

Applicant's Amended Outline of Closing Submissions
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

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GLOSSARY

General terms

Abbreviation	Term
Aileen Sandy proceeding	Proceeding in the WA Supreme Court commenced against YAC by Mavis Pat, Sylvia Allan and Aileen Sandy
Applicant	Yindjibarndi Ngurra Aboriginal Corporation RNTBC
beneficiated iron ore	Iron ore concentrate material (ie subject to substantial enrichment through a concentration plant)
Compensation application area	Area of the compensation application (CAA)
CDFM	Cumulative Deviation From the Mean
CIDs	Channel Iron Deposits
DMIRS	Department of Mines, Industry Regulation and Safety
Exclusive Area	The 'Exclusive Area' within the <i>Warrie (No.2)</i> Determination Area
Eureka	Eureka Archaeological Research and Consulting
FMG	The Mining, Exploration and Related Industries Respondents
FMG Agreement	Land Access Agreement between FMG (via the entities Fortescue Metals Group Ltd, The Pilbara Infrastructure Pty Ltd and FMG Pilbara Pty Ltd) and WYAC
FMG tenements	9 Mining Leases, 8 Exploration Licences, 13 Miscellaneous Water Licences and 3 Miscellaneous Licences over unallocated Crown land within the Exclusive Area and in parts of the non-exclusive area covered by the Mount Florance Pastoral Lease
GDEs	Groundwater-dependent ecosystems
GWLs	Groundwater Licenses granted under s5C <i>Rights in Water and Irrigation Act 1914</i> (WA).
ILUA	Indigenous Land Use Agreement
JAC	Juluwarlu Aboriginal Corporation

Abbreviation	Term
LAA	Land Access Agreement
LFR	Lower Fortescue River
NDVI	Normalised Difference Vegetation Index
NNTT	National Native Title Tribunal
Non-exclusive area	The balance of the <i>Warrie (No.2) Determination Area</i>
NTRI	Native title rights and interests
OPF	Ore processing facility
SHP	The Solomon Hub Project, which is underpinned by the FMG tenements, located largely on unallocated Crown land (UCL 7) within the Exclusive Area
Solomon Area rainfall data	Rainfall data from 11 gauges located in the vicinity of the SHP contained in Annexure JAB-1 (E.02.008.001) to the Affidavit of Jordin Barclay dated 22 February 2024.
supplementation schemes	The systems of groundwater reinjection, and associated construction activities, to combat the expected impacts of mine pit dewatering, governed by the <i>Kangeenarina Pools Supplementation Plan Rev 5</i> and the <i>Weelumurra Creek Supplementation Plan Rev 5</i> .
the State	The First Respondent
UCL	Unallocated crown land
Underground Dreaming story	The Dreaming story, which follows groundwater from Jigalong in the desert, through the Fortescue Marshes, through Kangeenarina Creek and the SHP and thence to Millstream.
Relevant Tenements	M47/1409-I, M47/1411-I, M47/1413-I, M47/1431-I, M47/1453-I and M47/1475-I
WMML	Water Management Miscellaneous Licences
WYAC	Wirilu-Murra Yindjibarndi Aboriginal Corporation
YAC	Yindjibarndi Aboriginal Corporation
Yindjibarndi #1	Yindjibarndi Native Title Determination Application (WAD6005/2003)

Abbreviation	Term
Yindjibarndi People	The common law holders of native title rights and interests

Pleadings and submissions

Abbreviation	Term	Court Book Reference
POC	Applicant's Further Amended Points of Claim filed on 5 July 2023	A.02.002
Applicant's Opening Submissions	Applicant's Outline of Opening Submissions	A.02.007
FMG Respondents' Opening Submissions		A.02.009
FMG Response	FMG's Second Further Amended Points of Response	A.02.013
LHC	Applicant's List of Heads of Compensation	A.02.014
SOAF	Statement of Agreed Facts	A.02.015
State Response	First Respondent's Amended Points of Response (A.02.003)	A.02.003

Lay-witness evidence

Abbreviation	Term	Court Book Reference
1st CILO	Amended First Affidavit of Christopher Ian Leonard Oppenheim sworn 4 August 2024	E.02.003
1st SCB	Affidavit of Simon Blackshield (SCB-1 to SCB-49) affirmed 1 May 2023	A.05.023
2nd CILO	Second Affidavit of Christopher Oppenheim sworn 4 August 2023	E.02.004

Abbreviation	Term	Court Book Reference
6th SNC	Sixth Affidavit of Sean Costello filed 30 August 2024	G.02.001
AM	Amended Witness Statement of Angus Mack filed 16 May 2023	A.05.017
CH	Amended Witness Statement of Christine Halls filed 27 April 2023	A.05.001
EG	Amended Witness Statement of Estelle Guinness filed 1 May 2023	A.05.010
FC	Witness Statement of Fabian (Charlie) Cheedy filed 7 August 2023	A.05.019
IG	Amended Witness Statement of Isaac Gilby Ted Billy Guinness filed 12 August 2023	A.05.011
IW	Amended Witness Statement of Isiah Walker filed 16 May 2023 with errata filed 26 September 2023	A.05.018
JAB	Affidavit of Jordin Alexander Barclay dated 22 February 2024	E.02.008
JC	Amended Witness Statement of Judith Coppin filed 4 May 2023 with corrigenda filed 16 August 2023	A.05.015
JK	Amended Witness Statement of Janet Kapetas filed 18 May 2023 with errata filed 26 September 2023	A.05.021
JM	Amended Witness Statement of Joan Maddison filed 27 April 2023	E.05.003
JNorman	Amended Witness Statement of Jean Norman filed 27 April 2023	A.05.002
KG	Amended Witness Statement of Kevin Guinness filed 4 May 2023	A.05.016

Abbreviation	Term	Court Book Reference
KW	Amended Witness Statement of Kaye Warrie filed 2 May 2023	A.05.012
LCheedy	Amended Witness Statement of Lyn Cheedy filed 2 May 2023	A.05.013
LCoppin	Amended Witness Statement of Lorraine Coppin filed 28 April 2023	A.05.006
MC	Amended Witness Statement of Middleton Cheedy filed on 3 May 2023	A.05.014
MN	Amended Witness Statement of Michael Nikakis filed 27 April 2023	A.05.004
MR	Witness Statement of Margaret Ranger filed 17 May 2023 with errata filed 26 September 2023	A.05.020
MW	Amended Witness Statement of Michael Woodley filed 5 June 2023	A.05.022
PV	Affidavit of Peter Vielhauer dated 29 September 2023	E.01.005
RS	Amended Witness Statement of Ricky Smith filed 27 April 2023	A.05.005
SNC-17	Annexure SNC-17 to 6 th SNC	G.02.001.01
SWarrie	Amended Witness Statement of Stanley Warrie filed 28 April 2023	A.05.008
SWilson	Amended Witness Statement of Sonya Wilson filed 9 August 2023	A.05.007
WW	Witness Statement of Wimiya Woodley filed 28 April 2023 with corrigenda filed 23 August 2023	A.05.009

Exhibits

Abbreviation	Term
Ex1	Exhibit 1 – Amended Affidavit of Margaret Roslyn Read (A.04.001)
Ex2	Exhibit 2 – Amended Affidavit of Tootsie Daniel (A.04.002)
ExG2	Exhibit G2 – Statement of Agreed Facts (Maps) (CB A.06.002)

Expert evidence

Abbreviation	Term	Court Book Reference
Arch Joint Report	Archaeological Joint Report (Conference of Experts) filed 12 October 2024	G.01.005
BM	Brian Miles, <i>Valuation Report</i> (including errata) filed 31 January 2024	E.03.005
CJ	Campbell Jaski, <i>Valuation Report</i> dated 5 March 2024	E.04.004
DW	Mr Douglas Williams, <i>Archaeological Report</i> filed 30 August 2024	G.01.003
GP	Mr Gregory Preston, <i>Amended Land Valuation Report</i> filed 5 March 2024	E.04.002
HG1	Dr Huade Guan, <i>Hydrologist Report</i> filed 19 December 2023	E.03.004
HG2	Dr Huade Guan, <i>Hydrologist Short Response to Dr Richard Evans' Hydrogeologist Report</i> filed 15 March 2024	E.03.008
HL	Martin Hall and Wayne Lonergan, <i>Amended economics report</i> filed 5 March 2023	E.04.005
JHR	<i>Dr Huade Guan and Dr Richard Evans, Joint Report (Conference of Experts)</i> dated 22 March 2024	E.05.005

Abbreviation	Term	Court Book Reference
JN1	Dr Jeffrey Nelson, Amended Psychologist Report filed 23 March 2023	E.03.003
JN2	Dr Jeffrey Nelson, Amended Supplementary Psychologist Report filed 16 February 2024	E.03.006
KP1	Dr Kingsley Palmer, <i>Amended</i> <i>Anthropologist Report</i> filed 14 December 2022	E.03.001
KP2	Dr Kingsley Palmer, <i>Amended</i> <i>Supplementary Anthropologist Report</i> filed 16 February 2024	E.03.006
BMJ Joint Report	Brian Miles and Campbell Jaski Joint Report (Conference of Experts, Jaski & Miles) filed 22 March 2024	E.05.003
MM	Murray Meaton, <i>Mining Economist</i> <i>Report</i> filed 22 March 2023	E.03.002
MJ Joint Report	Meaton, Murray and Jaski, Campbell, <i>Joint Report Conference of Experts</i> filed 22 March 2024	E.05.001
MJ RC Joint Report	Meaton, Murray and Jaski, Campbell, <i>Joint Report Royalty Calculation</i> filed 1 October 2024	G.01.001
RE	Dr Richard Evans, <i>Amended</i> <i>Hydrogeologist Report</i> filed 5 March 2024	E.04.001
VB1	Professor Peter Veth and Dr Caroline Bird, <i>Archaeological Report</i> filed 10 June 2024	G.01.002
VB2	Professor Peter Veth and Dr Caroline Bird, <i>Applicant's Expert Archaeological</i>	G.01.004

Abbreviation	Term	Court Book Reference
	<i>Short Response to the FMG Respondent's Expert Archaeological Report</i> filed 10 October 2024	

Legislation

Abbreviation	Term
AHA	<i>Aboriginal Heritage Act 1972</i> (WA)
<i>AIA</i>	<i>Acts Interpretation Act 1901</i> (Cth)
Mining Act	<i>Mining Act 1978</i> (WA)
NTA	<i>Native Title Act 1993</i> (Cth)
RDA	<i>Racial Discrimination Act 1975</i> (Cth)

Cases and other references

Abbreviation	Term
Adams v YAC 2014	<i>Adams v Yindjibarndi Aboriginal Corporation RNTBC</i> [2014] WASC 467
CIV2883 of 2017	<i>John Sandy & Anor v Yindjibarndi Aboriginal Corporation RNTBC</i>
Griffiths HC	<i>Northern Territory v Griffiths</i> [2019] HCA 7; (2019) 269 CLR 1
Griffiths (No.3)	<i>Griffiths v Northern Territory of Australia (No.3)</i> [2016] FCA 900
Native Title Act Case	<i>Western Australia v Commonwealth</i> (1995) 183 CLR 373
Sandy v YAC 2016	<i>Sandy v Yindjibarndi Aboriginal Corporation RNTBC (No. 2)</i> [2016] WASC 75
Sandy (No. 4)	<i>Sandy v Yindjibarndi Aboriginal Corporation (RNTBC No.4)</i> [2018] WASC 124
Starkey	<i>Starkey v South Australia</i> [2018] FCAFC 36
Stuart	<i>Stuart v South Australia</i> [2023] FCAFC 131
Perilya (2013)	<i>Valuer-General v Perilya Broken Hill Ltd</i> [2013] NSWCA 265
Perilya (2015)	<i>Perilya Broken Hill Ltd v Valuer-General</i> [2015] NSWCA 400
Ward HC	<i>Western Australia v Ward</i> (2002) 213 CLR 1

Abbreviation	Term
Warrrie (No.1)	<i>Warrrie (formerly TJ) on behalf of the Yindjibarndi People v Western Australia</i> [2017] FCA 803; (2017) 365 ALR 624
Warrrie (No.2)	<i>Warrrie (formerly TJ) on behalf of the Yindjibarndi People v Western Australia (No. 2)</i> [2017] FCA 1299; (2017) 366 ALR 467
Wurridjal HC	<i>Wurridjal v Commonwealth</i> (2009) 237 CLR 309
Yunipingu	<i>Yunipingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia</i> [2023] FCAFC 75
Jagot J Article	<i>Compensation for Economic Loss</i> , in an article published in (2022) 96 ALJ 832

Other documents

Abbreviation	Term
E.09.002.002	<i>Solomon Triennial Aquifer Review 2011-2014</i>
E.09.002.008	<i>Solomon Triennial Aquifer Review 2014-2017</i>
E.09.002.012	<i>Solomon Triennial Aquifer Review to 31 December 2019</i>
E.09.002.013	<i>Solomon Groundwater Monitoring Summary 2020</i>
E.09.002.016	<i>Solomon Mining Area: Updated H3 Hydrogeological Assessment</i>
E.09.002.018	<i>Solomon Groundwater Monitoring Summary 2021</i>
E.09.002.020	<i>Solomon Triennial Groundwater Monitoring Review – 2022</i>
KCSP	<i>Kangeenarina Creek Supplementation Plan Rev 5</i> dated 21 February 2020 (Annexure CILO-5, E.02.003)
WCSP	<i>Weelumurra Creek Supplementation Plan Rev 5</i> dated 24 June 2021 (Annexure CILO-6, E.02.003)

A. EXECUTIVE SUMMARY

- 1 There has been very little challenge in this proceeding to the case sought to be presented by the Applicant at a factual level. The challenges have all been largely as to the law, and that includes the approach taken by the economic experts to the assessment of economic loss. There is, however, a factual issue as to the effect of the mining operations on the groundwater and hence on the health of the vegetation.
- 2 Neither the First Respondent (**State**) nor the FMG Respondents called any evidence to contradict or challenge the Applicant's lay witnesses' evidence as to the cultural loss (including social division) caused by the grants of the 9 Mining Leases, 8 Exploration Licences, 16 Miscellaneous Licences and 3 Prospecting Licences (**FMG tenements**) to the FMG Respondents. Similarly, they chose not to call any expert evidence responsive to the expert evidence of Dr Palmer (anthropologist) or of Dr Nelson (psychologist). The expert archaeologists Prof Veth, Dr Bird and Mr Doug Williams conferred and reached agreement on the significance and the extent of the damage to and destruction of archaeological sites and were not required to give oral evidence. Accordingly, this summary largely focuses on the legal issues.
- 3 The FMG Respondents' Solomon Hub mine (**SHP**) is in Yindjibarndi country, in areas known as *Garliwinyji* and *Ganjingarringunha*. Mining is taking place in the valleys and hillsides of *Gamburdayinhja* – the Hamersley Ranges. Before the SHP this country was little impacted by the effects of European settlement. The tenure history of the areas shows it was the subject of pastoral leases and mining tenements but the landscape remained largely intact.

COMPENSATION CLAIMED

- 4 The Applicant claims the following compensation in relation to the SHP:

Head of Compensation ¹	Amount
1 and 2 and 6	\$678,088,000
3	\$34,850,000
4	\$112,140,000
7-9	\$1,000,000,000
TOTAL:	\$1,825,078,000

ENTITLEMENT TO COMPENSATION

- 4A The State's primary case is that the Applicant's claim for compensation under the *Native Title Act 1993 (Cth) (NTA)* in the Federal Court is misconceived. It says the Applicant should have claimed compensation in the Warden's Court under the *Mining Act, 1978 (WA) (Mining Act)*. This is also part of the FMG Respondents' case but they do not describe it as their primary case. These aspects of the State's and FMG's cases are based on a contention that s.24MD(3) NTA does not entitle the Yindjibarndi people to compensation in accordance with Part 2 Div 5 NTA for the grants of the FMG tenements and the mining at SHP.
- 5 The parties agree that the FMG tenements except the Water Management Licenses (see the FMG Respondent's Second Further Amended Points of Response at [13(e)]) are future acts to which s.24MD NTA applies. Whether s.24MD(3) entitles the Yindjibarndi people to compensation

¹ The Applicant notes that it has not addressed Head of Compensation Claim 5 in evidence or in these submissions and no longer seeks compensation under that heading.

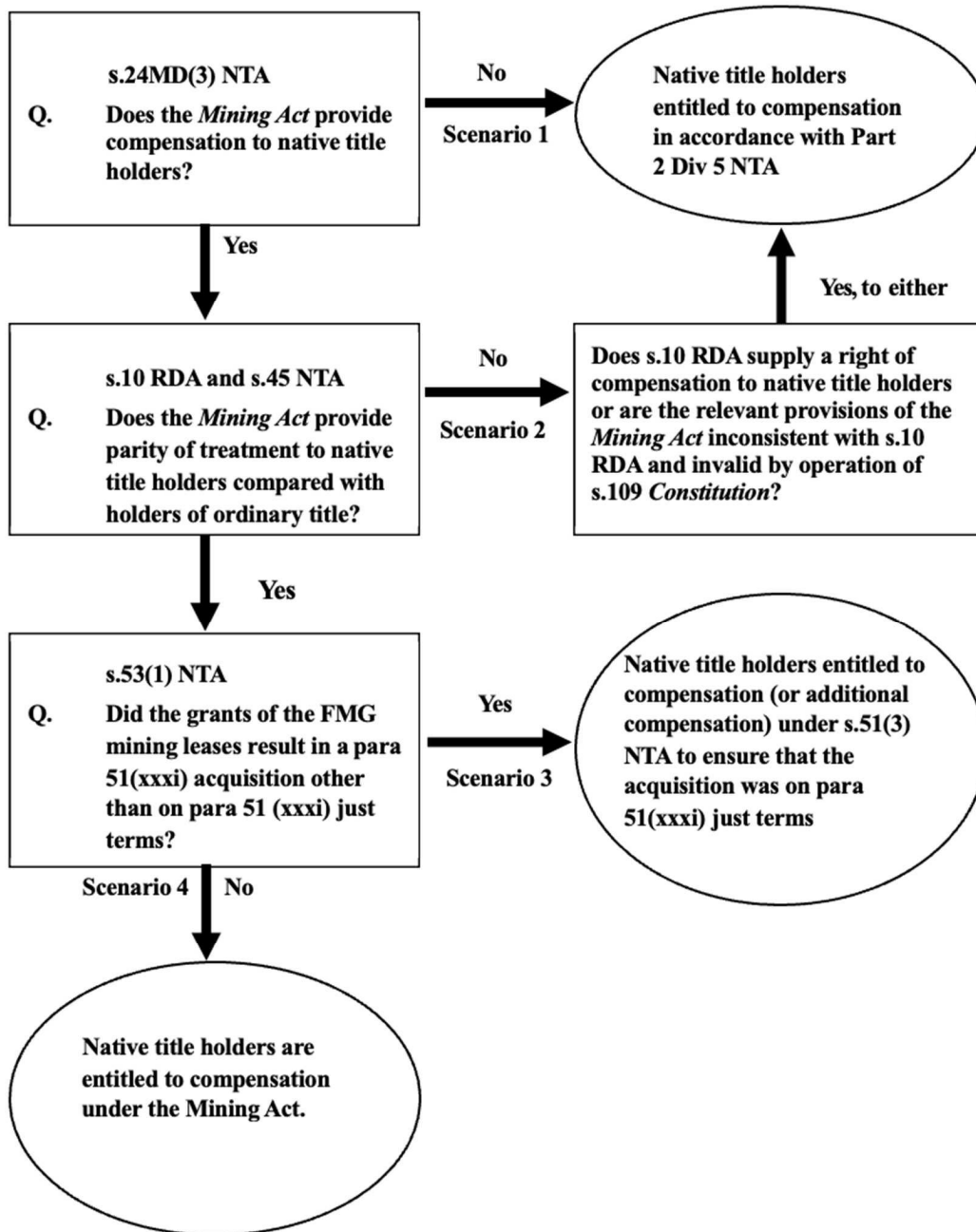
depends on whether the *Mining Act* provides compensation to native title holders. If it does then the second condition in s.24MD(3)(b) will not be satisfied with the consequence that the section will not provide an entitlement to compensation under Part 2 Div 5.

- 6 The Applicant's primary case is that the *Mining Act* does not provide compensation to native title holders, hence s.24MD(3) provides the Yindjibarndi people with an entitlement to compensation in accordance with Part 2 Div 5 NTA.
- 7 If the *Mining Act* does provide compensation to native title holders then, subject to the resolution of a second and possibly a third issue raised by the Applicant, s.24MD(3) does not provide an entitlement to compensation under Part 2 Div 5 NTA.
- 8 The second issue is whether s.10(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**) supplies a right of compensation to the Yindjibarndi people. It involves determining whether the *Mining Act* provides the Yindjibarndi people (as native title holders) with parity of treatment with the holders of ordinary title. If it does not, then on the Applicant's alternative case, s.10(1) RDA will supply a right to compensation and s.45 NTA will operate so that the compensation is determined under Part 2 Div 5 NTA. This pathway to Part 2 Div 5 NTA is premised on the disparity in treatment falling within the first category of "discrimination" in *Gerhardy v Brown* (1985) CLR 70.
- 9 The third issue only arises if s.10(1) RDA does not supply a right of compensation to the Yindjibarndi people. The Applicant's further alternative case in that scenario is that the Yindjibarndi people have an entitlement to compensation (or additional compensation) under s.53(1) NTA. The issue is whether the grant of the FMG Mining Leases resulted in a paragraph 51(xxxi) acquisition of the property of a person other than on paragraph 51(xxxi) just terms. If so, then the Yindjibarndi people will be entitled to such or additional compensation as is necessary to ensure the acquisition is made on just terms.

Applicable principles or criteria to determine compensation

The relevant alternative paths to compensation under the NTA are set out in the below diagram and explored further below:

Entitlement to compensation pathways



- 10 There are four scenarios to consider.
- 11 Firstly, s.24MD(3) entitles the Yindjibarndi people to compensation in accordance with Part 2 Div 5 NTA.
- 12 Secondly:
- (a) the *Mining Act* provides compensation to native title holders (so there is no entitlement to compensation under s.24MD(3)); but
 - (b) the *Mining Act* does not provide parity of treatment to native title holders compared to holders of ordinary title and s.10(1) RDA supplies a right of compensation and s.45 NTA provides that compensation is to be determined under Part 2 Div 5 NTA.
- 13 Thirdly:
- (a) the *Mining Act* provides compensation to native title holders;
 - (b) s.10(1) RDA does not supply a right of compensation to native title holders; and
 - (c) the grants of the FMG Mining Leases resulted in a paragraph 51(xxxi) acquisition of property (native title rights and interests (NTRI)) of a person (the Yindjibarndi people) other than on paragraph 51(xxxi) just terms so that the Yindjibarndi people are entitled to compensation (or additional compensation) under s.53(1) NTA.
- 14 Fourthly:
- (a) the *Mining Act* provides compensation to native title holders;
 - (b) s.10(1) RDA does not supply a right of compensation to native title holders; and
 - (c) s.53(1) NTA does not apply because the grants of the FMG Mining Leases did not result in a paragraph 51(xxxi) acquisition of property of a person other than on paragraph 51(xxxi) just terms.
- 15 Scenarios 1 – 3 result in an entitlement to compensation in accordance with Part 2 Div 5 NTA. The different pathways to Part 2 Div 5 in these scenarios raise their own important issues in the case. Ultimately, however, the Applicant's case is that the principles or criteria to determine compensation are the same for each scenario. In summary, the bifurcated approach in *Northern Territory v Griffiths* [2019] HCA 7; (2019) 269 CLR 1 (**Griffiths HC**) mandates that compensation be determined for both economic loss and separately, for non-economic or cultural loss (at [84]).
- 16 Before turning to the issues raised by scenarios 1 – 3 it is convenient to address scenario 4 briefly. With one important qualification, the Applicant accepts that in this scenario it is required to claim compensation in the Warden's Court under the *Mining Act* and the principles and criteria in that Act will apply to the determination of compensation. The qualification is the possible invalidity of s.123(1) *Mining Act* by operation of s.109 Constitution because of inconsistency with the NTA. In this scenario the Applicant's case is that s.123(1) is invalid and seeks a declaration to that effect.

First scenario – s.24MD(3) NTA entitlement to compensation in accordance with Part 2 Div 5 NTA

- 17 The parties agree that ss.51(1) and (3) NTA apply in this scenario and that the *Mining Act* is the relevant law for the purpose of s.51(3). While there are fundamental differences between the Applicant and the Respondents about how compensation should be determined within this framework there is a measure of agreement about the method for determining an economic loss component of compensation. This is not as helpful as it first appears. The Applicant and the respondents differ in their application of the method. And resolution of these issues requires resolution of the fundamental differences about the determination of compensation in this framework.
- 18 In summary, the Applicant's case on the application of ss.51(1) and (3) NTA and the relevant principles or criteria in the *Mining Act* is:
- (a) there are overriding requirements sourced in s.51(1) NTA and s.10(1) RDA that a determination of compensation under Part 2 Div 5 NTA requires a bifurcated approach – a component for economic loss and a component for non-economic or cultural loss; and
 - (i) must have regard to the unique character of NTRIs;
 - (ii) if the relevant principles or criteria in the *Mining Act* do not provide for these components of compensation then s.10 RDA and s.45 NTA apply with the result that compensation is determined under s.51(1) (see second scenario below);
 - (b) the principles or criteria in the *Mining Act* for determining compensation are not exhaustive or determinative because:
 - (i) to the extent that the relevant principles or criteria in the *Mining Act* do not have regard to the unique character of NTRI their application must yield to the overriding requirements set out above; and
 - (ii) further or alternatively, s.123(1) *Mining Act* is inconsistent with the NTA and invalid by operation of s.109 Constitution; and
 - (c) it is appropriate that the economic loss component of the Yindjibarndi people's compensation be determined by application of the *Spencer* test: *Griffiths* HC [66],[84]-[85] and the non-economic component be "appropriate, fair or just": *Griffiths* HC [237].
- 19 In this first scenario, the Respondents' cases emphasise that the principles or criteria for determining compensation in the *Mining Act* must be applied, including s.123(1), by force of s.51(3) NTA. However, as mentioned, there is a measure of agreement with the Applicant as to the appropriate methodology to determine compensation in this case.
- 20 The FMG Respondents accept that in any determination of compensation under Part 2 Div 5 NTA:
- (a) the Yindjibarndi people would be entitled to a component for economic loss and a component for non-economic or cultural loss; and
 - (b) the component for economic loss may be assessed by an application of the adapted *Spencer* test employed by the High Court in *Griffiths* HC.

- 21 The State does not go so far as to accept that the application of the relevant principles and criteria in the *Mining Act* requires a bifurcated approach. The State emphasises the primacy of the *Mining Act* principles or criteria within the framework of ss.51(1) and (3) NTA. However, the State accepts that the principles or criteria in the *Mining Act* are sufficiently congruent with *Griffiths* HC such that a bifurcated approach can be taken and the adapted *Spencer* test can be used to determine the economic loss component.
- 22 The real difference between the parties lies in their differing applications of the *Spencer* test and the application of s.51A NTA.
- 23 The Applicant says that the hypothetical willing but not anxious miner would have been prepared to pay a mixture of benefits including a royalty on production revenue to native title holders in the position of the Yindjibarndi people. Two important premises underpin this approach. Firstly, neither the NTA nor *Griffiths* HC precludes compensation being determined by reference to a royalty. Secondly, in determining the hypothetical bargain it is not necessary to do so by reference to the freehold value of the land. In relation to the cap on compensation in s.51A, the Applicant says that the relevant freehold estate includes the minerals in the land and/or that a component of special value needs to be added to reflect the Yindjibarndi people's valuable right to negotiate under the NTA. The Applicant also says that s.51A does not require or compel the use of freehold value as a proxy for economic loss when determining compensation. Or, to put it another way, it is not necessary to use the section as a starting point in determining compensation.
- 24 The State and FMG Respondents both say that the adapted *Spencer* test cannot be applied in this way. Instead, they say a proper application of the test to determine economic loss is by reference to the freehold value of the land covered by the FMG tenements. Both say that ss.51 and 51A NTA are to be read together as providing that the compensation payable is to be measured by reference to and capped at the freehold value of the land. The effect of those contentions on s.51A is that it is effectively used as a starting point in the determination of compensation.

Second scenario – s.10 RDA supplies a right of compensation and by operation of s.45 NTA the claim is determined in accordance with Part 2 Div 5 NTA

- 25 In this scenario the Applicant's case is that compensation is to be determined under s.51(1) and (4) and s.51(3) has no application. Compensation is to be determined in the same way as in the first scenario and s.51A applies.

Third scenario – s.53(1) applies so that there is an entitlement to compensation (or additional compensation) on paragraph 51(xxxi) just terms

- 26 In this scenario the Applicant's case is that compensation is determined under s.53(1) and s.51 has no application. Compensation is to be determined in the same way as in the first scenario and s.51A does not apply.

B. BACKGROUND

27 See Applicant's Outline of Opening Submissions (A.02.007) (**Applicant's Opening Submissions**) at [1]-[11].

28 The Yindjibarndi #1 Native Title Determination Application, WAD 6005 / 2003 (**Yindjibarndi #1**), was entered on the Register of Native Title Claims on 8 August 2003 and was determined by the Court following contested proceedings on 13 November 2017.²

29 In *Warrie (formerly TJ) on behalf of the Yindjibarndi people v Western Australia* [2017] FCA 803; (2017) 365 ALR 624 (**Warrie (No.1)**) at [151], Rares J found that under the traditional laws and customs of the Yindjibarndi people, they have the exclusive right to control access to Yindjibarndi country and in particular, to the compensation application area (**CAA**).³

30 In *Warrie (formerly TJ) on behalf of the Yindjibarndi people v Western Australia (No.2)* [2017] FCA 1299; (2017) 366 ALR 467 (**Warrie (No.2)**), the Court determined that, in the 'Exclusive Area',⁴ where ss.47A or 47B of the NTA applied to disregard any prior extinguishment of native title (**Exclusive Area**), the NTRI of the Yindjibarndi people confer on them the right to possession, occupation, use and enjoyment of that area to the exclusion of all others.⁵ In the balance of the *Warrie (No.2)* Determination Area (**non-exclusive area**), the Yindjibarndi people possess the rights listed in [7] of the Points of Claim, including the right to conduct activities necessary to give effect to them, namely:

- (a) a right to access (including to enter, to travel over and to remain);
- (b) a right to engage in ritual and ceremony (including to carry out and participate in initiation practices);
- (c) a right to camp and to build shelters (including boughsheds, mias and humpies) and to live temporarily thereon as part of camping or for the purpose of building a shelter;
- (d) a right to fish from the waters;
- (e) a right to collect and forage for bush medicine;
- (f) a right to hunt and forage for, and take fauna;
- (g) a right to forage for, and take flora;
- (h) a right to take and use resources;
- (i) a right to take water for drinking and domestic use;
- (j) a right to cook on the land including to light a fire for this purpose;
- (k) a right to protect and care for sites and objects of significance in the Determination Area (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others).⁶

² Statement of Agreed Facts (A.02.015) (**SOAF**) at [7].

³ SOAF (A.02.015) [145]-[150] describes the laws and customs for controlling access to Yindjibarndi country and the spiritual beliefs which underpin those laws and customs.

⁴ 'Exclusive Area' is defined in [11] of the Determination to mean that part of the Determination Area described in Part 2 of Schedule 1 and depicted on the maps in Schedule 3. It is those parts of the determination area where ss.47A and 47B apply to disregard any prior extinguishment of native title.

⁵ *Warrie (No.2)*; Determination at [4]; Applicant's Further Amended Points of Claim, A.02.002 (**POC**) at [5].

⁶ Determination at [3]; POC (A.02.002) [7].

- 31 Under s.56(3) of the NTA, the Applicant holds in trust for the Yindjibarndi people the NTRI that were recognised in *Warrie (No.2)*.⁷ The Applicant makes this application for a determination of compensation under ss.50(2) and 61(1) of the NTA and has conducted the consultation and obtained the consent prescribed by the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) prior to making the application.⁸
- 32 Until about 2007, the Yindjibarndi Aboriginal Corporation (**YAC**) in its capacity as the agent for the Applicant in Yindjibarndi #1 opposed the grant of mining tenements to the FMG Respondents but at the same time, it was involved in negotiations for a land access agreement (**LAA**) which would govern the terms on which mining operations would be conducted and the compensation which would be paid to the Yindjibarndi people for the impact of those operations on their NTRI.⁹ Those negotiations were conducted on the basis that compensation would be calculated on a percentage royalty of the FOB sale price of the iron ore produced from the mine.
- 33 Since May 2007, the State has made grants to the FMG Respondents of FMG tenements.¹⁰ Neither the Yindjibarndi #1 Applicant as the representative of the Yindjibarndi people under the NTA prior to the making of the *Warrie (No.2)* Determination nor the Applicant, as their post-determination representative, consented or agreed to the grant of any of the FMG tenements, save for the grant of 1 Exploration Licence¹¹. Neither has received any compensation for the grant of any of the FMG tenements.¹²
- 34 The FMG tenements collectively underpin and provide the legal basis for FMG's hugely profitable iron ore mine known as the SHP, which is located largely on unallocated Crown land (**UCL**) within the Exclusive Area.¹³ Mining commenced at the SHP in October 2012.¹⁴ There is no fixed date for the closure of the mine, but on current modelling, it is expected to have an operational life until 2045.¹⁵
- 35 The SHP is located in the Hamersley Ranges which are known in Yindjibarndi as *Gamburdayinha*,¹⁶ and which hold deep spiritual and cultural significance for Yindjibarndi people. The SHP is partly on Yindjibarndi *ngurra* (country) in an area known as *Garlawinji*.¹⁷ The *Ganjingarringunha wundu*, being the Yindjibarndi name for Kangeenarina Creek, goes through part of the SHP.¹⁸ The *Wirilu-Murra wundu* flows through the CAA.¹⁹ The SHP is very

7 SOAF (A.02.015) [3].

8 SOAF (A.02.015) [2].

9 SOAF (A.02.015) [28].

10 SOAF (A.02.015) [8].

11 The Applicant invited the State and FMG Respondents to agree to the following fact: "*SHP was approved, developed and continues to operate without the agreement or consent of the Yindjibarndi people. Under Yindjibarndi law and custom, those responsible for approving, developing and continuing to operate the SHP are manjangu who have never had the agreement or consent of the Yindjibarndi people to enter Yindjibarndi country, nor to develop and operate the SHP on Yindjibarndi country.*" But those parties declined to agree.

12 SOAF (A.02.015) [91], [311]; POC (A.02.002) [13]; FMG's Second Further Amended Response (A.02.013) (**FMG Response**) at [13].

13 POC (A.02.002) [9]; FMG Response (A.02.013) [9]; *Warrie (No.1)* at [8].

14 SOAF (A.02.015) [30].

15 SOAF (A.02.015) [20].

16 SOAF (A.02.015) [21].

17 SOAF (A.02.015) [12].

18 SOAF(A.02.015) [22]. But, as was evident during the site visit to the SHP on 14 August 2023, part of that *wundu* no longer exists and has been replaced by a road and other infrastructure: see Exhibit G1, Agreed Map 1, Enlargements 1-2 at A.06.001.01-A.06.001.015.

19 SOAF(A.02.015) [92].

close to a sacred site and freshwater spring that the Yindjibarndi refer to as *Bangkangarra* and the FMG Respondents refer to as 'Satellite Spring'.²⁰ *Bangkangarra* is within the area of the FMG Respondents' Exploration Licence (E47/1319)²¹. The Court heard both open and male restricted Yindjibarndi evidence at that site.

- 36 The hearing commenced at Roebourne on 7 August 2023 with opening addresses from all parties. Following opening addresses, the Court heard evidence from 17 Yindjibarndi, 1 Ngarluma and 4 non-Indigenous lay witnesses between 9 and 11 August 2023. The following week, on 14 August 2023, the Court convened at the SHP site for the purpose of taking a view and hearing further evidence from the Yindjibarndi witnesses.
- 37 The Court then reconvened at *Bangkangarra* where it heard the balance of the Yindjibarndi people's evidence over 3 days from 15 to 17 August 2023. During that period, the Court also heard evidence from Professor Veth at a nearby archaeological excavation site following which the Court undertook a view of the waterhole where it observed a public ceremony performed by Yindjibarndi men and women. The songs that were sung related to the travels of the *Bundut* Song Lines in and through the area where the Court then was. The Court then heard restricted evidence from the Yindjibarndi men who, with dance and song, revealed certain things to the Court about their religious and ceremonial life and about their spiritual connection to the country within the CAA. The Court (Mortimer J) had earlier heard preservation evidence via video-link from 2 aged and frail Yindjibarndi women elders, one of whom has subsequently passed away.
- 38 In April 2024, the Court heard expert evidence and the Respondents' lay evidence in Perth. This tranche commenced on 8 April with the Applicant's expert anthropologist, Dr Kingsley Palmer. Dr Palmer completed his evidence on 9 April and was followed by the Applicant's expert psychologist, Dr Jeffrey Nelson, who gave evidence on 9 and 11 April.
- 39 The Court then heard evidence from FMG's lay witnesses Christopher Oppenheim (on 11 April) and Jordin Barclay (on 12 April). Their evidence was followed by concurrent expert evidence from the hydrologists, Professor Huade Guane, called by the Applicant, and Dr Richard Evans, called by the FMG Respondents. Their evidence was heard on 12 April in Perth and completed via video-link from Perth to Melbourne and Adelaide on 19 April.
- 40 On 15-18 April in Perth, the Court heard expert economic and valuation evidence and some further lay evidence from the Applicant. Gregory Preston, a land valuer, gave evidence for the FMG Respondents on 15 April. The Applicant's solicitor, Mr Simon Blackshield, also gave very brief evidence on that day, following which the concurrent expert economic evidence was commenced to be heard.
- 41 The Court heard concurrent evidence from Murray Meaton, a mining economist called by the Applicant, and Martin Hall, an economist called by the FMG Respondents. That evidence was heard over 3 days, on 15-17 April. Mr Meaton gave further concurrent evidence on 17 April with Campbell Jaski, a valuer with expertise in the valuation of mining royalties (including native title royalties) who was called by the FMG Respondents. The Court then heard further concurrent expert evidence from the Applicant's valuer, Brian Miles, who gave evidence first, with Mr Hall on 17-18 April, and with Mr Jaski on 18 April.

²⁰ SOAF (A.02.015) [6].

²¹ T951.40-952.40 (ZA.07.019).

42 On 15 October 2024, the Court received into evidence the expert archaeologists' reports. The Applicant's reports were written by Prof Peter Veth and Dr Caroline Bird²². The FMG Respondent's expert report was written by Mr Doug Williams²³. The archaeologists had participated in an expert conference before Judicial Registrar McGregor in Perth on 11-12 October 2024 and agreed on all topics²⁴. Accordingly, they were not required to give oral evidence.

C. FUTURE ACTS

THE STATUTORY SCHEME FOR COMPENSATION UNDER THE NTA FOR "FUTURE ACTS"

43 See Applicant's Opening Submissions at [12]-[22].

WHAT IS THE RELEVANT FUTURE ACT SUBDIVISION VALIDATING THE FMG TENEMENTS – ARE THE WATER MANAGEMENT LICENCES COVERED BY SUBDIVISION H OR SUBDIVISION M OF PART 2 DIVISION 3 OF THE NTA? [ISSUE 10]

44 See Applicant's Opening Submissions at [23]-[29] and more specifically in relation to the Water Management Licences, see at [74]-[76]. Subdivisions M and P are the relevant subdivisions validating the FMG tenements, including the Water Management Licences. The Applicant adopts the submissions by Yamatji Marlpa Aboriginal Corporation at [5]-[28] in respect of the Water Management Licences.

45 As stated in the Applicant's Opening Submissions at [23], Subdivision P creates a statutory right for native title holders and registered native title claimants to negotiate in respect of certain future acts, including the creation, renewal or extension of a right to mine: NTA ss.25(1)(a), 26(1A)(c), (1)(c)(i).²⁵ The importance of the right to negotiate is highlighted in the Preamble to the NTA which states that in future, acts that affect native title should only be able to be validly done if, whenever appropriate, "*every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate*".

46 Compliance with the procedures set out in Subdivision P condition the validity of any future act to which the right to negotiate applies: NTA ss.24AA(5), 24OA, 28(1) and *Smith v Western Australia* (2001) 108 FCR 442 at 444 at [3] per French J. Section 33(1) provides that the negotiations may include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to the amount of profits made, any income derived, or anything produced by, the grantee party, as a result of doing anything in relation to the land or waters concerned.

²² Professor Peter Veth and Dr Caroline Bird, *Archaeological Report* filed 10 June 2024 G.01.002 (VB1) and Professor Veth and Dr Caroline Bird, *Short Responsive Archaeological Report* G.01.005 (VB2).

²³ Mr Douglas Williams, *Archaeological Report* filed 30 August 2024 (DW) G.01.003.

²⁴ See the Archaeological Joint Report (Conference of Experts) filed 12 October 2024 (G.01.005) (Arch Joint Report).

²⁵ The definition of "mine" in NTA s.253, includes "*explore or prospect for things that may be mined*".

47 As your Honour observed:²⁶

... ultimately, when one gets to considering the compensation for the grant of mining tenements, it would be odd if compensation didn't include that which is the subject of contemplated negotiation in the first of these options. ... Because there'd be no encouragement on the part of the parties to negotiate those aspects if ultimately they could not just do a deal and then have a more confined right ...

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

THE PART 2 DIVISION 5 COMPENSATION PROVISIONS

48 See Applicant's Opening Submissions at [7]-[11] and [30].

49 At [10]-[11] of those submissions reference is made to the High Court's decision in *Griffiths* HC, which is relevant to the ultimate disposition of this case. The Applicant places particular reliance on the majority judgment at [84] and [85] on the issue of economic loss and at [237] on the issue of non-economic or cultural loss. However, as Jagot J recently observed, writing extra-judicially²⁷, many issues were not raised for consideration in and therefore remain undecided by *Griffiths* HC. The extent to which that decision resolves issues at the level of principles capable of general application is also open to debate and, further, the arguments put there appear to have been confined in scope.

DOES THE *MINING ACT* PROVIDE FOR COMPENSATION TO NATIVE TITLE HOLDERS? [ISSUE 2]

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

50 See Applicant's Opening Submissions at [31].

Consideration of the Mining Act's compensation provisions [Issue 2]

51 See Applicant's Opening Submissions at [32]-[45].

52 It would have been unnecessary to amend the *Mining Act* by the addition of s.125A if the grantee of a mining tenement was already liable to pay compensation to native title holders under s.123(2) of that Act.

53 Although other States and Territories have amended their mining legislation to provide that native title holders are "*owners*", "*occupiers*" or "*landholders*", as the case may be, with a view to including them in the class of persons who are entitled to compensation under that legislation, Western Australia has not done this.²⁸

54 The FMG Respondents' contention at [39] that Rares J's finding that, for the purposes of ss.47A and 47B of the NTA "*when the application (was) made, one or more members of the native title claim group (occupied) the area*" means that the Yindjibarndi people therefore necessarily fall within the definition of "*occupier*" in s.8 of the *Mining Act* is simply wrong.²⁹ One cannot transplant a conclusion made in the context of ss.47A and 47B of the NTA into the very different context of the definition of an "*occupier*" in the *Mining Act: Fortescue Metals Group v Warrie*

²⁶ T22.19-.28 (A.07.005) and see too at T101.09-.34 and T102.26 (A.07.006).

²⁷ *Compensation for Economic Loss*, in an article published in (2022) 96 ALJ 832 (**Jagot J Article**).

²⁸ *Mining Act 1992* (NSW) – Dictionary; *Mineral Titles Act 2010* (NT) at s.14; *Mining Act 1971* (SA) at s.6; *Mineral Resources Act 1989* (Qld) at Schedule 2 – Dictionary; *Native Title (Queensland) Act 1993* at s.152; *Mineral Resources Development Act 1995* (Tas) at s.3.

²⁹ FMG Respondents' (Opening) Submissions, A.02.009 at [39].

on behalf of the Yindjibarndi people [2019] FCAFC 177; (2019) 273 FCR 350 at [462]-[463] per Robertson and Griffiths JJ.

55 The Applicant submits that the *Mining Act* does not provide compensation to native title holders. However, if, contrary to that submission, it is held that the *Mining Act* does provide compensation to native title holders, it is submitted that it does not provide them with parity of treatment with the holders of “ordinary title”, hence s.10(1) of the RDA will confer a right of compensation on the native title holders. Under s.45 of the NTA, the compensation is to be determined in accordance with s.50 of the NTA.³⁰

Section 51(1) and ‘just terms’ compensation [Issue 1]

56 See Applicant's Opening Submissions at [46]-[48].

57 Section 51(1) provides that, subject to subsection (3), the entitlement to compensation under the NTA is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their NTRI.

58 Note 1 to s.44H of the NTA (which forms part of the Act: see *Acts Interpretation Act 1901* (Cth) (AIA), s.13), states that any compensation to which the native title holders may be entitled for the grant of a lease, licence, permit or authority may take into account the doing of the activity. This provision is particularly apt to the circumstances here where, unlike in *Griffiths* HC, there are significant ongoing activities and commensurate significant ongoing economic and cultural loss.

SECTION 51(3) AND THE PRINCIPLES OR CRITERIA FOR DETERMINING COMPENSATION UNDER THE *MINING ACT* [ISSUE 3]

59 See Applicant's Opening Submissions at [49]-[51].

60 The text of s.51(1) makes clear that s.51(1) *always* applies, because it supplies the entitlement to compensation, whereas s.51(3) merely directs what principles or criteria must be applied in determining that compensation.

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

61 See Applicant's Opening Submissions at [52]-[56].

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? [Issues 3 and 3A]

62 See Applicant's Opening Submissions at [57]-[58].

63 In *Griffiths* HC the Court observed, regarding the assessment task under s51(1) NTA, that the detrimental consequence need not ‘directly arise’ from the compensable act. It may be an “inter-related effect” of the compensable acts on the Applicant's connection with the land.³¹

64 The Applicant submits that the impacts of the division and social disruption are interrelated effects of the grants of the FMG mining tenements and the mining at SHP on the Yindjibarndi people's connection to their *ngurra*.

³⁰ See Applicant's Opening Submissions (A.02.007) at [59]-[61].

³¹ *Griffiths* HC at [218]; [224].

- 65 The Applicant also submits that, characterised this way, the impacts fall within the “*loss and damage suffered or likely to be suffered by [the Yindjibarndi people] resulting or arising from the mining*” as provided for in s.123(2) *Mining Act*.
- 66 The Applicant appreciates that there is some novelty to this aspect of its claim for compensation. Having said that, there was also some novelty in the non-economic or cultural loss claim brought by the Applicant in *Griffiths* HC. The facts in this case are very different.
- 67 Valuation cases are highly evidence and fact dependent and many questions remain after *Griffiths* HC.³² The present matter differs in many ways from the circumstances facing the Court in *Griffiths* HC. When the State granted the mining leases to FMG, in circumstances where the Yindjibarndi have been determined to hold exclusive possession native title, FMG as *manjangu* (stranger) took possession of the Yindjibarndi people’s country without their permission and locked the Yindjibarndi out of their country. The physical disturbance is of a different type and vastly greater dimension than the physical disturbance in *Griffiths*. It has also occurred in circumstances where the granting of the tenure and the development of SHP were the cause and subject of a deep division within the community. *Griffiths* did not involve the fracturing of a community of native title holders as an inter-related effect of the relevant compensable acts, and accordingly the question of the compensability of the effects of such fracturing on the enjoyment of the group’s communal NTRI did not arise as it does here. The following passage from the Jagot J Article is relevant:
- The labels “cultural loss”, “loss of cultural connection” or “spiritual loss” are all thin descriptors for this potential kind of loss, in which an act enabling harm to country is also an act both embodying potential harm to the holders of native title in relation to that country and denying them the capacity to practise and transmit their culture in relation to that land. This is not a mere potential hurt to “feelings” or “spiritual” loss. It is a potential harm to, and destruction of, a way of life and a way of being in the world. This potential harm, depending on the evidence about the nature and effects of the act, may be existential. It may involve a wound or trauma to the capacity to exercise rights and responsibilities springing from the body of the traditional laws and customs too great for those laws and customs ultimately to survive.³³
- 68 The key to understanding that these impacts are interrelated effects of the grants of the FMG tenements and the mining on the Yindjibarndi people’s connection to their country is in understanding the nature and strength of that connection under traditional Yindjibarndi laws and customs.
- 69 The fact that NTRI are held communally is relevant. This feature of NTRI strengthens the argument that detrimental impacts on social relationships and the flow-on impacts on people’s connection to country amount to impairment of the Yindjibarndi people’s enjoyment of their NTRI.
- 70 Social disruption is dealt with further at [215],[222]-[223],[347]-[489] and [501]-[511] below.

³² Jagot J Article at 849.

³³ Ibid, pp,833-834.

ENTITLEMENT TO COMPENSATION UNDER S.10(1) OF THE RDA [ISSUE 11]

71 See Applicant's Opening Submissions at [59]-[61] and see too [39]-[45] for particulars of the disparity of treatment between native title holders and the holders of "ordinary title".

72 The *Mining Act* does not have regard to the unique character of NTRI. It does not make provision for compensation for cultural loss, for the loss of the right to negotiate or for compensation of the kind that can be negotiated under s.33(1) of the NTA.

WHETHER THE GRANTS OF THE FMG MINING LEASES RESULTED IN AN ACQUISITION OF PROPERTY WHICH GAVE RISE TO AN ENTITLEMENT TO COMPENSATION UNDER S.53(1) OF THE NTA [ISSUE 9]

73 See Applicant's Opening Submissions at [65]-[72].

74 The "*just terms*" standard is one of fair dealing: *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 at [600], Kitto J; cited in *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [190], Gummow J and Hayne JJ. Although s.53(1) does not prescribe any particular framework for the determination of *just terms* compensation, the underlying legislative intention as to what will constitute *just terms* compensation payable for mining on native title land is made apparent in the Preamble and in s.33(1).

75 In *Griffiths* HC at [26], the plurality observed that the enactment of the NTA was intended to rectify the consequences of the past injustices identified in the Preamble.³⁴ Principal among those injustices was that Aboriginal and Torres Strait Islanders have been progressively dispossessed of their lands "*largely without compensation*" or "*lasting and equitable agreement ... concerning the use of their lands*".³⁵ Their rights and interests under the common law of Australia need to be significantly supplemented and in future, acts that affect native title should only be able to be validly done if, typically, they can also be done to "*freehold land*",³⁶ and if, whenever appropriate, "*every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate*".

76 Here, as was submitted in the Applicant's opening address³⁷, what has occurred is the antithesis of what the enactment of the NTA intended to achieve. The Yindjibarndi people have been dispossessed of their traditional lands without compensation and without any lasting and equitable agreement concerning the use of their lands.

THE CONSTRUCTION AND OPERATION OF S.49 NTA [ISSUE 6]

77 See Applicant's Opening Submissions at [73].

³⁴ Which is part of the NTA: see s.13 of the AIA.

³⁵ See the Applicant's Opening Submissions (A.02.007) at [12].

³⁶ The meaning of the expression "*freehold land*" in the NTA is discussed in the submissions that follow in respect of Issue 8. The definition of "*land*" in the AIA includes minerals.

