich socio-spatial relationship with country that includes the *wuthuru* ceremony and *Nyinyaard* with country;

(viii) there was no evidence that the claim group was deliberately locked out of enormous parts of their country;

(ix) unlike *Griffiths (No.3)* at [376], there was no prior significant intrusion that had destroyed or impaired dreaming or sacred sites in previous times which the Court needed to take into account in order to gauge the appropriate level of compensation; and

(x) native title in *Griffiths* HC was non-exclusive.

E3.1.1 Quantum of non-economic loss

See FRCS [441]-[445]; FMGCS [379]-[385].

155. The ACS at [200]-[207] and [614]-[619]~~[617]~~ discusses the process of assessing non-economic or cultural loss. In *Northern Territory of Australia v Griffiths* [2017] FCAFC 106, the Full Court at [395] stated that the award for cultural loss "*would be judged by the Australian community as fair to the Claim Group. Whilst the loss of rights ~~are~~ so intertwined with the identity of a people cannot be valued in money, the award must signify by its amount a recognition of the level of the impact on the Claim Group.*"

156. In *Griffiths* HC the plurality at [237] emphasised that the trial judge had wide discretion and was not "*bound to approach the assessment with particular restraint or limitation*". The Applicant submits that when assessing non-economic loss the trial judge must consider the subject matter, the criterion of what is "*appropriate, fair or just*" in light of the whole of the NTA, and the facts, matters and circumstances that the Court has before it.

157. The Applicant submits that through the many apertures of loss, diminution, impairment and other effects caused by the grants of the mining tenements, the Yindjibarndi's cultural loss is a result of the events that led up to them, the events that continue to the present day, and further into the future to beyond 2045 (and the 25 years it takes to remediate the SHP). The Yindjibarndi people have been subject, *inter alia*, to the effects of the destruction of sacred sites, damage to *Bundut* songlines, loss of their connection to country, loss of their agency to make decisions about country, inability to speak for their country, inability to fulfil their responsibility to protect the land, inability to hunt, inability to practice cultural customs, inability to take younger generations to teach them culture and religion, the deprivation of

ground water, damage to spirits of the ancestors and the homes of the *nguga nulli,*[128] damage to *wirrard*, [129] damage to *Nyinyaard* with country and within the community, [130] cessation of an intact *Birdarra* ceremony that contains all the country and includes the whole community, damage to the *Galharra* system, [131] non-adherence to the respecting of elders and damage to social harmony and concord. The compensable acts have resulted in the indignity of Yindjibarndi people, gut-wrenching pain and a sense of helplessness.[132]

158. The evidence in the current proceedings demonstrates losses that extend far beyond the facts in *Griffiths* HC, and plainly establishes the necessity of an incomparably higher compensation award.

159. The Yindjibarndi's cultural loss, whether it be for the loss of sites, Dreaming tracks, cultural materials or social disruption, is a group-felt loss that, typically, involves a sense of injustice arising out of the damage to country caused by the compensable act: *Griffiths* HC ~~*Griffiths (No.3)*~~ [313]-[317]. All these things are more than just a "*sense of loss*", as FMG seems to submit at FMGCS [386]-[387]. Compensation for the loss or impairment of native title should be considered on a case-by-case basis. The circumstances of the Yindjibarndi people are unique, devastating and "*gut-wrenching*". The acts should be assessed as a series of accumulative losses. Some of those losses are without end, where the damage is irreparable and the country will never be the same again.[133]

160. The "*upset combined with justified indignation*" that Edelman J speaks of in *Griffiths* HC at [313] occurred to the Yindjibarndi People in an ongoing series of events that gathered momentum and produced a sense of injustice and powerlessness within the community. The Yindjibarndi were not listened to whilst negotiating with FMG staff, [134] they were placed in competition with WYAC—whom FMG actively favoured over the registered native title claimant.[135] FMG's financial backing of WYAC's legal actions against YAC, its orchestration of claim group meetings to replace the Yindjibarndi #1 Applicant [136] and its exclusion of the

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[128] SWarrie (A.05.008) [91], [20]-[21], [87], [88], [118], [129]; (A.07.010) T475.45-T476.30, T596.35-T597.20; MW (A.05.022) [35], [327]-[329] (A.07.010) T475.05, T484.40, T484.15; AM (A.05.017) [50], [117]; MC (A.05.017) [35], [40], [42], [47]; KG (A.05.016) [48], (A.07.012) T650.28; FC (A.05.019) [23]-[24], (A.07.013) T681.30-T682.10, T683.25; Ex2 (A.04.002) [23], [33]; JC (A.05.015) [10], [13]; Ex1 (A.04.001) [19], [44], (A.07.004) T03.40; JN (A.05.002) [14], [15], [20]; KW(A.05.012) [28], [35], [37]; LCheedy (A.05.013) [19], [29], LCoppin (A.05.006) [47], [51], [69]; IG (A.05.011) [28]; EG (A.05.010) [17], [20] (A.07.008) T328.20; IW (A.05.018) [12]; WW (A.05.009) [46], [47].

[129]SWarrie (A.05.008) [55], [78]; MW (A.07.011) T525.10; AM (A.05.017) [44], [45]; MC (A.05.014) [11], [33], [34]; KG (A.05.016) [54]; FC (A.05.019) [22], (A.07.013) T681.05; JC (A.05.015) [28], [52]; JN (A.05.002) [1]; (A.07.008) T359.20; LCheedy (A.05.013) T245.25; LCoppin (A.05.006) [13]; WW (A.05.009) [23]-[24].

[130] SWarrie (A.05.008) [26], [68] MW (A.05.022) [13], [28], (A.07.010) T474.15, (A.07.011) T516.20; KG (A.05.016) [33], [64], (A.07.012) T653.31; JC (A.05.015) [17], [70], [73]; KW (A.05.015) [16], [34]; LCoppin [49], [57], [58]; AM (A.05.017) [43], [44], [107]; MC (A.05.014) [32]; Ex1 (A.04.001) [33]; LCheedy (A.05.013) [37], (A.07.007) T247.45, T248.10; SWilson (A.05.006) [58]; IG (A.05.011) [41], (A.07.008) T294.10; EG (A.05.010) [26], (A.07.008) T331.38; IW (A.05.018) [19]; WW (A.05.009) [28]-[29], [32].

[131] SWarrie (A.05.008) [11], [86], [106]; (A.07.001) T514.27-T515.15; AM (A.05.017) [111], [112], [125], (A.07.001) T562.24, T563.01-T563.01-0.8; MC (A.05.014) [54], [55]; KG (A.05.016) [71]; FC (A.05.019) [16]-[17]; Ex2 (A.04.002) [46]; JC (A.05.015) [49]; KW (A.05.12) [11], [21]; LCheedy (A.05.013) [38]; LCoppin (A.05.006) [56]; SWilson (A.05.007) [3], [12], (A.05.007) T273.30; IG (A.05.011) [37]; EG (A.05.010) [32].

[132]JN1 (E.03.003) [18], [22]-[24], [32], [34] [50]; JN2 (E.03.007) [6], [12], [18], [28], [56]; (A.07.019) T972.12-T974.20; KP1 (E.03.001) [173]-[174].

[133] ~~Ex2 [42]; Ex1[36]; (A.07.004) T22.15, T8.40.~~ MC (A.05.014)[33]; S Wilson (A.05.007)[23]-[24].

[134] Ex2 [43].

[135] ACS [399]-[406].

[136] *TJ v State of Western Australia* [2015] 818 (A.08.013) [1]-[6], [10-58], [77]-[87], [93], [96]-[106], [107], [108], [113]-[125]; ACS [404], [407]-[417]; SOAF (A.02.015) [78].

broader Yindjibarndi group from key heritage and business arrangements all contributed to a breakdown of social cohesion. The result was an unprecedented level of intra-community conflict, culminating in public disputes and physical altercations, further deepening the trauma inflicted upon the Yindjibarndi people.[137] Without FMG's pursuit of the mining tenements and subsequent mining operations, the social dislocation would not have occurred.

161. The cultural loss here in the current proceedings is different to and far greater than it would have been if the grant of the mining tenements and the subsequent mining activities were done with the informed consent and agreement of the Yindjibarndi People, as would be the case where the miner and the traditional owners have first entered into a land access and compensation agreement. Mr Woodley explained in his evidence that agreement making with mining companies is an imperfect but important way of fulfilling cultural obligations to country and addressing the impacts of mining.[138] Here, from the Yindjibarndi People's perspective, their country has been *"stolen"* by *manjangu*,[139] who are commercially exploiting and irreparably damaging the country, over their strong objections, without their consent and without the payment of *any* compensation. The consequences of this conduct to the Yindjibarndi People's connection to country and to their continued acknowledgement and observance of the traditional laws and customs which support that connection has been profound.

162. Further, unlike the circumstances in *Griffiths* HC at [180], there were no prior instances of loss in the CCA beyond those directly caused by the compensable acts in the present proceedings. The land on which the SHP was established was predominantly unallocated Crown land (**UCL**), with only a small portion being pastoral station land. Before the establishment of the SHP, the country in this proceeding was pristine UCL where Yindjibarndi people visited freely for thousands of years until mining works began in 2012.[140] Moreover, *Griffiths* HC contained no evidence that the claim group's sense of indignity extended to the persistent auditory, visual, and respiratory impacts of large-scale construction work – distinct from open-cut mining – that permanently scars Yindjibarndi country. Here, the mining operations are conducted incessantly, operating continuously on a 24-hour, seven-day-a-week basis. Furthermore, in *Griffiths*, the claimants' "*sense of injustice*" arose in a different context, where compulsory acquisitions took place before their native title claim was determined. By contrast, in these proceedings, FMG was fully aware of the native title holders when entering negotiations, as there was a registered claim on foot. It was an agreed fact in *Warrie (No.1)* that the Yindjibarndi held at least non-exclusive native title rights and interests.

