First Respondent's Redacted Closing Submissions

WAD 37 of 2022

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

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC (ICN 8721)
Applicant

STATE OF WESTERN AUSTRALIA and others
Respondents

Filed on behalf of:	First Respondent (State of Western Australia)		
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A. EXECUTIVE SUMMARY

A1 The issues in dispute

1. It is agreed by the parties that the **Compensable Acts**[1] are valid *future acts*.[2] It is also agreed that an entitlement to compensation arises in respect of them.[3] The differences between the parties relate to: (a) the provisions of Part 2, Division 3 of the *Native Title Act 1993* (Cth) (**NTA**) under which the Compensable Acts were validated; (b) the provisions of the NTA under which any entitlement to compensation arises (including whether the effect of the NTA is that the entitlement arises under the *Mining Act 1978* (WA) (**MA**)); (c) how the compensation is to be assessed and quantified having regard to the source of the entitlement; and (d) who is liable to pay the compensation.

2. A flow chart depicting the operation of the NTA and MA in this proceeding is provided by way of an *aide memoire* in Annexure C.

A2 Which provisions of the NTA validated the Compensable Acts?

3. The First Respondent contends that all of the Compensable Acts are *future acts* which passed the *freehold test* contained in s.24MB(1) NTA and, accordingly, were validated under s.24MD(1) NTA. The First Respondent denies that those Compensable Acts which the FMG Respondents have called the "*Water Management Miscellaneous Licences*" were validated by s.24HA(3) NTA.[4] Whilst one of the purposes for which those licences were granted included "*taking water*" and/or "*a search for groundwater*", the licences included many other purposes which did not relate to the "*management or regulation of surface and subterranean water*"[5] such that they could not be validated under s.24HA(3).

A3 Does the entitlement to compensation arise under the NTA or the MA?

A3.1 COMPENSATION ENTITLEMENT ARISES UNDER THE MA

4. On the assumption that s.24MD(1) NTA validated each of the Compensable Acts, the First Respondent's primary case is that the **Application**[6] is misconceived because the effect of s.24MD(3)(b) NTA is that the entitlement for compensation arises under the MA and not Part 2, Division 5 NTA.

5. Section 23MD(3)(b) NTA provides, *inter alia*, that an entitlement to compensation in respect of the Compensable Acts will only arise under the NTA where: (a) the *similar compensable interest test* is satisfied (s.24MD(3)(b)(i)); and (b) the MA does not provide for compensation to the Applicant for the Compensable Acts (s.24MD(3)(b)(ii)). All parties agree that the *similar compensable interest test* is satisfied in relation to each of the Compensable Acts (because the holders of ordinary title could obtain compensation under the MA in respect of them).[7] The dispute is, therefore, whether the MA provides compensation to the Yindjibarndi People.

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1 Being the acts identified at paragraph [8] of CB A.02.002 (i.e. the grant, renewal and extension of the listed mining tenements).
2 CB A.02.002 at [17]; CB A.02.003 at [198]-[200]; CB A.02.013 at [13]; CB A.02.006 at [23].
3 CB A.02.002 at [16]; CB A.02.003 at [209], [211] and [245]-[247]; CB A.02.013 at [16]; CB A.02.006 at [21]-[22].
4 CB A.02.003 at [199]-[201]; CB A.02.011 at [9]-[13]; *cf* CB A.02.13 at [13(e)] and [17(b)].
5 See s.24HA(2)(b) NTA.
6 Being native title compensation application WAD 37 of 2020.
7 CB A.02.002 at [18]-[19]; CB A.02.003 at [202]-[207]; CB A.02.013 at [16(e)], [18]-[19]; CB A.02.006 at [23].

6. The First Respondent says that the MA provides compensation to the Yindjibarndi People for the Compensable Acts because they are "*owners*" and/or "*occupiers*" as those terms are defined in s.8 MA. Relevantly, pursuant to s.123(2) MA "*owners*" and "*occupiers*" are "*entitled, according to their respective interests, to compensation for all loss and damage suffered or likely to be suffered by them*" and may bring a claim under the MA for such compensation. Accordingly, the threshold requirement for an entitlement to compensation under Part 2, Division 5 NTA contained in s.24MD(3)(b)(ii) NTA has not been satisfied and the entitlement to compensation arises under the MA. It follows that the claim for compensation in this Court should be dismissed and, instead, an application must be made to the Warden's Court under the provisions of the MA.

A3.2 SECTION 10 RDA AND s.45 NTA DO NOT ALTER THIS OUTCOME

7. Section 10 of the *Racial Discrimination Act 1975* (Cth) (**RDA**) and s.45 NTA do not operate to alter the application of s.24MD(3)(b) NTA so as to make compensation, nevertheless, claimable under the NTA. Rather, the RDA yields to the NTA and has no residual operation. Alternatively, even if s.10 RDA and s.45 NTA were engaged, as the criteria in s.51(3)(a) and (b) NTA have been met, compensation would be determined under s.51(3) NTA (and not s.51(1) and (4) NTA).

A3.3 SECTION 53 NTA HAS NO OPERATION

8. If the MA provides compensation to the Yindjibarndi People for the Compensable Acts (and s.10 RDA and s.45 NTA do not alter this outcome) the Court must dismiss the Application and cannot continue to consider whether s.53(1) NTA applies. Even if, which is denied, there was a *paragraph 51(xxxi) acquisition of property*, s.53(1) NTA would apply only if the award of compensation by the Warden's Court under the MA was not on *paragraph 51(xxxi) just terms* and, even then, it would only 'top up' that amount to the extent necessary to achieve *paragraph 51(xxxi) just terms*. Until the Warden's Court makes that award, whether s.53(1) NTA applies is not a question this Court can answer.

A4 Alternatively, if compensation arises under the NTA how is that to be assessed?

9. If, contrary to the First Respondent's primary case, an entitlement to compensation does arise under the NTA by virtue of s.24MD(3)(b), then compensation for the Compensable Acts is to be determined in accordance with s.51(3) NTA. Relevantly, the entitlement to compensation on "*just terms*" under s.51(1) NTA is expressly subject to s.51(3) NTA. The exception in s.51(3) NTA arises where, in the case of something other than a compulsory acquisition, *the similar compensable interest test* is satisfied in relation to the act. In those circumstances, s.51(3) NTA provides that the Court must apply the principles or criteria set out in the relevant State or Territory law, "*whether or not on just terms*", to determine compensation. As the Compensable Acts were not a compulsory acquisition of native title[8] and it is agreed that the *similar compensable interest test* is satisfied, compensation for the Compensable Acts is to be determined in accordance with s.51(3) NTA.

A4.1 SECTION 51(3) NTA

A4.1.1 First Respondent's case

10. The First Respondent says that the effect of s.51(3) NTA is that compensation for the Compensable Acts must be determined in accordance with the principles and criteria contained in s.123 MA (i.e. as if the

[8] In asserting that s.24MD(3) NTA applies to the Compensable Acts it is implicit that the parties agree that none of the Compensable Acts was a compulsory acquisition covered by ss.24MD(2) or (2A) NTA: CB A.02.002 at [16]; CB A.02.003 at [201]; CB A.02.013 at [16].

Yindjibarndi People were "*owners*" or "*occupiers*" for the purposes of that section). Under s.123(2) MA, "*owners*" or "*occupiers*" are entitled, "*according to their respective interests*", to "*compensation*" for "*all loss and damage suffered or likely to be suffered*" by them. There is nothing in the text, context or purpose of the MA to suggest that "*compensation*" in s.123 MA should be given anything other than its well-established meaning. It follows that, like the "*compensation*" referred to in s.51(1) NTA, the "*compensation*" referred to in s.123(2) MA requires, in respect of native title holders, an application of the principles identified by the High Court in *Northern Territory v Griffiths*[9] (**Griffiths**).

11. Relevantly, this requires a bifurcated assessment of economic loss (for the effect of the Compensable Acts on the physical or material aspect of native title referred to in s.223(1)(a) NTA) and non-economic loss in the form of cultural loss (for the effect of the Compensable Acts on the connection with the land mentioned in s.223(1)(b) NTA). Economic loss is capped at freehold value as required by s.51A NTA.

A4.1.2 The Applicant's case

12. The Applicant now appears to be maintaining three alternative cases with respect to the assessment of economic loss.

13. The Applicant's first (and primary) economic loss case focusses on the Yindjibarndi People's statutory rights under Subdivision P NTA. It alleges, in substance, a failure of negotiation between it and the FMG Respondents in respect of the Compensable Acts and seeks compensation equivalent to that which it might have obtained had those negotiations resulted in an agreement. Accordingly, the Applicant seeks a determination by reference to "*common*" or "*standard*" s.31(1)(b) NTA agreements which are said to demonstrate the sum that a "*reasonable miner or government party*" would have been prepared to pay to the Yindjibarndi People to obtain their assent to the Compensable Acts.[10]

14. Under this case, the compensation differs in both quantum and method of calculation depending upon the party liable to pay that compensation. If the FMG Respondents are liable, compensation is to be assessed as a percentage of the revenue earned by the FMG Respondents from the sale of the minerals obtained from the Compensable Acts. If the First Respondent is liable, compensation is to be determined by the formula set out in s.38 MA (being 90% of the rents and royalties paid and payable to the First Respondent by the FMG Respondents in respect of the Compensable Acts) or, alternatively, the amount that the First Respondent would have been prepared to pay to obtain the Yindjibarndi People's assent to the Compensable Acts.[11]

15. This approach is fundamentally flawed because: (a) it is not tied to the scheme for compensation under the NTA; (b) it is inconsistent with the principles expressed in *Griffiths*; (c) the assessment of compensation under Part 2, Division 5 NTA is not concerned with any purported loss of opportunity to engage in a statutory process about the grant of a compensable act nor is it determined by the requirements of Subdivision P (including s.33(1) NTA); (d) it seeks compensation by reference to, or for, the value of minerals mined pursuant to the Compensable Acts when the Yindjibarndi People do not hold any rights to those minerals; (e) it incorrectly assumes that there is a standard or consistent outcome of, or agreement reached in, the negotiations contemplated by s.31(1)(b) NTA; and (f) it lacks coherence as it is predicated on the Compensable Acts attracting a particular statutory procedural right

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9 (2019) 269 CLR 1; [2019] HCA 7.
10 CB A.02.002 at [35] and [46(a)-(aaaa)]; CB A.02.007 at [92]-[93] and [95]-[97]; CB A.02.014 at Economic Loss, items 1-2; ACS at [23], [100]-[101], [158]-[159] and [176].
11 CB A.02.002 at [46(aa)-(aaaa)]; CB A.02.007 [95]-[97]; ACS at [101(h)-(j)] and [176]-[179].

(the right to negotiate under s.31(1)(b) NTA) and feature (the ability to generate revenue by mineral sales) which they do not all share.

16. The Applicant's second economic loss case is a new alternative case that arises if the NTA requires the economic value of native title rights and interests to be determined by reference to an unencumbered freehold estate. In that case the Applicant asserts that economic loss must be assessed by reference to a "*hypothetical freehold*" which includes mineral rights.[12] This case was not pleaded and cannot be asserted now for the first time. In any event, the concept of a "*hypothetical freehold*" is a tool of ratings and tax law (not compensation) and is irrelevant for the purposes of the NTA and the MA. Further, a downward adjustment would need to be made to a "*hypothetical freehold*" which includes mineral rights to take account of the fact that the Yindjibarndi People do not hold any rights to minerals.

17. The Applicant's third economic loss case is a new alternative case. It arises where the Applicant's first and second cases fail. In that circumstance, the Applicant says that economic loss must be assessed by reference to: (a) the market value of a freehold estate (without minerals);[13] (b) a "*special value*" component that is, in effect, the same amount as the Applicant asserts the FMG Respondents should pay under their first case; and (c) a component for the scientific and cultural values of the land.[14] This case was not pleaded and should not be entertained as the Applicant has failed to explain why, in establishing the value of a freehold estate in the land the subject of the Compensable Acts, the Court should do anything other than that which the plurality in *Griffiths* mandates.

18. The First Respondent disputes that the additional heads of economic loss sought by the Applicant[15] are compensable and says that those amounts are, in any event, calculated incorrectly. In addition, to the extent the Applicant seeks compensation for: (a) an asserted diminishment of surface and subterranean waters; and (b) social division amongst the Yindjibarndi People arising from a dispute as to whether (and on what terms) the Compensable Acts should be done, those things are not aspects of cultural loss and/or were not caused by the Compensable Acts (and, accordingly, are not compensable).

A4.2 SECTION 10 RDA AND S.45 NTA DO NOT ALTER THIS OUTCOME

19. Section 10 RDA and s.45 NTA do not operate to alter the effect of s.51(3) NTA for the reason expressed at paragraph [7] above. In any event, if applying the principles and criteria of the MA pursuant to s.51(3) NTA engages s.10 RDA and s.45 NTA, s.45 NTA only leads back to s.51(3) NTA (and not s.51(1) and (4)).

A4.3 SECTION 53(1) NTA

20. Section 53(1) NTA is not engaged as there has not been a *paragraph 51(xxxi) acquisition of property*. However, even if there had been, s.53(1) NTA is only engaged where the compensation determined under s.51(3) NTA (by reference to the principles and criteria contained in the MA) does not provide *paragraph 51(xxxi) just terms*. Section 51(3) NTA (in applying s.123 MA) provides native title holders with *paragraph 51(xxxi) just terms*.

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12 ACS at [107], [108] [119(a)], [135] and [144].
13 An amount which is not stated by the Applicant.
14 ACS at [107], [119 (b)], [145] and [147]-[148].
15 Being an amount for "*loss of or damage to country and to ancient occupation, cultural and dreaming sites and dreaming tracks*" and an amount for "*psychological and other services required to treat the social disruptions / division and related psychological trauma within the Yindjibarndi community*": CB A.02.014 at Economic Loss, items 3 and 4.

A5 Quantum of compensation

21. If compensation for the Compensable Acts is to be determined in accordance with s.51(3) NTA (by applying the principles and criteria of s.123 MA) the bifurcated assessment of economic and cultural loss requires the following (and gives rise to the quantum expressed below).

A5.1 ECONOMIC LOSS

22. Having regard to the principles contained in *Griffiths*, the determination of economic loss in respect of the Compensable Acts requires the following steps:

    (a) Step One: identification of the nature and extent of the native title rights and interests held in relation to the land affected by the relevant Compensable Act as at the date of that act;

    (b) Step Two: determination of the economic value of an unencumbered freehold estate in that land as a proxy for the economic value of exclusive native title in relation to the land and, where the native title rights and interests identified in Step One are non-exclusive only, apply a percentage reduction (50%) to represent the comparative limitations of the non-exclusive rights; and

    (c) Step Three: as the Compensable Acts were subject to the *non-extinguishment principle*, the application of a further percentage reduction to represent the extent to which the native title has been impaired short of extinguishment.

23. As none of the Compensable Acts extinguished the native title rights and interests, the upper limit in s.51A NTA is not engaged and any award of compensation for economic loss must be below the freehold value of the land over which the Compensable Acts were done. Having regard to the land valuation evidence, the First Respondent says that economic loss for the Compensable Acts is **$128,114.28**. The First Respondent says that simple interest only (calculated in accordance with the Federal Court's *Interest on Judgments Practice Note (GPN-INT)*) should be awarded on the economic loss component. The First Respondent contends that amounts to **$92,957.31.**

A5.2 CULTURAL LOSS

24. Unlike economic loss, the quantification of cultural loss is not amenable to a mathematical calculation or a formulaic approach. Rather, it is a social judgment of what the Australian community would accept as fair, reasonable or just. Having regard to the evidence in this proceeding, together with a comparative consideration of the High Court's findings with respect to cultural loss in *Griffiths*, the First Respondent submits that cultural loss should be valued at between **$5 – 10 million**.

A6 Liability to pay compensation

25. Any compensation under s.51(3) NTA for the Compensable Acts is to be paid by the FMG Respondents by operation of s.24MD(4)(b)(i) NTA and s.125A MA. Relevantly, s.125A MA is a law of the State of the kind referred to in s.24MD(4)(b)(i) NTA and s.125A MA is not invalid by force of s.109 of the *Commonwealth of Australia Constitution Act* (**Constitution**).

26. If, which is denied, s.53(1) NTA operates in this proceeding, it acts as a 'top up' provision. Accordingly, the First Respondent is only liable under s.53(1) NTA for the difference between any determination of compensation under s.51(3) NTA and what would be required to provide the native title holders with *paragraph 51(xxxi) just terms* under s.53(1). The FMG Respondents would remain liable for the compensation under s.51(3) NTA.

B. BACKGROUND

B1 Introduction

27. These submissions are filed in accordance with item 24 of the timetable attached to the orders of the Court made on 17 October 2024. For the purpose of making these submissions the First Respondent has addressed only the *Applicant's Outline of Closing Submissions* filed 13 November 2024 (**ACS**) and not the *Applicant's Summary of Lay Witness Evidence* (**Evidence Summary**) filed on 14 November 2024.

28. The purpose and intent of the Applicant's *Evidence Summary* is unclear to the First Respondent. Such a document was not contemplated by the programming orders and, to the extent that it is intended to be a submission by the Applicant, it exceeds the page limit set by the Court. No actual use seems to have been made of the *Evidence Summary* in the ACS and the Applicant has not relied upon it specifically to make its arguments. The utility of the *Evidence Summary* is also limited because it fails to address both the oral evidence and the expert evidence. Rather, the *Evidence Summary* appears to be no more than a selective reproduction of the statements of evidence of the Aboriginal witnesses. Accordingly, when considering the evidence relied upon by the Applicant in respect of any issue, the First Respondent has limited its consideration to the evidence set out in the ACS (and not the *Evidence Summary*). The evidence upon which the First Respondent relies is set out herein.

29. The First Respondent has also generally not addressed the substance of the *Closing Submissions* filed by Yamatji Marlpa Aboriginal Corporation (**YMAC**) on 17 November 2024 (**YMAC CS**) as it does not understand YMAC to be putting forward any different arguments to those made by the Applicant.

30. For the avoidance of doubt, the Applicant's pleadings assert (in the alternative) that Subdivision I may apply to the renewals or extensions of term of some of the Compensable Acts.[16] The Applicant has never identified these renewals or extensions, nor has it explained the basis upon which it contends that Subdivision I applies. On that basis the First Respondent assumes that this contention is no longer pressed and does not make any submission in respect of it.

B2 Interpretation

31. Terms defined in the NTA have been italicised in this document. Unless the context suggests otherwise, those terms have the same meaning as in the NTA.

32. Where this document refers to "*Confidential Information*"[17] (which is only permitted to be accessed by the Judge, staff of the Federal Court and "*Permitted Persons*"[18]) that material appears in red below or, alternatively, has been redacted in any unrestricted version of this document. For the avoidance of doubt, this document does not contain any references to "*Confidential Financial Documents*."[19]

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16 CB A.02.002 at [31A].
17 Which is defined in the orders of the Court dated 15 December 2023, 28 March 2024, 2 August 2024, 14 October 2024, 15 October 2024 and 25 October 2024
18 As defined in the orders of the Court dated 15 December 2023.
19 As defined in the orders of the Court dated 5 June 2024 and 7 June 2024.

C. FUTURE ACTS - PART 2, DIVISION 3 NTA

C1 Introduction

33. There is a dispute between the parties as to which Subdivision of Part 2, Division 3 NTA applied to validate some of the Compensable Acts.[20] It concerns, *inter alia*, whether Subdivision M or Subdivision H applied to certain Compensable Act miscellaneous licences that have been labelled the "*Water Management Miscellaneous Licences*"[21] by the FMG Respondents (**WMLs**).

C2 Scheme of Part 2, Division 3 NTA

34. In general terms, *future acts* are governed by Part 2, Division 3 NTA. Section 24AA NTA provides an overview of Division 3. It provides that a *future act* will be valid to the extent that it is covered by the list of acts contained in s.24AA(4)(a)-(k) NTA. Section 24AB NTA explains how the various validating provisions in Part 2, Division 3 (and, indirectly, the various Subdivisions) apply to a *future act.* Relevantly, s.24AB(2) NTA provides that "*to the extent that a future act is covered by a particular section in the list in paragraphs 24AA(4)(a) to (k), it is not covered by a section that is lower in the list*." Thus, the various sections (and Subdivisions) in Part 2, Division 3 NTA must be considered sequentially. To the extent that an earlier Subdivision applies, a later one will not. Therefore, in considering which Subdivision applies to each of the Compensable Acts, it is necessary to start at the beginning of the list in s.24AA(4) NTA and to consider whether, and to what extent, each validating provision described in paragraphs (a) – (k) applies, before considering any application of a later validating provision.

C3 Subdivision H of Part 2, Division 3 NTA

35. The FMG Respondents assert that Subdivision H applies to the grant of the WMLs.[22] Section 24HA(2) NTA applies, inter alia, to *future acts* consisting of the "*grant of a lease, licence, permit or authority under legislation that…that relates to the management or regulation of… surface or subterranean water or… living aquatic resources or… airspace*." Where s.24HA NTA applies, the following consequences arise: (a) the act is valid and subject to the *non-extinguishment principle*;[23] (b) where the act is attributable to the State, compensation is payable by the State;[24] and (c) prior to the act being done any *registered native title claimant* or *registered native title body corporate* must be notified of the act and given an opportunity to comment.[25]

36. The First Respondent understands the FMG Respondents' contention in respect of the WMLs to be that, because one or more of the purposes for which each of the WMLs were granted includes "*taking water*" or "*a search for groundwater*", Subdivision H, and only Subdivision H, applies to each licence.[26] This argument is incorrect as it fails to take into consideration that each of the relevant WMLs was granted for a range of other unrelated purposes which clearly do not fall within the scope of Subdivision H.

37. The WMLs were granted pursuant to s.91 MA. Section 91(1) MA provides that a miscellaneous licence may be granted for any one or more of the purposes prescribed in r.42B (**prescribed purposes**) of the

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20 CB A.02.013 at [13(e)], [17(b)] and [18(b)]; CB A.02.003 at [199]; CB A.02.002 at [17]-[20] and [31A]; and CB A.02.011.
21 CB A.02.013 at [13(e)] and [17(b)]. The First Respondent has adopted the label used by FMG. However, given the purposes of these licences, the First Respondent submits that it is misleading to refer to them by this nomenclature.
22 See, for example, CB A.02.013 at [13(e)], [17(b)], [18(b)], [20(c)] and [29(d)]; CB A.02.009 at [22]-[24] and [110]-[111].
23 Section 24HA(3) and (4) NTA.
24 Section 24HA(6) NTA.
25 Section 24HA(7) NTA.
26 CB A.02.013 at [13(e)], [16(a)-(f)] and [17(b)]; CB A.02.009 at [22]-[24].

Mining Regulations 1981 (WA) (**Mining Regulations**). Further, r.37(3) of the *Mining Regulations* provides that, within 35 days of the lodgement of an application for a miscellaneous licence, the applicant must lodge written details of any works to be constructed in connection with the licence (the **r.37 Statement**). The WMLs were granted for the purposes set out in CB A.02.015[27] and the r.37 Statements indicate that activities consistent with those purposes were proposed to be conducted on the WMLs by the FMG Respondents.[28] The WMLs must be continuously used for the purposes for which they were granted.[29]

38. Following *BHP Billiton Nickel West Pty Ltd v KN*[30] (**Tjiwarl (FC)**) the proper approach for assessing whether s.24HA(2) NTA applies to a licence is to: (a) identify the particular provisions under which the licence is granted and; (b) assess whether those provisions (as opposed to the Act or regulations as a whole) relate to the management or regulation of subterranean water. The Full Court in *Tjiwarl (FC)* held that s.91(1) MA and rr.42B(i) and (ia) *Mining Regulations* (the prescribed purposes of "*taking water*" and "*a search for groundwater*") were provisions that related to the management or regulation of subterranean water.[31] In the present proceeding, whilst the prescribed purposes of the WMLs relevantly include "*taking water*" and/or "*a search for groundwater*," they also include one or more other prescribed purposes listed in r.42B. Unlike rr.42B(i) and (ia), these other regulations do not relate to the management or regulation of surface or subterranean water (or any other purposes listed in s.24HA(2) NTA). It follows that, in granting the WMLs, the relevant "*legislation*" for the purposes of s 24HA(2) NTA comprises s.91(1) MA, r.42B(i) and r.42B(ia) *Mining Regulations* and those other sub-regulations of r.42B that correspond to the additional purposes of the licences. Hence, whilst it may be said that some of the provisions that authorise the grant of the WMLs are "*legislation that … relates to the management or regulation of … surface or subterranean water*", some are not.

39. Section 24HA(2) NTA does not deal with the situation where the provisions that authorise the grant of the relevant licence also include purposes that are not listed within the subparagraphs of s.24HA(2)(b) NTA. Rather, s.24HA(2) NTA only appears to contemplate a situation where the relevant legislation either does, or does not, satisfy s.24HA(2) NTA.[32] Further, s.24AB(2) NTA does not expressly provide for how a *future act* that is partially covered by the provisions listed in ss.24AA(4)(a) – (k) NTA is to be dealt with. The FMG Respondents submit that if a *future act* is covered 'to any extent' by a provision listed in an earlier paragraph in s.24AA(4) NTA, it is not covered at all by the later provision.[33] The First Respondent says that such a construction is not supported by the text of ss.24AA or 24AB NTA. Section 24AB(2) NTA provides that "*to the extent that a future act is covered by a particular section in the list in paragraphs 24AA(4)(a) to (k), it is not covered by a section that is lower in the list.*" The inclusion of the words '*to the extent that*' in s.24AB(2) NTA clearly indicates that Parliament contemplated that an act may be covered partly by a provision listed in paragraphs 24AA(4)(a) – (k), but not wholly.

40. If a *future act* is only partly covered by one of the validating provisions listed in s.24AA(4)(a) – (k) NTA, the question then arises: can the act be said to be "*covered*" by that provision? The preferable construction, having regard to the text of ss.24AA and 24AB NTA, in addition to the purpose of Part 2 Division 3 NTA, is that where a provision wholly covers the *future act,* s.24AB(2) NTA requires one to

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27 CB A.02.015 at [220], [224], [228], [232], [236], [240], [244], [248], [252], [256], [260], [272] and [276]. See also summary table at CB A.02.011 at [12(b)].
28 CB E.01.004 at 28-29, 43-44, 75-76, 92-93, 109-110, 127-128, 147-149, 172-177, 204-205, 221-222, 239-240, 254-255, 254-255 and 275-276.
29 Regulation 41(b) *Mining Regulations*.
30 (2018) 258 FCR 521; [2018] FCAFC 8.
31 *Tjiwarl (FC)* at [62].
32 The miscellaneous licences considered in *Tjiwarl (FC)* were granted solely for purposes to which s.24HA(2) NTA applied.
33 CB A.07.006 at 132.

stop at the first relevant paragraph of s.24AA(4) NTA. However, where an act is only partially covered by a provision listed in s.24AA(a) – (k) NTA, one must continue to work through the list in s.24AA(4)(a) – (k) until the act is wholly covered by a provision in the list, stopping at the last relevant paragraph. Such a construction produces a harmonious reading between ss.24AA(4) and s.24AB(2) NTA. If the FMG Respondents' construction were to be preferred, s.24AA(4) NTA would need to have been drafted in words to the effect that: *"if a future act is covered to <u>any extent</u> by a particular section in the list in paragraphs 23AA(4)(a) to (k), it will not be covered by a section that is lower in the list*."

41. Further, treating a licence granted partly pursuant to legislation which relates to the management or regulation of surface or subterranean water and partly pursuant to legislation which does not as falling within s.24HA(2) NTA is inconsistent with the purpose and intent of the future act regime in Part 2, Division 3 NTA. Relevantly, in *Harris v Great Barrier Reef Marine Park***,** the Full Court observed that the "*discernible legislative intent*" of the provisions contained in Part 2, Division 3 NTA is that "*persons with determined or possible native title interests in the land are to have carefully graded rights to be notified beforehand and are also to have carefully graded rights to have attention given by the decision-maker to their views about the doing of the act.*"[34] In particular, it would be contrary to the intent of Part 2, Division 3 for a *future act* to be treated as wholly covered by a particular Subdivision where, like here, some of the rights conferred by or under the act are plainly not covered by that Subdivision and are, instead, covered by a later Subdivision under which the native title holders are entitled to substantially greater procedural rights.

42. The practical effect of the FMG Respondents' contention being accepted would be that any applicant for a miscellaneous licence under the provisions of the MA could obtain a wide suite of rights under that licence[35] but, by including "*a search for groundwater*" among them, avoid the application of the more onerous procedural requirements provided for by Subdivision M. For example, Compensable Act L 47/859 (for the purpose of a "*power generation and transmission facility*")[36] would attract the procedural rights contained in s.24MD(6B)[37] but Compensable Act L47/361 which includes the same purposes as L 47/859, but which also has a number of additional purposes (including an aerial rope way, aerodrome, conveyor system and a storage or transportation facility for minerals or mineral concentrate),[38] would only attract the procedural rights in Subdivision H because it also includes the purpose "*taking water*." That cannot have been the intention of Parliament, particularly when one has regard to the fact that greater procedural rights are generally afforded as the *future acts* increase in terms of their effect.

43. In the First Respondent's submission, the Court must have regard to the consequences of giving a particular meaning to a statutory provision. In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*, Mason and Wilson JJ commented that where the Court has a choice between two strongly competing interpretations "*the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention*."[39] In the circumstances described above, the consequence of preferring the FMG Respondents' construction would produce an outcome which is unfair to *native title parties* and contrary to the intention of Part 2, Division 3 NTA. It follows that Subdivision H has no application to the WMLs.

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34 *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60; [2000] FCA 603 at [27].
35 Such as the right to construct aerodromes, accommodation facilities, power generation facilities, workshops, roads, mineral storage, tunnels and/or bridges: see r.42B *Mining Regulations*.
36 CB A.02.015 at [264(c)].
37 Relevantly, s.24MD(6B) provides for: (a) notification of the doing of the act; (b) an ability on the part of the *native title party* to object to the doing of the act; (c) if an objection is made, a requirement on the person who applied for the act to consult with the *native title party* regarding the doing of the act and the minimisation of its impact on the native title rights and interests; and (d) an ability to have the matter referred to an independent person for a determination as to whether the act may be done.
38 CB A.02015 at [224(c)].
39 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26 at 321.

D. HOW IS COMPENSATION TO BE DETERMINED?

D1 Overview

44. On the assumption that Subdivision H does not apply to the WMLs, the First Respondent submits that Subdivision M applies to all of the Compensable Acts. Relevantly, the Compensable Acts were *future acts* that passed the *freehold test* set out in s.24MB(1) as they: (a) related to an *onshore place*; (b) could be done in relation to the land if the Yindjibarndi People instead held ordinary title to it; and (c) the *Aboriginal Heritage Act 1972* (WA) (**AHA**) makes provision of the kind referred to in s.24MB(1)(c) NTA.[40] By reason of s.24MD(1) NTA, each of the Compensable Acts is valid and, as none of the Compensable Acts was a compulsory acquisition,[41] the *non-extinguishment principle* applies to them.[42]

45. Two interrelated issues arise next for determination. The first is: under which provisions of the NTA (if any) does the entitlement to compensation for the Compensable Acts arise? The second is: having regard to the source of any entitlement to compensation, how is that compensation to be assessed and quantified, including what (if any) sections of Part 2, Division 5 NTA apply? These issues have been summarised in the flow chart at Annexure C and are addressed below.

D2 Entitlement to compensation: s.123 MA

D2.1 INTRODUCTION

46. If the Court is satisfied that Subdivision M applies to the Compensable Acts, s.24MD(3)(b) NTA relevantly provides that an entitlement to compensation under Part 2, Division 5 NTA will arise where: (a) the *similar compensable interest test* is satisfied in relation to the Compensable Act (s.24MD(3)(b)(i)); and (b) the MA does not provide for compensation to the native title holders for that act (s.24MD(3)(b)(ii)). Section 24MD(3)(b) NTA thus has two limbs, each constituting a threshold condition which must be satisfied for a native title holder to be entitled to compensation in accordance with Part 2, Division 5 NTA. The First Respondent's primary case is that the threshold condition in s.24MD(3)(b)(ii) (i.e. the second limb) is not satisfied and the entitlement to compensation for the Compensable Acts arises under the MA and not Part 2, Division 5 NTA.

D2.2 FIRST LIMB: "SIMILAR COMPENSABLE INTEREST TEST" SATISFIED

47. The *similar compensable interest test* is defined in s.240 NTA. That section provides, *inter alia*, that the test will be satisfied if: (a) the act relates to an *onshore place*; and (b) compensation would, apart from the NTA, be payable if the native title holders instead held ordinary title to the land and waters the subject of the act. The parties agree that the *similar compensable interest test* is satisfied in relation to each Compensable Act as: (a) the Compensable Acts all relate to an *onshore place*; (b) if the Applicant held ordinary title to the land the subject of each Compensable Act then they would be an "*owner*" or "*occupier*" of that land within the meaning of s.8 MA and, as such, would be entitled to compensation under s.123 MA; and (c) that entitlement to compensation constitutes compensation "*for the act*" within the meaning of s.240(b) NTA.[43]

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40 CB A.02.002 at [17]; CB A.02.003 at [198]-[200]; CB A.02.013 at [13]; CB A.02.006 at [23].
41 In asserting that s.24MD(3) NTA applies to the Compensable Acts it is implicit that the parties agree that none of the Compensable Acts was a compulsory acquisition covered by ss.24MD(2) or (2A) NTA: CB A.02.002 at [16]; CB A.02.003 at [201]; CB A.02.013 at [16].
42 Section 24MD(3)(a).
43 CB A.02.002 at [18]-[19]; CB A.02.003 at [202]-[207]; CB A.02.013 at [16(e)] and [18]-[19]; CB A.02.006 at [23].

