Yamatji Marlpa Aboriginal Corporation's Closing Submissions

Federal Court of Australia
District Registry: Western Australia
Division: General

WAD 37/2022

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC
Applicant
STATE OF WESTERN AUSTRALIA & ORS
Respondents

A Executive summary

1. Yamatji Marlpa Aboriginal Corporation (ICN: 2001) (**YMAC**) makes these submissions on the basis that, pursuant to order 4 made 27 June 2023, its participation is (until further orders) limited to: (a) filing written submissions in accordance with the timetable for hearing, on matters arising from its pleadings to the extent to which those matters are not already addressed in the Applicant's written submissions; and (b) making oral submissions with the consent of all parties or with leave of the Court. Wherever possible, to avoid repetition, YMAC relies upon its written opening submissions filed 24 July 2023 (**Written Opening**),[1] and refers to relevant paragraphs of the *Applicant's Outline of Opening Submissions* filed 25 July 2023 (**Applicant's Opening**)[2] and the *Applicant's Outline of Closing Submissions* accepted for filing on 14 November 2024 (**Applicant's Closing**).

2. YMAC's particular concern is with the proper construction and operation of various provisions of the *Native Title Act 1993* (Cth) (**NTA**) and the ***Mining Act** 1978* (WA) relevant to determining claims to compensation.

B Background

3. YMAC repeats paragraphs [1]-[4] and [7] of its Written Opening.

---

1 Court Book (**CB**) A.02.010.

2 CB A.02.007.

Filed on behalf of Yamatji Marlpa Aboriginal Corporation
Prepared by Colin McKellar
Law firm Yamatji Marlpa Aboriginal Corporation
Tel (08) 9268 7000 Fax (08) 9225 4633
Email cmckellar@ymac.org.au
Address for service Level 8, 12 The Esplanade, Perth WA 6000

C Future acts

C1 The statutory scheme for compensation under the NTA for "future acts"

4. YMAC repeats paragraphs [8]-[14] of its Written Opening.

C2 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 Division 3 of the NTA? [Issue 10]

5. The submissions under this heading are in place of paragraphs [57]-[63] of YMAC's Written Opening.

6. The miscellaneous licences identified by FMG as Water Management Miscellaneous Licences (**WMMLs**) at FMG Response [13(e)][3] are said by FMG to be valid *future acts* pursuant to s 24HA(3) NTA. This is denied by YMAC.[4]

7. Each of the WMMLs are miscellaneous licences granted under s 91 of the ***Mining Act** 1978* (WA). They are referred to as WMMLs by FMG on the basis that at least one of the purposes for which each of the licences has been granted relates to water. However, under the *Mining Act* and the ***Mining Regulations** 1981* (WA), they are simply 'miscellaneous licences' granted for multiple specified purposes. Under the NTA, the grant of a miscellaneous licence, as a species of mining tenement created under State legislation, is the creation of a right to mine.[5]

8. FMG says that if the WMML grants were future acts covered by s 24HA(2) NTA, then the Applicant is entitled to compensation in respect of the WMML grants pursuant to s 24HA(5), in accordance with Part 2, Division 5 NTA.[6] That entitlement is an entitlement against the State: s 24HA(6). If the WMML grants are covered by s 24HA(2), they will not be covered by s 24MB.[7] So much is agreed.[8]

---

3 CB A.02.013.

4 YMAC Position [18] (CB AA.02.006).

5 *Harvey v Minister for Primary Industry and Resources* [2024] HCA 1; 98 ALJR 168 at [65]-[71] (Gageler CJ, Gordon, Steward and Gleeson JJ); [86] (Edelman J).

6 FMG Response at [16(f)(i)] (CB A.02.013); Applicant's *Reply to FMG Respondents' Further Amended Points of Response*, filed 21 July 2023 at [2] (CB A.02.005).

7 FMG Response at [16(a)-(c)] (CB A.02.013)which relies upon ss 24AA(4)(e), (j) and 24AB(2).

8 Applicant Points of Claim [30]-[31A] (CB A.02.002); FMG Response [30]-[31A] (CB A.02.013); and State Response [237]-[238A] (CB A.02.003).