³⁷ T56 (A.07.005).

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

IS THERE AN ENTITLEMENT TO COMPENSATION FOR THE EFFECT OF THE GRANTS OF THE FMG TENEMENTS ON A NATIVE TITLE RIGHT OF EXCLUSIVE POSSESSION IN THE EXCLUSIVE AREA? [ISSUE 5]

78 See the Applicant's Opening Submissions at [2], [5] and [88]-[91]. The Applicant does not rely on ss.47A and 47B. The Applicant relies on the *Warrie (No.2)* Determination which determined that the Yindjibarndi people possess and have always possessed, a right of exclusive possession in the Exclusive Area.

79 In addition to what is said there, it is submitted that ss.47A and 47B are directed towards disregarding prior extinguishment of native title for the purpose of "recognition". A compensation application does not seek "recognition" of native title, rather it seeks compensation for any loss, diminution, impairment or other effect of a compensable act on the NTRI. Here, the *Warrie (No.2)* Determination has recognised that the Yindjibarndi people possess a right of exclusive possession in the Exclusive Area. The Yindjibarndi people's compensation application does not rely on ss.47A and 47B: it relies on the terms of the Determination.

80 A native title determination is commonly described as a judgment *in rem* that is binding on all the world: *Starkey v South Australia* [2018] FCAFC 36 (*Starkey*) at [198], per Reeves J with whom White J agreed, at [401]. The effect of the *Warrie (No.2)* Determination is that the Yindjibarndi people have *always* possessed a right of exclusive possession in the Exclusive Area and not just from the date of the determination:

Accordingly, I consider it follows that the Kokatha Part A determination also determined as a fundamental matter, once and for all, that the Kokatha People's native title rights and interests did not come into existence as a consequence of, and from, the Kokatha Part A determination. Rather, that determination recognised as a fundamental matter that those rights and interests had existed continually in that form at all times in the past to at least sovereignty. The Adnyamathanha appellants are therefore wrong in their contention that the Kokatha Part A determination was only conclusive as to the native title rights and interests that the Kokatha People now hold in that area, or at least they have held since it was made in 2014. (*Starkey* at [202] per Reeves J with whom White J agreed; see too *Stuart v South Australia* [2023] FCAFC 131. (*Stuart*) at [68])

81 Further, the State and the FMG Respondents were parties to the *Warrie* proceeding and as the Full Court said in *Stuart* at [69]:

It is an abuse of process for a party to seek to relitigate a fundamental matter expressly or necessarily encompassed within an earlier determination, and to do so may otherwise give rise to an issue estoppel... In addition, a party to a native title determination application cannot lead evidence that is inconsistent with a conclusion upon which an existing native title determination is based.

THE EFFECT OF THE GRANTS OF THE FMG TENEMENTS ON THE NATIVE TITLE RIGHTS AND INTERESTS [ISSUES 3A, 4 AND 7]

82 A general description of the effect of the grants is given in the Applicant's Opening Submissions at [83] which references [33]-[38] of the POC. See too [86] of the Applicant's Opening Submissions. The effect of the grants on the economic value of the NTRI is described in the Applicant's Opening Submissions at [92]-[100].

- 83 The assessment of compensation whether for economic or for non-economic loss is not frozen as at the date of the doing of the compensable act – in this case the respective grants of the FMG tenements. The Act does not expressly say that it is frozen at that date and note 1 to s.44H of the NTA indicates a contrary intention. It makes clear that any compensation to which the native title holders may be entitled for the grant of any lease, license, permit or authority, may take into account the doing of the activity, which in this case consists of the FMG Respondent's extensive mining activities. The note forms part of the NTA³⁸ and would apply to the assessment of both economic and non-economic loss.
- 84 The legal effect of the grants of the FMG tenements and the doing of activities under them is summarised in the POC (A.02.002):
- The Yindjibarndi people's native title rights and interests have been wholly or partially suppressed and hence significantly diminished and impaired by, the grants of the FMG tenements within the areas of those tenements and will remain suppressed, impaired and diminished for however long those tenements remain on foot.³⁹
- 85 The other effects are set out in more detail in paragraphs POC [34] – [38]. Most of these other effects can be understood as effects on the Yindjibarndi people's connection to their country by their traditional laws and customs. One other effect not falling in this category is the loss of the chance to use the right to negotiate procedure in the NTA in respect of land covered by the FMG mining leases, particularly the area covered by the SHP. This is the loss described in [35] of the POC and elaborated on in the Applicant's Opening Submissions at [92] and [93]. We return to this effect in the next section of our submissions.
- 86 The State has taken issue with what it sees as the Applicant's failure to plead or adequately plead the effects of the FMG tenements on the NTRI. Consistent with its case the State draws a distinction between loss and damage in terms referable to s.123 *Mining Act* and effects on native title referable to s.51(1) NTA. It is true that the Applicant has not pleaded loss and damage in terms referable to s.123. On the Applicant's case, s.123 is only relevant as the law falling within s.51(3) NTA. Further, on the proper construction of ss.51(1) and (3) NTA – to the extent that s.123 is inconsistent with determining compensation in accordance with the principles in *Griffiths* HC it has no effect. So, in this context and consistent with its case, the Applicant has not pleaded loss or damage in terms referable to s.123 *Mining Act*.
- 87 As to the adequacy of pleading about the effects on native title referable to s.51(1), the Applicant accepts that it has not described or identified FMG tenement areas where it says native title has been partially or wholly suppressed and makes the following points.
- 88 Firstly, the Applicant does not dispute any of the law identified by the Respondents as being relevant to the effect of the FMG tenements on the native title. It agrees that the non-extinguishment principle applies and that *Warrie (No.2)* correctly sets out the relationship between the NTRI and the FMG tenements at [9]. Importantly, it accepts that it is only where there is an inconsistency between the FMG tenements and activities done under them with NTRI that the native title will be suppressed.
- 89 Secondly, the Applicant submits that a simple distinction can be drawn between the mining leases and miscellaneous licences where mining operations have or are taking place, and all

³⁸ s.13 AIA.
³⁹ POC (A.02.002) [33].

other tenement areas. The reality, well known to the Yindjibarndi and experienced by the Court and the parties during the trial, is that FMG restricts access to SHP:

*"I have tried many times with other Yindjibarndi people to visit the Mine. But we have never been allowed in by FMG even though it's our country. Each time they stop us at the gate and tell us we are not allowed in."*⁴⁰

90 It cannot be suggested that NTRI are anything but wholly suppressed where access is restricted. Equally, there are parts of the FMG tenement areas where FMG does not seek to wholly restrict access. *Bangkangarra*, the place of the on-country evidence in August last year is a good example. *Bangkangarra* is covered by exploration licence E47/1334. Charlie Cheedy said that it has been difficult to access *Bangkangarra* and *Ganjingaringunha* because the tracks are all fenced and gated off due to the mining works and to get there he has to go a very long way as he cannot take the tracks his ancestors did before the mine was built.⁴¹

91 The Applicant submits that a sufficiently precise delineation of the mining lease and miscellaneous licence areas where mining operations have or are taking place can be made by reference to the Agreed Maps. The composite area can be described as:

- (a) within the parts of the FMG mining leases that overlap the *Warrie (No.2)* determination area; and
- (b) within the parts of the FMG miscellaneous licences overlap the *Warrie (No.2)* determination area but do not overlap the FMG mining lease areas (this includes parts of L1SA and L47/914).

(SHP Operation Area)

92 The Applicant submits that the Yindjibarndi people's NTRI are wholly suppressed in the SHP Operation Area and will remain so until the mining leases and miscellaneous licences come to an end. The Applicant accepts that the tenements in this area were granted to FMG on different dates and that this means the duration of the whole suppression is not uniform across the area. However, the Applicant submits that these relatively small differences between dates when tenements were granted are irrelevant in a compensation context when the life of the tenements is measured in decades.

93 The forecast end of mine life is 2045 and the little evidence there is of FMG's rehabilitation plan suggests that rehabilitation works are planned to continue for many years afterwards (see below at [205] of these submissions). It is relevant to recall here Murray Meaton's oral evidence about the rehabilitation of the Mount Goldsworthy mine near Port Hedland.⁴² The most likely scenario supported by the evidence is that the Yindjibarndi people's NTRI will remain wholly suppressed until at least 2045. The Applicant accepts that when the relevant mining leases and miscellaneous licences come to an end, the native title will revive. However, the Yindjibarndi people will not be handed back their country in the same condition it was when negotiation about the SHP started in 2007. Large parts of the country will be destroyed as will the connection between the Yindjibarndi people and that country. This aspect of the impact of large-scale mining is well illustrated by Michael Woodley's telling of men singing about Mt Newman in the *Bundut*. He has heard old men say "*marnu Yunurrunha manggungarla wagba*

⁴⁰ Amended Witness Statement of Lorraine Coppin filed 28 April 2023 (A.05.006) (LCoppin) [70].

⁴¹ Witness Statement of Fabian (Charlie) Cheedy dated 25 May 2023 (A.05.019) (FC) [18].

⁴² T1350.5-13 (ZA.07.023).

ngarliya nhunagu yala wirndanha, jamba nhunha barni yulu nhani nhantharri yala yirramagyì", meaning "We are sad and sorry for Mt Newman. It got taken by the whiteman and now his being broken him up, soon he will be gone and then we will have nothing to sing for that place".⁴³ Thus, while the suppression of the native title will come to an end sometime in the distant future the effects of the mining in this respect will be permanent.

94 The likely duration of the whole suppression of native title within the SHP Operation Area and the permanent effect of the mining on the Yindjibarndi people's connection to their country means that in a compensation context, it is appropriate to treat the native title as effectively extinguished in this area.

95 Some support for these submissions comes from Campbell Jaski's expert report⁴⁴.

96 In summary, Mr Jaski's methodology for determining economic loss starts with a valuation of the freehold value of the land covered by each of the FMG tenements. Mr Jaski then applies three discounting factors to the freehold value of the land covered by each tenement.⁴⁵ They are:

(a) Rights and Interests Factor – Adjustment to the economic value of native title depending on whether it is exclusive or non-exclusive. The economic value of exclusive native title is treated as being equivalent to the freehold value. Non-exclusive native title is treated as being equivalent to 50% of the freehold value. Mr Jaski's basis for this factor is *Griffiths HC*.

(b) Impairment Factor – Adjustment to the economic value of the native title to account for the differential effects of the grants of the FMG tenements and the activities done under them. In effect, it is an adjustment for the extent of suppression of native title. Mr Jaski determined the impairment factors he used in his report.

(c) Deprivation Factor – Adjustment to the economic value of the native title to account for the duration of the effects of the grants of the FMG tenements and the activities done under them. This factor recognises that the native title will revive when the FMG tenements come to an end. Mr Jaski also determined the deprivation factors.

97 Generally, Mr Jaski's methodology proceeds on the basis that NTRI will be 90-100% impaired (or suppressed) in the FMG mining leases. The Applicant quibbles with some of Mr Jaski's assessment of impairment in his methodology. For example, he differentiates between miscellaneous licenses for power plants and the Water Management Licences.⁴⁶ The Applicant says that native title is wholly suppressed by any miscellaneous licence within the SHP Operation Area. The point to make though is that Mr Jaski's assessment of impairment is broadly consistent with the Applicant's submission about the extent of suppression.

98 Similarly, on the basis that the Yindjibarndi people's native title will likely be wholly suppressed until at least 2045, Mr Jaski's assessment of deprivation factors is broadly consistent with the Applicant's submission that, for compensation purposes, the native title should be treated as effectively extinguished. The Applicant acknowledges that Mr Jaski's deprivation factors are lower if the required rate of return used to calculate them is 5% rather than 10%.⁴⁷

⁴³ Witness Statement of Michael Woodley filed 5 June 2023 (A.05.022) (MW) [25].

⁴⁴ Cambell Jaski, *Valuation Report* dated 5 March 2024 (E.04.004) (CJ).

⁴⁵ CJ (E.04.004) [25]-[52].

⁴⁶ CJ (E.04.004) [198], [236]-[243].

⁴⁷ Eg see CJ (E.04.004) [313]-[316].

However, even in the 5% scenario the duration of impairment (or suppression) still puts the deprivation factor in Mr Jaski's "high value".

HAVE THE GRANTS OF THE FMG TENEMENTS DIMINISHED, IMPAIRED OR OTHERWISE AFFECTED THE ECONOMIC VALUE OF THE NATIVE TITLE RIGHTS AND INTERESTS [ISSUE 7]

99 See Applicant's Opening Submissions at [92]-[100].

100 As noted in the above section, one effect of the grants of the FMG tenements on the Yindjibarndi people's NTRI is to diminish or impair their economic value. The Applicant pleads this effect at [35] of its POC (A.02.002) and elaborates in its Opening Submissions at [92]-[100]. [35] says:

The economic value of the Yindjibarndi people's native title rights and interests, including the right to negotiate under Subdivision P of Part 2, Division 3 of the NTA, has been diminished or impaired because the FMG tenements were granted and mining and related activities have proceeded, without FMG or the State reaching any agreement with [the Yindjibarndi people] ... to pay compensation to the Yindjibarndi people for their assent to the infringement of their native title rights and interests.

101 In summary, in its Opening Submissions at [92]-[100] the Applicant contends:

- (a) the right to negotiate procedure in the NTA contemplates the payment of compensation to native title parties based on production, income or profit;
- (b) the Yindjibarndi people's NTRI have a unique economic value to them for this reason, which is a "special value" that they could have been expected to be able to exploit by entering into an agreement with a miner or government acting fairly and reasonably;
- (c) by the grant of the FMG tenements and the mining without any agreement having been reached, the opportunity to exploit this "special value" has now been lost;
- (d) there are many examples of agreements between miners and native title parties relating to iron ore projects in the Pilbara where miners agree to pay native title parties a percentage of revenue in exchange for their consent and support for projects;
- (e) the many comparable agreements establish that there is a common or standard practice according to which iron ore miners in the Pilbara are prepared to pay to obtain the assent of native title holders to the infringement of their native title;
- (f) *Griffiths* HC does not require the economic value of NTRI to be determined according to established precepts for the valuation of an interest in land;
- (g) the facts in this case are very different to *Griffiths* and there are a range of comparable agreements which may be called on in aid of determining economic value;
- (h) if the Yindjibarndi people had reached an agreement with a reasonable miner in accordance with common or industry practice then they could have expected to receive a percentage of revenue in exchange for their consent and support;
- (i) the value of the economic loss in this case is the percentage of revenue Mr Meaton selected as being appropriate applied to calculations of FMG's actual and forecast production and revenues (these are contained in the joint royalty calculations report by

Murray Meaton and Campbell Jaski dated 1 October 2024, G.01.001 (**MJ RC Joint Report**);

- (j) alternatively, if the State is liable to pay compensation the value of the economic loss is what a reasonable government party would have been prepared to pay to obtain the assent of the Yindjibarndi people to the grants of the FMG tenements.

102 Finally, in oral opening submissions after reading an extract from *Warrie (No.1)* it was submitted:

And his Honour [has] referred there to what is the nub of our case: is that there is an expectation – a reasonable expectation that if there is to be a sizeable mine on native title land, then the native title holders, as a community – a whole community – not just individuals within it – but the whole community is going to receive financial benefits out of that mine.

THE PROPER CONSTRUCTION AND EFFECT OF S.51A OF THE NTA AND THE FREEHOLD CAP [ISSUE 8]

103 See Applicant's Opening Submissions at [62]-[64].

104 Strictly, by its terms, s.51A, does not apply to the present proceeding because the compensable acts here have not extinguished any, let alone *all* NTRI.⁴⁸ More importantly, if s.51A does apply, it refers to a hypothetical "*freehold estate in the land*".

105 Section 2B of the AIA defines the term "*land*" in any Commonwealth Act as including "*corporeal hereditaments*". This would include minerals.⁴⁹ In *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 565, Deane, Dawson and Gaudron JJ observed⁵⁰:

While the theory of our land law is that the radical title of the Crown lies between the physical land and a freehold estate in it, the ownership of the freehold estate has long been, for almost all practice purposes, the equivalent of full ownership of the land. As a result, the freehold estate is, as a matter of legal and popular language, commonly treated as the land itself.

106 A hypothetical freehold estate would exclude a reservation of minerals: *Perilya Broken Hill Ltd v Valuer-General* [2015] NSWCA 400 (***Perilya (2015)***) at [82], [85], [89], Leeming JA with whom Bathurst CJ at [1] and Macfarlan JA at [2], [3] agreed.

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

107 If the Court does not accept the Applicant's submissions on the appropriate approach to determine compensation for economic loss, then the only alternative is to determine it by reference to the value of a hypothetical freehold estate in the land covered by the FMG

⁴⁸ *Griffiths* HC at [48], [50].

⁴⁹ *Perilya Broken Hill Ltd v Valuer-General (No 6)* [2015] NSWLEC 43 at [22], [39], Biscoe J; confirmed on appeal in *Broken Hill Ltd v Valuer-General* [2015] NSWCA 400 (***Perilya (2015)***). See too the *Land Administration Act 1997* (WA) which defines "*land*" in s.3 as including the air space above and the subsoil beneath, all land within the State.

⁵⁰ At [8] of their joint judgment.

tenements. Of course, whichever approach is taken the amount of compensation for economic loss will be capped by this value.

108 The expert evidence establishes that the most important determinative factors of the value of a hypothetical freehold estate in the land covered by the FMG tenements are:

- (a) whether the hypothetical freehold estate includes minerals; and
- (b) the highest and best economic use of the land upon which to base the valuation.

109 We address these matters in turn.

110 Mr Preston's and Mr Hall's evidence establishes that if the hypothetical freehold estate in land in this case includes minerals then, from a valuation perspective, it is appropriate to account for the minerals in the valuation. And in that scenario, it is appropriate to perform the valuation using a discounted cash flow method using revenues produced from any mine on the land.

111 The FMG Respondents asked Mr Preston to address the following in their instructions:

What amount would have been payable for the compulsory acquisition of a freehold estate in the land the subject of each of the FMG Tenements as at the time of the grant of each of the FMG Tenements, assuming that instead of the grant of each of the FMG Tenements, there had been a compulsory acquisition of an assumed freehold estate in the land?⁵¹

112 Importantly, the FMG Respondents also asked Mr Preston to assume that "each assumed freehold estate in the land ... does not include any rights to or interest in any mineral in, on or under the surface of the land".⁵²

113 It became clear during his oral evidence that Mr Preston's professional understanding of the meaning of freehold land was that ordinarily minerals were reserved to the State. This understanding reflects a long-standing legal position for grants of freehold land in Western Australia. However, Mr Preston accepted in cross examination that if freehold land was to be valued free of encumbrances and reservations in an iron-ore-rich region then it would be necessary to take into account the value of the iron ore. Although, he added "...but it is a highly unusual circumstance that you have put to me because it just doesn't exist".⁵³

114 Mr Preston also accepted in cross examination that when valuing land that is being mined the usual practice is to value the land by the present value of the cashflow generated by the mine. He refined his answer by explaining that this value (Mr Preston called it discounted cashflow) would be an all-up valuation for the mine and the land would only be a part of that. He explained that it would be necessary to deduct expenses from the value calculated to determine the value of the relevant interest in land.⁵⁴

115 While it was not the focus of Mr Hall's oral evidence, he gave some brief evidence about his understanding of the meaning of freehold land and its valuation. Like Mr Preston, Mr Hall understood that ordinarily freehold referred to "...ownership of the land ... but not including the minerals. That's normal freehold".⁵⁵ He accepted though that if the SHP land were valued

⁵¹ Expert report of Gregory Preston, *Amended Land Valuation Report* filed 5 March 2024, E.05.002 (GP), [3.1] of the letter at PDF p130 (E.04.002).

⁵² GP (E.05.002) [3.2(a)] at PDF 130.

⁵³ T1126.18 (ZA.07.021).

⁵⁴ T1127.08 (ZA.07.021).

⁵⁵ T1179.31 (ZA.07.021).

as freehold land including the minerals then it would be appropriate to use a discounted cashflow model to value that interest. He added that a royalty would be a reasonable and appropriate basis to determine compensation for the holder of such an interest.⁵⁶

116 Mr Jaski was not asked to value a hypothetical freehold estate in the land covered by the FMG tenements and in his expert report he relied on Mr Preston's valuation. He did not give oral evidence about his understanding whether a freehold estate includes minerals and the appropriate valuation methodology to value a freehold estate on that basis.

117 Mr Meaton was not asked to value a hypothetical freehold estate in the land covered by the FMG tenements. However, he did give some evidence on it in Topic 2 in the expert conferences. Topic 2 asked about the appropriate method to determine compensation for economic loss and directed attention, among other things to the value of a compulsory acquisition of a freehold estate in land. In his expert conferences Mr Meaton said that this value had no relevance to the case.⁵⁷ The Applicant accepts that this is incorrect as a matter of law. In the oral evidence he gave on the topic it was clear that Mr Meaton took the meaning of freehold as including minerals.⁵⁸

118 Mr Miles was not asked to value a hypothetical freehold estate in the land covered by the FMG tenements either. Like Mr Meaton, Mr Miles said in his expert conferences that this value was not relevant to the case.⁵⁹ Mr Miles did refer to freehold land in his oral evidence but in general he did so in the context of determining compensation under s.51(1) NTA rather than valuing a hypothetical freehold estate.⁶⁰ The exception to this is Mr Miles' criticism of Mr Preston's valuation, which we return to later in this section.

119 The Applicant's submissions on whether the hypothetical freehold estate in land includes minerals means that there are two valuation scenarios to consider:

- (a) a hypothetical freehold estate in land that includes minerals; and
- (b) a hypothetical freehold estate in land that does not include minerals.

120 The value of a hypothetical freehold estate in the land will depend upon the land's highest and best use.

121 In *Olefines Pty Ltd v Valuer-General of New South Wales* [2018] NSWCA 265, Basten JA said at [16] that the phrase 'highest and best use of the land' "*actually refers to the most financially rewarding use permitted within the boundaries of applicable legal regulation.*" In *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGRA 410, Jacobs J said the following at 415⁶¹:

[T]he highest and best use means exactly what it says – the most advantageous use of the subject land having regard to planning and all other relevant factors affecting its present and future potential. The first task of the valuer is to determine what that use is and then to value the land on that basis.

⁵⁶ T1180, T1181 (ZA.07.021).

⁵⁷ Joint Report (Conference of Experts, Jaski & Meaton) filed 22 March 2024 (E.05.001) (**MJ Joint Report**), M34.
⁵⁸ T1165 (ZA.07.021).

⁵⁹ Joint Report (Conference of Experts, Jaski & Miles) filed 22 March 2024 (E.05.003) (**BMJ Joint Report**), M24.

⁶⁰ See for example T1380.21 (ZA.07.023).

⁶¹ Neutral citation: *Adelaide Clinic Holdings P/L v Minister for Waters* [1988] SASC 433 pp.10-11.

122 In *The Minister v Matford Nominees* [1973] NSWLR 58, Else-Mitchell J said the following at 59 to 60:

A long line of decisions of this Court [the former Land and Valuation Court of NSW] and of the High Court of Australia ... establishes that the value of land at any point of time will reflect its potentiality for the best and highest or most profitable use to which it can be put. This potentiality will arise before actual development or redevelopment is undertaken and, in the case of *en globo* lands or broad acres, must not be regarded as non-existent until approval for development or redevelopment has in fact been granted.⁶²

123 The “*highest and best use*” of the land is as a mine: see the evidence of Mr Preston at T1128-1129 (CB ZA.07.021)⁶³. As we have submitted above, if the hypothetical freehold estate includes minerals, then both Mr Preston and Mr Hall agreed it was appropriate to account for the minerals when valuing the land.⁶⁴ This evidence is consistent with valuing the land on the basis that the highest and best use is mining. On the other hand, if the hypothetical freehold estate does not include minerals, then Mr Preston’s evidence was that the highest and best use is rural or pastoral land use.⁶⁵ The Court should not accept Mr Preston’s evidence on this point.

124 The Applicant does not rely on the evidence of Mr Meaton or Mr Miles to establish the highest and best use of the hypothetical freehold estate in land covered by the FMG tenements. Rather, our submissions are directed at why Mr Preston’s evidence on this point should not be accepted.

125 In his expert report Mr Preston describes his valuation methodology as a direct comparison approach, which involves “...considering comparable sales transaction evidence of like use land on a unit rate basis and applying this evidence to establish a market value for the subject property”.⁶⁶ He says that his valuation “...fundamentally assumes the adoption of the highest and best legally permissible, physically possible and financially feasible use” and that in his opinion this use is rural or pastoral use.⁶⁷ Mr Preston goes on to perform his valuation based on sales transactions of pastoral leases in the Pilbara, from which he derives a range of freehold values on a per hectare basis.

126 Mr Preston addresses highest and best use in part 5 of his expert report under the heading zoning. Maps in this part of the report show clearly that the FMG tenement areas are on land zoned rural within the Shire of Ashburton’s Town Planning Scheme No. 7. By reference to the scheme Mr Preston records that “extractive industries” is a permitted land use for land zoned rural. He then extracts a zoning table from the scheme that sets out whether uses are permitted or not permitted unless discretionary planning approval is given or not permitted by the scheme. The table indicates that for land zoned rural “agriculture” is a permitted use and “industry extractive” is discretionary. Mr Preston says “[from] a town planning perspective, the use of land as rural represents the highest and best legally permissible use”. He gives brief reasons in support of this view. He refers to the remote location of the land, the zoning and existing pastoral use in the vicinity in support of it. There is no discussion as to why “industry extractive” is not the highest and best use of the land.

⁶² Also see *Goode v Valuer-General* (1979) 22 SASR 247 per Wells J at 256.

⁶³ See also GP (E.05.002) at [459] and Table 4.2 on pp.86-87.

⁶⁴ See Mr Preston at T1125.42-T1126.2 (ZA.07.021) and Mr Hall at T1125.10-28 (ZA.07.021).

⁶⁵ GP (E.05.002) at 8.02.03 [573].

⁶⁶ GP (E.05.002) at 8.02.01 [562].

⁶⁷ GP (E.05.002) at 8.02.03 [571].

- 127 Mr Preston was cross examined about highest and best use, he:
- (a) agreed that a land valuation reflects the potential for the highest and best use of the land;
 - (b) explained that highest and best use refers to a use that is legally permissible, physically possible and financially feasible;
 - (c) confirmed that he selected “rural” as representing the highest and best use in his valuation by reference to the Shire of Ashburton zoning table;
 - (d) accepted that “industry extractive” (or mining) is a discretionary use recorded in the zoning table;
 - (e) when asked whether mining was a permissible use, said “[it] is not a fait accompli” because it is indicated in the zoning table as discretionary; and
 - (f) accepted that “looking back” it can be said that mining is a legally permissible use but did not accept that means mining is the highest and best use for the valuation he was asked to do – because he asked to assume there were no rights or interests in minerals.⁶⁸
- 128 As in his expert report, Mr Preston did not elaborate in his oral evidence why the highest and best use could not be mining. An explanation was called for in circumstances where the town planning scheme contemplates mining as a land use on land zoned rural. It can be distinguished from land uses expressly “not permitted” under the scheme.
- 129 While he was not cross examined on all points there are three additional reasons for not accepting Mr Preston’s evidence about the highest and best use of the land.
- 130 Firstly, in part 5 of his report Mr Preston includes a map showing pastoral lease boundaries and the compensation claim area (Mr Preston refers to it as the native title claim area) and observes “[as] can be seen, the subject mining tenements within the claim area are largely within the Hooley, Mulga Downs, Mount Florance and Coolawanyah pastoral lease boundaries”.⁶⁹ This is factually incorrect. Comprised of one area, about 50% of the FMG tenements overlap pastoral leases. The remainder of this composite area overlaps UCL. Importantly, almost all the SHP is located on UCL. Together with the fact that mining is clearly the current use of the land, the true factual position called for an explanation from Mr Preston as to why he did not select it as the highest and best use for the land.
- 131 Secondly, Mr Preston did not consider the highest and best use of the land from the perspective of a holder of the freehold estate in the land. The holder of this estate would hold a fuller or more extensive interest in the land compared to a pastoral lease holder.⁷⁰ The zoning table from the Shire of Ashburton Town Planning Scheme No. 7 in part 5 of Mr Preston’s expert report indicates a wide range of discretionary non-pastoral uses for land zoned rural. These include a range of residential, industrial and commercial uses. Mr Hall gave evidence about the potential to use the surface of the land in connection with mining.⁷¹ Mr Preston did not consider any of these potential uses in the context of selecting the highest and best use of the hypothetical freehold estate for this valuation.

⁶⁸ T1128.001-T1129.19 (ZA.07.021).

⁶⁹ GP (E.05.002) at 5.03.

⁷⁰ See *Western Australia v Ward* [2002] HCA 28 at [170]-[187].

⁷¹ T1310 (ZA.07.023) and 1428 (ZA.07.024).

- 132 Thirdly, Mr Preston did not consider any natural or heritage values of a hypothetical freehold estate in the land in the context of considering highest and best use (or his valuation more generally). Prior to the grants of the FMG tenements the land was a largely intact natural and cultural landscape. For the reasons given in the Jagot J Article the value of such a landscape to the State and the nation is something that can appropriately be considered in the context of determining economic loss (and, by the same reasoning, the value of a hypothetical freehold estate in the landscape). This intangible natural and heritage value can be seen in the responses to the destruction of Juukan Gorge, not that far from SHP.⁷² It can also be appreciated by considering Mr Preston's freehold valuation of *Bangkangarra*. *Bangkangarra* is covered by E17/1334. Mr Preston's freehold valuation for that exploration licence is \$7.84 per hectare.⁷³ It is difficult to reconcile such a nominal value (compared to the mining taking place nearby) when regard is had to *Bangkangarra*'s obvious scientific, natural and cultural values. The Court heard evidence from Professor Veth at the rock shelter that has yielded archaeological information of considerable value. Among other things it indicates continuous human use of the area for tens of thousands of years. This aspect of the rock shelter was brought alive by the presence of Yindjibarndi people at this evidence and their singing to country. The rock shelter is proximate to *Bangkangarra* spring and the rock paintings there. Again, the Yindjibarndi gave group evidence where they demonstrated their ongoing spiritual connection to this place. The scientific, natural and cultural values of *Bangkangarra* together form something of substantial value not just for Yindjibarndi people but for all of us. It should rightly be considered a part of State and National heritage. That value alone makes it hard to accept that *Bangkangarra* is worth \$7.40 per hectare. Similarly, it is that value alone that makes it hard to accept that hypothetical freehold estate in the land covered by the FMG tenements is worth around \$800,000⁷⁴ – less than the median price of a house in Perth.
- 133 A final point about Mr Preston's selection of rural or pastoral use as the highest and best use for the hypothetical freehold estate of the land is that it underpins the valuation that follows. That is an obvious point to make but it is material for this reason – Mr Preston's valuation is based on sales of pastoral leases and includes calculations to produce freehold values as opposed to pastoral lease values. This is theoretical and artificial. It is not based on comparable sales of freehold land because outside of the towns in the Pilbara there is no freehold land. It necessarily embodies all the comparative limitations of pastoral leases compared to freehold. It does not contemplate non-economic attributes of the land that otherwise contribute to its economic value (this is the point in the previous paragraph). In short, Mr Preston has used a conventional valuation methodology in a novel scenario and it is not appropriate. The Court should not accept his valuation.
- 134 We now turn to consider the value of the hypothetical freehold estate in the land in the two scenarios identified above.
- 135 The first scenario is a compulsory acquisition of a hypothetical freehold estate in the land including the minerals. For the reasons set in this part of the submissions, in this scenario, when valuing this estate it is necessary to account for the minerals. The Applicant submits that an appropriate valuation methodology in this scenario is to equate the value of the hypothetical freehold estate with the total rents and royalties paid to the State over the life of SHP.

⁷² Juukan Gorge is located in the Hamersley Range: VB2 (G.01.004) at [5].

⁷³ GP (E.05.002) at p.10.

⁷⁴ GP (E.05.002) at [847].

136 As Leeming JA, with whom Preston CJ of LEC agreed, said in *Valuer-General v Perilya Broken Hill Ltd* [2013] NSWCA 265 (*Perilya (2013)*) at [34]:

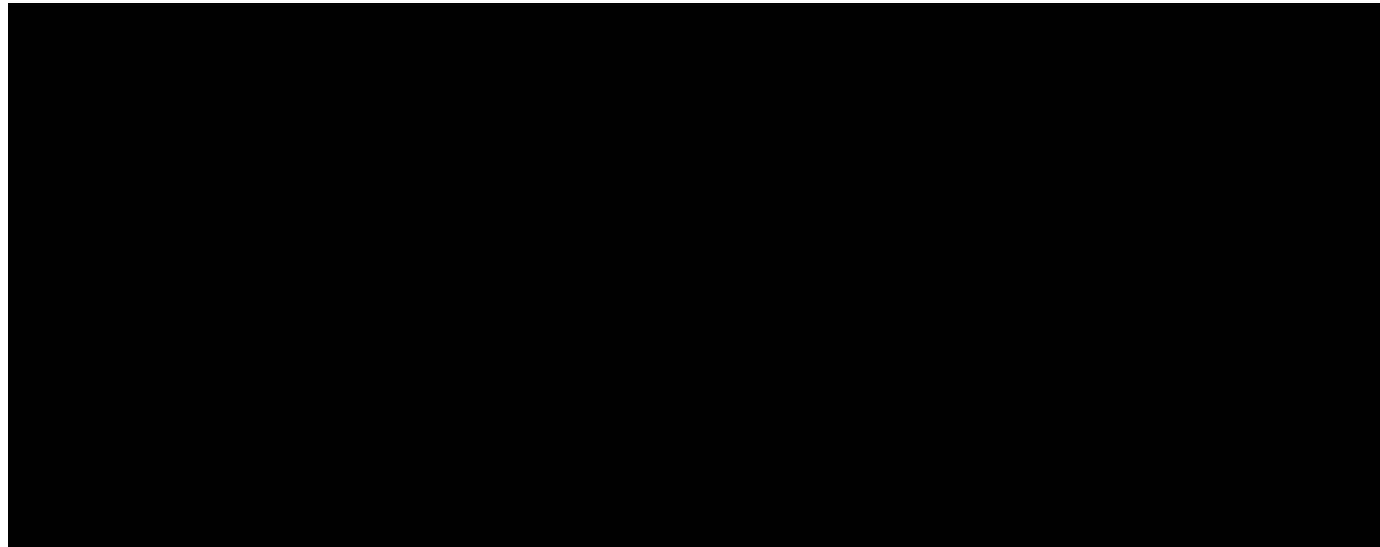
There is no *a priori* correct way to determine the 'land value'. One traditional approach to valuation involves seeking out relatively contemporaneous sales of comparable properties: cf *Maurici v Chief Commissioner of State Revenue* (2003) 212 CLR 111 at [16]. However, that approach is regularly not available in the case of land whose highest and best use is a mine⁷⁵. There are typically no comparables. For many years, it has been traditional for such land to be valued by reference to the present value of the cashflow that the mine would generate.

137 In *Perilya (2013)*, Leeming JA said that in valuing the hypothetical fee simple estate in the land where its highest and best use is as a mine, it would be an error not to have regard to the fact that the *Mining Act 1992* (NSW) states that if the Minister receives royalties paid in respect of privately owned mines, the Minister must pay 7/8^{ths} of the amount to the owner of the mineral: ss.284(2) and (2A).⁷⁶

138 [REDACTED]

⁷⁵ In *Perilya (2013)*, this was the highest and best use of the land in question: [13] per Leeming JA.
⁷⁶ *Perilya (2013)* at [13], [14], [33], [39], [73] and [74].

⁷⁷ [REDACTED]
⁷⁸ [REDACTED]
⁷⁹ SOAF F.01.001 [13].



139 [REDACTED]

140 In relation to rents received, Mr Vielhaur's evidence calculated total rents received across the SHP and did not break down those rents in accordance with the proportion of the FMG tenements which fall within the CAA⁸¹. Mr Vielhauer has calculated the total amount of rent received by the State in relation to the SHP to 29 September 2022 as \$14,945,000⁸².

141 The Applicant has calculated that consistent with the percentage of FMG tenements which fall within the CAA, the State has received \$6,319,697.79 in rents. This significant reduction is to account for L 1SA (a miscellaneous licence) which accounts for 47% of the total rent payments.⁸³ In accordance with the SOAF⁸⁴, only 5% of L1SA falls within the CAA.

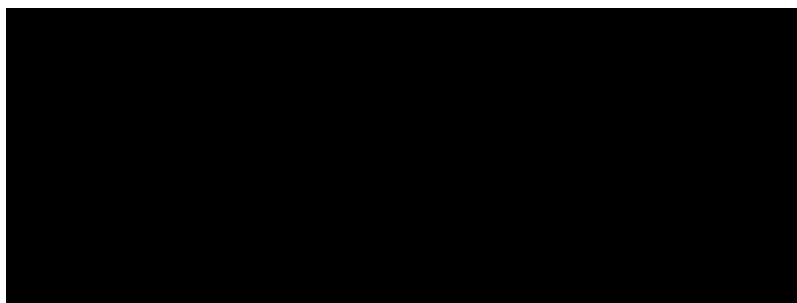
142 The Applicant has calculated forecast rents owed to the State as follows:

- (a) it has taken, as a benchmark, the most recent payment received in respect of each of the tenements, except for those tenements which have lapsed;
- (b) calculated the percentage that each of those tenements overlap with the CAA with reference to the SOAF and applied that percentage to the most recent payments;
- (c) tallied up the totals at [142(b)]; and
- (d) multiplied the total at c) (being \$767,678.12) by 21.75 (being the years since the most recent rental payments received, September 2022).

The Applicant accordingly estimates a total of \$16,696,999.10 in forecast rent.

143 [REDACTED]

⁸⁰ Applying the discount methodology employed by Mr Meaton and Mr Jaski, being 12.24% (per [23] of the Meaton Jaski Joint Report (G.01.001) and the forecast pricing in the Office of the Chief Economist's March 2024 report).
⁸¹ See Affidavit of Peter Vielhauer dated 29 September 2023, E.01.005 (PV) at [32].
⁸² PV (E.01.005) [33].
⁸³ Ibid.
⁸⁴ At [218].



144 Accordingly, under this first scenario the Applicant submits that the hypothetical freehold value of the land the subject of the SHP in the CAA is 9/10ths the total in the table at [143] above, being **\$4,531,265,898**.

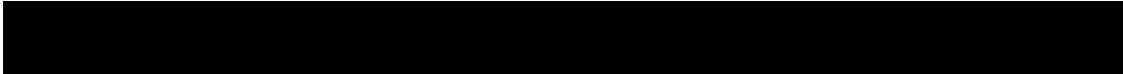
145 The second scenario is a compulsory acquisition of a freehold estate in the land not including minerals. This is the scenario that Mr Preston was asked to value.

146 Mr Preston's valuation hinges on his selection of rural or pastoral land use as the highest and best use for a hypothetical freehold estate. For the reasons set out above, the Court should not accept Mr Preston's evidence on this point and it should not accept his valuation.

147 The Applicant submits that compensation for a compulsory acquisition of a hypothetical freehold estate in this second scenario should include:

- (a) the market value of the estate (not necessarily determined on the basis that the highest and best use of the land is rural or pastoral);
- (b) a component for the special value of the land to the Yindjibarndi people, being the negotiation or exchange value of the NTRI; and
- (c) to the extent that it is not accounted for in market value, a component for the scientific, natural and cultural values of the land that are a part of the State's and the National heritage.

148 Putting aside the market value of the hypothetical freehold estate the Applicant submits the special value is:

- (a) 
- (b) **\$34,850,000⁸⁶**, being the Applicant's estimate of the State and National value of the cultural heritage in the land the subject of the SHP within the CAA.

149 Irrespective of the market value of the hypothetical freehold estate in the land this methodology produces a valuation in excess of the amount that the Applicant is claiming for economic loss under its Heads of Compensation 1-2⁸⁷ being **\$678,088,000**.

150 Finally, the Applicant submits that if a compulsory acquisition of a hypothetical freehold estate in the land is determined to be less than the amount claimed by the Applicant for economic loss under its Heads of Compensation 1-2 then s.53(1) NTA is engaged.

⁸⁵ Including the interest claimed at Section G of these submissions below at [624].

⁸⁶ See [195] below.

⁸⁷ Note the Applicant claims additional economic loss under its Compensation Heads 3-4.

COMPENSATION FOR ECONOMIC LOSS [ISSUE 7]

- 151 See Applicant's Opening Submissions at [92]-[100]; see also [107]-[138] above.
- 152 Native title cannot be extinguished or impaired to a point short of extinguishment, without just compensation.⁸⁸ Compensation for economic loss requires assessment of the sum that might fairly and justly have been demanded by the Yindjibarndi people for their assent to the infringement of their NTRI by the compensable acts.⁸⁹
- 153 In *Fejo v Northern Territory of Australia* (1998) 195 CLR 96 at [25], [33], the High Court said that the right to negotiate under the NTA is a “valuable right” and one that can be protected by injunctive proceedings. The fact that s.33(1) of the NTA expressly provides that those negotiations may include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to the amount of profits made, or any income derived or anything produced by the grantee party as a result of doing anything in relation to the land or waters concerned after the future act is done, is a strong indicator of the nature of the compensation which is envisaged if the relevant future act is the grant of a mining tenement.
- 154 In *Warrie (No.1)* at [136], Rares J said that, “*The presence of a large mine not only has a physical impact on the shared land and waters of an indigenous society that is unlike the kind of activities that their traditional laws and customs ever contemplated, but it also promises that community the potential for financial rewards that can relate the indigenous people to their co-extensive presence as a part of the broader, modern Australian society.*” In this case, the reasonable expectation that it would bring with it potential for financial rewards has not been realised. The financial rewards – and they are significant – have been derived solely by the FMG Respondents and by the State.
- 155 As Mansfield J said in *Griffiths v Northern Territory of Australia (No.3)* [2016] FCA 900 (*Griffiths (No.3)*) at [117], the NTA does not expressly provide for the date upon which the entitlement to compensation arises, or the date at which the value of the interest being “*acquired or extinguished*” (in this case suspended) is to be considered. In that case, where native title had been extinguished by previous exclusive possession acts, it was appropriate to calculate the economic loss as at the date when all NTRI were extinguished.
- 156 Here, however, the Court is not dealing with a situation where the NTRI have been extinguished on a particular date or dates, rather the native title rights and interest have continued to exist but have yielded and must continue to yield to, the rights and interests of the FMG Respondents. This is a situation contemplated by s.44H of the NTA where the compensable acts consist of the grants of various leases, licenses, permits and authorities. As Note 1 to s.44H states, the compensation to which the native title holders may be entitled for the grants, may take into account the doing of activities under the grants, in this case, extensive and destructive mining and mining-related activities which have produced substantial profits and income for the FMG Respondents and the State.
- 157 Any assessment of what would be “*fair and reasonable*” compensation for those grants would need to take account of both the effect which the grants and the activities carried out pursuant to the grants have had and will continue to have on the NTRI and on the native title holders,

⁸⁸ *Griffiths* HC at [75].

⁸⁹ *Griffiths* HC at [84]-[85].

and of the income and profits that have been gained and will continue to be gained-by the FMG Respondents and by the State. It would take account of what other miners have paid to native title holders to obtain their assent to mining on their land and what the State would be obliged to pay under s.38 of the *Mining Act*, if the minerals were privately owned. The Applicant claims 6 heads of compensation that fall within the category of economic loss⁹⁰ and sets out its claim to economic loss under each of those heads below.

Economic Value of NTRI – Heads of Compensation 1-2

- 158 An essential element of the Applicant's case is that the Yindjibarndi people's NTRI have a significant value in negotiation or exchange when what is being facilitated with the consent and support of the Yindjibarndi people is a large-scale, greenfield iron ore mining project. This value in negotiation or exchange is the real economic value of the NTRI in the circumstances of this case. And it is appropriate that this economic value form the compensation (or part of the compensation) for economic loss.
- 159 The relevant circumstances include that the Pilbara is a mineral-rich region and large-scale iron ore mining is one of the main land uses in the region. The value of NTRI in negotiation or exchange in the Pilbara is amply demonstrated by Mr Meaton's expert evidence and the extracts of iron ore agreements in evidence. Depending on the valuation methodology used, the negotiation or exchange value is potentially much greater than the freehold value of land covered by a mining project in the Pilbara. Certainly, the value to the Yindjibarndi people of an agreement with FMG calculated by reference to common or industry practice is orders of magnitude higher than the freehold value of the land covered by the FMG tenements advanced by Mr Preston.
- 160 Conceptually, the Applicant submits that the economic value in negotiation or exchange is similar to the "...value of the native title holder's capacity voluntarily to surrender [native title] in order to facilitate the grant to someone else of a form of ordinary title which would allow the land to be put to its highest and best use" described by Gageler J in *Griffiths* HC (as his Honour then was). The differences in this case are that it involves a native title holder's capacity to voluntarily assent to the suppression of native title for a very long period to facilitate the grant of mining tenements which would allow the land to be put to its highest and best economic use. These differences do not mean the economic value described by Gageler J is inapplicable. The context is different but the essence of the value is the same.
- 161 The Applicant submits that the negotiation or exchange value of the Yindjibarndi people's NTRI is the most appropriate starting point for determining economic loss in this case. This value can be accommodated within the adapted *Spencer* test described by the plurality in *Griffiths* HC at [84]. The Applicant accepts that this approach to economic value is different to the approach taken to the particular facts in *Griffiths* HC. In that case (and at trial and on appeal to the Full Court) the starting point was the freehold value of the relevant parcels of land at Timber Creek. The economic value of the NTRI was determined by reference to freehold value. There was little discussion about the economic value of NTRI in that litigation. In the following paragraphs we develop this submission.
- 162 The Applicant acknowledges that the economic value of exclusive native title will ordinarily be equated with the freehold value of the land in relation to which the native title exists.

⁹⁰ Applicant's List of Heads of Compensation (**LHC**) (A.02.014).

- 163 This is not a case where the economic value of the Yindjibarndi people's exclusive native title *necessarily* equates with the freehold value of the land in relation to which the right exists. Whether it does, depends on the freehold value of the land and whether this value reflects the highest and best economic use of mining.
- 164 The Applicant appreciates that s.51A NTA may be relevant here. Assuming the section applies to suppression of native title as opposed to extinguishment, its potential relevance depends on the value of the compulsory acquisition of the hypothetical freehold estate in the relevant land. The potential relevance is illustrated by the Applicant's and FMG Respondents' respective cases. On the Applicant's case the economic loss is the negotiation or exchange value of the Yindjibarndi people's NTRI, being generally 1% of FOB mining revenues. On the other hand, FMG's case is that the freehold value of the land covered by the FMG tenements is a little over \$800,000, and that this sets the cap on compensation for economic loss. We return to s.51A NTA in the next section of these submissions. The purpose of this part is to demonstrate that the real economic value of the Yindjibarndi people's NTRI lies in their negotiation or exchange value and this is something that should appropriately be accounted for when determining economic loss.
- 165 *Griffiths* HC was in the ordinary category of case contemplated by the plurality and Gageler J in their reasons. In the circumstances of that case it can readily be accepted that the economic value of a native title right to exclusive possession of land equated with the freehold value of the land in relation to which the right exists. There was no apparent negotiation or exchange value in that case with the potential to be greater than the freehold value.
- 166 A notable feature of *Griffiths* HC (and the preceding appeal and first instance decision) is the absence of significant consideration of the economic value of the relevant NTRI. At trial, the Applicant did not seek to establish the economic value of the relevant NTRI. Instead, it claimed economic loss for the freehold value of the relevant lots of land in Timber Creek as a proxy for economic value. The Commonwealth agreed that economic loss should be determined by reference to freehold value but contended that the value of non-exclusive NTRI should be valued at 50% of freehold value to reflect their comparative limitations. Whether and to what extent the freehold value should be reduced for this reason was one of the main issues in the case and on appeal.
- 167 By contrast, the Northern Territory sought to establish the economic value of the relevant NTRI. The Territory called expert evidence from Mr Wayne Lonergan in support of its approach. Mr Lonergan is the co-author of an economic report (with Martin Hall) relied on by the FMG Respondents in this case⁹¹. Relevantly, Mr Lonergan advanced a conceptual model of economic value comprising two components – usage value and negotiation value. Conceptually, Gageler J described Mr Lonergan's usage value as “the value, if any, of the commercial exploitation of the native title right in perpetuity”.⁹² We have set out above at [160] how his Honour described by Mr Lonergan's negotiation value. Ultimately, Mansfield J at first instance, the Full Court on appeal and the plurality in *Griffiths* HC rejected Mr Lonergan's approach.
- 168 As to the economic value of the relevant NTRI in the *Griffiths* cases, Mansfield J decided the case on the basis that the value of exclusive native title was equivalent to the value of freehold.

⁹¹ Martin Hall and Wayne Lonergan, *Amended Economics Report* E.04.005 (HL).

⁹² *Griffiths* HC at [243].

His Honour relied on the High Court decision in *Geita Sebea v Territory of Papua* (1941) 67 CLR 544 in support of this premise rather than an analysis of economic value in conventional economic terms. Similarly, the Full Court in carrying out its own assessment of economic loss said, “[the] starting point is an analogy of freehold with exclusive native title”.⁹³ Again, this statement was not accompanied by any discussion of economic value in conventional economic terms.

169 Likewise in *Griffiths* HC; in summary answer to the question “how the objective economic value of the affected native title rights and interests is to be ascertained” at [3] the plurality said:

... the objective economic value of exclusive native title rights to and interests in land, **in general**, equates to the objective economic value of an unencumbered freehold estate in that land. In these appeals, the objective economic value of the non-exclusive native title rights and interests of the Claim Group is 50 per cent of the freehold value of the land ...(emphasis added)

170 Some of the plurality’s reasoning is in its discussion of the legislative framework, particularly s. 51A NTA from [50]-[54]. For example, in the context of sounding a warning about the use of concepts like solatium in compensation under the NTA the plurality said:

The label “solatium” is also distracting in another way. What the *Native Title Act* requires to be compensated is the cultural loss arising on and from the extinguishment of native title rights and interests. Given that the *Native Title Act* is a Commonwealth Act which, under Div 5, equates native title rights and interests to freehold for the purposes of dealing with native title, and is intended to provide compensation for the extinguishment of those rights and interests on just terms to all native title holders affected by a compensable act, *ss 51 and 51A are to be read as providing that the compensation payable to the native title holders is to be measured by reference to, and capped at, the freehold value of the land together with compensation for cultural loss*. Principles or criteria set out in a compulsory acquisition law for the Commonwealth, or for the State or Territory to which the compensable act is attributable, may be of assistance but they are not determinative of the issues arising under s 51(1). (our emphasis added).

171 The italicised sentence in this extract is perhaps the strongest statement in this part of the reasons requiring that economic loss is to be determined by reference to freehold value. There are other similarly worded statements throughout the reasons.⁹⁴ It is clear the plurality considered that this approach would be appropriate in most cases. However, the plurality was careful to leave the door open for other approaches in appropriate circumstances. There is the “in general” qualification in paragraph [3] extracted above, which is repeated elsewhere. In explaining why the Full Court was right to avoid a “holistic approach” in determining compensation, the plurality explained:

There may be exceptions, but ordinarily the only way of achieving the degree of precision envisaged by s 51A of the Native Title Act – which, as has been seen, stipulates that the total compensation payable for an act which extinguishes native title must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters – is by the determination of economic value according to established precepts for the valuation of interests in land.⁹⁵

⁹³ *Griffiths* FC at [134].