D2.3 SECOND LIMB: DOES THE MA PROVIDE COMPENSATION TO THE APPLICANT?

48. There is, however, a dispute as to whether the threshold condition in s.24MD(3)(b)(ii) is satisfied.[44] The dispute between the Applicant and the First Respondent is, in effect, whether the MA provides compensation to the Yindjibarndi People.[45] This disagreement is significant as, in the event that the condition in s.24MD(3)(b)(ii) NTA is not met, any entitlement to compensation for each Compensable Act arises under the MA and not the NTA. The First Respondent says that the MA provides compensation to the Yindjibarndi People on the basis that they are "*owners*" or "*occupiers*" of the land the subject of each of the Compensable Acts and, accordingly, s.24MD(3)(b)(ii) NTA is not met.[46]

49. Relevantly, Part VII MA has, at all material times, provided compensation for "*owners*" and "*occupiers*" of land associated with the grant of mining tenements or mining. Pursuant to s.123(2) MA[47] the compensation for "*owners*" and "*occupiers*" of "*any land where mining takes place*" is, according to their respective interests and subject to ss.124 and 125 MA, "*for all loss and damage suffered or likely to be suffered by them*". "*Owners*" and "*occupiers*" of land are defined in s.8 MA. The MA assumes that an "*occupier*" may or may not be the same person as the "*owner.*"[48]

D2.3.1 Native title holders as "owners"

50. In *Western Australia v Ward*[49] (**Ward**), the plurality in the High Court considered that whilst native title holders did not generally fall within paragraphs (a), (b) or (d) of the definition of "*owner*" in s.8 MA, they may fall within paragraph (c) in circumstances where they hold a right of exclusive possession.[50] Relevantly, the plurality considered that the expression "*possession, occupation, use and enjoyment to the exclusion of all others*" was a "*composite expression directed to describing a particular measure of control of access to land.*"[51] When expressed in these terms, it is clear that native title holders with a right of exclusive possession would be considered persons who have "*the lawful control and management*" of that land for the purpose of paragraph (c) of the definition of "*owner*" in the MA. Alternatively, or in any event, native title holders with a right of exclusive possession would also be "*occupiers*" within the meaning of s.8(1) MA for the reasons expressed below.

D2.3.2 Native title holders as "occupiers"

D2.3.2.1 An inclusive or exhaustive definition?

51. Whilst non-exclusive native title holders are not "*owners*" for the purpose of s.8(1) MA (their native title rights not amounting to "*lawful control*") they are "*occupiers*" on the basis that their rights amount to a right to occupy the land as that is understood in the ordinary sense. Although it is clear that non-exclusive native title holders do not fall within the definition of persons "*in actual occupation of the land under any lawful title granted by or derived from the owner of the land*" (because their rights are not "*granted by or derived from*" the owner of the land),[52] that is not definitive of whether those native title holders are, nevertheless, "*occupiers*" within the meaning of s.8(1) MA. Rather, a person may be

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44 See CB A.02.002 at [20]; CB A.02.003 at [208]-[211]; CB A.02.007 at [31]-[45]; ACS at [6] and [50]-[55].
45 Being the persons described in Schedule 6 to the Yindjibarndi Determination (**Yindjibarndi People**).
46 Noting that the threshold condition in s.24MD(3)(b)(ii) NTA is expressed in the negative i.e. "*the law mentioned in section 240* [which defines the *similar compensable interest test*] *does not provide for compensation to native title holders for the act*."
47 Section 123(2) MA has appeared in its present form since 31 January 1986.
48 See, for example, ss.8(3) and 31(2) MA.
49 (2002) 213 CLR 1; [2002] HCA 28.
50 *Ward* at [317]. See also Callinan J at [854].
51 *Ward* at [89]. It was also described as: a "*right to control what others may do on or with the land*" (at [95]); a "*right to say who could or could not come onto the land*" (at [192]); a "*right to control access to the land or make binding decisions about the use to which it is put*" (at [52]); and a right "*to be asked permission and to 'speak for country'*" (at [88]).
52 *Ward* at [318].

an "*occupier*" for the purpose of the MA, even if they do not come within the express scope of the statutory definition. As the plurality in *Ward* identified, "*occupier*" is defined in s.8 MA in an inclusive way (as contrasted with the use of the term "*means*" in the definition of "*owner*") with the result that "*it may be that the Act does not limit what otherwise might be meant by the term 'occupier.*"[53] Further, although Callinan J dissented in relation to many of the holdings in *Ward*, in referring to the definitions of "*owner*" and "*occupier*" in the MA, his Honour said that "*each of these definitions is capable of applying to native title rights and interests. It can be seen that the definition of 'occupier' is expressed inclusively and does not exclude occupation according to its ordinary meaning of being in possession by having a physical presence on land.*"[54]

52. Similarly, although the primary focus was not the definition of "*occupier*" in s.8(1) MA, the Western Australian Court of Appeal in *Margaret River Resources Pty Ltd v His Honour Warden Calder SM* (**Margaret River Resources**) also took a broad interpretation of s.8(1) MA and noted that "*the terms owner and occupier are wide enough to include persons who do not necessarily have an interest (legal or equitable) in the land itself.*"[55] Sections 8(3) and 31(2) MA also confirm an inclusive rather than an exhaustive interpretation of "*occupier*" in that they contemplate that the "*owner*" and "*occupier*" of private land may be the same person. In other words, an "*occupier*" of land can, for the purposes of the MA, include the "*owner*" of that land, notwithstanding that an owner's title to land is clearly neither "*granted by*" nor "*derived from*" themselves.

53. To the extent that the Supreme Court in *Tisala Pty Ltd v Hawthorn Resources Ltd*[56] considered that, notwithstanding the use of the word "*includes*", the definition of "*occupier*" for the purpose of s.20(5)(c) MA was exhaustive (rather than inclusive) the First Respondent respectfully submits that this decision was wrong and/or is distinguishable.[57] Relevantly, the Court in *Tisala* was only considering the meaning of "*occupier*" in the context of s.20(5) MA and Hill J specifically conceded that "*it is possible that the definition may not be an exhaustive definition for all purposes of the Act*."[58] Further, the conclusion reached by the Court as to the interpretation of "*occupier*" in s.20(5) MA was predicated upon the Court's assumption that "*all persons with rights in Crown land derive any right of occupation from the State as owner of the land*" and that "*all interests in Crown land are wholly regulated by statute*."[59] However, such an assumption ignores the existence of native title rights and interests. As explained by the High Court, native title rights and interests are neither creatures of the common law nor of statute.[60] Accordingly, there are clearly persons who lawfully occupy and have rights and interests in "*Crown land*" (i.e. native title holders) who do not derive their rights from the State. On that basis an interpretation of "*occupier*" which is inclusive rather than exhaustive is to be preferred.

D2.3.2.2 Are native title holders "*occupiers*" for the purpose of the MA?

54. Assuming the definition of "*occupier*" in the MA is inclusive (rather than exhaustive) the question then arises as to its scope. In particular, is it capable of encompassing non-exclusive native title holders? The

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53 *Ward* at [318]. However, the plurality ultimately determined that they did not need to decide this point. This observation was referred to without demur by the plurality in *Griffiths* at [75]-[76]. See also *Western Desert Lands Aboriginal Corporation v Western Australia* (2008) 218 FLR 362; [2008] NNTTA 22 at [39]-[44]; *FMG Pilbara Pty Ltd v Cheedy and Others* (2009) 259 FLR 293; [2009] NNTTA 91 (**FMG v Cheedy**) at [83].

54 *Ward* at [854].

55 [2008] WASCA 238 at [27]. The Court of Appeal's primary focus was whether a reserve vested in a local government for the purpose of quarrying limestone was "*private land*" within the meaning of the MA. The case did not address native title.

56 [2022] WASC 109.

57 *Cf* CB A.02.007 at [34] (adopted in ACS at [51]).

58 *Tisala Pty Ltd v Hawthorn Resources Ltd* [2022] WASC 109 at [82].

59 *Tisala Pty Ltd v Hawthorn Resources Ltd* [2022] WASC 109 at [83].

60 See, for example, *Ward* at [20]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 at [75]-[76]; *Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56 at [9]-[11] and [37]-[38]; *Fejo v Northern Territory* (1998) 195 CLR 96; [1998] HCA 58 at [46].

word "*occupier*" appears in numerous other statutory settings. It is a word which takes meaning from its context, and there are numerous cases in which it is given different shades of meaning.[61] Relevantly, the Macquarie Dictionary defines an "*occupier*" as a "*person having the legal right to reside, or who is residing, in a house, on land*, etc" whilst to "*occupy*" is defined as "*to be resident or established in (a place)*." Similarly, Callinan J in *Ward* considered that "*occupier*" in the MA should be given its "*ordinary meaning*", namely "*being in possession by having a physical presence on land.*"[62]

55. Further, whilst the statutory context of ss.47A(1)(c) and 47B(1)(c) NTA is different to that of the MA, as the word "*occupy*" is not defined in the NTA, the Full Court in *Moses v Western Australia* drew upon general notions of what it means to "*occupy*" an area, stating that:

> *The word "occupy"...has a common meaning of being established in a place. In contemporary society, a person may occupy all of a house even though that person does not regularly enter every room and may never have entered a particular room or a particular part of a room; a pastoralist may occupy all of the area of a pastoral lease even though that person does not regularly visit every part of the area of the pastoral lease and may never have visited parts of it or have used parts of it for pastoral purposes*.[63]

56. Accordingly, consistently with what was said in *Margaret River Resources*, the term "*occupier*" in the MA should be given a broad meaning and would relevantly include native title holders who have rights to (amongst other things) access, remain in, camp on, take resources from, conduct activities on and otherwise use the land subject to a mining tenement granted under the MA. Such rights are, in the First Respondent's submission, sufficient to "*establish*" non-exclusive native title holders in a place such that they could be considered "*occupiers*" of it.

57. As a matter of practical application, the Yindjibarndi People were found to have "*occupied*" large portions of the Yindjibarndi #1 claim area[64] for the purpose of s.47B NTA. For example, the Court found that the Yindjibarndi People regularly visited, camped, obtained ochre, hunted, fished, gathered bush tucker and medicine, conducted ceremonial activities and lit fires for the rejuvenation of country within the areas to which s.47B NTA applied.[65] The Court concluded that "*the evidence of regular maintenance of the witnesses' spiritual connection to Yindjibarndi country by the visits to it and the exercise of traditional rights, rites and practices, amounted to occupation*…"[66] The requirements of "*occupation*" for the purpose of s.47B(1)(c) are clearly different from, and are not determinative of, the meaning of "*occupier*" in the MA. Nevertheless, the manner in which the Yindjibarndi People's native title rights and interests have been exercised is illustrative of how the existence of those rights and interests is sufficient to establish native title holders as being "*established in a place*" or having "*a physical presence*" on the land, within the ordinary meaning of the word "*occupier*".

58. Leaving aside the ordinary meaning of the word "*occupier*", in determining whether native title holders can be regarded as "*occupiers*" (particularly for the purpose of s.123 MA) it is also necessary to consider the statutory context and purpose of the provisions in which the word appears.[67] At a general level, the scope and purpose of the MA is to regulate mining in Western Australia by identifying land available for mining, setting out the basis on which tenements may be granted and resolving disputes concerning

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61 *Smith v Taylor* (1978) 24 ACTR 9 at 20; see also *Allison v Lowe* [1988] Tas R 21 at 28.
62 *Ward* at [854].
63 *Moses v State of Western Australia* (2007) 160 FCR 148; [2007] FCAFC 78 at [216].
64 Native title determination application WAD 6005 of 2003. The Application has been made over this area.
65 *Warrie v State of Western Australia* (2017) 365 ALR 624; [2017] FCA 803 (**Warrie (No.1)**) at [234]-[252], [263], [264], [266], [282]-[283] and [289]-[302].
66 *Warrie (No.1)* at [265].
67 For example: *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 (**SZTAL**) at [14].

tenements.[68] However, that is not the only object of the MA. It is also to regulate, and strike a balance between, the oft-competing interests of the holder of a mining tenement, the owner of the minerals, those persons who have an interest in the land on which the minerals are situated (i.e. "*owners*" and "*occupiers*") and the public interest. As observed by Michael Hunt, "*the history of mining legislation reflects the inter-action between the interests of these four classes of persons and the relative importance from time to time of the mining industry compared with the interests of the other three classes*."[69]

59. Accordingly, in *Margaret River Resources*, the Court of Appeal suggested that one reason for taking an expansive definition of "*owner*" and "*occupier*" in the MA was that "*persons with rights and privileges short of an estate or interest in the land may be affected, financially or otherwise, by the grant of a mining tenement*" so as to justify the extension to them of the rights and protections (including a right of compensation) contained in the MA.[70] Given this, it would seem reasonable to conclude that the purpose of Part VII MA is to make available to persons who have close associations with the land in question compensation "*for all loss or damage suffered or likely to be suffered by them resulting from or arising from the mining*" on that land. Obviously, not every association with the land in question will make a person an "*owner*" or "*occupier*" who is entitled to compensation. However, the statutory purpose would not be advanced by a construction of "*occupier*" that did not extend to non-exclusive native title holders. Non-exclusive native title holders are, of course, persons with rights and privileges short of an estate or interest in land who may be affected by mining and those persons can reasonably be expected to suffer loss or damage by reason of the impact of mining on their physical or cultural associations with the land. It is not in dispute in this case that the Yindjibarndi People were so affected.

60. Albeit that the Western Australian Parliament could not have had native title holders in mind when it settled upon the definition of "*occupier*", it is difficult to see why a group of native title holders whose rights have been recognised in a determination of the Court that operates *in rem* should be excluded from the rights and protections conferred by MA on other persons with close associations of different kinds with the land in question. Further, given that exclusive native title holders can properly be considered "*owners*", there is no reason in principle why non-exclusive native title holders should be excluded from the compensation scheme set out in s.123 MA. The only major difference between the two classes of native title holders is that one enjoys a right to control access and the other does not.

D2.3.3 "*Private land*", "*owners*" and "*occupiers*"

61. The Applicant provides particulars of a range of provisions of the MA which it alleges give rise to disparity in treatment between an "*owner*" or "*occupier*" of "*private land*" under the MA and native title holders, such that native title holders should not be considered "*owners*" or "*occupiers*" for the purpose of s.8 MA.[71] To the extent that the Applicant contends that this disparity of treatment engages s.10 RDA, that issue is discussed in Part D7.2.3 below.

62. In the First Respondent's submission, the Applicant's interpretation of s.24MD(3)(b)(ii) and s.123 MA suffers from a fundamental error in that it incorrectly characterises the question being posed by s.24MD(3)(b)(ii). The question posed by s.24MD(3)(b)(ii) NTA is, in effect, whether s.123 MA provides for compensation to native title holders. The question is not whether s.123 MA provides compensation to the native title holders as if their native title was instead "*private land*". Nor is the question whether the provisions of the MA more generally equate native title with "*private land*". The

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68 *Minister for Resources; Ex parte Cazaly Iron Pty Ltd* (2007) 34 WAR 403; [2007] WASCA 175 at [20]; *Thompson v Siberia Mining Corp Pty Ltd* [2021] WASCA 115 at [17] (quoting *Nova Resources NL v French* (1995) 12 WAR 50 at 57-58).

69 Michael Hunt, 'The Mining Act 1978 of Western Australia' (1979) 2(1) *Australian Mining and Petroleum Law Journal* 1.

70 [2008] WASCA 238 at [34].

71 CB A.02.002 at [21]; CB A.02.007 at [39]-[44]; ACS at [51].

question is simply – does s.123 MA provide compensation to native title holders? The categorisation of land as "*Crown land*", "*reserve land*" or "*private land*" under the MA does not alter the entitlement of any "*owner*" or "*occupier*" to compensation under s.123(2) MA. The compensation entitlement in s.123(2) arises expressly in respect of "*any land*" where mining takes place and is not limited to "*private land*" as defined in s.8 MA.

63. To the extent that s.123 MA includes a reference to "*private land*", those subsections are limited to either: (a) providing for additional heads of compensation that arise in the case of "*private land*" under cultivation;[72] or (b) ensuring that, in circumstances where an "*owner*" and an "*occupier*" of any "*private land*" are both entitled to compensation for loss or damage sustained by each of them as a result of mining, the compensation is severally apportioned (as opposed to jointly).[73] They do not detract from the general right of compensation, "*according to their respective interests*," that native title holders have under s.123(2) MA as "*owners*" or "*occupiers.*" Similarly, to the extent that the Applicant points to other provisions of the MA as to what may, or may not, be done by the holder of a mining tenement on "*private land*"[74] (such as s.29(2) and (7) MA) those provisions also do not detract from the general right of compensation under s.123(2) MA. The Applicant also appears to have overlooked that similar restrictions also apply in respect of "*Crown land*" (see s.20(5) MA), the general principle being that mining tenements should not interfere with certain types of areas or things (regardless of whether those are located on "*Crown land*" or "*private land*").

64. Further, it is not correct that s.123(3) MA would prohibit the Applicant from bringing an application for compensation in the Warden's Court.[75] The Compensable Acts are located upon "*Crown land*" as defined in s.8 MA (namely, unallocated Crown land and land subject to a pastoral lease within the meaning of the *Land Administration Act 1997* (WA))[76] and, for the reasons expressed above, the Yindjibarndi People are "*occupiers*" of that land. That is so regardless of whether the rights they hold are exclusive or non-exclusive in nature (i.e. either would qualify them as "*occupiers*"). On that basis, they are "*an occupier of Crown land*" to whom s.123(3) MA applies.

D2.4 CONCLUSION

65. For the reasons set out above, the Yindjibarndi People are: (a) to the extent that the Compensable Act is located within the **Exclusive Area,**[77] the "*owners*" of the land in respect of those Compensable Acts done <u>after</u> the **Yindjibarndi Determination**[78] (on the basis that **Exclusive Native Title**[79] did not exist until the making of the Yindjibarndi Determination);[80] and (b) "*occupiers*" of the land the subject of all Compensable Acts, regardless of when those acts were granted. Accordingly, as the MA provides compensation to the Applicant for each Compensable Act, the condition in s.24MD(3)(b)(ii) NTA is <u>not</u> satisfied and the entitlement to compensation for each Compensable Act arises under the MA and not the NTA. It follows that the Application must be dismissed and any application for compensation must necessarily be made to the Warden's Court under the MA.

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72 Section 123(4) MA.
73 Section 123(5) and (6) MA.
74 CB A.02.007 at [42] and [44].
75 *Cf* CB A.02.007 at [39]; ACS at [51]; also *cf* YMAC CS at [31].
76 CB E.01.002 (Annexure XPM4) in Current_and_Historical_Land_Mining_and_Petroleum_Tenure.wor (**Workspace**); CB A.06.001.18.
77 Being the area as defined in the Yindjibarndi Determination at [11].
78 Being the determination of native title contained in *Warrie (formerly TJ) v State of Western Australia (No.2)* [2017] FCA 1299.
79 Being those native title rights and interests described in the Yindjibarndi Determination at [4] (i.e. the right to possession, occupation, use and enjoyment of the Exclusive Area to the exclusion of all others).
80 See those Compensable Acts listed at paragraph [391(b)] below. If the First Respondent is wrong with respect to the effect of s.47B NTA, the Applicant would be the "*owner*" for the purpose of all Compensable Acts located in the Exclusive Area: see Part E2 below.

D2.5 S.10 RDA AND S.45 NTA NOT ENGAGED

66. If the Court determines the MA provides compensation to the Yindjibarndi People as "*owners*" or "*occupiers*", s.10 RDA and s.45 NTA are not engaged to confer an entitlement to compensation in accordance with Part 2, Division 5 NTA where there would otherwise be none. This is addressed in Part D7 below.

D3 Entitlement to compensation: s.24MD(3)(b) NTA

D3.1 WHAT PROVISION OF PART 2, DIVISION 5 NTA APPLIES TO DETERMINE COMPENSATION THAT ARISES UNDER S.24MD(3)(B) NTA?

67. If, contrary to the First Respondent's primary case, the Court determines that the MA does not provide compensation to the Yindjibarndi People as "*owners*" or "*occupiers*", the effect of s.24MD(3)(b) NTA is that compensation for the Compensable Acts is to be determined in accordance with Part 2, Division 5 NTA. A question would then arise as to which provision of Part 2, Division 5 NTA applies in those circumstances. The First Respondent contends that it is s.51(3) NTA for the reasons set out below.[81]

68. Section 48 NTA provides, *inter alia*, that where compensation is payable under Part 2, Division 3 NTA, it is payable only in accordance with Part 2, Division 5 NTA. The "*core provision*"[82] of Part 2, Division 5 NTA is s.51(1) NTA. Section 51(1) provides that, subject to s.51(3) NTA, the entitlement to compensation under Part 2, Division 2, 2A, 2B, 3 or 4 NTA is an "*an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.*" Part 2, Division 5 NTA does not contain provisions setting out the principles or criteria to be applied in the assessment of compensation on just terms under s.51(1) NTA. Rather, it directs the court assessing the compensation to any principles or criteria set out in the law of the polity to whom the compensable act is attributable (i.e. the Commonwealth, a State or a Territory). The extent to which those principles or criteria are binding on the court depends on the applicable provision of Part 2, Division 5 NTA.[83]

69. Further, whilst s.51(1) NTA generally provides compensation is to be on just terms, it is subject to the express exception contained in s.51(3) NTA. The exception in s.51(3) NTA arises where, in the case of something other than a compulsory acquisition, the State or Territory law would provide compensation to ordinary titleholders in similar circumstances (i.e. where the *similar compensable interest test* is satisfied).[84] In those circumstances, s.51(3) NTA provides that the Court must apply the principles or criteria set out in the relevant State or Territory law to determine compensation.[85] Native title holders, therefore, are to receive the same compensation as the holders of equivalent non-native title interests under the State or Territory law, "*whether or not on just terms*". As the Explanatory Memorandum to the *Native Title Bill 1993* (Cth) explained: "[i]*f the…act involves the grant of an interest which can be granted over ordinary title land, such as a mining interest, subclause (3) provides that compensation is to be assessed under the same regime as that for the holders of ordinary title. This is the exception to the entitlement to just terms compensation*."[86]

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81 See CB A.02.003 at [212] and [245]-[248].
82 *Griffiths* at [41].
83 Contrast, for example, the difference between s.51(3) NTA (where the Court "*must*" take into account the relevant principles and criteria) with ss.51(2) and (4) NTA (where it "*may*" take those things into account).
84 It is common ground that the *similar compensable interest test* contained in s.240 NTA is satisfied: see paragraph [47] above.
85 *Cf* ACS at [60]: s.51(1) NTA does not "*always apply*" nor does it supply the entitlement to compensation. The entitlement to compensation for the Compensable Acts, to the extent that it arises under the NTA, is supplied by s.24MD(3) NTA.
86 *Native Title Bill 1993* (Cth)*:* Explanatory Memorandum: Part B at 29.

70. In the present proceeding, if an entitlement to compensation arises under the NTA by operation of s.24MD(3)(b) NTA, s.51(3) NTA applies to determine that compensation. This is on the basis that it is agreed that: (a) the Compensable Acts were not a compulsory acquisition of native title[87] (s.51(3)(a) NTA); and (b) the *similar compensable interest test* is satisfied in relation to each of the Compensable Acts[88] (s.51(3)(b) NTA). The effect of s.51(3) NTA is that, subject to s.51(5) – (8), any entitlement to compensation in respect of the Compensable Acts is to be determined in accordance with the principles or criteria for the assessment of compensation set out in the MA, whether or not that would provide compensation to the Yindjibarndi People on just terms. However, as discussed in Part D8.2.2 below, the application of the principles and criteria of the MA pursuant to s.51(3) NTA provides just terms in any event.

71. In the First Respondent's submission, the Applicant, whilst acknowledging that s.51(3) NTA applies to the making of a determination of compensation in respect of the Compensable Acts,[89] wholly fails to address the principles and criteria for the assessment of compensation set out in the MA in accordance with s.51(3) NTA.[90] Rather, the Applicant erroneously assumes that the relevant principle or criteria is simply "*just terms*".[91] It appears that this approach stems from an (incorrect) assumption that either: (a) the principles and criteria contained in the MA are not exhaustive and "*yield to the overriding requirements*"[92] of s.51(1) NTA (such that the applicable principles and criteria for the assessment are, therefore, just terms instead of the principles and criteria for the assessment of compensation set out in the MA); (b) s.10 RDA and s.45 NTA operate to provide just terms under s.51(1) NTA if not provided by s.51(3) NTA; (c) if s.51(3) NTA does not require just terms, s.53(1) NTA does (such that the applicable principles and criteria are just terms); and/or (d) s.123(1) MA is inconsistent with the NTA and invalid by operation of the s.109 of the *Constitution.*[93] For the reasons expressed below, this is not the effect or operation of section s.51(1) NTA, s.53(3) NTA or s.10 RDA.

D3.2 THE PRINCIPLES OR CRITERIA WHERE S.51(3) NTA APPLIES: OVERVIEW

D3.2.1 Introduction

72. Part VII MA deals with compensation. Section 123(2) MA is the central provision conferring an entitlement to compensation. It is drafted broadly and provides a right to "*compensation for all loss and damage suffered or likely to be suffered.*" The entitlement arises in favour of both an "*owner*" or "*occupier*" "*according to their respective interests*". Section 123(4) MA further provides that the amount of compensation payable under s.123(2) MA "*may include*" compensation for a range of listed matters. As discussed at Part D3.2.4.1 below, one of those listed matters is "*social disruption*".[94] There is nothing in the text, context and purpose of the MA to suggest that "*compensation*" in s.123(2) MA should be given anything other than its well-established meaning. Whilst the entitlement to compensation is qualified by ss.123, 124 and 125 MA, those qualifications do not affect either the meaning of "*compensation*" or the ordinary principles that apply to its determination. These principles are discussed below.

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87 See footnote 41 above.
88 It is common ground that the *similar compensable interest test* contained in s.240 NTA is satisfied: see paragraph [47] above.
89 CB A.02.002 at [41]; CB A.02.007 at [49]; ACS at [17].
90 This appears to be accepted by the Applicant: ACS at [86].
91 See, for example, CB A.02.002 at [46]; CB A.02.007 at [50]; ACS at [18] and [86].
92 ACS at [18](b)(i)].
93 See, for example, CB A.02.002 at [43]-[46]; CB A.02.007 at [50]; ACS at [18], [60] and [86].
94 Section 123(4)(f) MA.

D3.2.2 Compensation generally

73. The general meaning of "*compensation*" was described by Dixon J in *Nelungaloo Pty Ltd v Commonwealth*[95] (**Nelungaloo**) as follows:

> *Now "compensation" is a very well understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. It is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived. Compensation prima facie means recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him.*[96] (emphasis added)

74. Similarly, in *MacDermott v Corrie*, Isaacs J observed that the ordinary meaning of compensation "*simply imports*" that the taking or resumption of a person's interest "*will be accompanied by an equivalent in money of the property taken or resumed, or of the damage occasioned, being returned or given*."[97] As explained by Lord Moulton in *Re Lucas and Chesterfield Gas and Water Board*, "*the principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money.*"[98] The concept of "*compensation*" was thus summarised by Dixon CJ in *Turner v Minister of Public Instruction* as follows:

> *the ultimate purpose of the* [compensation] *inquiry is to find a figure which represents adequate compensation to the landowner for the loss of his land. Compensation should be the full monetary equivalent of the value to him of the land. All else is subsidiary to this end.*[99] (emphasis added)

D3.2.2.1 "Value to Owner"

75. As can be seen from the above, the "*value*" of property which is to be ascertained for compensation purposes means the "*value to the owner*" of that property.[100] This is commonly known as the 'value to owner' principle. The 'value to owner' principle in the context of compensation has several important, and related, aspects.

76. **First**, the person being compensated must not be awarded more than they have lost.[101] This is often known by the shorthand term, "*the principle of equivalence.*"[102] It was described by Scott LJ in *Horn v Sunderland Corporation* as follows:

> [The dispossessed owner has] *the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but on the other hand, no greater.*[103]

Similarly, in *Director of Buildings v Shun Fung Ltd* the Privy Council, after observing that a claimant is entitled to be compensated "*fairly and fully for his loss*", went on to say that "*conversely, and built*

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95 (1947) 75 CLR 495; [1947] HCA 58.
96 *Nelungaloo* at 571; cited with approval in *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* (2018) 233 CLR 259; [2008] HCA 5 at [34]. See also *Turner v Minister of Public Instruction* (1956) 95 CLR 245; [1956] HCA 7 at 264; and *Griffiths* at [87] and [337].
97 *MacDermott v Corrie* (1913) 17 CLR 223; [1913] HCA 27 (**MacDermott v Corrie**) at 247-248 (affirmed by the Privy Council in *Corrie v MacDermott* (1914) 18 CLR 511 at 514 and 517; [1914] AC 1056.
98 *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16 at 29.
99 *Turner v Minister of Public Instruction* (1956) 95 CLR 245; [1956] HCA 7 at 264.
100 As Barton ACJ put it in *MacDermott v Corrie* at 233: "[T]*he word 'value' in the grant prima facie means the value to the owner*". See also *MacDermott v Corrie* at 234-235, 239 and 248-251; *Boland v Yates Property Corp Pty Limited* (1999) 199 CLR 270; [1999] HCA 64 at [11]; and *Leichhardt Council v Roads & Traffic Authority (NSW)* (2006) 149 LGERA 439; [2006] NSWCA 353 at [23]-[27].
101 *Haines v Bendall* (1991) 172 CLR 60; [1991] HCA 15 at 63.
102 *Redland Shire Council v Edgarange Pty Ltd* [2009] 1 Qd R 546; [2009] QCA 16 at [7].
103 *Horn v Sunderland Corporation* [1941] 2 KB 26 at 42.

into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail."[104]

77. **Second**, compensation is not measured by reference to the gain made by the acquiring party. It is measured by reference to the loss suffered by the dispossessed owner. As noted by Lush J in *Stebbing v Metropolitan Board of Works*: "*the question is not what the persons who take the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him.*"[105] As explained by Latham CJ in *Commonwealth v Reeve*:

> *It is often said in compensation proceedings that that which is to be assessed is the value of the land to the owner… the point of the phrase "value to the owner" is … that the value to the acquiring authority is not the measure of compensation. The principle excludes any increase in value due to the necessities of the authority which acquires the land.* [106] (emphasis added)

78. Similarly, in *Re Lucas and Chesterfield Gas and Water Board*, Lord Moulton explained that, in giving a dispossessed owner the "*equivalent*" in money for that which was lost, "*the equivalent is estimated on the value to him, and not on the value to the purchaser*." [107] As observed by Barton ACJ in *MacDermott v Corrie*:

> *the question is, what is the loss that the* [dispossessed owner] *has sustained by the taking of its land – that question being tested by the value of the land to them, not its probable value to the Government or the* [acquirer]. *They are not to be put in a better position than they would have held if the land had not been taken from them.*[108]

79. It was on this basis that the Full Court of the Federal Court upheld the Northern Territory's appeal from the decision of Mansfield J at first instance in *Griffiths v Northern Territory (No.3)*[109] (**Griffiths (No.3)**). The Full Court, citing *Commonwealth v Reeve*, found that by determining economic loss at 80% of freehold value, the primary judge had wrongly inflated the figure for compensation by taking into account the value or benefit to the Northern Territory of acquiring the native title rights and interests, rather than focussing on the value of the native title rights and interests to the native title holders.[110] The plurality in *Griffiths* confirmed that any benefit to the acquirer is "*irrelevant*."[111]

80. **Third**, and relatedly, as the value to be paid to a dispossessed owner is the value of their interest in the land, all conditions, reservations and restrictions attached to that land (including the likelihood of their continuance) must be taken into account in determining value.[112] Thus in *MacDermott v Corrie,* the High Court considered that where the interest held by the dispossessed owner was not the "*whole unblemished title and dominion over the land*", they were not to be compensated for the taking as if it were. Rather, the dispossessed owner was to be compensated by an equivalent in money for the property actually taken or resumed. [113]

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104 *Director of Buildings v Shun Fung Ltd* [1995] 2 AC 111 at 125; [1995] 1 All ER 846 at 128.
105 *Stebbing v. Metropolitan Board of Works* (1870) LR 6 QB 37 at 45-46. See also 42, where Cockburn C.J observed that "*when Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom property is taken for the loss that he sustains, it is intended that he shall be compensated to the extent of the loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it*."
106 *Commonwealth v Reeve* (1949) 78 CLR 410; [1949] HCA 22 at 418.
107 *Re Lucas and Chesterfield Gas and Water Board* [1909]1 KB 16 at 29.
108 *MacDermott v Corrie* at 237 and 239.
109 (2016) 337 ALR 362; [2016] FCA 900.
110 *Northern Territory v Griffiths* (2017) 256 FCR 478; [2017] FCAFC 106 (**Griffiths (FC)**) at [89]-[92]. See also *Griffiths* at [136].
111 *Griffiths* at [136].
112 *MacDermott v Corrie* at 237, 239-240 and 247-8.
113 *MacDermott v Corrie* at 247-8.