9. However contrary to FMG Response at [16(d)(ii)] and [17(b)],[9] and FMG Opening Submissions at [23],[10] for s 24HA(2) to apply it is not sufficient for the future act itself to relate to the management or regulation of surface and subterranean water (**water management**); rather, the WMMLs must each have been granted *under legislation* that relates to water management. That is, what must be characterised for the purposes of s 24HA(2) is not the licence, but the legislative provisions which authorise its grant.

10. Pursuant to s 91(1) of the *Mining Act*, a miscellaneous licence may only be granted for one or more prescribed purposes, which must be directly connected with mining. The purposes are prescribed in regulation 42B of the ***Mining Regulations*** *1981* (WA). Characterisation of the legislative provisions pursuant to which the WMMLs were granted for the purposes of s 24HA(2) requires, firstly, identification of the purpose(s) of each WMML, and secondly, identification of the particular legislative provision(s) that permit a grant for the purpose(s).

11. As to the first step, Part C1.2 of the State Response[11] accurately sets out the prescribed purposes for which each WMML was granted, except that the purposes for L47/362 and L47/363 have been transposed.[12] None of the WMMLs were granted for purposes relating only to 'water management'; each was also granted for purposes prescribed by one or more of the following paragraphs of *Mining Regulations* reg 42B: (a), (c), (d), (e), (f), (g), (k), (n), (p), (q), (u), (v), (x).

12. As to the second step, what is meant by 'legislation' in s 24HA(2) NTA is the specific legislative provisions which authorise the grant of the future act.[13] For the purposes of ascertaining the application of s 24HA(2) to a grant, the grant must be "under legislation that … relates to the management or regulation of… surface and subterranean water". Thus a miscellaneous licence solely for the purpose 'search for groundwater' is an act covered by s 24HA(2), on the basis that s 91(1) of the *Mining Act* and reg 42B(ia) of the *Mining Regulations* are, together, legislation that relates to the management or

---

9 CB A.02.013.

10 CB A.02.009.

11 CB A.02.003.

12 See State Response at [84(b)] and [88(b)] (CB A.02.003) as against items 3 and 4 in the table from YMAC Position at [18(b)] (CB AA.02.006) and paragraphs [37] and [48] of the affidavit of David Crabtree made 16 June 2023 and filed 6 July 2023 (E.01.004). YMAC understands the State agrees with the identification of this as an error: T60.33-39; T69.23 (CB AA.07.005).

13 ***BHP Billiton*** *Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8; 258 FCR 521 at [57] (North, Dowsett and Jagot JJ).

regulation of surface and subterranean water, and such a miscellaneous licence is granted under that legislation.[14]

13. FMG's position is apparently that s 24HA(2) is engaged, on its express terms, if there is a grant of a licence for the management or regulation of water, regardless of whether rights other than in relation to water management are granted.[15]

14. YMAC submits that s 24HA(2) does not apply to a future act where *only some* of the legislative provisions authorising the grant of the future act relate to water management, i.e. where the licence is granted under legislation that only partly relates to water management, and partly relates to something other than water management. For example, a miscellaneous licence granted for the purpose of 'search for groundwater' *and* for the purpose of 'road' is not a future act to which s 24HA(2) applies, because the legislation under which such a licence is granted (*Mining Regulations* reg 42B(a) ["a road"] together with reg 42B(ia) ["a search for groundwater"]) does not relate to water management within the meaning of s 24HA(2). Similarly, none of regulations 42B(a), (c), (d), (e), (f), (g), (k), (n), (p), (q), (u), (v), (x) are a legislative provision which relates to water management.