163. The Applicant submits that in the context of the profound losses suffered by the Yindjibarndi People, $1,000,000,000.00 should be the minimum amount awarded to the Yindjibarndi people as compensation for cultural loss.

164. Without providing any justification or methodology for their calculations, both respondents proffer similar figures of $5-10 million (FRCS [455]) and $8 million (FMGCS [386]) as their quantum of non-economic loss. FMG submits that $8 million is "erring on the very generous side" and that the "applicable principles" support its approach: FMGCS [386].

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[137] LCoppin (A.05.006) [9], [27]-[28]; LCheedy (A.05.013) [70], [63]- [64]; JC (A.05.0.15) [53]; JK (A.05.021) [40]; MW (A.07.11) T519.15; KG (A.05.016) [75]; Ex1 (A.04.001) [28], [30].

[138] MW (A.05.022) ~~from~~ [266] ~~to~~ [290].

[139] ACS [325]-[326]; KP1 (E.03.001) [209]-[210]; SWarrie (A.05.008) [89]; KG (A.05.016); AM (A.05.017) [62], [99]-[100]; Ex2 (A.04.002) [16].

[140] Ex 2 (A.04.002) [30]; (A.07.004) T16.25-16.40, T27.20; LCheedy (A.05.013) [62]; LCoppin (A.05.006) [67]; RS (A.05.008) [7]-[8]; FC (A.05.019) [11], [18], (A.07.013) T676.05-677.02; SW (A.05.008) [92].

165. At FRCS [454], the State submits that the Applicant's cultural loss claim is manifestly excessive when viewed through the lens of what the High Court considered was fair, reasonable or just in *Griffiths* HC. ~~The~~ FMG similarly submits at FMGCS [379] that the loss claimed by the Applicant is a "disproportionate claim" and that any more than $8 million adopts "a seriously generous calculus of the relevant Australian standards of value". On the one hand, FMGCS [383] says that assessing the quantum attributable to cultural loss cannot be based on a compare and contrast with the facts of *Griffiths* HC. On the other hand, FMG submits that the award of $1.3 million for cultural loss "*gives the Court some sense of the nature of the task that is required*": FMGCS [383]. FMG is correct that the quantum of compensation cannot be ~~limited to~~ guided by the quantification in *Griffiths* HC~~,~~. ~~where~~ ~~t~~The more substantial extent of the loss in the present matter can be plainly distinguished as outlined above.

166. FMGCS [379]- [384] submits a different test to the one urged in *Griffiths* HC at [237]. *Griffiths (No.3*) arrived at a figure as a result of the trial judge's "social judgment", not of "*Australian standards*", as FMG puts it: FMGCS [202]. The reason FMG uses different phraseology is not elucidated. The *Griffiths (No.3)* trial judge arrived at a non-economic loss figure after seeing and hearing all the evidence (*Griffiths* HC at [236]) in the context of the first compensation determination before the courts, which was monitored by the appellate courts, to decide on an award for the loss engendered by the construction of public works over 30 years ago in a small town to evaluate what is "appropriate, fair or just" compensation (*Griffiths* HC at [237]).

167. FRCS [115] misinterprets the proper approach to compensating non-economic loss by asserting that *Griffiths HC* at [3], [53]–[54] and [312]–[317] establishes that cultural loss is not an award akin to *solatium*. The State concludes that cultural loss does not compensate for distress caused by the compulsory extinguishment or impairment of native title. The State relies on the narrow definition provided by Edelman J at [313] of *Griffiths HC* to argue that, since the Applicant in this proceeding makes no explicit claim for '*solatium',* no award should be granted based on Dr. Nelson's evidence regarding the distress experienced by the Yindjibarndi people.

168. However, *solatium*—as defined by Edelman J—is neither adopted nor engaged with by the plurality. Instead, at [53]–[54] of *Griffiths* HC, the majority explicitly rejects the use of the term *solatium*, which originates from land acquisition statutes, and does not consider it further. The majority held that: *"*[*a*]*sking what would be allowed as "solatium" on the acquisition of rights that owe their origin and nature to English common law distracts attention from the relevant statutory task of assessing just terms for the acquisition of native title rights and interests that arise under traditional laws and customs which owe their origins and nature to a different belief system."* ~~.~~Notably, the remarks of the majority as they relate to nomenclature do not provide authority for the broad proposition advanced by the First Respondent at FRCS [115]~~;~~ and [282]-[284] that "all members of the High Court in *Griffiths* emphasised that cultural loss is not an award in the ***nature of a solatium***" (emphasis added).

169. Edelman J did not exclude the possibility of an award akin to *solatium*. Rather, his Honour clarified that: "*although the parties used the language of "solatium", no separate claim was made in this litigation for such subjective mental suffering based only upon the consequences of the compulsory nature of the extinguishment*."[141] Significantly, Edelman J acknowledged that distress resulting from a compensable act could, in itself, form a basis for compensation~~.~~: *Griffiths* HC at [276].

170. Broadly, the FRCS at [284] and Part E4 acknowledge the existence of a group-felt sense of loss, which gives rise to cultural loss. The State argues, however, citing (at [283]) parts of

[141] *Griffiths* HC at [27~~6~~3].

Griffiths HC at [154], that compensable cultural loss does not extend to the distress caused by the compulsory extinguishment or impairment of native title, nor the individual emotional suffering, referenced in Dr Nelson's report. In order to understand the State's submission in context, however, in *Griffiths* HC at [154] the plurality states that:

> Compensation for the non-economic effect of compensable acts is compensation for that aspect of the value of land to native title holders which is inherent in the thing that has been lost, diminished, impaired or otherwise affected by the compensable acts. It is not just about hurt feelings, **although the strength of feeling may have evidentiary value in determining the extent of it**. It is compensation for a particular effect of a compensable act – what is better described as "cultural loss"." (emphasis added).

171. The FRCS at [449] contends that compensation for non-economic losses should be discounted based on the proportion of Yindjibarndi country affected by the grants. Additionally, at [292], it asserts—without reference to authority—that the Applicant bears the evidential burden of demonstrating the impact of the destruction of each cultural site individually. However, the High Court in *Griffiths* HC at [216] held that assessing cultural loss by imposing specific temporal and physical limits is an incorrect approach to the statutory task required by s 51(1) of the NTA. Instead, the High Court endorsed the view of Mansfield J in *Griffiths (No.3)* that in *"assessing the non-economic consequences of the compensable acts it was not appropriate to adopt a lot-by-lot approach"*.[142]

E3.2 Compensability related to social disharmony

See AOS [57]-[58], [86]; ACS [62]-[70], [215], [222]-[223], [347]-[489] and [501]-[505]; FRCS D4.6 [260]-[280]; FMGCS D4.2 [128]-[161].

172. At FRCS [263], the State alleges that apart from the AOS at [57]-[58], the Applicant has not developed a legal basis for the Split being an aspect of compensation under s.51(1) NTA and s.123(4)(f) *Mining Act.* As considered above and at ACS [62]-[70], however, in *Griffiths (No.3)*, Mansfield J considered that the entitlement to cultural loss did not have to arise "directly" from the compensable acts themselves (in this case the actual grant of the mining tenements). His Honour held at [321] that it was not useful or appropriate to incorporate such an element into a statutory formula such as s 51(1) of the NTA, as it may carry some overtones of causative requirements beyond the statutory prescription. Instead, Mansfield J held that it is the "*effect of the particular compensable act(s)*" that should be measured or assessed, in quantifying compensation after considering the whole of the evidence.