⁹⁴ There is a similarly worded statement at *Griffiths* HC at [90].

⁹⁵ *Griffiths* HC at [86].

172 In acknowledging there is a degree of artificiality in applying an adapted *Spencer* test the plurality said:

But, at the same time, the native title rights and interests unquestionably existed and they had a recognisable economic worth which lay in the sum that might fairly and justly have been demanded for their lawful extinction in favour of the Crown⁹⁶.

173 This is one of their few statements in which they described economic value in conventional economic terms. It is relevant because the description contemplates the possibility of economic value other than by reference to freehold value.

174 At [84], the plurality set out its statement of an adapted *Spencer* test to determine economic loss. Importantly, the test is not expressed by reference to land. Rather, it is expressed as “*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 Claim Group could fairly and justly have demanded for their assent to the infringement*”. This description also contemplates the possibility of economic value other than by reference to freehold value.

175 The Applicant submits that its notion of the real economic value of the Yindjibarndi’s NTRI lying in their negotiation or exchange value can be accommodated within the adapted *Spencer* test described in *Griffiths* HC at [84].

176 The economic value of the NTRI in the circumstances is the amount that a reasonable miner would pay to obtain a native title party’s assent to the suppression of their native title for the life of a mine. This amount can be determined by reference to the many agreements between iron ore miners and native title parties in the Pilbara, which establish that there are common or industry standards for the payment of financial benefits to native title parties in exchange for their consent and support for a mining project.

177 The Applicant submits that there is a common or industry standard for iron ore miners in the Pilbara to pay native title parties 0.5% and above, of FOB revenue as part of a package of benefits. This is established by Mr Meaton’s evidence⁹⁷ and the several extracts of agreements in evidence⁹⁸. The Applicant relies on the MJ RC Report to establish the value of 0.5%, 0.55% and 1% FOB revenue for FMG’s actual and forecast revenues for mining within the CAA.

178 The Applicant submits that the amount calculated using 0.5% is the starting point for the application of the adapted *Spencer* test, which needs to be adjusted having regard to the circumstances of this case. A relevant circumstance is that the Yindjibarndi people hold exclusive native title over a substantial part of the SHP. Another circumstance is that the Yindjibarndi people do not have an agreement with the miner which provides other financial benefits over and above royalties and which protects their cultural heritage and their right to be consulted about activities on their land. For this reason, the Applicant submits that it is

⁹⁶ *Griffiths* HC at [85].

⁹⁷ M Meaton, *Mining Economist report* filed 22 March 2023, E.03.002 (MM) at [33]. See also evidence of FMG Respondent’s expert Campbell Jaski: T1334-1335 (ZA.07.023).

⁹⁸ [REDACTED]

appropriate that the percentage amount be increased to 1% so that the amount of economic loss is the 1% amount calculated by Meaton and Jaski.

179 If the State is liable to pay compensation, then the Applicant submits that the same approach is appropriate.

180 In the final part of our submissions in this section we address the relevant expert evidence.

The Evidence of Hall and Lonergan

181 Mr Hall and Mr Lonergan were the only experts to engage in a detailed analysis of the economic value of the Yindjibarndi people's NTRI in conventional economic terms.

182 A summary of their conceptual economic model⁹⁹ is as follows:

- (a) The focus of the model is on consequential economic loss i.e. but for the infringement what cash flows could the NTRIs have generated in perpetuity.
- (b) The but-for scenario in the model assumes there will never be impairment of the NTRIs.
- (c) Conventionally, to assess the consequential loss, projected cashflows generated from the NTRIs from the date of impairment are converted into present value using a discounted cashflow model and this is the value of the loss.
- (d) It is difficult to carry out this assessment of consequential loss for NTRIs.
- (e) In the absence of information about cashflows that have been or could be generated by the NTRIs it is appropriate to use the freehold value of the land as a "yard-stick" for the value of exclusive native title.
- (f) A notable feature of Hall and Lonergan's conceptual model in this case is that it does not advance two components of economic value as Mr Lonergan did in *Griffiths* HC – that is, a component for usage value and a component for negotiation value. Conceptually, Mr Hall and Mr Lonergan have confined their model to usage value.
- (g) Hall and Lonergan accepted Mr Preston's valuation of a hypothetical freehold estate in the land covered by the FMG tenements but did not use this to then determine economic loss according to their model.

183 Mr Hall maintained his focus on consequential economic loss in the experts' conferences and in his oral evidence. Mr Hall was emphatic in his oral evidence that in the "but-for" scenario in his and Mr Lonergan's model, there was no extinguishment of native title and hence no loss in perpetuity¹⁰⁰.

184 It was suggested to Mr Hall in cross examination that the grants of the FMG tenements to the Yindjibarndi people in the absence of an agreement between them and the FMG Respondents meant that they (the Yindjibarndi people) lost the chance to realise the negotiation or exchange value of their native title. Mr Hall did not agree and referred to the fact that the Yindjibarndi people did negotiate with FMG and did not reach agreement with them¹⁰¹.

185 The fact that the Yindjibarndi people and FMG negotiated but did not reach an agreement about the effects of the grants of the FMG tenements on the Yindjibarndi people's native title does not mean that their native title has no economic value in negotiation or exchange. What the

⁹⁹ Eg see HL PDF p6-9.

¹⁰⁰ T1163.18-23 (ZA.07.021).

¹⁰¹ T1172.43-T1174.27 (ZA.07.021).

NTA requires is an objective assessment of economic value. Assessed objectively, by reference to the evidence in this case, NTRI in the Pilbara clearly have substantial negotiation or exchange value. The point can also be illustrated by considering the test for economic loss advanced in the State's Amended Points of Response at [264]-[272].

186 In summary, the Applicant claims **\$678,088,000** (including compound interest) under its Heads of Compensation 1-2.

Head of Compensation 3 – Loss of damage to country and to ancient occupation, cultural and Dreaming sites and Dreaming tracks

187 The Applicant refers to, and relies on, the expert evidence of Dr Palmer, Professor Veth, Dr Bird and Mr Williams, and the evidence of its lay witnesses, summarised below at [516]-[548]. Dr Bird and Mr Williams agreed on the following statement in their joint report (G.01.005) (**Arch Joint Report**):

Within the Solomon Hub Project, 249 sites have been subject to s.18 consents under the Aboriginal Heritage Act 1972 (WA) and recorded to site identification level in accordance with the requirements of the s.18 process¹⁰². **The majority of these have been destroyed.** (emphasis added)

188 The Applicant submits that the total number of sites which have been damaged by or destroyed in the SHP is in excess of 285. The expert archaeologists are in agreement that more than 285 sites have been salvaged¹⁰³. "Salvage sites" is defined by the Applicant and FMG Respondents as "Aboriginal sites or heritage places that have been subject to archaeological or cultural salvage....The salvage process will involve removal and preservation of artefacts or other significant cultural material from the location."¹⁰⁴ Thus, the social and cultural value of these sites has been diminished and they have suffered a loss of integrity.¹⁰⁵

189 In addition to the 285 sites, Dr Palmer discusses the Dreamings which travel (led) through the area of the SHP in his *Amended Anthropologist Report* filed 14 December 2022 (E.03.001) (**KP1**) at [339]-[382]. Dr Palmer includes a map showing these Dreamings travelling the part of the Hamersley Ranges in which the SHP is situated. It is clear by reference to the site *Bangkangarra*, which is located on the Maps forming Exhibit G1, that the Dreaming tracks of the *Barnga* and *Barrimindi* have been destroyed¹⁰⁶. Details of other Dreaming tracks which have been impacted by the SHP are set out at [282]-[286]. There are six such Dreaming tracks.

190 The Applicant submits that the loss of these more than 285 sites, and the loss of these Dreaming tracks, is not "merely subjective"¹⁰⁷. The Applicant submits that this loss involves "an actual and objective loss experienced by all." This is supported by Mr Williams and Professor Veth's agreement that:

... the body of sites [within the SHP], collectively, **is regionally significant and is able to contribute to nationally important issues in the field of First Nations**

¹⁰² The Applicant invited the State and FMG Respondents to agree to this fact for the purpose of preparing the SOAF. They did not.

¹⁰³ Arch Joint Report (G.01.005) at [4].

¹⁰⁴ Statement of Agreed Facts (Maps) - Exhibit G2, CB A.06.002 (**ExG2**). Thus, the sites are no longer intact, by virtue of the removal of material.

¹⁰⁵ Dr Kingsley Palmer, *Amended Supplementary Anthropologist Report* filed 16 February 2024, E.03.006 (**KP2**) at [47].

¹⁰⁶ See eg. KP1 (E.03.001) [376]-[377].

¹⁰⁷ Jagot J Article, p.843.

archaeology and specifically the occupation of the arid zone of Australia.¹⁰⁸
 (emphasis added)

191 Whilst FMG has mostly acted under consents given pursuant to s.18(3)(a) of the *Aboriginal Heritage Act 1972* (WA) (**AHA**) and has not been prosecuted for any offence under s.17 of the AHA it is important to note that if a site is destroyed without consent,¹⁰⁹ then the WA Parliament has imposed penalties to discourage the destruction of sites by proponents. Under s.57(b) of the AHA, proven offences relating to the destruction of Aboriginal sites by a body corporate incur a penalty of \$50,000 for a first offence and \$100,000 for a second or subsequent offence and in any case, a daily penalty of \$1,000.

192 By contrast, under s.34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (**Sacred Sites Act**) a person shall not carry out work on or use a sacred site without an Authority Certificate or a Minister’s Certificate. The maximum penalty under s.34(1) is \$350,000. Recently, the High Court in *Aboriginal Areas Protection Authority v Director of National Parks* [2024] HCA 16 found that the Director of National Parks fell within the definition of a “person” contained in s.34(1) of the *Sacred Sites Act* and was liable for the destruction of a men’s site at Gunlom Falls.

193 The Applicant submits that the compensation for the economic loss suffered for the destruction of sites ought to be assessed on the amount of the penalty for the loss of sites, being a penalty to discourage body corporates from destroying sites. Applying the penalty system under the AHA, the Applicant says that it is entitled to at least:

- (a) \$50,000 for the destruction of the *Jinbi* referred to in the SOAF at [25]; and
- (b) \$100,000 for each of the 285 sites salvaged by the FMG Respondents and for a further 3 sites.¹¹⁰

194 In respect of the Dreaming tracks travelling through the SHP, the Applicant says that a penalty system more akin to the Northern Territory regime ought to apply. Given that Dreaming tracks are site complexes, the Applicant submits that it is entitled to at least \$1,000,000 each for the economic loss for each of those tracks.

195 In total under Heading 3 of its Heads of Compensation, the Applicant claims:

Item	Compensation	Total
Destruction of <i>jinbi</i>	\$50,000	\$50,000
Salvage, damage and/or destruction of 285 + 3 sites	\$100,000 x 288	\$28,800,000
Destruction of Dreaming tracks	6 x Dreaming tracks x \$1,000,000	\$6,000,000
	Total:	\$34,850,000

¹⁰⁸ Arch Joint Report (G.01.005) at [7].

¹⁰⁹ For example, see SOAF (A.02.015) [25] in which the parties agree that FMG disturbed a *jinbi*. Stanley Warrie gave evidence about this: Amended Witness Statement of Stanley Warrie filed 28 April 2023 (A.05.008) (**SWarrie**) at [20]-[21]. Note that FMG entered into an agreement with Yindjibarndi people following this incident that included an undertaking that FMG would pay a \$25,000 penalty for disturbing any Aboriginal heritage site either deemed significant by a Yindjibarndi heritage survey or classified as a site pursuant to s.5 of the AHA: see MW (A.05.022) p.222.

¹¹⁰ See below at [219(a)-(b)].

Head of Compensation 4 – Estimated cost of psychological and other services required to treat the social disruption/division and related psychological trauma within the Yindjibarndi community

196 The Applicant refers to the summary of Dr Nelson’s evidence later below. Whilst the Applicant makes submissions about the relevance of Dr Nelson’s evidence to its claim for “cultural loss” suffered by the Yindjibarndi people as a result of the social division created by the FMG Respondents’ actions, and the grant of the FMG tenements and activities on the SHP, it claims compensation for the economic loss suffered by the Yindjibarndi people for the funds required to address the following.

197 It is Dr Nelson’s opinion that the current division in the community is a real threat to the future of the Yindjibarndi as a united community.¹¹¹ Importantly, Dr Nelson has costed an intervention strategy at JN2, Attachment B, in order to bring the Yindjibarndi community together to deal with the legacy of mining on their country.¹¹² He has costed psychological intervention including administrative staff, psychologists, housing, travel and a healing centre at \$3.3 million plus GST, and \$1.735 million per year for ongoing costs.¹¹³ He considered that a bespoke mental health programme was important because his experience of regional centres meant that the services provided are haphazard, poorly serviced and ever changing. Further, they do not engender trust and should be community led facilities.¹¹⁴

198 In total then under this head of compensation, the Applicant claims:¹¹⁵

Phase/Work	Cost (ex. GST)	Total
First Phase	\$340,000 + \$460,000	\$800,000
Second Phase	\$340,000	\$340,000
Third Phase (fixed)	\$3.3M + \$3.3M	\$6,600,000
Third Phase (ongoing)	\$1.74M/year at 60 years ¹¹⁶	\$104,400,000
	TOTAL:	\$112,140,000

COMPENSATION FOR NON-ECONOMIC OR CULTURAL LOSS [ISSUES 3A, 4 AND 7]

Applicant’s Heads of Compensation 7-9

199 See Applicant’s Opening Submissions at [101]-[106].

200 As Mansfield J said in *Griffiths (No.3)* at [302], the process required for assessing non-economic or cultural loss, is a complex but essentially an intuitive one. His Honour went on to say at [318] that:

An evaluation of what are the relevant compensable intangible disadvantages, with a view to assessing an amount that is *fair and reasonable*, requires an appreciation of the relevant effects on the native title holders concerned, which, may include elements of

¹¹¹ Dr Jeffrey Nelson, Amended Psychologist Report filed 23 March 2023 (E.03.003) (JN1) at [53].
¹¹² Young people, like Wimiya Woodley, want compensation money to assist the community to feel empowered again and to bring the two factions together: Witness Statement of Wimiya Woodley dated 27 April 2023 (A.05.009) (WW) at [11].
¹¹³ Dr Jeffrey Nelson, Amended Supplementary Psychologist Report filed 16 February 2024 (E.03.007) (JN2) Attachment B [7]-[10].
¹¹⁴ T915.35-T916.25 (ZA.07.019).
¹¹⁵ See JN2 (E.03.007) pp.23-26.
¹¹⁶ Note Dr Nelson is of the opinion that this project would take generations rather than years to have an effect: JN2 (E.03.007)[58].

'loss of amenities' or 'pain and suffering' or reputational damage. In that respect, evidence about the relationship with country and the effect of acts on that will be paramount. (emphasis added)

- 201 In this case, as in the *Griffiths* case, the nature and the timing of the compensable acts has specific consequences for the assessment of compensation: *Griffiths* HC at [165]. The State has granted numerous Mining Leases and other mining tenements to FMG over the non-exclusive area since 2007. Collectively, those grants have enabled the development and the operation of FMG's hugely profitable SHP. The mining operations commenced in 2012 and the mine is expected to have an operational life until 2045¹¹⁷.
- 202 As was the case with the compensable acts in *Griffiths*, it is not appropriate to adopt a lot by lot or, in this case, a mining tenement by mining tenement approach to the assessment of compensation: *Griffiths* HC [165]; *Griffiths (No.3)* at [324]-[325]; see too s.49 NTA. It is not possible to establish the comparative significance of one grant over another; the effect of the grants has been incremental and cumulative and must be understood in terms of the pervasiveness of the Dreamings and the sites of significance: *Griffiths* HC [165], *Griffiths (No.3)* [324]-[325].
- 203 Again, as with *Griffiths*, an evaluation of the compensable effects of the grants of the FMG tenements on the NTRI requires an understanding of the relevant effects of the grants and of the mining activities carried out pursuant to those grants *on the claim group* and in that respect, evidence about their relationship with country and the effect of the acts on that relationship is paramount: *Griffiths* HC at [166].
- 204 The cultural loss here is no less because the grants of the FMG tenements have suppressed rather than extinguished the NTRI. In this case, the harm is irreparable. The scale and the gravity of the physical and cultural damage and destruction dwarfs the effects of the acts in *Griffiths*. The area of the compensable acts in *Griffiths* covered an area of 1.27 km² whereas the area covered here by that part of the mine footprint alone that falls within the CAA is more than 120.2km²¹¹⁸.
- 205 The significant harm to country, people and Dreamings remains ongoing. In this respect, mining operations commenced in 2012. The life of the mine is indefinite. The FMG Respondents have no fixed date for the closure of the mine but on current modelling, it is expected to have an operational life until 2045.¹¹⁹ The Mine Closure Plan states that following the mine's closure, rehabilitation activities are expected to take between 20 to 25 years to complete.¹²⁰ However, the land will never be restored. It will remain severely and permanently damaged with waste dumps and pits all over the land.¹²¹ There is no form of remediation that can restore the broken relationship that the Yindjibarndi people had with their religiously ordained country.¹²² The cultural loss and suffering is significantly greater than would have been the case if the FMG Respondents and the State had first obtained the agreement of the Yindjibarndi people to the grant of the FMG tenements and the development of the SHP.

¹¹⁷ SOAF (A.02.015) [20] and [30].

¹¹⁸ Being the size of the mining leases underpinning most of the SHP falling within the CAA – per SOAF (A.02.015) at [176], [180], [182], [184], [186], [188], [190], [192], [194], [196], [198], [200], [206], [208].

¹¹⁹ SOAF (A.02.015) [20].

¹²⁰ Extracts from Mine Closure Plan (D.01.002) PDF p. 5.

¹²¹ T1328.35 (Meaton), T1349 (Meaton and Jaski) and T1350-51 (Jaski) (ZA.07.023).

¹²² See Dr Palmer's evidence at T839 and see too T812-815 (ZA.07.018).

206 The Applicant relies on the evidence of anthropologist Dr Palmer¹²³, the Applicant's lay witnesses' evidence, s 86 material, other documentary material in the Court Book and the Applicant's other expert evidence that includes the psychology reports of Dr Jeffery Nelson.¹²⁴

AGREED FACTS AND S.86 EVIDENCE [ISSUES 3A, 4 AND 7]

207 The parties contend the Court ought to adopt the findings and evidence in the joint list at A.09.001.

Section 86 Material Relevant to Applicant's Claim for cultural or non-economic loss

208 The Applicant submits that the following s 86 materials supports its submissions on cultural loss set out below at [225] and following.

209 In *FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi people/ Western Australia*, [2009] NNTTA 91 (13 August 2009) (*FMG v Yindjibarndi [2009] NNTTA 91*) by National Native Title Tribunal (NNTT) Member O'Dea made the following findings at [59]:

Yindjibarndi people collecting *Gandi* stones from M47/1413¹²⁵ at [67]; and

ochre sites located on M 47/1409¹²⁶ utilised by Yindjibarndi people for the purpose of the *Maliya Thalu* ceremony at [73]-[74].

210 Member O'Dea made a finding that these ochre sites were likely to be interfered with, and/or that the Yindjibarndi people would be denied access to them and that this would:

Have a particularly injurious effect on the native title party's capacity to continue to practice its traditional laws and customs and religious obligations¹²⁷.

211 Member O'Dea also annexed a map of these 4 sites, referred to as Yin09-05, Yin09-06, Yin09-11 and Yin09-15 to his reasons for his determination. The parties did not agree to this map forming part of the s 86 material. However, each of these sites is shown to have been salvaged in SNC-17 (G.02.001.01). Further, YIYN09-05, YIN09-06 and YIN09-15 have been impacted 100% by physical disturbance over and above those salvaging activities¹²⁸.

212 In a later determination (that the grant of M 47/1409 can be done), Member O'Dea also referred to an important Yindjibarndi site located in that tenement area at which the "Marrga fought" and that songs "relevant to the area" are sung by Yindjibarndi people.¹²⁹

213 Member Shurven later considered the significance of *Bangkangarra* in *FMG Pilbara Pty Ltd and Another v Yindjibarndi #1* [2014] NNTTA 79 (31 July 2014) (A.09.012) (*FMG v Yindjibarndi [2014] NNTTA 79*) when she was asked to determine the FMG Respondents' application to determine that M47/1473 and M47/1475 ought to be granted¹³⁰. Member

¹²³ KPI (E.03.001) and KP2 (E.03.006).

¹²⁴ JN1 (E.03.003) and JN2 (E.03.007).

¹²⁵ The mining lease the subject of this determination: see SOAF 185(e). This lease underpins the "Firetail North" pit on the SHP (Ex G; Agreed Map 2(b) (A.06.001.17) and see also Map 1 Enlargements 3 and 4 (A.06.001.03-4).

¹²⁶ Where the Trinity and Kings Mine Pits are located: (Ex G; Agreed Map 2(b) (A.06.001.17) and see also Map 1 Enlargements 1, 2 and 5 (A.06.001,2 and 5).

¹²⁷ At [79]. See also Applicant's submissions at [189] above and [296] and [608] below.

¹²⁸ See submissions below at [538]-[547].

¹²⁹ *FMG Pilbara Pty Ltd/ Wintawari Guruma Aboriginal Corporation/ Ned Cheedy and Others on behalf of the Yindjibarndi people/ Western Australia*, [2009] NNTTA 99 (27 August 2009) (A.09.009) (*FMG v Yindjibarndi [2009] NNTTA 99*) at [41] and [47].

¹³⁰ SOAF (A.02.015).

Shurven found that within the area of the tenement application, there were the following sites of particular significance to Yindjibarndi people:

- (a) A stone arrangement/grinding stone¹³¹;
- (b) *Gardiwirndanha Wurndu*, a site that was “created by the actions of the Marrga”¹³²;
- (c) *Manggurla Thalu*, a “men’s business site”¹³³;
- (d) *Wundu* (watercourse/spring in gorge);¹³⁴ and
- (e) *Ganjingarringunha Wundu*¹³⁵.

214 Other s 86 material the parties propose the Court adopts which are relevant to the Applicant’s claim to non-economic (or cultural loss) are set out in Rares J’s findings in *Warrie No 1*.

Section 86 Material relevant to Applicant’s Claim to non-economic (social disruption) loss

215 The s.86 material relevant to the Applicant’s claim for compensation for social disruption includes:

- (a) *NC (deceased) v State of Western Australia (No. 2)* [2013] FCA 70 (A.09.011.01-02) – which dealt with an application to replace the Applicant in Yindjibarndi #1;
- (b) *TJ (on behalf of the Yindjibarndi people) v State of Western Australia* [2015] FCA 818 (A.09.013) – which dealt with the failed attempt by Yindjibarndi people aligned with the Wirlu-Murra Yindjibarndi Aboriginal Corporation (WYAC) to replace the Applicant in Yindjibarndi #1 by way of a secret ballot conducted on 23 June 2015;
- (c) *Warrie No 1* (A.09.016.01) – in which Rares J made findings about the role FMG played with respect to establishing WYAC and the Todd family respondents and FMG (and WYAC)’s interest in the Todd respondents’ role in the litigation;¹³⁶ and
- (d) *Sandy v Yindjibarndi Aboriginal Corporation RNTBC (No 4)* [2018] WASC 124, (2018) 126 ACSR 370 (*Sandy (No. 4)*) – which sets out the history of the negotiations between YAC and FMG and the related development of WYAC and attempts by WYAC aligned Yindjibarndi people to “take over” YAC at [133]-[189].

¹³¹ At [122].

¹³² At [125].

¹³³ At [133]. This is site 1473-34, also labelled site 120 in the *Warrie* proceedings and is shown on the Agreed Map 1 Enlargement 14 (A.06.001.14). This site is not listed in the FMG Respondent’s heritage database and has not been salvaged. However, it appears to be impacted by a road. See submissions in relation to the significance of *thalus* and the associated loss suffered by the Yindjibarndi people in relation to the impact of the SHP on these sites and the associated exercise of NTRI at [217]-[219] and [336]. See also *Warrie No 1* (A.09.016.01) at [59]

¹³⁴ At [135].

¹³⁵ At [136]. See also *Warrie No 1* (A.09.016.01) at [292]-[295].

¹³⁶ At [391], [393] and [395], his Honour found that FMG was providing financial support to WYAC and otherwise “has a very close relationship” with WYAC and has “an obvious and legitimate commercial interest in supporting both [WYAC] and the Todd respondents”. Rares J also refers to a finding he made in *TJ v Western Australia* (2015) 242 FCR 283 at [396], which was “that FMG had orchestrated, to a considerable degree, the convening of a meeting of the Yindjibarndi claim group and voting procedures in an attempt, under ss 251B and 66B of the [NTA], to replace the applicant with four directors and other members of [WYAC] and to authorise and direct the proposed replacement applicant to consent to a determination of native title in the proceeding.. with only non-exclusive native title rights and interests.” See also [505].

DOCUMENTARY EVIDENCE [ISSUES 3A, 4 AND 7]

216 The Applicant relies on a number of documents in the Court Book which have been tendered by the agreement of the parties and which have not already been referred to in these submissions. These documents include:

- (a) the (redacted) Affidavit of Philip Davies sworn 4 March 2014 (A.05.029) (**PD**);
- (b) the (redacted) Affidavit of Michael Woodley sworn 25 May 2009 (ZA.05.040) (**MW 2009**);
- (c) the (redacted) Affidavit Michael Woodley sworn 14 February 2011 (ZA.05.041) (**MW 2011**);
- (d) the Affidavit of Michael Woodley sworn 2 September 2015 (ZA.05.042)¹³⁷;
- (e) the Fourth Affidavit of Michael Woodley dated 18 November 2016 (CA.05.043) (**MW 2016**);
- (f) 3 x sets of minutes of WYAC meetings held on 14 June 2012, 7 August 2012 and 24 October 2012 (A.08.050.01-3);
- (g) a number of mining agreements (F.04.001-F.04.023); and
- (h) a number of invoices (and related documents) paid by and/or raised for FMG (H.03.5000, H.03.6.000, H.03.7.000, H.03.8.001-H.03.8.006, J.02.001-016).

Documents Relevant to Applicant's Claim for cultural or non-economic loss

217 The Applicant submits that the documents listed at [216(a)-(d)] are relevant to its claim for non-economic or cultural loss. These documents provide support for the Applicant's submission that a number of sites of significance to Yindjibarndi people have been destroyed and/or damaged by the SHP and that Yindjibarndi people have been prevented access to the SHP to conduct rituals and exercise their rights and interests. They provide support for the Applicant's submission that the grant of the FMG tenements and the conduct of activities on the SHP has resulted in the Yindjibarndi people experiencing a loss of spiritual connection with country¹³⁸ and have lost their rights and duties as owners of country¹³⁹.

218 As per Ex G2¹⁴⁰, PD includes information and a description of a number of sites recorded by Mr Davies on surveys with Yindjibarndi people in 2013 and 2014. They are the sites mapped as "Phil Davies 2014 Sites" in the Agreed Maps 1 and Enlargements 1-14 (Ex G1). Annexure 1 to PD lists and describes 17 sites, broadly categorised as:

- (a) ochre and *gandi* sources;
- (b) walled niches/caves;
- (c) stone arrangements;
- (d) religious narrative;
- (e) spring/permanent water course;

¹³⁷ This is Mr Woodley's affidavit filed in the *Warrie No 1* proceeding. It provides some of the evidentiary basis for Rares J's findings in that proceeding.

¹³⁸ Eg see [297] below.

¹³⁹ See [315]-[346].

¹⁴⁰ At [8].

- (f) scar tree;
- (g) *Thalu*; and
- (h) potential engravings.
- 219 These sites are shown on the maps forming Ex G1 at Enlargements 1 (A.06.001.01) and 14 (A.06.001.14). A review of these maps indicates:
- (a) as noted above at [213], site 1473-34 appears to now be on a road;
- (b) 1475-18 and 1475-19 have been destroyed and have not been salvaged. These sites were ochre sites (and rock shelters);
- (c) 1475-27 is included in SNC-17 (G.002.001.01) and has been salvaged as site YIN11-062. Map 1 Enlargement 14 and SNC-17 show this site has been destroyed. It was a stone arrangement and grinding stone. According to the WYAC members who participated in the heritage survey(s) for FMG however, the site had “no ethnographic values whatsoever” and no salvaging was necessary¹⁴¹; and
- (d) 1475-30 is recorded in FMG’s heritage database as YIN11-058. It is an ochre source and cave according to PD. It has been salvaged. Again, according to the WYAC members who participated in the heritage survey(s), the site has “no ethnographic values whatsoever”¹⁴².
- 220 MW 2009 provides the evidence relied upon by Member O’Dea in *FMG v Yindjibarndi* [2009] NNTTA 91 in finding that Yindjibarndi people collect *gandi* from M47/1413¹⁴³ at [3.11]-[3.12] and evidence about the protocols and beliefs associated with *manjangu* at [4.14]-[4.18]. It also refers¹⁴⁴ to:
- (a) the significance of *Ganjingarringunha wundu* and nearby *yamararra*; and
- (b) the *ganjingarringunha yaayu* (eastern creek of the *Ganjingarringunha wundu* – which has been destroyed¹⁴⁵), from which Yindjibarndi took *Gandi*.
- 221 MW 2011 provides evidence about the effect of M47/1431 on the *Garliwinji* area¹⁴⁶, the *Ganjingarringunha wundu*, the practice of taking *gandi* and *ochre* from these areas, and the effect of the SHP activities on Yindjibarndi beliefs and the exercise of Yindjibarndi rights and interests at [6.1]-[6.16] and [7.1]-[7.2].

Documents relevant to Applicant’s Claim to non-economic (social disruption) loss

- 222 MW 2016 is the fourth affidavit sworn by Michael Woodley filed in the *Sandy* proceedings. It sets out Mr Woodley’s evidence on who from FMG was in attendance at the 16 March 2011 meeting, the significance of which is addressed in the Applicant’s submissions on social disruption at [390]-[397]. Other documents relevant to the Applicant’s claim for compensation for social disruption include the 3 sets of minutes taken of WYAC Director meetings in 2012. These documents establish:

¹⁴¹ See Terra Rosa report at B.05.067 in Volume G, pp 54 and 234.

¹⁴² Ibid.

¹⁴³ See [209]-[210] above.

¹⁴⁴ At [5.6]-[5.10].

¹⁴⁵ T474.22-47 (A.07.009).

¹⁴⁶ See Rares J’s findings about the significance of this area for Yindjibarndi people in *Warrie (No. 1)* at [234]-[251], [260] and [289]-[291].

- (a) Michael Gallagher, consultant to WYAC, has been employed (and funded) by FMG¹⁴⁷;
- (b) Michael Gallagher himself was not sure as to who he was consulting to (FMG or WYAC)¹⁴⁸;
- (c) WYAC resolved to seek a guarantee from FMG employee Tom Weaver to fund Mr Gallagher's position with WYAC;¹⁴⁹ and
- (d) Michael Gallagher had an expectation that his rental accommodation at Point Samson would be paid for by WYAC. WYAC had an expectation that this rent would be paid for by FMG either directly or as a reimbursement to Mr Gallagher.¹⁵⁰

223 There are also a large number of invoices in the Court Book.¹⁵¹ The Applicant has made submissions about the relevance of these documents, and what they establish, below at [375], [397] and [399].

Documents relevant to Applicant's claim for economic loss

224 At [177] of these submissions, the Applicant says that there is a common or industry standard for iron ore miners in the Pilbara to pay native title parties a 0.5% and above royalty of the FOB revenue as part of a package of benefits. At F.04.001-F.04.023 of the Court Book, there are a number of mining agreements which the Applicant asserts support this submission. They include:

[REDACTED]

among others.

THE YINDJIBARNDI PEOPLE'S EVIDENCE AS TO THE IMPACT ON THEIR NATIVE TITLE RIGHTS AND INTERESTS [ISSUES 3A, 4 AND 7]

225 The lay evidence relating to cultural loss is extensive, harrowing and difficult to comprehend unless seen and heard firsthand. It is impossible to summarise that evidence within the word limit required. Hence, references are given throughout these submissions to the relevant source material. The evidence relevant to cultural loss has been grouped under the following five headings, which broadly correspond with chapter headings adopted by Dr Palmer in KP1:

¹⁴⁷ A.08.050.01 PDF p4; A.08.050.02 PDF 3.
¹⁴⁸ A.08.050.02 PDF 3.
¹⁴⁹ Ibid.
¹⁵⁰ A.08.050.03 PDF 4.
¹⁵¹ See [216(h)] above.

- (a) Yindjibarndi cosmology;
- (b) loss of culture, sites and heritage;
- (c) loss of spiritual connection;
- (d) loss of rights, interests and duties for country; and
- (e) loss arising from social disruption including group fragmentation and related trauma.

ANTHROPOLOGY EVIDENCE AS TO IMPACT ON YINDJIBARNDI PEOPLE'S NATIVE TITLE RIGHTS AND INTERESTS [ISSUES 3A, 4 AND 7]

226 Subject to certain rulings regarding KP1 and KP2, Dr Palmer's evidence was not challenged regarding his conclusions and opinions, or the fieldwork upon which these were based. No party called contradictory evidence. Dr Palmer was an impressive witness whose evidence should be accepted in its entirety.

Yindjibarndi Cosmology

227 In *Griffiths (No. 3)* Mansfield J (at [297]) in his introduction to the consideration of non-economic loss, referenced the remark of Professor Stanner in his 1968 Boyer Lectures that a non-Aboriginal way of thinking can leave us "*tongueless and earless towards this other world of meaning and significance*", a quote referred to elsewhere in native title case law including by Edelman J in *Griffiths HC* [251] where his Honour made reference to it in the context of the challenges involved in the valuation of "rights of immense cultural value" [252].

228 Those references underscore how a very different way of understanding and seeing the world can make certain dimensions of loss invisible to the untrained eye, in particular spiritual and religious dimensions.¹⁵² They also serve to demonstrate the important role that expert anthropological evidence has in proceedings such as these in helping the Court to understand the very different cultural and experiential framework within which the Yindjibarndi people's relationship to their communal group and their country is understood. It is only with such assistance that their claim relating to cultural loss and the diminishment of their NTRI can be understood and assessed.

229 Accordingly, in attempting to understand the "cultural loss" arising from the effects of the SHP on the NTRI of the Yindjibarndi people and to place a value on it, it is first necessary to understand the cosmological world view that underpins their relationship to their country. The nature of that relationship is summarised in the concluding portion of Chapter 2 of KP1 [90]-[105], and elsewhere in KP1. The lay witnesses also provide a body of evidence about their strong belief system that all living things and country were created by the *Marga* (see further below) and that each has duties and obligations within the Yindjibarndi system of law and custom arising from those creative events.¹⁵³

¹⁵² Isdale, "Compensation for Native Title" (Federation Press 2022) p.131.

¹⁵³ Exhibit 2 – Amended Affidavit of Tootsie Daniel (A.04.002) (Ex2)[45], SWarrie (A.05.008) [6], MW(A.05.022) [50], [134], [135], [274], Amended Witness Statement of Angus Mack filed 16 May 2023 (A.05.017) (AM) [40], Amended Witness Statement of Judith Coppin filed 4 May 2023 with corrigenda filed 16 August 2023 (A.05.015) (JC) at [19], LCoppin (A.05.006) [49], Amended Witness Statement of Lyn Cheedy filed 2 May 2023 (A.05.013) (LCheedy) at [10], [39], Amended Witness Statement of Middleton Cheedy filed on 3 May 2023 (A.05.014) (MC) at [10], [22], T288.01 (A.07.008), T650.22 (A.07.012), T409.08 (A.07.009).

- 230 Chapter 2 of KP1 describes the following important aspects of Yindjibarndi cosmology:
- (a) creation stories and their enduring importance to the everyday lived experience of Yindjibarndi people;
 - (b) the role of ritualised songs and activities known as the *Bundut*¹⁵⁴ (and the associated *Birdarra* Law);
 - (c) the distinction between *ngurrara* (countrymen) and *manjangu* (strangers);
 - (d) the role of various creation beings;
 - (e) the role of *thalu* and song in mediating the relationship between people and country; and
 - (f) the *Galharra* system of social relationships, including various totemic relationships, and the concept of *Nyinyaard*.

Creation stories

- 231 Yindjibarndi people have a superstructure of creation stories starting in the ancient past when the physical world was soft, waiting to be shaped and formed, called, *Ngurra Nyujunggamu*, ('when the world was soft')¹⁵⁵. During this time, the great creative spirit, named *Mingala*, along with the spirit beings he created, some of whom were known as *Marga*, shaped the country, elevated the then low sky and lifted the world from the sea.¹⁵⁶ Yindjibarndi people told Dr Palmer that *Mingala* and the *Marga* moved about the country, singing and creating the natural world as it is today. Animals, plants and birds were caretakers of language, rules for behaviour and culture, as ordained by *Mingala* as follows, "[t]hrough these various beings and their activities, now recounted as sacred song and text, moral obligations and relationship structures were taught".¹⁵⁷
- 232 Drawing on various accounts of the events of the Yindjibarndi creation story, Dr Palmer states, "[t]he system which is believed to have been laid down by the *Mingala* has jural-like qualities and in common with many other areas of Aboriginal Australia, is regarded as a determining rubric for all social, economic and religious action. Its representation as 'the Law' (that is, in the singular and with an initial capital) is, in my opinion and based on my many years of anthropological research and study, a way of reflecting the significance of the body of normative prescriptions and their singularity as a combined and indivisible whole".¹⁵⁸

The Bundut, Birdarra Law and the bestowal of land

- 233 Dr Palmer observes that the *Marga* prescribed the Law, the landscape and all living things which are believed to have been the product of a series of ritualised songs and associated actions known to the Yindjibarndi as *Bundut*. Dr Palmer quotes three senior male members of the Yindjibarndi who explain, "... that the *Burndud* came first – along with the creation of the

¹⁵⁴ Dr Palmer uses the spelling *Burndud* and accordingly, where quotations have been taken from KP1 or KP2, Dr Palmer's spelling has been utilised. However otherwise for the purpose of these submissions, the Applicant adopts the spelling *Bundut*, consistent with the spelling used in the SOAF and transcript of proceedings.

¹⁵⁵ See also SOAF (A.02.015) [93], [99]-[110].

¹⁵⁶ KP1 (E.03.001) [43], LCheedy [10], [39], T409.31 (A.07.009).

¹⁵⁷ KP1 (E.03.001) [44].

¹⁵⁸ KP1 (E.03.001) [49], Amended Witness Statement of Isaac Guinness dated 10 August 2023 (A.05.011) (IG) at [8].

world. The songs created the landscape and the animals. If there had not been the Burndud there would be no landscape."¹⁵⁹

234 Dr Palmer further observes that the *Bundut* is a cycle of songs that it is believed was first sung at the original ritual ground (called *Ganyirryanha*) located on the flat rocks of the Fortescue River. At that place a circular depression which marks "*the dancing feet of the women who first performed the accompanying ritual dance when the world was soft*" is also known as the *Bundut*. The song cycle continues to be sung during annual Yindjibarndi initiation rituals and is "*a lived ritual experience ... believed to reference all living things that were a product of its instigating performance*", and it, "*resonates with the totality of Yindjibarndi ngurra (country) and the people, plants and animals that are a part of it. The performance of Burndud as contemporary ritual is believed to renew and replenish the life force of the natural world, as well as to reinforce the normative values its Law set out.*"¹⁶⁰

235 Dr Palmer considers that implicit in the creation process during the *Ngurra Nyujunggamu* was a process of "*bestowal of country (ngurra) on different Aboriginal groups whose autonomy was framed by reference to their unique language ... portions of the Burndud, the sacred songs that brought into existence the language, the Law and the country itself, defined the country of the different groups...*".¹⁶¹ (emphasis added).

236 In the case of Yindjibarndi people, the Law directing them in their social, religious and economic actions is called *Birdarra Law*.¹⁶²

237 *Mingala* is understood by Yindjibarndi people to have bestowed their land on them "*as a sacred trust – it had rules for its use and responsibilities for its exploitation*", and as an "*inheritance*". This bestowal also conferred dominion over their country. The suffix "*ra*" [attached to '*ngurra*'] connotes that a Yindjibarndi person "*belongs*" to their country, also meaning "*countryman*" and one who owns the *ngurra*. A Yindjibarndi person thus describes themselves as "*ngurrara*" for Yindjibarndi country.¹⁶³

Ngurrara and manjangu (strangers)

238 Dr Palmer describes how the division of country in the *Ngurra Nyujunggamu* set the boundaries for the various named, (distinguishing Yindjibarndi from the neighbouring Banjima, Guruma, Ngarluma and other groups), and that the first rule is "*that you do not go onto anyone's country*", "*before you go and see that mob and ask them permission*".¹⁶⁴ There is a distinction between *ngurrara* (those with rights to country) and *manjangu* (strangers)¹⁶⁵ which Palmer

¹⁵⁹ KP1 (E.03.001) [50], FC (A.05.019) [13], Amended Witness Statement of Kevin Guinness dated 4 May 2023 (A.05.016) (KG) at [14], T566.28 (A.07.011), T409.31(A.07.009).

¹⁶⁰ KP1 (E.03.001) [56].

¹⁶¹ KP1 (E.03.001) [58].

¹⁶² KP1 (E.03.001) [55] and see [54] for description of *Mingala* first bestowing *Birdara Law* on Yindjibarndi people at a place called Gumana Hill on the Fortescue River.

¹⁶³ KP1 (E.03.001) [59]-[61].

¹⁶⁴ KP1 (E.03.001) [62], AM (A.05.017) [98], KG (A.05.016)[22]-[23], MW (A.05.022) [267], Amended Witness Statement of Kaye Warrie dated 1 May 2023 (A.05.012) (KW) at [43], [45]-[46].

¹⁶⁵ As to Applicant evidence that *ngurrara* have free and exclusive use of their *ngurra*, while *manjangu*, must ask permission: AM (A.05.017) [101], FC (A.05.019) [19], Amended Witness Statement of Estelle Guinness dated 1 May 2023, A.05.010 (EG) [44], LCoppin (A.05.006) [16], LCheedy (A.05.013) [13], Exhibit 1 – Amended Affidavit of Margaret Roslyn Read (A.04.001) (Ex1) [18], MW (A.05.022) [275]-[276], MC (A.05.014) [28], [30], Amended Witness Statement of Sonya Wilson dated 9 August 2023, A.05.007 (SWilson) at [19], SWarrie (A.05.008) [7]-[8], [96], Ex2 (A.04.002) [36], [38], WW (A.05.009) [69]-[71], T565.23 (A.07.011), T361.26-362.11 (A.07.008), T424.26-425.29 (A.07.009), Evidence of Tootsie Daniel T17.30 (A.07.004).

describes thus: “[i]n practical terms ngurrara have free and exclusive use of their ngurra. Manjangu, on the other hand, must ask permission to enter land that is not their ngurra.” He says that, “[c]ritical to all aspects of this account, by my reading, is that this not only constitutes a system of rights to country, but it is one that was laid down through supernatural agency in the creative period. As God-given Law its contravention through trespass is considered to have dire consequences.”¹⁶⁶

239 The duties of *ngurrara* towards their country include “looking after” the safety of strangers seeking to enter their country. This includes performing a well-documented ritual of introduction, accompanying them and giving clear direction as to where they can go and what they may do.¹⁶⁷ Otherwise *manjangu* may become a victim of a spirituality of which they have no comprehension.¹⁶⁸

Other creation beings

240 In addition to the central role of *Mingala* and the *Marga* in the *Ngurra Nyujunggamu*, at [65]-[66] of KP1 Dr Palmer sets out details of other beings that traversed Yindjibarndi country during the creative era and “[l]eaving their marks on the landscape and (that) are commemorated in oral narratives, songs and imprinted on the countryside itself, as well as now represented by its flora and fauna.”¹⁶⁹

241 They also demonstrate how moral order came to be defined in a time before humankind occupied the known Yindjibarndi world and “constitute the normative system of laws and customs upheld by the Yindjibarndi today.”¹⁷⁰ Dr Palmer sets out the narratives of:

- (a) *Bunggaliyarra* (two sisters-in law together);
- (b) *Barrimirndi* (a huge sea serpent who made the Fortescue River and other natural features);¹⁷¹
- (c) Eaglehawk and crow;¹⁷²
- (d) *Wirringil* (Quail) and *Jirruny* (Pelican);
- (e) *Nyingara* (Stone Man);¹⁷³ and
- (f) *Barganyji* (Olive Python).¹⁷⁴

The role of thalu (increase sites) and song

242 In KP1 Dr Palmer discusses both *thalu* (increase sites) and *jawi* (a type of non-secular song) as further examples of Yindjibarndi culture and custom that demonstrates the spiritual nexus between Yindjibarndi people and country.

¹⁶⁶ KP1 (E.03.001) [62]. See also SOAF (A.02.015) [93(c)].

¹⁶⁷ EG (A.05.010) [44], IG (A.05.011) [12]-[14], KG (A.05.016) [20], LCheedy (A.05.013) [14]-[15], MC (A.05.014) [25], SWarrie (A.05.008) [8].

¹⁶⁸ KP1 (E.03.001) [63], KG (A.05.016) [20], LCheedy (A.05.013) [13], SWarrie (A.05.008) [8], WW (A.05.009) [72], T679.20 (A.07.013), T361.30-362.10 (A.07.008).

¹⁶⁹ KP1 (E.03.001) [65].

¹⁷⁰ KP1 (E.03.001) [65].

¹⁷¹ MW (A.05.022) [51], T478.17-478.47 (A.07.010), T507.05, T535.36-536.06 (A.07.011).

¹⁷² KP1 (E.03.001) p21.

¹⁷³ MW (A.05.022) [135]-[138], WW (A.05.009) [51].

¹⁷⁴ LCheedy (A.05.013) [10].

- 243 *Thalu* are ordained through the *Bundut* and are mostly included in that song cycle. He quotes source material explaining that *thalu* are “*sacred ritual ceremonial increase sites*” associated with animals and “*all living things*” that are “*worked*” as a matter of ritual practice in order to ensure an abundance of living things as given to the Yindjibarndi people by the *Marga*.¹⁷⁵ He observes that “*those with responsibility for a thalu must look after it (ensure its physical integrity)*”. Dr Palmer reflects that, “*a belief that the natural order of things is wired to an infinite spiritual genesis that links the present physical world to the spiritual universe of the Ngurra Nyujunggamu. The celebration of thalu in the Burndud songs situates a contemporary spirituality of place within the metaphysical domain of the creative period whence all life, values, rules and cultural precedents emanated through supernatural ordinance*”.¹⁷⁶ Yindjibarndi people continue to observe rituals for thalus.¹⁷⁷
- 244 Dr Palmer documents a visit to the tailings dam in the SHP¹⁷⁸ which exists over the top of a *thalu* site (styled YIN10-095). The view was conducted from the dam wall. Photos and videos taken of the dam are in evidence.¹⁷⁹ YIN10-095 is documented as a registered site by Professor Veth and Dr Bird pursuant to the AHA and observed that the FMG Respondents’ consultants, Terra Rosa, assessed the site as a *thalu* and conducted a salvage of the site¹⁸⁰. This salvage involved bringing a *manjangu* onto the SHP to conduct unauthorised rituals¹⁸¹.
- 245 In addition to the *Bundut*, Dr Palmer observes that there are other forms of song that link Yindjibarndi people to metaphysical realms and to places within their country.¹⁸² He draws on source material to explain that a *jawi* is a song about a particular place or places, believed to have been given by transcendent powers to an individual through the agency of natural sleep, and then evidenced through a dream.¹⁸³ Dr Palmer refers to evidence given to Rares J in 2015, in which Michael Woodley explained that the person receiving the song would go on a journey with the *tharngangarli* (spirits of old ritual leaders), who would “*show them the event of what’s happening somewhere else in the country*”.¹⁸⁴
- 246 Many *jawi* were collected by the ethnographer von Brandenstein from Yindjibarndi people in Roebourne and published in the early 1970’s, a specific example being the “*Gambulanha* song” (Hamersley Range song), a Yindjibarndi song by Toby Wiliguru Bambaru (who died in 1934)¹⁸⁵, which has been passed down to successive generations.¹⁸⁶

¹⁷⁵ KP1 (E.03.001) [67].

¹⁷⁶ KP1 (E.03.001) [67]-[69] **Thalus**: AM (A.05.017) [89], Witness Statement of Isiah Walker with errata dated 16 May 2023 (A.05.018) (**IW**) [13], Amended Witness Statement of Jean Norman with errata, A.05.002 (**JN**) at [20], LCoppin (A.05.006) [48], [57], WW (A.05.009) [34]-[35], [49].

¹⁷⁷ AM (A.05.017) [90]-[93], MC (A.05.014) [24].

¹⁷⁸ KP2 (E.03.006) [107].

¹⁷⁹ Affidavit of Sophie Kilpatrick A.05.039 – photos A.05.039.14-16, Video footage taken by the Federal Court (A.07.015.07).

¹⁸⁰ VB1 [108]-[109]; CB B.05.064 p184-185.

¹⁸¹ Per Michael Woodley at T486.27-489.24 (A.07.010).

¹⁸² KP1 (E.03.001) [70]-[72].

¹⁸³ AM (A.05.017) [47], IG (A.05.011) [11], SWarrie (A.05.008) [88], T567.33 (A.07.011).

¹⁸⁴ Transcript *TJ v State of WA* (WAD6005-03) T.53.09 (A.09.016.02).

¹⁸⁵ KP1 (E.03.001) fn 45.

¹⁸⁶ KW (A.05.012) [38], LCoppin (A.05.006) [47], MW (A.05.022) [53], SWarrie (A.05.008) [130]-[132], [134] T462.29-463.36 (A.07.010).