15. YMAC's construction of s 24HA(2) is supported by the following matters.

16. *Firstly*, the nature of the relationship conveyed by the term 'relates to' (or 'relating to') will depend on the nature and purpose of the provision in question and the context in which it appears.[16]

17. *Secondly*, within Part 2 Division 3 of the NTA, "relates to" is used in various provisions. When used on its own, it is generally clear that it is referring to a particular and singular subject matter. See ss 24EBA(1)(a)(iii), 24JAA(1)(b), 44D(1)(c). In contrast, where the relationship between two things need not be exclusive, the term "relates to" is often used in conjunction with the words "to any extent": see ss 24JAA(1)(a), 24KA(1)(a), 43A(1)(a)(ii), 44A(2)(b).

18. If s 24HA(2) was intended to apply to the grant of a licence under legislation that partly related to water management *and* partly did not relate to water management, then it is to be expected that the phrase "relates, to any extent," would have been used within s 24HA(2)(b). The effect of FMG's submission as to the significance of the words

---

14 *BHP Billiton* at [62] (North, Dowsett and Jagot JJ).

15 FMG Opening Submissions at [23] (CB A.02.009).

16 *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 313 (Brennan CJ, Gaudron, McHugh JJ); *Oceanic Life Ltd v Chief Commissioner of Stamp Duties* (1999) 168 ALR 211, [56].

"relates to" in s 24HA(2)(b)[17] is that the provision is to be read, in effect, as "relates, *to any extent,* to the management or regulation of… surface and subterranean water".

19. *Thirdly*, Subdivision M makes specific provision for future acts like the WMMLs. Section 24MB(6B)(b) NTA expressly addresses "the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility… associated with mining". For a future act to be the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining, it must be (a) the grant of a mining tenement capable of being issued under State or Territory natural resources law, (b) linked to an actual mine, (c) which authorises the construction of an infrastructure facility (within the meaning of s 253 of the NTA) and nothing else.[18]

20. Each of the WMMLs satisfy these criteria. A miscellaneous licence is a mining tenement issued under State law, which cannot be granted unless the purpose for which it is granted is directly connected with mining: s 91(6) of the *Mining Act*. "Infrastructure facility" is inclusively defined in NTA s 253 as including (amongst other things): (a) a road, railway, bridge or other transport facility; (c) an airport or landing strip; (d) an electricity generation, transmission or distribution facility; (f) a storage or transportation facility for any mineral or mineral concentrate;(g) a dam, pipeline, channel or other water management, distribution or reticulation facility; and (i) any other thing that is similar to any or all of the things mentioned in (a)-(h) of the definition.[19] The purposes of "bore", "bore field", "pipeline", "taking water", "water management facility", "pump station", and "a search for groundwater" prescribed for a miscellaneous licence in the *Mining Regulations* are either expressly captured in (g) of the NTA definition of an infrastructure facility, or sufficiently similar to the matters described in (g) to be covered by the definition.

21. Thus on YMAC's construction of the NTA, Part 2 Division 3 has a coherent operation. A miscellaneous licence granted under a provision of the *Mining Regulations* that relates solely to the management or regulation of water falls within NTA s 24HA(2), while a miscellaneous licence granted under two or more provisions of the *Mining Regulations* of which one or more provide for some other form of infrastructure falls within NTA s 24MD(6B).

---

17 T135.40-136.06 (CB A.07.006).

18 ***Harvey*** *v Minister for Primary Industry and Resources* [2024] HCA 1; 98 ALJR 168 at [71], [73], [82] (Gageler CJ, Gordon, Steward and Gleeson JJ).

19 *Harvey* at [75]-[82] (Gageler CJ, Gordon, Steward and Gleeson JJ); [119] (Edelman J).

22. *Fourthly*, contrary to FMG in opening,[20] it was not put by YMAC or the State that there was an obligation under NTA Part 2 Division 3 Subdivision P to negotiate in respect of an act consisting of the creation of a right to mine if the act is solely for the construction of an infrastructure facility.[21] Rather, it was put in effect that FMG's construction of s 24HA(2) would enable tenement applicants to avoid the application of the more onerous procedural requirements that arise under ss 24MD(6B), which include a right to object and to have that objection heard by an independent person or body. But in any event, if FMG's construction is correct, then the creation of any right to mine, including one which is *not* for the sole purpose of the construction of an infrastructure facility, would also be captured by Subdivision H whenever the legislation under which it was granted related in any way to (amongst other things) the management or regulation of surface or subterranean water.