173. At FRCS [265], the State submits that the non-economic loss to be compensated under the NTA must be for cultural loss that relates to the land and waters. Accordingly, the State submits that as the Split is a result of the *"effect on people and their relationships with one another, not on the cultural or spiritual connection that those members have with the land and waters by their traditional laws and customs"* it cannot be compensable as non-economic loss. The submission ignores that *Griffiths (No.3)* held that as well as loss of land, the Court must evaluate the relevant *effects on the native title holders* which may include 'loss of amenities' or 'pain and suffering' or 'reputational damage' proven by evidence about the relationship with

[142] *Griffiths* HC at [198]~~; *Griffiths (No.3)* at [413].~~

country and the effects of the acts.[143]

174. In any event, the courts have recognised that community laws or customary practices, including kinship systems, can be inherently connected to land and water, each affecting and being affected by the other.[144] Critically, the Applicant's evidence in the present manner has demonstrated that the Yindjibarndi system of laws and customs inseparably incorporates the *people* and the *land*.[145] Before she died, Tootsie Daniel exemplarily gave preservation evidence and said: "[I]f we look after the *ngurra*, the *ngurra* look after us. *Ngurra* is a spirit living in country, on country."[146] The Yindjibarndi people, language and country, and all that is within it, are related parts, and they are inextricably connected to it by the spirits from the country.[147]

175. The spirit ancestors, the people of the group, particular land and everything that exists on it, are organic parts of one indissoluble whole.[148] *Minkala* laid down the law that is in the songs of the *Bundut* that teach moral obligations and relationship structures.[149] The *Birdarra* Law given by *Minkala* gave Yindjibarndi people the *Galharra* system that sets down the rules of how Yindjibarndi people relate to each other and the country. This system of relationships dictates how all Yindjibarndi fulfill their responsibilities and their role in the *Birdarra* ceremony.[150] Without the respect for *Birdarra* Law through songs and dances the *ngurra* is not rejuvenated.[151] In Yindjibarndi Law, everyone in the *Galharra* has their roles.[152] The division caused within the Yindjibarndi community by the grant of mining tenements to FMG has broken *Birdarra* Law, broken the *Galharra* system including the *Nyinyaard* practices that are part of it. The *Galharra* system governs everyday life, such as how to act on country and how the members of the Yindjibarndi community relate to one another.[153]

176. *Nyinyaard* exists both within the country ~~with~~ and its people.[154] Lorraine Coppin gave evidence that *Nyinyaard* is a system of reciprocity passed down by the *Marrga*, dictating that the Yindjibarndi people care for the country, and in return, the country cares for them.[155] She further explained that *thalu* sites exemplify this relationship by the ceremony being performed by the people, and the country then responds. If Yindjibarndi people do not care for the country, then it will not provide for them.[156] *Nyinyaard* subsequently creates environmental responsibilities[157] that are affected by the breakdown of *Birdarra* Law.[158] If Yindjibarndi people fail to comply with or acknowledge *Nyinyaard*, they become cursed by the country, which is called *gurruwara* and is a death warrant.[159]

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[143] ACS [200]; ~~*Griffiths* HC at [166]~~ *Griffiths (No.3)* at [318].
[144] See e.g. *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* [2004] FCA 298, 2004 WL 569911 at [147].
[145] ACS [259]-[262]; KP1 (E.03.001) [98]-[100] (section labelled 'the indissoluble whole'), [101]-[105].
[146] (A.07.004) T18.46, T19.08-09; See also JC (A.05.015) [17]; LCoppin (A.05.006) [49]; (A.07.011) T570.25
[147] SOAF (A.02.015) [93].
[148] *Ward* HC [14]; *Griffiths* HC at [153].
[149] KP1 (E.03.001) [44].
[150] SOAF (A.02.015) [125].
[151] MW (A.07.011) [273]-[275].
[152] LCheedy (A.05.013) [38].
[153] AM (A.05.017) [35]-[37].
[154] (A.07.007) T248.25-T248.40.
[155] LCoppin (A.05.006) [49]; (A.07.007) T246.20.
[156] LCoppin (A.05.006) [48], [57].
[157] (A.07.011) T515.30.
[158] JC (A.05.015) [67]; JN (A.05.002) [25]; KW (A.05.012) [14]; SWilson (A.05.007) [35]; MR (A.05.020) [14]; IG (A.05.011) [36]; EG (A.05.010) [26].
[159] MW (A.05.022) [282]-[283], [286].

177. Due to the Split, the knowledge of country and traditional laws and customs relating to the SHP area is not being passed down from elders to younger generations.[160] Some grandchildren are not going out on country like they once did.[161] The knowledge of the country at the SHP that was passed from generation to generation is being lost within the Yindjibarndi community[162] and must be accounted for as part of the compensation for non-economic loss. The Yindjibarndi Law of respecting elders has also been diminished.[163] The actions of the members of WYAC, by not respecting the authority of the elders, and disregarding the laws and customs that long governed the Yindjibarndi people, have been lost.[164]

178. FMGCS [135] appears to submit that the *Galharra* and *Nyinyarrd* and other laws and customs are still practiced by some people, and that there is therefore no loss. Under the traditional laws and customs of the Yindjibarndi People, these practices must occur for the whole group, not separate factions of the group. As a result of the grants, the whole community has lost the glue which bound them together under their laws and customs.

179. Despite all the lay evidence from Yindjibarndi people, third party lay witnesses, Dr Palmer and Dr Nelson regarding trauma in the Yindjibarndi community, including mental health issues related to working at the SHP,[165] FMGCS at [485] implies that young Yindjibarndi people working at the SHP have a "pretty good life". FMG did not challenge any of the lay witnesses about the trauma they are experiencing. It is submitted that FMG could have sought to rebut the Applicant's case regarding social dislocation/disruption and the causes of that social dislocation/disruption by calling members of WYAC who FMG has an ongoing business relationship with, in order to contradict YNAC's lay evidence. This could have included evidence relating to the Yindijibarndi people's distress and broken *wirrard* ~~about~~ due to the breakdown of ~~the~~ social relationships under ~~the~~ traditional laws and customs. FMG did not seek to do this.

E3.2.1 *Cause of social disharmony*

180. At FRCS [268], the State contends that the Applicant uses 'imprecise language' to identify a specific "*act*" responsible for the "*effect*s" and consequential loss. To be clear, the Applicant's submission is that the "*act*" is the grant of the various mining tenements that as a whole allowed for the construction and establishment of the SHP in the context of all the evidence.[166] Relevantly, to obtain the grants, FMG was required to comply with Subdivision P of the NTA and negotiate with the registered native title claimants. Once FMG commenced negotiations, FMG groomed a number of Yindjibarndi people by telling them they would not be compensated if they did not accept FMG's offer,[167] provided individuals with largesse such as cash, meals and driving assistance;[168] provided the assistance of FMG employee Michael Gallagher to work at WYAC;[169] partnered with WYAC for lucrative contracts on the SHP;[170]

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[160] AM (A.05.017) [121].
[161] (A.07.008) T355.15-T355.47.
[162] AM (A.05.017) [110]; MC (A.05.014) [50]; KG (A.05.016) [67]-[70].
[163] ~~FC (A.05.019) [45].~~ MW (A.05.022)[229], [231]
[164] MW (A.05.022) [350]; Ex1 (A.04.001) [31]); LCheedy (A.05.013) [61].
[165] MC (A.05.014) [26]; JC (A.05.015) [30], [33]-[34]; IG (A.05.011) [29]-[32]; FC (A.05.019) [22], (A.07.013) T681.05.
[166] ~~*Grffiths*~~ *Griffiths* HC at [219]; *Griffiths (No.3)* at [321]; ACS (A.09.013) [202]-[204]; SOAF (A.02.015) [9].
[167] ACS [37~~2~~4]; 1st SCB (A.05.023) Annexure 25 p.353; AM (A.05.017) [53].
[168] LCoppin (A.05.006) [22]; (A.07.009) T420.30-T421.10; JM (A.05.003) [15]; JK (A.05.021) [18].
[169] SWarrie (A.05.008) [5~~2~~3]; MC (A.05.014) [52]; JN (A.05.002) [23]; MR (A.05.0~~.~~20) [7]; LCoppin (A.05.006) [22], (A.07.009) T420.30-T421.10; SWilson (A.05.007) [5]; Ex2 (A.04.002) [43]-[47~~)~~].
[170] MW (A.05.022) [379]-[380], [385]-[386].

arranged and financed claim group meetings in order to undermine and replace the Yindjibarndi #1 Applicant.[171] Further, FMG funded litigation instigated by WYAC members .[172]

181. The State sets out various authorities in FRCS [267]-[268] and fn 533 regarding common law notions of causation and its applicability to cultural loss compensation. The cases referenced deal with the evolution of the appropriate causation test, in contexts outside of the NTA. In particular, they discuss the application of the "commonsense approach" as a test to be adopted, as opposed to the "but for" test in *March v Stramare (E&MH)* (1991) 171 CLR 506 (***March***).[173] However, the appeal courts in *Griffiths* do not appear to place a significant emphasis on the "commonsense test"/"practical test" in *March*. Rather, in *Griffiths* HC at [164]-[165] and [218], the High Court states that the effect of the acts on native title rights and interests do not have to be "direct", and the consequences may be "incremental and cumulative".

182. The State at FRCS [271] submits that the onus of proof must be reversed and that the Yindjibarndi must prove that the Yindjibarndi laws and customs would not have been disrupted (presumably by other events or forces) without FMG's applications for mining tenement grants and the concomitant negotiation process. The State does not provide any jurisprudence to support this submission, and it seems illogical. Neither the State nor FMG provided evidence that contradicts the Applicant's evidence regarding FMG's negotiation tactics or the effects that the Split has had on the Yindjibarndi community as a whole. Neither was it put to any Yindjibarndi witnesses in cross-examination that the physical and emotional/psychological injuries were not a result of the grant of the mining tenements to FMG but of other events. The rule in *Browne v Dunn* was not followed by the State or FMG in this regard. The State cites no legal principles when asserting that, *"there can be no liability to compensate for physical and emotional injuries … suffered by the Yindjibarndi People"* (see also FMGCS at [137]).

E3.2.2 *Evidence related to the cause of social disharmony*

183. The Yindjibarndi people split into two groups when WYAC was registered in late 2010.[174] This was the beginning of the end of the once harmonious community.[175] The Applicant has already provided detailed submissions on the social division and disruption within the Yindjibarndi community which has resulted from the non-consensual grants of the FMG tenements and the related non-consensual mining activities: AOS [57]-[58] and [86]; ACS [62]-[70], [215], [222]-[223], [347]-[489] and [501]-[505].