81. **Fourth**, any increase or decrease in the value of the land acquired, arising from the carrying out of the purpose for which the land is acquired, is to be ignored in assessing its value. As observed by Dixon CJ in *Nelungaloo*:

> *You do not give him any enhanced value that may attach to his property because it has been compulsorily acquired by the governmental authority for its purposes… Equally you exclude any diminution of value arising from the same cause. The hypothesis upon which the inquiry into value must proceed is that the owner had not been deprived by the exercise of compulsory powers of his ownership and of his consequent rights of disposition existing under the general law at the time of acquisition*.[114]

82. This is known as the 'Pointe Gourde principle', derived from the decision of the Privy Council in *Pointe Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands (Trinidad)*. In that case, Lord MacDermott said that *"it is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition*."[115] The rationale is to ensure that a dispossessed owner is neither advantaged nor disadvantaged by the acquisition. In *Waters v Welsh Development Agency*, Lord Nicholls observed that the principle's purpose "*is to forward Parliament's objective of providing dispossessed owners with a fair financial equivalent for their land. They are to receive fair compensation <u>but not more than fair compensation</u>*."[116]

D3.2.2.2 Assessing the 'Value to Owner'

83. The starting point to ascertain the 'value to owner' of the property taken is ordinarily the "*market value*" of the property at the time of expropriation, in other words, the price for which it could reasonably be expected to sell in the open market.[117] The principles for determining the market value of land were established by the High Court in *Spencer v Commonwealth*.[118] The Court applies an objective test (the **Spencer test**) to ascertain the sum which a reasonably willing vendor would have been prepared to accept and a reasonably willing purchaser would have been willing to pay for the property at the relevant date, with both parties "*perfectly acquainted with the land, and cognizant of all circumstances which might affect its value.*"[119]

84. As explained by Isaacs J in *Spencer v Commonwealth* the ultimate question for the Court is "*what was the value of the land*" on the required day of assessment:

> *…and the all important fact on that day is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted. The plaintiff is to be compensated; therefore he is to receive the money equivalent to the loss he has sustained by deprivation of his land, and that loss, apart from special damage not here claimed, cannot exceed what such a prudent purchaser would be prepared to give him. To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as*

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114 *Nelungaloo* at 571-2.
115 *Pointe Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands (Trinidad)* [1947] AC 565 at 572.
116 *Waters v Welsh Development Agency* [2004] 1 WLR 1304 at [61]. The High Court accepted and applied the principle in *Housing Commission of NSW v San Sebastian Pty Ltd* (1978) 140 CLR 196; [1978] HCA 28 at 205 and affirmed it in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259; [2008] HCA 5 at [37]-[47].
117 *Leichhardt Council v Roads & Traffic Authority (NSW)* (2006) 149 LGERA 439; [2006] NSWCA 353 at [23]-[25]. As observed by Lord Tucker in *Minister for Public Works v Thistlethwayte* [1954] AC 475 at 491: "*It must not be forgotten that it is the value of the land to the owner that has to be ascertained, and that the willing seller and purchaser is merely a useful and conventional method of arriving at a basic figure...*"
118 (1907) 5 CLR 418; [1907] HCA 82 (**Spencer v Commonwealth**).
119 *Spencer v Commonwealth* at 441.

> *then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.*[120]

D3.2.3 Compensation under s.51(1) NTA

85. "*Compensation*" in the NTA has the same meaning as discussed above. In *Griffiths*, Edelman J considered the meaning of "*compensation*" in the sense in which it is used in s.51(1) NTA to be "*well-established*", noting that the concept involves the "*equivalent in money of the property taken…or of the damage occasioned, being returned or given.*"[121] The plurality also recognised this principle, stating that it was "*fundamental that there must be economic equivalence between the value of what is lost and the compensation which is paid.*"[122]

86. As a result, the plurality in *Griffiths* considered that compensation for native title was to be assessed in the ordinary way but adapted as necessary to accommodate the unique features of native title as defined in s.223 NTA.[123] Accordingly, in circumstances where the ordinary approach to assessing compensation for the infringement of common law rights and interests involves an objective (or economic) component and a subjective (or non-economic component), the plurality in *Griffiths* considered that the parity of treatment required by the RDA was such that compensation for native title must also encompass an assessment of both kinds of loss.[124] In particular, the assessment of compensation for native title must have regard to the two aspects of native title identified in s.223(1) NTA, namely:

(a) the effect of the act on the physical or material aspect of native title (i.e. the right to do something in relation to the land) mentioned in s.223(1)(a) NTA (the **economic loss**); and

(b) the loss of connection with the land mentioned in s.223(1)(b) NTA (called non-economic loss, or **'cultural loss'**).[125]

87. These two aspects of native title rights must be valued separately to achieve parity of treatment with other rights.[126] Further, the clear implication from the reasons of the plurality in *Griffiths* is that it was satisfied that this parity of treatment between native title holders and the holders of equivalent non-native title rights amounted to compensation on just terms.[127]

D3.2.4 Compensation under s.51(3) NTA (applying the principles and criteria of s.123 MA)

88. It follows that, just like "*compensation*" in s.51(1) NTA, the "*compensation*" referred to in s.123(2) MA must be given its ordinary meaning in accordance with the well-established general principles outlined above. This means that, in respect of "*compensation*" for the "*loss and damage suffered or likely to be suffered*" by native title holders, s.123 MA (like s.51(1) NTA) requires the application of the principles enunciated by the High Court in *Griffith*s with respect to compensation for the loss, damage or impairment of native title rights and interests. Accordingly, the "*compensation*" to be provided to native title holders under s.51(3) NTA (in applying the principles and criteria of the MA) includes components of both economic loss and non-economic loss in the form of cultural loss. The limited authority on s.123(2) MA supports this proposition.

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120 *Spencer v Commonwealth* at 440-441; see also 432.
121 *Griffiths* at [262]-[263] (citing *MacDermott v Corrie* at 247-248).
122 *Griffiths* at [87]. See also [136].
123 *Griffiths* at [66].
124 *Griffiths* at [76] and [84].
125 *Griffiths* at [44], [75] and [84].
126 *Griffiths* at [271]; see also [84].
127 See, for example, *Griffiths* at [73]-[76].

89. For example, in *Western Australia v Thomas,*[128] the National Native Title Tribunal (**Tribunal**) relevantly made three observations regarding the operation of s.123(4) MA in the context of compensation to native title holders. First, the items listed in s.123(4) MA, although extensive, were illustrative of the items for which compensation may be payable and were not an exhaustive list.[129] Second, the words of s.123(2) and (4) MA did not, expressly or by necessary implication, exclude consideration of any special or unique aspects of the links which native title holders have to an area of land.[130] Third, because the NTA effectively adopted the principles and criteria of the MA for the determination of compensation under s.51(3) NTA, it was strongly arguable that the words should not be read narrowly but should be applied to the actual circumstances of native title holders. In other words, if the general intention of the legislative scheme of the NTA (which incorporates the relevant provisions of the MA) is to treat native title holders equally with the holders of ordinary title, then that equality should be actual equality, and not merely formal equality.[131] Relying on those principles, the Tribunal determined that:

> *..the plain meaning of the words of s 123 of the* [MA]*, whether read in the context of that Act or within the context of the* [NTA]*, leads to the conclusion that native title holders are to be put in a position of substantive equality with the owners of land when their entitlement to compensation is being assessed. It follows that, if owners of ordinary title are entitled to compensation for "all loss and damage" suffered or likely to be suffered by them resulting or arising from the actual mining, then native title holders are entitled to no less, even if the nature of their loss or damage is different from that of a non-Aboriginal landowner.*[132]

The Tribunal ultimately concluded that the assessment of compensation under s.123 MA: (a) may take into account any special or unique aspects of links of the native title parties to that land; and (b) was not limited to the freehold value of the land which is the subject of the proposed act.[133]

90. The plurality in *Ward* similarly observed that "*it is also significant that the compensation payable under the* [MA] *includes compensation for the loss of use of the land and for* '*social disruption*'*, which may be particularly apposite in respect of any compensation for native title holders*".[134] Subsequently, in *Western Desert Lands Aboriginal Corporation v Western Australia*, the Tribunal also observed that "[i]*t is conceivable however that in relation to a site of such importance special factors such as the Martu's relationship (spiritual or otherwise) to the land may make compensation for all loss and damage arising from the mining more than would be awarded to a normal freeholder.*"[135] These early decisions are prescient in that they anticipated an entitlement to compensation under s.123 MA arising in relation to what the High Court later recognised as cultural loss in *Griffiths*.

D3.2.4.1 The relevance of "*social disruption*": s.123(4)(f) MA

91. Section 123(4)(f) MA contemplates that compensation may be payable for "*social disruption*". The term is not defined in the MA and, accordingly, the starting point for its construction is to ascertain the legislative intention by reference to the language of the MA viewed as a whole.[136] Relevantly, the MA must be construed on the *prima facie* basis that its provisions are intended to give effect to harmonious goals[137] and its text must be considered in its context, including legislative purpose, legislative history

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128 (1996) 133 FLR 124; [1996] NNTTA 30 (**Western Australia v Thomas**).
129 *Western Australia v Thomas* at 191.
130 *Western Australia v Thomas* at 191.
131 *Western Australia v Thomas* at 191.
132 *Western Australia v Thomas* at 193.
133 *Western Australia v Thomas* at 195.
134 *Ward* at [316].
135 *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169; [2009] NNTTA 49 at [198].
136 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26 at 320 (see also at 304).
137 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [70]. This principle is also reflected in s.18 of the *Interpretation Act 1984* (WA).

and extrinsic materials.[138] Context should be regarded in its widest sense to include such things as the existing state of the law and the mischief which the statute was intended to remedy.[139]

92. An examination of the legislative history of s.123 MA reveals that the term "*social disruption*" was introduced through amendments to the MA in 1985 as part of a scheme of Bills which included the *Aboriginal Land Bill 1985* (WA), the *Mining Amendment Bill 1985* (WA) and the *Mining Amendment Bill (No.2) 1985* (WA). The *Mining Amendment Bill* sought to introduce amendments to the MA following recommendations of the committee of inquiry into the MA assembled by the Western Australian Government under the chairmanship of Michael Hunt. Relevantly, one of those recommendations in relation to compensation for mining provided as follows:

> *In addition to the value of the land, the farmer must also be compensated for social disruption to him and his family, for costs of relocation and any interim loss of earnings. Compensation should bear in mind the facts that the farmer may need to relocate in a district with which he is not familiar. Thus, he is losing the benefit of years of knowledge gained in operating a particular farm. The farmer must receive more than simply the value of the land.*[140] (emphasis added)

93. At the same time as the *Mining Amendment Bill* was being debated in Parliament, so too were the *Aboriginal Land Bill* and *Mining Amendment Bill (No.2)*. The *Aboriginal Land Bill* reflected the Western Australian Government's response to the 1984 report arising out of the Aboriginal Land Inquiry conducted by Paul Seaman SC. The Bill was intended to "*provide a rational and fair system for Aboriginal people to seek title to land with which they have had either a traditional affinity or long residential association or use.*"[141] The *Mining Amendment Bill (No.2)* was complementary to the *Aboriginal Land Bill* in the sense that the former proposed to amend the MA to deal with the terms and conditions upon which mining exploration and development could occur on land granted under the provisions of the *Aboriginal Land Bill*. Although neither the *Mining Amendment Bill (No.2)* nor the *Aboriginal Land Bill* were passed into law, the extrinsic materials relevant to those bills are useful in ascertaining the intention of the legislature at the time in relation to its use of the term "*social disruption.*"

94. Relevantly, the *Mining Amendment Bill (No. 2)* contemplated that "*compensation would be payable to Aboriginal landholders or occupiers for social disruption caused to Aboriginal residential areas by post-tenement exploration or mining development activities*."[142] In particular, it contained a proposed provision – clause 39N(2) – which does not appear in the current MA. That provision stated:

> *For the purposes of the assessment of compensation pursuant to this Division, social disruption shall not be taken to have occurred in relation to any Aboriginal residential area unless there is, as a consequence of exploration activities, construction, or mining operations, a substantial diminution of or substantial interference with –*
> *(a) the right of the members of an Aboriginal land corporation and their families to reside there;*
> *(b) their reasonable comfort in, and enjoyment and peaceful and quiet occupation of, that residential area; or*
> *(c) the use of any structures or improvements or the natural waterholes or other natural features in or immediately adjacent to that area.*

The Second Reading of the *Aboriginal Land Bill* provides further insight into the legislature's intended meaning of the term "*social disruption*" where it was stated that "*compensation will be payable in*

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138 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390; [1955] HCA 27 at 397; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55; at [39]; and *SZTAL* at [14].
139 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; [1997] HCA 2 at [88]; SZTAL at [14].
140 Michael Hunt, *Western Australia Report of the Inquiry into Aspects of the Mining Act* (1983) at 100.
141 Western Australia. *Parliamentary Debates*, Legislative Assembly, Second Reading, 12 March 1985 at 792.
142 Western Australia. *Parliamentary Debates*, Legislative Assembly, Second Reading, 21 March 1985 at 1249.

respect of damage, including social disruption, to residential areas and improvements, and will not be linked to the value of minerals or petroleum, or to spiritual or religious factors."[143]

95. It is apparent from the structure of s.123 MA and consideration of the extrinsic materials that "*social disruption*" was intended as a category that was distinct from other well-recognised heads of damage contained in s.123(4) MA. In particular, in addition to compensation for deprival of, or damage to, the land, the legislature intended that by s.123(4)(f) MA compensation should also be provided to "*owners*" and "*occupiers*" for the disruption and inconvenience caused to their lives due to having to relocate their place of residence and for the loss of their peaceful enjoyment of the area's amenities. It is also clear that "*social disruption*" under the MA was not intended to have the same meaning given to it by sociology (i.e. the alteration, dysfunction or breakdown of social structures). Its meaning was also not intended to encompass division and disharmony amongst "*owners*" and "*occupiers*" arising from a disagreement as to whether, and on what conditions, a mining tenement should be granted (or the manner in which mining activities were conducted on the land).

96. Given the loss that the MA intended to be compensated for as "*social disruption*", it is reasonably clear that it extends to loss or damage suffered by native title holders in the economic sense (e.g. the diminution of, or interference with, rights to live on the land or "*peacefully*" exercise other native title rights and interests). Further, whilst the term "*social disruption*" may not have been intended to encompass any spiritual dimension of loss or damage in the pre-native title era of 1985, accepting that legislation is generally to be construed as "*always speaking*",[144] the contemporary meaning of the term "*social disruption*" also extends to loss or damage suffered by native title holders in the non-economic or cultural sense (e.g. diminution of, or interference with, the native title holders' connection to land due to an inability to peacefully enjoy an area and its amenities).

97. Accordingly, "*social disruption*" is subsumed within economic and cultural loss. It is not a matter to be compensated for individually, as a separate head of damage and/or on top of economic and cultural loss. Rather, to the extent that the Compensable Acts caused: (a) a disruption or inconvenience to the Yindjibarndi People due to having to relocate their place of residence; and/or (b) a loss of their peaceful enjoyment of the area of the act and its amenities, those considerations are already taken into account by the Court when determining economic and cultural loss under the *Griffiths* principles.

D3.3 ECONOMIC LOSS

D3.3.1 What is economic loss?

98. Compensation for economic loss concerns the physical aspect of native title (i.e. the loss of the right to do something in relation to the land and waters: s.223(1)(a) NTA). Compensation for economic loss is, therefore, compensation for the effect of an act on the native title rights and interests held having regard to their legal content and nature (and not the way in which they may, or may not, be exercised).[145]

99. Fundamental to an understanding of the decision in *Griffiths* in respect of economic loss is the emphasis the High Court placed on s.10 RDA as requiring equality of treatment as between native title and other common law rights and interests in land.[146] Edelman J described this as "*the parity principle*" underlying

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[143] Western Australia. *Parliamentary Debates*, Legislative Assembly, Second Reading, 12 March 1985 at 795.

[144] Section 8 of the *Interpretation Act 1984* (WA) which provides that "*A written law shall be considered as always speaking and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to every part of the law according to its true spirit, intent, and meaning*."

[145] *Griffiths* at [81]. The plurality went onto observe that the way in which the native title rights and interests are actually used and enjoyed may affect their non-economic or cultural value.

[146] *Griffiths* at [76]. The operation of the RDA in respect of the NTA, and the parity principle, is discussed further in Part D7 below.

the NTA.[147] The parity principle has the following consequences for the manner in which economic loss is to be assessed:

(a) just as the ordinary approach to assessing compensation for the infringement of common law rights and interests involves an objective (or economic) component and a subjective (or non-economic component), the parity of treatment required by the RDA was such that compensation for native title must also encompass an assessment of both kinds of loss (economic and cultural), which are to be determined separately (**bifurcated approach**);[148]

(b) as a consequence of (a), compensation for economic loss does not include any allowance for the cultural or ceremonial significance of the land or the native title holders' attachment to the land (which is dealt with as cultural loss);[149]

(c) economic loss is to be determined in accordance with established precepts for the valuation of interests in land, adapted to accommodate the unique character of native title interests and the statutory context.[150] In particular, in the ordinary land acquisition context when applying the Spencer test, the question the Court asks is: '*what would a willing buyer be prepared to pay to a willing but not anxious seller?*' As there is no market for native title, the Court applies an **adapted Spencer test**, which asks: '*how much could native title holders have fairly and reasonably demanded from government for the surrender of their native title?*' Put another way: what would government (as a willing but not anxious purchaser) have reasonably paid to obtain a surrender of the native title?;[151]

(d) given that in an ordinary land acquisition context compensation is based upon unencumbered freehold market value, the NTA requires the economic value of native title rights and interests to be determined by reference to the objective economic value of an unencumbered freehold estate in that land. This involves equating exclusive native title with the unencumbered freehold market value in that land, with a percentage reduction from the freehold value of the land to be applied in the case of non-exclusive rights (to represent the comparative limitations of the non-exclusive native title relative to exclusive native title); [152]

(e) in the case of the complete extinguishment of exclusive native title, the maximum compensation payable for economic loss is capped at the unencumbered freehold value of that land[153] (see paragraph [108] below with respect to s.51A); and

(f) consistent with the orthodox approach to the valuation of land, the entitlement to compensation for economic loss arises when the relevant compensable act was done and is to be assessed at the date each such act was done.[154] That determination is made in respect of each compensable act on a lot by lot basis and not (contrary to the Applicant's case) on a project-wide basis.[155] Relatedly,

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147 *Griffiths* at [265] and [332].
148 *Griffiths* at [84]. This bifurcated approach is also necessary to achieve the degree of precision required by s 51A which applies to cap the economic component at equivalent freehold value (at [86]).
149 *Griffiths* at [61] and [84]; see also [271] (Edelman J).
150 *Griffiths* at [66], [76] and [86].
151 *Griffiths* at [84]-[85]. In this respect, the "*adaption*" of the Spencer test lay in the fact that, instead of inquiring into the price that hypothetical parties would agree upon for a transaction of the rights themselves, the plurality asked what price would be agreed for the extinguishment or impairment of them.
152 *Griffiths* at [3(1)] and [101].
153 *Griffiths* at [51], [54], [70], [86] and [101].
154 Whilst the NTA does not expressly provide the date on which the entitlement to compensation arises, as the entitlement to compensation is for the "*act*" itself, the date for the assessment of compensation is the date of the act: *Griffiths* at [43]. Note 1 to s.44H does not mandate a different approach: c*f* ACS at [83].
155 CB A.02.007 at [73]. In support of its submission that compensation must be assessed on a "*project-wide basis"*, the Applicant relies on (absent any explanation) the decision of the Tribunal in *Western Australia v Thomas* (1999) 164 FLR 120 at [286]; [1999] NNTTA 99 at 45. In that matter, the Tribunal was required to make a determination in relation to the proposed grant of a

compensation for economic loss is to be assessed according to the native title rights and interests actually held as at the date of the relevant compensable act.[156]

D3.3.2 How is economic loss to be calculated?

100. In light of the above, the determination of economic loss requires the following initial steps:

(a) the identification of the nature and extent of the native title rights and interests held in relation to the land affected by the relevant compensable act as at the date of that act;[157]

(b) the determination of the economic value of an unencumbered freehold estate in that land as a proxy for the economic value of exclusive native title in relation to the land;[158] and

(c) where the native title rights and interests to be surrendered are non-exclusive only: (i) determining a percentage reduction from exclusive native title that represents the comparative limitations of the non-exclusive rights and interests relative to exclusive native title; and (ii) the application of that percentage reduction to the economic value of a freehold estate determined in accordance with sub-paragraph (b).[159]

101. The determination of the percentage reduction referred to in paragraph [100(c)] above is not amenable to a mathematical calculation or a formulaic approach. Rather that determination requires an evaluative judgment that focuses on the nature and extent of the native title rights and interests and the entitlement to compensation for their extinguishment.[160] In *Griffiths*, all judges agreed that 50% was the appropriate reduction from freehold value for the extinguishment of non-exclusive rights and interests on the facts in that case.[161] In allowing this aspect of the Northern Territory and Commonwealth appeals, the plurality found that the awards made by the courts below (80% and 65% of freehold value respectively) were "*manifestly excessive*" given that the native title holders' rights and interests:

> *were essentially usufructuary, ceremonial and non-exclusive, without power to prevent other persons entering or using the land or to confer permission on other persons to enter and use the land, and without a right to grant co-existing rights and interests in the land, and without right to exploit the land for commercial purposes.*[162]

102. The plurality concluded that "*a correct application of principle dictates on any reasonable view of the matter that those non-exclusive rights and interests, expressed as a percentage of freehold value, could certainly have been no more than 50 percent*".[163] As no party had suggested that the percentage reduction should be set at less than 50%, the plurality was content to accept that "*for the purposes of the disposition of these appeals*" that 50% was the figure.[164] In the First Respondent's submission there is no obvious reason why a 50% reduction from freehold value for the Yindjibarndi People's **Non-Exclusive Rights**[165] would not be appropriate in these circumstances having regard to the nature of those rights.[166]

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number of mining leases which were part of the Murrin Murrin nickel mining project. In refusing to make payment by the *grantee party* of a trust amount a condition of the determination, the Tribunal observed, *inter alia*, that "*an assessment of compensation can more easily be made on a project-wide basis taking account of the activities on these and other mining leases as well as the impact of the infrastructure tenements*". The decision does not provide authority for the broad proposition advanced by the Applicant.

156 *Griffiths* at [56].
157 *Griffiths* at [56] and [68].
158 *Griffiths* at [87], [90] and [101].
159 *Griffiths* at [69]-[70], [74], [76], [91] and [101].
160 *Griffiths* at [87] and [91].
161 Albeit for different reasons: *Griffiths* at [107]; [241] (Gageler J); and [303] (Edelman J).
162 *Griffiths* at [106].
163 *Griffiths* at [106].
164 *Griffiths* at [107].
165 Being those non-exclusive native title rights and interests described in the Yindjibarndi Determination at [3]
166 The non-exclusive native title rights of the Ngaliwurru and Nungali Peoples in *Griffiths* are substantially similar to the Yindjibarndi People's Non-Exclusive Rights: see *Griffiths* at [10].

103. Further, the determination of economic loss set out at paragraph [100] above assumes the extinguishment of native title. In the case of non-extinguishing compensable acts (i.e. compensable acts to which the *non-extinguishment principle* applies), an additional step in the assessment of compensation for economic loss is the application of a further percentage reduction to represent the extent to which the native title has been impaired short of extinguishment (taking into account the prospect of native title again having effect).[167]

104. This step is required because the temporary suppression of native title rights and interests by operation of the *non-extinguishment principle* has a different character and quality to its permanent extinguishment in two important respects. First, unlike an extinguishing compensable act (where the native title rights and interests are permanently lost and do not revive),[168] if the *non-extinguishment principle* applies the native title rights and interests continue to exist in their entirety and are only temporarily suppressed to the extent of any inconsistency with the compensable act (and only for the duration of that inconsistency). The native title rights and interests will revive in full upon the conclusion of the compensable act or its inconsistent effects.[169] Second, the temporary suppression of native title rights and interests resulting from the operation of the *non-extinguishment principle* in respect of a particular compensable act is limited to that act, not all other acts in the same area. Accordingly, the native title rights and interests continue to have full force and effect in relation to other acts over the same area.

105. Compensable acts subject to the *non-extinguishment principle* will not affect native rights and interests in uniform ways. Inconsistency is a question of fact.[170] Accordingly, the determination of the percentage reduction for acts to which the *non-extinguishment principle* applies is also not amenable to a mathematical calculation or a formulaic approach. Rather, that determination requires an evaluative judgment that takes account of: (a) the extent to which there is an inconsistency between the rights held under the compensable act and the exercise or enjoyment of the native title rights and interests; (b) the geographical extent of any inconsistency; and (c) the duration of the compensable act and the contingency that any native title rights and interests which are wholly or partially of no effect might again have full or partial effect.

106. Accordingly, the percentage reduction will be very different for, on the one hand, an act of infinite duration which wholly suppresses all native title rights and interests and, on the other, an act of one day's duration in which the native title rights and interests could continue to be exercised. The appropriate percentage reduction falls to be determined somewhere between these two extremes based on the evidence. It may be that, in some circumstances, a percentage reduction to take into account the fact that a compensable act is subject to the *non-extinguishment principle* is not appropriate. By way of example, in *Griffiths*, three of the compensable acts (designated acts 1, 36 and 41) were *category D past acts* to which the *non-extinguishment principle* applied.[171] They comprised Crown to Crown grants in perpetuity by the Northern Territory to government authorities that wholly suppressed (and continued to suppress) all subsisting native title.[172] Mansfield J considered that, in a practical sense, these acts "*have the same effect as a previous exclusive possession act*" and that for the purposes of compensation,

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167 *Griffiths (No.3)* at [389] and [392].
168 Subject to ss.47, 47A, 47B or 47C NTA.
169 See, for example, *Jango v Northern Territory* (2006) 152 FCR 150; [2006] FCA 318 (**Jango**) at [78].
170 See, for example, *Western Australia v Brown* (2014) 253 CLR 507; [2014] HCA 8 (**Western Australia v Brown**) at [57] and *Ward* at [78] (applied, for example, at [194]-[195]) in the context of inconsistency more generally.
171 *Griffiths (No.3)* at [73] and [78]-[80]. There were a number of other *category D past acts* claimed in the application but those acts were followed by subsequent *previous exclusive possession acts* which extinguished native title. Acts 1, 36 and 41 were the only *category D past acts* to which the *non-extinguishment principle* still applied. See also *Griffiths* at ftn 164.
172 *Griffiths* at [258]-[259] (Edelman J). See also *Griffiths (No.3)* at [73] and [78]-[80] read with *Griffiths v Northern Territory of Australia* [2014] FCA 256 (**Griffiths (No.1)**) at Table (at 28-62) (see Acts 1, 36 and 41) and *Griffiths (FC)* at [11(e)] and [24]. The acts comprised act 1 (grant of a perpetual special purpose lease to the Conservation Land Corporation), act 36 (freehold grant to the Commonwealth) and act 41 (cemetery reserve).

it was not appropriate to reduce the freehold value in these circumstances, given that "*the removal either wholly or partially of the act or its affects is not likely ever to arise*."[173] However, where the evidence indicates that not all incidents of the native title rights and interests are entirely suppressed by the compensable act and/or the compensable act has a finite duration, some further percentage reduction will be required.

107. The calculation of the quantum of economic loss for each of the Compensable Acts in this proceeding is considered in Part E3 below.

D3.3.3 Limit on compensation for economic loss: s.51A

108. As discussed above, s.51A NTA: (a) equates the economic value of exclusive native title in relation to the land with the economic value of a freehold interest in the land; and (b) in the case of complete extinguishment of exclusive native title in relation to the land, applies an upper limit on compensation for economic loss at that amount.[174] The effect of s.51A NTA is that compensation for economic loss is to be measured by reference to the freehold value of the land and on the basis that the freehold value of the land caps the maximum compensation payable for economic loss in all cases. It follows that compensation for economic loss for an act that does not involve the complete extinguishment of exclusive native title in relation to the land is to be determined for an amount below the upper limit.[175] None of the Compensable Acts extinguished the native title rights and interests and none are of unlimited duration. On that basis, the upper limit in s.51A NTA is not engaged in relation to them. Accordingly, any award of compensation for economic loss must be below the freehold value of the land over which the Compensable Act was done.

D3.4 CULTURAL LOSS

D3.4.1 What is cultural loss?

109. Compensation for cultural loss is for the effect of a compensable act on the cultural or spiritual connection that native title holders have with the land and waters by their traditional laws and customs (s.223(1)(b) NTA).[176] It is compensation for the loss, diminution or impairment of the cultural or spiritual value of the land[177] and "*expressed more fully, it is compensation for the value of the loss of attachment to country and rights to live on, and to gain spiritual and material sustenance from, the land*" suffered by the native title holders as a result of the compensable act.[178]

110. Unlike economic loss, cultural loss reflects a subjective assessment of the effect of a compensable act on the "*inherent*" or "*cultural*" value of the land having regard to the content of the traditional laws and customs by which native title holders have a connection to that land.[179] An entitlement to compensation for cultural loss requires a group-felt sense of loss of connection to country that arises when the integrity of the land or waters is disrupted in a way that is attributable to the compensable acts.[180] Whilst the

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[173] *Griffiths (No.3)* at [392]. This approach was not challenged upon appeal and, as discussed by Edelman J in *Griffiths* (at [259]), "*the parties applied the principles of compensation to* [acts 1, 36 and 41] *as though they had extinguished native title… based upon a "pragmatic foundation that there is no foreseeable prospect of the revival of the native title rights and interests*".

[174] *Griffiths* at [54], [70], [86], [90] and [101].

[175] *Griffiths* at [70] and [101].

[176] *Griffiths* at [44].

[177] *Griffiths* at [154]. Edelman J referred to "*loss of culture*" (at [323]).

[178] *Griffiths* at [312] (Edelman J); see also [161].

[179] *Griffiths* at [84].

[180] *Griffiths* at [84], [214] and [218]. Contrary to CB A.02.010 at [22]-[25], the First Respondent is not suggesting that a "*group-felt sense of loss of connection to country*" requires that the sense of loss is "*felt equally, or indeed at all, by all members of the group*". Rather the term "*group-felt*" signifies that cultural loss should be assessed having regard to the communal nature and collective ownership of the native title holders.

entitlement to compensation arises at the time when the relevant compensable act is done, cultural loss is assessed as at the date of judgment.[181]

D3.4.2 How is cultural loss to be calculated?

111. The plurality in *Griffiths* considered that the determination of cultural loss requires three separate but inter-related steps: (a) identification of the compensable act(s); (b) identification of the native title holders' connection with the land or waters by their laws and customs; and (c) consideration of the particular and inter-related effects of the compensable act(s) on that connection.[182] In this context it is important to note that "*connection*" is something beyond the mere enjoyment of, or the ability to access, engage in activities on, or use, traditional lands.[183] Rather, "*connection*" is spiritual in nature[184] and, accordingly, assessing cultural loss requires an understanding that the "*spiritual integrity of the landscape* [is] f*undamental*" to native title holders and that there is a "*bond … between a person and the spirituality of country*."[185] As Mansfield J explained: "*It is that dimension that signifies the nature of connection to country that needs to be appreciated, whether approached as reflecting a special value of the land to the native title holders, or viewed when considering the intangible effects that result from their dispossession*."[186]

112. Impairment of an Aboriginal person's spiritual connection to the land is not to be considered by reference to what occurs on a particular lot or lots, but more generally by reference to feelings about loss of connection to country. Thus, whilst each compensable act may affect native title rights and interests with respect to a particular piece of land, for the purpose of assessing cultural loss the effect of each act must also be understood by reference to the whole of the area over which native title exists. Accordingly, multiple compensable acts may be considered on an *in globo* basis. Their effect can be incremental and cumulative. Also, it does not need to be a direct effect: loss may be felt beyond the boundaries of the land the subject of the compensable act.[187]

113. For example, in *Griffiths*, the native title holders' connection to country (and the spiritual integrity of that country) was compromised or diminished by the compensable acts which: (a) destroyed or damaged significant sites; (b) impeded the exercise of native title rights and interests and the practise of traditional laws and customs, including access to country for hunting and other cultural purposes; (c) reduced the availability of bush tucker; and (d) damaged Dreaming stories.[188] The loss was incremental and cumulative in the sense that, while earlier (non-compensable) acts had resulted in a sense of loss, a further sense of loss was felt as an effect of the later compensable acts.[189] The plurality likened it to successive "*holes*" being "*punched*" in a "*single large painting*."[190] Also, each compensable act "*chipped away*" the geographical area over which native title rights and interests were able to be exercised and enjoyed.[191]

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[181] The trial and appeals in *Griffiths* were all conducted on the assumption that cultural loss was assessed at the date of judgment. Edelman J, whilst noting that this was not challenged by any party before the High Court, considered that this was in error and that the correct principle was to assess it at the date of extinguishment with the addition of interest until judgment (at [318]). However, Edelman J considered that the error did not greatly affect the result because the proper methodology (assessing the effect on cultural value at the date of extinguishment and applying interest to that sum) would not have yielded any substantive difference in the award (at [325]).
[182] *Griffiths* at [218].
[183] *Griffiths* at [187]. See also *Griffiths (No.3)* at [372].
[184] *Griffiths* at [187].
[185] *Griffiths (No.3)* at [372].
[186] *Griffiths (No.3)* at [373].
[187] *Griffiths* at [198]-[200], [203]-[206], [219] and [223].
[188] *Griffiths* at [189]-[190].
[189] *Griffiths* at [198].
[190] *Griffiths* at [205].
[191] *Griffiths* at [225].