23. Pursuant to the *Mining Act*, the grant of:

    (a) a prospecting licence confers (amongst other rights) a right to the holder to, subject to the *Rights in Water and Irrigation Act 1914* (WA) (**RIWIA**), take and divert water from any natural spring, lake, pool or stream, and to sink a well or bore and to take water therefrom: s 48(d) of the *Mining Act*;

    (b) an exploration licence confers (amongst other rights) a right to the holder to, subject to RIWIA, take and divert water from any natural spring, lake, pool or stream, and to sink a well or bore and to take water therefrom: s 66(d);

    (c) a retention licence confers (amongst other rights) a right to the holder to, subject to RIWIA, take and divert water from any natural spring, lake, pool or stream, and to sink a well or bore and to take water therefrom: s 70J(d); and

    (d) a mining lease confers (amongst other rights) a right to the holder to, subject to RIWIA, take and divert water from any natural spring, lake, pool or stream, and to sink a well or bore and to take water therefrom: s 85(1)(d).

24. If an act which is, or is granted under legislation which is, *not solely* related to water management or regulation is nevertheless covered by Subdivision H, then prospecting, exploration, and retention licences, and mining leases, could be validly granted under the NTA on the basis of s 24HA(2). FMG's construction would thereby have the operation of Part 2 Division 3, including the affording of procedural rights and

---

20 T136.05-T140 (CB A.07.006).

21 State Opening Submissions [24] (CB A.02.008); T63.20-35 & T70.08-T71.14 (CB A.07.005)

compensation entitlements to native title holders, dictated by matters of form over substance.[22]

25. *Fifthly*, FMG's construction is not consistent with the evident intention of Subdivision H. When first enacted in 1993, NTA Part 2 Division 3 allowed 'permissible future acts' to take place, such acts being ones that could be done over ordinary (freehold) title land, including the grant of mining interests. The *Native Title Amendment Act 1998* (Cth) entirely repealed and replaced Part 2 Division 3 with a comprehensive scheme containing multiple subdivisions which address different 'types' of future acts. Subdivision H formed part of these amendments. Subdivision H was directed towards Point 8 of the 'Ten Point Plan':

> The ability of governments to regulate and manage surface and subsurface water, off-shore resources and airspace, and the rights of those with interests under any such regulatory or management regime would be put beyond doubt.[23]

26. Subdivision H was intended to ensure the validity of legislation directed towards the management and regulation of water resources (as distinct from 'waters') and a narrow sub-set of future acts which directly related to water management; not with a broad range of future acts that had only some connection to water management. That is consistent with the *Explanatory Memorandum to the Native Title Amendment Bill 1997* which stated, at [10.1], that Subdivision H "ensures that legislation and other future acts dealing with surface and sub-surface water, living aquatic resources and airspace will be valid". The Explanatory Memorandum at [10.9] gave as examples of acts subject to s 24HA(2), the grant of a fishing licence in an onshore area, and the grant of an irrigation licence. Acts which have been treated as subject to s 24HA(2) include the grant of permits for scientific research, moorings and the conduct of tourist activities such as fishing or snorkelling.[24] Such grants are radically different from the grant of a mining lease or licence in terms of their impact upon native title.

27. The construction put forward by YMAC (and the State) is consistent with the intention reflected in the Part 2 Division 3 future acts scheme, whereby future acts which are likely to have a greater impact on native title rights are subject to Subdivision M, which affords the native title party significantly greater procedural rights than the opportunity to comment conferred by Subdivision H: ss 24HA(7), 24MD(6A), 24MD(6B).[25] The evident

---

22 See *BHP Billiton* at [60].

23 *Explanatory Memorandum to the Native Title Amendment Bill 1997* at [2.9], referred to in *BHP Billiton* at [58].