184. The FRCS covers considerable ground at [260]-[280] in relation to the Split not being a head of compensation for cultural loss. It is hard to understand what point the State is making when it says a *"splinter group"* is suggestive of a group in the minority, whereas (as it submits) YAC and WYAC have approximately the same number of members. The Applicant does not submit that one group is larger than the other. In any event, there are a number of important points to make about the State's submissions:

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[171] MW (A.05.022) [342]; FC (A.05.019) [39]; SWarrie (A.05.008) [95].

[172] 1st SCB (A.05.023) (see Annexure SCB-27); MC (A.05.014) [14]-[17]; SWilson (A.0.007) [7]; SWarrie (A.05.008) [70]-[76], [110]; (ZA.05.043) [24]-[25]; KW (A.05.012) [60]; LCheedy (A.05.013) [50]; Ex1 (A.04.001) [25].

[173] *March* stands as authority that "but for" should not be adopted to the exclusion of common sense approach.

[174] SOAF (A.02.015) [63].

[175] JM (A.05.003) [21], [25]; JK (A.05.021) [66]; RS (A.05.005) [28]; WW (A.05.009) [97]; EG (A.05.010) [34]; (A.07.008) T323.11-.40.

(i) the FRCS at [261] states that 235 Yindjibarndi people are members of both organisations leaving about 245 in each group;

(ii) a large number of members of WYAC are members of the Hicks family who were determined by Nicholson J not to be Yindjibarndi, and the Todd family who were determined by Rares J not to be Yindjibarndi;[176]

(iii) YAC/YNAC were and are the agent that holds native title on behalf of all Yindjibarndi people and YAC was the agent of the registered native title claimant[177] who was responsible for negotiating with those intending to carry out future acts before the determination; and

(iv) WYAC members have been unsuccessful in their efforts to take control of the Yindjibarndi #1 Applicant or of YAC.[178]

185. WYAC purports to support members by delivering a positive financial return for the wider community. Yet, the evidence indicates that very little is received by WYAC members. [179]

186. It is an agreed fact that FMG made contact with the Yindjibarndi community in order to commence negotiations under Subdivision P in 2007.[180] It is to be recalled that negotiations between YAC and FMG did not commence until after the first mining tenement was granted over the SHP, being miscellaneous licence L1SA on 29 November 2006. The Split would not have occurred but for FMG's desire to be granted the mining tenements as expeditiously and inexpensively as possible.[181]

187. Rares J found that FMG provided financial support to WYAC and had a commercial interest in supporting WYAC to gain greater numbers in order to take over control of YAC by majority vote. Once the members of ~~the~~ WYAC seized control of YAC, they would agree to a non-exclusive native title determination and a lesser compensation agreement with FMG.[182] Members of WYAC attempted to replace the Yindjibarndi #1 Applicant in 2011 and 2015 by holding claim group meetings to enable them to authorise a new Applicant to take control.[183]

188. Whilst the State and FMG at FMGCS [133] submit that there is evidence that there were arguments before FMG's involvement with the community, this is not correct. The only evidence of arguments in the Yindjibarndi community was about women, which were dealt with by the Elders.[184] At FRCS [273], the State disingenuously cites evidence from Dr Palmer's report where he collected data whilst on a fieldtrip in 2022. On the trip, Ms Read told him that bad relations between the two Yindjibarndi groups started in 2004 when the WYAC wanted to form their own group. It is clear when Ms Read's evidence is examined that when she said

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[176] *Daniel v Western Australia* [2003] FCA 666 at [246] and [1452]; *Warrie* (*No.1)* at [25] were acknowledged as Ngarluma and determined not to be Yinjibarndi at [514] ~~and [1452]~~.
[177] SOAF (A.02.015) [91].
[178] *NC (deceased) v State of Western Australia (No.2)* [2013] FCA 70 (A.09.011.01-.02) and *TJ (on behalf of the Yindjibarndi People) v State of Western Australia* [2015] FCA 818 (A.09.013).
[179] MR (A.05.020) [11], [13]; SWilson (A.05.007) [8]; (A.07.007) T264.10-.45, T265.5-.10; Ex2 (A.04.002) [43]-[44]; JC (A.05.015) [71]-[72]; Ex1 (A.04.001) [29]; KW (A.05.012) [7]-[8], [49]; LCoppin (A.05.006) [22], [43]; (A.07.009) T420.30-T421.10; EG (A.05.010) [27], [29].
[180] SOAF (A.02.015) [8], [9], [24]-[28].
[181] 1st SCB ~~[56] [59]~~ p.56-p.59 (A.05.023) (see -Annexure SCB-6).
[182] *Warrie (No.1)* (A.09.016.01) at [391]-[393~~398~~].
[183] 1st SCB p.357-p.394 ~~[27]~~ (A.05.023) (see Annexure SCB-27); *TJ (on behalf of the Yindjibarndi People) v State of Western Australia* [2015] FCA 818 (A.09.013) at [12] and [15].
[184] JM (E.05.003) [6], [7], [13], [20]-, [27]; JK (A.05.021) [15].

2004 she was mistaken because *"the splinter group"* was established in late 2010 and she was "*devastated by the split and the arguments*".[185] In her affidavit, Ms Read states at [16], [23], and [25], "[e]*veryone in the Roebourne community was happy before Andrew Forrest turned up talking up the agreement with FMG"* and "[i]*n 2010, everything changed. A man named Michael Gallagher arrived from FMG*".[186] Ms Read provided preservation evidence in March 2023 before her passing, yet the State never challenged the timeline in her affidavit as inconsistent with her earlier statement to Dr Palmer. No other witness has suggested that social disharmony existed in 2004. It is unfair for the State to seize on a single discrepancy of dates, told by an elderly woman in an informal setting, as a 'gotcha moment' that contradicts all other evidence, including her own sworn testimony.[187]

189. FRCS [274]-[275] states that WYAC members were concerned about the financial management of YAC and *"oppressive conduct"* commenced in December 2010 as a reason for social disharmony. [redacted]

190. At FRCS [276], the State submits that in 2008 the Split was not cited as a reason in the NNTT's decision about whether or not FMG had negotiated in good faith. It can be seen from the lay evidence that the Split did not occur overnight;[190] rather, it was incremental, with people like George Ranger organising meetings and bussing people from Carnarvon[191] and with Michael Gallagher and Corser and Corser working with some of the community.[192] The State submits that there was existing social dysfunction due to the drinking epidemic. However, the State does not acknowledge that the Yindjibarndi community was able to 'get over' any drinking issues and reinvigorate their community and culture and remain cohesive, whilst prosecuting the *Daniel* claim.[193] Further, Dr Nelson gave evidence relating to how the current threat they faced is much worse because they are unable to just say 'no' and build again, because what the FMG mine has done to the environment is irreparable.

191. Michael Woodley and Stanley Warrie gave evidence that tensions slowly built up between 2007 and 2010 until the Split became official and WYAC was registered.[194] For example, one of the catalysts for the split was FMG arranging a Yindjibarndi meeting under the guise of a 'Workshop' for the FMG-run Vocational Training Education Centre (**VTEC**). Rather than being told about jobs, attendees were told by FMG employees Michael Gallagher and Alexa Morecombe that they would not get an exclusive possession determination over the UCL, because they did not go there anymore; if they did not accept the FMG offer, they would not get compensation; and the Yindjibarndi had better start doing heritage surveys for FMG, or

[185] Ex1 (A.04.001) [34].
[186] Ex1 (A.04.001) [16].
[187] (A.07.004) T21.30, T22.5, T23.35; LCheedy (A.0.013) [42], [46], [43]-[45]; SWarrie (A.05.008) [61-64]; MW (A.05.022) [209]-[213], [340].
[188] SOAF (A.02.015) [63]; (H.03.7.001)-(H.03.7.003).
[189] ACS [377]-[440]; (H.03.7.001)-(H.03.7.003).
[190] SWarrie (A.05.008) [54], ~~[67],~~ [61]-[64], [67]; MN (A.05.004) [18]; Ex2 (A.04.002) [42]; JC (A.05.015) [51]; KW (A.05.012) [25].
[191] SWarrie (A.05.008) [73].
[192] MW (A.05.022) [34], [215], [217]-[218], [341]; SWilson (A.05.007) [5].
[193] MW (A.05.022) [90]-[94]; CH (A.05.001) [19]; MW (A.05.022) [354~~)~~], Annexure MW-13;(A.07.004) T21.30-T22.5~~.~~ ; CH (A.05.001) [8]-[9], [15]
[194] SWarrie (A.05.008) [27], [50], [54], [58], [61]-[64]; MW (A.05.022.01) [170], [209]-[213], [340] [345], [348]; JK (A.05.021) [24]-[26]; MN (A.05.004) [18].