The Galharra, nyinyaard and other Yindjibarndi social relationships and principles

- 247 The *Galharra* system involves all Yindjibarndi people belonging to one of four named social categories, by which, “*Yindjibarndi social relationships are structured according to principles laid down by the Marga in the Ngurra Nyujunggamu ...*”.¹⁸⁷
- 248 Dr Palmer explains that *Galharra* “*categorisation extends to plants, animals and places and areas of spiritual importance, resulting in particular relationships between people and the natural world who are believed to share the same Galharra. Social categories also determine roles in the Birdarra rituals in which the Burndud is celebrated and evoked.*”¹⁸⁸
- 249 The *Galharra* “*underpins Yindjibarndi social living*” and “*is believed to have supernatural authority as it was bestowed through the agency of the great creative mythic being*”.¹⁸⁹
- 250 Based on his fieldwork data, Dr Palmer opines that a significant aspect of kin relationships is based on an ethic of reciprocal generosity and sharing, known in the Yindjibarndi language as *nyinyaard*.¹⁹⁰
- 251 At KP1 [80]-[81] Dr Palmer draws attention to evidence given to Rares J, as well as his Honour's observations regarding evidence given about *nyinyaard*, set out in his findings. In particular Rares J referred to evidence given by Michael Woodley that it is “*the social fabric of Yindjibarndi ...it is a social contract under which every Yindjibarndi person is entitled to share in the bounty of Yindjibarndi country and prosper...* ”. The material Dr Palmer refers to is consistent with his observation that, “[*t*]he term ... expressed the idea of sharing but also could be used for an action that made up for something that had been deprived.”¹⁹¹
- 252 At KP1 [82]-[88] Dr Palmer provides details of two other important social relationships linked to the *Galharra*: the *wurruru* (midwife) and *gajardu* (godfather) relationships. The English translations do not do justice to the culturally specific spiritual nature of these terms. The *wurruru* relationship is rooted in events that occur at, or are associated with birth, including particular locations on country.¹⁹² Stanley Warrie gave evidence about the sorrow and cultural loss he felt when Aileen Sandy, his *wurruru* (*urruru*) sued him as a director of YAC in the Supreme Court.¹⁹³ The *gajardu* relationship links a person indissolubly to country through the agency of a natural species.
- 253 The *gajardu* relationship in particular demonstrates the tangible manner in which a child is linked spiritually to the natural world, whereby their development in utero relates to events occurring on country, that hold significance throughout the child's life through that relationship.¹⁹⁴ Stanley Warrie gave evidence about the *gajardu* relationships and that some of those relationships were destroyed by the social disruption between those Yindjibarndi people who support the SHP constituting the WYAC and those members of the Applicant and YAC who do not.¹⁹⁵

187 KP1 (E.03.001) [73], T412.27-413.17 (A.07.009).

188 KP1 (E.03.001) [76].

189 KP1 (E.03.001) [76].

190 KP1 (E.03.001) [78].

191 KP1 (E.03.001) [78]. See also SOAF (A.02.015) [125], [138], [140].

192 KW (A.05.012) [20], T357.30-358.15 (A.07.008).

193 SWarrie (A.05.008) [11], T581.45-586.31 (A.07.011).

194 KP1 (E.03.001) [85]-[88].

195 T587.11-588.24 (A.07.011).

254 Dr Palmer observes that there is an indivisibility of person and country because the Yindjibarndi believe that their ancestors continue to inhabit the countryside and, “[t]hese beings, apparent as spirits, are an ever-present metaphysical force that must be acknowledged, managed and sometimes placated.”¹⁹⁶

Dr Palmer's conclusions in relation to Yindjibarndi culture –valuing cultural loss

255 In the concluding portions of KP1, Chapter 2 Dr Palmer draws together the various aspects of Yindjibarndi culture outlined above to make the following points, which it is submitted should be accepted by the Court.

256 **Firstly**,¹⁹⁷ he emphasises the essentially spiritual nature of the connection between Yindjibarndi people and their country, consistent with past judicial statements concerning the connection of Aboriginal people to country¹⁹⁸, and affirmed by Rares J in the case of the Yindjibarndi:¹⁹⁹

Country (ngurra) is believed to have been imbued with spirituality during the creative period of Ngurra Nyujunggamu. It was consequently to be understood as comprising not merely earth, clay, rocks and creeks. It was a landscape redolent with spirituality, complete and integrated which was bestowed upon the Yindjibarndi, who were themselves a creation of the same originating spirituality, along with their laws, customs; language and kinship. As constituent parts of the greater whole (‘one indissoluble whole’) Yindjibarndi relationships with country are innately spiritual because they are a part of the same originating spirituality. Humankind and ngurra are conceived of as being of the same elemental and spiritual form.²⁰⁰

257 Further, at KP1 [94] Dr Palmer observes that the notion of sentience is part of the Yindjibarndi belief system in that the country is believed to be cognisant of danger or harm from the physical world and relationships, and has emotions and feelings as living people do.

258 Dr Palmer is of the opinion at KP1 [95] that for Yindjibarndi people “*the whole of the topography is believed to be redolent with meaning and spiritual value*” and “*Yindjibarndi people believe that they were given a portion of this land, ‘as a birth right’ so were given dominion over it to the exclusion of all others*”. Further, at KP1 [96] he states that country was “*given to be used in a certain way; to be protected and managed... As this is a duty of supernatural ordinance an inability to comply is understandably a keenly felt and negative emotion*”.

259 At KP1 [97] he concludes that “*the Yindjibarndi religious experience is first and foremost about a relationship with country; the possession of country as well as a possession by country. The ngurra defines who an Aboriginal person is. It is the Dreaming that gives ngurra and the laws to enable Yindjibarndi people to live in it and look after it. These prescriptions for living with country include the rules for religious observance (the Birdarra Law and the Burndud song cycle), the Yindjibarndi language and rules for social relationships*”.

260 **Secondly** he emphasises the “*inter-dependent*” nature of the various parts of the Yindjibarndi religious system, and the lack of any divide, in spiritual terms, between one part of Yindjibarndi country and another, this being consistent with the Yindjibarndi people, their laws and customs,

¹⁹⁶ KP1 (E.03.001) [89], IG (A.05.011) [12], IW (A.04.018) [11], JC (A.05.015) [23], T480.34 (A.07.010).

¹⁹⁷ KP1 (E.03.001) [90]-[97], under the heading “*Sanctity of Country*”.

¹⁹⁸ Eg *Milirrpum v Nabalco Pty Ltd* [(1971) 17 FLR 141 at 167 per Blackburn J, *WA v Ward* (2002) 213 CLR 1 at [14].

¹⁹⁹ *Warrie (No. 1)* at [40], [42].

²⁰⁰ KP1 (E.03.001) [93].

being derived from one common origin (the events of the Dreaming, or *Ngurra Nyujunggamu*).²⁰¹ For this reason:

....a proper understanding of Yindjibarndi religious belief, practices and associated human responses, emotions and feeling, cannot rest on any separation of component parts, or dictating that one part of the country was separable from another. Such discrimination and dissociation, in my opinion, belies the very nature and origins of the Yindjibarndi religious system...

- 261 **Thirdly**²⁰², the divine and supernatural origins of Yindjibarndi cultural attributes are held to be of high value – all *ngurra* is held by the Yindjibarndi people as a “*sacred and inviolable trust*”. This high cultural value extends to the ways of doing things that include the rules, laws and normative values which, “*are understood to be component parts of the bestowal of a spiritual dispensation, founded upon the gift of country. These together are believed to have emanated from a supernatural world and powers beyond and above that of a mere human world. This supernatural ordination means that emotions, feelings and determination are inspired by something believed to lie beyond the merely human*”.²⁰³
- 262 Dr Palmer refers to the “*epic emotions*” that can be involved in the experience of Aboriginal people in the context of their relationship to country, described in the work of Professor Basil Sansom, and referenced by Mansfield J in the context of the *Timber Creek* decision. Dr Palmer is of the opinion that such, “*intensely felt and acutely experienced*” emotions are apposite to describe the negative feelings of Yindjibarndi people “*where spiritual values and a divine order of land, Law and language are contravened, devalued or disregarded*” and are the product of the “*unique spiritual foundation*” of their Law and culture.
- 263 It is submitted that Dr Palmer’s opinions concerning these three matters are centrally important to fully grasp and understand the context, gravity and depth, of Yindjibarndi people’s experience of cultural loss through the damage and destruction to their country caused by the grant of the tenements and the non-consensual establishment of the SHP. An important example of this is that the *Bundut* is broken, incomplete and its integrity is called into question.²⁰⁴ Evidence of the experience of Yindjibarndi people as a consequence of the impacts of the negotiations and establishment of the SHP on their country is the subject of the four matters at (b) to (e) that follow. These reflect the subject areas addressed in KP1, Chapters 3 to 6.

Loss of Culture, Sites and Heritage - The Physical Impact of the SHP on the Landscape and Cultural Loss

- 264 Mining (particularly of the type that occurs at the SHP) is an extractive industry involving open cut operations, tailings and associated infrastructure. It transforms the landscape - much of its original form is destroyed. A very significant component of cultural loss for Yindjibarndi people is therefore the effect on them (in the context of their NTRI) that results from the direct physical impacts on the landscape.
- 265 The relevant evidence demonstrating the enormity of those impacts includes the direct oral and statement evidence of Yindjibarndi witnesses, Dr Palmer’s expert analysis based on his

²⁰¹ KP1 (E.03.001) [98]-100] – section headed “*The indissoluble whole*”.

²⁰² KP1 (E.03.001) [101]-[105] section headed “*‘Epic’ Emotions*”.

²⁰³ KP1 (E.03.001) [101].

²⁰⁴ T813.44-814.06, T839.09 (A.07.018).

fieldwork, and the body of evidence that relates to "sites" recorded in the course of archaeological and survey work in the SHP area.

266 In order to fully appreciate the quality and depth of this key aspect of the cultural loss entailed by the SHP, the submissions:

- a) discuss the inadequacy of considering such loss simply on the basis of individual site specific damage;
- b) set out details (based on Dr Palmer's analysis and the Applicant's direct evidence) of places associated with mythic beings of the *Ngurra Nyujunggamu* (the Dreaming) which have high cultural value because of that association - paying appropriate regard to Yindjibarndi cosmology in relation to the *Bundut* and the travels of creative beings;
- c) consider the extent and nature of 'site' damage and destruction in the SHP area in the context of Yindjibarndi culture; and
- d) examine some of the responses of Yindjibarndi people in Dr Palmer's field data, and in the evidence that has been adduced, to the destruction of places associated with the *Ngurra Nyujunggamu*, and of 'sites' identified in heritage surveys.

267 This approach is consistent with that adopted by Dr Palmer in Chapter 6 of KP1 and revisited by him at various points in KP2.

Limitations of individual "site-based" approach vs an "ethnography of place"

268 The loss to Yindjibarndi country occasioned by the physical impacts of the SHP cannot be singularly defined in terms of individual sites. The Applicant's lay evidence and the views expressed to Dr Palmer treat country as a whole rather than as an aggregation of special enumerated 'sites'. While it is true that some places are singled out as having particular attributes that are significant (eg ochre, other mineral resources, burial), the principal impact of the mine on Yindjibarndi people and their consequential feelings of loss develops from an appreciation of the totality of country and the degree to which it has been diminished, fractured or destroyed.²⁰⁵

269 Dr Palmer is of the view that a "*site-based approach to evaluating heritage values and any subsequent assessment of the diminution of those values through site destruction*" has limitations. In particular, the provisions of the AHA, by seeking to protect small pockets of land ('sites'), ignore "*the pervasive nature of the Indigenous relationships with country that defy neat and restrictive boundaries*". These limitations are demonstrated by his observations concerning the spirits of the countryside, and that these beings are not site-bound but may be found almost anywhere across the country.²⁰⁶

270 Dr Palmer concludes that the impact of the SHP on Yindjibarndi people and their consequential feelings of loss not only develops from the destruction of country and sites, but from the Yindjibarndi's appreciation of the totality of country and the degree to which it has been diminished, fractured or destroyed.²⁰⁷

²⁰⁵ KP1 (E.03.001) [337]; consistent with the approach in *Griffiths HC* – see Applicant's Opening Submissions (A.02.007) [102]-[103].

²⁰⁶ KP1 (E.03.001) [333]-[334].

²⁰⁷ KP1 (E.03.001) [337].

271 As distinct from “sites” identified in heritage surveys, central to appreciating the consequential impact of the SHP on the totality of country is its effects on Yindjibarndi Dreamings or “songlines” derived from the *Ngurra Nyujunggamu*. This involves the songs and associated narrative stories of the *Bundut*, as well as other creation stories such as that of the *Barrimirndi*'s role in creating all the waterways in Yindjibarndi country. The sites, songs and Dreamings are woven together.

The high cultural value of places associated with the Bundut and Dreaming

The Bundut, and its complex relationship to the country as ‘jina’ (tracks) in a jigsaw

272 As background to understanding the significance of the SHP's impact in relation to the *Bundut* songline, Dr Palmer explains the significance of the *Bundut*:²⁰⁸

- (a) the *Birdarra* law rituals involve the singing of verses of the *Bundut* by men who keep time while beating an upturned hollow log or *yandi* with sticks while the women dance. The vibrations of the singing and syncopated beating of the *yandi* reverberate through the ground and spread across Yindjibarndi country, serving to revivify the country. Michael Woodley explained to Dr Palmer that this was a part of the purpose of the *Bundut* and part of the *ngurrara*'s duty;
- (b) further, the *Bundut* and the performance of the *Birdarra* rituals are the means by which young men are made into men through ritual processes. They are a rite of passage “whereby members of the younger generation learn of the spiritual mysteries of the Yindjibarndi world and how the natural world is sustained through the rehearsals of songs that evoke revivification of the spirit”; and
- (c) the *Bundut* also prepares youths for manhood, marriage and procreation.

273 The direct evidence was consistent with this. In particular, at [52], [83]-[84] of Amended Witness Statement of Michael Woodley²⁰⁹ and at [8] of Witness Statement of Fabian (Charlie) Cheedy.²¹⁰

274 Dr Palmer observes, therefore, that the “*Burndud is then about the continuity of country, humankind and social relationships, through the agency of the spirituality it is believed to embody and evoke.*”²¹¹ This appreciation of the fundamental import of the *Bundut* for Yindjibarndi people is essential, it is submitted, to fully appreciate:

- (a) the profound significance of the accounts given by Yindjibarndi people in their evidence, and of the senior male claimants to Dr Palmer, explaining that parts of the song lines have been destroyed by the mines (see Dr Palmer's examples at KP1 [365] per Stanley Warrie and [366] per Charlie Cheedy, and further evidence referred to below at [66]); and
- (b) that, as Dr Palmer observes, a consequence of the SHP's effect on the song lines has been the loss of place as testament to the events of the *Ngurra Nyujunggamu*, and the loss of country as a means to ensure the integrity of the teaching and instruction of the Law for future generations.²¹²

208 KP1 (E.03.001) [363]-[364].

209 MW (A.05.022).

210 FC (A.05.019).

211 KP1 (E.03.001) [364].

212 KP1 (E.03.001) [365], [367].

275 Dr Palmer also observes that frequent reference was made by his Yindjibarndi informants to the song lines as a footprint or *jina*, and that the word *jina* is defined as meaning, foot, footprint and track. In his opinion it is the latter sense of a track or trail that is meant by Yindjibarndi people in their accounts of the significance of the *Bundut*. *Jina* provides proof of the past passage through and it is through the singing of the *Bundut*, following a particular lineal track, that the spirituality of the creative times of the *Ngurra Nyujunggamu* are evoked and country and people are revived.²¹³

276 Dr Palmer's informants explained to him that the *Bundut* relates to country like a jigsaw. Michael Woodley referred to "*the jigsaw that the Burndud puts together piece by piece*" and described the "*language of the Burndud*" as "*the first language.*" Middleton Cheedy, Stanley Warrie and Michael Woodley told Dr Palmer:

If you don't have all the songs you can't put the pieces together. And, if the country is bugged up, you can still sing it but it's not the same feeling [message] that we give out to the land and to the young people [who we are teaching].²¹⁴

277 Dr Palmer observes that his data shows the *Bundut* to have multiple attributes and several sorts of cultural significance (see KP1 [371]). He explains that the path of the *jina* brings the spirituality that is believed to reside in and to be evoked by the *Bundut*, to tracts of country: "*likened to a jigsaw – made of multiple component parts all of which are required to bring satisfaction and a sense of completion. When just one piece is missing, the whole is marred.*"²¹⁵

278 The Yindjibarndi people's direct evidence also reflected this quality of the *Bundut's* relationship to country.²¹⁶

279 At KP1 [372] reference is made to the findings made by Rares J in *Warrie (No. 2)*, in which his Honour compared the use of a now no longer spoken language in the *Bundut* as comparable to the use of Latin rituals in the Catholic church and referred to the *Birdarra* Law as "*the defining ritual of making uninitiated (mostly young) males pass formally into manhood*". Although that portion of the reasons (KP1 [39]) is not part of the s.86 material tendered by agreement, it is submitted that such findings could equally be made in this matter, based on the expert and lay evidence. In particular, evidence given by Stanley Warrie²¹⁷ and Fabian Cheedy²¹⁸ refer to the '*ancient*' language in which the *Bundut* is sung.

280 The nature of the *Bundut* and its integral relationship to country is verified by the statements by senior men about *Bangkangarra* being a significant place in the *Bundut* tradition. While not directly impacted by the SHP, it is regarded as having been negatively affected by the SHP and "*is now not the same because the area around it is destroyed*": KP1 at [370].

The relationship between the Bundut songline and the SHP

281 At the outset of KP1 Dr Palmer explains the centrality of the *Bundut* in commemorating the life-giving events that occurred in the *Ngurra Nyujunggamu*. In the last substantive section of KP1 (commencing at [339]) he returns to this subject matter to consider the impact that the SHP has had on the *Bundut* narratives and beliefs, and on the cultural appreciation of creation

²¹³ KP1 (E.03.001) [368].

²¹⁴ KP1 (E.03.001) [369].

²¹⁵ KP1 (E.03.001) [371].

²¹⁶ MW (A.05.022) [24], [26], [47], IG (A.05.011) [8], WW (A.05.009) [53], T288.15 (A.07.008).

²¹⁷ SWarrie (A.05.008) [133].

²¹⁸ FC (A.05.019) [13].

beings that are central to that narrative. In KP2, based on the direct evidence of the witnesses at the hearing, he affirms the views reached in the course of his fieldwork and draws attention to particular direct evidence.²¹⁹

282 The sequential songs of the *Bundut* are conceptualised by Yindjibarndi people to follow a “*song line*” across the country. Dr Palmer sets out sequential portions of the journey through Yindjibarndi country, particularly as they intersect with the SHP area and its surrounds. He explains that the songs of the *Bundut* are accompanied by substantial narrative explanation, which accumulates over time as the *Bundut* is repeated throughout an adult man's life. The places celebrated in the *Bundut* are the subject of comment and observation during visits to country, which is also part of the learning process.²²⁰ The following features of the *Bundut* song line are relevant to understanding its travels relative to the location of the SHP:

- (a) ***its direction of travel from its origin at Ganyirranha*** (see above at [234]) near the flat rocks of *Birlinbirlin* on the Fortescue River to the Hamersley Ranges (***Gamburdayinha***). One of its songs is about ***clouds building up over Gamburdayinha*** and concerns the area that includes the SHP, the words of which ordain animal life across Yindjibarndi country²²¹;
- (b) ***A song that features a table top hill (Mumiyanha)*** in the vicinity of Roy Parson's Gorge that travels to *Barngkawinha* (“Split Hill”), a short distance east of Wirilu-Murra Creek (about 15km west of Solomon airport), and which then travels through the SHP, down *Ganjingarringunha wundu*²²² to *Bangkangarra*.²²³ The narrative relates to a fight between two Marga and incorporates a song about the boomerang;²²⁴
- (c) ***Bangkangarra***: is named for the *barnga* (the sand goanna, yellow and black in colour). It is sung in the *Bundut*, with multiple accounts having been provided to Palmer by senior Yindjibarndi men. The *barnga* travelled up *Ganjingarringunha wundu* to *Bankgangarra*, where he made the spring and pool, and the natural feature of the gorge. From there he travelled everywhere across the country, following various paths through songs, including “*across where the mine is now*”. At KP1 [349] Palmer sets out the *Barnga* song that accompanies the narrative of its journey, provided to him by Michael Woodley.²²⁵ Its path is described at KP1 [358] and [361] and is consistent with direct evidence.²²⁶
- (d) ***Another song travels into Guruma country to the southwest*** of the SHP where three stones represent the mythic proto-type of the spear thrower. The song line then returns to Yindjibarndi country across the country where the SHP is now, to the Fortescue River flats, where it caught up with three girls (*gurri*). The girls were given three songs in the *Bundut* as they ran out of Yindjibarndi country and into Banjima country.²²⁷

219 KP2 (E.03.006).

220 KP1 (E.03.001) [342]-[343].

221 KP1 (E.03.001) [345], SWarrie (A.05.008) [130]. SOAF (A.02.015) [128].

222 Dr Palmer spells the name of this creek *Ganyjingarringunha*. The Applicant has adopted the spelling *Ganjingarringunha*, consistent with the transcript of proceedings and the SOAF. However, Dr Palmer's spelling is adopted for the purpose of quotations from his reports.

223 Roy Parson's Gorge, Barngkawinha and Bankgangarra can be seen on the map, Exhibit 9 (A.05.036).

224 KP1 (E.03.001) [346]-[347], see also [356].

225 KP1 (E.03.001) [348]-[349].

226 SWarrie (A.05.008) [130]-[132], T620-626 (A.07.012).

227 KP1 (E.03.001) [352], SWarrie (A.05.008) [131].

The path of other creative beings from the Ngurra Nyujunggamu, including the Barrimirndi

- 283 The Yindjibarndi evidence was replete with references to the significance of the travels of the *Barrimirndi*²²⁸ that is celebrated in a *jawi* (song). Dr Palmer also highlights the *Barrimirndi* and *Burlinyjimarra* as having significance for the SHP area.
- 284 Details of the *Barrimirndi*'s role in the creation of the Fortescue River and various other natural features are set out at KP1 [66] and further referred to at KP2 [117]-[118]. Michael Woodley gave evidence identifying the *Barrimirndi* as a *warlu* (mythic serpent or snake) who created, as he travelled, *Ganjingarringunha wundu*.²²⁹ After travelling to Hooley Creek and Rio Tinto Gorge (*Yijigarrinha*), *Barrimirndi* "cut across where the mine site is now and down the *Ganjingarringunha creek*". The track is represented in green on the Exhibit 9 map.²³⁰ Dr Palmer observes that the track of *Barrimirndi* has been impacted by the SHP and part of the track in the central parts of *Ganjingarringunha wundu* is now obliterated or destroyed.²³¹
- 285 Dr Palmer also sets out Stanley Warrie's deep concern about the destruction of this Dreaming track as relayed to him, at KP1 [377]. Based on his research Dr Palmer expresses the opinion (at KP1 [378]) that a *jawi* is believed to bring the spirituality of those who populated the *Ngurra Nyujunggamu* into present lived experience. The integrity of the *jawi* song line and the narrative it represents is diminished by the damage to the country through the SHP.
- 286 Consistent with the Yindjibarndi's direct evidence,²³² another narrative concerns a *Marga* who is chased by *Barganyji* (olive python) through large areas of the Hamersley Range and finds its expression in a gender restricted song sung during the *Bundut*.²³³ The story is "brought into" the area of *Ganjingarringunha* and the mine is considered to have "destroyed aspects of the country in which these events have taken place" The mines are seen to have impacted all parts of the *Bundut*, including this gender restricted sequence.

The effect of the SHP on the Bundut songline and the path of the Barrimirndi

- 287 It is not only places that are "named" in the *Bundut* that are important – the 'lines' through country that a song and its footprint traverses are complex. In particular, Dr Palmer draws on Michael Woodley's explanation that like "a storm coming across and its going to rain on everything", they affect "the whole country, not just single places."²³⁴
- 288 The Yindjibarndi's direct evidence and the direct observation available to the Court during its tour of parts of the mine site reflected the fact that a central portion of *Ganjingarringunha wundu* has now been destroyed, and that the Trinity Pit appears to have obliterated the creek altogether. The Yindjibarndi evidence concerning the physical nature of that destruction is referenced at KP2 [119]-[120]. A clear consequence is that the songline of the *Barrimirndi*'s path and its attestation to the events of the *Ngurra Nyujunggamu* has in part been destroyed.
- 289 A further consequence is that the activities and travels of the *Barnnga*, directly associated with its travels up the lower gorge of *Ganjingarringunha wundu* to its home at *Bangkangarra* then

228 MW (A.05.022) [10], WW (A.05.009) [52].

229 MW (A.05.022) [10], T461.30 (A.07.010).

230 Exhibit 9 was the subject of evidence of Michael Woodley at T620-625 and also appears at KP1 (E.03.001) p124. Its provenance is described at KP1 (E.03.001) [358]-[362].

231 KP1 (E.03.001) [375]-[376].

232 SWarrie (A.05.008) [123].

233 KP1 (E.03.001) [66], [381]-[382].

234 KP1 (E.03.001) [354]-[355].

south through the SHP area,²³⁵ as sung in the *Bundut*, has also been severely impacted. Michael Woodley gave evidence²³⁶ of the effect of that destruction “on the song cycle that we sing” and stated that “*you can't have a Burndud that doesn't have those things in there.... They the thing that connects the song lines together and it, again, teaches the young kids how, you know, about what the Burndud is, what it's singing about and how you connected to that, you know, song line and the culture.*”

290 Dr Palmer observes that the reasonable implication of such evidence “...is that if you do not have the Ganyjingarringunha creek, you cannot have the Burndud. While portions of the creek remain, the Burndud can be understood to be devalued and diminished by the degree to which its component geographic parts are destroyed or damaged”.²³⁷

291 In Dr Palmer's opinion, the nature of the loss resulting from the impacts of the SHP on Yindjibarndi country in the vicinity of *Ganjingarringunha wundu* is significant and accords with an understanding of the *Bundut* and observance of the *Birdarra* Law as commensurate with the belief and practice of other great religions.²³⁸

292 In KP2 [138]-[149] Dr Palmer returns to the centrality of the *Bundut* in understanding the cultural loss resulting from the damage caused by the SHP. The deep significance of that loss cannot be understated. Dr Palmer concludes that the “*integrity of the Burndud, as between person, country and its resources and the perpetuation of that relationship and associated beliefs through time is of supreme importance to the Yindjibarndi with whom I have worked. Its loss or partial loss threatens the fundamentals of the Yindjibarndi social, cultural and religious systems. It also threatens the mechanisms whereby they are able to legitimise and perpetuate their rights to country. Such a loss occasions deep emotions, regret, disquiet and guilt.*”²³⁹ That loss is further explained by psychologist Dr Nelson below. This loss also has a physical and spiritual effect on Yindjibarndi people, as Angus Mack says:

*“The Mine has already impacted the song cycle with the destruction of the caves near Bangkangarra. It's like a limb of your body coming off because it makes Yindjibarndi people sick. When you sing the song cycle, the spring and the caves are a part of it. It becomes a missing part of life. When I sing these songs now, I do not feel connected to country in the same way. The country is weakened, and you are weakened as a person because the song is not connecting to country as it is no longer there. I feel like this even when I'm not on country because you feel for country in your spirit.”*²⁴⁰

Physical disturbance evidenced by the cataloguing “sites” during heritage surveys at SHP

293 At KP1 [307]-[320] Dr Palmer gives some consideration to the extent and nature of site disturbance and destruction occasioned by the physical operations of the SHP. He does so by reference to satellite mapping imagery, data in relation to the numbers of sites identified during certain periods of heritage survey work, and by reference to the number of applications that have been made for destruction of sites under the AHA, referable to the FMG Respondents' activities in the SHP area.

²³⁵ KP2 (E.03.006) [127]-[128].

²³⁶ T506, T512-513 (A.07.011), referenced in KP2 (E.03.006) [129]-[130].

²³⁷ KP2 (E.03.006) [132].

²³⁸ KP1 (E.03.001) [373].

²³⁹ KP2 (E.03.006) [145].

²⁴⁰ AM (A.05.017) [50].

294 While providing data to quantify the overall extent of site disturbance and destruction, Dr Palmer observes, at KP1 [319], that it is not within his expertise to “*document the places that have been recorded during multiple ‘heritage surveys’ as being significant to the Yindjibarndi people in terms of their cultural values*”. However, “[t]he area of the Solomon Mine has within it many places of cultural significance and that at least some of these have been destroyed.”²⁴¹ Submissions regarding the evidence of the destruction and disturbance of sites are set out below in relation to the archaeology experts.

295 In KP2²⁴² Dr Palmer reports that he calculates that out of 451 places of cultural significance that had been recorded, approximately 253 had been damaged or destroyed.²⁴³ Importantly, Dr Palmer observes that those sites that remain “*intact*” nevertheless remain outside the control of the Yindjibarndi native title holders, who are unable to access them. Further, “(a) *catalogue of places and a visual assessment of damage or destruction does not take account of cultural loss. It does not accommodate the metaphysical aspects of a place and the interplay between values related to the spiritual sphere with the context of the mine site, its works and disturbances.*”

The responses of Yindjibarndi people to damage, destruction and other effects on specific places in the SHP area

296 Dr Palmer addresses this matter in KP1 [321]-[337]. At KP1 [321]-[323] he provides examples such as the following from his field data:

- (a) Stanley Warrie valuing Yindjibarndi country as a repository of his identity, of “*teachings*”, and of “*everything*”. He regards those areas that are now inaccessible due to the SHP and that may have been destroyed, as having been lost forever²⁴⁴;
- (b) Michel Woodley regarding the artefacts and other evidence of occupation in the SHP area as evidence of the occupation of his forbears and showing the presence on the land of those who are now spirits – the loss of sites and destruction of his heritage thus being a significant cultural loss²⁴⁵.
- (c) a number of Yindjibarndi women referring to the lack of respect and loss occasioned by the destruction of caves, (referring to an example where artefacts had been dated to tens of thousands of years), these being old “*camping places*” of ancestors²⁴⁶; and
- (d) Pansy Cheedy referring to the inability of Yindjibarndi to teach children their culture by reference to places (such as ochre sites) that are now inaccessible and that may have been destroyed. They are no longer “*story places*”.

Dr Palmer’s conclusions in relation to loss of culture and places and the forfeiture of Yindjibarndi heritage

297 In respect of cultural loss from damage to sites of the type the subject of evidence during the mine site tour, Dr Palmer’s conclusion at KP2 [112] is uncontradicted and should be accepted. He states as follows: “*I consider that it is evident that in each case the Yindjibarndi consider the impact of the mine to have diminished their cultural heritage and to have caused them*

²⁴¹ KP1 (E.03.001) [320].

²⁴² KP2 (E.03.006) [19]-[37].

²⁴³ 285 heritage places have been salvaged and 126 Aboriginal sites completely destroyed (see Sixth Affidavit of Sean Costello filed 30 August 2024 (G.02.001) (6th SNC).

²⁴⁴ SWarrie (A.05.008) [126]-[127].

²⁴⁵ MW (A.05.022)[13].

²⁴⁶ JC [31]; KW [35]-[36]; Ex1 (A.04.001) [43]-[44].

emotional and spiritual distress. I am further of the opinion that the sites that were chosen for the mine site tour represent but a small sample of the many sites that have been destroyed by the mine. ... The fact of cultural loss expressed through an analysis of specific places and the adverse feelings such loss evidently occasions is amplified by the quantum of loss, evidenced by the enormity of the Solomon Hub excavations."

298 More generally at KP1 [383]-[385] in his conclusions in relation to the nature of the loss for Yindjibarndi people that results from the physical impact on country caused by the SHP, Dr Palmer makes the profound observation that:

"Given that for the Yindjibarndi these are matters that relate to the reproduction of spiritual belief, life, social relationships and the continuity of a culture over successive generations, the cultural loss as I have documented it is existential."

299 Dr Palmer concludes KP1 at [386]-[392] by explaining the responses provided to him by senior Yindjibarndi men when asking them about the notion of loss as it relates to land. The response set out at KP1 [386] and [387] is as follows:

"Our heart is in our house [*ngurra*]. It's a connection. You put your *jina* [feet] in this *ngurra* and you feel connected. ... when you step onto your own country, it's ours. It's a privilege. ... we lose it in the mine" (emphasis added).

300 To assist in understanding how loss in relation to country is felt by Yindjibarndi people, Dr Palmer provides translations of the terms his informants used:²⁴⁷

- (a) An appreciation of *ngurra* as extant and whole was rendered as "*Your spirit is healed*";
- (b) Upon seeing the mines and associated destruction the response was expressed as "*Your spirit is embittered or broken*"; and
- (c) An additional feeling expressed was that "*Your spirit becomes angry*".

301 Dr Palmer points out that the rendering of the term used by the men for "anger" – "*bayaarri*" ("*to become savage, vicious, wild or angry*"), is to experience more than anger. It is also a physical manifestation of that anger. He then concludes as follows:

"Loss of *ngurra* has taken many forms for the Yindjibarndi, as I have set out in this report. The feelings of the loss are by my reading of these texts, more than a sense of regret that something that once was is no more. Rather it is something that, according to Yindjibarndi spiritual beliefs, perceptions and emotions, *affects the central spiritual core of a person to render it sour, thus denying the healing powers that emanate from country which is whole*. The consequence of the souring of a person's spirit has another side – that of anger. Anger extinguishes equilibrium and *represents a loss of personal well-being*".²⁴⁸

302 Those conclusions should be accepted. In KP2 Dr Palmer further addresses the felt nature of cultural loss for Yindjibarndi people arising from the imposed development of the SHP on their country, and without their permission. That loss, as felt by Yindjibarndi people, arises from a coalescence of the different aspects of loss as discussed under the separate headings loss of culture, sites and heritage, loss of spiritual connection, and loss of rights, interests and duties. Dr Palmer's conclusion regarding the extent and felt nature of cultural loss is therefore further

²⁴⁷ KP1 (E.03.001) [388]-[390].

²⁴⁸ KP1 (E.03.001) [392].

addressed later in the submission after the type of cultural loss identified by each of those topics has first been identified.

The Loss of Spiritual Connection with Country

303 In Chapter 5 of KP1 Dr Palmer explores two aspects of the effects of the SHP, both of which emphasise the loss of spiritual connection with country. These are (i) personal spiritual diminishment and loss, and (ii) Yindjibarndi spirits and the Solomon Hub.

304 Both concern the “fundamentals of Yindjibarndi ... relationships with country”, including the sentience of country through the agency of the *wirrard* and the interplay between person and country, as important features in understanding the nature of the loss occasioned by the SHP. That loss “is perceived to result in personal hurt because for the Yindjibarndi diminishment of country also diminishes a person.”²⁴⁹ For example, Kevin Guinness says:

“When I was a kid driving with my grandmother from Wittenoom to Roebourne, I would see smoke in the Gamurdayinya hills, where the Mine is now. I asked her “what them smoke there”? She said, “it’s the nguga nulli”. The nguga nulli are little spirits that look after country. But now when I have a look at the hills near the Mine, I don’t see the nguga nulli’s smoke there anymore because they have lost their ngurra.

“I was taught by my parents and grandmother to leave those caves alone because that’s where the nguga nulli live. I’ve seen caves in the Mine area and the next time I’ve been back they are gone. Many of those caves are lost. We talk about this at the YAC general meetings. I feel terrible about this. I feel like my wirrard is dying away.

“I was taught by my Mum and Dad and other Yindjibarndi elders it’s my job to protect the caves and the nguga nulli but I couldn’t do anything to stop the destruction by FMG. My right to make decisions about that country as a Yindjibarndi man has been taken away from me when FMG built the Mine without my permission and locked me out of the Mine site. I feel powerless and hopeless.”²⁵⁰

(i) Personal spiritual diminishment and loss

305 Fieldwork data of significance to Dr Palmer in describing the nature of this loss to Yindjibarndi people includes:²⁵¹

- (a) A group of Yindjibarndi people being rendered ‘*speechless*’ and disbelieving upon viewing the extent and nature of the SHP and its effect on their country;
- (b) Descriptions by senior Yindjibarndi people likening the SHP to growing cancer of the body, and describing it with the Yindjibarndi word “*wirnda-na*” meaning ‘broken’ and ‘cannot be fixed’; and
- (c) Feelings of loss being described in terms such as “*your heart, you feeling ripped up inside*” (Middleton Cheedy at KP1 [269]); and “*all mixed up, no good inside*”, “*You losing your identity*” (Stanley Warrie at KP1 [269]).

²⁴⁹ KP1 (E.03.001) [264]-[265].

²⁵⁰ KG (A.05.016) [30]-[32].

²⁵¹ KP1 (E.03.001) [266]-[268].

- 306 An understanding that the destructive physical process also carries a spiritual dimension is necessary to understand the intensity of the feelings that are involved. The loss firstly develops because country has been unalterably changed and destroyed and is also understood as *‘a fundamental dislocation of the nexus between person and country through the agency of the wurrard which is a spiritual quality common to all life and the country itself.’*²⁵²
- 307 In describing this Dr Palmer draws on a number of examples from his field data, including: descriptions of the *“healing”* nature of visits to country, and its positive effect on the wurrard of both children and older people (Margaret Read at KP1 [272]); and explanations given to him of the sentience of country being visited – both the country itself that is being visited, along with the Yindjibarndi person visiting their country, having a feeling of happiness and being alive (Middleton Cheedy, Stanley Warrie at KP1 [273]-[275]);
- 308 Conversely there is an absence of such positive feelings and emotions from all encounters with the SHP area. The absence of parts of the landscape that were previously there results in the feeling that a part of the person, and their *wurrard* is now missing (likened by Pansy Cheedy as almost like the feeling of losing a child) (various, at KP1 [277]).
- 309 The loss of the country as a consequence of the mine is equated to a personal loss that involves a sense of personal diminishment and hopelessness (various at KP1 [279]), and is equated to a suffocation, affecting country and individuals as a hollowness or emptiness (by use of the Yindjibarndi word *‘yarluyarlu’* for *‘hollow log’*) (various at KP1 [282]-[283]).
- 310 Consistent with this, Dr Palmer gave evidence about the SHP that *“the landscape has been completely changed. And that even if one were to imagine somehow it could be put back together again, which means you have to fill in some pretty large holes, the Yindjibarndi lore is understood to have been broken, because one of the fundamental beliefs is, apart from the ones I’m talking about ... the in-viability of country in terms of the religious belief is that you don’t take anything physically from the country. You don’t take artefacts ... don’t pick up things and remove them, because the belief is that they have been put there by – by the God.”*²⁵³ He said, *“[N]o form of remediation could remedy what Yindjibarndi people have described to me as being the country which has now become like a hollow log, Yala yala, I think is the Yindjibarndi term, meaning that it’s like a hollow log, there’s nothing left in it of vitality/reality.”*²⁵⁴

(ii) Yindjibarndi spirits and the Solomon Hub

- 311 The second further aspect of cultural loss relating to spiritual connection concerns the diminishing effects on the spirits that Yindjibarndi people understood to reside in the *ngurra* of the SHP. Dr Palmer observes that *“[t]his represents a loss to a portion of the spiritual world which is believed to be the birthright of Yindjibarndi people”*.²⁵⁵ Judith Coppin describes her reaction to driving in the vicinity of the SHP as follows:

²⁵² KP1 (E.03.001) [284].

²⁵³ T484.15, T484.40 (A.07.010) and T839.25 (A.07.018). Also see LCoppin (A.05.006)[14], AM (A.05.017)[61]. Contrast with the FMG Respondent’s practice of storing salvaged artefacts in an undisclosed location on the SHP: eg see CB G.B.01.015, “Cultural Heritage Management Plan Fortescue Project Areas” PDF p45. There is no evidence that indicates the FMG Respondents have consulted with the Applicant about the storage of archaeological material salvaged at the SHP and/or the return of that material to Yindjibarndi country.

²⁵⁴ MW (A.05.022) [24], T839.35 (A.07.018).

²⁵⁵ KP1 (E.03.001) [300].

*“Once I was driving with my husband Bruce James to his meeting at Tom Price about his Banjima country. We were driving on the Rio Tinto Road near Hamersley Station, near Wirlu-Murra jinbi (spring). This is near where the T-junction meets the turn off to the Auski Roadhouse (Nanuturra Wittenoom Road). I could see the lights from the Solomon Hub Project Mine (the Mine). **I just went so quiet.** It looked like a big city. Bruce who was driving stopped at the gate there. I asked him, “what are them lights?”. Bruce said that was my country getting blown up. I said, “Can't be”. Then we heard a big blast. **I started crying and he cried with me. I didn't talk to Bruce again on that trip until we got to our camp at the windmill north of Tom Price. All the way from that gate at Wirlu-Murra jinbi to where we were stopping at the windmill near Tom Price. I was speechless.** This was for about 1.5-2 hours. When we got out of the car, **I was still quiet. I had seen my ngurra just blown up. I was devastated. My wirrard (soul and spirit) was destroyed.**”²⁵⁶ (emphasis added)*

312 Dr Palmer prefaces his description of the felt reality of this aspect of the loss, by observing that the Yindjibarndi native title holders “*understand the spirits of their forebears to both inform the landscape and act as an agent of spiritual communication between the living and the spiritual domain. ... a belief in the spiritual presences within the country informs their relationship with that country, how they act when visiting it and so serve as a signal to others of their dominion over it.*”²⁵⁷ Spirits are “*real*” entities that are in essence spiritual (to be distinguished from the spiritual noumena of the *wirrard*). They make their home in the country, including in caves and will sometimes follow people around. They are believed to be ubiquitous and their presence is palpable (KP1 (E.03.001) [287], [289]). They are described by terms including “*tharnga-ngarli*” (ritual leaders), “*juju-ngarli*” (old people together); *nyugangarli* and *ngurrara* (country owners).

313 Dr Palmer also sets out field data (consistent with the Applicant's direct evidence) of the belief that as a consequence of the SHP spirits now wail at night due to having been made homeless (KP1 [291]).²⁵⁸ Spirits have moved to the miner's accommodation where they confront and frighten workers.²⁵⁹ Some are believed to be antagonistic and dangerous and to have caused ‘*mental problems*’ for people at the mine site, and the death of one worker (KP1 [293]-[294]).²⁶⁰ Yindjibarndi people are no longer able to properly receive *jawi* songs from spirits who have been disturbed, this being a further aspect of loss of connection to country (KP1 [295]-[298]).²⁶¹

Dr Palmer's conclusions and opinion regarding loss of spiritual connection to country

314 The conclusions reached by Dr Palmer (at KP1 [301]-[303]) concerning the loss of spiritual connection to country in these two ways (this being an aspect of cultural loss) are strongly supported by both his fieldwork and the Yindjibarndi evidence, and should be accepted by the Court. Dr Palmer concludes by observing that his field data speaks to a countryside that is altered not just in its physical form, but also in its spiritual dimensions, this being a significant aspect of how relationships with country are perceived and executed for Yindjibarndi people.

²⁵⁶ JC (A.05.015) [5].

²⁵⁷ KP1 (E.03.001) [286] referring to [70], [89], [95].

²⁵⁸ KW (A.05.012) [41], Ex1 (A.04.001) [42], LCheedy (A.05.013) [30], EG (A.05.010) [17], Ex2 (A.04.002) [31], T246.28 (A.07.007), T328.20, T336.10 (A.07.008).

²⁵⁹ Ex1 (A.04.001) [42].

²⁶⁰ MC (A.05.014) [26], Ex2 (A.04.002) [25], JNorman (A.05.002) [11]-[12], LCheedy (A.05.013) [31]-[32], SWilson (A.05.007) [16]-[17], AM (A.05.017) [132], JC (A.05.015) [32], [34].

²⁶¹ Ex2 (A.04.002) [30].

Senior men identified this loss with an emptiness and vacating, accompanied by a deep sadness, using the term *yurluwa* (nothing, none, nil) to express this emotion. This is how they now feel about *Ganjingarringunha* (the area of the mine).²⁶² The diminution of the spirits in that area also causes a loss and sadness – “[t]he spiritual link between those who live and those who preceded them being an important part of what it is in essence to be a Yindjibarndi person.”²⁶³

The Loss of Rights and Duties of an Owner of Country

315 Jagot J has observed that “*it is a deeply held moral, spiritual, and existential responsibility of the bearers of the traditional culture to protect the land from harm, to nurture the land, to protect and nurture the culture, and to transmit the knowledge.*”²⁶⁴ As well as, in the exclusive area, conferring the right to possession, occupation, use and enjoyment of the area to the exclusion of all others, the NTRI of the Yindjibarndi people include, within the claim area “*a right ... to protect and care for sites and objects in ... including a right to impart traditional knowledge concerning the area to succeeding generations*”, as well as “*the right to conduct activities necessary to give effect to (those rights).*”²⁶⁵

316 As distinct from the cultural loss arising more directly from the physical impact of the SHP on the country of the Yindjibarndi people, a significant aspect of the cultural loss suffered by them concerns their loss of the capacity to exercise their rights and duties in relation to their land. At KP1, Chapter 4, under the heading “Loss of Rights and Duties of an Owner of Country”, Dr Palmer addresses issues relating to the following forms of loss:

- (i) of dominion;
- (ii) of the right to be asked;
- (iii) of the right to teach others and the duty to do so; and
- (iv) of the right to look after country.

317 Dr Palmer describes his task on these issues to be to ascertain whether the consequences of the actions taken on Yindjibarndi country without permission, as perceived by Yindjibarndi people as contravening their Law, has resulted in cultural loss, and to describe the extent of that loss.²⁶⁶

(i) Loss of Dominion

318 By the term ‘*dominion*’, Dr Palmer means ‘*the power or right of governing or controlling*’ Yindjibarndi people’s command over their country according to customary principles.²⁶⁷ Dr Palmer explains that, in order to gain an appreciation of the nature of cultural loss resulting from forfeiture of dominion, “*it is necessary to understand the economic, social and cultural value placed upon country (ngurra) by the country owner (ngurrara).*”²⁶⁸

319 Dr Palmer repeats his conclusion from his 2014 native title report that, “*a ngurrara has the right to enter, use and exploit his or her countryside. These rights, whether enumerated as to*

²⁶² KP1 (E.03.001) [302].

²⁶³ KP1 (E.03.001) [303].

²⁶⁴ Jagot J Article at 833.

²⁶⁵ *Warrie (No. 2) Determination* at [3], [4].

²⁶⁶ KP1 (E.03.001) [192].

²⁶⁷ KP1 (E.03.001) [195].

²⁶⁸ WW (A.05.009) [62], Ex2 (A.04.002) [36], SWarrie (A.05.008) [89], MC (A.05.014) [12], IG (A.05.011) [7]-[12], IW (A.05.018) [9], Ex1 (A.04.001) [39], T650.28 (A.07.012).

*their detailed particulars or not, may be considered to encompass all activity that could be contemplated on the country ...*²⁶⁹

- 320 He explains that country is not merely real property, but rather it was described to Dr Palmer as the “power” of the gift of country given to Yindjibarndi people by *Mingala*, who also provided a set of rules as to how the land was to be looked after and managed. *Mingala* left the Yindjibarndi people the land and laws to manage the country, the Law being that *ngurra* is a *ngurrara*'s first responsibility.²⁷⁰
- 321 The English translation of words used by Dr Palmer's informants to describe their rights as *ngurrara* include ‘owner’, ‘heirs’ and that country is to them ‘your inheritance’. As an owner of the country, in Dr Palmer's opinion the customary rights and duties of Yindjibarndi include:
- (a) the right to use and access the country;
 - (b) the right to grant or withhold permission should a *manjangu* wish to enter the country; and
 - (c) the duty to look after both unauthorised visitors and the country itself in prescribed ways.
- 322 Consistent with this, the native title rights that have been recognised and determined in Yindjibarndi country, at their most extensive (in the ‘Exclusive Area’) ‘*confer the right to possession, occupation, use and enjoyment of that area to the exclusion of all others*’ (subject to certain noted qualifications).²⁷¹ This right is seen as the most important right held by the Yindjibarndi.²⁷²
- 323 Dr Palmer emphasises the important distinction between *ngurrara* and *manjangu* (strangers) to emphasise the nature of the loss that the development of the SHP represents for Yindjibarndi, also noting the recognition by Rares J of the distinction in the *Warrie (No. 2)* Determination.²⁷³ Dr Palmer regards the fact that non-owners should seek permission from owners prior to entering country as lying at the foundations of the native title rights of the Yindjibarndi people. He considers that, “[t]hose who do not seek permission are regarded with suspicion as *potentially dishonest, seeking to steal by stealth*”. It is Dr Palmer's opinion that:
- ‘the laws that are believed to ordain and uphold [the rights] according to Yindjibarndi customary practice are the social and religious context that informs the Indigenous response to the mining tenements and the consequential mining activities.’²⁷⁴
- 324 Unfamiliarity of *manjangu* with the country also makes them ‘*potentially dangerous, unpredictable and volatile – [and] above all unwelcome*’.²⁷⁵ Without permission, the *manjangu* who conduct the mining activity at the Solomon Hub area are not simply unauthorised but are also destructive.²⁷⁶

²⁶⁹ KP1 (E.03.001) [196].

²⁷⁰ KP1 (E.03.001) [197]-[198], AM (A.05.017) [40], [62], MW (A.05.022) [30], [230], MC (A.05.014) [25], T682.21 (A.07.0138), T249.02 (A.07.007).

²⁷¹ *Warrie (No.2)* [4], [5].

²⁷² EG (A.05.010) [42], MW (A.05.022) [268]-[269], T508.12 (A.07.011), T678.12-679.06 (A.07.013).

²⁷³ KP1 (E.03.001) [203] referring to *Warrie (No. 2)* at [111], [151].

²⁷⁴ KP1 (E.03.001) [205].

²⁷⁵ KP1 (E.03.001) [205], KW (A.05.012) [44], MC (A.05.014) [30], T678.12-679.06 (A.07.013), T472.40-473.06 (A.07.010).

²⁷⁶ KP1 (E.03.001) [208].

Development of the mine seen as theft - 'loss of dominion'

- 325 Dr Palmer observes that for Yindjibarndi people, the loss of dominion over parts of Yindjibarndi country constitutes theft. He quotes Charlie Cheedy who draws the comparison of if he were to go into someone's backyard and pull out trees and suggests that he would go to jail for such destructive conduct. Dr Palmer also reflects on Middleton Cheedy drawing a parallel between what he witnessed as a child as the "*stealing*" of country in the case of the construction of the Harding Dam on Yindjibarndi country, (believed to have fatal consequences for Law man Long Mack, who had the main responsibility for that area²⁷⁷) and equivalent circumstances now happening with the SHP.²⁷⁸
- 326 Dr Palmer also observes that the act of '*theft*' constituted by the development of the mining project without permission, is also seen to contravene the concept of "*nyinyaard*" (separately from the consequences of the division between WYAC and YAC). Senior informants told Dr Palmer that FMG broke Yindjibarndi Law by it taking the land without consent and not observing *nyinyaard*, by not '*sharing*' and practising *quid pro quo*. Further, he observes that '*trespassing*' by FMG and then denying Yindjibarndi people access to their *ngurra* is such that they consider such actions are punishable by death.²⁷⁹
- 327 Dr Palmer observes a further aspect of the loss of dominion to be the effect that the SHP has in limiting the nature of excursions that Yindjibarndi people can now make on their country. Such excursions serve the purposes of reuniting community members and allowing them to reconnect with the spirits in their country. The emotional and spiritual satisfaction gained from such trips is affected by the physical limitations now imposed by the SHP. The destructive nature of the curtailment was emphasised by Stanley Warrie, who observed to Dr Palmer that you "*might be blown up*" if you went where you wanted to go.²⁸⁰

Dr Palmer's concluding opinion as to how "loss of dominion" informs cultural loss

- 328 In summarising his opinion concerning loss of dominion, Dr Palmer considers it to be part of cultural loss. He considers it goes further than the economic loss reflected in the fact that *ngurrara* can no longer access the SHP. That lack of access results in the loss of all rights and obligations bringing "*deep hurt*" and "*the denial of rights to the country cuts the essentiality of Yindjibarndi religious belief: that Mingala allocated country along with a multitude of cultural attributes that serve to identify and define the Yindjibarndi as an autonomous people*".²⁸¹ The SHP fractures the Yindjibarndi peoples' identity and breaks the integrity of their *ngurra*.
- 329 The loss of country "*informs feelings of cultural loss that relate to identity, autonomy and personal status*" and results in a significant personal loss for senior Yindjibarndi men, whose individuality and identity are defined in terms of their role in the practice of the Law, which includes looking after and having authority over all of Yindjibarndi country. Such cultural loss results in a deep emotional hurt and loss of identity that can result in physical decline and perhaps even death. Based on his field data, Dr Palmer regards this as a significant component

²⁷⁷ AM (A.05.017) [62], Ex2 (A.04.002) [16], T569.16-570.11.