24 *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603; 98 FCR 60 at [10]-[11]; *Lardil Peoples v Queensland* [2001] FCA 414; 108 FCR 453.

25 *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603; 98 FCR 60 at [40]-[42].

intention is that, in the usual case, the grant of a mining tenement is validated by Subdivision M, generally subject to the negotiation procedure set out in Subdivision P, with the procedure in s 24MD(6B) applying only to the narrower class of cases involving the grant of a mining tenement for the sole purpose of the construction of an infrastructure facility.[26]

28. *Sixthly*, YMAC's construction of s 24HA(2) is consistent with the rule-like quality of the scheme established by Part 2, Division 3 of the NTA, and the desirability of precision in relation to entitlements affecting interests in land.[27]

D How is compensation to be determined for the effect of the grant of the FMG tenements?

D1 The Part 2 Division 5 compensation provisions

29. YMAC repeats paragraphs [15]-[18] of its Written Opening.

D2 Does the *Mining Act* provide for compensation to native title holders? [Issue 2]

D2.1 The provision made for compensation under the Mining Act [Issue 2]

30. YMAC agrees with the Applicant that the similar compensable interest test is satisfied in relation to each of the compensable acts to which NTA Part 2 Division 3 Subdivision M applies: see s 24MD(3)(b)(i).[28] That is, if the Applicant held ordinary (freehold) title, it would be entitled to compensation under the *Mining Act* in relation to the compensable acts.

D2.2 Consideration of the Mining Act's compensation provisions [Issue 2]

31. YMAC agrees with the Applicant that the *Mining Act* does not provide compensation to native title holders. YMAC adds that is clearly the case in relation to the non-exclusive area, as Yindjibarndi People are neither owners nor occupiers as defined under the *Mining Act*.[29] As submitted at Applicant's Closing [51]-[53] including by reference to Applicant's Opening [32]-[45], Yindjibarndi People are also not 'owners' for the purposes of *Mining Act* s 123 in respect of the exclusive area. YMAC adds that *Mining Act* s 123(2), which confers a right to compensation, does so "[s]ubject to this section…" and "in accordance with this Act". Section 123(3) only provides a mechanism for determining

---

26 *Harvey* at [74] (Gageler CJ, Gordon, Steward and Gleeson JJ).

27 *Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia* [2020] FCAFC 64; 276 FCR 53 at [89]-[93] (Rares, White and Banks-Smith JJ); *Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96 at [76] (Kirby J).

28 Applicant's Opening at [27]-[28] (CB A.02.007).

29 *Tisala Pty Ltd v Hawthorn Resources Ltd* [2022] WASC 109.

compensation "payable to the owner **of private land** or to an occupier of Crown land or private land" (emphasis added). The compensable acts do not relate to private land. It follows a compensation entitlement arises under the NTA: see NTA s 24MD(3)(b)(ii).

D3 Section 51(1) and 'just terms' compensation [Issue 1]

32. YMAC repeats paragraphs [21]-[25] of its Written Opening.

D4 Section 51(3) and the principles or criteria for determining compensation under the Mining Act [Issue 3]

33. YMAC repeats paragraphs [26]-[34] of its Written Opening. In particular, YMAC agrees with Applicant's Closing [60].

D4.2 Is there a s 109 inconsistency between s 123(1) of the Mining Act and the NTA? [Issue 3]

34. YMAC makes no written submissions on the basis of order 4(a) made 27 June 2023, as the Applicant's submissions generally address the issues arising from YMAC Position.