FMG would do the surveys without them.[195] A small number of YAC members, Jimmy Horace, Barry Philips, Frank Jerrold, Mark Horace, Glen Toby, Francis Phillips, Rodney Adams and William Long then agreed to participate in heritage surveys for FMG. At the end of the meeting, a group of about 10 Yindjibarndi people decide to form a breakaway group.[196]

192. At FRCS [277], the State points to the NNTT member's finding that there was no new evidence before him ~~submits that there is no evidence~~ that the FMG Respondents had "actively incited dissention" within the Yindjibarndi community. The Applicant refers to ACS [399]-[412] and ~~CB H~~ the social disruption documents in evidence. If there was any ambiguity as to whether FMG assisted WYAC members in establishing a rival group, the minutes of a directors meeting on 14 June 2012 clarifies it (**Minutes**). The meeting was attended by Michael Gallagher (ex-FMG employee, whose position at WYAC was funded by FMG),[197] WYAC directors and Janet Tavelli, principal of Integra Legal. The costs of all WYAC legal services were paid by FMG.[198] [redacted][199]

193. The Minutes indicate that WYAC intended to write in order to meet with Hancock Prospecting (who YAC was engaged with) and Kreab Gavin Anderson (a communications consultancy) to produce newsletters, DVDs, and websites with the intention of projecting the message that WYAC speaks with authority for "*Kalawinji*" (*Garliwinjyi*) *ngurra"*.[200] [redacted]

194. The Minutes reveal that Mr Gallagher had originally been employed by FMG 18 months earlier for a period of three months to *"deal with issues"* for WYAC, but was still *"batting away with all these YAC troubles"*, and expected to continue doing so for "*some months at least*" (A.08.050.01, p.4). [redacted]

195. [redacted]

196. From 28 March 2011, WYAC sent all Integra Legal invoices to FMG (see ACS [412], [430] ~~[431]~~).[206] [redacted]

[195] LCheedy (A.0.05.013) [43]; JK (A.05.021) [24]-[27]; 1st SCB (A.05.23) (see Annexure SCB-25 ~~[352] [353]~~ pp.352-p.353), (see Annexure SCB-39 ~~[573] [574]~~ p.573-p.574), (see Annexure SCB-43 ~~[591]~~p.591).
[196] LCheedy (A.05.013) [43]-[44]; SWilson (A.05.007) [6]; MW (A.05.022.01) [214].
[197] (A.08.050.01) p.4; (A.08.050.02) p.3.
[198] (H.03.7.001); (H.03.7.003).
[199] (H.01.001) p.4~~-5~~.
[200] ~~(A.05.050.01) p.5.~~ (H.01.01) p.7.
[201] (H.01.001) p.7~~.3~~.
[202] (H.01.001) p.8.
[203] (A.08.050.01) p.~~6~~5.
[204] (A.08.050.01) p.6.
[205] (H.01.001) p.23.
[206] (H.03.7.001)~~;~~ -(H.03.7.003).

[redacted]

197. [redacted][209]

198. [redacted]

199. [redacted]

200. [redacted]

201. [redacted]

202. [redacted]

[207] (H.02.019) p.3.
[208] (H.02.021).
[209] SOAF (A.02.015) [57], [62].
[210] (H.02.001); (H.02.004) ~~p.37~~.
[211] (H.02.004) ~~p.37~~.
[212] (H.02.002).
[213] (H.02.006) ~~p.~~ PDF 7.
[214] (H.02.009) ~~p.~~ PDF 2.

203. [redacted]

204. [redacted]

205. [redacted]

206. [redacted]

E3.2.3 Evidence of Dr Nelson

207. At FRCS [285] the State submits that Dr Nelson's evidence should be disregarded. FMG makes a similar submission and similarly criticises Dr Nelson's evidence under the heading at E.6.6 at FMGCS [478]-[488], alleging a lack of impartiality, credibility, thoroughness and professionalism, and alleging that Dr Nelson was unbalanced and was selective with source material. The State accused Dr Nelson of only speaking to two WYAC members (in circumstances where Dr Nelson went out of his way to communicate with and meet with them), alleged that not enough people were interviewed, and that Dr Nelson's interview notes were "sparse", and asserted that the findings expressed in his report were not reflected in his fieldnotes: FRCS [285]. Dr Nelson explained that he takes brief notes so as to maintain eye-contact with his interviewees, in order to establish a rapport and a sense of confidentiality. He also explained that he had limited time to carry out his clinical engagements and typed his

[215] (H.02.013) ~~p.~~ PDF 2.
[216] (H.02.014) ~~p.~~ PDF 2.
[217] (H.02.016) ~~p.~~ PDF 38.
[218] (H.02.017) ~~p.~~ PDF 5.
[219] (H.02.018) ~~p.~~ PDF 3.
[220] (H.03.8.004) '10 FMG:078.002.0019 dated 22 April 2011'; '11 FMG:061.002.5330' dated 4 March 2011.
[221] (H.03.8.004) '11 FMG:061.002.5330.002'; MR (A.05.020) [11]-[13].
[222] (H.03.8.004); Ex2 (A.04.002) [43] - [44]; JC (A.05.15) [38].
[223] Agreement among the parties on the total amounts which should appear in spreadsheets H.03.8.001 and H.03.8.002 prepared by the Applicant had not been confirmed as at the date of these submissions.

notes each night.[224]

208. FRCS [285] underplays Dr Nelson's efforts to enjoin the members of WYAC. ~~At E.03.003 at [12] where he said~~ He observes in his report (E.03.003) at [12] that "*it is unfortunate that more people that were strongly affiliated with the Wirlu-Murra Yindjibarndi Aboriginal Corporation did not participate in interviews. All efforts were made to have contact with people from this group*". Further, FMGCS [493]-[495] states that Dr Nelson, having only met with 21 people, cannot statistically represent the whole Yindjibarndi group. Yet crucially, Dr Nelson's evidence evaluates and reports "community trauma" in those that he worked with. The lay evidence supported his opinions and no evidence was called to contradict it.

209. FMGCS ~~at~~ [497]-[498] submits 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 were not taken into account by Dr Nelson. On the contrary, in his report at JN1 (E.03.003) [22] and [49], and when giving oral evidence at (ZA.07.019) T910.41 – ~~9.~~11.8, Dr Nelson discussed prior traumas visited on the Yindjibarndi community. He used the ~~time of alcohol abuse~~ period of chronic alcohol use in the 1960s and 1970s as the litmus test for major trauma in the community and stated that the arrival of FMG in the community was a comparable trauma to those times.[225]

210. The State and FMG misstate the evidence of Dr Nelson at FRCS [286] and FMGCS [483], when they say that Dr Nelson forwarded a draft of his supplementary report to Michael Woodley for editing before it was filed, and that this proves that Dr Nelson was "*an advocate for the cause of the Applicant*". When the State cross-examined Dr Nelson and asked him whether he provided his draft supplementary report to Mr Woodley, he replied, "*No*".[226] Mr Woodley was not asked about interactions between Dr Nelson and himself regarding expert reports.

211. It would be expected when making serious allegations are being made about Dr Nelson's "credibility" and his "unbalanced accounts", casting doubt on the veracity of his evidence, those allegations would, out of fairness, be put to him directly by the State or FMG. Yet they were not. Contrary to the submissions of the State and FMG, Dr Nelson's evidence was thoughtful and thorough.[227]

212. Dr Nelson provided a cost estimate at JN2 (E.03.007) Attachment B, which is criticised by the respondents. The figure of $3.3 million for the construction of a wellbeing centre is included as part of the planned Third Phase. FMGCS [503] notes that $6.6 million is claimed in ACS [198]. This was a mistake and is withdrawn. The total figure in the table in ACS at [198] should read $108,840,000. The remaining figures in Attachment B are pressed as out-of-pocket expenses for non-economic loss. FMG alleges that in cross-examination Dr Nelson gave evidence that the construction of a new building is unnecessary and he would prefer to carry out the project in one that already existed. There is no evidence before the Court that a well-being centre, or any equivalent one, already exists in Roebourne. The evidence that Dr Nelson gave on this subject was clearly hypothetical,[228] and no specific existing building was proposed by Dr Nelson or put to Dr Nelson by counsel for the State. Rather, Dr Nelson gave evidence

[224] (ZA.07.019) ~~T918.2, T918.10 T918.15.~~ T918.02-T918.23
[225] JN1 (E.03.003) [15]; (ZA.07.019) T911.07-T911.15.
[226] ~~(ZA.0.019) T897.45-T908.35.~~ (ZA.07.019) T897.45-T897.47.
[227] (ZA.07.019) T913.30-T920.37.
[228] (ZA.07.019) T~~901.1-901.6~~908.17-T908.26.

that land for the construction of a new building had been identified.[229]

213. Relevantly, the State submits at FRCS [258] that Dr Nelson also expressed some hesitation in explaining his costings, agreeing that it was "a very rough estimate" and that he was no "financial wizard.".[230] Dr Nelson was clear about speaking with a builder he knew who was familiar with building mental health facilities in remote locations and the approach to be taken for a wellness centre. He proposed a realistic solution that he thought could contribute to improving the community's mental health.

214. Further, the State submits at FRCS [258] that despite ~~the~~ ACS at [198] putting a sixty-year timeframe on the "Third Phase" of the therapeutic program (on the basis of Dr Nelson's opinion that the program would require "generations" to have any effect), Dr Nelson agreed in cross-examination that it would be apparent after 5 years whether the intervention was having an effect and a time frame for reflection would be useful to determine successes.[231] He said: *"it's about being patient and not saying after a year, 'Well, we've failed.' … So if, after five years, we still had no shift at all, then there's reason for great concern and we can argue the intervention has been not effective as such*.".[232] Nevertheless, Dr Nelson's solution to improve mental health comes from his study, training and experience and he revealed that the plan would have to be examined at points to see if it worked. In the future, he intended to consult with Yindjibarndi people about the appropriate number of therapy rooms, the number of group rooms, and what an outside area would look like ~~for people~~ in order to undertake constructive mental health work in ~~an outside area~~ such a setting, rather than inside.