114. It follows that an appropriate award for cultural loss will vary depending on the particular facts. There is, for example, no *a priori* assumption that extinguishment of native title involves a complete loss of a claim group's traditional connection with the land.[192] Whether or not it does so will depend upon the evidence.

D3.4.2.1 Cultural loss is not solatium

115. In compulsory acquisition law, 'solatium' refers to compensation to cover distress caused by the taking of land and other subjective factors such as nuisance and annoyance caused to the claimant who must relocate. The power to award solatium is discretionary, derives from statute and has a particular meaning. All members of the High Court in *Griffiths* emphasised that cultural loss is not an award in the nature of a solatium.[193] It follows that cultural loss is not an award to cover the distress caused by the compulsory extinguishment or impairment of native title. Rather, cultural loss is a group-felt loss that, typically, involves a sense of injustice arising out of the damage to country caused by the compensable act.[194]

D3.4.2.2 s.51A NTA does not limit compensation for cultural loss

116. The High Court in *Griffiths* found that the statutory limit on compensation provided by s.51A NTA (fixed by reference to freehold value) applies to cap only that part of the 'total compensation payable' comprising economic loss. It does not apply to limit the compensation payable for cultural loss.[195]

D3.4.3 Translation of cultural loss into monetary compensation

117. Ultimately, an award for cultural loss requires a fair or just assessment, in monetary terms, of any sense of loss of connection to country suffered by the native title holders by reason of the compensable acts. It is not subject to any particular restraint or limitation, but rather is a social judgment of what the Australian community would accept as fair, reasonable or just. As explained by the plurality in *Griffiths*: "*what, in the end, is required is a monetary figure arrived at as the result of a social judgment, made by the trial judge and monitored by appellate courts, of what, in the Australian community, at this time, is an appropriate award for what has been done… what is appropriate, fair or just*."[196]

118. It follows from the above that an appropriate award for cultural loss will vary depending on the particular facts of the case. Quantification of cultural loss is not amenable to a mathematical calculation or a formulaic approach. Rather, the assessment of compensation for cultural loss requires an intuitive judgment involving a multifactorial approach. The following matters guide its assessment:

(a) any sense of loss of connection to country suffered by the native title holders is to be understood by reference to feelings about loss of connection to country but not by reference to individual acts and their effects on a lot-by-lot basis;

(b) to attract an award of compensation, the cultural loss must be the effect or consequence of, or be produced by, one or more of the relevant compensable acts (although the sense of loss of connection to country need not be a direct effect). As such, it may be necessary to consider the extent to which any sense of loss of connection to country is attributable to acts other than the relevant compensable acts. It is also necessary to appreciate that the sense of loss of connection

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[192] Mansfield J found that "[w]*hile the loss of Ngaliwurru-Nungali People was evident, there was also significant evidence that the attachment of claimants to country has not been wholly lost*": *Griffiths (No.3)* at [364].
[193] *Griffiths* at [3] and [53]-[54]; [312]-[317]
[194] *Griffiths* at [313]-[317]. See also at [154].
[195] *Griffiths* at [50] and [54]; [329]-[334].
[196] *Griffiths* at [237].

may be incremental and cumulative. So, for example, while earlier non-compensable acts may have resulted in a sense of loss of connection, the compensable acts may have resulted in a further sense of loss of connection. In that circumstance, it is only the further sense of loss of connection that is compensable as cultural loss;

(c) in the exercise of the Court's discretion to determine what the Australian community would accept as appropriate, fair or just, it is appropriate to consider the circumstances in which the relevant compensable acts were done. Depending on the facts, this may include consideration of: (i) the extent to which the native title rights and interests were exercised in relation to the area the subject of each such act prior to the act being done; (ii) whether the native title rights and interests have been exercised in relation to the area the subject of each such act subsequent to the act being done and, if so, to what extent; (iii) any mitigating circumstances such as any steps taken to seek to avoid or minimise the extent to which the native title holders would suffer a sense of loss of connection to country as an effect of those acts; and (iv) any aggravating circumstances that may have contributed to a sense of loss of connection to country; and

(d) any compensation for cultural loss is awarded to the native title holders on an *in globo* basis with its distribution to individuals being an intramural matter.[197]

D4 Applicant's case contrary to fundamental compensation principles & the NTA

D4.1 INTRODUCTION

119. The Applicant's account of the method for assessing compensation for the effects of the Compensable Acts is difficult to follow. This is due, *inter alia*, to: frequent adoption in the ACS of parts of the Applicant's opening submissions, which sometimes contradict the ACS; (b) the promulgation of two new (and unpleaded) constructions of how economic loss is to be assessed; and (c) the sparse development or explanation in the ACS of many aspects of the Applicant's pleaded case. The First Respondent generally assumes the Applicant continues to press all issues raised in its pleadings and opening, even if they are not referred to in the ACS. However, the appropriate place for development or explanation of the Applicant's case was in the ACS and further development of the Applicant's case should not occur by way of reply.

D4.1.1 Economic loss

120. As discussed in Part A above, the Applicant now appears to be maintaining three alternative bases upon which it says economic loss for the Compensable Acts should be assessed. It is also claiming two additional heads of damage under its claim for economic loss: an amount for "*loss of or damage to country and to ancient occupation, cultural and dreaming sites and dreaming tracks*" (**Heritage Amount**) and an amount for "*psychological and other services required to treat the social disruptions / division and related psychological trauma within the Yindjibarndi community*" (**Psychological Amount**). Each of these cases and additional heads of damage are dealt with in turn below.

D4.1.2 Cultural loss

121. The First Respondent primarily deals with the Applicant's claim for cultural loss in Part E4 below. However, to the extent that the Applicant seeks compensation for things and events which, in the First Respondent's submission, are not compensable as cultural loss, they are addressed in Part D4.6 below.

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[197] *Griffiths* at [156], [198]-[200], [203]-[206], [214], [217]-[219], [223], [225]-[226] and [237].

D4.2 APPLICANT'S FIRST ECONOMIC LOSS CASE

122. The Applicant's first economic loss case focusses on the Yindjibarndi People's statutory rights under Part 2, Division 3, Subdivision P (**Subdivision P**) NTA and seeks a determination of compensation by reference to a potential outcome of the negotiations contemplated by s.31(1)(b) NTA (**right to negotiate**). The Applicant has alleged, in substance, a failure of negotiation between it and the FMG Respondents in respect of the Compensable Acts and seeks compensation equivalent to that which it asserts it might have obtained had those negotiations resulted in an agreement.[198] It is this first economic loss case which the First Respondent had understood it was meeting during the hearing and, despite it being given little attention in the ACS, it is the Applicant's primary (and only pleaded) case.

123. In effect, the Applicant asserts that the loss it suffered by the Compensable Acts was the loss of the right to negotiate and/or the loss of the "*valuable opportunity*" it had to "*exploit*" the right to negotiate procedures contained in Subdivision P and reach an agreement in respect of the Compensable Acts that provided compensation based on the production, income or profit made or obtained from the Compensable Acts. On this basis, the Applicant seeks compensation equivalent to that which it asserts it might have obtained "*from a fair and reasonable*" *grantee party* (i.e. miner) or *government party* had the statutory processes in Subdivision P resulted in an agreement.[199] Accordingly, the Applicant asserts that compensation should be determined by reference to "*the many comparable…common or standard*" Subdivision P Agreements which are said to demonstrate "*the sum which a reasonable miner or Government party, acting fairly and justly, would have been prepared to pay to the Yindjibarndi People to obtain their assent to the grants of the* [Compensable Acts]."[200] In the ACS the Applicant calls this the "*negotiation or exchange value*" or the "*special value.*"[201]

124. Under the Applicant's first economic loss case, it asserts that the determination of compensation differs in both quantum and method of calculation depending upon the party liable to pay that compensation. In particular, it asserts that:

(a) if the FMG Respondents are liable, compensation is to be determined by reference to "*comparable agreements*" entered into by mining companies and native title claimants under s.31(1)(b) NTA (**Subdivision P Agreements**). In particular, the Applicant asserts that, having regard to those Subdivision P Agreements, compensation is to be assessed as a percentage of the revenue earned by the FMG Respondents from the sale of the minerals obtained from the Compensable Acts (**Revenue Share**).[202] It says that this amount is [redacted] (**Revenue Share Amount**);[203] or

(b) if the First Respondent is liable, compensation is to be determined by the formula set out in s.38 MA (being 90% of the rents and royalties paid and payable to the First Respondent by the FMG Respondents in respect of the Compensable Acts (**s.38 MA Amount**)).[204] It says that the s.38 MA Amount is $4,531,265,898.[205] Alternatively, the compensation amount payable by the First Respondent is the amount that the First Respondent would have been prepared to pay to obtain

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198 CB A.02.002 at [35] and [46(a)-(aaaa)]; CB A.02.007 at [92]-[93] and [95]-[97]; CB A.02.014 at Economic Loss, items 1-2; ACS at [23], [100]-[101], [158]-[161] and [176].

199 CB A.02.002 at [46(a)-(aaa)]; CB A.02.007 at [93]; CB A.07.005 at 6; ACS at [85], [100]-[101], [158] and [176]-[179].

200 CB A.02.002 at [35] and [46(a)]; CB A.02.007 at [92]-[100]; and ACS at [100]-[101].

201 See, for example, ACS at [147(b)]; [158]-[165] and [175]. See also CB A.02.007 at [93].

202 CB A.02.002 at [46(a)-(aaa)]; CB A.02.007 [95]-[96]; ACS at [101(h)-(i)] and [176]-[178].

203 ACS at [4] and [186].

204 A.02.002 at [46(a) and (aaaa)]; ACS at [101(j)] and [157] read with A.02.007 at [97]; CB A.07.005 at 6(30)-7(14). This was also confirmed by counsel for the Applicant on the last day of hearing (15 October 2024) at 1617(25-31).

205 ACS at [144]. Somewhat confusingly the Applicant required the rents and royalties paid by the FMG Respondents to the First Respondent in respect of the Compensable Acts for this pleaded case: see CB A.07.005 at 6(30)-7(14). However, the s.38 MA Amount is now also tied to the Applicant's second economic loss case (discussed below).

the Yindjibarndi People's assent to the Compensable Acts.[206] To the extent the latter amount is not the same as the s.38 MA Amount, the Applicant had not previously specified how the amount was to be calculated or its quantum. It now appears that amount may be the same as the Revenue Share Amount.[207] However, the Applicant has not explained on what basis the Revenue Share Amount is an amount that the First Respondent would have been "*prepared to pay.*"

125. In addition to the Revenue Share Amount (or the s.38 MA Amount), the Applicant is also seeking compensation under its first case for the Heritage Amount and the Psychological Amount.[208] The First Respondent says that the Applicant's first economic loss case is wrong in principle and should not be accepted for the reasons set out below.

D4.2.1 Compensation must be for the effect of an act on native title rights and interests

126. The fundamental flaw with the Applicant's first case on economic loss is that it is not tied to the scheme for compensation under the NTA. However, as the Applicant's claim is made under the NTA, the statutory requirements of the NTA must be met. Relevantly, a native title holder's entitlement under the NTA is an entitlement to "*compensation*" for the effect of a compensable act on their native title rights and interests. "*Compensation*" is compensatory; it is not restitutionary or gains driven[209] and "*it is fundamental that there must be economic equivalence between the value of what is lost and the compensation which is paid…and…the economic value of the property that was lost must be assessed according to the rights and interests that were held…*".[210] However, by framing the loss to be compensated as the loss of the right to negotiate and/or a loss of an opportunity to negotiate an agreement under Subdivision P (rather than the diminution or impairment of their native title rights and interests by the Compensable Acts), the Applicant's "*negotiation or exchange value*" approach fails to meet the requirements of the NTA.

127. In particular, Part 2, Division 5 NTA is not concerned with the loss of any opportunity that a native title holder may have had to engage in a statutory process about the grant of a compensable act. Nor is compensation assessed by reference to a hypothetical outcome of that statutory process. This is because, whatever value (if any) that the rights and procedures contained in Subdivision P (or the NTA more generally) may have, those rights are statutory rights. They do not form part of the bundle of native title rights and interests. Thus, in *State of Queensland v Central Queensland Land Council Aboriginal Corporation,* Kiefel J (with whose reasons Beaumont and Lee JJ agreed) relevantly held that removing or amending the right to negotiate (by way of a determination under s.26A NTA) was not an act which "*affects native title*" stating that:

> *There is a further difficulty in the contention that the means by which a right to negotiate is removed can be described as an act which "affects native title" in the way described in s 227, although it is not strictly necessary to deal with it. It treats procedural rights under the NTA (defined in s 253) as if they were part of the bundle of rights which are native title rights. Clearly that is not correct: see s 223 of the NTA, which defines "native title" and "native title rights and interests" and Western Australia v Ward…*[211] (emphasis added)

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206 A.02.002 at [46(a) and (aaaa)]; A.02.007 at [97]; ACS at [101(j)]. To the extent that ACS at [179] may now suggest that the First Respondent is to pay the Revenue Share Amount, that is contrary to the Applicant's pleadings and openings.
207 Based on ACS at [179].
208 ACS at [4]. See also CB A.02.014 at Economic Loss, items 3-4.
209 *Griffiths* at [136]. Restitutionary remedies do not arise under the NTA because any benefit derived from a valid effect on native title is not unjust.
210 *Griffiths* at [87].
211 (2002) 125 FCR 89; [2002] FCAFC 371 at [153].

128. The Full Court's holding is fundamentally destructive of the core of the Applicant's case: this Court is bound to find, contrary to the Applicant's submissions,[212] that the right to negotiate accorded by Subdivision P is not in any sense part of the content or value of the Yindjibarndi People's native title rights and interests. Even if the Court were satisfied (which in the First Respondent's submission it cannot be) that the right to negotiate was somehow "*lost*"[213] or otherwise not fully accorded to the Applicant, that cannot be an "*effect*" on the Yindjibarndi People's native title rights and interests and, accordingly, is simply not applicable to the compensation inquiry required by Part 2, Division 5 NTA (which is directed by s.51(1) NTA to the effect of an act on the native title rights and interests).

129. The Applicant's error is demonstrated in its brief to its expert valuer, Mr Brian Miles. Mr Miles was not instructed to value the Yindjibarndi People's rights and interests in land. Instead he was asked: "*would a fair and reasonable method of valuing the Yindjibarndi People's economic loss be to assess compensation by reference to the royalties which miners in the Pilbara commonly agree to pay to native title parties, in return for their consent to mining on their traditional lands or waters*?"[214] In cross-examination, Mr Miles agreed that his report was not directed to valuing the native title rights and interests themselves[215] and that he had no prior experience in providing a valuation of native title rights and interests or in relation to native title compensation.[216] Similarly, the Applicant's mining economist, Mr Murray Meaton, was asked: "[i]*n the event that FMG had reached an agreement with the Yindjibarndi People… for the payment of royalties in accordance with any common or standard practice for such agreements in the Pilbara, what would the approximate value of the royalty component of that agreement be to the Yindjibarndi People in monetary terms?*"[217] Mr Meaton also agreed that he did not seek to value the Yindjibarndi People's native title rights and interests or consider the effect of the Compensable Acts on those rights and interests.[218] Mr Meaton undertook a similar analysis[219] in *Santos v Gomeroi*, where the Tribunal ultimately concluded that it "*is difficult to avoid the conclusion that the process adopted by Mr Meaton was not designed to produce a compensation figure which reflected the relevant impairment, including any compensation for cultural loss, as discussed in* [Griffiths]."[220]

D4.2.2 Economic loss to be determined by reference to, and capped at, freehold value

130. As discussed in Part D3.3 above, *Griffiths* is binding authority that, consistent with the parity principle underlying the NTA, the NTA provides: (a) the economic value of native title rights and interests is determined by reference to the objective economic value of an unencumbered freehold estate in that land[221] and s.51A NTA applies to cap the economic component at equivalent freehold value;[222] and (b) a percentage reduction from the freehold value of the land must be applied in the case of non-exclusive rights to represent the comparative limitations of the non-exclusive native title relative to exclusive native title.

131. Contrary to the ACS,[223] the plurality in *Griffiths* (at [86]) did not "*leave the door open for other approaches in other circumstances*" in a manner which would support the Applicant's "*negotiation or*

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212 See, for example: CB A.02.002 at [35]; CB A.02.007 at [92]-[100]; ACS [100]-[102] and [152]-[179].
213 See, for example, ACS [101(c)].
214 CB E.03.005 at 61.
215 CB ZA.07.023 at 1406(22-26).
216 Mr Miles is a real estate valuer whose experience lies in valuing rural properties. He agreed in cross examination that he had no experience in negotiating agreements between native title parties and mining companies: CB ZA.07.024 at 1410-1411.
217 CB E.03.002 at [2(b)].
218 CB ZA.07.022 at 1208-1209 and 1211-1212.
219 CB ZA.07.022 at 1291(19-41).
220 *Santos NSW Pty Ltd v Gomeroi* [2022] NNTTA 74 (**Santos v Gomeroi**) at [329]. See also [317]-[329] for a summary of the approach taken by Mr Meaton in that proceeding.
221 *Griffiths* at [3(1)] and [101].
222 *Griffiths* at [86].
223 ACS at [171].

exchange value" approach. Rather, the plurality was considering whether there were any circumstances in which it may be appropriate to not divide the compensation assessment into economic and non-economic components and instead undertake a "*holistic*" assessment. The qualifying "[t]*here may be exceptions*" reference in *Griffiths* at [86] was not a reference to exceptions to economic loss being determined by reference to a freehold estate, but a reference to exceptions to the bifurcated approach.[224] Further, and importantly, the plurality in *Griffiths* rejected the Northern Territory's approach to economic loss because it failed to value that economic loss in the required manner (i.e. by reference to freehold value). The Northern Territory's approach, relevantly, advanced a model of economic loss which included a "*usage value*" and a "*negotiation value*."[225] The plurality considered that the "*principal difficulty*" with that approach "*is that what it purports to value is not the economic value of the native title rights and interests in the subject land*."[226] In light of the above, this Court is bound to assess economic loss by reference to freehold value.

132. In any event, even if it could be said that the High Court's statement of the adapted *Spencer test* left open some other valuation methodology for economic loss, the Applicant's "*negotiation or exchange value*" approach, whilst adopting *Spencer*-like language, is a rejection of the *Spencer test* adapted by the High Court in *Griffiths* because it is not applied to ascertain the 'value to owner' of the native title rights and interests that were held when they were affected by the Compensable Acts. In particular, by asking the Court to assess compensation by reference to the sum a "*fair and reasonable*" *grantee party* or *government party* would have been prepared to pay to obtain the assent of the Yindjibarndi People to the Compensable Acts under Subdivision P (that sum being determined by the content of what other "*miners commonly agree to pay*" under "*comparable*" Subdivision P Agreements),[227] the Applicant fundamentally misapplies *Griffiths*.

133. The Applicant's approach also offends the 'value to owner' principle because it wrongly takes into account the value of the land (or, more correctly, its minerals) to the First Respondent and the FMG Respondents in a way that goes well beyond that allowed by *Griffiths*. Contrary to the 'value to owner' principle, the Applicant's approach fixes upon, rather than ignores, the benefit to the First Respondent and the FMG Respondents from the carrying out of the purpose for which the Compensable Acts were done. In other words, it is a 'benefit to the acquirer' rather than a 'value to owner' approach. For example, in the joint report prepared with Mr Jaski, Mr Meaton said: "*I disagree that the compensation payable should be the amount lost. I say it should be a fair payment for rights impaired as well as the value of the benefits obtained by the future act conducted on their country*."[228] Similarly in the joint report prepared with Mr Hall, Mr Meaton said "[t]*he rights should be part of the valuation but in addition the benefit of the loss to the other party*."[229]

134. The Applicant's incorrect approach (and its reliance upon a 'benefit to the acquirer') is perhaps most starkly demonstrated by the Applicant's contention that the compensation payable will vary depending on whether the FMG Respondents or the First Respondent is liable to pay compensation.[230] A *Griffiths*

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[224] The plurality (at [86]) also stated the Full Court were correct to reject the "*holistic*" approach as it would mean that, instead of a valuation in accordance with "*the established precepts for the valuation of interests in land*", "*the determination of the economic value of native title rights and interests would be largely dependent on idiosyncratic notions of what is fair and just.*"

[225] *Griffiths* at [88]. The Northern Territory's approach focussed on the amount the native title holders would have been prepared to pay to acquire similar rights and interests in a different, more remote and undeveloped location.

[226] *Griffiths* at [89].

[227] CB A.02.007 at [92]-[93] and CB A.02.002 at [46(a)-(aaa)]; see also ACS at [176] (being "*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 the mine… determined by reference to the many agreements between iron ore miners and native title parties in the Pilbara*.")

[228] CB E.05.001 at 6 (M13) (emphasis added). In Mr Meaton's view, compensation is not to be assessed according to the damages caused to, or the amount lost by, the Yindjibarndi People: CB ZA.07.022 at 1205(29-37).

[229] CB E.05.002 at 10 (M23) (emphasis added).

[230] See paragraph [124] above.

assessment of economic loss will give rise to the same quantum of compensation, regardless of the entity liable to pay that compensation, because it is based on the 'value to owner' principle and focusses on the loss suffered by the native title holder (which is independent of the identity of the compensator). However, by assessing compensation by reference to a percentage of the benefit received by either the First Respondent (s.38 MA Amount) or the FMG Respondents (Revenue Share Amount) from the minerals obtained pursuant to the Compensable Acts, the Applicant has entirely divorced the compensation assessment from the 'value to owner' principle or the loss suffered by it as a result of the Compensable Acts. It cannot be in accordance with ordinary compensatory principles for the quantum of economic loss, on the Applicant's case, to vary by a factor of over 6[231] (and in terms of over $3.8 billion[232]) depending solely upon the identity of the entity liable to pay that compensation.

135. Rather, the purpose of compensation is to put the Yindjibarndi People, "*so far as money can do*", in the same position in which they would have been if their native title rights and interests had not been affected by the Compensable Acts.[233] It is not a right to be put in the same position as if the Compensable Acts were done by way of a hypothetical agreement under Subdivision P, assessed by reference to the value of the minerals on the Compensable Acts to the First Respondent and/or the FMG Respondents.

136. In this respect it is illustrative to compare the outcome of the Applicant's approach with the outcome if the First Respondent had simply compulsorily acquired all of the native title rights and interests which existed in the area of land subject to the Compensable Acts (**Compensable Acts Area**). If the Yindjibarndi People's native title rights and interests had been wholly extinguished in this manner, the economic loss component of compensation for that extinguishment would have been payable in accordance with the principles enunciated in *Griffiths* i.e. by reference to, and capped at, the objective economic value of an unencumbered freehold estate in that land (with any necessary percentage reduction where the native title rights and interests were non-exclusive). Even assuming that Exclusive Native Title existed over the entirety of the Compensable Acts Area (which it does not),[234] the First Respondent submits that the maximum economic loss for a compulsory acquisition of all native title rights and interests in the Compensable Acts Area would have been capped by s.51A NTA at $800,873.[235]

137. Yet on the Applicant's case, if the FMG Respondents are liable for the Compensable Acts, the economic loss would be approximately 103,022%[236] of freehold value. If the First Respondent is liable the economic loss would be over 584,144%[237] of freehold value. That is before any reduction is made for the differences between exclusive and non-exclusive native title. It cannot be the case that the temporary suspension of inconsistent native title rights and interests over the Compensable Acts Area for so long as the Compensable Acts are in force should result in economic loss between 1,030 – 5,841 times greater than a total (and permanent) extinguishment by compulsory acquisition.

138. Further even if, which is denied, the Applicant were correct that the Yinjibarndi People "*have always possessed*" Exclusive Native Title,[238] it is not the case that they hold Exclusive Native Title over the

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231 This figure is equal to s.38 MA Amount divided by the Revenue Share Amount (as asserted by the Applicant). It is noted, however, that the Applicant has not led evidence to establish the s.38 MA Amount beyond 30 June 2023 (see Part D4.2.8 below) and that Mr Jaski gave a different Revenue Share Amount.

232 This figure is equal to s.38 MA Amount minus the Revenue Share amount.

233 *Griffiths* at [136].

234 See Part E2 below.

235 As assessed by Mr Preston at CB E.04.002 at 10 (Table). The First Respondent says that the unencumbered freehold value is not to be valued in accordance with the Applicant's second or third economic loss case: see Part D4.3 and D4.4 below.

236 [redacted]

237 This figure is equal to ((s.38 MA Amount + Heritage Amount + Psychological Amount)) / 800,873) x 100.

238 ACS at [78].

whole of the Compensable Acts Area.[239] The Applicant has failed to apply any percentage reduction in the case of those Compensable Acts done where Non-Exclusive Native Title exists (either in whole or in part) to represent the comparative limitations of the non-exclusive native title relative to exclusive native title. Accordingly, it is clear that the Applicant's "*negotiation or exchange value*" approach is entirely inconsistent with s.51A and *Griffiths* and should not be accepted.

D4.2.3 Compensation under Part 2, Division 5 NTA is not determined by the requirements of Subdivision P

139. A fundamental element of the Applicant's "*negotiation or exchange value*" approach is to equate the permission given by s.33(1) NTA for parties in the right to negotiate under Subdivision P to negotiate about payments based on profit, income or things produced, with the entitlement to compensation under Part 2, Division 5 NTA. In other words, the Applicant asserts, in effect, that as s.33(1) NTA allows negotiations with respect to those matters, compensation under Part 2, Division 5 NTA should be assessed on a similar basis.[240] This submission is interrelated with the Applicant's assertion that the loss suffered by it is the loss of the right to negotiate and/or the opportunity to enter into an agreement with another *grantee party* or *government party* under Subdivision P in terms which contain payments of the kind referred to in s.33(1) NTA.[241]

140. That is a misreading of the NTA. When viewed in a proper statutory context, the "*payments*" referred to in s.33(1) NTA are not synonymous with the "*compensation*" referred to in Part 2, Division 5 NTA. Rather, the right to negotiate provided in Subdivision P gives parties the opportunity to negotiate an agreement with respect to the doing of a *future act* on any terms they may choose (and without limits). However, the NTA does not confuse, or equate, the content of those agreements with the assessment of compensation under Part 2, Division 5 NTA. Mortimer CJ observed in *Gomeroi People v Santos:*

> *…the ability of native title holders, or registered claimants, to pursue payments as part of their statutory right to negotiate serves a different and wider purpose from the ability to seek compensation for the doing of certain acts under Division 2 of Part 5 of the NTA, although the two purposes are not mutually exclusive and there may be some overlap.*[242]

D4.2.3.1 Negotiation in good faith

141. For the purposes of Subdivision P, the substantive and operative issue is whether (and how) a proposed *future act* may be done (ss.28, 31 and 32 NTA). Relevantly, s.31(1)(b) requires the parties to "*negotiate in good faith with a view to obtaining the agreement*" of the *native title party* to the doing of the act. The obligation contained in s.31(1)(b) NTA is an obligation to "*negotiate in good faith*" only. There is no obligation on the parties to, in fact, reach an agreement and a lack of good faith cannot be inferred from a party referring the matter to the Tribunal in accordance with s.35(1) NTA in the absence of an agreement being reached.[243] Relatedly, whilst a party must approach negotiations with a willingness to compromise, they are under no obligation to capitulate, accept the other side's position or act contrary to their own interests in order to reach an agreement.[244] As summarised by the Tribunal in *Santos v*

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239 See A.02.015 at [176(b)], [188(b)], [204(b)], [208(b)], [218(b)], [226(b)], [238(b)], [246(b)], [250(b)], [254(b)], [258(b)], [262(b)], [266(b)], [270(b)], [274(b)], [278(b)], [290(b)], [294(b)], [298(b)], [302(b)], [306(b)], [310(b)], [314(b)], [318(b)] and [322(b)]. See also Agreed Map 2(c) at A.06.001.18.

240 CB A.02.007 at [92]; ACS [153],

241 CB A.02.007 at [92] and [100].

242 *Gomeroi People v Santos NSW Pty Ltd* [2024] FCAFC 26 (**Gomeroi v Santos**) at [112]. See also *Santos v Gomeroi* at [309], [352] and [431]. See also paragraphs [127] and [128] above.

243 *FMG Pilbara Pty Ltd v Cox* (2009) FCR 14; [2009] FCAFC 49 (**FMG v Cox**) at [19]; *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303; [1998] FCA 86 (**Strickland**) at 322; *Western Australia v Dimer* (2000) 163 FLR 426; [2000] NNTTA 290 at [117]; and *Western Australia v Daniel* (2002) 172 FLR 168; [2002] NNTTA 230 at [95].

244 *Western Australia v Taylor* (1996) 134 FLR 211; [1996] NNTTA 34 at 222-223; *Strickland* at 312; *Western Australia v Daniel* (2002) 172 FLR 168; [1996] NNTTA 34 at [40] and [138].

Gomeroi: "s *31(1) addresses a process, not an outcome. It may implicitly reflect a hope or expectation as to such outcome, but the section addresses the "quality" of the negotiation, with the desired outcome being agreement to the proposed grants.*"[245]

142. Further, the requirement to negotiate in good faith is not an open-ended obligation. Rather it is limited to negotiating in good faith about the effect of the proposed *future act* on the native title rights and interests.[246] Nonetheless, the NTA does not dictate or limit what the parties may voluntarily include in their discussions under s.31(1)(b) NTA.[247] Instead, the objective of those discussions is to have the *native title party* agree "*on one basis or another*" to their native title rights and interests being affected by the relevant *future act*.[248] As noted by the Full Court in *FMG v Cox,* the NTA "*does not dictate the content and manner of negotiations by compelling parties to negotiate in a particular way or over specified matters. Providing what was discussed and proposed was conducted in good faith and was with a view to obtaining agreement about the doing of the future act, then the requirement under s 31(1)(b) will be satisfied*."[249]

143. Accordingly, whilst compensation for the impairment of native title rights and interests is one matter about which the parties may negotiate under s.31(1)(b) NTA, they "*need not do so*" and not doing so will not necessarily mean that a party has failed to negotiate in good faith.[250] Conversely, any payments which may be negotiated in a Subdivision P Agreement are not required to be determined by reference to Part 2, Division 5 NTA or the *Griffiths* principles. Rather, parties are at liberty to agree any sum of money, however calculated, as the "*price*" to be paid to the *native title party* for their consent to the doing of the *future act*. Thus, Subdivision P Agreements often solely reflect extraneous commercial considerations with no attempt to link what has been lost by the *native title party* with what is being paid under the agreement.[251] In other words, "*the reckoning which takes place in future act negotiations is rarely about trying to achieve recompense*"[252] as that is commonly understood. For example, Mr Jaski gave evidence that in respect of the negotiation of agreements between mining companies and native title parties that he has been involved with, "*there was no attempt to look at the value of the rights and interests by either party*".[253] This was confirmed by Mr Meaton, who agreed in cross-examination that parties negotiating Subdivision P Agreements can agree whatever they wish to agree by reference to any matters they regard as relevant.[254]

144. However, whilst the NTA provides a platform for the parties to engage in broad ranging negotiations, and places no limit on the scope of what can be discussed, there is ultimately a distinction between, on the one hand, the freedom that the parties have to negotiate about anything of their choosing in order to try and reach agreement and, on the other, with what is required by the NTA to satisfy the obligation to negotiate in good faith. The statutory obligation to negotiate in good faith does not go beyond the doing of the proposed *future act* and its possible impact on the native title rights and interests (and matters

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245 *Santos v Gomeroi* at [377].
246 Section 31(2) NTA. See also, for example, *Cox obo PKKP People/Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd* (2008) 219 FLR 72; [2008] NNTTA 90 (**Cox v FMG**) at [48].
247 *Walley v Western Australia* (1999) 87 FCR 565; [1999] FCA 3 at [17]; *Williams v Minister for Land & Water Conservation (NSW)* (2003) 128 FCR 517; [2003] FCA 360 at [22].
248 *Strickland* at 319.
249 *FMG v Cox* at [38].
250 *Santos v Gomeroi* at [316]. See also *Gregory Wayne Down/Cyril Barnes obo Wongatha People/Western Australia* [2004] NNTTA 91 at [13]; *Griffin Coal Mining Co Pty Ltd v Nyungar People* (2005) 196 FLR 319; [2005] NNTTA 100 at [36]-[37].
251 See, for example, *Jax Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/Queensland* (2011) 260 FLR 99; [2011] NNTTA 46 at [48]-[54].
252 David Ritter, *The Native Title Market* (University of Western Australia Press, 2009) at 44.
253 CB ZA.07.023 at 1335(1-12).
254 CB ZA.07.022 at 1214(12-16); see also [redacted]

related to them as contained in s.39 NTA).[255] In other words, the NTA does not require, and a party will not necessarily have failed to negotiate in good faith if it does not agree to, a Subdivision P Agreement of the type relied upon by the Applicant in this proceeding. What must be remembered is that s.31(1)(b) NTA only gives a *native title party* the right to negotiate an agreement with a *grantee party* and *government party* in good faith. It does not give the *native title party* a right to an agreement, or an agreement of any particular kind (i.e. one containing certain types of payments). Even in circumstances where the same parties may previously have successfully negotiated a Subdivision P Agreement, there is no guarantee that they will do so again should the need arise.[256] In those circumstances, the content of such voluntary Subdivision P Agreements cannot rationally form any basis for the assessment of compensation under Part 2, Division 5 NTA.