²⁷⁸ KP1 (E.03.001) [209]-[210]. See also SW [89], KG [24], AM [99]-[100].

²⁷⁹ KP1 (E.03.001) [212], [215].

²⁸⁰ KP1 (E.03.001) [216]-[217], SWarrie (A.05.008) [92], [124], LCheedy (A.05.013) [21], [35], MC (A.05.014) [50], MW (A.05.022) [42]-[47], KG (A.05.016) [20], [27], [49], [62].

²⁸¹ KP1 (E.03.001) [220].

of cultural loss.²⁸² In KP2 (at [171]) Dr Palmer indicated that his review of the lay witness evidence was consistent with this opinion.

(ii) Loss of the right to be asked

330 The second aspect of “*Loss of rights and duties of an owner of the country*” identified by Dr Palmer is the “*Loss of the right to be asked*”. Yindjibarndi people understand the failure of FMG to “*seek permission from the native title holders to undertake their activities*” as a cultural loss.²⁸³

331 FMG’s conduct in relation to the right to negotiate procedures under the NTA, did not, and is not viewed by Yindjibarndi people as, seeking permission. This approach was emphasised by FMG negotiators telling the Yindjibarndi that any resistance was futile, and by its subsequent preference to not include YAC representatives, the registered native title claimant, in heritage surveys and involving only WYAC representatives.²⁸⁴

332 A “*concomitant duty*” and a specific Yindjibarndi ritual practice is the *wuthuru* (calling out to the spirits in the country).²⁸⁵ Dr Palmer, at KP1 [240]–[241], references his fieldwork, and observations made by Rares J in *Warrie (No. 1)*, showing the significance and the dangers that may come to pass if the spirits residing in the country are not properly addressed by those entering. The *nyuga* (spirits) must be addressed in Yindjibarndi by *ngurrara* for the country.

333 Dr Palmer refers to the belief that workers and others at the SHP are understood to have come to harm, both physically and mentally as a result of encounters with spirits.²⁸⁶ In Dr Palmer’s view, this reflects a belief that ancestral spirits are in a state of disquiet following the destruction of their habitat (the Hamersley Ranges and its caves and deep valleys) and are considered to be “*a consequence of the lack of any opportunity by the ngurrara to manage the spirits of the landscape, according to customary ritual practice, as is their duty.*”²⁸⁷

334 Dr Palmer’s opinion is that the deprivation of the right to be asked has a double element of cultural loss: firstly being the loss of the right to control the entry of others and the use of the land by giving or withholding permission; and secondly, the privation of the exercise of the duty to protect strangers from the spiritual forces of the country.²⁸⁸

(iii) Loss of the right to teach others and the duty to do so

335 The third aspect of “*Loss of rights and duties of an owner of the country*” identified by Dr Palmer is the “*Loss of the right to teach others and the duty to do so*”.²⁸⁹

336 Dr Palmer’s opinion concerning this aspect of cultural loss derives from his view that for the Yindjibarndi “*... landscape and country are testament to eternal truth and a witness to the normative structures of contemporary living.*”

²⁸² KP1 (E.03.001) [221].

²⁸³ KP1 (E.03.001) [237], FC (A.05.019) [19], EG (A.05.010) [43], JC (A.05.015) [22], SWarrie (A.05.008) [97], T655.01 (A.07.012), T508.20 (A.07.011).

²⁸⁴ SWarrie (A.05.008) [30]–[31], [35], [79], MW (A.05.022) [336]–[338], LCoppin (A.05.006) [43].

²⁸⁵ KG (A.05.016) [20], LCheedy (A.05.013) [13]–[14], [20].

²⁸⁶ KP1 (E.03.001) [240]–[241]. See also AM (A.05.017)[132], JNorman (A.05.002) [11]–[12], EG [13], T364 (per Kaye Warrie) (A.07.008), JC (A.05.015)[13].

²⁸⁷ KP1 (E.03.001) [243].

²⁸⁸ KP1 (E.03.001) [244], LCheedy (A.05.013) [13]–[14], [20], SWarrie (A.05.008) [8], T242.38 (A.07.007).

²⁸⁹ KP1 (E.03.001) [245]–[254].

- 337 Dr Palmer draws from his fieldwork with a number of informants including Stanley Warrie and Charlie Cheedy to explain the importance of the physical existence of country and the capacity to take younger people to country *“to ensure the continuity of these beliefs through successive generations. In short: to see is to believe; to believe is to understand.”*²⁹⁰
- 338 Dr Palmer observes that Charlie Cheedy likened the attestive qualities of the countryside to the Bible of Christian practice. Yindjibarndi country was to be valued above the *“‘Whitemans’ Bible which come from overseas”*, as a testament to spiritual events. Mr Cheedy told Dr Palmer that they could not teach young people about country that had been dug up – *“If these places are destroyed they will not provide evidence of these things happening in the Ngurra Nyujunggamu.”*²⁹¹
- 339 Dr Palmer observes that Yindjibarndi women who accompanied him on his fieldwork at *Ganjingarringunha wundu* in 2022 told him about the role that country played in ensuring the continuity of knowledge over the generations. They observed that campsites stood as a testament to the eternal nature of Yindjibarndi occupation of their country. Such places were now gone from the SHP and they *“can’t teach our kids about these places and what they mean to our culture”*.²⁹²
- 340 Dr Palmer explains that the cultural loss of the right to teach younger Yindjibarndi by reference to the landscape and places within it requires close referencing to country, and *“the whole of the country, along with social and ritual actions, are understood to form a single organic and spiritual whole. The loss of a portion [of the SHP] “diminishes the whole and so too the integrity of both cultural knowledge and the relationship with country”* and means that *“the laws and customs of the Yindjibarndi people can no longer be handed down intact and unbroken”*. This is perceived by Yindjibarndi people as *“a threat to sustaining the integrity of Yindjibarndi cultural beliefs and knowledge for future generations”* and in Dr Palmer’s opinion represents a cultural loss.²⁹³
- (iv) *Loss of the Right to look after country*
- 341 The fourth aspect of *“Loss of rights and duties of an owner of the country”* identified by Dr Palmer is the *“Loss of the right to look after country”*.
- 342 Dr Palmer at KP1 [255] draws on earlier parts of his report that explain the customary duty of Yindjibarndi people to look after their country as a matter of *‘sacred trust’* and explains that it is appropriate to regard this as both a duty but also a right to look after country. The exercise of the duty resides with the bosses (*nyambali*) and keepers of the Law (*tharagangarli*) and involves looking after both country and the spirits that reside there, and may involve the performance of rituals, including both singing and sometimes burning country.²⁹⁴
- 343 Dr Palmer refers to the fact that the SHP and associated infrastructure have destroyed or rendered unrecognisable, a part of the country of his Yindjibarndi informants, and that beyond this, concerns were expressed to him by those responsible for the country that the SHP had additional consequences for the surrounding country. Dr Palmer at KP1 [246]-[257] gives

²⁹⁰ KP1 (E.03.001) [245], SWarrie (A.05.008) [126]-[127], LCheedy (A.05.013) [35], LCoppin (A.05.006) [52], AM (A.05.017) [96]. See also evidence of Fabian “Charlie” Cheedy: T688.05 (A.07.013).

²⁹¹ KP1 (E.03.001) [251]-[252].

²⁹² KP1 (E.03.001) [253].

²⁹³ KP1 (E.03.001) [254].

²⁹⁴ KP1 (E.03.001) [256], [260].

examples of concerns expressed to him about what are perceived as the effects of the mining activity on surrounding country and watercourses, and on the quantity of plants and animals, and fears that are held concerning perceived threats to the spring, close to the SHP, at *Bangkangarra*.

- 344 At KP1 [258]-[260] he gives examples of the sense of failure felt and expressed by senior men as a result of their inability to prevent the destruction caused by the mine, and the perceived effect on surrounding country. They have feelings of failed responsibility that develop from the inability to discharge their sacred trust. Dr Palmer also explains that there is an imperative to look after country and the unity that exists between a Yindjibarndi person and their country.²⁹⁵
- 345 Angus Mack expressed his frustration, anger and powerlessness to look after country in the SHP to Dr Palmer, and in doing so likened his experiences to those of his father, Long Mack, who was believed to have died of grief as a result of his failure to protect his country from inundation as a result of the construction of the Harding Dam.²⁹⁶
- 346 Dr Palmer observes that the inability to discharge the duty (given the sacred nature of the trust involved in doing so) is hurtful at a personal and spiritual level and therefore reflective of the ‘*epic emotions*’ of Yindjibarndi people described earlier. The example of the Harding Dam demonstrates how the loss of the ability to look after country may result in personal anguish and even death. In this respect, he concludes that the relevant loss occasioned by the SHP has occasioned substantial personal pain to Yindjibarndi people.²⁹⁷ It is observed that the long term and likely permanent nature of the destruction to the country effected by the SHP represents ongoing cultural loss through deprivation of the right to look after country for the Yindjibarndi people and their descendants.

Loss Arising From Social Disruption Including Group Fragmentation and Related Trauma

- 347 The Yindjibarndi people divided publicly in August 2010 over a LAA. They have remained divided since then. This section relates to the Yindjibarndi lay evidence, documentary evidence, the SOAF and the s.86(1) NTA material in evidence relating to the division and its impacts. In this section where “FMG” is used it refers to the FMG Respondents.
- 348 This division and social disruption are properly understood as arising from the development and operation of SHP. Factually, the two are so closely entwined as to make them hard to separate in a meaningful way. The Applicant submits that the division and social disruption is an aspect of non-economic or cultural loss compensable under s51(1) NTA and s.123 *Mining Act*.
- 349 Much of this evidence is subject to undetermined relevance objections from FMG and the State (on the ground that social disruption and division is not a component of non-economic or cultural loss). The parties have agreed that it is appropriate for the Court to determine this objection in its reasons.

²⁹⁵ KP1 (E.03.001) [260] per field data from Angus Mack.

²⁹⁶ KP1 (E.03.001) [261], AM (A.05.017) [62], Ex2 (A.04.002) [16], T569.16-570.11 (A.07.011).

²⁹⁷ KP1 (E.03.001) [263], AM (A.05.017) [44]-[45], JNorman (A.05.002) [1], JC (A.05.015) [28], KG (A.05.016) [54], LCoppin (A.05.006) [13], [45], [49], Ex1 (A.04.001) [39], T359.20 (A.07.008).

FACTUAL ACCOUNT OF THE DIVISION AND SOCIAL DISRUPTION

Introduction

350 The period from 2007 to March 2011 marked the early stages of the relationship between the Yindjibarndi people and FMG. Between the beginning of 2008 and August 2010 the Yindjibarndi people and FMG attempted to negotiate a LAA. It is an agreed fact that no agreement had or has been reached.²⁹⁸ The negotiation was characterised by the opposition of YAC, as the representative body for the Yindjibarndi People, to the grants of mining leases to FMG and a stalemate between the parties about the financial aspects of an agreement.²⁹⁹

351 In 2010, some division emerged among the Yindjibarndi people, including in relation to YAC's negotiations with FMG which ceased in August 2010. A number of Yindjibarndi people who were in favour of continued negotiations with FMG and who were dissatisfied with YAC's unwillingness to continue to pursue negotiations, decided to establish their own corporation, which became WYAC.³⁰⁰ WYAC and FMG negotiated a LAA from at least November 2010 (WYAC FMG LAA).³⁰¹ YAC did not know about this.

352 With FMG's support, WYAC attempted to get the Yindjibarndi people to support making an agreement with FMG at a meeting in late December 2010. The meeting disbanded before considering any resolutions.³⁰²

353 WYAC made a second attempt to secure this support at a meeting on 16 March 2011, again with FMG's backing. This meeting also included a first attempt to authorise WYAC members to replace the Yindjibarndi #1 Applicant.³⁰³ Minutes of that meeting prepared by WYAC's lawyers, Corser & Corser Lawyers (**Corser & Corser**), record that resolutions were made in support of the WYAC FMG LAA and authorising a replacement Applicant. Following the meeting, Corser & Corser brazenly sent a copy of the agreement partially signed by WYAC aligned members of Yindjibarndi #1 Applicant to YAC with a request for the remaining members of the Applicant to sign it. They never did.³⁰⁴ In a causative sense, events that followed arose from this relatively short period between August 2010 and March 2011.

354 The aspects of the division that we then address are:

- (a) the relationship between WYAC and FMG;
- (b) WYAC attempts to replace the Yindjibarndi #1 Applicant and participation in the trial of *Warrie (No.1)*
- (c) court proceedings against YAC in the Supreme Court of Western Australia;
- (d) cultural heritage; and
- (e) attempts to reconcile.

355 All these aspects are related.

298 SOAF (A.02.015) [91].

299 SOAF (A.02.015) [67], MW (A.05.022) [185]-[186].

300 SOAF (A.05.022) [57].

301 SOAF (A.05.022) [62].

302 SOAF (A.05.022) [65].

303 SOAF (A.05.022) [68].

304 SOAF (A.05.022) [69].

356 The Applicant submits that, at its heart, the division has been characterised by two things. Firstly, the repeated attempts by WYAC to take control of YAC and, prior to *Warrie (No. 1)* take control of the Yindjibarndi #1 claim. Secondly, it has been characterised by the close business relationship between WYAC and FMG.

356A The evidence in this case details the closeness of the relationship and the extent of FMG's involvement in key events contributing to the division. This was first revealed when FMG produced documents upon which Rares J based his decision in *TJ v Western Australia* [2015] FCA 818. The documents related to the replacement of the then Yindjibarndi #1 Applicant. The relevant findings are included in the s.86(1) NTA material. Notably, his Honour found that the meeting of June 2015 meeting was heavily orchestrated by FMG.³⁰⁵ The Applicant has summarised these documents in spreadsheets, which are in evidence (Vol H of the Court Book)³⁰⁶. Following the relevant orders of the Court made on 28 October 2024 FMG's lawyers have written to the Applicant's lawyers identifying alleged errors in the spreadsheets. These errors will be reviewed and corrected as necessary in reply submissions.

The Yindjibarndi people before 2007

357 An account of the history of the Yindjibarndi people arising from their interaction with settlement in the Pilbara from around 1860s and 1870s prior to the split is conveniently set out by Nicholson J in *Daniel v Western Australia* [2003] FCA 666 at [149] and [157]-[201], which is part of the s.86(1) NTA material in this case (see CB A.09.006).

358 Yindjibarndi witnesses have described the community before 2007 as united, peaceful and together as one.³⁰⁷ Michael Woodley gave evidence about the nature of the community in the hearing of *Warrie (No. 1)*³⁰⁸ and elaborated on it in his witness statement.³⁰⁹ He describes an identifiable Yindjibarndi community in Roebourne from the late 1960s. Mr Woodley says:

“When I was growing up the Yindjibarndi community elders were from my abigee's generation who got moved off their country with all their families who lived in the village. The community was strong. I saw the rules for the community were enforced by the elders and by mutual acknowledgement and respect for them. The rules meant that any arguments did not weaken the community and were dealt with by the elders in each family.

“At no time when I was growing up was there a division like now with Wirlu-Murra. No family or families went outside the structure and authority of the community to pursue separate ways. This was inconceivable amongst my abigee's generation.

359 Yindjibarndi witnesses describe in their evidence that the community before 2007 was united under the obligations of the *Galharra* system,³¹⁰ respected elders as the decision-makers of the

³⁰⁵ *TJ v Western Australia* (2015) 242 FCR 283 (A.09.013) at [396] and see also fn 136 above.

³⁰⁶ Also see CB Vol J.

³⁰⁷ SWarrie (A.05.008) [27], [58], AM (A.05.017) [5], [52], [106], MC (A.05.014) [52], KG (A.05.016) [75], T653.06, Ex2 (A.04.002) [45], JC (A.05.015) [53], Ex 1 (A.04.001) [16], JN (A.05.002) [26], KW (A.05.012) [18], [22], [47], LCheedy (A.05.013) [37], T231.30, LCoppin (A.05.006) [9], SWilson (A.05.007) [12], IG (A.05.011) [17], EG (A.05.010) [25], [26], WW (A.05.009) [84].

³⁰⁸ CB ZA.05.042 s.86(1) NTA material Witness statement of Michael Woodley filed in WAD6005 of 2003.

³⁰⁹ MW (A.05.022) [55]-[99].

³¹⁰ SWarrie (A.05.008) [10], AM (A.05.017) [35]-[36], MC (A.05.014) [54], Ex2 (A.04.002) [38], Ex 1 (A.04.001) [35], JN (A.05.002) [26], KW (A.05.012) [18], [22], [47], LCheedy (A.05.013) [37], T231.30.

community,³¹¹ practiced *nyinyaard* (the system of reciprocity),³¹² and attended Birdarra Law ceremonies as one.³¹³

360 Because of the important work done by Juluwarlu Aboriginal Corporation (**JAC**), other people can access rich media that describes all these aspects of Yindjibarndi people and Yindjibarndi *ngurra*.

Yindjibarndi and FMG try to negotiate a LAA and a division emerges in the Yindjibarndi people between May 2007 to March 2011

2007

361 Yindjibarndi representatives first met with FMG in 2007 to discuss the identification and protection of Yindjibarndi cultural heritage sites regarding the FMG Respondents' exploration program for its then proposed SHP.³¹⁴

362 Yindjibarndi people participated in some cultural heritage surveys over E47/1334 and E47/1447 for FMG in 2007.³¹⁵

363 As set out elsewhere in these submissions, after one of those surveys FMG bulldozed a spring or *jinbi* at *Ganjingarrinngunha*.³¹⁶

364 After this, Yindjibarndi people stopped participating in cultural heritage surveys for FMG. Except for a period in 2008 and in 2009, Yindjibarndi people did not participate in heritage surveys for FMG again until mid-2010.³¹⁷ This was a significant feature of the relationship between FMG and the Yindjibarndi people between mid-2007 and mid-2010.³¹⁸

365 By late 2007, the Yindjibarndi people (through its representatives YAC and JAC) had started talking with FMG about a LAA for the development of the SHP. In November of that year YAC wrote to FMG agreeing to negotiate an agreement on the basis that Yindjibarndi would suspend heritage surveys during the negotiation and negotiations would take place according to the attached "Yindjibarndi Marrga Negotiation Protocols".³¹⁹ It is an early statement of facts and matters that go to the heart of important issues in this case.³²⁰

366 In December 2007, January 2008 and April 2008 the State notified FMG's applications for mining leases M47/1409, M47/1411 and M47/1413 under s 29 of the NTA. This triggered the

311 MW (A.05.022) [24], AM (A.05.017) [121], MC (A.05.014) [171], JC (A.05.015) [62], Ex 1 (A.04.001) [35], KW (A.05.012) [13], T369.15, LCoppin (A.05.006) [9].

312 SWarrie (A.05.008) [26], MW (A.05.022) [282]-[283], AM (A.05.017) [18], MC (A.05.014) [32], JC (A.05.015) [62], Ex 1 (A.04.001) [33], LCoppin (A.05.006) [57], WW (A.05.009) [25].

313 AM (A.05.017) [118], KG (A.05.016) [72], KW (A.05.012) [17], LCheedy (A.05.013) [38].

314 SOAF (A.02.015) [26]-[27].

315 SOAF (A.02.015) [24].

316 SOAF (A.02.015) at [168].

317 SOAF (A.02.015) [24], [38]-[40], [48], [49], [51].

318 MW (A.05.022) [175], [186], [201] and annexures MW-19 to MW-22, SOAF (A.02.015) [32]-[34], [42],[50].

319 MW (A.05.022) at annexure MW-18 and SOAF (A.02.015) [26].

320 MW (A.05.022) [178].

six-month right to negotiate period under the NTA in relation to each mining lease application.³²¹

2008

367 In 2008 YAC was appointed agent for the Yindjibarndi #1 Applicant under s.84B of the NTA. FMG and YAC engaged in negotiation throughout 2008 in relation to a LAA. Offers of financial compensation were exchanged. No agreement was reached. The sticking point was compensation.³²²

368 In November 2008 FMG lodged an application with the NNTT under s.35 NTA for a determination that M47/1413 could be granted. This was followed by applications relating to M47/1409 and M47/1411 in January 2009.³²³

2009

369 The Yindjibarndi #1 Applicant objected to all three applications to the NNTT and provided evidence in support of its objections. These are in evidence as extracts from affidavits of Michael Woodley.³²⁴ In August 2009 the NNTT determined that the three mining leases could be granted subject to conditions.³²⁵ The Yindjibarndi #1 Applicant appealed the NNTT determinations to the Federal Court. The appeals were dismissed in July 2010. The Yindjibarndi #1 Applicant appealed to the Full Court and this too was dismissed in August 2011. There were no meetings between FMG and YAC in 2009 to negotiate a LAA.

2010

370 At the beginning of 2010 FMG wanted to have a meeting with Yindjibarndi people to satisfy itself that the community had rejected FMG's previous offers. YAC objected to this meeting.³²⁶

371 In May 2010 the NNTT started providing mediation assistance to the Yindjibarndi people and FMG in relation to the negotiation of a LAA.³²⁷

372 After July 2010 FMG organised another meeting with Yindjibarndi people in Roebourne. YAC did not know about this meeting before it took place. FMG employees Michael Gallagher and Alexa Morcombe attended the meeting.³²⁸ A copy of a flyer handed out by FMG at this meeting said "[u]nder the law, no financial compensation is payable to Yindjibarndi if the leases are granted".³²⁹ Some Yindjibarndi people agreed at this meeting to participate in FMG cultural heritage surveys, which took place soon afterwards. These FMG cultural heritage surveys in July 2010 marked the beginning of a long partnership between FMG and Yindjibarndi people who went on to establish WYAC.

373 In August 2010, the last negotiation meeting between YAC and FMG took place at Roebourne. The then President of the NNTT chaired the meeting. One of the FMG representatives at the

³²¹ SOAF (A.02.015) under heading "H. Mining Tenure of the SMH"

³²² MW (A.05.022) [184], [185], [188] and annexures MW-24 to MW-28. SOAF (A.02.015) [28], [35], [36], [37], [41], [43].

³²³ SOAF (A.02.015) under heading "H. Mining Tenure of the SMH".

³²⁴ CB ZA.05.040 and 041 Extract of affidavit of Michael Woodley dated 25 May 2009 filed in NNTT WF08/31 and WF09/01 (**M Woodley affidavit 25 May 2009**) and extract of affidavit of Michael Woodley dated 14 February 2011 in NNTT WF10/19 (**M Woodley affidavit 14 February 2011**).

³²⁵ SOAF (A.02.015) under heading "H. Mining Tenure of the SMH".

³²⁶ MW (A.05.022) [210], [221] and MW-44 to MW-47.

³²⁷ MW (A.05.022) [223], [224], MW-49 and MW-52.

³²⁸ MW (A.05.022) [214] and MW-50, SOAF [53].

³²⁹ Affidavit of Simon Blackshield dated 1 May 2023, A.05.023 (**1st SCB**), Annexure SCB-25 p.353.

meeting was Blair McGlew. He reminded the meeting that FMG was a company in a hurry and “would use every legal avenue to get the mining tenements if we have too”. FMG made a financial offer comprising payments on the signing of an agreement, annual payments prior to mining and the following future mining payments:

- (a) 15 cents per tonne payment to a maximum of \$3,000,000 per year;
- (b) 5 cents per tonne contribution to a vocational training and education scheme to a maximum of \$1.5m per year; and
- (c) 5 cents per tonne payment to elders to a maximum of \$1,000,000 per year.

YAC did not respond to FMG's offer at the meeting. Shortly after FMG made it Yindjibarndi people Bruce Woodley, Maudie Jerrold, Jill Tucker and Allery Sandy announced that they were going to go their separate ways from YAC.³³⁰ This meeting marked the beginning of clear, public division in the Yindjibarndi people.

374 As to the origins of this division, it is an agreed fact that since approximately 2008, members of YAC, who later established WYAC, held concerns about how YAC was managed, about the management of YAC's finances and the finances of its subsidiaries, and about the role of Mr Woodley as its CEO.³³¹ This is also a finding made by Pritchard J in *Sandy (No. 4)*.³³²

375 Later in August 2010 there appears to have been a meeting of Yindjibarndi people who wanted to separate from YAC. Two lawyers from Corser & Corser, Chau Savas and Kerry Savas, attended the meeting. A resolution was made at this meeting for the establishment of WYAC. The attendance of lawyers from Corser & Corser is significant. Documents produced on subpoena from WYAC, Lawfirst Pty Ltd (**Bennett**) and Integra Legal, and documents produced by FMG in response to requests for informal discovery establish that Corser & Corser sent numerous invoices to FMG for legal services it provided to WYAC. These and other documents produced on subpoena and discovered are in evidence. While there is no Corser & Corser invoice referable to this meeting in evidence the inference can readily be drawn that FMG paid Corser & Corser's fees in connection with this meeting.

376 Also in late August 2010 FMG lodged an application with the NNTT under s.35 NTA for a determination that M47/1431, E47/1398 and E47/1399 could be granted. YAC objected to the application and Mr Woodley provided an affidavit in support of the objection in February 2011.³³³ This affidavit contains detailed cultural information about the tributary to *Ganjingarringunha wundu* where the Firetail mining operations are located.

377 In September 2010 Michael Woodley, then CEO of YAC, wrote to Andrew Forrest, then CEO of FMG to respond to FMG's offer at the August meeting. The letter refers to the division in the community and FMG's role in it. It makes various representations in connection with the negotiation of a LAA. Finally, the letter rejects FMG's offer and makes a counter-offer in the following terms:

The Yindjibarndi people remain willing to continue to negotiate with FMG; and, as a mark of good faith, the Yindjibarndi are prepared to lower their opening position for the purpose of these negotiations, from the previous “2.5% royalty”, put in late 2008, to a 1.5% royalty. Moreover, I can indicate that the Yindjibarndi are willing to negotiate

³³⁰ MW (A.05.022) [217], MW-53 and MW-57. SOAF (A.02.015) [55], [56], [162].

³³¹ SOAF (A.02.015) [58].

³³² CB A.09.017.01 s.86(1) NTA material *Sandy (No. 4)* at [122]-[131].

³³³ SOAF (A.02.015) under the heading “H. Mining Tenure of the SMH”, MW 2011 (ZA.05.041).

some way downwards from that opening position, but only upon receiving written confirmation that FMG agrees to:

- negotiate upwards, in a substantial and meaningful way, from the “ballpark” established by FMG’s agreements with other indigenous groups in the Pilbara;
- cease doing heritage surveys with Yindjibarndi men who, under Yindjibarndi law, have no authority to speak for, or manage, our sacred sites and areas of significance;
- refer any and all future communications or requests from any members of the so called “FMG Yindjibarndi” or from any members of the Yindjibarndi People, other than those comprising the Yindjibarndi Negotiating Team, to the Yindjibarndi Negotiating Team; and
- direct all future communications or requests from FMG to me, as the lead negotiator on the Yindjibarndi Negotiating Team.³³⁴

378 The day after this letter was sent there was a NNTT mediation conference attended by YAC and FMG representatives. YAC’s in-house counsel George Irving attended for YAC. Michael Gallagher and lawyer Ken Green attended for FMG. Mr Green indicated at the conference that he needed to take instructions about the division in the community and how FMG wanted to respond to the offer in the letter. The relevant outcome of the meeting was that Mr Green would take instructions and respond to YAC in writing within 7 days.³³⁵ In its response FMG indicated it was willing to continue negotiations but did not support YAC’s conditions of negotiation. FMG suggested that mediation in the NNTT continue.³³⁶ That was the last NNTT mediation conference between YAC and FMG, but not quite their last engagement about a LAA.

379 In November 2010 several Yindjibarndi people signed a letter to the local member of the Western Australian Legislative Assembly. The letter set out concerns about the conduct of Michael Woodley as a member of the Yindjibarndi #1 Applicant. It claimed that a substantial number of Yindjibarndi people did not support ongoing legal proceedings brought by the Yindjibarndi #1 Applicant against FMG. Finally, it invited representatives from the government to attend a meeting of Yindjibarndi people concerned about these matters. The letter is signed by Yindjibarndi people including those who announced at the meeting in August that they wanted to separate from YAC and three members of the Yindjibarndi #1 Applicant (AS, SA and MP). The return address on the letter is care of Corser & Corser.³³⁷ WYAC was incorporated on 23 November 2010.³³⁸

380 At the end of November 2010 there was some engagement between Blair McGlew and Michael Woodley. In that context, on 24 November Mr Woodley wrote to Mr McGlew to acknowledge that FMG had increased its financial offer, to make representations about why the offer was inadequate and to criticise FMG’s involvement in the division in the community. Mr Woodley said that YAC remained willing to negotiate:

The YAC remains committed to reaching an agreement with FMG if such agreement is based on mutual respect and prosperity, and if FMG are committed to agreement principles that serve to develop and support Yindjibarndi life and industry with the same momentum and competence as is devoted to mining iron ore – an activity that

334 MW (A.05.022) annexure MW-55, p.484.

335 MW (A.05.022) annexure MW-56, p.488.

336 MW (A.05.022) annexure MW-57, p.492.

337 MW (A.05.022) annexure MW-59, p.507, SOAF (A.02.015) [60] and *Sandy (No.4)* at [141].

338 *Sandy (No. 4)* at [77], SOAF (A.02.015) [63].

will inevitably cause irredeemable and long-term harm to our deepest cultural values, social organisation and identity as these are imbued in 'Ngurra' – our sacred country.³³⁹

- 381 On 26 November 2010 there was a meeting between YAC representatives (including Mr Woodley) and FMG representatives (including Mr McGlew) hosted by the Hon. Vince Catania MLA (the then local member), to discuss the negotiation. Shortly after this meeting on 30 November 2010 Mr McGlew wrote to Mr Woodley:
- (a) indicating that FMG was not prepared to negotiate with him separately to the Yindjibarndi people who did not accept that he had the authority to represent them;
 - (b) advising that a substantial number of Yindjibarndi people had approached FMG seeking to conclude a LAA on terms acceptable to FMG;
 - (c) advising that FMG had proposed to this group a financial benefits package totalling \$10,500,000 annually; and
 - (d) advising he understood a meeting of the Yindjibarndi #1 claim group would be held on 21 December 2010 to consider finalising an agreement based on that benefits package.³⁴⁰
- 382 During November and possibly early December 2010 FMG and WYAC negotiated the WYAC FMG LAA. YAC had no knowledge of the negotiation.³⁴¹ YAC received a copy of the agreement on 8 December 2010 from the office of the Hon. Mr Catania MLA.³⁴² The WYAC FMG LAA provided:³⁴³
- (a) it would cover all FMG's operations within the Yindjibarndi portion of the Ngarluma Yindjibarndi determination of native title in *Daniel v Western Australia* [2005] FCA 536 and the then Yindjibarndi #1 claim area;
 - (b) FMG would pay compensation to WAYC; and
 - (c) compensation paid under the agreement would constitute full and final satisfaction of all liabilities, claims for, or entitlement to native title compensation.
- 383 In early December 2010, Ron Bower, the then Principal of Corser & Corser, wrote directly to the Hon. Mr Catania MLA to convey concerns about Mr Woodley held by the "more than 100 members of the Yindjibarndi native title claim group" that Mr Bower said he represented.³⁴⁴ On 8 December 2010 Mr Woodley wrote a strongly worded response to Mr McGlew's letter of 30 November 2010 that echoes all the main themes in this case.
- 384 In December 2010 Ronald Bower wrote to ACMC advising that WYAC did not object to the first FMG application under s.18 AHA to destroy Yindjibarndi sites in the Firetail Priority Mining and Infrastructure areas.³⁴⁵ This was the first of many such applications by FMG. WYAC supported every single one.

³³⁹ MW (A.05.022) annexure MW-60, p.510.

³⁴⁰ M Woodley statement at MW-61, p.514.

³⁴¹ *Sandy* (No. 4) at [193].

³⁴² *Sandy* (No. 4) at [192], SOAF (A.02.015) [62].

³⁴³ *Ibid* at [147] and [148], SOAF (A.02.015) [71].

³⁴⁴ MW (A.05.022) annexure MW-62, p.516.

³⁴⁵ CB Vol G, B.03.001.01, App 12 – Letter from R Bower (Corser & Corser) to Aboriginal Cultural Material Committee (ACMC) dated 7 December 2010.

385 On 15 December 2010 there was a YAC AGM held in Juluwarlu's office at Roebourne. Prior to the meeting WYAC members accompanied by lawyers from Corser & Corser spoke with Mr Woodley about current events. Mr Woodley indicated that they should not attend the meeting. In *Sandy (No. 4)* Pritchard J found:

I find that Ms Allan and Ms Sandy (together with a number of other YAC members) attended the premises of Juluwarlu for the purpose of attending the YAC AGM on 15 December 2010. Mr Woodley, who was YAC's CEO, made clear that they would not be permitted to attend the AGM.³⁴⁶

386 At this AGM YAC also purported to cancel the membership of 26 of its members who were also WYAC members. The exclusion of members from this meeting and the purported cancellation of memberships was the earliest conduct the subject of *Sandy (No. 4)*. YAC accepted this this conduct constituted oppressive conduct within s.166-1 CATSI Act. Subsequent conduct relating to the cancellation of memberships and applications for membership of YAC formed a significant part of the conduct the subject of that case.³⁴⁷

387 On 21 December 2010 there was a Yindjibarndi meeting called by WYAC members and members of the Yindjibarndi #1 Applicant Mavis Pat (deceased) (MP), Aileen Sandy (deceased) (AS) and Sylvia Allen (deceased) (SA). The notified purposes of the meeting were to consider motions to the effect that: all objections on behalf of the Yindjibarndi #1 claim group members against FMG's [SHP] land tenure should be withdrawn; the Yindjibarndi #1 Applicant should consent to any tenement application by FMG; and the Yindjibarndi #1 Applicant should immediately proceed to finalise a LAA with FMG on terms approved by a majority of the claim group.³⁴⁸ Ron Bower from Corser & Corser attended. It is an agreed fact that Michael Woodley spoke throughout the meeting and would not allow any other person to speak by interrupting and talking over questions by members. The meeting was abandoned after one hour after many people walked out.³⁴⁹

388 It is an agreed fact that from late 2010 onwards there were genuine and very strongly held opposing views within the Yindjibarndi community, and within YAC's membership, about whether the Yindjibarndi people (through YAC) should enter into a LAA with FMG, and in particular the WYAC FMG LAA.³⁵⁰

2011

389 On 10 March 2011 YAC directors passed the following resolution at a directors meeting:

That the Yindjibarndi Aboriginal Corporation (YAC) continues to oppose FMG and the Wiru-Murra group with every legal avenue possible so that YAC protects all Yindjibarndi country, both in the Yindjibarndi native title determination and application areas because the agreement that FMG and the Wiru-Murra group want YAC to sign is a bad agreement for YAC and all Yindjibarndi people.³⁵¹

390 MP, AS and SA called another claim group meeting for 16 March 2011.³⁵² The notified purposes of this meeting were the same as the December 2010 with one additional purpose.

³⁴⁶ *Sandy (No. 4)* at [249].

³⁴⁷ SOAF (A.02.015) [74], [75], [79], [80], [81], [82], [83], [84].

³⁴⁸ *Sandy (No. 4)* at [171] and [172].

³⁴⁹ SOAF (A.02.015) [65].

³⁵⁰ SOAF (A.02.015) [66], *Sandy (No. 4)* at [155]-[161], [181] and [182].

³⁵¹ *Sandy (No. 4)* at [152].

³⁵² *Sandy (No. 4)* at [175]-[179], SOAF (A.02.015) [68],[163].

This was to consider a resolution to the effect that MP, AS and SA were authorised to replace the then Yindjibarndi #1 Applicant if it refused to comply with any directions from the meeting. The meeting on 16 March 2011 was a significant event in the history of the division among the Yindjibarndi people. Many of the Yindjibarndi witnesses in this case gave evidence about it.

391 The Yindjibarndi #1 claim group meeting on 16 March was held in the 50 Cent Hall at Roebourne. Several FMG representatives attended including Andrew Forrest, Nev Power and Blair McGlew. Ron Bower and two other lawyers from Corser & Corser were there and another lawyer, Graham Castledine, engaged by Corser & Corser to chair the meeting. Michael Gallagher was also in attendance.³⁵³

392 Yindjibarndi witnesses in this case described WYAC members and supporters sitting on one side of the 50 Cent Hall and YAC members and supporters sitting on the other.³⁵⁴ They described a disrupted, argumentative and chaotic meeting, and what they perceived as disrespectful behaviour towards the most senior living Yindjibarndi man at the time.³⁵⁵ These descriptions are supported by the meeting transcript in evidence.³⁵⁶

393 The meeting transcript records an exchange between Mr Forrest and Mr Woodley that features in some of the Yindjibarndi witnesses' evidence:

Andrew Forrest: Hello everyone. My name's Andrew Forrest. I'm a local boy up here. I grew up in the Ashburton country near Onslow and I have been coming to Roebourne since I was 2 years old and ah, I have a real heart for the people here and I have great love for this country. And I do want to do whatever I can to see this community grow and improve with my own efforts and with your own efforts working together. And that is I think the best chance for a great future and I'm very happy to take any of your questions. It's a lot written about me, but believe me the Thalanyji mob, all the fellas who have known me since I was a little *cubaji* [*cubija* is small child] know where my heart is, and my heart is with Aboriginal people, it always has been and it always will be. And I am very prepared to do everything I can to help you. Now if you have got any questions for me, I am very pleased to take them from you.

...

Michael Woodley: First of all thanks for coming here because what we have right is a, is a really serious issue today. Today, what we have right

...

Michael Woodley: I was just saying thanks to Andrew for coming today because what we have here today is a very serious issue. We have a community divided. On one part of, on one part, one part of the floor we have a people are willing to accept an agreement put by you on the table, that has no future for this side of the people. Right. Now.

...

Andrew Forrest (off mic): That's wrong, that's completely wrong.

Michael Woodley: We read your agreement, and we understand your agreement. And to be frank with you its crap, right? Now what we are saying to you, if you want our blessing, you want our consent on Yindjibarndi country, to give you our country, our heritage, our culture, right, for the next hundred years, for our generations to come, you

³⁵³ Annexure SCB-27 to 1st SCB (A.05.023), p. 358.

³⁵⁴ MC (A.05.014) [14]-[17], KW (A.05.012) [59], T365.40-370.03, LCheedy (A.05.013) [37], T231.30, LCoppin (A.05.006) [25]-[26], SWilson (A.05.007) [7].

³⁵⁵ SOAF (A.02.015) [164], SWarrie (A.05.008) [73], MW (A.05.022) [229], [231], Ex 1 (A.04.001) [40], KW (A.05.012) [59], IG (A.05.011) [43].

³⁵⁶ Annexure SCB-27 to 1st SCB (A.05.023), pp. 357-394.

need to be fair in terms of looking after us as well. There's a bottom line here, right, we made that clear to your people. Blair McGlew is one of them. That RIO coming straight off the bat and saying that we respect Yindjibarndi people, and if we mine here tomorrow we'll give you 0.5%. You come to us, we want to mine your country, take, take, take, take 50% of your country and give you four million dollars capped, right? In return we give you training and employment and business opportunities. Now they are broken promises, if people wanna do that, that's fine, right? But there's a big issue here, Andrew and the issue comes with, you know, Yindjibarndi people looking after ourselves from the country that's making you rich and your shareholders and your investors.

...

Andrew Forrest: Ok. Look. Umm, ah, I've heard, I have read those statements in the thing, in the papers which Michael Woodley has put out. What I would like to share with you and this is why I'm here, I am here personally. What Michael Woodley just said to you, is blatantly un true. It is completely false. And I would like to share with you, why it is false. I think you judge a person, not on their words but on their actions. What do they actually stand for, what is the calibre of the man? What if... You look into the soul of the person, right, and you know, if you look at me, what I have already done for Aboriginal people. Now let me give you an example, in Port Hedland, we had a similar agreement for the people of Port Hedland. And we have excelled the value of that agreement by probably eight to nine times. Only in salaries and wages alone for the Aboriginal people around that Port Hedland district, which we now employ over 350 people. We pay salaries alone to the Aboriginal people, over 24 million dollars a year. The four million dollars pales into significance with that. We also have provided a hundred and fifty houses, we've also provided training. Now what we asking here, particularly for you mob on this side that have heard that complete and utter bull dust from Michael, particularly you mob, I want you to know that I want to do, if, if you give me the opportunity, and you give my company the opportunity, I want to do the same thing for you. I have one message I give, and I have been giving this ever since I became a businessman. The more you know Aboriginal people, the more you love them.

...

Andrew Forrest: And that, that's how I grew up. My, the people who helped rear me, old, old Scotty Black, [***unintelligible] many of you may know him, he taught me that fundamental value of respect for Aboriginal people. I deeply respect Aboriginal people. This is no ripping off here, but I'll tell you this, what Michael has asked you to believe is that we just want to pay some cash, like a big London based company does, pay some cash and go. That's not how we operate at Fortescue, we want to deeply integrate with you in the community, we want to have benefits flowing to you, for generations to come, not one off cash. Cash to help the old people, cash to help people who cant get jobs. But most importantly training, and guaranteed employment for all those who want to come with us, and, I stand here before you simply to say to you the absolute truth. What I've done in Port Hedland and what I have done for Aboriginal people, I want to continue with you, if you give us the opportunity.

SLOW CLAP FROM MICHAEL WOODLEY

Andrew Forrest: And Michael, Michael you can clap away, but you have written lies, you just told more lies here, I am now telling you the truth.
(typographical errors in original)

- 394 Following this exchange, the transcript records Mr Bower trying to bring votes on motions. There is no semblance of an orderly meeting procedure. YAC members and supporters leave the meeting before it finishes.

395 Pritchard J made findings about the meeting from minutes prepared by Corser & Corser in *Sandy (No. 4)*. Findings from this case are included in the s.86(1) NTA material in the Court Book. The following findings are part of this material:

[177] A set of minutes of the meeting, prepared by Corser & Corser, which were in evidence, make plain that strongly felt opposing views were expressed about whether the meeting should proceed at all, and about the issues on the agenda. The minutes note, at various points, that arguments broke out between various members of the claim group, and that there was 'disruption from Michael Woodley and surrounding persons, stating that they did not want the Agenda to proceed'. Mr Woodley acknowledged that he opposed the discussion. Mr Woodley's evidence was that he and many other Yindjibarndi people, including some of the claimants for the Yindjibarndi #1 claim, left the meeting before any voting took place. The minutes indicate that the total number of votes cast in respect of each of the various items on the agenda was markedly less than the total number of persons who signed the attendance register.

[178] The minutes, and the evidence of Ms Allery Sandy, established that during the meeting a resolution was passed (with 120 votes in favour, and none against) in favour of the following resolution:

That the Yindjibarndi #1 Native Title Claim Applicants immediately proceed to finalise a land access agreement with [FMG] in terms approved by the majority of the claim group membership.

[179] In addition, the minutes of the meeting record that the following resolution was also passed (by 112 votes in favour and no opposing votes):

That Aileen Sandy, Mavis Pat and Sylvia Allan be authorized to apply to the Federal Court of Australia under section 66B of the Native Title Act 1993 (Cth) for the removal of any Yindjibarndi #1 claim applicant who refuses to sign documents or do other things necessary to be signed or done by the Yindjibarndi #1 claim applicants to give effect to any motion passed in this meeting.

396 FMG supported WYAC in relation to this meeting. Yindjibarndi witness Margaret Ranger gave evidence that she and her mother Esther Mingo were long time supporters of WYAC – they sat on the WYAC side of the 50 Cent Hall during the meeting.³⁵⁷ Ms Ranger said George Ranger, a Yindjibarndi man, and Kerry Savas, a lawyer from Corser & Corser visited her family at Carnarvon in the early days and encouraged her and the family to join WYAC.³⁵⁸ In relation to the meeting on 16 March 2011 Ms Ranger described that; FMG organised a bus to travel from Carnarvon to Roebourne, which she travelled on; she received a \$500 fee for attending; and she supported WYAC.³⁵⁹

397 Ms Ranger's evidence is corroborated by a remarkable document discovered by FMG in August this year. It is an invoice and corresponding purchase order from Corser & Corser to FMG for \$107,000.³⁶⁰ The invoice is dated 4 March 2011. It refers to the meeting to be held on 16 March and is for anticipated expenses for 214 WYAC members to be paid \$500 expenses each. This is a clear and significant measure of support for one side of what was already a serious division in the community. There should be no difficulty in inferring that FMG gave the support to further its own commercial interests. This invoice from Corser & Corser to FMG

³⁵⁷ Amended Witness Statement of Margaret Ranger filed 17 May 2023 (A.05.020) (**MRanger**) [12].

³⁵⁸ MRanger (A.05.020) [6]

³⁵⁹ MRanger (A.05.020) [8], [10]-[11].

³⁶⁰ CB H.03.8.004 Corser & Corser worksheet docs at 11 FMG.061.002.5330.

is one of several that FMG produced for Corser & Corser's representation of WYAC in connection with the WYAC FMG LAA. Almost all these invoices date from 2011 and they total just over \$590,000.

398 The meeting on 16 March 2011 was amongst the first attempts by WYAC to take control of the Yindjibarndi #1 claim.³⁶¹ In late March 2011 the WYAC FMG LAA signed by MP, SA and AS was sent to the remaining members of the Yindjibarndi #1 Applicant to sign. No other members did so.³⁶²

Relationship between WYAC and FMG

399 The evidence establishes that FMG was closely involved in the establishment of WYAC. At the first instance, this is indicated by Corser & Corser's representation of WYAC from late 2010 and FMG's direct payment of Corser & Corser's fees and disbursement for this work. Indeed, Corser & Corser lawyers were present at the meeting in late August 2010 that resolved to establish WYAC. While there are no specific invoices for this meeting in evidence, numerous other invoices allow the inference that FMG likely paid for Corser & Corser's attendance. The relevant invoices are summarised in the spreadsheet "H.03.08.002 list of FMG docs for tender & summaries".

400 FMG's role in establishing WYAC is further indicated upon its payment for the leadership and media training of WYAC members in 2011.³⁶³

401 Moreover, evidence establishes that Michael Gallagher, an employee of FMG from at least 2007 to November 2010³⁶⁴ and a part of FMG's negotiation team with Yindjibarndi³⁶⁵, had a substantial connection to WYAC and its formation. Mr Gallagher started working with WYAC from at least February 2011. This is established by affidavits from WYAC members in support of FMG's application to the NNTT for the grants of M47/1431, E47/1398 and E47/1399 dated 14 February 2011. The affidavits describe how Ron Bower and Mr Gallagher were working with WYAC in February 2011.³⁶⁶

401A The nature and extent of Michael Gallagher's involvement can be discerned to an extent from the Yindjibarndi witness lay evidence, which describes his frequent visits to Roebourne and interactions with Yindjibarndi people who would later become WYAC members.³⁶⁷ It can also be ascertained from the WYAC directors meeting minutes in evidence. Some of these minutes were produced by WYAC in response to a subpoena and are covered by confidentiality orders.³⁶⁸ These minutes are redacted in places. The Applicant has also included in the CB what appear to be versions of the same minutes.³⁶⁹ These versions are not redacted. One of the questions raised by these minutes (and other evidence) is whether Mr Gallagher was working with WYAC as a consultant for FMG or as a consultant for WYAC, or both. Mr Gallagher's

³⁶¹ *Sandy (No. 4)* at [198].

³⁶² SOAF (A.02.015) [70], *Sandy (No. 4)* at [180].

³⁶³ CB H.03.08.004 "24 FMG.078.002.0036".

³⁶⁴ SOAF (A.02.015) [31].

³⁶⁵ MW (A.05.022) [214].

³⁶⁶ CB A.09.010 s.86 NTA material *FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi people / Western Australia* [2011] NNTTA 107 (17 June 2011) at [98].

³⁶⁷ SWarrie (A.05.008) [53], [60], MC (A.05.014) [52], Ex2 (A.04.002) [43]-[44].

³⁶⁸ CB H.01.000 Minutes of MW dirs. Meetings.

³⁶⁹ CB A.08.050.01 – 03 Minutes of meetings held on 14 June, 7 August and 24 October 2012.

role was also included as a consultant anthropologist, for WYAC and for FMG, in relation to some of FMG's applications under s.18 AHA.³⁷⁰

- 402 There are numerous disbursement invoices from Corser & Corser to FMG for Mr Gallagher's fees and expenses. He sent his first invoice to Corser & Corser on 19 March 2011. The project description on the invoice states "Project 01/11: Corsers (Wirlu-Murra Yindjibarndi) / FMG Land Access Agreement. Expenses for Yindjibarndi #1 claim group meeting 14-18 March". The documents establish that Mr Gallagher provided consulting services in connection with WYAC between March 2011 and February 2014 and FMG ultimately paid his bills. The invoices discovered are over \$580,000. Other Corser & Corser invoices produced by FMG establish that Mr Gallagher started renting a house in Point Samson (near Roebourne) in March 2011 paid for by FMG. The relevant invoices discovered are for the period March 2011 to October 2013 and the total rent ultimately paid by FMG was a little over \$121,000. All of this is summarised and referenced in the spreadsheet "H.03.8.002 list of FMG disc docs for tender & summaries".
- 403 This spreadsheet and the spreadsheet "H.03.8.001 list of subpoena docs for tender & summaries" summarise all the payments that the Applicant submits FMG has made for WYAC's benefit. In most cases the documents summarised establish direct payment links. In other cases, it is necessary to draw inferences. Where that is the case the Applicant submits that inferences should be drawn that FMG made the payment for WYAC's benefit.
- 404 The facts established by these spreadsheets are important because they establish similar levels of FMG's involvement in key events such as the subject of findings by Rares J in *TJ v Western Australia* [2015] FCA 818.
- 405 WYAC and FMG have a close commercial relationship. FMG produced several commercial agreements between it and WYAC, which are in evidence. These agreements are covered by confidentiality orders. Michael Woodley gave some evidence about the commercial aspect of this relationship.³⁷¹
- 406 An important part of the relationship between WYAC and FMG relates to cultural heritage. We address this aspect in a separate section below.

WYAC attempts to replace the Yindjibarndi #1 Applicant and participation in the trial of Warrie (No.1)

- 407 It is convenient to start with WYAC's attempts to replace the Yindjibarndi #1 Applicant. There have been two. The first arose out of the Yindjibarndi #1 claim group meeting held on 16 March 2011. MP, AS and SA applied to the Federal Court to replace the Applicant in September 2011.³⁷²
- 408 In the context of discussing the first attempt by Yindjibarndi people to reconcile the division in 2012 Mr Woodley mentions this application, the YAC AGM held that year and a "s66B meeting" a few days later.³⁷³ This is a reference to a meeting of the Yindjibarndi #1 claim group in 2012 where another replacement Yindjibarndi #1 Applicant was authorised. YAC as agent

³⁷⁰ CB Vol G 005 – Firetail West & Trinity, B.03.005.10 -Section 18 Firetail West & Trinity "App 21 – Ethnographic Report M Gallagher". See also [222] above.

³⁷¹ MW (A.05.022) [385]-[389] and the annexures referred to in those paragraphs.

³⁷² *Sandy (No. 4)* at [183].