E3.3 Compensability related to hydrogeological evidence

See ACS [~~551~~549]-[613]; FRCS D4.6.3 [287]-[290]; FMGCS E6.8 [541]-[579].

215. At FMGCS [541]-[542], FMG submits that *Warrie (No.2)* determined that native title rights and interests do not confer exclusive rights in water or water captured by the holders of water licences.[233] However, this submission overlooks the core issue: the Yindjibarndi people have provided evidence that their springs, creeks, rivers, and permanent water sources have been irreversibly damaged within the SHP. They can directly observe the effects of dewatering on their country. As a result of the loss of water in the SHP and its subsequent impact across their lands, the Yindjibarndi people have lost their ability to undertake the *wuthuru* and maintain their connection with the Dreamings that travel along the watercourses; this amounts to spiritual, not economic loss.

216. Groundwater in the SHP area should flow underground through the CCA to the waters downstream from the SHP. The abstraction of colossal amounts of water from the SHP has been one of the many causes of loss to the Yindjibarndi people, including through its effect on *Ganjingarringunha* Creek, which is an important spiritual site (ACS [602]-[604]).[234] The State submits that the Applicant's claim for compensation for loss of groundwater is seeking double compensation. The Applicant submits that the loss of water is what Mansfield J called

[229] (ZA.07.019) T908.28-T908.32.
[230] (ZA.07.019) T~~908.12-T908.26~~T907.45-T908.26.
[231] (ZA.07.019) T906.12-T906.21.
[232] (ZA.07.019) T906.12-T906.21.
[233] 2nd CILO (E.02.004).
[234] LCoppin (A.05.006) [52]; MW (A.05.022) [10], [35], [50]-[53]; (A.07.010) T461.30, T475.05; (A.07.011) T506.40; LCheedy (A.05.013) [35]; SWarrie (A.05.008) [25], [39], [100], [128]; KG (A.05.016) [28], [56]; Ex1 (A.04.001) [20]; WW (A.05.009) [51]-[52].

"*incremental detriment to the enjoyment of native title rights over the entire area*" which contributed, in that case, to the claimants' "*sense of failed responsibility for the obligation, under the traditional laws and customs, to have cared for and looked after the land*": *Griffiths (No.3)* at [381]. The selection of an appropriate level of compensation is not a matter of science or of mathematical calculation, it is intuitive, and the court has the discretion to weigh all the losses, diminutions and impairments when deciding on an amount of non-economic loss: *Griffiths (No.3)* at [383].

217. Water is physical and without it, there can be no economic benefits, as without water plants and animals will die. When water declines, this is noticed. The loss of water and the opportunity to access permanent water on the SHP and in adjacent areas affects the spiritual life of the Yindjibarndi people. For example, Michael Woodley gave evidence that the *wuthurru*[235] is a welcome ritual to *ngurra* which utilises water. Mr Woodley says he puts *bowar* (water) into his mouth, blows it out, and then speaks to the *ngurra*. He says, "*I am Yindjibarndi, and I am here*." His *wangka* (words) tell the *ngurra* that he is Yindjibarndi. Then he can make himself at home. To give thanks to the *ngurra* for taking care of him and his family, he sings the songs that connect them to that place. He is saying to the *ngurra* "*gunum*," which means "*you fulfil me*." Without the ability to practice the *wuthurru* at permanent waterholes at the SHP the Yindjibarndi have no ability to be welcomed by the spirits to those parts of the country where groundwater has become scarce.[236] Further, the *jinbis* (springs) were places where the ancestors collected water and are places with deep spiritual connection.[237]

218. The permanent waterholes and the *Barrimirndi* Dreaming of *Ganjingarringunha* ~~*wurdu*~~ wundu have been impacted by the SHP.[238] Charlie Cheedy gave evidence that *Ganyijingarringunha wundu* was a large creek that ran through the SHP and is now dry. FMG has built a causeway up high off the ground along the creek bed. There is a grout wall that has been built to stop the underground water flowing from Wirlu-Murra *jinbi* and *wundu* (creek) into the Queens pit on Eastern Guruma country. Holes are dug vertically into the ground and grout or cement is poured into them to make the wall. The water is not flowing from *Wirlu-Murra wundu* or *Ganyijingarringunha wundu* like it once did, and the water levels in these *wundus* are lower than Mr Cheedy has ever seen before.[239]

219. Margaret Read gave evidence that FMG has constructed water bores along Kangeenarina Creek. She could not believe that they were taking water without Yindjibarndi people's permission, and it made her feel horrible. The water travels up to *Jirndawurrunha* (Millstream), a sacred site in the Millstream National Park, where a water serpent resides (Ex1 (A.04.001) [20]). The men have stories about the serpent at Millstream and *Ganyjingarringunha* in their men's ~~l~~Law business songs and stories.[240]

220. Stanley Warrie is very concerned that the Wirlu-Murra *jinbi* and *wundu* are very close to the SHP. They are a part of the Yindjibarndi D~~d~~reaming story and are sung in the *Bundut* at ceremonies. *Wirlu-Murra* permanent waterhole is the *thalu* for the curlew and is a men's Law site. *Ganyijingarringunha wundu* and *Wirlu-Murra wundu* both flow into the Fortescue River

[235] MW (A.05.022) [18], (A.07.010) T480.30.
[236] IG (A.05.011) [12]; SWarrie (A.05.008) [126]; MC (A.05.014) [25]; KG (A.05.016) [20]; (A.07.012) T651.44.
[237] MC (A.05.014) [9]; (A.07.010) T475.45-476.30.
[238] (A.07.010) T475.05; MW (A.05.022) [35].
[239] FC (A.05.019) [23]-[24], (A.07.013) T681.30-T682.10; ~~1st CILO (E.02.004) [75] [76]~~.
[240] WW (A.05.009) [37]-[42], [51]-[52].

along the *Bundut* songlines.[241]

221. At FRCS [288], the State submits that there is little common ground between the Applicant's and FMG's expert hydrogeologists. This is not correct, as the experts agreed on many issues in the conference of experts. Most importantly, they agreed that the SHP had an effect on the water in the footprint of the SHP.[242] They could not agree on the effects outside of the footprint ~~further afield~~.

222. It is submitted that the State ~~does not~~ fails to appreciate that the connection people have with country includes visiting significant places such as pools, creeks and sacred water places, connecting with those places, and ~~does not appreciate~~ that losing connection will result in losing a part of themselves.[243]

E3.3.1 *Evidence of Dr Guan*

See ACS at [549]-[611].

223. FMGCS [554] states that Dr Guan did not consider the extensive modelling conducted by FMG or its third-party consultants. It is not clear what FMG means when it refers to "modelling". Dr Guan makes it very clear that he has read all of FMG's groundwater, environmental, aquifer, and hydrogeological reviews and assessments (HG1 (E.03.004) Appendix 3~~.4~~).

224. FMGCS [560] states that paleochannel aquifers are replenished with water despite dewatering caused by mining. Each of the supplementation programmes is comprised of lines of bores which reinject water into the paleochannel aquifer. Like FMG's insistence on their compliance with heritage legislation, FMG is fixated ~~with~~ on showing it is compliant with the management objectives of the Kangeenarina and *Wirlu-Murra* Creeks Supplementation Plans which are designed to try to mitigate the loss of the natural flow of the creeks and the paleochannels.

225. FMGCS [570] submits that the CDFM method is the industry-standard practice for assessing groundwater responses to rainfall over time. However, Dr Evans does not characterise CDFM as the industry-standard, but rather describes it as "a standard method" (RE (E.04.001) [40]; see ACS [576]).

226. From 2011 to 2022, approximately 46 million m^2 of land has either been increased or decreased in topography and approximately 160GL (64,000 Olympic swimming pools)[244] of groundwater at SHP is abstracted for mining progression, dust suppression, ore processing, construction and camp supply (HG1 (E.03.004) [11]). Yet, the vegetation around the Trinity and Kings pits (HG1 (E.03.004) [18]), has been depleted, "*because* [Kangeenarina Creek] *doesn't have a natural flow anymore and is outside the Supplementation zone*" ((ZA.07.019) T981.05-.20). FMGCS [570] submits that Dr Guan accepted that, although CDFM was not useful for measuring short-term vegetation response to rainfall, it was suitable for assessing groundwater recharge. What Dr Guan did say was "*CDFM for ... recharger is probably okay*" ((ZA.07.0~~19~~20) T1091.36; see ACS [565]). In HG2 (E.03.008) at [8], while Dr Guan ~~states~~ observes that despite CDFM being useful to "*infer possible groundwater recharge change*", ~~he notes that when relying~~ reliance on rainfall data to prove that a dry period is responsible for affecting groundwater-dependent vegetation is contradicted by ~~being affected, Dr Guan shows~~

[241] SW (A.05.008) [25], [39], [100].
[242] JHR (E.05.005) Proposition 2 p.4.
[243] AM (A.05.017) [76].
[244] For context, there are 500 GL in Sydney Harbour.

~~that~~ three wet periods in 1996, 1998-99 and 2005 ~~contradict Dr Evans' reliance on his dry period theory~~.