D4.2.3.2 Section 33(1) NTA

145. It is not disputed that s.33(1) NTA identifies the "*possibility*" that profit sharing or royalty type payments "*may, if relevant,*" be included within the scope of negotiations for the purposes of s.31(1)(b). However, the fact that parties may voluntarily negotiate about such payments does not mean that any entitlement to compensation under Part 2, Division 5 NTA must be assessed on the same basis or with respect to the same considerations. Relevantly, s.33(1) NTA is limited in scope and does not impose any obligation upon the parties to take profit sharing or royalty type payments into account for the purposes of s.31(1)(b). Further, even if s.33(1) NTA profit sharing or royalty type payments are put forward by a *native title party*, the *grantee party* or the *government party* is not obliged to "*strike a deal*" involving such payments in order to have negotiated in good faith.[257] The obligation is merely "*to receive and consider fairly, dispassionately and proportionately any proposal from a native title party for a payment of the type outlined in s.33(1), but without an obligation to 'capitulate in order to reach agreement.* "[258]

146. Accordingly, the effect of s.33(1) NTA was summarised by the Tribunal as follows: "[i]*n short, s. 33(1) is not a mandatory provision that requires a grantee party to negotiate about profit or royalty type payments. Instead, it is designed to allow such a matter to be discussed voluntarily because it cannot be imposed involuntarily by the Tribunal*."[259] In the First Respondent's submission it is difficult to see how a non-mandatory opportunity to negotiate about (but not necessarily agree to) profit sharing or royalty type payments can form a mandatory basis for the assessment of compensation under Part 2, Division 5 NTA. Rather, as identified by Lee J in *Brownley v Western Australia*, payments of the kind described in s.33(1) "*may have a compensatory aspect but they may represent more than that*."[260]

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[255] Section 31(2) NTA; *Cox v FMG* at [48]; *Williams v Minister for Land & Water Conservation (NSW)* (2003) 128 FCR 517; [2003] FCA 360 at [22]; *Magnesium Resources Pty Ltd v Cox* (2010) 259 FLR 181; [2010] NNTTA 211 at [65]; *Minister for Mines /Kevin Peter Walley obo Ngoonooru Wadjari People* [1998] NNTTA 4. The obligation to negotiate in good faith does not extend to "*any demand or issue brought to the negotiation table by one of the negotiation parties, no matter how remote, tenuous or legally doubtful it may be*"*: Cox v FMG* at [48].

[256] For example, in 2008 Atlas Iron and the Nyamal People entered into a Subdivision P Agreement with respect to an iron ore project located in the Pilbara but were subsequently unable to reach agreement with respect to the expansion of Atlas's operations (which required the grant of additional mining tenements). The NNTT determined that Atlas Iron had negotiated in good faith (*Atlas Iron Pty Ltd v Nyamal Aboriginal Corporation* [2020] NNTTA 75) and that the tenements could be granted (*Atlas Iron Pty Ltd v Nyamal Aboriginal Corporation RNTBC* [2021] NNTTA 7). The NNTT also declined to impose (by way of condition) the terms of the 2008 agreement on the grant of the tenements.

[257] *Cox v FMG* at [40]-[41]. See also *Gregory Wayne Down/Cyril Barnes obo Wongatha People/ Western Australia* [2004] NNTTA 91 at [14]; *The Griffin Coal Mining Co Pty Ltd v Nyungar People* (2005) 196 FLR 319; [2005] NNTTA 100 at [43]-[46] and cases cited therein; *South Blackwater Coal Ltd/Queensland/Cliff Kina and Others obo Kangoulu People (QC98/25)/Lindsay Kemp obo Ghungalu People (QC99/16)* [2001] NNTTA 23 at [34]-[35]; *Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal #2)/Brendan Wyman & Ors (Bidjara People)/Queensland* [2012] NNTTA 93 at [206]-[219] and [227]-[230].

[258] *Cox v FMG* at [37] (see also cases cited therein at [33]-[37]).

[259] *Cox v FMG* at [36].

[260] *Brownley v Western Australia* (1999) 95 FCR 152; [1999] FCA 1139 (**Brownley v Western Australia**) at [50].

D4.2.3.3 Where a Subdivision P Agreement cannot be reached

147. Further, and contrary to the Applicant's "*negotiation or exchange value*" approach, it is not possible to consider s.33(1) NTA (and the ability for parties to negotiate profit sharing or royalty type payments) in isolation from the remainder of Subdivision P. Rather, the scope of s.33(1) NTA must also be understood in the context of what happens if negotiations are unsuccessful and an application is made to the Tribunal for a determination under s.35 NTA. In those circumstances s.38(2) NTA specifically prohibits the Tribunal from making a determination which contains a condition requiring payments of the type outlined in s.33(1) NTA. Thus, the Court has recognised that profit sharing or royalty type payments are "*matters to be dealt with by an accord reached by the parties in negotiation, or not at all*."[261]

148. To the extent that the Tribunal may make a determination under s.38 NTA imposing conditions which require a specified amount of money to be secured by a bank guarantee (s.41(3) NTA) or to be paid and held in trust (s.41(5) NTA) until dealt with in accordance with ss.52 or 52A NTA, it has generally been considered that it is appropriate to have regard to the criteria that would be applied by the Federal Court under Part 2, Division 5 NTA when imposing those conditions:

> *Not to do so would mean the Tribunal making an assessment of… compensation without any guidance. It would also mean that native title holders could receive different amounts of compensation depending on whether the compensation was for a past act, a future act to which [the right to negotiate does not apply] or a future act to which the right to negotiate applies… It would be incongruous for native title parties to be able, in the case of a future act to which the right to negotiate applies, to have access to compensation which may exceed just terms purely on the basis that the act was subject to the right to negotiate*.[262] (emphasis added)

Consistent with this approach, the Tribunal has rejected conditions requiring payments based on the market capitalisation of the *grantee party*, expenditure on mining operations or amounts that the parties may have agreed previously on the basis that such payments bear no relationship to the criteria which would be used by the Federal Court in a final determination of compensation under Part 2, Division 5 NTA.[263]

149. In light of the above, two propositions are clear. First, the assessment of compensation for acts to which the right to negotiate applies is, unless an agreement of the kind described in s.31(1)(b) NTA provides otherwise, left to the Federal Court to apply the principles and criteria contained in Part 2, Division 5 NTA upon the lodgement of a compensation application.[264] To the extent that the Tribunal may consider imposing a condition requiring a bank guarantee or amount held on trust, that assessment is to be grounded in the principles and criteria of Part 2, Division 5 NTA that the Federal Court would ultimately apply. Second, and relatedly, the purpose of s.33(1) NTA is, therefore, not to determine the manner in which compensation should be assessed under Part 2, Division 5 NTA. As recognised by Lee J in *Brownley v Western Australia*, a matter on which a *native title party* is entitled to negotiate under s.33(1) NTA "*is not to be confused*" with the entitlement to compensation for the act pursuant to Part 2, Division 5 NTA.[265]At best it may be described as a tool to incentivise negotiated outcomes in that it allows the parties to agree certain types of payments that cannot: (a) be ordered by the Tribunal in arbitration;

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261 *Brownley v Western Australia* at [52].

262 *Western Australia v Strickland* [1998] NNTTA 2 at [39]. See also *Western Australia v Thomas* (1999) 164 FLR 120; [1999] NNTTA 99 where the Tribunal stated that "[i]*f the Tribunal decides to assess the amount in trust it is reasonable as a matter of practice to do this by reference to the loss, diminution, impairment or other effect on native title rights and interests and the criteria in s 123 of the Mining Act as these are criteria that would ultimately be used in determining the amount of compensation*": at [278]. See also, *Anaconda Nickel Ltd v Western Australia* (2000) 165 FLR 116; [2000] NNTTA 366 (**Anaconda Nickel**) at [212].

263 *Anaconda Nickel* at [212]; *Western Australia v Evans* (1999) 165 FLR 354; [1999] NNTTA 231 at [36]; *Australian Manganese Pty Ltd v State of Western Australia* (2008) 218 FLR 387; [2008] NNTTA 38 at [66]-[67].

264 Section 48 NTA. See also *Anaconda Nickel* at [215]. See also *Cheedy v Western Australia* (2011) 194 FCR 562; [2011] FCAFC 100 (**Cheedy v Western Australia**) at [182].

265 *Brownley v Western Australia* at [53].

and/or (b) form the basis of a determination of compensation by the Federal Court under Part 2, Division 5 NTA.[266] In those circumstances is it is clear that the NTA does not conflate, confuse or equate payments that might be the subject of a commercially negotiated Subdivision P Agreement with the assessment of compensation under Part 2, Division 5 NTA.[267]

D4.2.3.4 Applicant did not "lose" the right to negotiate (with the FMG Respondents or another miner)

150. In light of the above, it is clear that the loss suffered by the Applicant in respect of the Compensable Acts was not a loss of the right to negotiate in respect of those acts. In particular, in respect of the Compensable Acts to which the right to negotiate applied (see paragraph [197] below), it is not in dispute that both the FMG Respondents and the First Respondent negotiated in good faith with the Yindjibarndi People and that all necessary procedures contained in Subdivision P were complied with prior to the doing of the Compensable Acts, such that those acts were valid *future acts*.[268] Whilst an agreement in the terms sought by the Applicant may have been the Applicant's desired outcome, a right to an agreement (or an agreement containing payments of a particular kind) was not the right given to Applicant by the NTA. The distinction between the right to negotiate an agreement and the right to an agreement is conveniently overlooked by the Applicant. Even if, which is denied, the NTA compensated for the loss of an opportunity to negotiate an agreement under Subdivision P, this was not a loss suffered by the Applicant. The Applicant did have the opportunity to negotiate an agreement with respect to those Compensable Acts to which the right to negotiate applied. The fact that no agreement was reached does not mean that Court can conclude, as a matter of fact, that the Applicant was deprived of the opportunity to negotiate. Where it applied, that opportunity was fully accorded and discharged in this case.

151. Nor has the Applicant lost the right to negotiate (and/or enter into an agreement) with another miner over the Compensable Acts Area on terms which it considers are "*common or standard*" in the Pilbara.[269] This contention seems to suggest some sort of "*market*" in which various miners, including FMG, and native title parties, including the Yindjibarndi People, are participating. The Applicant seems to implicitly assert that it had the ability to give consent to another miner carrying out activities on the Compensable Acts Area, which ability was lost with the doing of the Compensable Acts.[270] In the First Respondent's submission this is a gross misreading of both the MA and the NTA with respect to the grant of mining tenements. The Applicant had no ability, or right, to negotiate with any person other than the FMG Respondents with respect to the Compensable Acts or the Compensable Acts Area.

152. Relevantly, the MA provides a strict priority regime in respect of tenements applied for over the same area.[271] The result of these MA provisions is that there can only ever be one miner with whom a *native title party* could negotiate an agreement at any particular time. Further, given the priority regime for tenements under the MA, there can only ever be one s.29 NTA notice for the grant of a mining tenement over a particular area.[272] In any event, the requirements of s.31(1)(b) NTA are not to be equated with a

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266 For example, in *Cheedy v Western Australia* (at [182]) the Full Court noted (without exploring or deciding the issue) that, given s.38(2) NTA, s.33(1) NTA may have been intended to provide some incentive to a negotiated outcome.
267 This was also the view of Mr Hall (CB ZA.07.021 at 1177(17-22)).
268 CB A.02.015 at [177(d)], [181(d)], [185(d)], [189(f)(i)], [197(c)], [201(c)], [205(d)], [210(c)], [295(f)(i)] and [299(f)(i)].
269 *Cf* CB A.02.007 at [100]; ACS at [101(h)] and [176].
270 See also the Applicant's cross-examination of Mr Hall at CB ZA.07.021 at 1173-1174.
271 Under the MA there can only ever be: (a) one application for a mining tenement over a particular area under consideration for grant (and that application cannot include the area of an existing mining tenement); and (b) one mining tenement granted over a particular area: see ss.18, 23, 27 and 105A MA. It is noted that miscellaneous licences are an exception (in that s.91(7) MA allows a miscellaneous licence to be granted over the same area as another tenement). Further, if an exploration licence or prospecting licence has been granted, the holder of that tenement has the first right to apply for, and receive, a mining lease: ss.49 and 67 MA.
272 The practice of the First Respondent is that a s.29 NTA notice should not be issued until the application for the mining tenement is otherwise compliant with the MA (i.e. such that, subject to satisfaction of the processes required by the NTA, the application could otherwise proceed to grant under the MA): CB E.01.007 at [9]-[10].

marketplace in which the Applicant can negotiate and reach an agreement with another miner to carry out the *future act* the subject of the s.29 NTA notice. Rather, the s.29 NTA notice is directed at a specific *future act* and, in the case of a mining tenement, with a specific *grantee party* (being the person at whose request, or upon whose application, the *future act* is to be done). It is that *grantee party* who has the obligation to negotiate in good faith with the *native title party* under s.31(1)(b) NTA.[273]

153. Even if, which is denied, the Applicant had the ability to negotiate with some other *grantee party* in respect of the land the subject of the Compensable Acts, there is no basis upon which the Court can conclude that, had such negotiations occurred, they would have resulted in a Subdivision P Agreement with the Applicant. For example, during the course of the right to negotiate for Compensable Acts M 47/1409-I, M 47/1411-I and M 47/1413-I the Applicant was seeking a Revenue Share from the FMG Respondents of between 2.5% – 5%[274] (a figure which is between [redacted] times greater than that which is now claimed by the Applicant to be the 'industry standard' in the region). [redacted] Accordingly, there is no basis to assume that any "*reasonable miner… acting fairly and justly would have been prepared to pay the Yindjibarndi People*"[276] the amounts that the Applicant had been seeking from the FMG Respondents for their agreement to the Compensable Acts. In other words, in light of the Applicant's negotiation position, it cannot be assumed that an agreement would have been reached had only the identity of the *grantee party* or *government party* changed.

154. Further, or in any event, there is no evidence in this proceeding that there were, in fact, any other miners interested in obtaining a mining lease in the Compensable Acts Area such that there could have been a 'market' for mining tenements in which those miners and the Yindjibarndi People were participating. Rather, whilst Hamersley Iron / Rio Tinto entities, Hancock Prospecting and some other smaller miners held a number of exploration licences in and around the Compensable Acts Area from as early as 1982, none of those miners exercised the rights they had under s.49 MA to be granted a mining lease in the area of their exploration licences.[277] In other words, by the time of the doing of the Compensable Acts, the only interested miners in the Compensable Acts Area were the FMG Respondents.

D4.2.4 Subdivision P Agreements are not the appropriate comparator

155. As discussed in Part D4.2.2 above, *Griffiths* is binding authority on this Court that economic loss is to be determined by reference to freehold value. In any event, the First Respondent submits freehold is a more appropriate comparator for the assessment of compensation under Part 2, Division 5 NTA than a hypothetical Subdivision P Agreement.

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273 As summarised by the Tribunal in *Santos v Gomeroi* at [289]-[290]: "*Santos cannot acquire the proposed grants by getting somebody other than the Gomeroi applicant to give the relevant agreement. Nor may the Gomeroi applicant provide its agreement to anybody other than Santos...Only Santos has been authorized by the State to negotiate with the Gomeroi applicant. The Gomeroi applicant cannot meaningfully agree to allow any other party to perform the relevant extraction activities on its land*."

274 CB A.02.15 at [43] and [45]. See also *FMG Pilbara Pty Ltd/ Ned Cheedy (obo Yindjibarndi) Western Australia*, [2009] NNTTA 38 at [19], [44], [49] and [68(j)].

275 [redacted]

276 CB A.02.002 at [46(a)].

277 CB E.01.002 (Annexure XPM4) Workspace (see, in particular, "*Mining_Grant_19750111_19931231*" browser and the "*Mining_Grant_ 19940101_20230123*" browser). In this regard, Dr Nelson also noted that "[t]*he Yindjibarndi interviewees shared that the tenements that FMG were presently controlling in the Solomon Hub were originally owned by Rio Tinto but only as exploration licences*": see CB E.03.003 at [28].

156. A freehold comparator provides a reliable, straightforward and orthodox methodology for valuation which is routinely undertaken and based on publicly available information.[278] It is, for example, routine for valuers to determine the market value of a bespoke interest in land subject to restrictions by applying a discount to the freehold value of the land.[279] At all levels in *Griffiths,* freehold was treated as the appropriate starting point from which reductions could be made. For example, Mansfield J considered that "*having regard to the express purposes of the NTA, and the recognition of the Aboriginal peoples as the original inhabitants of Australia, it would be erroneous to treat the nature of their original interests in land* [i.e. exclusive native title] *as other than the equivalent of freehold and the economic value of those interests as other than the equivalent of freehold interests*."[280] Similarly, the Full Court considered that "*the starting point is an analogy of freehold with exclusive native title. Then the value of non-exclusive native title can be derived by adjusting freehold value to account for the restrictions and limitations applicable to non-exclusive native title rights*."[281] The plurality in the High Court agreed.[282]

157. By contrast, Subdivision P Agreements are not appropriate comparators for the assessment of compensation under Part 2, Division 5 NTA, including because those agreements do not provide for "*common or industry standards for the payment of financial benefits*" to native title parties.[283] If Subdivision P Agreements are to be the comparator, the Applicant must establish (and not merely assert) that: (a) there is sufficient similarity between Subdivision P Agreements such that, together, they provide a consistent or standard comparator that can be utilised in a compensation assessment; and (b) there is sufficient similarity between the benefits obtained from, and the consideration given by, the doing of the Compensable Acts and the purported "*common*" or "*standard*" Subdivision P Agreement that "*like for like*" is being compared. The Applicant has not demonstrated this. Further, as discussed in Parts D4.2.4.4 and D4.2.5 below there are also pragmatic reasons for not adopting Subdivision P Agreements as the appropriate comparator (including their confidentiality).

D4.2.4.1 No "comparability" demonstrated.

158. In *Santos v Gomeroi*, the Gomeroi applicant asserted that Santos had failed to negotiate in good faith under Subdivision P because it had offered compensation that was said to be below the "*market rate for comparable projects*".[284] However, the Tribunal considered that the experts for the Gomeroi applicant (Mr Meaton and Mr Ho) had failed to provide any evidence that the "*comparable*" projects were, in fact, comparable to the Santos project in terms of their size, economic viability, life expectancy, resource output or applicable legislative regime. Similarly, no attempt had been made to compare the impairment of native title rights and interests occasioned by the "*comparable projects*" with that which may be attributable to the Santos project. Absent such evidence of comparability, the Tribunal considered that the sample of agreements utilised by the experts could not be used to assess whether any offer made was "*fair*" or should have been accepted. Nor could those agreements have any relevance to the question of whether Santos had negotiated in good faith.[285]

159. Similarly to the Gomeroi applicant, the Applicant in this proceeding has also failed to establish the "*comparability*" of the Compensable Acts with relevant Subdivision P Agreements, save that they are

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278 See, for example, CB E.04.002. Mr Preston relies on sales information contained in pastoral lease transfer documents publicly available from the Western Australian Land Information Authority (Landgate).
279 See, for example, *Hornsby Shire Council v Roads Traffic Authority of New South Wales* (1998) 100 LGERA 105.
280 *Griffiths (No.3)* at [214].
281 *Griffiths (FC)* at [134].
282 *Griffiths* at [67], [70] and [74].
283 *Cf* ACS at [176].
284 *Santos v Gomeroi* at [227] and [298].
285 *Santos v Gomeroi* at [278], [318], [388]-[390] and [448]-[449].

all said to involve the mining of iron ore in the Pilbara. For example, the Applicant's approach does not attempt to compare the extent of any impairment of the Yindjibarndi People's native title rights and interests with the extent of any impairment caused by various "*comparable*" projects and Subdivision P Agreements it seeks to rely upon.[286] In some respects this is explicable in that, as discussed at Part D4.2.3.1 above, Subdivision P Agreements reflect extraneous commercial considerations with no attempt to link what has been lost by the *native title party* with what is being paid under the agreement.

160. This was reflected in Mr Hall's evidence, when he observed that mining companies and native title parties are not negotiating about native title rights; rather "[i]*t's a negotiation to shorten the process and enable mining earlier. So they're willing to give royalties as part of a negotiation because they get benefits out of that negotiation.*"[287] Further, Mr Hall suggested that it makes no difference to the negotiations as to whether the native title claim group holds exclusive or non-exclusive rights:

> *So the amount that they* [the miner] *will pay to avoid delay is based on the mining value and the value of their mining rights. They don't care whether the land is worth 100,000 or 200,000 when the mining rights are worth millions or billions. So the royalty rate that they are willing to pay, the benefit that they get from avoiding delays, depends on the mining project … not the nature of the native title rights.*[288]

Similarly, Mr Jaski observed during his concurrent evidence session with Mr Meaton:

> *… the royalty comparators that Mr Meaton uses are not comparators that involve the bargain or the negotiation of native title rights and interests; they are a bargain between mining companies and native title holders which combine a whole myriad of rights and obligations and assets and liabilities, some of which have nothing to do with native title holders, rights or interests. For example, the cost of project delay to a mining company in seeking to get agreement.*[289]

161. Nor has the Applicant sought to establish the particular circumstances in which each of the so called "*comparable*" Subdivision P Agreements was entered into to demonstrate comparability with the Compensable Acts. Factors such as the size of the project, its economic viability, life expectancy, resource output and timing pressures may all affect the content of the Subdivision P Agreement and its benefits. As commentators have observed:

> *The bottom line with the resource interest is profitability and no rational corporation will negotiate an agreement that goes beyond what is regarded as an acceptable margin ... How payments are structured and determined will also depend on the nature of the project and the mineral being extracted. Mines differ vastly in size and scale, individual ore bodies have distinctive characteristics and particular minerals contrast widely in terms of value. All of these variables will affect the quantum and the structure of the payments at the heart of any future act agreement.*[290]

Similarly, in this proceeding, Mr Hall gave evidence that mining companies "*have a strong incentive to strike a deal and make an agreement with the native title holders in order to be able to start mining earlier and... have good relationships with the community and avoid other delays… there are very significant benefits to the miners relating to the value of their mining rights and their mining operations that encourage them to make those deals.*"[291]

162. Mr Hall's observations were echoed by both Mr Miles and Mr Meaton. Mr Miles agreed in cross-examination that agreements are entered into for any number of reasons, including the miner's desire to

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[286] In cross-examination, Mr Miles agreed that in his consideration of 'comparable' agreements, he had not focussed on the nature of the native title rights impacted: CB ZA.07.023 at 1389(16-27). Mr Meaton was, for example, under the mistaken belief that the Yindjibarndi Determination is the only determination in the Pilbara in which exclusive possession rights have been recognised (see paragraph [172] below).
[287] CB ZA.07.021 at 1164(24-27).
[288] CB ZA.07.021 at 1168(37-43).
[289] CB ZA.07.023 at 1326(18-23).
[290] David Ritter, *The Native Title Market* (University of Western Australia Press, 2009) at 50.
[291] CB ZA.07.021 at 1164(17-21). See also the evidence of Mr Jaski: CB ZA.07.023 at 1334(35-45).

expeditiously progress a mining project, create goodwill in the community, or maintain a positive public relations profile.[292] Mr Meaton gave evidence that there is "*considerable pressure on the* [mining] *companies to reach agreement, because that is the most expeditious way in which they can bring their project into development.*"[293] [redacted]

D4.2.4.2 Benefits under a Subdivision P Agreements are not, in fact, consistent

163. Given the variability and differing circumstances in which Subdivision P Agreements are entered into it is not surprising that, as discussed below, there is not in fact a standard or consistent benefit provided under the Subdivision P Agreements which the Court can use to assess compensation for the Compensable Acts in this proceeding. Indeed, the Applicant's experts both proposed different Revenue Shares, being 0.5%, 0.55% and 1%.[296]

Evidence of Mr Meaton

164. Mr Meaton was briefed, *inter alia*, to provide his opinion as to what it would be "*reasonable to expect*" in a Subdivision P Agreement, had one been reached between the FMG Respondents and the Applicant.[297] In particular, Mr Meaton was asked by the Applicant to provide his opinion as to "*the approximate value of the royalty component*" of any such agreement "*in accordance with any common or standard practice for such agreements in the Pilbara.*"[298] In addressing this question, Mr Meaton selected 38 agreements negotiated between native title parties and mining companies in the Pilbara region between 2006 and 2020 under the right to negotiate contained in Subdivision P. These agreements were all said by Mr Meaton to relate to iron ore or manganese mining and involved land subject to a registered native title claim or a determination of non-exclusive native title only.[299] Underpinning this analysis was a spreadsheet in which Mr Meaton had recorded the purported Revenue Share[300] of those agreements.[301]

165. On the basis of that spreadsheet Mr Meaton calculated the average Revenue Share to be 0.55%,[302] but noted that "*the most common rate by far*" was 0.5%.[303] Mr Meaton's ultimate opinion was that, based on the 38 mining projects he had reviewed, a Revenue Share of 1.0% was an appropriate measure of compensation for the Compensable Acts within the Exclusive Area and that a Revenue Share of 0.5% was an appropriate measure of compensation for the Compensable Acts within the **Non-Exclusive**

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292 CB ZA.07.021 at 1175(1-32); CB ZA.07.023 at 1385-1386 and 1389-1390.
293 CB ZA.07.021 at 1160(41-43).
294 [redacted]
295 [redacted]
296 See paragraphs [165] and [180] below.
297 CB E.03.002 at [28].
298 CB E.03.002 at [2(b)].
299 CB E.03.002 at Appendix C (p.23).
300 Referred to by Mr Meaton variously as the "*royalty rate*", percentage of "*FOB sale revenue*" or the "*FOB rate*".
301 See [redacted]
302 CB E.03.002 at [33]. See also [redacted]
303 CB E.03.002 at [33]. It appears, therefore, that Mr Meaton has adopted the mode of his dataset (as opposed to the average or mean) as the basis for his opinion, although why Mr Meaton adopted a 0.5% Revenue Share instead of a 0.55% Revenue Share is not explained.

Area.[304] In Mr Meaton's view these amounts would include compensation for both economic loss and cultural loss.[305]

166. In the First Respondent's submission, Mr Meaton's opinions are only as good as the data on which he relies, namely the spreadsheet and the supporting documents used to produce the spreadsheet.[306] [redacted] Logically, any errors in the spreadsheet inputs must also necessarily affect the validity of Mr Meaton's ultimate opinion as to the common or standard benefits provided in a Subdivision P Agreement. Whilst Mr Meaton gave his evidence frankly, it is clear, with respect, that the various calculations and assumptions that he made to arrive at the common or standard benefits under a Subdivision P Agreement were methodologically flawed, in error or, at the very least, had no supporting basis. [redacted]

167. [redacted] Mr Meaton acknowledged that whilst parties may start with a particular negotiating position, that starting position is not a "*benchmark*" and what is ultimately agreed depends upon factors such as the parties, the project and other issues raised in the negotiation.[313] In other words, where the negotiations started may not be where they end up such that Mr Meaton's expected outcome cannot be equated with the actual (but unknown) outcome.

168. [redacted]

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304 Being that part of the Determination Area subject to Non-Exclusive Native Title (i.e. areas other than the Exclusive Area).
305 CB E.03.002 at [35] and Appendix C at p.24; CB E.05.001 at 15 (M42-43); CB E.05.002 at 9 (M19) and 18 (M35-36); CB ZA.07.022 at 1205(8-18).
306 Mr Meaton's company, Economics Consulting Service, was subpoenaed to produce all documents from which he had derived the financial details of the 44 iron ore projects as mentioned in paragraph [29] of his report (CB E.03.002).
307 [redacted]
308 [redacted]
309 [redacted]
310 [redacted]
311 [redacted]
312 [redacted]
313 CB ZA.07.021 at 1184(10-36).

[redacted]

169. [redacted]

170. However, in circumstances where the Applicant's case is that compensation is to be assessed in accordance with terms of the alleged standard or common Subdivision P Agreement, the onus is upon the Applicant to establish that relevant Subdivision P Agreements contain both: (a) a common benefit model; and (b) a common or standard rate utilised under that benefit model. Mr Meaton, having focussed primarily on the second element, has overlooked the first element and/or has conflated the two elements by attempting to convert one model into another. [redacted]

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314 [redacted]

315 [redacted]

316 [redacted]

317 [redacted]

318 [redacted]

319 [redacted]

[redacted]

171. Further, Mr Meaton also accepted that Subdivision P Agreements provide for a mix of benefits including cash payments, employment, training and business development assistance, and that the amount of the agreed Revenue Share may depend on the other benefits that are to be given and the particular circumstances of the particular mining project.[320] [redacted]

172. Despite calculating the average Revenue Share to be 0.55%, Mr Meaton considered a Revenue Share of 1% to be appropriate in this case on the basis that the Yindjibarndi people held exclusive native title rights (whereas Mr Meaton (wrongly) believed that the traditional owners in all of the other transactions recorded in his spreadsheet held non-exclusive native title).[322] [redacted]

173. Further, to the extent that any of the negotiations considered by Mr Meaton took place prior to a determination of native title, the NTA provides that, for the purpose of Subdivision P, the *native title party's registered native title rights and interests* are to be accepted as if they were determined. Accordingly, where the Register of Native Title Claims records that a *native title party's* claimed rights and interests include a right of exclusive possession, that right is presumed to exist for the purpose of the right to negotiate (unless or until a determination of native title provides otherwise).[326] Therefore, in the case of negotiations with a non-determined native title claimant under Subdivision P, to the extent that the content of the native title rights and interests is relevant to those negotiations, the parties are required to have operated on the basis that those rights included a right of exclusive possession if such a right was claimed.[327]

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320 CB ZA.07.021 at 1182(14-38) and 1183(42-46).

321 [redacted]

322 CB ZA.07.021 at 1161(12-19); CB E.03.002 at Appendix C (p.23).

323 [redacted]

324 [redacted]

325 [redacted]

326 Sections 30(3), 31(1)(b), 31(2), and 39(1) NTA. "*The intention of the Act was to place registered claimants and determined holders of native title on the same footing for the purposes of the right to negotiate once the claim was registered … The registered native tile rights are to be accepted as if they were determined for the purposes of the right to negotiate*": *Mt Gingee Munjie Resources Pty Ltd* (2003) 182 FLR 375; [2003] NNTTA 125 at [53].

327 [redacted]

174. In any event, it is not clear on what basis Mr Meaton has increased the Revenue Share to take into account exclusive native title rights and interests when, as discussed at paragraphs [159] – [162] above, the evidence is that parties to a Subdivision P Agreement are not negotiating about the effect on, or content of, the relevant native title rights and interests. In other words, the evidence establishes that whether the native title rights or interests are exclusive or non-exclusive makes no difference to the content of the Subdivision P Agreement. Mr Meaton also appears to have overlooked that, at the time the FMG Respondents were negotiating with the Applicant under Subdivision P in respect of most of the Compensable Acts to which the right to negotiate applied, the Applicant did not have a determination of Exclusive Native Title. If the Revenue Share is to be uplifted to 1% only in the case of determined exclusive possession the Applicant would not have been entitled to such an uplift at the time those Compensable Acts were in the right to negotiate process.

175. Even if, which is denied, the Yindjibarndi People held Exclusive Rights as at the date of all of the Compensable Acts, Mr Meaton has failed to take into account that they do not hold Exclusive Rights over all of the Compensable Acts Area,[328] such that Mr Meaton's calculations were required to apportion between those Compensable Acts subject to a 0.5% Revenue Share and those subject to a 1% Revenue Share. It is noted that, in any event, there is no evidence before the Court as to the amount payable under a 0.5% Revenue Share.[329]

176. If the Court considers that some weight could be given to Mr Meaton's calculations with respect to the Revenue Share, when determining whether there is a standard or consistent benefit provided under Subdivision P Agreements, it is necessary to not only consider the Subdivision P Agreements relied upon by Mr Meaton but also the contents of those Subdivision P Agreements which Mr Meaton did not consider. For example, in *Santos v Gomeroi*, the Tribunal had concerns regarding the sample of agreements used by the experts to determine the amount typically paid to native title parties, in that they were limited to the agreements that the relevant expert had personal knowledge of and were, accordingly, not a true "*market sample*" (but rather were only a sample of agreements which the relevant expert had worked upon).[330] Further, the sample used by the experts also failed to take into account the agreements Santos had entered into (which did not contain the production levy sought by the Gomeroi applicant) and that if those agreements had been taken into account they would likely have significantly changed the results of the comparison.[331] Given that Santos was a major Australian gas producer who had recently entered into native title agreements, the Tribunal considered that those agreements could not be treated as outliers or ignored for the purpose of determining the amount typically paid to native title parties.[332]

177. As with Santos, the FMG Respondents are major iron ore producers in the Pilbara such that the content of their agreements must, necessarily, be considered when determining if there is a standard or consistent benefit provided under Subdivision P Agreements. [redacted]

328 See, for example, paragraph [391(b)-(c)]below.
329 Mr Meaton and Mr Jaski only calculated the Revenue Share amount based on a 0.55% and a 1% Revenue Share: see Murray Meaton and Campbell Jaski, "*Joint Report Royalty Calculation*" dated 26 September 2024 and filed on 1 October 2024 (redacted version at CB G.01.001) (**Meaton Jaski Report**) at 6. It is not clear why the 0.55% was chosen for this report as it is contrary to Mr Meaton's ultimate conclusion that the Revenue Share should be 0.5% (non-exclusive) and 1% (exclusive).
330 *Santos v Gomeroi* at [420]-[424].
331 *Santos v Gomeroi* at [424]-[428].
332 *Santos v Gomeroi* at [424] and [441].
333 [redacted]

[redacted]

178. In the First Respondent's respectful submission, Mr Meaton's opinions as to the existence and content of a standard or common Subdivision P Agreement in the Pilbara (and what the Yindjibarndi People could have expected to obtain under one) are wholly unreliable. While Mr Meaton was only cross-examined on approximately one third of the agreements / documents underlying his spreadsheet, the data he derived from that third was shown to be either plainly incorrect or otherwise entirely unfit for the purposes of his calculations. Accordingly, Mr Meaton's spreadsheet, and his opinion based on it, cannot carry any weight.