³⁷³ MW (A.05.022) [435] and annexures MW-189 and MW-190.

for the Yindjibarndi #1 Applicant organised this meeting. An application to replace the Applicant followed. This second application “overtook” the one made by MP, AS and SA, which they opposed. McKerracher J heard the second application in late 2012 and delivered judgment in February 2013. His Honour observed in his reasons that the competing applications reflected the serious division in the community.³⁷⁴ Ultimately, his Honour found that the replacement Applicant authorised at the March 2012 meeting was properly authorised and made orders accordingly.

- 409 The invoices and purchase orders produced by FMG establish that FMG paid Corser & Corser's invoices for representation of WYAC and MP, AS and SA in relation to these applications. The total amount is a little over \$43,000. However, Corser & Corser were not the lawyers on the record for these applications. Eastwood Sweeney Law is recorded as the solicitors for the three women. FMG has also produced invoices from Eastwood Sweeney to WYAC, and invoices from WYAC to FMG for payment of the same. One of these invoices includes a disbursement for Greg McIntyre SC's counsel fees, who is recorded as counsel for the women. The total of these invoices is a little over \$227,500. These documents establish that FMG paid approximately \$270,500 in legal fees.
- 410 The application by MP, SA and AS to replace the Yindjibarndi #1 Applicant was a legal attempt by WYAC, supported by FMG, to facilitate the WYAC FMG LAA to be concluded.
- 411 The second attempt by WYAC to replace the Applicant was in June 2015, only two and a half months before the trial of *Warrie (No. 1)* was listed to commence. The extraordinary degree of involvement in that attempt by FMG is set out in detail in Rares J's reasons in *TJ (on behalf of the Yindjibarndi people) v Western Australia* [2015] FCA 818. Meetings were held concurrently at Roebourne, Carnarvon and Perth on 23 June 2015 to consider resolutions including authorising WYAC members to replace the Applicant.³⁷⁵ Rares J said, “[documents] produced by FMG revealed that it had orchestrated the convening of the meeting and the voting procedure to a considerable degree”.³⁷⁶ The degree of FMG's involvement was only revealed because his Honour ruled that it was required to produce documents sought by the existing Applicant. Other resolutions voted on at the meeting included directing the replacement Applicant to consent to a non-exclusive determination of native title agreeing to a whole-of-country LAA and replacing YAC as the Yindjibarndi PBC.
- 412 The law firm for the replacement Applicant in this application was Integra Legal. Integra Legal was also acting for a sibling set of respondents (**Todd family**) in the Yindjibarndi #1 claim and for WYAC members in a proceeding against YAC in the Supreme Court of Western Australia. There are numerous Integra Legal invoices to WYAC in evidence relating to its representation of the WYAC members in the Supreme Court proceeding. And there are invoices from WYAC to FMG for payment of these Integra Legal invoices. There are also numerous Integra Legal invoices to WYAC in evidence relating to its representation of the Todd family in the Yindjibarndi #1 claim. However, there are no invoices from WYAC to FMG for payment of these Integra invoices in evidence. The Integra Legal invoices relating to its representation of the Todds are not redacted and there are detailed time entries in them. None of these invoices

³⁷⁴ CB A.09.011.0 s.86(1) NTA material *NC (deceased) v Western Australia (No 2)* [2013] FCA 70 at [73].

³⁷⁵ SOAF (A.02.015) [76], MW (A.05.022) [372], CB A.09.013 s.86(1) NTA material *TJ (on behalf of the Yindjibarndi people) v Western Australia* [2015] FCA 818 at [4], [49]-[55].

³⁷⁶ CB A.09.013 s.86(1) NTA material *TJ (on behalf of the Yindjibarndi people) v Western Australia* [2015] FCA 818 at [10].

in evidence appear obviously to relate to Integra Legal's representation of WYAC members in their application to replace the Yindjibarndi #1 Applicant. However, the Applicant submits it can be inferred that FMG ultimately paid for these legal fees. The inference is based on the other evidence of FMG ultimately paying Integra Legal's fees and the level of FMG's involvement in this attempt.

413 It is an agreed fact that the objective purpose of the 23 June 2015 authorisation meeting, was to pass resolutions, the effect of which, if adopted and acted upon, would be to bypass YAC so that it could no longer stand in the way of an agreement being entered into between FMG and the members of the Yindjibarndi #1 claim group and so that it would no longer have any role to play in the Yindjibarndi #1 claim.³⁷⁷

414 It can be added that this attempt by WYAC, supported by FMG, to replace the Yindjibarndi #1 Applicant was an attempt to take over complete control of the Yindjibarndi #1 claim. It was an extraordinary and brazen event in the history of the division.

415 As mentioned, Integra Legal acted for the Todd family in the trial of *Warrie (No. 1)*. Members of the Todd family claimed to be Yindjibarndi people. Rares J found that they were not. Rares J considered that claims by members of the Todd family to be Yindjibarndi, supported by WYAC, were a part of the division. His Honour found:

The Todd issue arose in a context that involved a deep and unfortunate internal division that emerged relatively recently within the Yindjibarndi people over whether, and, if so, on what terms, they should co-operate with FMG developing and operating what is now the Solomon Hub mine. On one side were those opposed to co-operating with FMG, who had a voting majority within YAC (which held the Moses land on trust, under the 2005 and 2007 determinations) led by Michael Woodley, while on the other side were the minority within YAC, who, with FMG's financial support, established Wirilu-Murra Yindjibarndi Aboriginal Corporation (**WYAC**) in 2010.

...

This proceeding has involved earlier stages in the battle to control both YAC and those who comprise the applicant. The Todd respondents are part of a large family who would be entitled to be admitted as members of YAC if the Todd respondents succeed in establishing that they are Yindjibarndi persons. Indeed, the votes of the Todd respondents' family members would be likely to be decisive in bringing about a change of control of YAC and the claim group, as the WYAC members have attempted, unsuccessfully, to do in the past.

...

FMG has an obvious and legitimate commercial interest in supporting both WYAC, directly, and, through it, indirectly, the Todd respondents. Indeed, prior to McKerracher J ordering on 14 October 2014 that the Todd respondents be joined as respondents (*Jacob v Western Australia* [2014] FCA 1106), while his Honour's decision was reserved, FMG had raised a contention in its amended statement of response to the applicant's statement of contentions filed on 26 September 2014, that "any list of apical ancestors should include the person, [Todd family ancestor]".³⁷⁸

416 This is an example of WYAC, with FMG's support, trying to take over control of YAC.

³⁷⁷ SOAF (A.02.015) [78].

³⁷⁸ CB A.09.016.01 s.86(1) NTA *Warrie (No. 1)* at [391], [392] and [395].

417 As explained above, there is no direct evidence to establish that FMG ultimately paid Integra Legal's invoices to WYAC for its representation of the Todd family in the trial of *Warrie (No. 1)*. However, the Applicant submits that it should be inferred that FMG did so based on the extent to which the evidence establishes that FMG paid WYAC's other legal fees, including in relation to the Yindjibarndi #1 claim.

Court proceedings against YAC in the Supreme Court of Western Australia

418 There have been four relevant proceedings against YAC:

- (a) *Sandy (No. 4)*;
- (b) *Adams v Yindjibarndi Aboriginal Corporation RNTBC* [2014] WASC 467 (***Adams v YAC 2014***);
- (c) *Sandy v Yindjibarndi Aboriginal Corporation RNTBC (No. 2)* [2016] WASC 75, (2016) 306 FLR 205 (***Sandy v YAC 2016***); and
- (d) *John Sandy & Anor v Yindjibarndi Aboriginal Corporation RNTBC (CIV2883 of 2017)*.

419 Each of them has been brought by WYAC members and/or directors who are also members of YAC. All were resolved by trial except for CIV2883 of 2017, which is ongoing. Michael Woodley's statement contains evidence about each of these cases. Findings from *Sandy (No. 4)* and *Sandy v YAC 2016* are included in the s.86(1) NTA material.

420 *Sandy (No. 4)* was the longest running proceeding and largest in terms of number of allegations and hearing days at trial. Both *Adams v YAC 2014* and *Sandy v YAC 2016* were commenced and tried while *Sandy (No. 4)* was on foot. In each of these cases the plaintiffs were successful to a substantial degree; in the sense that they proved many or all their allegations against YAC, they were awarded some relief and either some or all their costs.

421 The Applicant's main submission on these cases is that, notwithstanding the adverse findings against YAC made in them, they can properly be characterised as attempts by WYAC, supported by FMG, to take over control of YAC so as to clear the way for WYAC and/or YAC to make an agreement with FMG in relation to SHP. And further, that these asserted takeovers were part of WYAC and FMG's attempts to take over control of the Yindjibarndi #1 Applicant.

422 This submission echoes YAC's defence of *Sandy (No. 4)*. A big difference between that case and this one is that the evidence in this case goes a lot further in establishing the nature and the extent of FMG's support for WYAC in these cases and more generally in relation to the division. From 2010 to 2015, FMG's support for WYAC was hidden in plain sight.

Sandy (No.4)

423 MP, SA and AS commenced *Sandy (No. 4)* in the Supreme Court of Western Australia in June 2011. MP was removed as a plaintiff in 2013. The plaintiffs alleged that YAC had engaged in oppressive conduct contrary to s166-1 of the CATSI Act and sought various declarations and the appointment of a receiver. There were numerous allegations in this case. The main allegations, reflected in the findings included in the s.86(1) NTA material, related to:

- (a) denial of membership rights and improper conduct in dealing with membership applications;

- (b) failure to conduct or manage meetings properly; and
- (c) improper administration of YAC's finances.

424 The conduct of YAC in relation to the YAC AGM in 2010, the purported cancellation of memberships and the applications for membership to YAC have been referred to earlier in these submissions. YAC has admitted that some of this and other conduct was oppressive, and described that its membership considered they were being backed into a corner by WYAC and FMG, in support.

425 In relation to YAC's defence, Pritchard J wrote:

A large plank of the defendants' case was that the conduct which is said to constitute 'oppressive conduct' by YAC was informed by the *belief* held by the directors of YAC that it was WYAC, supported by FMG, which stood behind the plaintiffs and the other YAC members who had taken steps to try to secure YAC's entry into the FMG Agreement, to try to replace the Applicant in the Yindjibarndi #1 claim, and YAC as the agent for the Applicant. The defendants contended that throughout this proceeding, the plaintiffs and WYAC had acted as if they were one and the same, and in substance, the plaintiffs represented WYAC's interests in this proceeding. I understood that submission to amount, in effect, to a submission that the present dispute should be seen, not as a dispute between YAC and some of its members, but in truth as a dispute between YAC and WYAC. The defendants' case was that that characterisation of the dispute was relevant to the exercise of the Court's discretion whether to grant relief in the event that it found that YAC had engaged in oppressive conduct, particularly with respect to applications for membership of YAC, and that that characterisation was also relevant as part of the context within which the facts relating to the issues in dispute should be viewed.³⁷⁹

(footnotes removed).

426 In relation to these beliefs, Pritchard J found:

...from late 2010 and up to the date of the trial, YAC's directors and its CEO, Mr Woodley, honestly, and not unreasonably, believed that:

- (i) WYAC stood behind the plaintiffs and the other YAC members who took steps to oblige YAC to enter the FMG Agreement, and who sought to have it removed as the agent for the Applicant in the Yindjibarndi #1 claim;
- (ii) WYAC's objective in doing so was, initially, to enter into the FMG Agreement, and later to enter into an agreement with FMG in similar terms to the FMG Agreement;
- (iii) WYAC members were determined to achieve this objective — they had been willing to apply to the Federal Court to remove YAC as the agent for the Yindjibarndi #1 claim, and to seek to remove YAC as the PBC for the common law holders in respect of the Daniel claim; and
- (iv) FMG was supporting WYAC and its members in seeking to achieve these objectives.

427 The membership issues in *Sandy (No. 4)*, independently of the case, arose out of an attempt by WYAC, with FMG's support, to take over control of YAC by seeking membership applications to YAC and thereby building a majority of supportive members. In the context of talking about this case in his statement Michael Woodley said. "[from] 2011, YAC started receiving hundreds

³⁷⁹ *Sandy (No. 4)* at [190].

of membership applications often organised and lodged by Michael Gallagher, who was then working for Wirru-Murra".³⁸⁰

428 There are findings about some of these membership applications in *Sandy (No. 4)* that are included in the s.86(1) NTA material. Some of them in summary are:

- (a) on 17 June 2011 Corser & Corser sent 52 membership applications to YAC;
- (b) the then YAC directors refused all 52 membership applications in July 2011;
- (c) as to the reasons given by YAC for refusing the applications:
 - (i) these included that the applicants were WYAC members or supporters, WYAC had advocated contrary to the interests of YAC and for these reasons the applicants were unsuitable;
 - (ii) YAC took into account the WYAC FMG LAA; and
 - (iii) YAC considered that the applications were made for the purpose of taking over control of YAC at the next general meeting and to secure entry into the WYAC FMG LAA,
- (d) the primary reason why the applications were rejected was to ensure that members and supporters of WYAC did not take control of YAC; and
- (e) the reason the YAC directors were concerned to ensure that this prospect did not eventuate was because they expected that if WYAC members and supporters gained control of YAC then they would take action to ensure that YAC entered into the WYAC FMG LAA.³⁸¹

429 Pritchard J found that the YAC directors refused these 52 applications for an improper purpose. This is an example where, notwithstanding the adverse finding, WYAC's conduct in forwarding the 52 membership applications can be characterised as an attempt to take over control of YAC for the reasons summarised in the last paragraph. This characterisation is supported by the extent to which FMG was supporting WYAC in relation to this conduct. The evidence establishes for example that FMG was likely paying Corser and Corser's legal fees in relation to this work. There is another source of support in *Sandy (No. 4)*. Later in her reasons, still dealing with membership issues, Pritchard J finds that Michael Gallagher attended a meeting of Yindjibarndi people in November 2011 and collected another 36 membership applications for YAC.³⁸² Many of the applicants recorded their address as care of WYAC. The evidence in this case establishes that Mr Gallagher was an ex-FMG employee, consulting to WYAC and whose bills and rent were paid for by FMG and was garnering membership support from WYAC sympathisers to seize control of YAC.

430 Corser & Corser acted for the plaintiffs in *Sandy (No. 4)* from June 2011 to around January 2012. Integra Legal then acted for them from around January 2012 until around September 2016. Finally, Bennett acted for them from around 2016 until the finalisation of the matter in 2023. There are numerous invoices from these firms for their representation of the plaintiffs in evidence. These together with other documents establish that FMG funded this proceeding against YAC.

³⁸⁰ MW (A.05.022) [365].

³⁸¹ *Sandy (No. 4)* at [336]-[344].

³⁸² Ibid at [375].

431 Pritchard J awarded the plaintiffs 70% of their costs. Costs were finally resolved in April 2023. YAC paid almost \$680,000 to Bennett.³⁸³

Adams v YAC 2014

432 Charmaine Adams and Jill Tucker were appointed as YAC directors at the YAC AGM held in September 2014. They were members of WYAC. Shortly after their appointment as YAC directors they notified a YAC general meeting for the purpose of considering a resolution to replace all the YAC directors with WYAC members. YAC challenged the validity of the meeting notice in the Supreme Court of Western Australia. In *Adams v YAC 2014*, Martin J held that the meeting notice was valid and made a declaration accordingly. Bennett acted for Ms Adams and Ms Tucker. They sought personal costs orders against Michael Woodley and YAC's in-house counsel, George Irving.³⁸⁴

433 The YAC general meeting went ahead in November 2014. The motion to replace all the directors failed. Michael Woodley saw WYAC members and supporters wearing t-shirts with "Yes" printed on them, including Ms Adams' and Ms Tucker's lawyer.

434 There are no findings from *Adams v YAC 2014* included in the s.86(1) NTA material.

435 There are no invoices in evidence in relation to Bennett's representation of Ms Adams and Ms Tucker. The Applicant submits it should be inferred that FMG ultimately paid their legal fees based on FMG's payment of Bennett's legal fees in *Sandy (No. 4)* and *Sandy v YAC 2016*.

436 Further, it should be inferred that WYAC, with FMG's support, attempted to take over control of YAC at the general meeting in November 2014.

Sandy v YAC 2016

437 WYAC member John Sandy commenced this proceeding against YAC. This proceeding concerned the term of appointment of directors and the acceptance of membership applications by the YAC directors in December 2015. Mr Sandy was successful in this proceeding and the Court made declarations. Later, the Court appointed a receiver. The Office of the Registrar of Aboriginal Corporations took regulatory action following the decision including by convening a general meeting in April 2016 to elect directors. Le Miere J referred to the division and WYAC in his reasons for judgment.³⁸⁵

438 Bennett acted for Mr Sandy in the proceeding and the relevant Bennett invoices in evidence establish that FMG paid them.

CIV2883 of 2017

439 A concerted campaign has been waged by WYAC to take control of and ensure YAC is diverted from the native title determination application and compensation application from 2011 to the present. John Sandy and Paul Aubrey commenced this proceeding against YAC in late 2017. Some of the allegations are allegations that Pritchard J did not allow the plaintiffs in *Sandy (No. 4)* to make shortly before trial. This case is still on foot.³⁸⁶

383 MW (A.05.022) [366].

384 MW (A.05.022) [367], [368] and annexure MW-132.

385 MW (A.05.022) [369], CB A.09.014 s.86(1) NTA material *Sandy v Yindjibarndi Aboriginal Corporation RNTBC & Ors (No 2)* [2016] WASC 75, (2016) 306 FLR 205 at [2], [10], [11], [63] and [70].

386 See supplementary submissions covered by the Court's confidentiality orders of 7 June 2024.

440 The Applicant proposes to file some confidential submissions about confidential documents in evidence relating to this case.

Cultural heritage

441 WYAC and FMG's close relationship in relation to cultural heritage is a significant aspect of the division. That relationship started in July 2010 when some Yindjibarndi people agreed to participate in FMG heritage surveys.

442 From late 2010 onwards WYAC worked very closely with FMG in relation to cultural heritage. The relationship was formalised in February 2012 when FMG appointed a subsidiary of WYAC to coordinate FMG's heritage survey program in relation to the SHP.³⁸⁷

443 In the context of the division this relationship is well known among Yindjibarndi people and was described by the Yindjibarndi witnesses in their evidence.³⁸⁸ In his long account of the effect of SHP on Yindjibarndi *ngurra* Michael Woodley said:

I know that Wirilu-Murra people have done heritage survey's for FMG since July 2010. I did not go on any of these surveys myself. Wirilu-Murra's participation is common knowledge in Roebourne and all the reports that FMG gave to the Aboriginal Cultural Heritage Committee to support their s 18 applications talked about the surveys and who went on them. I was strongly opposed to Wirilu-Murra people going on those surveys. Many of the people going on them did not know the *ngurra* there very well and the significance of it under Yindjibarndi Law.

Wirilu-Murra consistently supported FMG's section 18 applications. Generally, I recall that whoever their lawyers were at the time would write to the ACOMC and say that Wirilu-Murra did not oppose them.³⁸⁹

The way FMG has managed cultural heritage over the years with Wirilu-Murra has been a huge issue for YAC. YAC has always objected to it. YAC has used lots and lots of resources – people, time and money – opposing the section 18 applications.³⁹⁰

444 This evidence is borne out by the documents in evidence relating to FMG's 25 applications under s.18 AHA for consent to impact "*Aboriginal Sites*". The documents include for example a letter of support for each application from WYAC to FMG from whichever lawyers were acting for WYAC at the time.

445 The documents establish other aspects of this part of WYAC and FMG's relationship. FMG's first two applications were called the Firetail Priority Mining Area and the Firetail Priority Infrastructure Area. Mr Woodley describes YAC's strong objection to those applications. He recalled an early memory of attending an ACOMC committee meeting by telephone at which Phil Davies from YAC gave a presentation. WYAC members attended.³⁹¹ The ACOMC committee meeting on 4 May 2011 considered a request from YAC for an extension of time to prepare a responsive report. FMG opposed the request.³⁹² It may be inferred from Mr Woodley's evidence that WYAC members supported FMG's position at the meeting. An invoice from Michael Gallagher to Corser & Corser that FMG paid establishes that Mr

387 MW (A.05.022) annexure MW-128, CB Vol. G 001 – Firetail PMA B.03.001.02 "Letter S Warrie to R Crawford".

388 KG (A.05.016) [57], LCheedy (A.05.013) [47]-[48], Ex2 (A.04.002) [43].

389 MW (A.05.022) [293],[294].

390 MW (A.05.022) [293], [294], [332].

391 MW (A.05.022) [296].

392 CB Vol. G 003 – Firetail Conveyors & Trinity TSF B.03.003.01 "App 9 – Powerpoint presentation FMG to ACOMC" PDF p. 20.

Gallagher made cash payments to the WYAC members at that meeting totalling \$1,400.³⁹³ The ACMC gave YAC an extension of time and YAC lodged a report in support of its objections.³⁹⁴

446 Another example relates to FMG's application under s.18 AHA called Firetail Conveyors & Trinity TSF. The Minister consented to this application on 27 January 2012. One of the conditions of the consent was to "[engage] an archaeologist to record any previously "declassified" Sites on the Land to section 18 standard ...".³⁹⁵ The background to this application involved the Department of Indigenous Affairs investigating the area covered by the application in November 2011. Mr Woodley gives evidence about YAC's unsuccessful attempts to access SHP during the investigation.³⁹⁶ WYAC members attended a meeting with FMG on 13 July 2011 where FMG gave a presentation about matters including cultural heritage and the area that became the subject of this application.³⁹⁷ Based on FMG's powerpoint presentation in evidence it can be inferred that FMG told the WYAC members at the meeting about FMG's new consultant archaeologist's view that several sites previously identified as potentially "*Aboriginal Sites*" under the AHA did not meet that threshold. And, for this reason, it was not necessary to apply for consent to impact these sites. The Firetail Conveyors & Trinity TSF did not include them and most of these are the "declassified" sites referred to in the Ministerial consent of 27 January 2012. Two invoices from Corser & Corser to FMG in evidence relate to this meeting. There is one for sundries and expenses of WYAC including sitting fees for 18 people of \$500 each. The second is for a "[site] visit to Solomon Mines regarding heritage matters by Wirlumurra Yindjibarndi Aboriginal elders". It can be inferred that the invoice was for payments of \$1,000 each to thirteen elders who took part in the site visit, which was in connection with the Firetail Conveyors & Trinity TSF application.³⁹⁸

447 There are other illustrative examples in the s.18 AHA documents in evidence of the close relationship between FMG and WYAC in relation to heritage.

448 A notorious aspect of the division is that the AHA did not at relevant times require FMG to engage with native title claimants and native title holders in relation to the protection of "*Aboriginal sites*".

Attempts to reconcile

449 The several attempts to reconcile the division among the Yindjibarndi people are set out in detail in Michael Woodley's statement and in other statements from Yindjibarndi witnesses.³⁹⁹ Early attempts at reconciliation took place in 2012 and 2014. An attempt to mediate, supported by the Hon. Ben Wyatt MLA, took place in 2018 following the decision in *Sandy (No. 4)*.

450 The most recent attempt was in 2021. Mr Woodley says the sticking point then was the then unresolved costs from *Sandy (No. 4)* and the ongoing *Sandy v YAC* 2017 proceeding. There are minutes of a Yindjibarndi community meeting held at Roebourne in May 2021 in evidence. According to the minutes "[the] purpose of this meeting is as an Information session for all Yindjibarndi people to work out the best way to come together and work with FMG towards

³⁹³ CB Vol. H H.03.8.005 M Gallagher worksheet docs 9 FMG.072.001.0516.

³⁹⁴ CB Vol. G 001 – Firetail PMA B.03.001.03 "Yindjibarndi Heritage Report for ACMC".

³⁹⁵ CB Vol. G 003 – Firetail Conveyors & Trinity TSF B.03.003.02 "Ministerial Consent dated 27 January 2012".

³⁹⁶ MW (A.05.022) [306] and annexures MW-6 and MW-7.

³⁹⁷ CB Vol. G 001 – Firetail PMA B.03.001.05 "Powerpoint presentation FMG for Wiru-Murra"

³⁹⁸ CB Vol. H H.03.8.004 Corser & Corser worksheet docs 25 FMG.072.001.1068 and 28 FMG.060.011.0226

³⁹⁹ SWarrie (A.05.008) [75], [83]-[85], [105], [107], [114]-[115], AM (A.05.017) [126]-[127], MC (A.05.014) [43]-[44], KG (A.05.016) [57]-[58], [76], Ex2 (A.04.002) [41], JC (A.05.015) [49], Ex1 (A.04.001) [23]-[27], LCheedy (A.05.013) [58]-[67].

an Indigenous Land Use Agreement (ILUA)". There was discussion about dropping "the court case" against YAC. During that discussion WYAC member John Sandy said "[W]e didn't make that case – that was FMG – this is just part of the process – we can't just rip up that Mirli-Mirli [paper]..."⁴⁰⁰

Expert evidence of Dr Kingsley Palmer

451 In preparing KP1, Dr Palmer was asked⁴⁰¹ to "adopt the assumption that 'social disruption' is a matter that will be relevant to the courts when considering the application of compensation as this is a principle that must bear on the deliberation."

452 Dr Palmer was asked to assume that FMG had entered into a relationship and agreements that are ongoing, with some part only of the Yindjibarndi native title holders, without the consent of the relevant registered claimant or (post-determination) registered native title body corporate (RNTBC), and that this had caused a division in the Yindjibarndi community.⁴⁰²

Opinion of Palmer and relevant fieldwork relevant to 'causation' of social disruption

453 Dr Palmer considers it to be evident that the division developed from differing views as to how NTRI, recognised by the Court, were to be exercised (KP1 [112]). Evidence of FMG's role in bringing about the division in the course of engaging with the Yindjibarndi community both in the context of the right to negotiate procedures under the NTA, the granting of the tenements and later in the course of development of the SHP, is separately addressed above. Whether or not FMG played a conscious role in causing that division, that evidence is relevant as part of the body of evidence demonstrating that it was the grant of the relevant tenements and the development of the mine by FMG that led to the social disruption and its consequent effects on the Yindjibarndi people's NTRI.

454 At KP1[120]-[131] Dr Palmer sets out relevant aspects of oral accounts given to him by members of YAC/YNAC concerning how the division began to emerge. He refers to Margaret Read describing her return to the community in Roebourne in around 2004 or 2005, and that "everyone was happy about the native title arrangements and there was no division in the community". It is clear from Ms Read's evidence that from her perspective the division did not occur until "Andrew Forrest turned up talking up the agreement with FMG".⁴⁰³

455 Other oral accounts referred to by Dr Palmer concerning the emergence of a division in the community include those of John Woodley describing growing up in Roebourne as "one big Yindjibarndi family together" and that "we knew all the WYAC people and had good relationships with them". However, when he was about 16 years of age, "then FMG came into the picture and they made another Yindjibarndi group. They took them on a ride against us". After that "the community went downhill". Dr Palmer also refers to Kaye Warrie (a senior Yindjibarndi woman) and her father's sister (Joyce King) attributing the "split" to events following the arrival of Andrew Forrest and the formation of WYAC, who "wanted an agreement of their own".⁴⁰⁴

456 Accounts given to Dr Palmer concerning the origin of the split are closely tied to observations by YAC members that in entering an agreement with WYAC, in the absence of agreement with

⁴⁰⁰ MW (A.05.022), annexure MW-143.

⁴⁰¹ KP1 (E.03.001) [107].

⁴⁰² KP1 (E.03.001) [109], quoting letter attached to Appendix A at [6].

⁴⁰³ Ex1 (A.04.001) [16].

⁴⁰⁴ KP1 (E.03.001) [124].

all Yindjibarndi people, FMG were not doing the “right thing”. By commencing their mining operations without permission from the native title holders (as represented by YAC), FMG “broke our Law”.⁴⁰⁵ Dr Palmer’s fieldwork reflects that the split in the community is viewed by senior Yindjibarndi people as the product of FMG’s actions, resulting in the creation of WYAC and the commencement of mining without reaching agreement with YAC, and that this involved a breach of Yindjibarndi Law by FMG. This is reflected in the various accounts quoted by Palmer (at KP1 [126]-[129]).⁴⁰⁶

457 Dr Palmer gives an extensive reference to the Applicant’s evidence that demonstrates the relationship between the SHP, FMG’s policies and the split at fn115 of KP2 (p.64).

458 Based on the data he reviewed, at KP1 [130] Dr Palmer summarises the ‘sequence of events’ that “caused” the ‘split’, this being precipitated by FMG’s wish to mine on Yindjibarndi country, YAC not giving permission to do so and the subsequent support provided by FMG to the ‘breakaway group’ who did not agree with the withholding of permission.

459 Other evidence referred to above is consistent with this and goes further, by demonstrating the extent to which FMG encouraged and fostered the ‘breakaway group’ to show WYAC’s willingness to “give permission” to FMG, in contrast to the position taken by YAC, and fostering the division on a continuing basis by funding WYAC and a number of the legal actions it has taken against YAC.

460 At KP1[132] and following Dr Palmer addresses the ways in which the social disruption caused by these events is manifested, observing that these are comprehensible through an appreciation of Yindjibarndi cultural norms and values.

The impact on observance of customary kinship behaviour

461 Drawing on Chapter 2 of KP1, Dr Palmer refers to the fact that kinship, in Yindjibarndi culture, is a matter of “divine ordination”, the observance of which is prescribed by “supernatural authority”.⁴⁰⁷ At KP1[133] he observes that the data collected during his field work indicates that the division of the Yindjibarndi community as a consequence of the actions of FMG has “had a significant impact on the observance of customary kinship behaviour”.

462 Examples given by Dr Palmer from his fieldwork involve disruption to the normative rules of kinship under the *Galharra* system, and other normative rules governing human interaction (the concept of *nyinyaard*, *wurruru* and *gajardu* relationships), and adverse effects on ritual practice. They include the following, all of which arise from the division consequent upon FMG’s arrival culminating in:

- (a) lack of respect shown to close family members, involving the failure to greet or interact with one another, and the potential for fights to occur, due to close family members being on different sides of the “split” (see KP1[134]-[137];
- (b) antagonism, and treating each other as ‘strangers’ despite the occasional mutual observance of “sorry business” (KP1 [139]);

⁴⁰⁵ KP1(E.03.001) [127] quoting field notes taken from Micheal Woodley, with Middleton Cheedy and Kevin Guinness
⁴⁰⁶ Accounts of Michael Woodley, with Middleton Cheedy and Kevin Guinness; Lyn Cheedy; Pansy Cheedy and Wendy Hubert; and Margaret Read.

⁴⁰⁷ KP1 (E.03.001) [132].

- (c) an absence of effective meetings being held among elders that resolve disagreements, as would previously have occurred, contributing to the hardening of negative feelings towards one another (KP1 [140]-[141]);
- (d) an unwillingness to engage in collective "ritual mourning" relating to the death of a close relative, as was appropriate in the past, with resultant hurt feelings (KP1 [142]); and
- (e) disrespect being shown to senior and elderly Yindjibarndi men in meetings, something that would never occur in public meetings in the past (KP1 [143]).

463 Dr Palmer also gives a number of examples of the division having severe consequences for divided families extending across close consanguineal kin relationships. These include:

- (a) grandchildren whose grandmothers were on either side of the 'split', with significant consequences for the grandchildren and their feelings (KP1[147]-[148]), and a "new generation of Yindjibarndi children who are caught up in the split" (KP1[154]);
- (b) hurt felt by siblings who grew up with first cousins (regarded as siblings) but who now as adults are on either side of a divide "marked by open hostility, abuse and legal action" and "are no longer linked by the bonds prescribed by customary Yindjibarndi kinship relationships" (KP1[149]-[150]); and
- (c) the extent to which the descendants of Wimiya King, encompassing many Yindjibarndi families, are split between the two groups: senior Yindjibarndi people such as Michael Woodley and Kaye Warrie and various other members of the Warrie family being members of YAC, and various members of the Sandy and Andrews families being largely aligned with WYAC.

464 Dr Palmer notes the comment made to him by Kaye Warrie and Joyce King: "So we all very close, yet this man (evidently a reference to Andrew Forrest) came and divided us. Now we fighting each other family against family" (KP1[153]). Dr Palmer observes that he thinks it, "reasonable to conclude that there are other examples of divisions between kin, given that the Yindjibarndi comprise such a close-knit set of relationships".⁴⁰⁸

465 Dr Palmer also records the observation of Yindjibarndi man Angus Mack that the kin rules of *nyinyaard*, requiring generosity in providing for the material needs of others (for example sharing meat following hunting trips) had been impacted by the division. In his view "members of [WYAC] were not honouring this practice with respect to the benefits of the mine" (see specific quote at KP1[155]). Angus Mack expressed the belief that this was not necessarily the fault of the WYAC, saying that "they just get bribed".

466 Another example given by Dr Palmer concerning the impact of the division on customary social relationships is an example of its effect on the relationship between SA (now deceased), as *urruru* to Stanley Warrie. As an Applicant to court proceedings taken against directors of YAC in the context of the division, the perceived actions of SA (in the context of what would, according to cultural norms, be a special mutual life-long relationship of respect and care) were very upsetting to Stanley Warrie and other family. This extended to a denial by some members of the WYAC that such a relationship existed.⁴⁰⁹

⁴⁰⁸ KP1 (E.03.001) [154].

⁴⁰⁹ KP1 (E.03.001) [158]-[159].

The effect of the division on ritual practice

- 467 Dr Palmer recorded field data from Angus Mack and Michael Woodley, as well as from younger men, about the adverse effect of the division on the practice of Yindjibarndi ritual and *Birdarra* Law.⁴¹⁰ In particular, *Birdarra* rituals at Woodbrook Lawground are no longer conducted as a whole by the Yindjibarndi but alternated each year between the Yindjibarndi and WYAC. Younger men explained to Dr Palmer that the Law rituals that are supposed to bring all Yindjibarndi together now stand as a painful mark of separation and the split in the community.
- 468 In KP2⁴¹¹ Dr Palmer further explains the important function played by people 'coming together' for the practice of Law business and more generally the ritual practice known as *gumawarri*, an occasion when differences and disagreements are settled and which "is prescribed both before and after ritual action as well as during periods of common sorrow", that ensures that all participants in ritual action "feel at ease" (KP2 [200]). Dr Palmer describes the breakdown of this practice as a cultural loss "facilitated" by FMG's activities "by reference to a particular sub-set of the native title holders" (KP2 [204]). Michael Woodley expressed the opinion to Dr Palmer that this "goes to the heart of the disjuncture that FMG has generated".⁴¹²
- 469 Further, there are adverse effects on 'yulbu' relationships that existed between simultaneous initiates, who share a lifelong close relationship marked by reciprocal care and generosity, as a matter of Yindjibarndi Law.⁴¹³ An example of the breakdown of *yulbu* is of a particular young man whose *yulbu* is from the WYAC group. He is no longer able to associate with his *yulbu* due to the split and the important bonds are broken.

Physical and emotional injury

- 470 Dr Palmer collected examples of "physical violence that has resulted from the deep-seated feelings that have developed as a consequence of the events that have shaped the relationships between the YAC and WYAC", and "witnessed strong displays of emotion in this regard." (see KP1[164]-[165]). There are instances where people on both sides of the divide have received terms of imprisonment for their conduct.
- 471 Particular concern was expressed to Dr Palmer about the negative effect of such violence and animosity on young people, from whose perspective the division has been ongoing over a long period of time. This has involved fighting between young people and the negative use of social media (see KP1[166]-[170]). Based on his field data Dr Palmer concluded that "social media plays a role in perpetuating the divisions and negative feelings associated with them."⁴¹⁴
- 472 Judith Coppin, mother of Lorraine Coppin and mother-in-law of Michael Woodley, gives the following devastating evidence in relation to one of her grandchildren:

Wil, the youngest, has been getting involved in fighting too. It has spread through Lorraine's family from the biggest boy to the littlest boy. Wil is now 14. He is in boarding school in Perth. Before he went, he would talk to me about seeing his older brothers and sisters in the fights as an eight year old, and how he would wet himself because he was paralysed with fear for himself. He was frightened for his brothers and sisters and was feeling bad because he couldn't help them.⁴¹⁵

410 KP1 (E.03.001) [160]-[163].

411 KP2 (E.03.006) [191]-[194], [198]-[204].

412 KP1(E.03.001) [160]-[161].

413 KP1 (E.03.001) [163].

414 KP1 (E.03.001) [170].

415 JC (A.05.015) [58].

Loss of Yindjibarndi History and Culture

473 In KP2 Dr Palmer summarises the evidence of Lorraine Coppin⁴¹⁶ regarding the efforts of JAC in recording and documenting many aspects of Yindjibarndi history and culture. Ms Coppin described the co-operative efforts involving all Yindjibarndi elders (some of whom subsequently became members of WYAC) in the years prior to the arrival of FMG. This included developing cultural materials in a manner that would be accessible and of interest to children.⁴¹⁷ The aims of the group were to preserve for future generations the cultural knowledge held by senior Yindjibarndi men and women before they died. The last of JAC's books documenting Yindjibarndi country was published in 2008 and Dr Palmer observes that the project was put on hold as a consequence of the need to focus more on FMG.

474 Isaac Guinness gave evidence that as a result of the division in the community the old people no longer came together for trips to country where they would pass on knowledge to younger people, and that this had made that passage of knowledge to his own children more difficult.⁴¹⁸ Dr Palmer describes the effect of the division in this respect as a cultural loss and that "[t]he cultural knowledge that has been lost in the years since the documentation project had to be abandoned is, in my opinion, likely to be irreplaceable. It is a further casualty of the mine."⁴¹⁹

'Sadness of spirit' –the nexus between wirrard and country in the context of social division

475 Dr Palmer refers to the word '*wirrard*' as "an important Yindjibarndi word in a discourse of personal feelings", with dictionary meanings of 'feelings', 'emotions' and 'spirit', but often translated into English as 'spirit.' Based on his reading of relevant data, Dr Palmer describes it as:

an essential and non-physical part of a person which has life and vitality, responding both positively and negatively, depending on circumstances, which informs its human abode. For the Yindjibarndi your *wirrard* is the seat of many emotions, including a sense of freedom and the happiness this evokes in country (*ngurra*).⁴²⁰

476 Dr Palmer quotes Pansy Cheedy explaining the connection between one's *wirrard* and country. She refers to travelling on country and gives the example of seeing a hill she is familiar with, and greeting the hill as an old friend. She goes on to explain that:

Wirrard is not a softly spoken feeling. It ties in with the whole of your *ngurra*. Your *wirrard* is tying in with – its connected. When I see this hill still there my *wirrard* becomes strong – ah not strong but – it becomes exciting [excited] because it's still there. And I'm able to connect with it. Connect.⁴²¹

477 Dr Palmer explains that one's *wirrard* can be damaged and broken by certain actions. He refers to the expression "*ngayu wirardgu wirndarna*" (literally 'I spirit broken'), which informants told him could be used for matters of personal loss such as the death of a close family member.⁴²² Dr Palmer explains that the rough rendering of this term in English as 'I am broken

416 T396-413 (A.07.009), KP2 (E.03.006) [205]-[211].

417 T408-411(A.07.009).

418 IG (A.05.011) [41].

419 KP2 (E.03.006) [214]

420 KP1 (E.03.001) [171].

421 KP1 (E.03.001) [171].

422 KP1 (E.03.001) [172].

hearted' does not reflect the centrality of the *wirrard* to the Yindjibarndi concept of person and spirit, as well as the brutalising agency that effected the break:

Apposite English terms for *wirnda* might be 'gut-wrenching' or perhaps 'heartrending' both having the sense of active and forceful destruction. Accepting these understandings, the phrase *ngayu wirrardgu wirndarna* might better be rendered as 'My inner-most spiritual self was ripped apart'.⁴²³

478 Dr Palmer observes that the division in the community was sometimes characterised by his informants in terms of damage to one's spirit or heart.⁴²⁴ The concept of *wirrard*, and the manner in which damage to one's *wirrard* is felt, helps in interpreting and understanding the sorts of feelings arising from the division in the community expressed to him by informants including Lyn Cheedy, Lorraine Coppin, Margaret Read and Angus Mack, as set out at KP1[174]-[179]. The feelings conveyed to Dr Palmer by them are referred to in a variety of ways, such as being "very upsetting", leaving people's lives in "lots of broken pieces" and as experiences that invoke anger, sadness, helplessness and frustration.

The depth and nature of the loss arising from the social disruption

479 As his field data reflects the experiences of "one group of the now fractured Yindjibarndi people" Dr Palmer makes the assumption that the dislocation and hurt that is felt likely applies to all members of the Yindjibarndi community and that "[A]ll are victims of the circumstances that have caused the division." He observes that accounts of the split laid responsibility directly on FMG, sometimes personalised as Andrew Forrest, and that the failure of Andrew Forrest to have rectified the social disruptions that FMG is asserted to have caused. This further exacerbates the hurt.⁴²⁵

480 Dr Palmer makes the very significant point that the Roebourne Indigenous community is a small, physically proximate community with a common cultural heritage, involving families with tight social bonds over generations through inter-marriage, resulting in a network of strong support. In such circumstances the fracturing of relationships by external influences is all the more keenly felt.⁴²⁶

481 Dr Palmer's anthropological analysis is of particular assistance in understanding the depth and nature of the effects of the division and he observes:

"In order to understand the full impact of these events on the emotions and feelings of those with whom I worked, it is necessary to step inside Yindjibarndi cultural acuties. [Palmer then refers back to Pansy Cheedy's account to him] ... From this I conclude that for a Yindjibarndi person *wirrard* is far more than 'emotion' or even 'spirit'. **Rather it has its essence bound up in and organically linked to country.**"⁴²⁷
(emphasis added)

Dr Palmer's Opinion on nature of the loss arising from the social division and the supernatural origin of the practices and relationships affected

482 Dr Palmer's analysis also assists by appropriately situating the division in the context of the Yindjibarndi system of social relationships including the *Galharra*, bearing in mind that the prescribed rules for such interactions "are not the dictates of mere good manners or an

⁴²³ KP1 (E.03.001) [173].

⁴²⁴ KP1 (E.03.001) [174].

⁴²⁵ KP1 (E.03.001) [181]-[183].

⁴²⁶ KP1 (E.03.001) [184].

⁴²⁷ KP1 (E.03.001) [189] and see above at [304],[306]-[308],[311]-[312],[474]-[475].

accomplished demonstration of social etiquette.” Rather “[t]hese are the Law, the principles that underpin Yindjibarndi living as established by supernatural ordinance. Contravention breaks this Law.”⁴²⁸

- 483 In KP2 Dr Palmer observes that in KP1 he sought to understand the social disruption consequent upon the development of the mine in terms of “social loss”, by which he means “the deleterious and adverse consequences of the divisions as evidenced by the loss or diminution of the relationships Yindjibarndi people are expected to have with one another”(KP2[187]). He observes that in KP1 he pointed to an additional type of consequential loss that concerned the effect on the ritual practice of the Law carried out at Woodbrook by Yindjibarndi people. He views this as a “cultural loss” (a lessening or forfeiture of a fundamental component of Yindjibarndi belief and practice) that has arisen in addition to the social loss.
- 484 One of his purposes in KP2 is to expand on and augment those observations by reference to the written and oral evidence. He collates some of the key direct evidence concerning the *Galharra* (KP2 [220]-[225]); *Nyinyarrd* (KP2 [226]-[237]) and the *urruru* relationships (KP2[237]-[243]). That evidence, derived from multiple witnesses, demonstrates the centrality of the *Galharra* system as one that has been handed down in the creation time and “connects” Yindjibarndi people to their country and religion.⁴²⁹ It determines not just social relationships but “how to act on country”.⁴³⁰ As Dr Palmer observes that its origins: “in Yindjibarndi country ... affirms that the *Galharra* is not solely about social relationships. It is embedded in the country and is, through its honouring, a means to equate a person with country” and its diminution represents a cultural loss.⁴³¹
- 485 There are supernatural origins of the practice of *Nyinyaard*.⁴³² Middleton Cheedy’s narrative account of the actions of the Willy Wagtail (*Tjitit Tjiti*) and Pelican (*Jerinya*) also attested to those supernatural origins.⁴³³ Dr Palmer cites a number of instances from the evidence that demonstrate *Nyinyaard* to be a principle that also applies to how the Yindjibarndi should relate to their country and is understood to apply to the natural resources of the land, including the environment (KP2 at [232]-[236]). One account observes that “Yindjibarndi *ngurra* is obliged to produce and share its resources with the Yindjibarndi people but only if we continue to follow the Law by caring for our *ngurra* and our people.”⁴³⁴
- 486 Dr Palmer concludes that “*nyinyaard* is essentially and quintessentially an attribute of Yindjibarndi Law and its normative values that frame moral order”. Its observance within the Yindjibarndi community has been significantly diminished. This is a cultural loss arising from the development of the SHP and “the manner and policies that those responsible for the mine have employed in their relationships with those who hold native title rights to the land wherein

428 KP1 (E.03.001) [185].

429 See reference to SWarrie (A.05.008) [10] at KP2 (E.03.006) [220].

430 Reference to AM (A.05.017) [35]; T561-2 (A.07.011) at KP2 [221], [223].

431 KP2 (E.03.006) [246]-[247].

432 See references to evidence at KP2 [226]-[229], including AM (A.05.017) [40], T563 (A.07.011), Lorraine Coppin at T426 (A.07.009).

433 KP2 (E.03.006) [231]; MC (A.05.014) at [59].

434 KP2 (E.03.006) [236] per MW (A.05.022) [285]-[286]; T515-516 (A.07.011).

the mine is situated.”⁴³⁵ Dr Palmer reaches a similar conclusion in relation to the cultural loss exemplified by the breakdown of the *urruru* relationships.⁴³⁶

Dr Palmer's concluding opinion in relation to the loss arising from social disruption

487 In KP1 Dr Palmer conveys the depth of the damage caused by the division by observing that the contravention of the Law that is involved in fracturing relationships poses a threat to autonomy and the integrity of Yindjibarndi identity. In doing so Dr Palmer refers to the work of anthropologist Fred Myers and what Myers called “a moral order” of social relationships, the breaking of which ultimately threatens the well-being of the community as a whole. In his opinion the feeling of hurt that developed from the cultural loss in this context is of the sort identified by Sansom as “an epic emotion”.⁴³⁷

488 Dr Palmer concludes by observing that the pain felt by Yindjibarndi people, “comprehended through the lens of Yindjibarndi concepts and expressions, shows that this pain extends to the core of a Yindjibarndi's personhood”. He further observes:

But it also potentially hurts a relationship that the individual has through the agency of their *wirrard* with their own country. In this then the origins of the hurt and the consequences of the hurt, find their destination in the same physical location – the area of the mines of the Solomon Hub.⁴³⁸

489 He draws on the work of Victor Turner and his concept of ‘normative communitas’ derived from a group's shared deep culture, to make the devastating observation that the shared ‘communitas’ lies at the centre of the continued integrity of the Yindjibarndi as a viable group. Dr Palmer concludes by observing that this is a cultural loss attributable to the establishment of the SHP and subsequent events.⁴³⁹

490 Dr Jeffrey Nelson's evidence relevant to social disruption is dealt with in the next section.

PSYCHOLOGY EVIDENCE AS TO IMPACT ON YINDJIBARNDI PEOPLE'S NATIVE TITLE RIGHTS AND INTERESTS [ISSUES 3A, 4 AND 7]

Expert evidence of Dr Jeffrey Nelson

491 The Applicant has tendered two expert psychology reports by Dr Nelson (Exhibit H) (JN1) tendered 9 April 2024 and Amended Supplementary Expert Psychological Report of Dr Jeffrey Nelson (JN2) tendered 9 April 2024 (T861).

492 Dr Nelson's qualifications are exceptional. He is an Aboriginal psychologist who has vast experience working with Aboriginal people suffering trauma in communities in Queensland, Northern Territory and Western Australia.⁴⁴⁰ Dr Nelson has experience in tertiary teaching and has undertaken detailed assessments of individual functioning as well as systems with children, young people and adults.⁴⁴¹

435 KP2 (E.03.006) [249]-[251].

436 KP2 (E.03.006) [252]-[253] based on references to evidence referred to at [237]-[244].

437 KP1 (E.03.001) [186].

438 KP1 (E.03.001) [191].

439 KP2 (E.03.006) [261].

440 JN1 (E.03.003) [12].

441 JN1 (E.03.003) [9].

- 493 Dr Nelson's evidence was challenged and he was accused of not undertaking enough fieldwork with Yindjibarndi people⁴⁴² or taking enough notes⁴⁴³ from which to base his opinions. This was denied by Dr Nelson and he explained that he did not take extensive notes due to his experience working with Aboriginal communities stating, "if my job is therapeutic and my client sees me writing madly, they stop. They don't want to engage. Because my job is for what's happening at that moment."⁴⁴⁴ He described how he did not need notes because he interviewed people and drafted sections of his reports within 2 hours while the interviews were fresh in his mind (T918.10-.15).
- 494 In cross-examination, it was put to Dr Nelson, that he did not have the expertise to be, "able to make an assessment of people's spiritual connection to country?". Dr Nelson responded, "[m]y experience over many, many years in many communities at levels of [spirit], working with a client group and private practice of 85 to 95% Aboriginal and Torres Strait Islander people. Of those, up to 50 per cent talk[ing] about spiritual loss and spiritual pain, I believe I am fully qualified and experienced and able to make the – the recommendations that I do."⁴⁴⁵
- 495 Dr Nelson was asked to agree that the portion of a population affected pre- and post-FMG is hard to work out when there is trauma pre-dating FMG's involvement. He agreed⁴⁴⁶ and in re-examination qualified his statement regarding already traumatised people or communities by referring the Court to the United States publication, "*Principles of trauma therapy, A guide to symptoms, evaluation and treatment*," by Drs John Briere and Katherine Scott.⁴⁴⁷ He gave evidence that victim variables and risk factors can make trauma responses more likely, more intense or more complicated including, "...age, with younger or older individuals being at greater risks than mid adulthood. Race, with African America and Hispanic as compared to Caucasians at higher risk. Lower socioeconomic status. Previous psychological disfunction or disorder. Less functional coping styles. Family dysfunction and a history of psychopathology. Previous history of trauma exposure. A hyperactive or dysfunctional nervous system. Genetic predisposition. And greater distress at the time of trauma or immediately there".⁴⁴⁸ He gave his opinion that people from the Yindjibarndi community would respond to trauma at a much higher level for subsequent traumas.⁴⁴⁹ It is submitted that such victim variables and risk factors under the race rubric would include Indigenous Australians who have pre-existing trauma from being the most disadvantaged people in Australian society.⁴⁵⁰

Egg shell skull principle

- 496 The Applicant contends that, although Dr Nelson gave evidence about pre-existing trauma (see the preceding paragraph), the "egg shell skull"⁴⁵¹ principle applies in this case.