D4.3 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]

35. YMAC agrees with the Applicant that compensation under NTA Part 2 Division 5 may include social disruption. YMAC adds that is specifically mentioned in *Mining Act* s 123(4)(f), which is applied by NTA s 51(3). That is, s 51(3) expands (to the extent necessary) the general entitlement to compensation (for economic and cultural loss) under NTA s 51(1) so that native title holders are entitled to compensation on no lesser criteria than an owner of ordinary (freehold) title.[30]

D5 Entitlement to compensation under s 10(1) of the RDA [Issue 11]

36. YMAC submits that Applicant's Closing [72] arises under the Applicant's alternative argument based on RDA s 10. It should not be necessary for the Court to ultimately rely on that alternative argument, as compensation is to be assessed under NTA s 51(1) which does have regard to the unique character of native title rights and interests. Insofar as the Court must *also* apply the criteria in the *Mining Act* by reason of NTA s 51(3), the overriding criteria in the *Mining Act* is in s 123(2) i.e. compensation "according to their respective interests … for all loss and damage suffered or likely to be

30 YMAC Position at [45(c)] (CB A.02.006).

suffered by them resulting or arising from the mining…".[31] That encompasses the matters in Applicant's Closing [72].

D6 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]

37. YMAC repeats paragraphs [42]-[45] of its Written Opening.

D7 The construction and operation of s 49 NTA [Issue 6]

38. The Applicant in opening said in effect that s 49 means that compensation is to be assessed on a 'project wide' basis.[32] The State in opening said that the proper construction and operation of s 49 is a hypothetical issue which does not arise on the pleadings of the other parties, on the basis of a position said (by the State) to have been adopted by the Applicant as to the absence of any compensable acts other than those included in this application.[33] FMG in opening said that the issue of whether s 49(a) precludes other native title holders from claiming compensation does not arise as between the Applicant, the State and FMG, and need not be decided – but also asserts that s 49(a) precludes the Applicant from seeking compensation for the effect of the grant of the FMG tenements where they overlap with other FMG tenements.[34]

39. While the State and FMG in opening each denied that the construction and operation of s 49 is in issue, FMG has pleaded s 49(a) as having an effect, and – to the extent relevant tenements overlap[35] – presumably intends to rely upon their construction and its effect for submissions on quantum. As a result, the construction and operation of s 49 is in issue. Accordingly, YMAC repeats paragraphs [46]-[54] of its Written Opening, and in addition submits as follows.

40. Section 49(a) of the NTA was *not* intended to address a situation where there are multiple tenements covering (wholly or partly) the same area. That is because each future act is a separate act for which compensation is payable. Such separate future

---

31 YMAC Position at [45(d)] (CB A.02.006).

32 Applicant Opening Submissions (CB A.02.007) at [73].

33 State Opening Submissions (CB A.02.008) at [86]. See also State Response at [195] (CB A.02.003); YMAC Position at [20] (CB A.02.006); Applicant Reply to State Response at [3] (CB A.02.004)

34 FMG Opening Submissions (CB A.02.009) at [108]-[109].

35 See, for example, Exhibit G1, Map 6 – Tenement Overview, Key Infrastructure & Key Mine Areas (CB A.06.001.30).

acts, even where granted over the same area, are not "essentially the same" within the meaning of s 49(a). That is evident from the text and operation of NTA Part 2 Division 3.

41. *Firstly*, different future acts can fall under different Subdivisions. For example, the grant of a mining lease attracts Part 2 Division 3 Subdivisions M and P. A grant of a miscellaneous licence over the same area may attract s 24MD(6B) (within Subdivision M), while a grant of a different miscellaneous licence may attract Subdivision H. The scheme of the NTA is that each act is treated separately.

42. *Secondly*, different persons may be liable to pay the compensation arising from future acts which are done under different Subdivisions: see ss 24EB(4)-(7), 24FA(2), 24GB(8), 24GD(5), 24GE(5), 24HA(6), 24ID(2), 24JAA(9), 24JB(5), 24KA(6), 24MD(4), 24NA(7). In some cases it is a government party which is liable, and in other cases it may be a particular third party (such as the original grantee, or the current holder, of a mining tenement). If s 49(a) meant compensation was only payable once for different future acts under different Subdivisions of Part 2 Division 3, or even for different future acts under the same Subdivision where the person from whom the compensation may be recovered is different, it may be unclear from whom the singular compensation award is to be recovered.