179. Fundamentally, whilst a particular miner at a particular point in time may pay a certain type of benefit at a certain rate in respect of the Subdivision P Agreements it enters into,[338] that does not mean that there is, in fact, a standard, consistent or predetermined benefit model (or rate under that benefit model) that a *native title party* could expect to obtain when negotiating a Subdivision P Agreement. Rather, the Subdivision P Agreements considered by Mr Meaton demonstrate that a Revenue Share is not given in all instances and, where given, the rate varies depending upon the particular characteristics of the negotiations and the negotiating parties. Mr Meaton ultimately acknowledged that historically the Revenue Share has not been uniform and that there was, in fact, *"no single number"* or set benchmark.[339] In other words, a *native title party* cannot be guaranteed any particular type of Subdivision P Agreement, benefit or rate when commencing (or finalising) negotiations with a *grantee party* under the right to negotiate, even if an agreement is reached at all.

Evidence of Mr Miles

180. Mr Miles was briefed, *inter alia*, to provide his opinion as to the "*reasonable and appropriate*" method(s) for assessing the economic loss component of the compensation arising from the Compensable Acts.[340] In particular, Mr Miles was asked whether: "*would a fair and reasonable method of valuing the Yindjibarndi People's economic loss be to assess compensation by reference to the royalties which miners in the Pilbara commonly agree to pay to native title parties, in return for their consent to mining on their traditional lands or waters*?"[341] Mr Miles was of the opinion that "*as a valuer… the most appropriate method of valuation for compensation is using an assessed royalty percentage* [i.e. a Revenue Share] *applied to the net value of annual iron ore production based on similar compensation agreements with Aboriginal Groups having similar exclusive native title rights.*"[342] Mr Miles' evidence was that a Revenue Share rate of 0.55% was an appropriate measure of compensation for the Compensable Acts.[343]

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334 [redacted]
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338 See for example, those agreements cited in ACS at [224].
339 CB ZA.07.021 at 1184(1-8).
340 CB E.03.005 Annexure 1 at [25(a)].
341 CB E.03.005 Annexure 1 at [25(b)].
342 CB E.03.005 at [44].
343 CB E.03.005 at [38], [91(3)] and [92(2)].

181. Central to Mr Miles forming his opinion that a Revenue Share was an appropriate valuation method was his incorrect assumption that the Yindjibarndi People have rights to minerals.[344] Whilst ultimately accepting that this was an incorrect assumption to make,[345] Mr Miles refused to agree that it affected the opinions he expressed in his expert report in relation to the correct valuation methodology to be adopted.[346] When pressed as to why that was, Mr Miles was unable to offer a coherent explanation.[347] He ultimately appeared to express the view that his approach could still be justified on the basis that the Yindjibarndi People had a *potential* right to exploit the minerals (either on the basis that they could have applied for a mining lease themselves[348] [redacted]). In the First Respondent's submission, neither of these reasons provides a justification for a departure from the standard valuation methodology expressed in *Griffiths*.

182. Further, or in any event, Mr Miles also failed to establish that his suggested Revenue Share of 0.55% was, in fact, an appropriate "*benchmark*" rate. In support of his opinion about the benchmark royalty rate, Mr Miles cited a Business News article.[350] In cross-examination, Mr Miles asserted that was not the only piece of information he was relying on, but acknowledged he had not referred to other agreements in his report,[351] and that as a qualified valuer he could not rely on a Business News article to identify an applicable royalty rate.[352] Mr Miles accepted that his report did not disclose any process of reasoning about why this was a benchmark, and conceded that the word "*benchmark*" was probably not appropriate.[353]

183. Mr Miles also listed six mining projects under the heading "*Royalty Evidence*" in his expert report, and in relation to each identified a royalty or compensation amount.[354] However, in cross-examination, he acknowledged he had not seen those royalty agreements, that they did not provide support for his benchmark figure, and that he had not set out in his report either the basis for using those agreements as a comparison in the present case, or how he had used that information to evaluate the correctness of his benchmark figure.[355] In the First Respondent's submission, the evidence of Mr Miles does nothing to advance the Applicant's case.

D4.2.4.3 Consideration given by a *native title party* is not the same

184. Further, even if (which is denied) Subdivision P Agreements provide a consistent or standard benefit, in order to assess whether those agreements are an appropriate comparator it is necessary to not only compare the benefits provided but also what the *native title party* must give in consideration for those benefits. Only if the consideration is the same, similar or substitutable can a Subdivision P Agreement be truly "c*omparable*." The difficulty with the Applicant's approach is that looks at one part of the Subdivision P Agreements (the Revenue Share) in isolation, without regard to all aspects of the agreement, including the consents given by the *native title party*.

185. In the First Respondent's submission, the available Subdivision P Agreements are not comparable with the present proceeding, which concerns compensation for the grant of a limited number of specific

344 CB E.05.003 at 3 (M2); CB ZA.07.023 at 1372(5-9).
345 CB ZA.07.023 at 1370(1-9).
346 CB ZA.07.023 at 1370(11-15), 1374(8-29) and 1383(11-15); CB ZA.07.024 at 1420(20-27).
347 CB ZA.07.023 at 1374(8-29); CB ZA.07.024 at 1420(29-41) and 1451(27-46).
348 CB ZA.07.023 at 1374(8-29); CB ZA.07.024 at 1431-1432.
349 [redacted]
350 CB E.03.005 at [74(j)] and Footnote 31.
351 CB ZA.07.023 at 1393-1394.
352 CB ZA.07.023 at 1394-1395.
353 CB ZA.07.023 at 1398(19-24).
354 CB E.03.005 at [75]-[80].
355 CB ZA.07.023 at 1399-1405.

mining tenements. Rather, the Subdivision P Agreements which have been produced in this proceeding are significantly broader and go far beyond a mere consent to, and compensation for, a number of specified *future acts*. This is typically because "[i]*n their ideal world, resource interests want two things: the freedom to do whatever they want to pursue their business and the certainty to know they will be able to keep on doing it.*" Accordingly, what mining companies are seeking "*is the most comprehensive consent possible ... under all applicable laws: ideally a clause that says, in effect, that the native title group will never, ever, in any way do anything to inhibit the resource interest doing what they want on the tenure in question.*"[356]

[redacted]

186. [redacted]

187. [redacted]

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356 David Ritter, *The Native Title Market* (University of Western Australia Press, 2009) at 27.

357 [redacted]

358 [redacted]

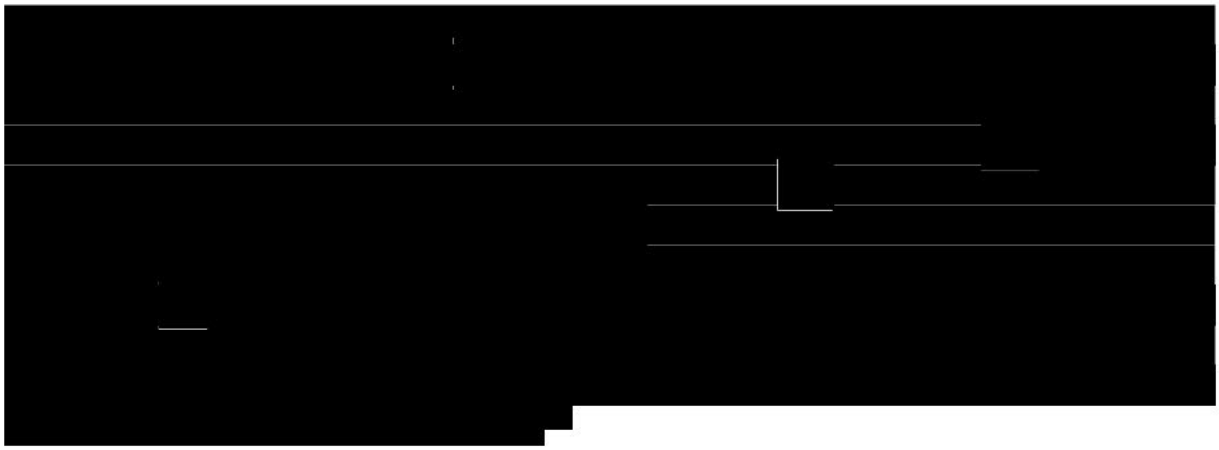
359 [redacted]

360 [redacted]

361 [redacted]

362 [redacted]

363 [redacted]



188. In the First Respondent's submission, it is not reasonable to assess compensation for the Compensable Acts by way of comparisons with the benefits delivered under Subdivision P Agreements when the Applicant has not 'lost' what a *native title party* would otherwise have had to in order to obtain those benefits (i.e. there is no "*economic equivalence*").[372] As noted by commentators, "[t]*he bargain at the heart of* [a Subdivision P Agreement]*…is that the grantee gets the freedom and certainty that they require to prosecute their industry*."[373] That is not what the Applicant 'gave up' to the FMG Respondents in respect of the Compensable Acts and, accordingly, compensation for the Compensable Acts should not be assessed as if it had.

D4.2.4.4 Subdivision P Agreements are confidential

189. A further difficulty with calculating compensation by reference to Subdivision P Agreements is that those agreements are confidential[374] and, accordingly, their terms are not generally available unless the parties agree to waive confidentiality, or they are successfully subpoenaed.[375] As noted by the Northern Territory during oral argument before the High Court in *Griffiths*, these agreements "*are kept confidential so even on the* [Register of Indigenous Land Use Agreements], *if one were to search it, one cannot find the price at which people agreed for things*."[376] As a result, in *Santos v Gomeroi*, the Tribunal observed that: *"... if most compensation arrangements are confidential, one wonders how a native title party, such as the Gomeroi applicant, could acquire an understanding of "fair" treatment for present*

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372 *Griffiths* at [87].

373 David Ritter, *The Native Title Market* (University of Western Australia Press, 2009) at 27.

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375 For example, David Ritter has observed that "*Native title agreements are invariably shrouded in layers of secrecy, designed to hide the terms of exchange from curious eyes … The result is that there is very little on the open record about how the value of future act agreements is determined. In particular, smaller scale bilateral agreements with junior mining companies are most likely to go 'largely unheralded and unrecorded'*: *The Native Title Market* (University of Western Australia Press, 2009) at 38.

376 *Griffiths* [2018] HCATrans 174, Day 1 (4 September 2018) at 18(line 650).

purposes. The only available source of such information seems to be somebody, such as Mr Meaton, who has such knowledge, and is willing to disclose at least some of it. This is an unsatisfactory basis for either the negotiation process or any Tribunal determination."[377]

190. [redacted] In other words, how are parties to assess compensation by reference to the content of Subdivision P Agreements where the only circumstances in which they can know the content of those agreements is to be complicit in a person potentially breaching their confidentiality obligations and disclosing their contents? This, in the First Respondent's respectful submission, is not a suitable or practical basis upon which to assess compensation.

191. For example, the First Respondent does not request, nor obtain, copies of Subdivision P Agreements and its knowledge of such agreements is generally limited to: (a) the parties to the agreement; and (b) the date on which the agreement was entered into. To the extent that the First Respondent may be given access to extracts of Subdivision P Agreements, the information provided is often similar in content to the extract of an ILUA from the Register of Indigenous Land Use Agreements and is limited, primarily, to the statements of the kind mentioned in section 24EB(l) or 24EBA(l) or (4) NTA.[379] In those circumstances, if the First Respondent is liable to compensate a native title holder for the grant of a mining tenement, it has no basis upon which to calculate that compensation liability by reference to a Subdivision P Agreement.[380]

192. Further, it is simply not practical for parties wishing to assess compensation by reference to Subdivision P Agreements to require those agreements to be subpoenaed each and every time. In this proceeding, the subpoena of the sample of Subdivision P Agreements upon which the Applicant relies[381] was strongly contested by the parties thereto and took approximately 7 months to resolve. Further, they are presently subject to such strict confidentiality orders that their mere existence (let alone their content) is confidential and limited to a select number of persons.[382] Given the current confidentiality orders, the Court cannot include any reference to a particular Subdivision P Agreement or its contents in any publicly available decision in this matter. How then are other *native title parties*, *grantee parties*, *government parties* or members of the public more generally to understand any compensation figure arrived at using the Applicant's approach if its basis cannot be disclosed to, or interrogated by, them? On what basis are they to apply the relevant principles in their own matters?

193. In this respect the same criticisms can be made of assessing compensation by way of Subdivision P Agreements as the plurality in *Griffiths* made of the Northern Territory's valuation methodology, in that it is a "*complex and expensive exercise*" which "*can be avoided if economic value is determined by the comparatively simple and relatively thrifty means of assessing the freehold value of the subject land and applying the appropriate percentage discount according to the nature of the native title rights and interests in suit. Given the presumably limited resources of most native title claimants, such simplicity and economy is surely to be encouraged.*"[383]

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377 *Santos v Gomeroi* at [327].
378 [redacted]
379 CB E.01.007 at [22]-[24] and [29].
380 Nor can the First Respondent use the information it has obtained in this proceeding in any other: see CB A.01.004 at order 6(b).
381 In the period August 2023 to March 2024, the Applicant issued a total of 20 subpoenas to third parties for the production of confidential Subdivision P Agreements.
382 CB A.01.004.
383 *Griffith*s at [92].

D4.2.5 Applicant's approach lacks coherence

194. A further difficulty with the Applicant's approach is that it lacks coherence and is, accordingly, unprincipled. In particular, the Applicant's case is predicated on: (a) the procedural rights attaching to each Compensable Act being the right to negotiate (as compensation is said to be assessed by reference to what the Applicant may have obtained had the statutory processes contained in Subdivision P resulted in an agreement); (b) each Compensable Act relating to iron ore mining in the Pilbara (as the Applicant seeks a determination of compensation by reference to the terms of Subdivision P Agreements entered into by iron ore miners and *native title parties* in the Pilbara); and (c) each Compensable Act generating revenue (such that compensation can be assessed by reference to a Revenue Share or s.38 MA Amount). However, in circumstances where one (or more) of those assumptions is incorrect in respect of a particular act, that act cannot be dealt with under the Applicant's approach.

195. For example, if a native title holder seeks to bring a compensation application only in respect of mining tenements which do not attract the right to negotiate contained in Subdivision P,[384] how is compensation to be assessed for those tenements on the Applicant's case? The hypothetical applicant would not have lost any opportunity to reach an agreement with a *grantee party* under Subdivision P (the NTA not requiring such a negotiation) and there would be no comparable Subdivision P Agreements to form the basis of the compensation assessment.[385] Similarly, as the Applicant's approach is based only on Subdivision P Agreements which relate to iron ore mining in the Pilbara, it cannot apply to mining tenements more broadly (as Subdivision P Agreements relating to different minerals or locations may have a different benefit structure, rate or method of payment).[386] Further, if the mining tenement does not generate revenue, compensation cannot be assessed by way of a Revenue Share or s.38 MA Amount (both of which are predicated on the sale of minerals from the tenement generating revenue).[387]

196. The Applicant attempts to camouflage these difficulties by, in effect, grouping the Compensable Acts together and assessing them as if they were the same or, alternatively, assessing compensation on a "*project-wide*"[388] or *in globo* basis. However, the plurality in *Griffiths* was clear that economic loss must be assessed on an act-by-act basis at the time each relevant act was done.[389] Accordingly, it is inappropriate to amalgamate the Compensable Acts and assess them all on the basis of a statutory procedural right (the right to negotiate) and feature (the ability to generate a Revenue Share or s.38 MA Amount) which they do not all share for the purpose of assessing economic loss. If the Applicant's methodology is to be applied, it must be applied to each Compensable Act individually to determine the economic loss suffered. This is particularly relevant where there is a disagreement as to the entity liable to pay that compensation and where the liability may differ across Compensable Acts[390] i.e. the Court

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384 These would include, for example, mining tenements which constitute *past acts*; miscellaneous licences validated under Subdivision H; mining tenements which are *pre-existing right-based acts* validated under Subdivision I to which Subdivision P does not apply (see s.26(2) and 26D NTA); miscellaneous licences which attract the procedural rights contained in s.24MD(6B) NTA (and not Subdivision P); and mining tenements (primarily exploration and prospecting licences) to which the *expedited procedure* applies.

385 Similarly, what of a native title holder who, at the time of the grant of the mining tenement, was not a *native title party* who was entitled to the benefit of Subdivision P?

386 For example, Mr Meaton was aware of, but did not consider, any Subdivision P Agreements with respect to the mining of gold, lithium and granite in the Pilbara for the purpose of this proceeding, presumably because those agreements provided a different method or rate of compensation: CB ZA.07.022 at 1295. See also *Santos v Gomeroi* (at [297]-[298] and [355]) where it is clear that benefits provided under Subdivision P Agreements for gas projects were purportedly calculated on an entirely different basis.

387 Both Mr Meaton and Mr Miles agreed that if mining does not proceed after a Subdivision P Agreement has been entered into, no Revenue Share would be paid to the *native title party*: see CB E.05.001 at 7 (M16, M32); CB ZA.07.023 at 1398(26-30). Mr Meaton also agreed in cross examination that a model of compensation based on revenue could not apply to *future acts* (such as the construction of public infrastructure) that do not generate any revenue: see CB ZA.07.022 at 1292-1293.

388 CB A.02.007 at [73].

389 See paragraph [99] above.

390 For example, the Court may determine that the First Respondent is liable for the WMLs and the FMG Respondents for the remaining Compensable Acts.

may need to apportion the compensation payable between the Respondents having regard to the particular Compensable Acts for which each party is liable.

197. In this proceeding, only 12 of the Compensable Acts were *future acts* which attracted the right to negotiate contained in Subdivision P. These were: M 47/1409-I; M 47/1411-I; M 47/1413-I; M 47/1431-I; M 47/1453-I; M 47/1473-I; M 47/1475-I; M 47/1513-I; M 47/1570; E 47/1319-I;E 47/1398-I; and E 47/1399-I.[391] It is, accordingly, only in respect of these tenements that the Applicant can claim (even if wrongly) to have lost the opportunity to negotiate an agreement under Subdivision P. Further, of these 12 tenements, only the mining leases were capable of generating revenue (and thereby producing a Revenue Share or s.38 MA Amount)[392] and only 6 mining leases have, in fact, produced revenue.[393] On the Applicant's case, therefore, it would appear that only these 6 mining leases are compensable, or are capable of generating an amount of compensation, to be paid in accordance with the Applicant's method for assessing compensation (i.e. a Revenue Share based on "*comparable*" Subdivision P Agreements or a s.38 MA Amount).

198. In contrast, 16 of the Compensable Acts were notified under s.24MD(6B)(c) and did not attract the right to negotiate contained in Subdivision P. These were L 1SA; L 47/302; L 47/361; L 47/362; L 47/363; L 47/367; L 47/396; L 47/472; L 47/697; L 47/801; L 47/813; L 47/814; L 47/859; L 47/901; L 47/914; and L 47/919.[394] The procedural rights contained in s.24MD(6B) NTA cannot be equated with the right to negotiate.[395] Similarly, the remaining 8 Compensable Acts (E 47/1333-I; E 47/1334-I; E 47/1447-I; E 47/3205-I; E 47/3464-I; P 47/1945; P 47/1946; and P 47/1947)[396] were notified under s.29 NTA with a statement pursuant to s.29(7) that the grant attracted the expedited procedure (**expedited procedure statement**). The right to negotiate does not apply to acts where the expedited procedure statement has been given (s.31(1) NTA), save for circumstances where the Tribunal determines that the act does not attract the expedited procedure (s.32(5) NTA). Where the expedited procedure statement has been given, the procedural rights given to a *native title party* by the NTA are limited to the ability to lodge an objection to the statement (s.32(3) NTA) and have that objection heard by the Tribunal (s.32(4) NTA).[397]

199. Accordingly, it is not correct to characterise the loss suffered by the Applicant in respect of the Compensable Acts referred to in paragraph [198] above as being: (a) characterised by the loss of an opportunity to negotiate an agreement under Subdivision P (as the right to negotiate did not apply to

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391 CB A.02.015 at [177], [181], [185], [189], [193], [197], [201], [205], [210], [283], [295] and [299].

392 As noted in Michael Hunt et al, *Hunt on Mining Law of Western Australia* (5th edition) (Federation Press, 2015) (**Hunt on Mining Law of Western Australia**) at [11.16.1] (p.229) whilst specimens and samples obtained from exploration licences, prospecting licences or under the powers contained in s.40D MA may, in the case of minerals such as gold or diamonds, be of considerable value, this is not the case in respect of minerals such as iron ore whose value is calculated in millions of metric tonnes (see, for example r.86AD of the *Mining Regulations* and CB E.01.006), an amount which cannot be extracted from an exploration or prospecting licence (see r.14 and r.20 of the *Mining Regulations*).

393 CB E.01.006 at [7]-[9] and [11]; CB A.02.015 at [10]-[11]. Further, one of the Compensable Act mining leases (M 47/1570) is not authorised for iron ore, such that no Revenue Share from the sale of iron ore can ever be generated from it: see paragraph [416] below.

394 CB A.02.015 at [219(a)], [223(a)], [227(a)], [231(a)], [235(a)], [239(a)], [243(a)], [247(a)], [251(a)], [255(a)], [259(a)], [263(a)], [267(a)], [271(a)], [275(a)] and [279(a)]. Only 5 miscellaneous licences were subject to an objection pursuant to s.24MD(6B)(d) NTA: CB A.02.015 at [227(b)], [231(b)], [235(b)], [243(b)] and [251(c)]. Two of those objections (L 47/396 and L 47/697) were ultimately not pursued by the Yindjibarndi People: CB A.02.015 at [243(c), (d)] and [251(d), (e)]. The remaining three objections (L 47/361, L 47/362 and L 47/363) were referred to the Independent Person but were ultimately dismissed due to the failure of the Yindjibarndi People to file required documents and appear at hearings: CB A.02.015 at [227(e)], [231(e)] and [235(e)].

395 They are limited to a requirement on the person who applied for the act to consult with the *native title party* regarding the doing of the act and the minimisation of its impact on the native title rights and interests and an ability to have the matter referred to an independent person for a determination as to whether the act may be done: s.24MD(6B) NTA.

396 CB A.02.015 at [287(a)], [291(a)], [303(a)], [307(a)], [311(a)], [315(a)], [319(a)] and [323(a)].

397 In respect of 5 of the exploration and prospecting licences (E 47/3205-I; E 47/3464-I; P 47/1945; P 47/1946; and P 47/1947) no objection was made pursuant to s.32(3) NTA: CB A.02.015 at [307(b)], [311(b)], [315(b)], [319(b)] and [323(b)]. In respect of E 47/1333-I; E 47/1334-I and E 47/1447-I an application was made objecting to the expedited procedure statement but the objection was subsequently withdrawn: CB A.02.015 at [287(b)], [291(b)], [303(b)]; CB E.01.008 at [123], [128] and [149].

those Compensable Acts); (b) compensated by reference to "*common*" or "*industry standard*" Subdivision P Agreements (as Subdivision P Agreements are not comparable with, or applicable to, *future acts* which attract a different (and more limited) set of statutory procedural rights); and/or (c) compensated by way of a Revenue Share or s.38 MA Amount (as such tenements do not, and have not, generated any revenue upon which a Revenue Share or s.38 MA Amount could be based).

200. The end result is that the Applicant's approach results in a compensation methodology that, in practical terms, lacks coherence and is unprincipled in that it can only ever be applicable to a very narrow class of mining leases (i.e. mining leases that: are *future acts* subject to the right to negotiate; relate to iron ore mining in the Pilbara; and generate revenue).[398] Unlike the plurality's methodology in *Griffiths,* the Applicant's methodology is incapable of being consistently applied to all acts that may give rise to an entitlement to compensation under the NTA or MA or, if it does, it does not produce an amount of compensation for acts which are incapable of generating a Revenue Share or s.38 MA Amount. For this reason alone it should not be accepted.

D4.2.6 Applicant seeking more than a hypothetical Subdivision P Agreement

201. Whilst the Applicant's claim for compensation purports to superficially accord with the bifurcated approach endorsed by the High Court in *Griffiths*[399] it is, in the First Respondent's submission, an artificial bifurcation arising from the fact that the Applicant has claimed additional cultural loss in a manner which is not in keeping with the evidence. In particular, all of the evidence establishes that the benefits received under Subdivision P Agreements of the kind relied upon by the Applicant are in full and final satisfaction of any and all compensation liabilities that a mining company may have to the *native title party* for the mining company's operations (both under the NTA and State law).[400] Further, Mr Jaski, Mr Meaton, Mr Hall and Mr Miles all agreed that the amounts provided under those Subdivision P Agreements are compensation for <u>both</u> economic and non-economic (cultural) loss with no differentiation between the two made in the agreements.[401]

202. In those circumstances, the Applicant has not explained how or why it can sustain additional claims of economic loss (for the Heritage Amount and the Psychological Amount), together with an additional $1 billion in cultural loss when the <u>total</u> of what it asserts the Yindjibarndi people "*could fairly and justly have demanded for their assent to the infringement of their native title rights and interests*"[402] under a Subdivision P Agreement was the Revenue Share Amount alone. In other words, the Applicant is seeking approximately [redacted] times more compensation than even it says other native title parties may "*fairly and justly*" have expected to receive for the same *future acts* if they had an agreement with a "*reasonable miner*" under Subdivision P.

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398 It does not, for example, apply to mining tenements granted under the MA more broadly, mining leases which are not *future acts*, mining tenements that are not subject to the right to negotiate, mining tenements for minerals other than iron ore or mining tenements in locations other than the Pilbara.

399 *Griffiths* at [84].

400 See paragraph [186] above.

401 Mr Meaton gave evidence that mining agreements cover all aspects of loss to the native title holders, including both economic and non-economic loss: CB E.05.002 at M19 and CB ZA.07.022 at 1205(8-18). Mr Miles agreed: CB E.05.004 at M10. Mr Hall also agreed: CB E.05.002 at H21. Mr Jaski highlighted the difficulties in comparing Subdivision P agreements in circumstances where the agreements do not differentiate between the value being ascribed to the *native title party's* economic loss vis-à-vis their cultural loss: CB ZA.07.023 at 1334(27-40); CB E.05.001 at J13 and M12.

402 CB A.02.002 at [46(a)].

D4.2.7 Compensation not to be determined by reference to the value of minerals on or under the land

203. The Applicant seeks to assess the compensation payable for the Compensable Acts under the NTA either: (a) by reference to a percentage of the value of minerals obtained from the Compensable Acts in the event that the FMG Respondents are liable (the Revenue Share); or (b) by reference to the royalties which a person may be entitled to under s.38 MA in respect of the value of minerals obtained from the Compensable Acts in the event that the First Respondent is liable (s.38 MA Amount).[403] The First Respondent says that either measure is wrong in that it seeks to compensate the Applicant by reference to, or for, a right to minerals which the Yindjibarndi People do not hold.

D4.2.7.1 Ownership of minerals generally

204. At common law there is a presumption that the owner of land owns all that is beneath and above the land to an infinite extent.[404] Accordingly, the common law assumes that a landholder also owns all minerals on, or beneath, the surface of that land. However, the presumption of ownership of minerals at common law is subject to the exception of the 'royal metals' (namely, gold and silver). The common law considers all gold and silver (whether on Crown land or alienated land) to be owned by the Crown, together with the power of the Crown to enter, dig and remove those minerals.[405]

205. This common law position was inherited in the Australian colonies.[406] Accordingly, the earliest freehold grants of Crown land in Western Australia were subject to the reservation of "*gold, silver and other precious metals*" to the Crown.[407] Further, as the common law rules as to the ownership of minerals were also subject to any express reservation contained in the original Crown grant,[408] many early *Land Regulations* in Western Australia also permitted the Governor "*from time to time*" to reserve (in addition to gold and silver), other alluvial deposits, inferior metals, gems and jewels when issuing a Crown grant.[409] However, apart from any specific reservations made in the Crown grant for particular, specified, minerals, early freehold land grants in Western Australia conveyed to the grantee the property in all minerals on or below the land (save for the royal metals).[410]

206. However, the private ownership of minerals was subsequently abolished in Western Australia and replaced with the statutory reservation of all minerals in the Crown. This process commenced with the introduction of responsible government in Western Australia by the *Western Australia Constitution Act 1890* (Imp). Section 3 of the *Western Australia Constitution Act* provided that: "*the entire management and control of the waste lands of the Crown in the colony of Western Australia, and of the proceeds of the sale, letting, and disposal thereof, including all royalties, mines, and minerals, shall be vested in the*

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403 See paragraph [124] above.

404 The maxim being *Cejus est solum ejus est usque as coleum, et ad inferos* ('to whomsoever the soil belongs, he owns also to the sky and the depths'): see *Commonwealth v New South Wales* (1923) 33 CLR 1; [1923] HCA 34 at 23.

405 *R v Earl of Northumberland (Case of Mines)* (1567) 1 Plowden 310; 75 ER 472.

406 *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; [1969] HCA 28 at 186. See also *Woolley v AG of Victoria* (1877) 2 App Cas 163 and *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195; [2010] HCA 27 at [1]-[4] and [69]-[70].

407 Prior to 1 January 1899, Crown land in Western Australia was disposed of pursuant to a succession of *Land Regulations*. The forms to be used for Crown grants were specified in the regulations and varied from time to time but all required the reservation of gold, silver and other precious metals to the Crown: See, for example, *Land Regulations 1860* (WA) at r.3 and Schedules A & B; *Land Regulations 1860* (WA) at r.3-4 and Schedules A & B; *Land Regulations 1872* (WA) at r.3 and Schedules 1 & 2; *Land Regulations 1874* (WA) at r.3 and Schedules 1 & 2; *Land Regulations 1878* (WA) at r.8 and Schedules 1 & 2; *Land Regulations 1882* (WA) at r.3 and Schedules 1 & 2; *Land Regulations 1887* (WA) at r.16

408 The common law has recognised the possibility of separate ownership of the surface of the land and the subsoil and/or any minerals beneath the surface: *Cox v Glue* (1848) 5 CB 533; 136 ER 987 at 992-3.

409 *Land Regulations 1880* (WA) at r.15; *Land Regulations 1882* (WA) at r.108; *Land Regulations 1878* (WA) at r.17.

410 *Western Australia v Ward* (2000) 99 FCR 316; [2000] FCA 191 (**Ward (FC)**) at [523].

legislature of that colony." The plurality in *Ward* observed that s.3 had the effect of subjecting all minerals and petroleum, on or under Crown lands, to legislative disposition by the Crown.[411]

207. Pursuant to the authority given by s.3 of the *Western Australia Constitution Act*, the *Land Act 1898* (WA) came into effect on 1 January 1899. Section 15 relevantly provided that all "*Crown Grants*" (i.e. grants of freehold)[412] issued under the *Land Act 1898* "*shall contain a reservation of all gold, silver, copper, tin, or other metals, ore, mineral, or other substances containing metals, and all gems or precious stones, and coal, or mineral oil in or upon the land comprised therein*." The prescribed forms for leases of Crown land under the *Land Act 1898* also provided the same mineral reservation.[413]

208. Further, beyond merely reserving all rights to minerals to the Crown in respect of future Crown grants, on the commencement of the *Mining Act 1904* (WA) on 1 March 1904, those minerals were made property of the Crown. In particular, s.117 of the *Mining Act 1904* provided that:

> *Subject to the provisions of this Act and the regulations*
>
> *(1) Gold, silver, and other precious metals on or below the surface of all land in Western Australia, whether alienated or not alienated from the Crown, and if alienated whensoever alienated, are the property of the Crown.*
>
> *(2) All other minerals on or below the surface of any land in Western Australia which was not alienated in fee simple from the Crown before the first day of January, One thousand eight hundred and ninety-nine, are the property of the Crown.*

Relevantly for this proceeding, s.115 of the *Mining Act 1904* provided that, for the purpose of s.117, "*minerals*" included "*iron*" and "*the ores and earths*" of that metal (i.e. iron ore).