227. FMGCS [571] incorrectly submits that Dr Guan states that there has been no decline at Warp 16 Bore when, in fact, ~~1st CILO (E.02.003) at [73]~~ HG1(E.03.004) at [46] details that Warp 16 dropped below the Tier 3 trigger levels in 2018 and 2019 (which is blamed on Rio Tinto). Later, ~~he~~ Mr Oppenheim turns the finger of blame from Rio Tinto to "*somebody [who]equipped it and pumped from it"* ((ZA.07.019) T976.35; see ACS [598]-[601]). Dr Guan states emphatically that following the commencement of mining in May 2012, groundwater bores in the vicinity of the SHP show significant rates of decreasing water levels at rates around 0.2 m/year, resulting in the table decreasing by one metre.

228. Although the hearing schedule suggested that all parties intended to question Drs Guan and Evans, the State's counsel did not cross-examine either hydrologist.[245] Nevertheless, FRCS [287]-[290] provides extensive responsive submissions regarding the abstraction of groundwater at SHP because "*even if it is the case that the Compensable Acts have, in fact, caused environmental changes … their effect on the native title rights and interests as a component of economic loss and/or cultural loss is already taken into account"* and would amount to *"double compensation*". Groundwater has not been considered by the economic loss experts as a component of economic loss. Dr Guan was briefed in relation to cultural loss as a result of the Yindjibarndi noticing diminished water flows, loss of vegetation and fewer fauna.[246] The State submits at FRCS [290] that if the Court is of the view that "*a causation analysis in respect of the hydrogeology evidence is necessary*", it should prefer the evidence of Dr Evans over the evidence of Dr Guan. For the reasons submitted in the ACS at [563]-[564], the Applicant says that Dr Guan's evidence should be preferred over the evidence of Dr Evans.

E3.4 Compensability related to archaeological evidence

See ACS [518]-[55048]; FRCS D4.6.4 [291]-[293], E4.1 [444]-[451]; FMGCS E6.7 [506]-[540].

229. The loss of sites ~~are~~ is dealt with in the ACS at [217]-[221], [264]-[271], [293]-[296], [516]-[548]; cosmology at [227]-[230]; creation stories at [231]-[241], [272]-[292]; the role of *thalu* and song at [242]-[~~346~~ 246], [482]-[489]; and the spiritual nature of connection at [256]-[263], [303]-[314].

230. At FRCS [451] the State accepts that portions of the *Bundut* song line which relate to the activities of the *Barnga* (sand goanna) and the *Barrimirndi* (serpent) in the vicinity of *Ganjingaringunha* (Kangeenarina) Creek have been affected by the SHP. Yet, the State submits that the *Bundut* songs are still known and sung. The evidence of the *Bundut* songline at the SHP and the path of the *Barrimirndi* are set out at ACS at [281]-[295].[247] The State misses the ~~important~~ critical point that, although the songs are still known and sung, they have lost their anchor to the sites on country to which they refer.

231. *Bangkangarra* and *Ganjingaringunha* (Kangeenarina) Creek are part of the wider SHP

[245] It should be noted that two passages are attributed to Ranson in the transcript of the XXN of Guan on the final day of the hearing, but the transcript review conducted by the parties picked up that the first passage should have been attributed to Tim Russell, and the second should have been attributed to Dr Evans.
[246] See HG1 (E.03.004) [12], [23]-[28]; also see ACS [566]-[567], [602]-[609] and [612]-[616].
[247] [redacted]

archaeological and cultural landscape within the CCA.[248] The Court was taken to *Bangkangarra* ~~as~~ for part of the evidence in part to show the contrast between the SHP and *Bangkangarra. Bangkangarra* largely ~~depicts~~ reflects how country on the SHP once ~~existed~~ was. The impact which the SHP has had on heritage and cultural sites has been a serious issue between FMG and YAC since they first engaged. The history of the Yindjibarndi ~~P~~people's struggles to maintain a say over cultural heritage is set out at ACS at [441]-[450]. That evidence goes to the loss of important sites and the sense of failed responsibility under traditional laws and customs to have cared for and looked after the sites: *Griffiths (No.3)* at [381]. This extends to anxieties about mining at *Bangkangarra*.[249]

232. In FRCS [292], the State accepts that the destruction and damage to the landscape constitutes compensable cultural loss, but says that "mere destruction" is not enough without further contextualisation and the Applicant meeting its evidentiary burden by describing each of the 249 sites which were the subject of the s.18 consents. The evidence of those sites is contained in the reports and articles at VB1 (G.01.002) pp.95-104.

233. The Applicant submits that all of the 249 sites were of cultural significance to the Yindjibarndi people, as they are all part of the wider cultural landscape. Contrary to the inference at FRCS [293] that the 'National Significance' of individual sites under the *Environmental Protection and Biodiversity Act 1999* (Cth) has no relevance to the assessment of cultural loss, ~~Drs~~ Professor Veth and Dr Bird at VB1 (G.01.002) [9] gave evidence that archaeological significance under s 5 of the AHA is markedly different from cultural significance to Aboriginal people.[250] As submitted in ACS [269], Dr Palmer gave evidence that the State is wrong to take a site-based approach to evaluating ~~sites~~ heritage values, as the totality of country and its destruction is how feelings of loss emerge.[251] Professor Veth, Dr Bird and Mr Williams all agreed that a "*body of sites, collectively, is regionally significant*".[252] Mansfield J found in *Griffiths (No.3)* at [325], [379]-[380] that the country must be seen as a whole and "*one cannot understand hurt feelings in relation to a boxed quarter acre block. The effects of acts have to be understood in terms of the pervasiveness of Dreaming*". The ~~entirety of the~~ sites affected should be considered as a whole.

234. The SHP is established over three very significant places to the Yindjibarndi people: *Gamburdayinha* (Hamersley Ranges), *Garliwinjyi Ngurra* area and *Ganjingarringunha* (Kangeenarina). These places do not begin and end at the SHP. Michael Woodley says that everything within Yindjibarndi knowledge, including all of the spirits and the creation times sits within G*amburdayinha*.[253] *Barrimirndi* is present in the *Ganjingarringunha wundu*.[254] Middleton Cheedy says that Yindjibarndi sites are interconnected, *"forming an inseparable whole akin to a human body where each part is linked and interdependent, essentially for travel, survival, and the overall health of Yindjibarndi country. Every element and site fulfills a vital whole"*.[255] ~~Hence, all of~~ Yindjibarndi country as a whole is sacred, and cannot be considered in pieces.

235. Professor Veth and Dr Bird considered the documentation relating to Kangeenarina Creek and ~~consider~~ concluded that it could be regarded as a site complex or even a single site, as the

[248] (G.01.004) Applicant's Expert Archaeologists' Short Response at [12].
[249] KG (A.05.016) [28], [56]; EG (A.05.010) [12], [14].
[250] VB1 (G.01.002) [171]-[172].
[251] See ACS [270].
[252] Arch Joint Report (G.01.005) [7].
[253] MW(A.05.022) [9~~7~~]; (A.07.011) T510.17-T510.25.
[254] MW(A.05.022) [10], [50]-[53]; *Warrie (No.1)* at [234]-[252].
[255] MC (A.05.014) [9]. See also AM (A.05.017) [81].

boundaries of surface sites can be difficult to determine.[256] The disturbance in mining operations can influence how sites are recorded, leading to their being documented separately rather than as a single site complex, as they might have been previously (see VB1 (G.01.002) [113], [137]). Incrementally, as mining tenements were granted, each affected the SHP and beyond, and subsequently incrementally diminished the Yindjibarndi's cultural and spiritual connection to those areas. This diminution resulted from the Yindjibarndi people being locked out whilst knowing all too well that the country of their ancestors was being removed,[257] resulting in the Yindjibarndi people's sense of failed responsibility for carrying out their obligations, under traditional laws and customs, to care for and look after the land. The Applicant's evidence, understandably, is focused on the SHP more than other areas in the CCA which are connected to significantly important~~ce of~~ places such as the Fortescue River,[258] the Hamersley Range,[259] the areas traversed by the *Barrimindi* ~~*Barrimundi*~~[260] and related sites.[261] The Yindjibarndi have a sense of responsibility to look after country, and it is seen as a failure to not properly look after the country, and it is seen as a failure to not properly look after the country and preserve it for future generations. ~~Such m~~Matters of such cultural ~~sensitivity~~ significance should be compensable.[262]

236. At all times, except once,[263] the Yindjibarndi people did not agree to the granting of the FMG tenements as the SHP would "*destroy sacred sites, burial grounds and other areas*".[264] After July 2010, ~~the~~ YAC was not included in any heritage work carried out on the SHP, and ~~the~~ WYAC members were instead ~~became~~ the only Yindjibarndi people included in heritage work for many years.[265]

237. There is extensive evidence relating to the high cultural value of places associated with the *Bundut*.[266] Loss of spiritual connection generally in the SHP and beyond cannot be separated from sites, places, stories, ceremonies and the spirits of the *nguga nulli*, *Marga*, *Barrimirndi* and ancestor spirits that are part of all of Yindjibarndi country.[267]

238. FMGCS [390], [423]-[427] and FRCS [448]-[449] both submit that the assessment of compensation for non-economic loss in this case should take into account the fact that there remain areas of Yindjibarndi country which are not covered by the SHP. These submissions do not take into account the impact of the SHP, or the impact of the other effects of the grants of the titles which underpin the SHP, on the exercise and enjoyment of the Yindjibarndi People's native title rights and interests throughout their traditional country (and see [240] below). Further, FMGCS [426] submits that the Yindjibarndi are not excluded from accessing all the areas comprising the tenements. This is a disingenuous submission, in light of all the evidence that Yindjibarndi people gave about not having access to the area of the SHP footprint since 2012. Further, evidence was given that *Bangkangarra* is covered by an