442 T909.40 (ZA.07.019).

443 T888.30, T903.10, T918.10-50 (ZA.07.019).

444 T918.2 (ZA.07.019).

445 T899.31 (ZA.07.019).

446 T911.30-40 (ZA.07.019).

447 T914.45 (ZA.07.019).

448 T915.25 (ZA.07.019).

449 T915.34 (ZA.07.019).

450 Preamble NTA.

451 Discussed by McHugh J in *Tame v New South Wales* 211 CLR 317; [2002] HCA 35 at [117] by reference to *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 470 and See *Rigby v Mirror Newspapers Ltd* (1963) 64 SR (NSW) 34 as being "a principle of compensation, not of liability". McHugh J observed that the rule applies such that "once the plaintiff establishes that a person of normal fortitude would have suffered

- 497 It is submitted that an already vulnerable community with a history of trauma has been further impacted by the non-consensual establishment of the SHP and the subsequent division within the community.⁴⁵² All persons interviewed, across all age groups, show signs of trauma and mental distress, irrespective of which side of the FMG debate they fall on. Those impacts included distress about past, current and likely future events caused by mining. As to the latter, Yindjibarndi people are anxious about the potential mining-related impacts to *Bangkangarra*.⁴⁵³ During cross-examination, Mr Christopher Oppenheim acknowledged that the exploration tenement over *Bangkangarra* authorises FMG to extract water and/or earth resources from that area.⁴⁵⁴
- 498 Dr Nelson observes that the current intergenerational trauma and likely future intergenerational transmission of trauma through the effects of these events has caused physical and emotional exhaustion and sadness.⁴⁵⁵ He considers that ongoing trauma and psychological injury is being experienced by current community members due to the ongoing nature of the mining and the now more perceptible realisation of the irretrievable impact on Yindjibarndi country and culture.⁴⁵⁶ Yindjibarndi people seek support from family and kin as part of their culture (through *Galharra*). A lack of support generates mistrust and predictably creates symptoms of hyperarousal.⁴⁵⁷ Dr Nelson says that community members shared with him that they lack any hope of being able to overturn the mining rights on their land. This results in a sense of helplessness and hopelessness about the future of the community.⁴⁵⁸
- 499 Middleton Cheedy told Dr Nelson about the psychological difficulties he experiences when waiting at a railway crossing. The trains carrying ore to the ports are up to 2.4 km long and carry up to 30,000 tonnes at a time. Mr Cheedy considers that while he waits at the crossing he is forced to see 30,000 tonnes of Yindjibarndi country being moved to another country after being violently removed.⁴⁵⁹ Mr Cheedy suggested that most people would not realise how distressing this is or how often Yindjibarndi people are required to wait at level crossings in the Pilbara. FMG trains are labelled so Mr Cheedy has a fair idea of where the ore has originated from. The damage to country and to significant sites is irreversible even with 'rehabilitation efforts' at the conclusion of mining as they consider that the country is gone.⁴⁶⁰ Wimiya Woodley said that the loss of sacred sites is like losing a checkpoint on country and if they are removed then people lose their way physically.⁴⁶¹
- 500 Dr Nelson observed Michael Woodley struggling to manage his sadness and his fear that he had not done enough for his people. His emotion was deep and genuine, and perhaps best understood in the context of his sense of personal failure, sadness about the destruction that he could not prevent, and despair about the then current state of his country and the Yindjibarndi

psychiatric illness as the result of the defendant's action, the defendant must take the plaintiff as he or she is. The defendant's liability extends to all the psychiatric damage suffered by the plaintiff even though its extent is greater than that which would be sustained by a person of normal fortitude."

452 JN1 (E.03.003) [50].

453 IW (A.05.018) [12]-[13], IG (A.05.011)[27], AM (A.05.017) [117], KW (A.05.012) [38], [33]-[34].

454 T951.38-T952.40 (A.07.019).

455 JN2 (E.03.007) [31].

456 T972.12-T974.20 (A.07.019), JC (A.05.015) [23], MC (A.05.014) [33], KG (A.05.016) [63], KW (A.05.012) [26].

457 T901.17 (A.07.019), JNorman (A.05.002) [25].

458 JN1 (E.03.003) [50]; JN2 (E.03.007) [6].

459 MC (A.05.014) [33].

460 JN1 (E.03.003) [38], MC (A.05.014) [33], Ex1 (A.04.001) [19], Ex2 (A.04.002) [32].

461 WW (A.05.009) [47].

community.⁴⁶² Wimiya Woodley says that sadness has overwhelmed his parents who are not happy anymore like they were when Wimiya was a child.⁴⁶³ Dr Nelson heard stories from parents about their children's slide into alcohol and drug addiction, antisocial and unlawful behaviours (usually including physical violence) and psychosis-related illnesses. Non-Aboriginal witnesses observed the effects the split had had on the young people.⁴⁶⁴ While there is an acknowledgement of the potential influence of the division in the community on their children's trajectory, there is also a reluctance to acknowledge it, because the parents have supported the division and the concomitant behavioural consequences.⁴⁶⁵ Intergenerational effects of trauma are clear and the impacts are cumulative and enduring.

- 501 Social disruption caused by the construction and establishment of mining infrastructure, mining activities and the conduct of FMG from 2007 has caused deep cultural loss and social disruption amongst the Yindjibarndi. Feelings of loss relate to the cessation of the ability to control access to the SHP area, the denial of access to the SHP, inability to speak for country and protect sites in the SHP, inability to teach younger generations about country, the fracture to the community, the failures of negotiations with FMG and WYAC, losing hunting and gathering places, loss of groundwater, the incursion of dust, as well as light and noise pollution, humiliation brought about by having no ability to make decisions, the re-emergence of anxieties that come from dispossession and the triggering of emotions when FMG applies for new tenements that are then subsequently granted.⁴⁶⁶
- 502 From his experience with Aboriginal communities Dr Nelson considers that compared to other Aboriginal people he has worked with, the Yindjibarndi people have a strong traditional culture second only to the Pintupi who live in the Western Desert.⁴⁶⁷ He considers that social disruption caused by the establishment of the SHP has led to the impairment of important cultural practices and norms set down by the *Marga* under Yindjibarndi Law including the breakdown of social relationships (*Galharra*), reciprocity and mutual care (*nyinyaard*) and ritual practices (*Birdarra Law*)⁴⁶⁸. All of these elements underpin Yindjibarndi society and are believed to have a common origin in the events of the Dreaming. Dr Palmer explains them as having jural-like qualities and says they are determining rubrics for all social, economic and religious actions (KP1[45]-[49]).
- 503 Dr Nelson collected clinical data in February 2023⁴⁶⁹ and August 2023⁴⁷⁰ to assess the psychological impact on members of the Yindjibarndi community, including the WYAC splinter group. Dr Nelson spoke with 21 Yindjibarndi people in order to analyse and provide diagnosable opinions as to the psychological effects of the impact that the establishment of the SHP and the concomitant social division has had on them.⁴⁷¹ He stated that he would be sure of a complete diagnosis if he spent six months with the community but in any event the work

462 JN1 (E.03.003) [24].

463 WW (A.05.009) [66].

464 Amended Witness Statement of Joan Maddison filed 27 April 2023 (A.05.003) (**JM**) [26].

465 JN1 (E.03.003) [43].

466 IW (A.05.018) at [12]-[13], AM (A.05.017) at [117].

467 T869.30 (ZA.07.018).

468 JN1 (E.03.003) at [14], [24], [29] and [44].

469 JN1 (E.03.003) at [12].

470 JN2 (E.03.007) at [1].

471 T887.20-40 (ZA.07.019).

he has done gives him a very strong basis to provide the opinions he has proffered in his reports.⁴⁷²

- 504 He found that in terms of the extent of the impact of the SHP, it was deeply concerning that all persons interviewed, across age groups, showed signs of trauma and mental distress, “irrespective of which side of the FMG debate they fell”.⁴⁷³ In his opinion, Dr Nelson considers that four domains of potential harm arise from the SHP including the following a) the grants of the FMG tenements, b) the non-consensual circumstances in which those grants were made, c) the subsequent mining activities, and d) other actions taken by FMG to advance its commercial and mining interests within the CAA.⁴⁷⁴
- 505 Dr Nelson says that psychological injury or illness can often lead individuals to feel a lack of control over their circumstances as well as a sense of helplessness which creates further harm to individuals’ psychological wellbeing.⁴⁷⁵ Individual symptomatology can occur at a group or community level and can be evident in the systematic disruption to the life of a community with multiplicative rather than simply additive effects.⁴⁷⁶
- 506 The Yindjibarndi community considers that there were and are two periods of greatest threat to their survival as true Yindjibarndi people, being the times of the drinking epidemic from the 1960s to the 1980s,⁴⁷⁷ on the one hand, and the current unrest around the establishment of SHP, and related community division, on the other.⁴⁷⁸ Dr Nelson outlines the effect that FMG’s corporate behaviour has had on the Yindjibarndi group, resulting in FMG’s preferencing of WYAC members for heritage surveys and business relationships over YAC, as well as WYAC’s complicity in dealings with FMG. He considers that rather than FMG negotiating an agreement with YAC through the right to negotiate process, mistrust emerged between the two proportions of the community culminating in greater psychological and ongoing injury to all.⁴⁷⁹
- 507 Dr Nelson considers that trauma can share many symptoms of psychological disorders but it is commonly perceived as resulting from events or circumstances that are experienced by an individual as emotionally harmful and/or life threatening.⁴⁸⁰ Dr Nelson observes that there are clear signs of grief in the community relating to disconnection from former friends and close family members, and obligations as part of the *Galharra*, and as a result of the SHP. An example of trauma of this kind was described by Kevin Guinness who spoke of an incident relating to the death of John Sandy’s son and his obligations under the *Galharra* that are no longer followed due to the split.⁴⁸¹ Middleton Cheedy says that as the WYAC members are not joining with the YAC members to conduct the Men’s Law together they are not following through with their *Galharra* and *Birdarra* Law cultural obligations.⁴⁸²

472 T887.30 (ZA.07.019).

473 JN1 (E.03.003) at [50].

474 JN1 (E.03.003) at [46].

475 JN1 (E.03.003) at [18].

476 JN1 (E.03.003) at [18].

477 MW (A.05.022) at [90]-[94], T518 (A.07.011)..

478 JN1 (E.03.003) at [16].

479 JN1 (E.03.003) at [16].

480 JN1 (E.03.003) at [21].

481 Dr Palmer field notes (Ex E (Tab 1), E.07.001.001) p.19.4.

482 JN1 (E.03.003) at [24], JN2 (E.03.007) at [39], KG (A.05.016) at [72], MC (A.05.014) at [54]-[55], MW (A.05.022) at [77], AM (A.05.015) at [118]-[122], IG (A.05.011) at [40].

- 508 Dr Nelson observed that the Yindjibarndi is a community where those aligned with the YAC on the one hand, and WYAC, on the other, distrust each other, where factions within YAC distrust each other, where members of younger generations distrust those of the older generations, and where there is an almost universal mistrust of FMG (and Mr Andrew Forrest specifically) and the West Australian Government.⁴⁸³
- 509 It is Dr Nelson's opinion that community, culture and country are the three foundational pillars of wellbeing for the Yindjibarndi community. It was clear to him that the psychological injury caused to the foundational pillars created damage to each individual's wellbeing, as well as the wellbeing of the whole community which has disrupted a long-standing way of living including relationships between and within families.⁴⁸⁴ He said this had placed stressors on an already vulnerable community with a history of trauma and the impacts of colonisation, geographic dislocation and the introduction of alcohol and other events.⁴⁸⁵
- 510 In cross-examination Dr Nelson said he considers that the social division started around the formation of a YAC negotiation committee formed between 2007-2009 for the purposes of negotiating with mining entities.⁴⁸⁶ He said that what he considered to be the start of the trauma from mining commenced when conversations occurred suggesting mining could take place.⁴⁸⁷
- 511 Yindjibarndi people over 30 years of age can remember that the Yindjibarndi community were harmonious before 2007 when FMG arrived in Roebourne to negotiate the SHP tenements.⁴⁸⁸ Those who are younger cannot recall amicable relations between members of WYAC and YAC.⁴⁸⁹ Up until then, the traditional form of decision making was "that elders would discuss and consider the views of the wider community (including their families and partners) before making final decisions."⁴⁹⁰
- 512 Dr Nelson attended the view of the SHP on 14 August 2023 in a bus carrying a group of Yindjibarndi people. He observed, as did the Court and as can be seen on videos taken (A.05.039), that the people in the bus exhibited significant distress when confronted with the vision of the SHP and the damage to their country. Those present appeared connected as one in an outpouring of grief and sadness and he observed that they were genuinely shocked by what they witnessed. This spectre of grief observed by Dr Nelson he considered showed the strength of Yindjibarndi people's connection to their country.⁴⁹¹ He stated, "*the level of emotion I observed was best described as being consistent with intense grief and loss, and the trauma that comes with losing a family member(s). I observed that the impact of sitting with this level of distress was felt more than it is seen or heard.*"⁴⁹²

483 JN2 (E.03.003) at [34].

484 IG (A.05.011) at [37], LCoppin (A.05.006) at [14], [41] and [58], FC (A.05.019) at [16]-[17], AM (A.05.015) at [43], JC (A.05.019) at [67], KG (A.05.016) at [64].

485 JN1 (E.03.003) at [49]; JN2 (E.03.007) at [6].

486 T885.40 (ZA.07.019).

487 T886.40 (ZA.07.019).

488 JC (A.05.015) at [45], [50], EG (A.05.010) at [25]-[26], SWilson (A.05.007) at [12], LCheedy (A.05.013) at [4], [37], CH (A.05.001)[18]-[26].

489 IW (A.05.018) at [17], KW (A.05.012) at [24].

490 Amended Witness Statement of Christine Halls filed 27 April 2023 (A.05.001) (CH) [14], Amended Witness Statement of Janet Kapetas filed 18 May 2023 (A.05.021) (JK) [15], LCheedy (A.05.013) [4], MW (A.05.022) [347], LCoppin (A.05.006) [9], SWarrie (A.05.008) [58]. T236.09-T238.11 (A.07.007).

491 JN2 (E.03.007) at [28].

492 JN2 (E.03.007) at [46]. Importantly, see also Applicant's photos and videos of the SHP from 14 August 2023 (A.05.039).

- 513 Dr Nelson reasoned that while Yindjibarndi people were warned about the changes to country caused by mining, he observed in the bus that when the concept became a reality, it was overwhelming, and many tears were shed. He was told that going back to country has special meaning and is rejuvenating when people are getting older. One respected elder told Dr Nelson that when a site is no longer available, in his mind, an essential part of this belief system has been stolen. The older interviewees also recalled being on country to visit significant sites and having the experience of mining personnel herding them into one area so that blasting could continue. They explained that the feeling of having their country destroyed while they were present was devastating and the memories of that will not fade.⁴⁹³ Stanley Warrie blames himself for informing FMG personnel that a significant natural spring was near a road at the SHP. After he asked workers not to damage it, it was destroyed. Andrew Forrest then wrote a letter of apology to the Yindjibarndi people in August 2007 stating, “[t]he Fortescue family wants to ensure that areas of significance to the Yindjibarndi people are protected”.⁴⁹⁴ This promise was broken by FMG when sites were destroyed or salvaged without consulting with the registered native title holders (see [532]-[548] below).
- 514 Dr Nelson considers that the Yindjibarndi people’s opposition to mining on their land, the continued questioning of their rights to the land by others, and their need to protect important aspects of their culture and identity, have had a significant negative impact on the mental health of the group. The prevalence of acute hypervigilance, mistrust, helplessness and emotional dysregulation observed in Yindjibarndi informants, he said, was abnormally high even when compared to other similar communities that he has worked with for more than 30 years. He considers this extremely clinically concerning, especially in the context of high rates of suicide, self-harm and violence in remote communities in Australia. He contemplates that the levels are understandable when regard is had to the traumatic perceptions of failure to protect and care for their country,⁴⁹⁵ failure in meeting expectations for unconditionally caring for and supporting each other, in practising respect and reciprocity,⁴⁹⁶ and failure in adhering to the entirety of their cultural obligations.⁴⁹⁷ The mining has caused breakdowns in relationships formed through the *Birdarra Law* ceremonies resulting in separate YAC and WYAC ceremonies now being held,⁴⁹⁸ interference into established courtship practices and acknowledgement that maintaining the dispute requires contravening the obligations of both the *Nyinyaard* and *Galharra* that then weakens the culture and the *Wirrard*.⁴⁹⁹
- 515 It is Dr Nelson’s opinion that there is a learned helplessness arising from the Yindjibarndi’s history of being negatively affected by decisions made about them and *not with them* by government and commercial interests [emphasis added].⁵⁰⁰ Dr Nelson was told that the struggle

493 JN1 (E.03.003) at [23].

494 A.05.023 (1st SCB), Annexure SCB-2 p.38.

495 KG (A.05.016) [32], [54], MW (A.05.023) [28], [47], JC (A.05.015)[47], KW (A.05.012)[48], LCoppin (A.05.006) [45], IG (A.05.011) [26].

496 AM (A.05.017) [43]-[44], KG (A.05.016) [64], KW (A.05.012) [16], T331.38, T370.07 (A.07.008), WW (A.05.009) [27], [32], LCheedy (A.05.013) [36].

497 JN2 (E.03.007)[18]; for *nyinyaard* see JN1 (E.03.003) at [14]; for *Birdarra Law ceremonies*: SWarrie (A.05.008) [58], AM (A.05.017) at [118], KG (A.05.016) at [72], SWilson (A.05.007) at [13]; for *Galharra*: KG (A.05.016)[71], SWarrie (A.05.008) [11], AM (A.05.017) [111], WW (A.05.009) [80].

498 JN1 (E.03.003) at [44].

499 JN2 (E.03.007) [35].

500 JN1 (E.03.003) [48].

was too much, was pointless and they would get no compensation, have no community and no country left.⁵⁰¹

ARCHAEOLOGY EVIDENCE [ISSUE 7]

516 As per [42] above, Professor Veth and Dr Bird produced an Expert Archaeology Report on behalf of the Applicant (G.01.002, VB1). Mr Williams produced an expert witness Response Report on behalf of the FMG Respondent (G.01.003, DW). Prof Veth and Dr Bird produced a further responsive report to DW, dated 10 October 2024 (G.01.004, VB2). There was a Conference of Experts on 11 and 12 October 2024, at the conclusion of which a joint report by all the experts was filed (G.01.005, Arch Joint Report).

517 Section 5 of the AHA provides the threshold test for a location to be considered an Aboriginal "site".⁵⁰² The ACMC determines if the threshold is met.⁵⁰³ Only locations considered "likely" to pass the threshold are reported to the ACMC.⁵⁰⁴ If deemed a s.5 site, it is protected.⁵⁰⁵ Under s.18, holders of a mining tenement⁵⁰⁶ can apply for consent to destroy, or otherwise impact, an Aboriginal site.⁵⁰⁷ Similarly, under s.16 the Registrar of Aboriginal Sites can authorise the excavation and removal of objects from an Aboriginal site.⁵⁰⁸ Sections 16 and 18 authorise FMG's salvage activities, which would otherwise breach s.17.

Extent of damage

518 The extent of the damage to archaeologically significant sites in the SHP has been immense. As per [188] above, two-hundred and eighty-five heritage places have been salvaged (249 under s.18 AHA).⁵⁰⁹ At least 126 of these have been completely physically destroyed and all but 74 have been physically impacted.⁵¹⁰ However, even for those sites that remain in Heritage Restriction Zones, the experts agreed that they may still be impacted by blasting, vibration and dust.⁵¹¹

519 FMG's heritage consultants, unilaterally and subjectively, report locations they consider likely to meet the s.5 AHA threshold.⁵¹² Other "non-site heritage places" are only recorded internally on FMG's system⁵¹³. For this reason, Prof Veth and Dr Bird consider it likely that more sites, other than the 285 referred to above, have been impacted by FMG's mining activities.⁵¹⁴ The Applicant's experts highlight the period between February 2013 and June 2014: 68% of heritage places were considered unlikely to meet s.5 criteria and were not reported, including 12 rock shelters and 11 artefact scatters, some with clearly identifiable archaeological

501 JN1 (E.03.003) [48].

502 AHA s.5.

503 VB1 (G.01.002) [65], AHA s.39.

504 VB1 (G.01.002) [65].

505 AHA s.17.

506 AHA s.18(1).

507 AHA s.18(2).

508 AHA s.16.

509 Annexure SNC-17 (SNC-17, G.02.001.01) to the Sixth Affidavit of Sean Costello (6th SNC, G.02.001) lists only those heritage places salvaged under s.18 AHA. FMG made the unilateral decision that a further 36 heritage places did not qualify as sites under s.5 AHA; they did not lodge s.18 applications over them. Despite not considering them sites, FMG salvaged these heritage places (Map 1 – Heritage Overview Map (ExhG1, A.06.001.15)).

510 SNC-17 (G.02.001.01).

511 Arch Joint Report (G.01.005) [4]-[5].

512 VB1 (G.01.002) [65].

513 These are included in 2 spreadsheets in the Court Book at CB G.06.002-003.

514 VB1 (G.01.002) [65]-[66].

features.⁵¹⁵ It is submitted that the true number of impacted sites is likely greater than 285. In addition, all experts agreed that more detailed investigations could have occurred to mitigate the amount of loss.⁵¹⁶

Archaeological significance of the area

520 The SHP area is one of significant heritage values and high archaeological potential.⁵¹⁷ The experts all agree that the age of human occupation in, and surrounding, the SHP is 40-45 thousand years, based on current evidence,⁵¹⁸ including the dating of ancient rock shelters between 35 and 53 thousand years old (**ka**). Several of these rock shelters have been demolished, others impacted through salvage.⁵¹⁹

521 Beyond its antiquity, the SHP area is rich with human and environmental records.⁵²⁰ Other than ancient rock shelters, FMG has impacted or destroyed sites of immense cultural value, including a stone circle *thalu*,⁵²¹ and artefact scatters present at a noteworthy density, the latter of which has revealed an incredible diversity of uses, such as woodworking, processing skins and bone working.⁵²² All of these sites retain their cultural significance to the Yindjibarndi people (discussed further below).

522 The experts all agreed that the body of sites located within the area of the SHP is regionally significant and is able to contribute to nationally important archaeological questions, including the initial occupation of Australia's arid zone.⁵²³ FMG's consultant archaeologists repeatedly emphasise the immense significance of the SHP area.⁵²⁴

Archaeological significance likely underestimated

523 Regardless of this assessment of the extraordinary archaeological significance of the area, all experts agreed that the piecemeal and overlapping survey and excavation programs make it difficult to consistently assess site significance at the SHP.⁵²⁵ Prof Veth and Dr Bird consider that assessment methodology, although compliant with regulations, may inadequately identify the archaeological importance of certain sites.

524 For example, on multiple occasions,⁵²⁶ initial probing has underestimated the depth of deposits, resulting in low-significance assessments, s.18 permission being granted over the site and the site being impacted, despite potentially (or actually) being of high significance.⁵²⁷ Notably, this occurred at YIN11-028, a rock shelter dated to over 40ka with an unusually large number of artefacts.⁵²⁸ Initially assessed to be of low significance, s.18 consent was granted over the site

515 VB1 (G.01.002) [65], [178].

516 Arch Joint Report [17].

517 VB1 (G.01.002) [45].

518 Arch Joint Report (G.01.005) [1].

519 The following rock shelters have been destroyed: YIN09-002 (50-45ka), TRYINPAD13-03 (53-35ka), YIN11-028 (>35ka). The following rock shelters have been impacted by salvage: YIN10-111 (up to 48ka), YIN08-031 (>35ka). (Annexure SNC-17 (G.02.001.01), VB1 (G.01.002) [17]-[19]).

520 VB1 (G.01.002) [144].

521 YIN10-095 see: VB1 (G.01.002) [108]-[110], SNC-17 (G.02.001p8), Video 11 (A.05.039.27).

522 VB1 (G.01.002) [116].

523 Arch Joint Report (G.01.005) [7], VB2 (G.01.004) [3].

524 VB1 (G.01.002) [41], [46], [145]-[147], VB2 (G.01.004) [3].

525 Arch Joint Report (G.01.005) [16].

526 See VB1(G.01.002) [106]-[107] for discussion of YIN10-111.

527 VB1 (G.01.002) [40]-[41].

528 VB1 (G.01.002) [41].

and only during salvage was the site's true archaeological significance understood,⁵²⁹ including the potential to update understandings of the adaptation of lithic technologies across Australia.⁵³⁰ Prof Veth, Dr Bird and FMG's heritage consultants draw on this example to demonstrate how more work, namely test excavations, ought to have been done to assess the significance of sites and provide the best opportunity for mitigation.⁵³¹ Prof Veth and Dr Bird suggest that, generally, multiple test pits may be required to assess a rock shelter's history.⁵³² YIN11-028 was destroyed.⁵³³ FMG's heritage consultants have consistently relied on probing⁵³⁴ and many rock shelters were not test-pitted before being impacted.⁵³⁵

525 Even where test-pitting has occurred, there have been errors in the assessment of significance or consultants have indicated additional test-pitting ought to have been conducted. YIN10-111, a rock shelter dated up to 48ka, was test-pitted, assessed of low significance and recommended not to require further investigation.⁵³⁶ Different consultants were engaged, and two new test pits were excavated, revealing evidence of some of the oldest known occupation in the Pilbara.⁵³⁷ This site, which is a significant cultural heritage site, now sits under an access road, exposed to vibration, dust and potential roof fall.⁵³⁸ It was visited by the Court on 14 August 2023. It is submitted that archaeological assessment in commercial projects, under the AHA, is far from best practice and it is likely that other sites have been similarly undervalued.⁵³⁹

526 YIN11-053, which has been destroyed, was a large open artefact scatter on the *Ganjingarringunha wundu*. The results of archaeological investigations were reported as:

*a unique artefact scatter containing an impressive surface assemblage as well as what appears to be a relatively intact, stratified, sub-surface archaeological deposit*⁵⁴⁰

however only a 1x1m² was dug in a 4,649m² site and the consultants opined:

*to obtain a clearer picture of how an open-air artefact scatter was utilised over time, a larger sample area...would have been beneficial to increase the statistical accuracy of lithic materials being excavated*⁵⁴¹.

527 Regulatory factors also impact heritage assessments. As the AHA demands the identification of "sites", large artefact scatters and site complexes may be reduced to defined areas, rather than the entire cultural landscape.⁵⁴² The result is that reported impacts to surface deposits have been constrained to site boundaries.⁵⁴³ Examples include surface deposits at

529 VB1 (G.01.002) [41].

530 Terra Rosa Report dated June 2014 (Vol G B.05.064) p.179.

531 VB2 (G.01.004) [10].

532 VB1 (G.01.002) [41].

533 VB1 (G.01.002) [124].

534 SNC-17 (G.02.001.01).

535 Probing occurs when a metal rod is inserted into the ground to estimate the depth of an archaeological deposit; see DW (G.01.003) at [107], VB1 (G.01.002) p.167 Photo 5(d).

536 VB1 (G.01.002) [88].

537 VB1 (G.01.002) [106].

538 VB1 (G.01.002) [106]-[107], [124].

539 VB1 (G.01.002) [107].

540 T630.34-T631.29 (A.07.012).

541 *Howard, C and Chisolm, S. Addendum report on an archaeological salvage excavation program of HWI YIN_214 conducted by the Yindjibarndi Traditional Owners and Terra Rosa Consulting for Wirlu-murra Aboriginal Corporation and prepared for Fortescue Metals Group Limited. February 2016. P.31. Note the parties agreed to this report being tendered on 15 October 2024.*

542 Ibid.

543 VB1 (G.01.002) [110], [112], Figure 6 of VB1 shows the density of artefact deposits along Kangeenarina Creek.

VB1 (G.01.002)[113].

Ganjinarringunha wundu (Kangeenarina Creek),⁵⁴⁴ the cultural significance of which is discussed above (at [284]-[291]).

528 While all experts accepted that the SHP has deeply impacted an area of high archaeological importance, it is submitted that the richness and complexity of the archaeological record is nonetheless likely to be underrepresented by the material available to the Court.⁵⁴⁵

SHP in comparison to *Bangkangarra*

529 By contrast to the SHP, excavations currently underway at the nearby *Bangkangarra* site illustrate the investigation standard required to adequately ascertain the significance of rock shelters with deep stratified deposits. The antiquity and artefact density of excavated sites at *Bangkangarra*, which is exceptional,⁵⁴⁶ is on par with the older and richer sites in the SHP (all experts agreed).⁵⁴⁷ Some of these sites have been destroyed by the SHP.⁵⁴⁸

530 Excavations at YG02 at *Bangkangarra* in July 2023 were conducted in consultation with the Applicant as the RNTBC and two pits were excavated.⁵⁴⁹ As bedrock was not reached at either location, further excavation is planned since more archaeological material is expected to be found.⁵⁵⁰ A mixture of radiocarbon and optically stimulated luminescence (OSL)⁵⁵¹ dating was employed to date materials in consideration of a lack of organic material in the lower stratigraphic units.⁵⁵² It is common for organic material to be poorly conserved in the Pilbara, however OSL was only haphazardly applied during investigations at the SHP.⁵⁵³ The 2m x 1m test pits are scheduled to be expanded, and further OSL samples collected, to assess variability in the site and refine dating samples.⁵⁵⁴ In comparison, most rock shelters in the SHP were assessed using single, smaller test pits. More intensive investigation and follow-up work is required to properly assess sites.⁵⁵⁵

531 Professor Veth and Dr Bird cite consistent evidence that the *Bangkangarra* and SHP areas contain equally archaeologically rich sites, some of which have been destroyed.⁵⁵⁶ Mr Williams agreed that the older and richer sites in the SHP are on par with those at *Bangkangarra*.⁵⁵⁷ Thus, the intensity and antiquity of occupation at *Bangkangarra*, and at sites throughout the SHP, is rare in the region and appears on par with the oldest and richest archaeological areas in the Hamersley Range, including sites like Juukan 2. However, FMG did not investigate any of the sites in the SHP to a comparable level of investigation as heritage places like YG02 and Juukan 2.⁵⁵⁸

544 YIN11-002 and YIN11-004 discussed at VB1 (G.01.002) [110]-[114].

545 VB1 (G.01.002) [88].

546 T637.15, VB2 (G.01.004) [13].

547 Arch Joint Report (G.01.005) [11].

548 VB1 (G.01.002) [149]. Examples are YIN09-002 and YIN11-028, both of which have been destroyed. YIN09-002 has been dated to 42,000 years with confidence (eg see DW CB G.01.003 at [38] and VB2 G.01.004 at [4]. YIN11-028 was similarly dated with confidence to 42,000 years and contained a density of artefacts similar to those located at Juukan Gorge (VB2 (G.01.002) [5]-[6]).

549 VB1 (G.01.002) [72].

550 VB1 (G.01.002) [72].

551 VB1 (G.01.002) Annexure 5.1 p.153.

552 VB1(G.01.002) [74]-[75]

553 VB2 (G.01.004) [9].

554 VB1 (G.01.002) [80].

555 VB1 (G.01.002) [81].

556 VB1 (G.01.002) [149].

557 Arch Joint Report (G.01.005) [11].

558 VB2 (G.01.004) [10].

Consultation

- 532 Further, archaeological assessment of the SHP would have benefitted from consultation with a wider range of Yindjibarndi people and, in particular, with YAC/RNTBC. It is best practice for site avoidance heritage surveys that a heritage agreement with the authorised Traditional Owner corporation be reached,⁵⁵⁹ and that native title holders from the PBC are involved in all the surveys.⁵⁶⁰
- 533 Throughout July 2007, heritage surveys were attended by all Yindjibarndi people.⁵⁶¹ In August 2007, the *Ganjingaringunha jinbi* was destroyed by FMG, despite warnings from senior Yindjibarndi people (discussed further below).⁵⁶² This resulted in YAC refusing to participate in heritage surveys until a heritage agreement had been reached,⁵⁶³ in line with best practice. To improve the relationship with FMG, YAC attended surveys in March and April 2008.⁵⁶⁴ Again, in May 2008, YAC decided to cease heritage surveys until a heritage agreement was in place.⁵⁶⁵ Regardless, until April 2009, FMG continued to conduct heritage surveys without any Yindjibarndi people in attendance.⁵⁶⁶ Under the belief that, in return, FMG would recommence negotiations for a LAA,⁵⁶⁷ YAC conducted heritage surveys in April 2009.⁵⁶⁸ Concerned that FMG was not committed to reopening negotiations, YAC ceased participating in heritage surveys in June 2009.⁵⁶⁹ Until February 2010, FMG again continued heritage surveys without Yindjibarndi people.⁵⁷⁰
- 534 From May 2010, FMG only conducted heritage surveys with the WYAC aligned people.⁵⁷¹ On 6 July 2010, FMG held a meeting and told Yindjibarndi attendees they would never get native title over the SHP area, they will get nothing if they don't take what FMG is offering them and that they should participate in paid heritage surveys, or FMG would do the surveys without them resulting in Yindjibarndi people losing the opportunity to protect sites.⁵⁷² At that meeting, a number of WYAC people signed up to participate in heritage surveys.⁵⁷³ In May 2011, FMG advised YAC that all heritage matters would from that point forward be directed to WYAC.⁵⁷⁴ On 25 May 2011, FMG stated they would no longer countenance YAC's attempts to negotiate a heritage agreement.⁵⁷⁵
- 535 Thus, from 2010 until 2021,⁵⁷⁶ FMG conducted heritage surveys with WYAC people, expressly favouring them over YAC, the RNTBC, despite requests from YAC not to conduct surveys with

559 VB1 (G.01.002) [89(i)(a)].

560 VB1 (G.01.002) [179].

561 Eureka Preliminary Report dated July 2007 (B.05.001) p.1, SWarrie (A.05.008)[19].

562 SWarrie (A.05.008) [21].

563 SWarrie (A.05.008) [28], Annexure SCB-3 (A.05.023) p.41, MW (A.05.022) [177].

564 SWarrie (A.05.008) [37]-[38], Eureka Report dated June 2008 (B.05.004) p.6.

565 SWarrie (A.05.008) [40], Annexure SCB-12 (A.05.023) p.155.

566 Western Heritage Report dated July 2008 (B.05.005), Excerpt Western Heritage Report dated September 2008 (B.05.006), Western Heritage Report dated March 2009 (B.05.007).

567 Annexure MW-33 (A.05.022) p.344.

568 Western Heritage Preliminary Report dated April 2009 (B.05.008), ACHM Report dated 21 May 2009 (B.05.009), SWarrie (A.05.008) [46], MC (A.05.014) [39].

569 Annexure MW-33 (A.05.022) p.344.

570 Veritas Preliminary Report dated July 2009 (B.05.010) p.3, Veritas Preliminary report dated July 2009 (B.05.011) p.3, Veritas Report dated June 2010 (B.05.017) p.2, Veritas Report dated 9 March 2010 (B.05.015) p.5.

571 Veritas and Eureka Report dated July 2011 (B.05.022) p.1.3.

572 Annexure SCB-25 (A.05.023) p.351, LCheedy (A.05.013) [43]-[44], SWilson (A.05.007) [8].

573 LCheedy (A.05.013) [44].

574 Annexure MW-109 (A.05.022) p.1024.

575 SWarrie (A.05.008) [81].

576 SWarrie (A.05.008) [82].

people without authority to speak for country.⁵⁷⁷ The lack of consultation with YAC culminated in at least 15 heritage places not being identified, that Prof Veth and Dr Bird consider would have been sites under s.5 of the AHA.⁵⁷⁸ These sites were identified in one report done by YAC and have been mapped in the maps forming Exhibit G1.⁵⁷⁹ Dozens of surveys and s.18 applications occurred without YAC's or the RNTBC's consultation. There is no telling how many unidentified sites of cultural and archaeological significance have been destroyed because of their exclusion from heritage surveys. Further, the cultural loss associated with being deprived of their decision-making authority under Yindjibarndi law, and contrary to the *Warrie (No.2)* Determination, is discussed above at [341]-[346].

Publication

- 536 Although not required under legislation, Prof Veth and Dr Bird draw attention to the industry expectation that, after excavation, compliance reports and publication should be released for the use of other heritage professionals and the wider public.⁵⁸⁰ The experts note it is best practice to produce salvage reports in scientific formats for peer-review and posterity.⁵⁸¹ However, there is no public mention of salvage work across the SHP,⁵⁸² other than a minor mention of YIN09-002 in a publication a decade old.⁵⁸³ The three experts in this proceedings are the only experts who have been privy to the heritage reports emanating from the SHP. Upon reviewing FMG's heritage reports, Prof Veth and Dr Bird registered their surprise at being unaware of the "unusually high volume of Pleistocene sites and a rich, diverse cultural landscape".⁵⁸⁴ In contrast, other sites, like Juukan 2 and Hope Downs, are known to be of similar antiquity and archaeological significance as the SHP because their compliance data has been the subject of publication.⁵⁸⁵
- 537 It is submitted that visibility through publication is essential for the advancement of archaeological questions and provides the opportunity for scrutiny and deeper investigation into the significance of nationally important areas like the SHP⁵⁸⁶, which is located in an archaeologically rich area of the Hamersley Range.⁵⁸⁷ Instead, hundreds of sites have been destroyed and/or salvaged, and the opportunity for deeper investigation has passed; there has been no detailed investigation to test the claims about the significance of the archaeological landscape of the SHP.
- 538 Lean, and overlapping, assessment procedures, lack of best practice consultation and lack of publication mean it is likely that significant archaeological sites have been underreported and the significance of identified sites has been undervalued. At a minimum, 285 heritage places

⁵⁷⁷ Annexure MW-55 (A.05.022) p.484, Annexure MW-57 (A.05.022) p.491, JC (A.05.015) [19]-[21], AM (A.05.017) [44].

⁵⁷⁸ VB1 (G.01.002) [179].

⁵⁷⁹ YAC Report dated April 2019 (B.05.084). Enlargement 11 of Map 1, CBA.06.001.11, includes a number of these sites as having been salvaged and destroyed or physically impacted by the building of a road and/or other infrastructure. SNC-17 (CB G.02.001.01) shows 9 of the YNAC 2018 sites have been salvaged and of those, 4 have been physically impacted.

⁵⁸⁰ VB1 (G.01.002) [96]-[100].

⁵⁸¹ VB1 (G.01.002) [89(iii)(a)].

⁵⁸² VB1 (G.01.002) [31].

⁵⁸³ VB2 (G.01.004) [15].

⁵⁸⁴ VB2 (G.01.004) [15].

⁵⁸⁵ VB2 (G.01.004) [16].

⁵⁸⁶ Mr Williams and Dr Bird agreed with this proposition: see Arch Joint Report (G.01.005) [21]-[22].

⁵⁸⁷ T631.33 (A.07.012).

have been impacted by salvage, 126 of which have been destroyed and are lost to Yindjibarndi people and the nation, forever.

The cultural significance of specific sites

- 539 During the hearing at SHP on 14 August 2023 the Court was taken to several locations. The Applicant's witnesses expressed visceral responses upon seeing the reality of open cut mining and its effects on Yindjibarndi country. This evidence cannot be overstated to demonstrate the cultural loss experienced by Yindjibarndi people resulting from damage to individual locations (that the Court was taken to) and the general devastation of open cut mining. Videos and photos taken during the SHP site visit reflect the extent of the manipulation of Yindjibarndi country,⁵⁸⁸ which is contrary to the Yindjibarndi laws of preserving and protecting country and leaving objects where you find them.⁵⁸⁹
- 540 The Court was taken to YIN10-111, a rock shelter. The substantial disturbance to the area includes its close proximity to a haulpack road and noisy vehicles, dust and infrastructure.⁵⁹⁰ Michael Woodley gave evidence describing the cultural importance of such rock shelters (*yamararra*).⁵⁹¹ They were used as living areas or shelters in the past and were important in contemporary Yindjibarndi cultural heritage since they provide a record of the past and the continuity of Yindjibarndi people in those places. They were also the abode of spirits of Yindjibarndi ancestors,⁵⁹² some of whom had been buried in the caves, sometimes in walled niches.⁵⁹³
- 541 Witnesses including Lyn Cheedy, Estelle Guinness, Kaye Warrie and Lorraine Coppin also gave evidence concerning the displacement of spirits as a result of the effect the SHP has had on the rock shelters and caves where they reside.⁵⁹⁴ Evidence was given by the Yindjibarndi witnesses concerning the spiritual potency of such caves and their connection to the *Bundut* ritual and song some of which was sung for the Court by Michael Woodley and Angus Mack.⁵⁹⁵
- 542 The Court was taken to YIN10-004, a burial site (*thungari*) where human remains are located. At this site, which is surrounded by extensive mine workings to the north, west and east,⁵⁹⁶ Michael Woodley gave evidence describing details of rituals he and other elders performed at this site. He said he felt unable to visit the site since that time and from his perspective had been "locked out of" his country.⁵⁹⁷
- 543 Yindjibarndi people are deeply concerned about the destruction or disturbance of human remains of their ancestors, typically found in niches within rock shelters. Many are known to Yindjibarndi people in the SHP.⁵⁹⁸ Yindjibarndi people carry out elaborate rituals in *Ganjingarringunha* gorge, just outside the SHP that ensure the safety from spiritual forces of those visiting and serve as a learning experience for children. Such ritual visits "are an

588 A.05.039.01-A.05.039.27.

589 AM (A.05.017) [61]-[62], KG (A.05.016) [31], SWarrie (A.05.008) [120], T682.21 (A.07.013), SWilson (A.05.007) [18].

590 KP2 (E.03.006) [56].

591 Referred to at KP2 (E.03.006) [62].

592 T484.11, T491.46-T492.06 (A.07.010).

593 T291-T292 (A.07.008), T481.09, T484.19, T487.34, T493.33 (A.07.010).

594 See references at KP2 (E.03.006) [63].

595 KP2 (E.03.006) [64]-[66], T488.01-T490.10 (A.07.010).

596 KP2 (E.03.006) [76].

597 T494.35 (A.07.010) and KP2 (E.03.006) [77]-[79].

598 KP1 (E.03.001) [324].

important part of sustaining and perpetuating Yindjibarndi culture and associated practices” and illustrate that if the sites are not extant then such rituals are lost.⁵⁹⁹

- 544 The Court was taken to YIN11-002, an archaeological scatter and “habitation and resource area” that was salvaged. At that location Michael Woodley showed the Court stone artefacts that had been missed in the salvage process. He and other senior men described how these were used to produce items of material culture of continuing use and significance to Yindjibarndi people.⁶⁰⁰ Mr Woodley gave evidence that such artefacts were not supposed to be removed from the country because the country has been left to the Yindjibarndi people intact and complete and to act in a way that diminishes its integrity is contrary to Yindjibarndi law.⁶⁰¹
- 545 YIN11-002 was adjacent to *Ganjingarringunha wundu* that once flowed south where both Trinity and Kings pits and the Kings Ore Processing Facility (**OPF**) are now located. The significance of the *wurndu* to the *Bundut* and the travels of the *Barrimirndi* has been described above at [283]-[287]. The Yindjibarndi also gave evidence of its significance as a place of habitation and sustenance for Yindjibarndi people, and as a pathway for *manjangu* to travel through country, with the permission of Yindjibarndi people, to attend places for ceremony.⁶⁰² Kevin Guinness used the resources of *Ganjingarringunha* Creek, and Michael Woodley gave evidence that the creek was a source of a commodity that could not be openly talked about in Court.⁶⁰³
- 546 As distinct from its fundamental significance in the context of the *Bundut* and the *Ngurra Nyujunggamu* (discussed above at [283]-[287], *Ganjingarringunha* has “importance as a food, resource and water source, as well as having ritual and social significance”.⁶⁰⁴
- 547 The evidence given during the SHP visit, and the emotion with which witnesses reacted to seeing the SHP,⁶⁰⁵ revealed the continuing significance of sites and of country to Yindjibarndi people. Stanley Warrie addressed the Court directly at a viewing of the Trinity Pit and who was visibly distressed said:
- “...and its all been destroyed. My dreaming, my stories, my dreamtime stories. My land, Yindjibarndi land, where my religion – this area is the cornerstone of my religion – **stolen from me**”⁶⁰⁶ (emphasis added)
- 548 The Yindjibarndi witnesses unanimously expressed substantial feelings of loss, knowing that individual heritage places have been, and will continue to be, destroyed by the *manjangu* who have not received permission,⁶⁰⁷ have refused them access⁶⁰⁸ and denied them their right to protect country and sites,⁶⁰⁹ all of which is contrary to Yindjibarndi Law. A system of spiritual punishment is believed to have resulted in SHP accidents and mine workers being punished at

599 KP1 (E.03.001) [325].

600 T457-T460 (A.07.010).

601 KP2 (E.03.006) [90].

602 T461.29 (A.07.010).

603 KP2 (E.03.006) [94], T456.39-T457.10 (A.07.010).

604 KP2 (E.03.006) [95].

605 T453.42 (A.07.010).

606 T454.11-T454.14 (A.07.010); see also video taken by the Federal Court: CB A.07.015.01.

607 MT17.01(A.07.004), JNorman (A.05.002) [16], SWarrie (A.05.008) [89], T602.30 (A.07.01), MC (A.05.014) [31], FC (A.05.019) [19].

608 MW (A.05.022) [43]-[44], KG (A.05.016) [27], T244.20 (A.07.007).

609 KW (A.05.012) [48], IG (A.05.011) [31], KG (A.05.016) [20], SWarrie (A.05.008) [126].

SHP.⁶¹⁰ The cultural loss associated with physical impacts to country is discussed above. Michael Woodley says:

Manjangu cannot dictate what happens on our ngurra. We cannot fulfil our responsibilities to the Minkala and Marrga under our Law if this happens. It was not just the denial of access to our ngurra that was wrong. The reason I and many other Yindjibarndi people wanted access was to do surveys of areas that FMG had made a section 18 application over. We had not consented to the destruction of Yindjibarndi sites in these areas. We wanted to see the area for ourselves to see what would be destroyed and to try and stop it. We were trying to exercise our rights and our responsibilities under our Law. We could not do that, and our sites were destroyed. I am fearful that I and other Yindjibarndi people will be punished because we have not looked about [sic] the *ngurra*. I know what the consequences under our Law are for this.⁶¹¹

HYDROGEOLOGY EVIDENCE AND ITS RELEVANCE TO COMPENSATION FOR THE GRANT OF THE FMG TENEMENTS [ISSUE 7]

- 549 This section of the submissions relates to the effect that the SHP has had on groundwater within its footprint and surrounding areas. Evidence was given by Yindjibarndi lay witnesses regarding the effects that lowering groundwater levels has had on the exercise of their traditional NTRI. Aboriginal witnesses gave evidence that they were aware of water decline in water places outside the SHP, including the Fortescue River. This decline has affected plants and animals in and near the SHP. It is important to remember that mining began at the SHP in October 2012.
- 550 Expert hydrogeologist Dr Guan provided two reports for the Applicant and Dr Evans provided a report regarding the hydrogeological processes surrounding the SHP for the FMG Respondents.⁶¹² Both attended an expert conference on 19 March 2024 and addressed 13 propositions producing a Joint Expert Report (**JHR**) on 22 March 2024.⁶¹³ Dr Evans agreed that the SHP has had a major effect on the landscape and the water beneath the SHP and that groundwater levels have significantly decreased, as expected, due to dewatering.⁶¹⁴ Further, at the April 2024 hearing, FMG called evidence from FMG hydrogeologist, Christopher Oppenheim. Large sections of his first affidavit were struck out due to him expressing opinions as an expert and not as a lay witness.⁶¹⁵ Mr Oppenheim identified that E47/1319 is the exploration licence over *Bangkangarra*; and he had no authority to rule out that FMG could apply to replace the licence with a mining lease in the future.⁶¹⁶ Another FMG hydrogeologist, Jordin Barclay, gave evidence of compiling data available to FMG from 11 rainfall gauges

⁶¹⁰ AM (A.05.017) [132], MC (A.05.014) [26], JC (A.05.015) [30]-[34].

⁶¹¹ MW (A.05.022) [316]-[317].

⁶¹² *Applicant's Expert Hydrologist's Report* dated 19 December 2023 (**HG1**, E.03.004), *Applicant's Expert Hydrologist's Short Response to the FMG Respondents' Expert Hydrogeologist's Report* dated 15 March 2024 (**HG2**, E.03.008), *Amended Assessment of hydrogeological processes surrounding the Solomon Hub Mine – responsive expert witness report* dated 5 March 2024 (**RE**, E.04.001).

⁶¹³ JHR (E.05.005).

⁶¹⁴ JHR (E.05.005) Topic 11, RE (E.04.001) Figure 7-1, [51].

⁶¹⁵ Amended First Affidavit of Christopher Ian Leonard Oppenheim dated 4 August 2024 (**1st CILO**, E.02.003).

⁶¹⁶ T951.41-T952.43, T957.33-T958.45.

“located in the vicinity of the [SHP]” (**Solomon Area rainfall data**) and groundwater monitoring bores.⁶¹⁷

- 551 Outside the SHP, Dr Evans believes that the likely cause of groundwater decline is a gradual, variable decline in rainfall, superimposed on a hydrogeological adjustment in groundwater levels, following the wetter period prior to the commencement of mining at SHP.⁶¹⁸ Dr Evans believes that the supplementation schemes have confined the decline in groundwater to within the SHP boundary.⁶¹⁹ Dr Guan considers that the supplementation scheme has been locally successful, but has not protected downstream vegetation.⁶²⁰
- 552 Between August 2011 and December 2022, at least 120GL⁶²¹ of water was abstracted from the ground beneath Yindjibarndi country.⁶²² This is water that otherwise would have been available to downstream groundwater-dependent ecosystems (**GDEs**) and eventually flowing down the Fortescue River to Millstream, both being important Yindjibarndi sites.⁶²³
- 553 Rainfall in the Pilbara results from both tropical and more temperate meteorological processes. Groundwater is the main water resource in the Pilbara. Most aquifers are re-charged by water infiltrating through streambeds during large rainfall events. Groundwater resources in the Pilbara have important environmental value; they support terrestrial ecosystems. GDEs and river pools indicate areas of groundwater discharge and occupy less than 0.5% of the Pilbara. Between 1988 and 2011 an analysis of satellite remote sensing indicates that GDEs generally showed limited Normalised Difference Vegetation Index (**NDVI**) variability, which represents vegetation cover condition.⁶²⁴
- 554 Much of the Lower Fortescue Headland (**LFH**) region is underlain by fractured rock formations, which form local aquifers. Re-charge to these aquifers is mainly associated with rainfall infiltration, which is 1-5% of annual rainfall and only occurs when rainfall exceeds 20 mm/day.⁶²⁵ Soils dry rapidly between rainfall events since evaporation exceeds rainfall. The LFH region contains alluvial aquifers, millstream calcrete, dolomite of the Wittenoom Formation and deeper paleochannel aquifers. Some of the paleochannels are associated with Channel Iron Deposits (**CIDs**). The SHP contains important aquifers and CIDs.⁶²⁶ The groundwater from the LFH region flows into Millstream, thence to the Harding River Dam, which supplies towns Dampier, Karratha, Roebourne, Point Wickham and Point Samson.
- 555 It is submitted that the NTRI listed at [7(d)-(i), (k)] of POC (A.02.002) have been impacted by the SHP's effects on groundwater, GDEs and the surface catchments of Kangeenarina Creek and Wirlu-Murra Creek (that flow into the Fortescue River).

⁶¹⁷ Affidavit of Jordin Alexander Barclay dated 22 February 2024 (**JAB**, E.02.008) [11(a)], [23], [28], Annexure JAB-1.

⁶¹⁸ JHR (E.05.005) Topic 10.

⁶¹⁹ JHR (E.05.005) Topic 13.

⁶²⁰ JHR (E.05.005) Topic 13, HG1 (E.03.004) [41], [42], [44(e)].

⁶²¹ JAB (E.02.008) [31]; *Solomon Mining Area: Updated H3 Hydrogeological Assessment (E.09.002.016)* p.13; Sydney Harbour contains 500GL.

⁶²² JAB (E.02.008) [31].