209. The plurality in *Ward* considered that the reservation of minerals to the Crown, and the subsequent vesting of the property in them in the Crown, had several consequences:

> *First, it was no longer necessary (if it ever had been necessary) to consider questions of prerogative rights to some but not all minerals. Thenceforth, upon the subsequent alienation of land by the Crown, all minerals on or under the land would remain vested in the Crown. Secondly, the Crown could, and did, deal with minerals separately from the land and could thereafter, and did, grant separate rights to search for and recover them… Vesting of property and minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question no matter whether the substances were on or under alienated or unalienated land.*[414]

210. Further, whilst there was no evidence of any traditional law or custom in respect of, or right to, minerals demonstrated by the applicant in *Ward*, the High Court agreed with the reasoning of the Full Court that, if any native title rights and interests to minerals had existed, by virtue of s.3 of the *Western Australia Constitution Act* and the provisions of s.117 of the *Mining Act 1904*, they had been wholly extinguished within Western Australia.[415] In particular, "*those provisions were intended to reserve to the legislature and the Crown the full beneficial ownership of all the minerals specified*."[416] Accordingly, the Yindjibarndi People's native title rights and interests expressly do not include any rights in relation to minerals as defined in the *Mining Act 1904* (WA) (repealed) or the MA.[417]

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411 *Ward* at [384].
412 "*Crown Grant*" was defined in s.3 of the *Land Act 1898* (WA) as "*a deed of grant issued in the name of Her Majesty, conveying to the grantee some portion of Crown land in fee simple*". "*Crown Land*" was defined, inter alia, as "*the waste lands of the Crown*" (being land not otherwise reserved, dedicated or set aside or granted in fee simple).
413 See, for example, the mineral reservation contained in the standard form leases and licences prescribed in Schedule 9 (conditional purchase leases), Schedule 14 (grazing lease), Schedule 16 (poison leases), Schedule 22 (lease of a working man's block), Schedule 24 (pastoral lease), Schedule 29 (special lease) and Schedule 33 (999 year lease).
414 *Ward* at [384].
415 *Ward* at [382]-[383]. There is equally no evidence of any traditional Yindjibarndi law or custom in respect of minerals.
416 *Ward (FC)* at [541].
417 Yindjibarndi Determination at [5(c)].

211. The consequences of the above may be summarised as follows:

(a) in respect of Crown grants of freehold prior to 1 January 1899 (**pre-1899 freeholds**), the owner of that land retained ownership of the minerals therein, save for: (i) the royal metals (gold and silver); and (ii) any other specific minerals which the Governor may, from time to time, have also reserved to the Crown in the particular grant;

(b) since 1 January 1899, all new grants of titles in Western Australia reserve all minerals to the Crown and, since 1 March 1904, all minerals were made the property of, and vested in, the Crown; and

(c) any native title rights and interests to minerals in the State (including iron ore) which may have existed were wholly extinguished by the introduction of s.117 of the *Mining Act 1904*. This includes any right to minerals that the Yindjibarndi People may have held in the **Application Area**.[418]

212. Further, as a consequence of the fact the Crown has limited ownership of minerals on a pre-1899 freehold, the MA only applies to pre-1899 freeholds in relation to the mining of gold, silver and precious metals (i.e. the minerals the Crown owns on those lands). The owner of a pre-1899 freehold is, therefore, able to mine or deal with other minerals as he or she wishes, free from the provisions of the MA (including the requirement to pay a royalty to the Crown for those minerals).[419] Conversely, in respect of those minerals which the Crown does own on a pre-1899 freehold, the MA governs the terms on which a person may be granted a right to mine or deal with those minerals.[420]

213. Additionally, consistent with the Crown's ownership of minerals, the right to compensation given under s.123(2) MA is expressly subject to s.123(1)(b) and (c) which relevantly provide that "*no compensation shall be payable*" and "*no claim lies for compensation*" (whether under the MA or otherwise) "*in respect of the value of any mineral which is or may be in, on, or under the surface of any land*," or "*by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral.*" In other words, consistent with the 'value to owner' principle discussed above, an "*owner*" or "*occupier*" of land is not to be compensated for, or by reference to, the value of the minerals on their land, having never had any right to those minerals in the first place.

214. It is against that background that s.37 and s.38 MA are to be understood.

D4.2.7.2 Sections 37 & 38 MA

215. Sections 37 and 38 MA provide a mechanism by which any person can apply to have a pre-1899 freehold brought within the operation of the MA for the purpose of mining minerals in addition to gold, silver and precious metals (which are covered by the MA). Similar provisions also appeared in the *Mining Act 1904*.[421] As explained by the Minister for Mines during consideration of the *Mining Bill 1903* (WA), the

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[418] Being all those land and waters covered by the Application as described in Schedule B of the Application.

[419] Part VI of the *Mining Act 1904* governed mining on "*private land*" but s.115 excluded the mining of minerals other than gold, silver and precious metals on pre-1899 freeholds from the definition of "*private land*". Similarly, whilst s.29(1) MA provides that a mining tenement may be applied for in respect of "*private land*", s.8 MA excludes mining for minerals other than gold, silver and precious metals on pre-1899 freeholds from the definition of "*private land*". See also *Balde Exploration Consultants Pty Ltd v Cable Sands (WA) Pty Ltd* [2014] WAMW 1 at [22]-[29].

[420] As noted by the *Report of the Committee of Inquiry appointed to inquire into, and report on, the operation of the Mining Act of the State and to report whether any and what amendments should be made to the Mining Act 1904* (1971) (**Adams Inquiry**) in designing a new mining Act (that would become the MA) "*certain principles should be observed. In the first place, and perhaps fundamentally, the paramount right of the State to all minerals (other than those which passed with the pre 1899 titles) must be recognised. This means that no individual or company has any rights to minerals other than those which the State is prepared to grant. It is for the government of the day to regulate the production of minerals in what it considers the best interests of the people of the State both present and future.*" (at 13).

[421] *Mining Act 1904* at ss.154-159. Sections 37 and 38 MA simplified those provisions.

rationale for these provisions was to balance the right of the owner of a pre-1899 freehold to the minerals on their land with the interests of the State in having that land mined.[422]

216. At the outset it must be noted that not all pre-1899 freeholds are susceptible to being brought within the operation of the MA. Rather, in order to bring a pre-1899 freehold land within the MA, s.37(3) requires a geologist or professional officer of DMIRS to form the opinion that there is a "*reasonable likelihood*" that the land contains minerals in "*payable quantities*". Only then may the Minister, with the approval of the Governor (and by notice published in the *Government Gazette*) declare that at the expiration of a specified period (not less than 6 months) the pre-1899 freehold is to come within the operation of the MA. Accordingly, pre-1899 freeholds which are not prospective (i.e. are not mineral rich) would not fall within the operation of s.37(3) MA.

217. In the event that a notice is published in the *Gazette* in accordance with s.37(3) MA, s.38(1) MA allows the owner of the pre-1899 freehold to apply (before all others) for a mining tenement over that land. In the event that a tenement is granted to the owner, s.39 MA provides that the owner must comply with the terms and conditions of the mining tenement (including as to expenditure) but is not required to pay any rent or royalties to the State. This is in recognition of the fact that the owner of the pre-1899 freehold (and not the State) holds the rights to the minerals it is mining (i.e. a person is not required to pay the State for that which it already owns). If the owner of a pre-1899 freehold does not apply for a mining tenement under s.38(1) MA (or is not granted one), s.38(2) provides that the land is brought within the MA and a mining tenement may be granted to a third party.[423] In those circumstances, 90% of all rents and royalties received by the Crown for any minerals obtained from the pre-1899 freehold are to be paid to the owner of the land. This is, in effect, payment for the mineral rights which the owner of the pre-1899 freeholder lost when the land was brought within the operation of the MA.

218. The circumstances in which the powers under s.37(3) MA have been applied are extremely rare. The Adams Inquiry (which reviewed the operation of the *Mining Act 1904* in 1971) suggested that the provisions to bring pre-1899 freehold into the *Mining Act 1904* "*have not been used for many years and in our opinion should now be regarded as obsolete*."[424] The Parliamentary Debates with respect to clause 37 of the *Mining Bill 1978* (WA)[425] suggest that, as at 1978, there was only one pre-1899 freehold in the State in which mining occurred (located in Kalgoorlie).[426] Similarly, the authors of *Hunt on Mining Law of Western Australia* indicate that they had only been able to find one instance in which a pre-1899 freehold had been successfully brought within the MA under ss.37 and 38. However, the authors noted that this was a special circumstance as the land concerned was owned by the Executive Director of the Department of Conservation and Land Management (a body corporate established under the *Conservation and Land Management Act 1984* (WA)) (i.e. the land and its minerals was effectively held by a State entity, such that s.38 MA had no practical effect).[427]

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422 Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 August 1903 at 693 where the Minister stated that: "*We are giving now the right to mine for the baser metals on private lands alienated prior to 1899, I wish to point out the provisions which we intend to make, so that it will be known we are not going to rob the land holder. We are going to try and act as fairly as we can by him, but the nation must come first. If a man holds a mineral belt and will not work it…we are justified in coming forward, with such legislation as this*". See also Western Australia, *Parliamentary Debates*, Legislative Council, 21 October 1903 at 1643.

423 With priority given to the person who applied to bring the land within the MA under s.37(1).

424 *Adams Inquiry* at 67.

425 Now s.37 MA.

426 Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 October 1978 at p 4196. See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 November 1978 at 4466

427 *Hunt on Mining Law of Western Australia* at 62. It is suggested that the lack of utilisation of s.37 MA can be explained by: (a) the fact that pre-1899 freeholds are themselves not common and typically located in non-mineral resource rich areas; and (b) the restrictions placed by the MA on mining freeholds: See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 November 1978 at 4839; CB E.03.005 at [46(d)(iii)].

219. A number of consequences can be said to flow from the above analysis:

(a) save for pre-1899 freehold grants, the objective economic value of an unencumbered freehold estate in the State cannot be treated, or valued, as if the owner had a right to minerals. Similarly, as the Yindjibarndi People do not hold a right to minerals, the economic value of an unencumbered freehold estate in the land the subject of the Compensable Acts cannot include the value of those minerals. Failing to appreciate these concepts reflects a fundamental error in the assumptions made by the Applicant's economic experts;[428]

(b) in order for s.38 MA to have any application, there must exist a pre-1899 freehold grant in respect of which an application is made under s.37 MA to bring that land under the operation of the MA. As a matter of fact, no pre-1899 freehold was ever granted within the Application Area,[429] such that there is no land to which s.37 MA can apply in this proceeding; and

(c) in any event, the payment of royalties under s.38 MA is predicated on the basis that the owner of the land also has ownership of its minerals. Again, this is a right which the Yindjibarndi People do not have, such that s.38 MA could have no application in this proceeding. To use the words of Isaacs J in *McDermott v Corrie*, "*on what conceivable principle… can it be imagined the Crown is to pay for what it always had, to a person who never had it*?"[430] Consistent with this principle, the MA is clear that in respect of all non pre-1899 freehold land, an "*owner*" or "*occupier*" is not to be compensated for, or by reference to, the value of the minerals on that land (as those minerals belong to the Crown).

220. Accordingly, to the extent that the First Respondent is liable for the Compensable Acts, the assessment of compensation is not governed by s.38 MA and does not require the payment of 90% of the rents and royalties received by the First Respondent in respect of the Compensable Acts.

D4.2.8 Applicant has not established the quantum of the s.38 MA Amount

221. If, which is denied, the First Respondent is liable for the Compensable Acts and the quantum of that compensation is to be assessed by reference to s.38 MA, the First Respondent says that the Applicant has failed to establish what that amount would be. Contrary to the ACS,[431] the forecasting of the s.38 MA Amount is, like the forecasting of the Revenue Share Amount undertaken by Mr Meaton and Mr Jaski,[432] an exercise to be conducted by an expert economist. For example, it requires an evaluation of, and opinion on, amongst other things: (a) future production and pricing; (b) assumptions about the future form in which any ore will be sold; (c) future discounting required (to reflect additional risk); and (d) future State royalty policy. Accordingly, it is not possible to conduct the exercise the Applicant has done and arrive at the correct s.38 MA Amount for the following reasons.

222. **First**, the Applicant has erroneously assumed that the [redacted] in royalties received in respect of the Compensable Acts between 2014 and 2023 was only in respect of those portions of the Compensable Acts that fell within the Application Area.[433] Mr Sharman did not apportion royalties having regard to the extent to which the Compensable Acts overlapped the Application Area and expressly did not take

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428 For example, Mr Meaton was firmly of the view that the value of the minerals and the value of the land are inseparable: see, for example, CB ZA.07.023 at 1329(16-23); CB E.05.001 at 3 (M4). Mr Miles agreed that the assumption that the Yindjibarndi People have a right to minerals was central to his opinion that a royalty of 0.55% is an appropriate measure of compensation: CB ZA.07.023 at 1371-1372.

429 CB E.01.002 (Annexure XPM4) Workspace.

430 *MacDermott v Corrie* (1913) 17 CLR 223; [1913] HCA 27 at 247. This case concerned the resumption of land that was subject to a number of restrictions (and where the residual interest in the land was held by the Crown).

431 ACS at [138]-[139].

432 See Meaton Jaski Report.

433 ACS at [138].

into account the fact that only 5.07% of M 47/1411-I and 73.9% of M 47/1409-1 fall within the Application Area (i.e. the royalty amounts given by Mr Sharman were for the Compensable Acts as a whole).[434] It is a question for expert evidence as to how that apportionment should occur.[435]

223. **Second**, the Applicant has erroneously averaged the royalty rate. Regulation 86 of the *Mining Regulations* provides for two applicable royalty rates for iron ore: 5% of the "*royalty value*" for "*beneficiated iron ore*"[436] and 7.5% of the "*royalty value*" for crushed or screened iron ore. The iron ore sold from the Compensable Acts includes both beneficiated iron ore and crushed or screened iron ore,[437] such that two royalty rates apply to any shipment of ore. There is no evidence before the Court as to the percentage of beneficiated vs crushed or screened ore that may be produced from the Compensable Acts going forward and, absent expert evidence, no way for that to be predicted. All that can be said is that two rates will apply (and not that it will be the average relied upon by the Applicant). It could, for example, be the case that as the mine gets towards the end of its life, the quality of the ore changes such that one type of ore becomes more common than the other. However, without expert evidence, the Court has no way of knowing or predicting this.

224. **Third**, it is not clear how the Applicant has arrived at its future royalty figure ([redacted])[438] from the Meaton Jaski Report. Contrary to the ACS,[439] there is no forecast production data included in the Meaton Jaski Report. The only way it seems possible to attempt such a calculation with the evidence in this proceeding is to use the figures contained on page 6 of the Meaton Jaski Report, however this produces a figure of approximately half that claimed by the Applicant.[440]

225. **Fourth**, and in any event, the limitations of the Meaton Jaski Report mean that it is not possible to utilise it to produce a future royalty figure. Mr Meaton and Mr Jaski did not provide the calculations showing how they reached their final figures[441] and the source data which underpinned the conclusions reached is not in evidence. Accordingly, it is not possible for the Court to confirm whether the data used in that report (such as the "*sales*" data and "*pricing assumptions*")[442] are equivalent to data needed to calculate the "*royalty value*" of iron ore as defined in r.86AD(2) *Mining Regulations* (having regard to the corresponding definitions of "*sale*," "*gross invoice value*", "*shipping costs*" and "*shipping date*" used in that section). The basis on which royalties are calculated under the MA and the *Mining Regulations* is complex, technical and definition driven. Unless it can be established that the corresponding (and correct) data was used by Mr Meaton and Mr Jaski, their calculations as to the future Royalty Amount bear no relationship to the s.38 MA Amount.

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434 F.01.001 at [19] is expressly "*subject to the qualifications and limitations expressed at paragraphs [10] and [49] – [51] of the Affidavit of John Sharman*." Paragraph [51(d)] of Mr Sharman's affidavit (CB E.01.006) provides that "[t]*he calculations in the Royalties Spreadsheet do not take account of the fact that two of the Relevant Tenements only fall partly within the Yindjibarndi #I determination area (see paragraphs [10(b)] and [10(c)] above)*."

435 For example, should apportionment occur on a tenement overlap basis or an area of mine footprint basis? Mr Meaton estimates that only 55% of the Trinity / Kings mines (located on M47/1409-I) were within the Application Area: CB E.03.002 at [10]-[12]. No mine is located on that portion of M 47/1411-I within the Application Area: CB A.06.001.17. Accordingly, a tenement overlap vs. a mine site footprint apportionment would give very different royalty amounts.

436 Beneficiated iron ore is iron ore that has been improved, concentrated or upgraded in some way (other than by crushing or screening) so as to increase its value: CB E.01.006 at [31].

437 CB E.01.006 at [36] and [55].

438 ACS at [139].

439 ACS at [139].

440 This calculation would involve taking Mr Meaton's "*Value of future royalty payments*" figure and dividing it by the Revenue Share percentage (to generate a predicted future profit) and then multiplying that predicted future profit by 7.28% (the Applicant's "*average royalty*") i.e. [redacted]

441 It appears that Mr Meaton and Mr Jaski exchanged some working calculations between themselves but they were not provided to the First Respondent or attached to their report: Meaton Jaski Report at [11].

442 Meaton Jaski Report at [15]-[16] and [19]-[20].

226. **Fifth**, where the Applicant purports to calculate the rent paid in respect of each Compensable Act by reference to the percentage of the Compensable Act located within the Application Area, it has not set out those calculations such that they cannot be verified. Further, and in any event, as noted by Mr Vielhauer, it is DMIRS's practice to review rents payable annually on 1 July[443] (and Schedule 2 of the *Mining Regulations* is amended accordingly),[444] such that it is not possible to say with any confidence what rent will be payable in the future in respect of the Compensable Acts. Again, like the forecasting of future royalties, the forecasting of future rent was a matter which should have properly been the subject of expert evidence from the Applicant.

227. The end result is that the Applicant's calculations of the future s.38 MA Amount are unreliable and/or wrong. The s.38 MA Amount was a matter put in issue by the Applicant's amended pleadings in June 2023 and, to the extent that a forecasting exercise was relevant to its case on this point, it is a task that should have been done by way of an expert report filed in December 2023.[445] By not doing so, the Applicant denied the First Respondent the opportunity to lead its own expert evidence or cross examine the Applicant's experts on this point (as it was reasonably assumed by the First Respondent that, having failed to lead the expert evidence needed to support its case, the issue was no longer being pressed by the Applicant). To the extent that the Applicant made a forensic decision in 2023 (which decision was confirmed again in October 2024)[446] not to lead expert evidence on this point, then the Applicant should bear the consequences of that decision, including a finding that it has failed to make out its case.[447] The First Respondent should not be prejudiced by the failure of the Applicant to lead the appropriate evidence, particularly in circumstances where the errors made by the Applicant are likely to be in the magnitude of billions (or hundreds of millions) of dollars.

D4.2.9 Compensation not to be determined by the amount that the State would have been prepared to pay under Part 2, Division 3 NTA

228. As discussed at paragraph [124(b)] above, if the First Respondent is liable for the Compensable Acts the Applicant asserts that compensation is to be determined by the s.38 MA Amount or, alternatively, the amount that the First Respondent would have been prepared to pay to obtain the Yindjibarndi People's assent to the Compensable Acts under Part 2, Division 3 NTA. To the extent the latter amount is not the same as the s.38 MA Amount, the Applicant's pleadings and openings did not specify how the amount was to be calculated or its quantum, save to say that "*the amount of royalties and rents received can inform the Court of the amount that the State would have been prepared to pay for the consensual impairment of the native title rights and interests*".[448] It now appears[449] that amount may be the same as the Revenue Share Amount to be paid by the FMG Respondents. However, the Applicant has not explained on what basis the Revenue Share Amount is an amount that the First Respondent would have been "*prepared to pay*."

229. The only evidence in this proceeding is that the First Respondent does not enter into agreements of the kind contemplated by the Applicant in respect of mining tenements in the same position as the Compensable Acts. The role of the First Respondent in the right to negotiate process, insofar as it concerns the grant of a mining tenement, is limited to facilitating the exchange of information between

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443 CB E.01.005 at [14].
444 See for example the *Mines and Petroleum Regulations Amendment (Fees and Charges) Regulations* of 2017, 2018, 2019, 2020, 2021, 2022, 2023 and 2024 which amended the rents payable for mining tenements under the *Mining Regulations*.
445 See Item 10 of the Timetable attached to the orders dated 18 September 2023 (as amended by orders dated 30 November 2023).
446 Transcript 15 October 2024 at 1617-8.
447 Parties to litigation, especially those who are well resourced and represented by competent counsel, are ordinarily bound by their forensic choices at trial: *TAL Life Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68 at [166].
448 A.02.002 at [46(aaaa)]; A.02.007 at [97]. See also ACS at [101(j)].
449 Based on ACS at [179].

the *grantee party* and the *native title party* so that those parties can engage in meetings and discussions with a view to reaching agreement in relation to the proposed grant of the mining tenement.[450] The evidence of Mr Moore from DMIRS is that the First Respondent rarely participates in those discussions because they "*are generally about matters which do not affect the State*".[451] That evidence was not challenged by the Applicant.

230. In other words, the amount that the First Respondent is "*prepared to pay*" for the grant of mining tenements in the same circumstances as the Compensable Acts is, having regard to s.125A MA, nothing (compensation being the responsibility of the mining tenement holder).[452] At no stage during the negotiations conducted in respect of the Compensable Acts to which Subdivision P applied, did the Yindjibarndi People propose that the First Respondent pay compensation for those tenements. Further, having regard to the State's ownership of minerals and s.123(1)(b) – (c) MA, there can be no suggestion that, if the First Respondent pays compensation for mining tenements in the same circumstances as the Compensable Acts, it does so by reference to the value of the minerals on those tenements.

D4.3 APPLICANT'S SECOND ECONOMIC LOSS CASE

231. The Applicant's second economic loss case is a (new and unpleaded) alternative case that arises if the NTA requires that the economic value of the Yindjibarndi People's native title rights and interests are to be determined by reference to the objective economic value of an unencumbered freehold estate in that land (i.e. where the Applicant's first case fails). In that circumstance, the Applicant asserts that the economic loss for the Compensable Acts must be assessed by reference to a "*hypothetical freehold*" which includes minerals[453] (**Hypothetical Mineral Freehold**). The Applicant equates the value of the Hypothetical Mineral Freehold to the s.38 MA Amount (i.e. $4,531,265,898).[454]

232. In this scenario it is not clear whether the economic loss also includes the Heritage Amount or the Psychological Amount but, for present purposes, the First Respondent has assumed that these amounts are being claimed by the Applicant in addition to the value of the Hypothetical Mineral Freehold. The Applicant has also not specified whether the First Respondent or the FMG Respondents are liable to pay this amount. It is assumed that whichever party is ultimately found liable for the Compensable Acts will bear the cost. The First Respondent says that the Applicant's second economic loss case is wrong in principle and should not be accepted for the following reasons.

D4.3.1 Prejudice to the respondents

233. The assertion that compensation is to be assessed based on a Hypothetical Mineral Freehold was raised for the first time in the ACS. It was not a matter that the Applicant addressed in its own expert economic evidence, nor was it something that the economic experts were directed to consider in the context of the experts' conferences. Further, the First Respondent did not have an opportunity to lead expert economic evidence on the topic, nor could it cross examine the expert economic witnesses about it. Had the value of a Hypothetical Mineral Freehold been part of the Applicant's case, it was an issue upon which Mr Miles was suitably qualified to give evidence. Given this, the First Respondent submits that it is highly prejudicial to allow the Applicant to now run this alternative case. However, in the event that the Court

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450 CB E.01.007 at [12], [13] and [25]-[27].
451 CB E.01.007 at [14] and [28].
452 The Tribunal has also held that as a result of s.125A MA there is no obligation imposed on the First Respondent to negotiate about compensation as part of the good faith negotiations required by s.31(1)(b) NTA: *Griffin Coal Mining Co v Nyungar People* (2005) 196 FLR 319; [2005] NNTTA 100 at [37]-[38].
453 ACS at [108], [110] and [135]-[144].
454 ACS at [144].

allows the Applicant to pursue it, the First Respondent says that it is both fundamentally flawed and unsupported by any evidence.

D4.3.2 Highest and best use of the land is not "*mining*" or "*industry extractive*"

234. The Applicant asserts that the highest and best use of the Compensable Acts Area for the purpose of determining the amount payable for a compulsory acquisition of a freehold estate in that land is "*mining*" or "*industry extractive*."[455] However, the Applicant appears to (correctly) accept that none of the evidence given by the economic experts supports this conclusion.[456] Of those experts who considered the issue, Mr Preston's opinion was that where the freehold estate in question did not contain a right to minerals, the highest and best use of the land was "*rural.*"[457] Mr Miles's opinion was that the highest and best use was "*as the traditional country of the Yindjibarndi People*" [458] and, to the extent that he considered mining was the highest and best use of the Yindjibarndi People's native title,[459] this opinion was based on the incorrect assumption that the Yindjibarndi People have a right to minerals.[460]

235. As Mr Preston correctly identifies, the highest and best use of land refers to a use that is legally permissible, physically possible and financially feasible.[461] Contrary to the ACS, "*mining*" or "*industry extractive*" is not a legally permissible activity on any freehold that could be granted in the Compensable Acts Area. Rather, the Applicant has fundamentally misunderstood the application of the MA and the relationship between the MA and the relevant town planning schemes.

236. As discussed in Part D4.2.7.1 above, the starting point for any consideration as to the highest and best use of the land the subject of the Compensable Acts is an acceptance that the State owns of all of the minerals in or under that land. This means that no individual, including any person who may hold a freehold estate over that land, has any rights to the minerals in or under it (other than those individuals to whom the State is prepared to grant a mining lease under the MA). Secondly, and relatedly, s.155 MA creates an offence to carry on any mining on land unless authorised by the MA. Relevantly, mining is defined broadly in s.8 MA to include "*fossicking, prospecting and exploring for minerals, and mining operations.*"[462] Accordingly, the holder of a freehold estate over the Compensable Acts Area is not permitted to conduct activities such as those undertaken by the FMG Respondents pursuant to the Compensable Acts on their freehold. If they do, it is punishable by a fine of $150,000 (together with a further fine of $15,000 per day during which the offence continues).

237. Further, the restrictions and offences imposed by the MA are not 'cured' (or allowed) by the fact that a planning scheme may, on a discretionary basis, zone that land for "*industry extractive*". Rather, the MA demonstrates an intention that planning schemes are not to derogate from the provisions of the MA and, for example, allow activities which the MA would not permit. Instead, the opposite is true. For example, s.120 MA provides that whilst the Minister, warden or mining registrar will take into account planning schemes when considering an application for a mining tenement, those planning schemes do not operate

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455 ACS at [123] and [126].
456 ACS at [115]-[118] and [123]-[124]. It appears to be accepted by the Applicant that Mr Hall, Mr Jaski and Mr Meaton did not address this issue and the Applicant specifically states that it "*does not rely upon Mr Meaton or Mr Miles evidence to establish the highest and best use*" and instead its submissions "*are directed at why Mr Preston's evidence on this point should not be accepted*": ACS at [124].
457 CB E.04.002 at [460]-[472]; CB ZA.07.021 at 1128-1129.
458 CB E.03.005 at [41] and [46]; CB E.05.003 at [M27-M34].
459 CB E.05.003 at [M31].
460 See paragraph [181] above. Also see, in particular, CB E.05.003 at [M30].
461 CB E.04.002 at [571]-[572].; CB ZA.07.021 at 1128(9-12).
462 "*Mining operations*" are defined in s.8 MA to include "*any mode or method of working whereby the earth or any rock structure stone fluid or mineral bearing substance may be disturbed removed washed sifted crushed leached roasted distilled evaporated smelted combusted or refined or dealt with for the purpose of obtaining any mineral or processed mineral resource therefrom...*"

to prohibit or effect the grant of the tenement or the carrying out of any mining operations authorised by the MA. Accordingly, it has been held that the MA may allow activities which would otherwise not be allowed by the planning scheme (or would require approval under the planning scheme).[463]

238. In any event even if, which is denied, highest and best use to be made of the land the subject of the Compensable Acts is "*mining*" or "*industry extractive*", the Applicant has not provided the Court with an alternative valuation of a freehold whose highest and best use is "*mining*" or "*industry extractive*" (noting that the question of highest and best use of a freehold is different from the valuation of a hypothetical freehold discussed in Part D4.3.3 below).

239. In light of the above, the First Respondent submits that Mr Preston's valuation of a freehold estate in the land the subject of the Compensable Acts is correct and, importantly, is unchallenged by any contrary evidence upon which the Court could base a different valuation.

D4.3.3 A Hypothetical Mineral Freehold is irrelevant to the NTA and the MA

240. Contrary to the ACS,[464] the concept of a hypothetical fee simple which includes minerals is an "*artificial concept*" that has developed in the context of ratings or taxation legislation (not compensation) and is a creature of those statutes.[465] Relevantly, *Perilya Broken Hill Ltd v Valuer-General*[466](**Perilya (2015)**) and the cases upon which it relies, namely *Gollan v Randwick Municipal Council*[467] (**Gollan**) and *Royal Sydney Golf Club v Federal Commissioner of Taxation*[468] (**Royal Sydney Golf**), all concerned the meaning of "*unimproved value*" in s.6A(1) of the *Valuation of Land Act 1916* (NSW)[469] and s.3 of the *Land Tax Assessment Act 1910* (Cth)[470] as being, *inter alia,* the "*capital sum which the fee-simple of the land might be expected to realise.*" These cases held that, in their statutory context, the "*fee simple*" under consideration meant an unencumbered fee simple estate without any restrictions attaching to the title (such as a reservation of minerals) so that the land was taxed or rated without those restrictions.[471]

241. These findings reflected the policy, adopted in ratings and taxation statutes, of bringing the first estate of land into tax, irrespective of whether that estate in land may in fact be divided between various holders and interests.[472] In effect, the owner of the first estate was selected as the taxpayer or ratepayer "*who was to represent all persons beneficially entitled to the land*." This is done so as to avoid the evasion of tax or ratings by the division of interests.[473] As explained by Sugerman J in *Sydney Council v Valuer General* these ratings systems postulate a uniform basis of assessment of rates, payable by a class of ratepayers whose estates and interests may vary considerably, on a basis which:

> *…has no regard of the quantum or incidents of any particular ratepayer's estate or interest. The system is a system of rating, not upon the value of the ratepayer's estate or interest, but upon the value of the "fee simple of the land" ascertained by the reference to a hypothetical sale thereof defined in terms which make it independent of the personality of any actual owner for the time being.*[474]

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463 *Panoramic Resources Limited and Lanfranchi Nickel Mines Pty Ltd and Shire of Coolgardie* [2010] WASAT 159.
464 ACS at [136]-[137].
465 *Perilya Broken Hill Limited v Valuer-General (No.6)* [2015] NSWLEC 43 (**Perilya (No.6)**) at [33].
466 (2015) 10 ARLR 235; [2015] NSWCA 400. It is noted that the case that the Applicant cites (*Valuer-General v Perilya Broken Hill Ltd* [2013] NSWCA 265 (**Perilya (2013)**)) was an earlier decision and *Perilya (2015)* contains a more comprehensive consideration of this topic.
467 [1961] AC 82.
468 (1955) 91 CLR 610; [1955] HCA 13.
469 In the case of *Perilya (2015)* and *Gollan.*
470 In the case of *Royal Sydney Golf.*
471 *Perilya (2015)* at [82] and [85]; *Gollan* at 101-102 and *Royal Sydney Golf* at 622-623.
472 *Perilya (No.6)* at [33].
473 *Royal Sydney Golf* at 622-623. See also *Gollan* at 95.
474 (1956) 1 LGRA 229 at 234-235.