[256] VB1 (G.01.002) [113]-[115].
[257] MC (A.05.014) [33]; Ex2 (A.04.002) [44]; KW (A.05.012) [29].
[258] SWarrie (A.05.008) [130]-[15~~3~~32].
[259] KG (A.05.016) [19].
[260] MW (A.05.022) [10].
[261] LCoppin (A.05.006) [47]-[48]; (A.07.012) T650.28.
[262] See *Griffiths (No.3)* at [381].
[263] with respect to E47/3464-I (POC (A.02.002) [13]).
[264] MW (A.05.022) MW-71 Annexure 9 [1.7] at p.639.
[265] See ACS [364]-[365], [372], [441]-[447]; MW (A.05.022) [215]-[344]; LCheedy (A.05.013) [43]-[45].
[266] See ACS [272]-[302].
[267] See ACS [303]-[324]; (A.09.008) [38].

exploration licence,[268] and the Yindjibarndi people are anxious about FMG's mining there.[269] The Yindjibarndi people have inadequate access to *Bangkangarra* and have to ask permission which is humiliating.[270] When features of the country are sung ~~in song~~ in the *Bundut* ritual that instigates the renewal and replenishment of all people, plants and animals as a whole, the senior men who sing those songs are all too aware that there is a broken song line (See ACS [233]-[234]).[271] Mr Mack is worried about a *thalu* near *Wirlu-Murra* Creek being affected by the dust from SHP even though it is not part of an FMG tenement.[272]

239. Importantly, heads of compensation can often be overlapping and are heterodox as each thread of native title rights and interests are lost. There is an accumulative sense of failure that the Yindjibarndi people feel from the crippling inability of not being able to stop the destruction of their ancestor's country; country that they have occupied for over 40,000 years.[273]

240. ~~Following on from its submission on the option of alternative country, the~~ The State submits at FRCS [449] that there are other places within Yindjibarndi country where ochre and Gandi stones can be found. At FMGCS [465], it is submitted that there is only "a partial loss" because the *Bundut* continues to be performed and knowledge of the places is retained. However, the rituals and songs themselves, and the places where an object is found, produce a link between the ritual at one place and the places on country where the object to be used in the ritual is found. As Dr Palmer explains, the Yindjibarndi people's "*ability to perform the rituals was diminished because the totality of the link with Yindjibarndi country, which the use of these items in part symbolises, has been broken*" (KP1 (E.03.001) [332]). It is submitted that it is not just the deprivation of access and use that has been lost but the bond that exists between a person and the spirituality of the country through the gathering of those objects for use elsewhere on Yindjibarndi country (*Griffiths* HC at [197]) and the objects on country, people, and spirits are viewed as one indissoluble whole: *Griffiths* HC at [198]. The State and FMG cannot cherry-pick specific sites and divorce them from the totality of the loss of country and the resultant damage to Yindjibarndi people's *wirrard* without considering the "*collateral detrimental effect of the compensable acts*": *Griffiths* HC at [202].

F. COMPENSATION PAYABLE BY STATE OR FMG RESPONDENTS

241. The evidence has established that the Yindjibarndi People's NTRI have an economic value based upon the compensation that miners in the Pilbara commonly agree to pay and native title claimants/holders commonly agree to accept, for the latter's assent to the development of a major iron ore mining project on their traditional country. If the FMG Respondents are not liable to pay compensation for the grants of their mining tenements but the State is, then the State will be liable to compensate the Yindjibarndi People for that economic loss. The fact that the State, as one of the three *"negotiation parties"* in respect of those future acts, chose not to involve itself in the negotiations over whether it should grant the FMG mining tenements, and if so, on what conditions, is irrelevant. The State's 'Pontius Pilate' approach to those negotiations cannot relieve it of a legal obligation to pay compensation under the NTA.

242. FRCS [230] submits that the amount the State is *"prepared to pay"* for the grant of mining tenements here is, *"having regard to s.125A MA, nothing"*. That submission and that defence

[268] (ZA.07.019) T958.15.
[269] KW (A.05.012) [29]; AM (A.05.017) [51].
[270] SWarrie (A.05.008) [124].
[271] MW (A.05.022) [24], [26], [47]; (A.07.011) T513.05-T513.20.
[272] AM (A.05.017) [92].
[273] Arch Joint Report (G.01.005) [1].

fall to the ground if, as the FMG Respondents contend, s.125A is invalid by force of s.109 of the Constitution.[274]

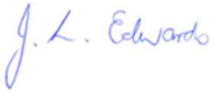
243. The State at FRCS [279] says, citing s.31(1A) NTA, that Subdivision P establishes a negotiation process between *grantee parties* and *native title parties*, which does not necessarily require the First Respondent as *government party* to participate. There are three *"negotiation parties"* under Subdivision P, the Government party, native title party and grantee party: s.30A NTA. In this case, the Government party was the State, the native title party was the Yindjibarndi #1 Applicant (*registered native title claimant*) and the grantee party was (were) the FMG Respondents. Section 31(1)(b) required the negotiation parties to negotiate in good faith with a view to obtaining the agreement of the native title party to the doing of the relevant *future act* and, if so, on what conditions. The fact that the State chose not to involve itself in those negotiations, which included negotiations about compensation, cannot relieve it of any liability that the NTA may impose on it to pay compensation.

G. INTEREST

See ACS [620]-[624]; FRCS [463]-[468]; FMGCS [597]-[605].

Dated: 3 February 2025





……	……	……
Vance Hughston SC	Tina Jowett SC	Justin Edwards SC
Counsel for the Applicant	Counsel for the Applicant	Counsel for the Applicant

274 FMG Respondents' Second Further Amended Points of Response at [29(H)].

Attachment A

M 47/1409-1	2011-2023	1,595,452.42	0.74	1,180,634.79	$164,784	121940.16		
M 47/1411-1	2011-2023	816,315.81	0.05	40,815.79	$84,312	4215.6		
M 47/1413-1	2011-2023	242,826.65	1.00	242,826.65	$25,080	25080		
M 47/1431-1	2012-2024	719,025.50	1.00	719,025.50	$77,012	77012		
M 47/1453-1	2014-2024	146,918.10	1.00	146,918.10	$17,472	17472		
M 47/1473-1	2015-2024	92,818.80	1.00	92,818.80	$12,272	12272		
M 47/1475-1	2015-2024	103,437.90	1.00	103,437.90	$13,676	13676		
M 47/1513-1	2019-2020	16,578.65	1.00	16,578.65	$0	0		
M 47/1570	2021-2024	86,358.80	1.00	86,358.80	$24,792	24792		
LISA	2007-2023	7,009,568.44	0.05	370,105.21	$960,630	50721.264		
L 47/302	2010-2013	13,501.02	1.00	13,501.02	$0	0		
L 47/361	2012-2023	859,605.10	0.97	832,097.74	$97,834	94703.312		
L 47/362	2012-2024	726,262.84	1.00	726,262.84	$76,868	76868		
L 47/363	2012-2024	149,867.06	1.00	149,867.06	$15,862	15862		
L 47/367	2013-2024	237,565.70	1.00	237,565.70	$27,038	27038		
L 47/396	2013	2,786.40	1.00	2,786.40	$0	0		
L 47/472	2015-2024	169,647.00	1.00	169,647.00	$23,160	23160		
L 47/697	2014-2023	16,179.60	0.99	16,001.62	$2,134	2110.526		
L 47/801	2020-2024	60,114.40	0.88	52,600.10	$14,344	12551		
L 47/813	2019-2024	63,117.60	0.74	46,852.19	$12,716	9439.0868		
L 47/814	2019-2024	101,774.40	0.94	95,739.18	$20,504	19288.1128		
L 47/859	2020-2024	561.6	1.00	561.60	$132	132		
L 47/901	2020-2024	1,029.60	1.00	1,029.60	$242	242		
L 47/914	2020-2023	22,744.50	0.71	16,148.60	$6,490	4607.9		
L 47/919	2021-2024	71,857.20	0.94	67,545.77	$20,504	19273.76		
E47/1319-I	2013-2024	93,139.20	1.00	93,139.20	$14,931	14931		
E 47/1333-1	2008-2024	375,208.78	0.10	36,770.46	$37,350	3660.3		
E 47/1334-1	2008-2024	224,259.33	0.37	82,975.95	$19,197	7102.89		
E 47/1398-1	2012-2024	357,413.10	0.99	353,838.97	$51,543	51027.57		
E 47/1399-1	2012-2024	339,229.86	0.31	105,161.26	$47,808	14820.48		
E 47/1447-1	2008-2024	195,256.95	1.00	195,256.95	$19,908	19908		
E 47/3205-1	2017-2023	17,362.00	1.00	17,362.00	$1,880	1880		
E 47/3464-1	2018-2024	16,002.50	0.42	6,721.05	$3,760	1579.2		
P 47/1945	2022-2024	399.7	0.37	147.89	$37	13.69		
P 47/1946	2022	320.93	0.99	316.15	$160	157.616		
P 47/1947	2022	290	0.97	281.30	$145	140.65		
				6,319,697.79		**767678.1176**	21.75	**16696999.1**

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Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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