⁶²³ LCheedy (A.05.013) [10], SWarrie (A.05.008) [39], [87], [100], [123]-[124], [128], [131]-[132], KG (A.05.016) [17], [26], [28].

⁶²⁴ HG1 (E.03.004) pp.68-69.

⁶²⁵ At the SHP, recharge only occurs if rainfall exceeds 30mm/day (HG [16], T956.06, T1006.43 (ZA.07.020)).

⁶²⁶ HG1 (E.03.004) pp.65-70.

Kangeenarina Creek and Wirlu-Murra Creek

- 556 There are two main drainage systems which are intercepted by FMG's mining pits within the SHP area. Both are ephemeral and only flow after heavy rainfall infiltrates into the subsurface paleochannels. Kangeenarina Creek, which is groundwater-fed, lies mostly where the Kings (including Trinity) and Firetail deposits have been identified and mined.⁶²⁷ It once flowed north through the SHP area, northeast for approximately 14km, and discharged into the Lower Fortescue River (**LFR**) through an alluvial fan.⁶²⁸ The majority of the catchment of Kangeenarina Creek is located within active or pending FMG tenements.⁶²⁹
- 557 Wirlu-Murra Creek, west of the SHP, is groundwater-fed and flows in a north-westerly direction before discharging into the LFR.⁶³⁰ The LFR flows to Millstream National Park in the *Daniel* determination area and then to the Indian Ocean. It is of immense importance to Yindjibarndi people.⁶³¹
- 558 Groundwater beneath the Trinity deposit flows both west through the Queens deposit, discharging into Wirlu-Murra Creek, and northeast through the Trinity deposit discharging into Kangeenarina Creek.⁶³² The remainder of the Queens Valley catchment, including the Queens pit, drains west, towards Wirlu-Murra Creek.⁶³³

Expert evidence

- 559 Generally, the experts agreed on the hydrogeology of the SHP, including that the paleochannel aquifers underlying the SHP are of high permeability and the impacts of dewatering may be transmitted along them.⁶³⁴ Thus, dewatering in the SHP can impact the groundwater along the paleochannel as long as the SHP is not completely isolated from the surrounding paleochannel aquifers.⁶³⁵ The experts agreed that actual rainfall time series is most appropriate for investigating vegetation responses to rainfall.⁶³⁶ Nonetheless, Dr Evans preferred Cumulative Deviation from the Mean (**CDFM**) analysis. Dr Guan and Dr Evans agreed that, based on the publicly available Bureau of Meteorology (**BoM**) data, there has been no clear rainfall trend since 2014.⁶³⁷ However, Dr Evans posits that the Solomon Rainfall data shows a drying trend since 2014.⁶³⁸ Both experts agreed there are GDEs in the region and that NDVI is appropriate to identify alterations in groundwater-dependent vegetation.⁶³⁹ They also agreed that there are clear negative NDVI trends, as depicted throughout Dr Guan's first report.⁶⁴⁰ Despite agreeing to this proposition, Dr Evans only concedes that it is *possible* that there is a decrease in vegetation health in the CAA; Dr Guan believes the decline is clear.⁶⁴¹

627 E.09.002.016 pp.3, 19.

628 *Solomon Triennial Groundwater Monitoring Review – 2022 (E.09.002.020)* p.23.

629 E.09.002.020 p.23.

630 E.09.002.016 p.19.

631 SWarrie (A.05.008) [130]-[132], MW (A.05.022) [17], T650.28 (A.07.012), T239.44 (A.07.007).

632 E.09.002.016 p.33.

633 E.09.002.020 p.24.

634 JHR (E.05.005) Topics 1 and 2 p.4-5; HG1 (E.03.004) [17], RE (E.04.001) [25]-[27].

635 JHR (E.05.005) Topic 2 p.4.

636 JHR (E.05.005) Topic 4 p.5.

637 JHR (E.05.005) Topic 5 p.6, T1097.35.

638 JHR (E.05.005) Topic 4 p.6.

639 JHR (E.05.005) Topics 6 and 7 pp.6-7.

640 JHR (E.05.005) Topic 8 p.7, see HG1 (E.03.004) Figures 13-18.

641 JHR (E.05.005) Topic 9 p.7.

- 560 Dr Evans acknowledges that groundwater levels have significantly decreased within the SHP and that there has been a more moderate decline outside the SHP boundary.⁶⁴² The experts agree it is possible there has been a groundwater-level induced vegetation response, outside the SHP boundary, but disagree as to the cause. Dr Guan believes dewatering at the SHP and surface and subsurface catchment alteration has decreased groundwater recharge to GDE areas beyond the SHP. In contrast, Dr Evans believes climate-related processes are the cause, namely that groundwater levels have decreased following an extended period of high rainfall.⁶⁴³
- 561 In preparing HG1, Dr Guan analysed the NDVI throughout the CAA between January 2015 and November 2023. NDVI represents vegetation cover condition; a positive change in NDVI represents an improvement in cover condition; and a negative change correlates to a decrease in cover condition.⁶⁴⁴ Dr Guan also identified areas in the CAA known to contain GDEs⁶⁴⁵ and areas with a moderate potential to contain GDEs. GDEs need groundwater for their survival. Dr Guan's first investigation analysed whether any change in the NDVI had occurred in quadrats (a square plot of a defined area) *known* to contain GDEs. In those areas, he found the health of one-third of those sites has declined since 2015.⁶⁴⁶ Similarly, he examined the NDVI trend across the whole CAA between December 2018 and November 2023 and mapped the trends according to whether they occurred in areas *likely* to contain GDEs.⁶⁴⁷ That investigation found GDE degradation in the alluvial fan and some sections of the Kangeenarina (*Ganjingarringunha*) valley and at Wirlu-Murra Creek.⁶⁴⁸ Dr Guan then investigated what caused the decline in vegetation health, including the analysis of rainfall trends for the period over which the GDE degradation occurred. He concluded the cause could not be climate and was most likely to be the mining activities at SHP.⁶⁴⁹
- 562 Dr Evans did not analyse rainfall over the period in which GDE decline has been identified. He emphasises a decreasing rainfall trend in the SHP and the surrounding area from 2013 to 2023. He also identifies a wetting period from 1996 to 2006 in the area. He believed this wetting period "*would have produced artificially high groundwater levels over much of the region. The onset of a drier phase shows a downward adjustment in groundwater levels in response*". Dr Evans concludes that the NDVI degradation in recent years is due to a combination of short-term rainfall conditions and long-term groundwater readjustment. Dr Evans does not believe dewatering at the SHP could impact groundwater levels in the areas identified by Dr Guan in the time since mining began.
- 563 In producing a responsive report, Dr Evans did not conduct a like investigation, nor his own investigations. He relied heavily on FMG's literature. Dr Evans had little regard to the results of Dr Guan's NDVI analysis, dismissing it in favour of a 2023 report by contractors, Ecoscape.⁶⁵⁰ The Ecoscape report differs from Dr Guan's investigation as it uses different metrics to identify impacts to GDEs, examines different timeframes and concerns different locations. Despite initially preferring the Ecoscape report, Dr Evans acknowledged that Dr

642 JHR (E.05.005) Topic 11 p.8.

643 JHR (E.05.005) Topics 10 and 12 pp.8-9.

644 HG1 (E.03.004) [25].

645 HG1 (E.03.004) [21], [29] citing Ecologia (2014).

646 HG1 (E.03.004) Table 1, [33], [34], [44(c)], T1045.14, JHR Topic 9 p.7.

647 HG1 (E.03.004) [35]-[43].

648 HG1 (E.03.004) Figures 16, 17 and 18.

649 HG1 (E.03.004) [34], [36], [39], [44], [45].

650 Ecoscape, *Solomon Vegetation Health Monitoring Program 2022* dated 16 March 2023 (E.09.002.35).

Guan's CAA-wide investigation is an improvement on the type of investigation conducted by Ecoscape.⁶⁵¹

564 Hence, Dr Evans' report and conclusions do not engage closely with those of Dr Guan. Dr Evans makes no comment on Dr Guan's specific NDVI methods, nor Dr Guan's reasons for excluding rainfall as the cause of GDE decline. Crucially, Dr Evans does not scrutinise the same timeframe that Dr Guan considers relevant to his interpretation of NDVI trends and rainfall data, nor does he explain why he considers a longer timeframe to be more relevant to assess vegetation health. Dr Evans focused on a timeline beginning in the late 1990s, for both groundwater levels and rainfall trends. Dr Guan, however, specifically investigated the impact on vegetation, which responds quickly to rain. Given the differences in the scope of his investigation, Dr Evans has failed to give an alternative explanation for the decline of GDEs in the period since 2015, and particularly that since 2019, during which rainfall has increased and so has mining.

565 Dr Evans relies on the CDFM method to analyse rainfall data. Dr Guan considers this inappropriate to assess the nexus between rainfall and vegetation. This is because CDFM curves vary depending on which mean annual rainfall is chosen (Evans Figure 1). The CDFM curves graphed in Appendix D2 in Evans' report, cited multiple times, compares rainfall at "Solomon Area" against the mean annual rainfall of other locations near the SHP. It is submitted that this is conceptually wrong to analyse rainfall trends. The CDFMs in Appendix D2, are apt to mislead by showing a decreasing trend in the SHP and an increasing trend for locations further away.

Impact to NTRI

566 It is submitted that groundwater abstraction and mining-related changes to the surface catchment areas of Kangeenarina Creek and Wirlu-Murra Creek on or near the SHP have impacted the Yindjibarndi people's NTRI, including their important right to take water in the SHP and surrounds.

567 To Yindjibarndi people, water is sacred and the lifeblood of their *ngurra*.⁶⁵² Many Yindjibarndi people lament how, since the SHP was established, it has taken away water from their country and the landscape has dried.⁶⁵³ As well as parts of Kangeenarina Creek being destroyed, the enormous opencut pits pool water that must be dewatered for the SHP to successfully operate. Abstraction of that water from beneath the ground has been significant, almost all of which has evaporated.⁶⁵⁴ There is now far less groundwater present in the aquifers on Yindjibarndi country; the ability to utilise the groundwater traditionally has diminished since the SHP has been dewatered and the springs (*jinbi*) have been destroyed.⁶⁵⁵ There is no evidence before this Court that the *jinbi* nor the creeks can be restored to pre-mining conditions.

568 Yindjibarndi people express hurt, anger and despair at the way the mining activities at the SHP have impacted flora and fauna on their country.⁶⁵⁶ The Yindjibarndi gave evidence that hunting

⁶⁵¹ T1538.01 (ZA.07.025).

⁶⁵² LCheedy (A.05.013) [10], [19]; KG (A.05.016) [28]; SWarrie (A.05.008) [24].

⁶⁵³ FC (A.05.019) [23]-[24]; LCoppin (A.05.006) [51]; EG (A.05.010) [21]; KG (A.05.016) [26], [59]; IG (A.05.011) [34]; AM (A.05.017) [51]; SWarrie (A.05.008) [25]; WW (A.05.009) [46].

⁶⁵⁴ T1005.15-31 (ZA.07.020).

⁶⁵⁵ Annexure SCB2 to 1st SCB (A.05.023), p.38.

⁶⁵⁶ MC (A.05.014) [7]-[9], [24], KG (A.05.016) [28], [47]-[51], [59], IG (A.05.011) [12], [28], KW (A.05.012) [28], SWarrie (A.05.008) [25], [128], WW (A.05.009) [46], [48].

in the surrounding area of the SHP has caused them significant ongoing distress due to the lack of animals.⁶⁵⁷ As Kevin Guinness says:

We have no right to hunt, protect, speak for, or fish on Yindjibarndi country. The Mine has taken it all away. The mine's noises and lights are going 24 hours a day. I believe that the animals have their timeclocks off by the lights and the noise and they have moved away.⁶⁵⁸

This has affected the ability of Yindjibarndi people to collect resources and care for ecologically significant sites.⁶⁵⁹ Yindjibarndi people observe and have concerns that the vegetation associated with Kangeenarina Creek has dried up because of the SHP.⁶⁶⁰

Impacts within the SHP boundary

569 To mine iron ore from the Queens, Kings and Trinity mining pits, FMG must keep them dry by continually drawing water from the paleochannel aquifers.⁶⁶¹ Dewatering and groundwater abstraction at the SHP are authorised pursuant to six groundwater licenses (GWLs) granted under s5C of the *Rights in Water and Irrigation Act 1914*.⁶⁶² Since 2011, FMG's annual abstraction entitlement under their GWLs has increased from 3.25GL/pa to 28.2GL/pa.⁶⁶³

570 Since 2011, only 17% of groundwater abstracted from Yindjibarndi country below the SHP has been returned to the environment via supplementation at Kangeenarina Creek and Wirlu-Murra Creek.⁶⁶⁴ The remaining water has evaporated after being used for a range of mining purposes,⁶⁶⁵ including ore processing (73.04GL), dust suppression (37.13GL), camp supply (5.08GL), "Kings injection" (0.7G), Zalamea supplementation (1.39GL), "infiltration trench" (1.17GL), Karijini supplementation (0.41GL) and Eliwana Railway (0.33GL).⁶⁶⁶

571 The Court will recall, during the SHP mine site tour on 14 August 2023, the level of interruption to the natural environment through construction activities, land clearing, earthworks, roads and the like.⁶⁶⁷ The scope of that damage is represented in "Map 1 – Heritage overview map" (A.06.001.15) and its 14 enlargements (A.06.001.01-14), as well as the photos and videos taken during the mine tour (A.05.039).

572 Beneath the ground, dewatering has utterly depleted water levels within the SHP boundary. Dr Evans accepted that, within the SHP, there has been a significant decrease in groundwater levels due to dewatering.⁶⁶⁸ The Kings and Trinity areas, the latter of which is entirely in the CAA,

657 JC (A.05.015) [8], [17], KW (A.05.012) [33]-[34], LCoppin (A.05.006) [49], SWarrie (A.05.008) [128], JNorman (A.05.002) [15], Ex2 (A.04.002) [23], T359.35-360.05.

658 KG (A.05.016) [62]

659 KG (A.05.016) [28], [47]-[51], [54]; JNorman (A.05.002) [15], KW (A.05.012) [28], WW (A.05.009) [48].

660 KP2 (E.03.006) [96]-[97].

661 RE (E.04.001) [25].

662 Second Affidavit of Christopher Oppenheim sworn 4 August 2023 (2nd CILO, E.02.004) [7]-[10].

663 *Solomon Triennial Aquifer Review 2011-2014* (E.09.002.002) p. 44; E.09.002.020 p.13.

664 Between 2011 and 2022, total annual groundwater abstraction from beneath Yindjibarndi country was 120GL. Supplementation volumes have been 16.7GL at Kangeenarina Creek and 4.26GL at Wirlu-Murra Creek, which is on Eastern Guruma country. (See E.09.002.002 p.33, *Solomon Triennial Aquifer Review 2014-2017* (E.09.002.008) p.44, *Solomon Triennial Aquifer Review to 31 December 2019* (E.09.002.012) pp.18-19, 39, E.09.002.020 pp.17, 35, *Solomon Groundwater Monitoring Summary 2020* (E.09.002.013) p.17, *Solomon Groundwater Monitoring Summary 2021* (E.09.002.018) p.16.

665 T1005.15-31(ZA.07.020).

666 E.09.002.002 p.33, E.09.002.008 p.44, E.09.002.012 p.39; E.09.002.020 p. 35.

667 SWarrie (A.05.008) [20].

668 JHR (E.05.005) Topic 11 p.8.

have seen drawdowns up to 35m from pre-mining water levels.⁶⁶⁹ Exhibit N, Tab 5 (E.02.008.04) depicts an extreme level of groundwater drawdown (m/yr) at several bores located within the mine footprint, within the CAA.⁶⁷⁰ These bores represent dewatering to below the CID level to allow ore extraction. At Queens, which is outside the CAA, water levels are up to 50m below pre-mining levels.⁶⁷¹

Impacts outside the SHP boundary

- 573 Yindjibarndi people speak of the dryness now present throughout their country, anxious that *bowar*, the lifeblood of their *ngurra*, is being sucked up by the SHP.⁶⁷² Dr Guan's investigations established that, in some areas hydrogeologically connected to the SHP, ecosystem health has degraded because groundwater recharge (the amount of groundwater flowing to a given area after heavy rain) to these areas has decreased because of mining activities at the SHP.
- 574 Outside the SHP, the health of GDEs has declined. As set out at [559] above, the experts agree there are GDEs in the CAA and that vegetation health had declined in recent years.⁶⁷³ Since 2015, and accelerating in 2019, GDE health has declined in the alluvial fan downstream of Kangeenarina Creek, which flows through the SHP. This decline was demonstrated in both of Dr Guan's investigations.⁶⁷⁴ At three valleys in the Wirru-Murru Creek catchment, GDE health has declined since 2015, accelerating rapidly in 2022 and 2023.⁶⁷⁵ These declines are shown in HG1 at Figures 17 and 18.

Rainfall could not have caused this decline

- 575 Dr Guan, who specialises in vegetation, emphasised that vegetation, including that which is groundwater-dependent, responds very quickly to changes in rainfall.⁶⁷⁶ This rapid response can be seen in Figure 10 of Dr Guan's report.⁶⁷⁷ In Figure 10, the NDVI at the quadrat shows a sharp decline in 2019 due to the low rainfall that year. Before 2020, vegetation health has recovered. Thus, to assess whether rainfall accounts for vegetation health decline, analysis of the rainfall trend must be contemporaneous to the decline in vegetation health.⁶⁷⁸
- 576 By contrast, Dr Evans interpreted rainfall trends as far back as the mid-1990s using the CDFM analysis method to analyse the "longer-term groundwater response".⁶⁷⁹ Dr Evans acknowledges the CDFM interpretation method is inappropriate for assessing vegetation response.⁶⁸⁰ Dr Guan never uses this method for this purpose in his research; he considers it

⁶⁶⁹ E.09.002.016 p.47.

⁶⁷⁰ See TRP153 (11.4 m/yr), TRM132 (6.0 m/yr), SMB1004 (4.0 m/yr), KMB01D (2.4 m/yr), SMB1020 (2.2 m/yr).

⁶⁷¹ E.09.002.020 p.44.

⁶⁷² KG (A.05.016) [28], [48], WW (A.05.009) [48].

⁶⁷³ RE (E.04.001) [69], T1048.32 (ZA.07.020), T1516.17, T1540.46 (ZA.07.025).

⁶⁷⁴ JHR (E.05.005) Topics 8 and 9 p.7, HG1 (E.03.004) Figure 10, Figure 13, Figure 17, [39], [45(b)(i)], T1045.14 (ZA.07.020).

⁶⁷⁵ HG2 (E.03.008) Figure 3, [15], JHR (E.05.005) Topic X p.7, T1045.14-41(ZA.07.020).

⁶⁷⁶ HG2 (E.03.008) [3]-[4], T1090.42 (ZA.07.020): water sources for groundwater-dependent vegetation, include vadose-zone water replenished by surface inputs (rain) and groundwater (E.09.002.016 p.25).

⁶⁷⁷ HG1 (E.03.004) Figure 10.

⁶⁷⁸ T1105.22 (ZA.07.020).

⁶⁷⁹ T1098.22 (ZA.07.020).

⁶⁸⁰ T1098.22 (ZA.07.020).

problematic.⁶⁸¹ It is submitted that the statistical method, employed by Dr Guan, is preferable.⁶⁸²

BoM data is reliable

577 Rainfall *trends*, rather than the specific amount of rainfall at any given location, are relevant to assessing the impact on vegetation. This means that data from areas throughout the CAA, that are subject to the same weather patterns, can identify a rainfall trend. The weather systems impacting the CAA are tropical cyclones, which span up to thousands of kilometres. Thus, although two stations may receive different amounts of water, because the same weather system impacts both stations, their trends will be the same.⁶⁸³ BoM stations that are hundreds of kilometres from each other display very similar rainfall *patterns*.⁶⁸⁴ Their data is relevant to ascertaining the rainfall trend at the SHP. Dr Guan chose this dataset by prioritising continuity of data up to 2023.⁶⁸⁵ In any case, the Solomon Area rainfall data depicts a similarly stable trend since 2015.

Rainfall could not have caused the decline in GDE health

578 Rainfall statistics must be paired with vegetation response to understand the full picture. It is submitted that (1) there has been no rainfall trend since 2015, improving in some places since 2019; (2) the NDVI of some (non-groundwater-dependent) vegetation near the SHP has improved since December 2018, in line with increasing rainfall; (3) however, GDE health has declined over the same period. Thus, the cause of vegetation decline must be other than rainfall.

579 Dr Evans and Dr Guan agreed that the BoM data shows no rainfall trend since 2014.⁶⁸⁶ Rainfall data from Yalleen and Newman Aero weather stations (the only stations with continuous data until 2023) show no trend in recent years.⁶⁸⁷ This is corroborated by data from the Coolawanyah weather station, close to the SHP.⁶⁸⁸ The Solomon Area rainfall data shows steady rainfall during the same period, other than a notably dry year in 2023.⁶⁸⁹

580 Since 2019, GDE health has decreased. However, in that period, rainfall increased according to the BoM data,⁶⁹⁰ and only slightly decreased according to the Solomon Area rainfall data. In the same time frame, the health of the non-groundwater-dependent vegetation in the CAA has improved since 2019.⁶⁹¹ This includes vegetation in the immediate vicinity of SHP, nearby to where the Solomon Area rainfall data was collected.⁶⁹²

681 HG2 (E.03.008) [4], [6], T1090.42 (ZA.07.020).

682 T1091.18, T1102.04, T1114.24 (ZA.07.020).

683 T1090.20 (ZA.07.020).

684 T1090.20 (ZA.07.020), HG2 (E.03.008) Figure 2 shows very similar rainfall trends from BoM stations hundreds of kilometres apart.

685 T1090.020 (ZA.07.020).

686 T1097.35 (ZA.07.020).

687 HG2 (E.03.008) [5].

688 HG2 (E.03.008) [5], Figure 2, HG1 (E.03.004) Figure 8.

689 Annexure JAB-1 to JAB (E.02.008).

690 HG1 (E.03.004) Figure 12, [44(b)], T1105.22 (ZA.07.020).

691 HG1 (E.03.004) Figure 11, [34], [36], [44(b)], HG2 (E.03.008) [7], T1515.46, T1519.15 (ZA.07.025).

692 The green areas in HG1 (E.03.004) Figure 11 indicate areas where vegetation health has improved. See also T1519.15 (ZA.07.020).

581 Meanwhile, GDEs at Kangeenarina Creek and Wirlu-Murra Creek have degraded. The fact that
not all vegetation investigated showed a decreasing NDVI trend suggests that the decreasing
582 NDVI trends were not caused by climate.⁶⁹³ It is submitted, there must be another cause.⁶⁹⁴

SHP has reduced groundwater recharge to GDEs

582 It is submitted that construction and dewatering of mining pits at the SHP have affected
groundwater recharge to downstream GDEs, causing their health to decline.⁶⁹⁵

583 The following was accepted by both experts and FMG's lay witnesses:

- (a) The SHP is a recharge zone.⁶⁹⁶ It is the site where rainwater permeates through the sediment and rock, gathering primarily in the paleochannel aquifer before flowing downstream along the paleochannel.⁶⁹⁷
- (b) FMG is abstracting a lot of water from the recharge zone.
- (c) The paleochannel connects the impacted sites at Kangeenarina Creek to the Trinity pit and the impacted sites at Wirlu-Murra Creek to the Queens pit.⁶⁹⁸
- (d) The paleochannel has high hydraulic conductivity.⁶⁹⁹

Increasing abstraction rates coincide with the decline in GDE health

584 It is submitted that, based on the coincidence of the decline in the health of GDEs and
increasing volumes of groundwater abstraction, upstream mining activities at the SHP have
contributed to the decline in downstream GDEs along both Kangeenarina and Wirlu-Murra
585 Creeks.

585 Between 2012 and 2019, 2.78GL was abstracted from the Queens mining area,⁷⁰⁰ without
supplementation into Wirlu-Murra Creek.⁷⁰¹ Vegetation health decline has been observed since
2015. However, the decline in vegetation health at Wirlu-Murra Creek abruptly increased in
2021-2022 and the NDVI has not recovered since then, despite supplementation.⁷⁰² This
corresponds to a marked increase in abstraction at Queens in 2019 and again in 2020.⁷⁰³

586 Similarly, 3.77GL of water was abstracted, unabated, from Kings and Trinity before
supplementation began in 2014.⁷⁰⁴ Abstraction volumes increased significantly in 2014,
compared with moderate rates of supplementation. Dr Guan's study found that vegetation
degradation related to Kangeenarina Creek has occurred gradually since 2015, consistent with
the increase of groundwater abstraction in the recharge zone.⁷⁰⁵

⁶⁹³ HG1 (E.03.004) [34], HG2 (E.03.008) [7].

⁶⁹⁴ T1515.46 (ZA.07.020).

⁶⁹⁵ HG1 (E.03.004) [44]-[45].

⁶⁹⁶ HG1 (E.03.004) [39]-[40]; RE (E.04.001) [27]-[28].

⁶⁹⁷ RE (E.04.001) [28].

⁶⁹⁸ T1069.24 (ZA.07.020), T1520.01, T1569.07 (ZA.07.025).

⁶⁹⁹ JHR (E.05.005) Topics 1 and 2 p.4-5; HG1 (E.03.004) [17], RE (E.04.001) [4], [25]-[27], T1520.01, T1570.17 (ZA.07.025).

⁷⁰⁰ E.09.02.016 p.43 (Table 9).

⁷⁰¹ E.09.002.012 p.19, E.09.002.020 p.44.

⁷⁰² HG [42], [44(c)], [45(a)(ii)].

⁷⁰³ E.09.002.016 p. 43 (2012-2019), E.09.002.020 p. 44 (2020-2022).

⁷⁰⁴ *Abstraction*: E.09.002.016 p.43 (2007-2019), E.09.002.020 pp.43, 45 (2020-2022); *Supplementation*:

E.09.002.002 p.33, E.09.002.008 p.44, E.09.002.012 pp. 18, 39, E.09.002.020 pp.17, 35.

⁷⁰⁵ HG1 (E.03.004) Figure 17, [44(c)].

587 It is submitted that, if it is accepted that the paleochannel is of high conductivity, the impacts of dewatering can transmit rapidly downstream.⁷⁰⁶ Dr Evans considers that, if the paleochannel is “very” permeable, those effects could be felt in months to about a year; if “moderately” permeable, in several years to a decade.⁷⁰⁷ Dr Guan’s investigation reported degradation at Kangeenarina Creek from 2015 (eight years after abstraction began and one year after a substantial increase in abstraction) and at Wirlu-Murra Creek from 2018 (six years after abstraction began and coinciding with an unmitigated increase in abstraction). Both periods fall within Dr Evans’ estimated timeframe under either high or moderate permeability conditions. Both experts repeatedly acknowledged that the paleochannels are highly permeable (see [583(d)] above).

Dewatering mechanisms impacting downstream GDEs

588 It is submitted that dewatering has:

- (a) decreased the amount of recharge at the SHP (the primary recharge zone), reducing groundwater flow downstream to GDEs;
- (b) reduced the hydraulic gradient between the upstream and downstream reaches of Kangeenarina and Wirlu-Murra Creeks’ catchments, altering groundwater flow paths so that less water flows downstream to GDEs; and
- (c) alongside construction and earthworks, reduced the catchment area of Kangeenarina Creek, increasing surface runoff during heavy storms, reducing infiltration and reducing groundwater recharge.

589 Further, although maintaining water levels immediately near the SHP, the supplementation schemes have failed to protect the health of downstream GDEs. Dewatering has severely steepened the hydraulic gradient between the mining pits and the reinjection point, causing recirculation of reinjected water, despite the presence of hydraulic barriers at both creeks.

Mechanism 1: Dewatering decreases the volume of recharge to downstream GDEs

590 Primarily, aquifer recharge occurs over the paleochannels underneath the SHP.⁷⁰⁸ Without mitigation, if water is taken from the aquifer upstream, less water flows downstream. This is the *expected* impact of dewatering at the SHP.⁷⁰⁹ The FMG Respondents have acknowledged that dewatering at Trinity has contributed to the disappearance of semi-permanent groundwater-fed pools at Kangeenarina Creek.⁷¹⁰

591 For these reasons, Dr Evans concedes that “dewatering of the paleochannels could cause lowering of the water table in the vicinity of the SHP and hence a possible impact on surface water and vegetation.”⁷¹¹

⁷⁰⁶ T1569.03-T1570.04 (ZA.07.025).

⁷⁰⁷ JHR (E.05.005) Topic 2 pp.4-5.

⁷⁰⁸ RE (E.04.001) [28].

⁷⁰⁹ JHR (E.05.005) Topic 2(a) pp.4-5, RE (E.04.001) [27].

⁷¹⁰ E.09.002.016 p.24.

⁷¹¹ RE (E.04.001) [27].

Mechanism 2: Dewatering alters the hydraulic gradient, causing groundwater to flow towards dewatered areas

592 Under ordinary conditions, groundwater flows from the recharge zone at a higher altitude (under the SHP) to the valley at the mountain front (the Fortescue River).⁷¹² The recharge zone, full of water, has high pressure, so the groundwater moves to a low-pressure area – the stream channel and discharge point at the Fortescue River. Groundwater abstraction reduces (flattens) this gradient by reducing the pressure at the recharge end. As a result, there is less groundwater replenishment downstream.⁷¹³ Dewatering at Queens, Kings and Trinity, and supplementation at Kangeenarina and Wirilu-Murra Creeks, has reversed the hydraulic gradient (also known as head difference), since the groundwater levels at the recharge zone are now lower than those at the supplementation points. Grout walls have been inserted at Kangeenarina Creek and Wirilu-Murra Creek to obstruct water flowing back into the pits but are not totally effective. As a result, water is flowing back (recirculating) into the dewatered pits, rather than downstream.⁷¹⁴ This circumstance is explored further below, at [596]-[597].

Mechanism 3: At Kangeenarina Creek, the SHP has reduced the catchment area, causing faster stream flow, more runoff and less recharge

593 Finally, the SHP, through earthworks and dewatering, has reduced the catchment area of Kangeenarina Creek.⁷¹⁵ Less catchment area means the same amount of water must travel over less land, creating faster stream flow and more surface runoff.⁷¹⁶ Similarly, dewatering of the pits means there is less water storage for the catchment, causing aquifers to fill more quickly, leading to more surface runoff.⁷¹⁷ More runoff means that, during heavy storms, there is less opportunity for water to soak into the soil and enter the aquifer. Given Kangeenarina Creek primarily relies on these heavy rainfall events for groundwater recharge,⁷¹⁸ there is less water available to downstream GDEs.

Supplementation has failed to protect the whole system

594 The purposes of the Kangeenarina Pools Supplementation Plan (**KCSP**) and the Wirilu-Murra Creek Supplementation Plan (**WCSP**) (**the supplementation schemes**) are to maintain permanent and semi-permanent pool levels,⁷¹⁹ not to explicitly protect downstream GDEs.

595 As a result, FMG's groundwater-dependent vegetation monitoring is confined to areas in the immediate vicinity of the SHP; FMG has not taken a regional gaze like Dr Guan's investigation, which Dr Evans acknowledged is an improvement on FMG's monitoring regime.⁷²⁰ Rather, FMG has *assumed* that maintaining water levels within the upstream reaches of the pools (close

712 HG1 (E.03.004) [39].

713 HG1 (E.03.004) [39].

714 T978.34-T979.14 (ZA.07.019), T1003.26-T1004.14 (ZA.07.020), E.09.002.016 p.34.2 ("head differences are exacerbated...").

715 HG2 (E.03.008) [12], T1020.23-T1021.29 (ZA.07.020).

716 HG2 (E.03.008) [12].

717 T1511.26 (ZA.07.025).

718 HG1 (E.03.004) [16], T956.06 (ZA.07.019), T1006.43 (ZA.07.020); FMG's data indicates that a 50mm magnitude storm event is required to initiate surface water flow and direct recharge to Kangeenarina Creek (E.09.002.016 p.24).

719 *Kangeenarina Creek Supplementation Plan Rev 5 dated 21 February 2020* (Annexure CILO-5, E.02.003) p.8; *Wirilu-Murra Creek Supplementation Plan Rev 5 dated 24 June 2021* (Annexure CILO-6, E.02.003) p.10.

720 T1537.18-T1538.17 (ZA.07.025).

to the supplementation point) would prevent impacts to the groundwater environment and pools further downstream (see Annexure CILO-6, E.02.003, p.29.4).

Recirculation of supplemented water

596 However, water at Wirlu-Murra Creek and Kangeenarina Creek is flowing back into the SHP, not reaching those GDEs whose health has declined since 2015.⁷²¹ This is because the hydraulic gradient is steeper between the pits and the supplementation point than between the supplementation point and downstream.⁷²² As mining moves closer to the supplementation areas, more groundwater is recirculating, leading FMG to consider applying to increase its groundwater extraction allocation.⁷²³

597 Because water is recirculating, at Kangeenarina Creek, recharge is only occurring at a local level, not reaching further downstream.⁷²⁴ As FMG's supplementation schemes are concerned with maintaining pool levels, they have increased reinjection to combat recirculation.⁷²⁵ However, given the altered groundwater flows, not all this water is making its way further downstream. The supplementation schemes are successfully maintaining pool levels while failing to prevent the decline of downstream GDEs.⁷²⁶

Groundwater monitoring

598 Similarly, vegetation decline in Wirlu-Murra Creek in the proximity of SHP suggests that the supplementation system has not functioned as well as expected.⁷²⁷ Wirlu-Murra Well is the closest bore to this impact area. The bore's groundwater level decline has been more modest than at the alluvial fan (0.7m since 2008).⁷²⁸ However, since 2017, the groundwater level has begun regularly fluctuating below 6m below the surface,⁷²⁹ which is the boundary below which GDEs no longer make true use of groundwater.⁷³⁰ In addition, after 2018, groundwater level fluctuation became extreme; between 8-13 February 2020, groundwater fell 65cm.⁷³¹ Extreme fluctuation negatively impacts the health of groundwater-dependent vegetation.⁷³²

599 Groundwater monitoring in connection with the KCSP extends only as far north as KMB15S, which falls within the section of Kangeenarina Creek successfully supplemented.⁷³³ Groundwater levels near the alluvial fan, however, where the impacts have been observed, show a far more dramatic decline; as much as 3m since 2014.⁷³⁴

⁷²¹ T947.07, T978.37-T979.10 (ZA.07.019), T1006.25-39 (ZA.07.020), E.09.002.020 p.77, E.09.002.016 p.4.

⁷²² T978.37 (ZA.07.019).

⁷²³ E.09.002.016 p.11.

⁷²⁴ HG1 (E.03.004) Figure 13 shows the stark difference between where supplementation has been effective (dark green along Kangeenarina Creek) on a local scale and where degradation begins because recharge is not occurring. E.09.002.020 p.77.

⁷²⁵ HG1 (E.03.004) [44(e)].

⁷²⁶ HG1 (E.03.004) [44(f)].

⁷²⁷ 'Regional GWL Hydrograph' Annexure JAB-3 (E.02.008.003).

⁷²⁸ Annexure JAB-3 (E.02.008.003).

⁷²⁹ T1045.41 (ZA.07.020).

⁷³⁰ Annexure JAB-3 (E.02.008.003); Similarly, between 1-25 February 2021 groundwater fell 73cm.

⁷³¹ T1046.02 (ZA.07.020).

⁷³² RE (E.04.001) Figure 7-1.

⁷³³ Annexure JAB-3 (E.02.008.003): groundwater levels at LF-MB005S and LF-MB001D have declined ~2m since 2016 and ~3m since 2014, respectively.

- 600 Groundwater monitoring data, such as that cited, disproves the regional readjustment argument proffered by Dr Evans. In any case, bores downstream of the supplementation schemes now rely on supplementation (rather than climate) for recharge, since the recharge point is dewatered. The fact that, regardless of upstream supplementation, they depict falling groundwater levels evidencing the failure of the supplementation schemes.
- 601 Despite supplementation, semi-permanent pools at Kangeenarina Creek have disappeared, at least partly due to groundwater abstraction at the SHP,⁷³⁵ and, overall, there has been a decline in groundwater-fed pools at Kangeenarina Creek and Wirlu-Murra Creek since mining began.⁷³⁶ FMG believes a cumulative rainfall deficit accounts for these changes,⁷³⁷ even though rainfall has been steady since 2014 and the pools are fed by supplementation. Even for the upstream pools that have been maintained by supplementation, Yindjibarndi country is on life support and is severely damaged.

Yindjibarndi Dreaming stories related to groundwater

- 602 Yindjibarndi people have a Dreaming story following groundwater flow from Jigalong in the desert and through the Fortescue Marshes, thence to *Ganjingarringunha wundu* (Kangeenarina Creek) and the SHP and thence to Millstream (the **underground Dreaming story**).⁷³⁸
- 603 There is also a *jawi* for *Ganjingarringunha*, which is intercepted by the SHP and is part of the *Bundut*.⁷³⁹ Wirlu-Murra Creek also forms part of the Dreaming story and is sung in the *Bundut*.⁷⁴⁰
- 604 The Applicant's witnesses gave evidence about the damage caused by FMG to a *jinbi* (spring) at *Ganjingarringunha*.⁷⁴¹ Prior to its destruction, Stanley Warrie warned FMG workers of the importance of the site and that it was to be avoided. Kevin Guinness gave evidence of having visited this spring as a child and of it being beautiful and rich in resources.⁷⁴² Further, Stanley Warrie explained that it had spiritual significance.⁷⁴³ Dr Palmer discusses this incident and its impact on Mr Warrie's *wirrard* at KP2 [121]-[126]. Dr Palmer explains that the creative powers of the *Barrimirndi*, creator of all waterways in Yindjibarndi country, are believed to be responsible for the *jinbi*. That Dreaming is now affected by the SHP.
- 605 The physical damage caused to *Ganjingarringunha yaayu* (the eastern branch of the creek) was observed from Location 7 during the Court's tour of the SHP area and Michael Woodley gave evidence that the SHP activities had obliterated the natural features of the valley.⁷⁴⁴
- 606 Both Charlie (Fabian) Cheedy and Michael Woodley have described how there were various walking routes that passed through the *Ganjingarringunha* area (in the SHP). Charlie Cheedy described these as "roads" that followed creeks.⁷⁴⁵ They were "put there" to enable passage to

⁷³⁵ E.09.002.016 p.24.

⁷³⁶ E.09.002.016 p.24.

⁷³⁷ E.09.002.016 p.24.

⁷³⁸ Ex2 (A.04.002) [24], LCheedy (A.05.013) [10], KG (A.05.016) [51], SWarrie (A.05.008) [24].

⁷³⁹ Ex1 (A.04.001) [20], LCoppin (A.05.006) [52], KG (A.05.016) [28].

⁷⁴⁰ SWarrie (A.05.008) [25], [100].

⁷⁴¹ SWarrie (A.05.008) [20]-[21], T475-476 (A.07.010), T596-598 (A.07.011).

⁷⁴² T476.38-T477.42 (A.07.010).

⁷⁴³ T596.16 (A.07.011).

⁷⁴⁴ T475 (A.07.010) and see KP2 (E.03.006) [105]-[106].

⁷⁴⁵ KP1 (E.03.001) [326], Figure 6.4.

open mulga flats (*wirndamarra*) and camping areas, where water could be obtained and people could gather. These camping areas and walking tracks have been “blocked off by the mines.”⁷⁴⁶

607 Charlie Cheedy described the destruction of these routes in SHP.⁷⁴⁷

“... the camping area in the mulga has been destroyed. The tributary to the Wirlumurra which runs west is ‘all dug up’ so that the *wurndu* [creek] is gone. The track that extended from Ganyjingarringunha Creek to the railway loop is now Firetail Mine while Queen mine, ‘heading back towards the Rio [Tinto] line, ‘all that *wurndu* is dug up’. Tharndibirndinha is the name of a creek (*wurndu*) and associated catchment which drains south eastern portion of the Solomon Hub before turning north to flow into the Fortescue north of Yijigarrinha (Rio Tinto Gorge). It was his understanding that the Tharndibirndinha catchment was scheduled to be mined soon.”

608 Ochre sites (ochre being used as body decoration in the performance of *Birdarra* law) and another (restricted) resource used in the *Birdarra* law were to be found in the SHP area but are no longer accessible.⁷⁴⁸ Yindjibarndi people’s ability to perform the rituals is now “*diminished because the totality of the link with Yindjibarndi country, which the use of these items in part symbolises, has been broken. It is then now incomplete and the integrity of the Burndud brought into question.*”⁷⁴⁹

609 Evidence regarding the significance of, and impacts to, Kangeenarina Creek, is discussed at [566]-[567].

Permanently altered the surface catchment area and groundwater flow patterns

610 Mining pits, earthworks, and other construction have permanently altered the surface catchment area of *Ganyjingarringunha wundu*, destroying the culturally significant areas described above. Jordin Barclay and Christopher Oppenheim were both taken to “Map 1 – Enlargement 2” (A. 06.001.02). Both acknowledged that the Trinity pit has impacted the catchment area and the natural creek line of Kangeenarina Creek so that it no longer flows as it once did.⁷⁵⁰ “Map 1 – Enlargement 1” (A.06.001.01) depicts the destruction of the creek line, which runs from the bottom-centre of the map to the centre-right, near the numbers 7,553,000.

611 The SHP has broken the crucial Dreaming story.⁷⁵¹ As a result, although Yindjibarndi people can sing the song for that area, it no longer matches reality and the “*sign posts*” have gone.⁷⁵² The song can no longer be passed on to future generations because they cannot see the creek of which they sing.⁷⁵³

⁷⁴⁶ KP1 (E.03.001) [327]-[328], SWarrie (A.05.008) [124], KG (A.05.016) [27], FC (A.05.019) [18].

⁷⁴⁷ KP1 (E.03.001) [330].

⁷⁴⁸ AM (A.05.017) [69], KG (A.05.016) [15], T688.04-T690.27 (A.07.013).

⁷⁴⁹ KP1 (E.03.001) [332]; SWarrie (A.05.008) [129].

⁷⁵⁰ T974.04 (ZA.07.019), T1020.32-T1021.27 (ZA.07.020).

⁷⁵¹ FC (A.05.019) [23], LCheedy (A.05.013) [19], LCoppin (A.05.006) [51], KG (A.05.016) [27], [28], IG (A.05.011) [28], AM (A.05.017) [88], JNorman (A.05.002) [15], SWarrie (A.05.008) [20], [100], MW (A.05.022) [35].

⁷⁵² LCoppin (A.05.006) [52], IG (A.05.011) [12], WWoodley (A.05.009) at [47].

⁷⁵³ LCoppin (A.05.006) [52].

CONCLUDING OBSERVATIONS IN RELATION TO CULTURAL LOSS

- 612 The submissions on cultural loss have referred throughout to the felt experience and impact of that loss as it relates to the separate forms of that cultural loss addressed above. However, there are some overarching observations to be made about the effects of cultural loss as there is necessarily some overlap between how those forms of loss are felt.
- 613 One theme running through Dr Palmer's discussion of the cultural loss is that it cannot be assessed adequately by reference to a series of enumerated sites. It is his view that the *ngurra* as a totality, informed by the multiple layers of meaning and significance is greater than the sum of its parts and likens it to a symphony in this respect.⁷⁵⁴
- 614 Comprehending the significance of *ngurra* requires attention to be given to the entirety of *ngurra* as a part of the Yindjibarndi lived experience, social exchange and religious belief and practice: "assessing loss must comprehensively consider the entity that is subject to that loss, being *ngurra* as a totality of the geographic and spiritual environment wherein the Yindjibarndi have held rights and duties since, according to their reckoning, the great creative period of the Dreaming..."⁷⁵⁵ Dr Palmer endorses Mansfield J's observation that "the ... contention ... that there can be a significant area of landscape that is unimportant to Aboriginal people, or that there could be an area that is devoid of spirituality, defies logic in the Aboriginal tradition."⁷⁵⁶
- 615 The following passage from Dr Palmer in relation to the effect of the SHP is thereby particularly important for appropriately valuing the cultural loss that has occurred:

Ngurra is divine bestowal and is regarded as inviolate. That part could be lost is not contemplated in the beliefs that define its originating. That a portion has been not only appropriated but also eradicated challenges the whole of the relationship between the Yindjibarndi and their land as divinely ordained and as spiritually articulated. In terms of my anthropological analyses then cultural loss cannot be comprehended by seeking to enumerate component parts subject to the destruction (sites, individual songs). Rather, it should be understood in terms of the loss to the totality of Yindjibarndi country and the entirety of Yindjibarndi religious beliefs founded upon that country.⁷⁵⁷

- 616 Another observation made by Dr Palmer and referred to earlier in these submissions is the potentially existential nature of the threat to the Yindjibarndi people posed by the consequential effects of the SHP.⁷⁵⁸ That threat is not limited to one that arises from the consequences of social disruption. That the nature of cultural loss is such that it may encompass such profoundly dire consequences is consistent with the view expressed by Jagot J when writing about "non-economic loss" in the context of native title compensation, as follows:

The labels "cultural loss", "loss of cultural connection" or "spiritual loss" are all thin descriptors for this potential kind of loss, in which an act enabling harm to country is also an act both embodying potential harm to the holders of native title in relation to that country and denying them the capacity to practise and transmit their culture in relation to that land. This is not a mere potential hurt to "feelings" or "spiritual" loss. It is a potential harm to, and destruction of, a way of life and a way of being in the world. This potential harm, depending on the evidence about the nature and effects of the act, may be existential. It may involve a wound or trauma to the capacity to exercise

⁷⁵⁴ KP2 (E.03.006) [181].

⁷⁵⁵ KP2 (E.03.006) [182].

⁷⁵⁶ KP2 (E.03.006) [184] citing *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [370].

⁷⁵⁷ KP2 (E.03.006) [185].

⁷⁵⁸ KP1 (E.03.001) [385], KP2 (E.03.006) [197], [257]-[258].

rights and responsibilities springing from the body of the traditional laws and customs too great for those laws and customs ultimately to survive.⁷⁵⁹

COMPENSATION CLAIMED FOR CULTURAL LOSS – HEADS OF COMPENSATION 7-9

617 As discussed above at [200], the process required for assessing non-economic or cultural loss is “a complex but essentially an intuitive one.” It must be conducted “with a view to assessing an amount that is *fair and reasonable*”. The Applicant submits that in view of the immensity of loss suffered by the Yindjibarndi community, as summarised above, and the particular facts in this case, the Applicant is entitled to **\$1,000,000,000** in compensation for cultural loss. The Applicant notes that on the assumption that there are 1000 people in the Yindjibarndi community,⁷⁶⁰ this amount would compensate each Yindjibarndi person \$1,000,000.

F. COMPENSATION PAYABLE BY STATE OR FMG RESPONDENTS [ISSUE 10] THE CONSTRUCTION AND OPERATION OF S.125A OF THE *MINING ACT* [ISSUE 10]

618 See Applicant's Opening Submissions at [77]-[81].

IS S.125A INCONSISTENT WITH THE NTA AND THEREFORE INVALID BECAUSE OF S.109 OF THE CONSTITUTION? [ISSUE 10]

619 See Applicant's Opening Submissions at [82].

G. INTEREST [ISSUE 12]

620 See Applicant's Opening Submissions at [107].

621 In *Griffiths (No.3)* at [252], Mansfield J acknowledged that there are no authorities directly applicable that would preclude the Court, if it decided that the award of compound interest was an appropriate course to adopt to secure fair compensation, from granting compound interest. His Honour said that the NTA is silent on the topic and does not foreclose the conclusion that, depending on the facts, an award of compound interest may be appropriate. The High Court endorsed the Court's approach at first instance and said (at [133]):

...it is possible that there may be circumstances in which, by analogy with an award of damages at common law for loss of use of money, it would be just to award interest on a native title compensation claim on a compound interest basis....⁷⁶¹

622 The Applicant submits that it is appropriate to award it compound interest for the economic loss suffered in the circumstances of this case. This is consistent with the High Court's observation in *Hungerfords v Walker* [1989] HCA 8; (1989) 171 CLR 125, that: “*Simple*

⁷⁵⁹ Jagot J Article at 833-834.

⁷⁶⁰ The Applicant submits that this is a conservative figure, noting that there are just under 500 members of YAC: T759.25; see also Exhibit E (Tab 2) CB E.08.002.003 and that membership to YAC is limited to those 18 and over: YAC Rule Book: Rule 3.1(a). The YAC Rule Book is not in evidence but is readily available on ORIC's website: <https://register.oric.gov.au/Document.aspx?documentID=935635&concernID=104370>

⁷⁶¹ *Griffiths HC*.

interest would not reflect accurately the extent of the [Applicant's] loss. Simple interest almost always undercompensates the injured party's true loss."⁷⁶² (emphasis added).

623 In this case, the evidence demonstrates that the Yindjibarndi people would have applied the funds received by way of compensation as working capital in their businesses or would at least have invested the very large sums of money that would have been received and hence an award of compound interest would be appropriate. In this respect, the Applicant refers to Michael Woodley's witness statement (CB A.05.022) at [244]-[265] and "MW-67" and "MW-68". Mr Woodley's evidence confirms that since the time production commenced on the SHP (in October 2012), Yindjibarndi people had established corporate structures and businesses in which to invest compensation monies negotiated with mining proponents. Had an agreement been reached with the FMG Respondents to facilitate the grant of the FMG tenements, and in which Yindjibarndi people received compensation by way of royalties, Mr Woodley's evidence is that the monies would have been invested and utilised for the purposes of Yindjibarndi businesses. Mr Woodley's evidence is that this is what Yindjibarndi people did with monies received from agreements (re)negotiated with Rio Tinto.⁷⁶³ Mr Woodley says this is "an established model and structure" for use for "any compensation paid to Yindjibarndi people."⁷⁶⁴ This evidence was not challenged by either Respondent party and Mr Woodley was not cross-examined on this evidence⁷⁶⁵. The Applicant submits that this evidence far exceeds "speculation or supposition" that the Applicant would have invested the funds, as per Banks-Smith J in *Davey v Northern Territory* [2023] FCA 642 at [33].

624 The Applicant relies on the Supplementary Report prepared by economist Murray Meaton dated 15 October 2024 (CB F.02.004) and says that the Applicant is entitled to receive compound interest of **\$109,935,000** on historic payments owed.

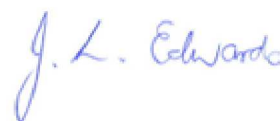
Dated: 13 November 2024



.....
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.....
Tina Jowett SC
Counsel for the Applicant



.....
Justin Edwards SC
Counsel for the Applicant

⁷⁶² at [41]. Note that contrary to the cases relied on by the Applicant in *Griffiths*, which referred to compound interest arising in equity, this case was, as characterised by Beach J in *Directed Electronics OE Pty Ltd v OE Solutions* [2023] FCA 462 at [26], a "plain vanilla common law claim" to damages.

⁷⁶³ MW (A.05.022) [245]-[246].

⁷⁶⁴ Ibid at [265].

⁷⁶⁵ Stanley Warrie and Angus Mack also gave evidence about Yindjibarndi businesses and trusts. Mr Warrie, on cross-examination, referred to Yindjibarndi trusts, the "YCCL" and "Yurra"– at T.611-622 (A.07.012). Mr Warrie provides an explanation of these terms and businesses in his witness statement at SWarrie (A.05.008) [13]-[15]. See also AM (A.05.017) [19]-[31].