43. *Thirdly*, the NTA expressly contemplates renewals may be separate future acts for which compensation is separately payable. See ss 24IC, 24ID(1)(d), 26(1A), 26(1)(c)(i), 26D(1)(a), 226(2)(b). Hence a renewal cannot have been intended to be essentially the same act as the original grant.

44. Furthermore, the non-extinguishment principle generally applies to future acts (e.g. s 24MD(3)(a)). The effect of the non-extinguishment principle is that the native title rights and interests have no effect "in relation to the act": s 238(3), (4) (emphasis added). Yet they still have effect in relation to another act even while the non-extinguishment principle applies: see the *Explanatory Memorandum to the Native Title Bill 1993*, clause 223 (which became NTA s 238, and which has not been subsequently amended) which stated:

> The effect of the reference in clause 223 to native title having "no effect in relation to the act" is that the native title holders are not prevented from exercising the rights given to them by this Bill (such as the right to negotiate set out in Subdivision B of Division 3 of Part 2 of the Bill) in the event, for example, that while an existing mining lease is in force, an application is made by a person unrelated to the holder of that existing mining lease for the grant of a new mining lease over the same native title affected land as that covered by the existing mining lease.

45. For the above reasons, insofar as Applicant's Closing [77] referring to Applicant's Opening [73], and Applicant's Closing [202], suggest NTA s 49 has the effect that

compensation *must* always be assessed on a project wide basis, YMAC submits that is not correct.

46. That s 49(a) NTA, on its proper construction, does not deprive native title holders of an *entitlement* to compensation in respect of a tenement which is granted over the same land as an earlier or existing tenement (e.g. a miscellaneous licence granted over the same land as a mining lease) does not however mean that the *assessment* of the quantum of the compensation entitlement must proceed on a tenement-by-tenement basis. There is no barrier to the Court assessing the entitlement(s) associated with multiple acts on a project wide basis where that is how an applicant presents its case and where the facts of the case merit that approach.

47. That approach is appropriate here, on the basis that (as pleaded by the Applicant and admitted by YMAC, the State and FMG) each of the claimed compensable acts form part of a single project or operation, known as the Solomon Hub mine.[36]

E The claimed loss, diminution, impairment or other effect on the native title rights and interests [Issue 7]

E1 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]

48. YMAC agrees with the Applicant, especially at Applicant's Closing [78]-[79], and repeats paragraphs [72]-[84] of YMAC's Written Opening.

49. Further to paragraphs [78] and [81]-[83] of its Written Opening, YMAC submits that the broader effect of FMG Opening at [131]-[134] (CB A.02.009) and State Opening Submissions (CB A.02.008) at [112]-[113] would be that, in respect of any act done in relation to any area of land over which native title was determined to exist on the basis of ss 47, 47A and 47B NTA in circumstances where the prior acts extinguished all native title rights and interests, no compensation would ever be payable for any subsequent act. This would deny native title holders the full enjoyment of their rights (a matter which the Preamble identifies as "particularly important"), and permit the (re)acquisition and (re)extinguishment of those rights without any compensation.

---

[36] Applicant's Points of Claim at [9] (CB A.02.002); YMAC Position at [16] (CB A.02.006); State Response at [190] (CB A.02.003); FMG Response at [9] (CB A.02.013).

E2 The effect of the grants of the FMG tenements on the native title rights and interests [Issues 3A, 4 and 7]

50. YMAC repeats paragraphs [86]-[94] of its Written Openings.

51. Further, YMAC adopts [83], [92], [94] and [155]-[156] of the Applicant's Closing.

E3 Have the grants of the FMG tenements diminished, impaired or otherwise affected the economic value of the native title rights and interests [Issue 7]

52. YMAC repeats paragraphs [86]-[89] of its Written Opening.

53. Further, YMAC adopts [18(c)], [158], [161] and [174]-[175] of the Applicant's Closing and adds that the assessment of the economic value of exclusive native title by reference to common or standard practice according to which iron ore miners in the Pilbara are prepared to pay a percentage of revenue to obtain the assent of native title holders to the infringement of their native title, is consistent with the application of the *Spencer* test (as modified in *Griffiths* HC) to the fact of the existence of native title. In the case of exclusive native title, the rights the miner seeks to suppress include the right to exclude others for any reason or for no reason. The economic value of that native title right is what a reasonable willing but not anxious miner would pay to obtain a native title party's assent to the suppression of their native title for the life of a mine, on the basis of a hypothetical negotiation in which the miner could not enter the land and mine without the native title party's consent to the grant of a mining lease. Indeed, what actually occurs in the market demonstrates that, even where the native title rights are non-exclusive, a reasonable willing but not anxious miner is prepared to pay compensation including in the form of a percentage of revenue for the suppression of native title rights and interests. In either case (exclusive or non-exclusive native title), such a hypothetical negotiation may be postulated without necessarily assuming it takes place pursuant to or because of the right to negotiate process under the NTA.

E4 The proper construction and effect of s 51A NTA and the freehold cap [Issue 8]

54. YMAC repeats paragraphs [38]-[41] of its Written Opening.

55. Further, YMAC adopts [105]-[106] of the Applicant's Closing, and adds that s 51A should be taken to refer to a pre-1899 freehold (which includes the ownership of minerals) because: (a) that is the most valuable form of freehold, which is more appropriate if s 51A was to operate as a cap; and (b) it is consistent with native title existing under pre-sovereignty laws and customs.

E4.1 What is the value of a hypothetical freehold estate in the land the subject of the FMG tenements? [Issue 8]

56. YMAC makes no written submissions, on the understanding this heading is largely concerned with factual matters.

E5 Compensation for economic loss [Issue 7]

57. YMAC repeats paragraphs [86]-[90] of its Written Openings.

E5.2 Economic and valuation evidence

58. YMAC makes no written submissions, on the understanding this heading is largely concerned with factual matters.

E6 Compensation for non-economic or cultural loss [Issues 3A, 4 and 7]

59. YMAC repeats paragraphs [90]-[94] of its Written Openings.

60. Further, YMAC adopts Applicant's Closing [202] (subject to paragraph 45 above) and [205]. As to the last sentence of Applicant's Closing [205], YMAC adds that an aspect of exclusive native title is the right to speak for country.[37] That right is infringed, and consequently connection to country is impacted, where a mining tenement is granted and mining occurs without agreement of the native title holders, because the right to speak for country and the connection to country that manifests, is disregarded and disrespected. The non-exclusive native title in this case (and in many Pilbara determinations) includes a right to protect and care for sites and objects of significance. That too is infringed, and the right to obtain spiritual sustenance from the land is affected, where mining proceeds and sites and objects are impacted without the agreement of the native title holders.

61. YMAC otherwise makes no written submissions on the understanding this heading is largely concerned with factual matters.

F Compensation payable by State or FMG respondents [Issue 10]

62. YMAC repeats paragraph [55] of its Written Opening.

F2 The construction and operation of s 125A of the Mining Act [Issue 10]

63. YMAC repeats paragraphs [64]-[69] of its Written Opening.

---

37 *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at [14], [88].

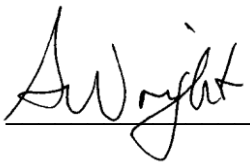
F3 **Is s 125A inconsistent with the NTA and therefore invalid because of s 109 of the Constitution? [Issue 10]**

64. YMAC repeats paragraphs [64]-[69] of its Written Opening, and otherwise, save for the submissions at [C2] above, YMAC makes no further written submissions.

G Interest [Issue 12]

65. YMAC adopts paragraphs [621]-[623] of the Applicant's Closing.

Dated: 17 November 2024



Stephen Wright SC

Tessa Herrmann

NOTICE OF FILING

Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	17/11/2024 9:50:50 PM AWST
Date Accepted for Filing:	17/11/2024 9:50:57 PM AWST
File Number:	WAD37/2022
File Title:	YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC ICN 8721 AND STATE OF WESTERN AUSTRALIA & ORS
Registry:	WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

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

The date of the filing of the document is determined pursuant to the Court's Rules.