242. Accordingly, the Courts have long recognised that the task being undertaken when valuing the hypothetical or 'pure' fee simple to determine "*unimproved value*" is an artificial one, undertaken for a particular ratings or tax purpose. As explained by the House of Lords in *Gollan,* "'*improved value' and 'unimproved value' are special terms to which is allocated a particular statutory meaning…as has been pointed out 'unimproved value' is fundamentally a ratings concept and, it seems, is resorted to for virtually no other purpose*."[475] The Courts have confirmed that the principles which determine ratings assessments are not those which operate in the case of compulsory acquisitions (where it remains the case that a dispossessed owner is only entitled to the value of the interest in the land actually held by them).[476] Thus in *Gollan,* Lord Radcliffe observed that "*while burdens on individual titles may naturally enough be treated as irrelevant under a general rating scheme, it would hardly be possible to expect that similar treatment was intended to be given when it came to valuing a person's individual interest for any…other purposes,*" including death duties, resumptions and mortgage valuations.[477]

243. Similarly, in *Broken Hill Proprietary Co Ltd v Valuer-General*[478] (**BHP v VG**) the Privy Council held that the general valuation principles applicable to ratings (i.e. the use of the hypothetical or 'pure' fee simple) did not apply to other valuation purposes and, if so applied, would produce "*great hardship and unfairness*."[479] Relevantly, Lord Upjohn considered that:

> *if the rating principles of valuation are to be applied, it is quite plain that great injustice would be done if some estate or interest in property is to be valued as though it was an absolute unencumbered fee simple, whereas in law it may be subject to easements, restrictive covenants and so forth. Such a basis of valuation would produce grossly unjust results which the legislature could never have intended or be presumed to have enacted save by clear words*.[480]

244. There is no suggestion in either the NTA or the MA which requires equivalence between the economic value of a Hypothetical Mineral Freehold and exclusive native title for compensation purposes.[481] **First**, none of the judges in *Griffiths* suggested that the relevant "*freehold*" was a hypothetical or 'pure' freehold. Rather, the plurality recognised that the economic value of a freehold estate and, in turn, the economic value of exclusive native title, would differ from location to location depending upon the circumstances of the relevant land.[482] This would not be the case had the Court adopted a hypothetical or 'pure' freehold. **Second**, none of the textual indicators present in *Perilya (2015)*, *Gollan* or *Royal Sydney Golf* are contained in ss.51 or 51A NTA.[483] Further, and more importantly, the Courts have been clear that the hypothetical or 'pure' freehold is an artificial concept, undertaken for ratings or tax purposes, and has no place in a compulsory acquisition context. **Third**, leaving aside the policy considerations and purposes served by rating or tax legislation, the hypothesis of a hypothetical or 'pure' freehold is not required to achieve the "*parity principle*" and/or the non-discrimination required by the NTA (and/or the RDA). As discussed in Part D4.2.7.1 above, no holder of a freehold estate in the Compensable Acts Area would hold any rights to minerals.[484] It would treat exclusive native title holders vastly more favourably if the land were to be valued as equivalent to a freehold estate with those minerals. **Fourth**, whatever the position under the NTA, it is clear from s.117 *Mining Act 1904*, s.9 and s.123(1) MA that there is no textual indicator for a hypothetical or 'pure' freehold under the MA. Indeed

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475 *Gollan* at 101-102.
476 *Gollan* at 96.
477 *Gollan* at 101.
478 [1970] AC 627.
479 *BHP v VG* at 641.
480 *BHP v VG* at 640.
481 *Cf* YMAC CS at [55].
482 See, for example, *Griffiths* at [90], [95]-[97].
483 Those cases were concerned with "*unimproved value*" being "*the fee-simple of the land*", whereas s.51A NTA refers to the amount payable if the act were instead a compulsory acquisition of "*a freehold estate in the land.*"
484 There is not, and has never been, a pre-1899 freehold granted in the Application Area, such that any presumed freehold estate in the Application Area must be one without minerals: see Part D4.2.7.1 above.

the MA is founded upon the opposite principle, namely the separation of the minerals (owned by the Crown) from the land (and any estate or interest granted in the land).

245. Fundamentally, the assessment of economic loss required by s.51(3) NTA (in applying s.123 MA) is one that values a freehold estate in the particular land the subject of the Compensable Acts having regard to the highest and best use to which that land may be put and, in accordance with ordinary compensation principles, takes into account any conditions, reservations and restrictions attached to that land. It is not to value some hypothetical or 'pure' freehold. Accordingly, the valuation task required by the Court cannot take into account: (a) those things which a freeholder would not (and could not) own as part of their freehold i.e. the minerals; or (b) a purpose which cannot legally be conducted pursuant to that freehold (mining). On this basis, the First Respondent submits that Mr Preston correctly valued the economic value of an unencumbered freehold estate in the land subject to the Compensable Acts.

D4.3.3.1 Applicant has not established the value of a Hypothetical Mineral Freehold in any event.

246. If, contrary to the First Respondent's submission, the Court considers that it is appropriate to calculate compensation for the Compensable Acts by way of a Hypothetical Mineral Freehold, the Applicant has not established by expert evidence (or otherwise) the manner in which that exercise should occur. As the Applicant correctly identifies, no experts (including the Applicant's own experts) were asked how to value a Hypothetical Mineral Freehold.[485] It is not sufficient for Mr Preston or Mr Hall to agree in cross examination that, if they had to value a Hypothetical Mineral Freehold, they would need to value the iron ore in the land[486] or for those experts to postulate how they may theoretically go about such a task (in circumstances where neither expert agreed with the approach or had turned their mind to the question previously).[487]

247. The ACS assumes, absent any evidence, that the Hypothetical Mineral Freehold should simply be equated to the s.38 MA Amount. However, as recognised by Leeming J in *Perilya (2013)*, "*there will be a variety of ways in which the land value of the hypothetical fee simple may be calculated validly. As Mason J said,* '*valuation is not an exact science, but an exercise in estimation*'."[488] Thus when valuing a hypothetical or 'pure' freehold (or a hypothetical mine) there is "*no a priori correct way to determine the land value*." For example, one approach may be to value by reference to relatively contemporaneous sales of comparable properties. Another, more common approach, would be to value by reference to the present value of the cashflow that the mine would generate (a discounted cashflow model).[489] Accordingly, whilst Mr Preston considered the proposition to be "*hypothetical*", he agreed in cross examination that one approach to calculate the value of a Hypothetical Mineral Freehold was using a discounted cash flow model.[490] Mr Hall also appeared to agree that a discounted cash flow approach may be "*the natural way to value it…if you were valuing an asset that included the right to minerals.*"[491]

248. However, even if it is agreed that a discounted cash flow approach is the assumed valuation method, "[t]*he valuer will face a series of choices in deriving the inputs into a discounted cashflow calculation. One dimension of those choices relates to the level of generality to be chosen - for example, is allowance to be made for tax? If so, what to do about depreciation? How to determine what the hypothetical operating costs will be? All these matters lie within the expertise of the valuer*."[492] It is clear from *Perilya*

485 ACS at [112] and [115]-[118].
486 ACS at [115] and [138].
487 ACS at [113] and [115].
488 *Perilya (2013)* at [35].
489 *Perilya (2013)* at [34].
490 CB ZA.07.021 at 1126-1127.
491 CB ZA.07.021 at 1180(14)-(27).
492 *Perilya (2013)* at [39].

(2013), together with the limited evidence given by Mr Preston, that the valuation of a Hypothetical Mineral Freehold requires a great many more integers than the (incorrect) calculation of the s.38 MA Amount which the Applicant has equated with the value of the Hypothetical Mineral Freehold. For example, the discounted cashflow approach in *Perilya (2013)* appeared to include factors such as net operating revenue, expenditure, improvements, production, depreciation, tax, royalties and compensation owed and discount rates[493] and that the valuation of many of those factors was in controversy between the experts.[494] Similarly, Mr Preston stated that a discounted cash flow valuation would be an '*all-up valuation*", "*of which land would only be a part*" and would require a consideration of such things as revenue from the mineral resources, licence fees, rentals, royalties, expenses and costs, plant and equipment, business goodwill and the interest in the land held.[495]

249. This is not to say that the First Respondent agrees that the discounted cashflow approach is the correct method to value a Hypothetical Mineral Freehold, only that: (a) the First Respondent was denied the opportunity to properly consider, cross examine and/or lead expert evidence on this point; (b) whatever the discounted cashflow approach may or may not involve, it is not the equivalent of the s.38 MA Amount; and (c) in any event, for the reasons discussed at Part D4.2.8 above, the Applicant has incorrectly calculated the s.38 MA Amount (and hence the value of a Hypothetical Mineral Freehold).

D4.3.4 Reduction from the value of the Hypothetical Mineral Freehold would be required

250. Even if, which is denied, the Hypothetical Mineral Freehold was relevant to the assessment of compensation under the NTA or MA, a downward adjustment would still be required to account for the fact that the Yindjibarndi People do not have rights to minerals. As discussed in *Griffiths,* there is no suggestion "*that the nature and incidents of particular native title rights and interests are irrelevant to their economic worth or to the determination of just compensation for extinguishment or impairment.*"[496] Rather, it is "*fundamental*" that "*the economic value of the property that was lost must be assessed according to the rights and interests that were held*."[497] Just as non-exclusive native title holders are not to be compensated under Part 2, Division 5 NTA as if they held exclusive rights,[498] native title holders who do not hold a right to minerals are not to be compensated as if they do. Accordingly, the starting point of any economic valuation of the Yindjibarndi People's native title rights and interests would have to be parity with a freeholder who, like them, does not hold any rights to minerals. That was the valuation conducted by Mr Preston.[499]

D4.4 APPLICANT'S THIRD ECONOMIC LOSS CASE

251. The Applicant's third economic loss case is a (new and unpleaded) alternative case to its second case. It arises if: (a) the Court considers that the NTA requires the economic value of the Yindjibarndi People's native title rights and interests to be determined by reference to the objective economic value of an unencumbered freehold estate in that land; and (b) that freehold estate should not be valued on the basis that it contains any rights to minerals (i.e. where the Applicant's first and then second cases fail). In that circumstance, the Applicant asserts that the economic loss for the Compensable Acts must be assessed by reference to: (a) the market value of the freehold estate (an amount which is not stated by the Applicant); (b) a "*special value*" component to recognise "*the negotiation or exchange value*" of the Yindjibarndi People's native title rights and interests (being, in effect, the same as the Revenue Share

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493 *Perilya (2013)* at [37] and [62].
494 See, for example, *Perilya Broken Hill Limited v Valuer-General* [2012] NSWLEC 235 at [12].
495 CB ZA.07.021 at 1126-1127.
496 *Griffiths* at [75].
497 *Griffiths* at [87].
498 *Griffiths* at [74].
499 CB E.04.002 at 10 (Table).

Amount); and (c) a "*component for the scientific and cultural values of the land that are a part of the State's and the National heritage*" (being, in effect, the same as the Heritage Amount).[500]

252. In this scenario it is not clear whether the economic loss also includes the Heritage Amount or the Psychological Amount but, for present purposes, the First Respondent has assumed that it includes the Psychological Amount but not the Heritage Amount (otherwise the Applicant would be seeking compensation twice for the same element). The Applicant has not specified whether the First Respondent or the FMG Respondents are liable to pay this amount.

253. For the reasons set out in Part D4.2 above and Part D4.5.1 below, the second and the third elements of this economic loss case (i.e. the additional "*special value*" and "*scientific and cultural value*") are not part of the economic loss assessment outlined by *Griffiths* and required by s.51(3) NTA (in applying s.123 MA). Further, and in any event, *Griffiths* was clear that the notion of "*special value*" in compulsory acquisition cases was to be equated with cultural loss in the context of native title compensation.[501] Accordingly, "*special value*" is not a separate heading of economic loss, nor can what is claimed by the Applicant as "*special value*" be considered cultural loss. The Applicant has not explained how, or why, if the Court is to establish the value of a freehold estate in the land the subject of the Compensable Acts, it should do anything other than what the plurality in *Griffiths* mandates i.e. by obtaining the market value of that land having regard to its highest and best use, together with any conditions or restrictions that the land may contain. On that approach there is no place for the additional "*special value*" or "*cultural value*" claimed. Further, the Applicant has not explained why the additional claim for "*special value*" and "*cultural value*", in addition to freehold value, would not offend against s.51A NTA.

D4.5 APPLICANT'S ADDITIONAL ECONOMIC HEADS OF DAMAGE

D4.5.1 The Heritage Amount

254. Each of the Applicant's three economic loss cases seeks an additional award of compensation in the amount of **$34,850,000** for "*loss of or damage to country and to ancient occupation, cultural and dreaming sites and dreaming tracks*."[502] In particular, the Heritage Amount is said to reflect: (a) $50,000 for the destruction by the FMG Respondents of a *Jinbi* (spring), identified by Stanley Warrie during a heritage survey conducted on behalf of the FMG Respondents;[503] (b) $100,000 for each of the 288 sites said to have been salvaged by the FMG Respondents; and (c) $1 million for each of the six Dreaming tracks which travel through the SHM and which the Applicant alleges has been destroyed or impacted.[504]

255. The summation of the Dreaming track evidence in the ACS is, with respect, difficult to follow and, in particular, it is unclear which particular Dreaming tracks the Applicant says travel through the Compensable Acts Area. On the First Respondent's analysis, it appears that, contrary to ACS at [189], Dr Palmer was of the view that at least one of the Dreaming tracks referred to in ACS at [282]-[286] does *not* travel through the SHM and is therefore not "*impacted"* by the Compensable Acts: see *gurri* (the Girls).[505] In relation to the narrative about the *Marga* known as *Burlinyjirrmarra* and *Barganyji* (olive python), Dr Palmer noted that the travels of *Burlinyjirrmarra* were not portrayed in the map at Figure 6.5 of his first expert report (which depicts "*tracks of the Burndud and mythic beings*" as drawn

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500 ACS at [147]-[149].
501 *Griffiths* at [84], [304], [309] and [311].
502 CB A.02.014 at Economic Loss item 3, ACS at [4] and [187]-[195].
503 CB A.02.015 at [25] and CB A.05.008 at [19]-[21].
504 ACS at [193]-[195].
505 CB E.03.001 at [374].

by Michael Woodley, Middleton Cheedy, Kevin Guiness and Stanley Warrie)[506] and, in Dr Palmer's view, "*is not specifically impacted by the mines of the Solomon Hub.*"[507]

256. In any event, the Heritage Amount is not a compensable form of economic loss. Rather, the Heritage Amount reflects the kinds of losses which the First Respondent accepts may be considered in assessing cultural loss (see Part E4 below). By also taking this kind of loss into account in assessing economic loss, the Applicant offends against the basic principle against double compensation.[508]

257. Further, the Applicant's methodology for calculating the Heritage Amount is punitive in nature. It involves considerations which go beyond what is strictly compensatory, into the realm of exemplary damages associated with punishment of the FMG Respondents (or the First Respondent) and general deterrence.[509] There is no evidence before the Court which indicates that the FMG Respondents have not complied with the requirements of the AHA before destroying, damaging or in any way altering Aboriginal sites. The archaeological experts all agree that the methods for identifying, investigating and mitigating damage to archaeological sites in the Solomon Hub Project are broadly comparable to those widely employed in the Pilbara and that heritage consultants engaged by the FMG Respondents appear to have complied with regulatory requirements.[510] The experts also agree that the salvage of sites and archaeological places within the Solomon Hub Project represents a "*substantial effort to mitigate the loss of cultural material.*"[511] In circumstances where the respondents have acted lawfully and consistently with the standard of Aboriginal heritage work conducted in the Pilbara region, the Applicant's claim for the Heritage Amount should not be entertained.

D4.5.2 The Psychological Amount

258. Each of the Applicant's three economic loss cases seek a further additional award of compensation in the amount of **$112,140,000** for "*psychological and other services required to treat the social disruption / division and related psychological trauma within the Yindjibarndi community.*"[512] The costings for the Psychological Amount are provided by the Applicant's expert witness, Dr Jeffrey Nelson.[513] In cross-examination, Dr Nelson admitted that he has no expertise in establishing a health and wellbeing centre and therapeutic program of the type referred to in Attachment B of his second expert report.[514] Dr Nelson also expressed some hesitation in explaining his costings, agreeing that it was "*a very rough estimate*"[515] and that he was no "*financial wizard.*"[516] It was clarified in cross-examination that, if Dr Nelson's remedial plan was implemented, the trauma he identified would be "*significantly reduced or alleviated*" at a cost of $4.44 million (excluding GST), plus an annual employment cost of $1.735 million.[517] Despite the ACS at [198] putting a 60 year timeframe on the "*Third Phase*" of the therapeutic program (on the basis of Dr Nelson's opinion that the program would require "*generations"* to have any effect), Dr Nelson agreed in cross-examination that it would be apparent after 5 years whether the intervention was having an effect.[518] A submission is made at paragraphs [285] – [286] below in relation to the approach

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506 CB E.03.001 at [379].
507 CB E.03.001 at [382].
508 *Griffiths* at [105].
509 ACS at [191].
510 Peter Veth, Caroline Bird and Douglas Williams, *Joint Report: Conference of Experts (11-12 October 2024)* (**Archaeological Joint Report**) at [14].
511 Archaeological Joint Report at [4].
512 CB A.02.014 at Economic Loss item 4; ACS at [4] and [196]-[198].
513 CB E.03.007 at Attachment B.
514 CB ZA.07.019 at 904(8-10).
515 CB ZA.07.019 at 908 (26).
516 CB ZA.07.019 at 907(45).
517 CB ZA.07.019 at 912(27-46) – 913(1-21). Dr Nelson's $4.44 million amount is comprised of one-off costs for the 'First Phase' ($800,000), 'Second Phase' ($340,000), and the construction of a wellbeing centre ($3.3 million).
518 CB ZA.07.019 at 906(19-21).

the First Respondent says the Court ought to take in respect of Dr Nelson's evidence generally. In short, Dr Nelson's evidence should be given little weight.

259. In any event, as outlined above in Part D3.3 above, the loss to be compensated under the NTA is for the effect of a compensable act on the native title holders' "*native title rights and interests*". Those rights must be "*in relation to land and waters*" and they must have the three characteristics specified in s.223(1)(a) – (c).[519] The Psychological Amount is not a compensable form of economic loss because it does not represent a loss referable to the rights of the Yindjibarndi People to do something in relation to the land.

D4.6 APPLICANT'S CULTURAL LOSS CASE

D4.6.1 The Split is not compensable

260. The Applicant contends that, in August 2010, division within the Yindjibarndi community emerged in relation to whether and, if so, on what terms the Yindjibarndi People should agree to the development of the Solomon Hub Mine.[520] The disagreement and disharmony is said to have resulted in a split occurring within the group of native title holders (the **Split**). The Applicant attributes the Split to the actions of the FMG Respondents in pursuing the Compensable Acts.[521] There is no suggestion in the evidence or otherwise that the Split was caused or contributed to by the actions of the First Respondent.[522] The First Respondent was not privy to the day-to-day interactions that occurred between the Yindjibarndi People and the FMG Respondents whilst those parties were attempting to reach agreement with respect to the doing of the Compensable Acts.

261. The Split is manifested in some Yindjibarndi People aligning themselves with Yindjibarndi Aboriginal Corporation (**YAC**), and other Yindjibarndi People aligning themselves with Wirlu-Murra Yindjibarndi Aboriginal Corporation (**WYAC**). WYAC is sometimes referred to by the Applicant as a "*splinter group*",[523] which is suggestive of a group whose members are in the minority. However, the evidence discloses that the membership of both corporations is approximately equal: as at 30 June 2023, YAC had 474 Yindjibarndi members[524] and WMYAC had 480 Yindjibarndi members.[525] A total of 235 Yindjibarndi People were members of both YAC and WMYAC as at 30 June 2023.

262. The Applicant contends that the Split has had a number of consequences. In particular, the Split is said to have: (a) affected social relationships under the *Galharra* system (e.g., *wurruru* and *gadjardu* relationships) and cultural norms such as reciprocity and mutual care (*nyinyaard*); (b) disrupted the Yindjibarndi People's practice of *Bidarra* Law,[526] in the sense that initiation ceremonies are no longer conducted as a single community event each year. Rather, since the Split, the two factions of Yindjibarndi People conduct the *Bidarra* rituals separately at Woodbrook law ground on an alternating annual basis; and (c) given rise to physical, emotional and psychological injury suffered by the Yindjibarndi People.[527]

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519 *Ward* at [17]; *Griffiths* at [22].
520 CB A.02.002 at [36]; CB A.02.007 at [57]; ACS at [347].
521 CB A.02.002 at [36]; CB A.02.007 at [57]. It is noted that the Applicant was not permitted to amend its pleadings in terms of proposed paragraph [36A] (see *Affidavit of Simon Blackshield* affirmed 23 May 2023 at Annexure SCB-70) to allege that the Split was "*a direct result of the conduct of FMG's employees and officers in their pursuit of the grant*" of the Compensable Acts. See also Transcript 2 June 2023 at 47-49.
522 See, for example, ACS at [456]: "*Dr Palmer's fieldwork reflects that the split in the community is viewed by senior Yindjibarndi people as the product of FMG's actions…*"
523 See, for example, CB A.04.001 at [23]-[32] and ACS at [503].
524 CB E.08.002.003 (Exhibit E, Tab 2).
525 CB E.08.002.004 (Exhibit E, Tab 3).
526 CB A.02.002 at [46(c)(ii)]; ACS at [462].
527 CB A.02.002 at [36]; ACS at [470] and [497].

263. According to the Applicant, the Split and its consequences are "*an aspect of non-economic or cultural loss compensable under s.51(1) NTA and s.123 MA*".[528] Save for paragraphs [57] – [58] of their written opening,[529] the Applicant has not developed or explained the legal basis for this assertion. However, in the First Respondent's submission the Split does not fall within the meaning of "*social disruption*", as that term is used in s.123(4) MA, and is not otherwise compensable loss or damage under either the NTA or MA according to *Griffiths* principles.

D4.6.1.1 The Split is not "*social disruption*"

264. As discussed at Part D3.2.4.1 above, "*social disruption*" in s.123(4)(f) MA has a particular meaning. That meaning does not encompass any social disharmony or conflict within the Yindjibarndi People that arose due to a dispute as to whether (and on what terms) the Compensable Acts should be done. Leaving aside the fact that s.123(4)(f) MA does not give rise to a separate head of damage or entitlement to compensation (i.e. one falling outside of the *Griffiths* bifurcated assessment of economic and cultural loss), the Split and its consequences are not compensable as "*social disruption.*"

D4.6.1.2 The Split is not economic or cultural loss

265. As outlined above in Parts D3.2.3 and D4.2.1, the loss to be compensated under the NTA is the loss, diminution, impairment or other effect of a compensable act on the native title holders' "*native title rights and interests*".[530] Relevantly, the compensation enquiry must have regard to, and compensate for the effect on the "*physical or material aspect*" of those rights and interests (i.e. the right to do something in relation to the land or waters) and the "*cultural or spiritual aspect*" (i.e. the connection with the land or waters).[531] The Split (and its consequences) does not fall within either category as:

    (a) the Split is not an effect of the Compensable Acts on the right of the Yindjibarndi People *to do something in relation to the land* (that is, the Split is not a form of economic loss); and

    (b) nor is the Split an effect of the Compensable Acts on the Yindjibarndi People's *spiritual connection with their land and waters*. Division and disharmony amongst members of the native title holding group is an effect on people and their relationships with one another, not on the cultural or spiritual connection that those members have with the land and waters by their traditional laws and customs. As Dr Palmer said in cross-examination, "*social disharmony is a feature of the relationships of humankind.*"[532] Social division does not of itself amount to cultural loss, for the reason that a difference of opinion amongst native title holders in relation to the doing of a *future act* does not affect the cultural value of the land.

D4.6.1.3 The Split was not caused by the Compensable Acts

266. If, contrary to the above, the Court finds that a split or division within a group of native title holders may be a form of cultural loss, the First Respondent submits that the Split in question in this proceeding was not caused by the doing of the Compensable Acts for the reasons set out below.

267. Whether the entitlement to compensation arises under the MA or the NTA, there must be a causal connection between the doing of the Compensable Act (the **act**) and the "*loss, diminution, impairment or other effect*" (the **effect**) on the Applicant's native title rights and interests. The requisite connection between an act and its effect on native title rights and interests is to be decided by reference to two

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528 ACS at [348].
529 CB A.02.007.
530 *Ward* at [17]; *Griffiths* at [22].
531 *Griffiths* at [23].
532 CB ZA.07.018 at 819(27-28).

questions: one factual (is the *act* a necessary condition of the *effect*?) and one normative (whether legal responsibility for that particular *effect* occurring in that way should be attributed to a particular person).[533]

268. Accordingly, when considering causation, the first issue to be addressed is how to characterise the "*act*" and the "*effect*" that must be causally linked. On the Applicant's case, the relevant "*effects*" are the Split and its consequences: namely, the disruption to cultural practices and physical, emotional and psychological injuries that arose because of the Split. The relevant "*act*", however, is more contentious. Using highly imprecise language, the Applicant variously describes the relevant "*act*" which caused the Split as "*FMG and FMG's mining activities*"[534] or "*the Solomon Hub Mine and the actions of the FMG Respondents*";[535] or "*the development and operation of SHP*"[536] or "*the grant of the relevant tenements and the development of the mine by FMG*",[537] or "*the construction and establishment of mining infrastructure, mining activities and the conduct of FMG …*"[538]

269. By the Applicant's account, the relevant "*act*" commenced in or around the period 2007 – 2009.[539] For example, Dr Palmer gave evidence that events related to the development of the Solomon Hub mine on the Compensable Acts caused the Split[540] and that those events included early discussions in 2008 and 2009 between the FMG Respondents and the Yindjibarndi People.[541] Similarly, Dr Nelson was of the view that the relevant event commenced with the mere "*suggestion that mining could take place by a particular party, and there's a conversation*"[542] and that this occurred with "*the arrival of FMG*"[543] in Roebourne in the period between 2007 – 2009.[544] It is unclear when, if at all, the Applicant says the relevant "*act*" ceased. Arguably, the unbounded and undefined "*act*", as posited by the Applicant, will continue for as long as the mine continues to operate.

270. The Applicant's characterisation of the relevant "*act*" is impermissibly broad and uncertain. It is clear that compensation is for the effects <u>of the acts</u> themselves on the native title rights and interests.[545] In the First Respondent's submission, the relevant "*act*", must therefore be the doing of the Compensable Acts, being the "*acts*" for which the Applicant seeks compensation.[546] This is consistent with the definition of "*act*" in s.226(2)(b) NTA (namely, "*the grant … of a licence, permit, authority or instrument*") which is a core definition used throughout the NTA, including in ss.24MD(3), 51(1) and 51(3) NTA.

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533 *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [11]-[12]. No Court in *Griffiths* gave substantive consideration to the applicable test for causation under the NTA, although the primary judge applied "*the practical test*" (also known as the "*commonsense test*") for causation approved by the High Court in *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506; [1991] HCA 12: see *Griffiths (No.3)* at [321]. However, the common law principles in relation to causation have undergone some refinement since the High Court's decision in *March v Stramare*, particularly in relation to the role played by the concept of 'commonsense' as a touchstone of causation at common law: see, for example, *Travel Compensation Fund v Tambree* (2005) 224 CLR 627; [2005] HCA 69 at [45]; *Comcare v Martin* (2016) 258 CLR 467; [2016] HCA 43 at [42]; *Young v Chief Executive Officer (Housing)* (2023) 97 ALJR 840; [2023] HCA 31 at [60].
534 CB A.02.002 at [36].
535 CB A.02.007 at [58].
536 ACS at [348].
537 ACS at [453].
538 ACS at [501].
539 It is an agreed fact that FMG's relationship with the Yindjibarndi People commenced in 2007 (CB A.02.015 at [159]).
540 CB E.03.001 at [130]; CB E.03.006 at [213]; see also at [251].
541 CB ZA.07.017 at 795(27-38). Although it is noted that Dr Palmer did not speak to anyone from the WYAC side of the Split: CB ZA.07.017 at 798(1-3); CB ZA.07.018 at 816-817.
542 CB ZA.07.019 at 886(40-47).
543 CB E.03.003 at [29].
544 CB ZA.07.019 at 886(3-11). See also CB ZA.07.019 at 878-880.
545 *Griffiths* at [42]-[43]; s.227 NTA.
546 Section 226(2)(b) NTA; A.02.001 at Schedule I; A.02.002 at [8].

271. Accordingly if, which is denied, the Split and its consequences may be relevant to an assessment of compensation under s.51(3) NTA, the Applicant must demonstrate that the doing of the Compensable Acts caused the Split (and its consequences). If it is accepted that there is no causal connection between the doing of the Compensable Acts and the Split, it follows that no liability for disruption to cultural practices can arise. This is because, on the Applicant's case, the disruption to the acknowledgement and observance of traditional laws and customs concerning the *galharra*, *nyinyaard* and ritual practice is a consequence of the Split. There is no suggestion in the evidence or otherwise that the Yindjibarndi People's acknowledgement and observance of traditional laws and customs in relation to those matters would have been disrupted if the Split had not occurred. Similarly, there can be no liability to compensate for physical and emotional injuries, or psychological injuries, suffered by the Yindjibarndi People, to the extent that Dr Palmer and Dr Nelson attribute such injuries to the Split.[547]

272. In the First Respondent's submission, the relevant causal link between the doing of the Compensable Acts and the Split has not been established for the reasons set out below.

273. **First**, it appears as if the Split had its origins in events that occurred prior to the first engagement of the FMG Respondents with the Yindjibarndi People in 2007[548] (and for reasons unrelated to the Compensable Acts). As outlined by Dr Nelson in his expert report, the community of Roebourne, where the majority of Yindjibarndi People live, is a community that has historically experienced considerable social problems stemming from the dispossession and oppression of Aboriginal people.[549] These social problems were, as Dr Nelson acknowledges, "*accompanied by a failing in the structures that had maintained the community and their culture for so long*."[550] In addition to the existing social dysfunction within Roebourne, the evidence reveals there was disharmony and dissension within the Yindjibarndi People from as early as 2005. Whilst interviewing Yindjibarndi elder, Margaret Read (deceased), in March 2022, Dr Palmer recorded in his fieldnotes that:

> *Margaret recalls coming back from travels with her husband in about 2004 and 2005 when everyone was happy about the native title arrangements and there was no division. Then about 2005 some of the Wirlumurra wanted to form their own group, while others, including Margaret wanted everyone to stay together. But they decided 'no' and they went off and formed their own group. … This caused quite a division in these early years while some continued to argue that they should keep together. Margaret was working then and didn't get too involved. Then by 2006 the splinter group really took off and left the YAC. It certainly involved [affected?] her family … Then when Andrew Forrest came along things got worse as he put on 'his two bobs worth'.*[551] [emphasis added]

274. Further, the evidence confirms that since approximately 2008 some Yindjibarndi People had been expressing concerns with respect to the management of YAC. Relevantly, it is agreed that: (a) since approximately 2008, members of YAC held concerns about how YAC was managed, the management of YAC's finances and the finances of its subsidiaries, and about the role of Michael Woodley as its CEO;[552] (b) those concerns contributed to the decision made by some YAC members to establish or join WYAC, and continue to contribute to the dispute between YAC and WYAC;[553] and (c) the dispute between YAC and WYAC was not confined to a dispute about the terms of any agreement with FMG,

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547 CB E.03.001 at [164]-[179]; CB E.03.003 at [16], [22], [24], [29]-[33] and [40]-[46]; CB E.03.007 at [20]-[26], [31]-[34] and [54]-[56].
548 CB A.02.015 at [159].
549 CB E.03.003 at [14]-[16].
550 CB E.03.003 at [15]; CB ZA.07.018 at 871-872.
551 CB E.07.001.001 (Exhibit E); *cf* ACS at [454].
552 CB A.02.015 at [58]; *Sandy v YAC RNTBC (No.4)* (2018) 126 ACSR 370; [2018] WASC 124 (**Sandy (No.4)**) at [122] and [131] (see extracts in CB A.09.017.01).
553 CB A.02.015 at [59]; *Sandy (No.4)* at [131] (CB A.09.017.01).

but was also a dispute about the management of YAC, including as to its financial management.[554] At [374] of the ACS, the Applicant describes these events as "*the origins*" of the Split.

275. The abovementioned observations were made by Pritchard J in a proceeding commenced in the Supreme Court of Western Australia in 2016 by Aileen Sandy and Sylvia Allen (the **plaintiffs**), being members of the Yindjibarndi People (both now deceased), who were recognised as elders in the Yindjibarndi community.[555] The plaintiffs alleged that, over the course of approximately six years commencing in December 2010, YAC had engaged in "*oppressive conduct*" in contravention of the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (Cth) (**CATSI Act**). Pritchard J was satisfied that some of the conduct relied upon by the plaintiffs constituted conduct which was conduct of the kind described in s 166-1(1)(d) or s 166-1(1)(e) of the CATSI Act.[556] In other words, the concerns that members of WYAC had about the management were YAC were justified (and unrelated to the Compensable Acts).

276. **Second**, consistent with the above, in respect of the earliest Compensable Acts, there was no suggestion made at the time that the Yindjibarndi People were divided as a group as a result of the conduct of FMG in the "*pursuit*" of those Compensable Acts. For example, Compensable Acts M 47/1409-I, M 47/1413-I and M 47/1411-I were the subject of the right to negotiation under Subdivision P in 2008. There is no suggestion in the Tribunal's consideration of those Compensable Acts that the actions of the FMG Respondents had caused a 'split' or division within the Yindjibarndi People. Rather, the focus of the good faith challenge was on issues such as the authority of the FMG Respondents' representatives, the nature of counter offers and delay.[557]

277. **Third**, whilst it is agreed between the parties that the Yindjibarndi People were clearly divided as a group by August 2010[558] it is notable that the Tribunal was not ever satisfied that there had been a failure to negotiate in good faith on the part of the FMG Respondents (or the First Respondent) with respect to the Compensable Acts negotiated during this period.[559] Relevantly, in a good faith challenge in the Tribunal in 2011 relating to Compensable Acts E 47/1398, E47/1399 and M47/1431, the Tribunal noted that Michael Woodley asserted that "*there had been a deliberate strategy adopted by the grantee party designed to undermine the authority of the native title party and sow the seeds of dissent within it, in order to achieve its purpose of an unsatisfactory agreement.*" However, the Tribunal was of the view that "*in circumstances where a native title party has broken into factions the grantee party is entitled to enter into discussions with both groups with the view to reaching agreement with them jointly about the proposed act, so long as it does not, in that process, engage in sharp practice or unconscionable conduct.*" The Tribunal found that there was no such evidence. There was also no evidence that the FMG Respondents had "*actively incited dissention*" within the Yindjibarndi People. Rather, whilst "*there was, and is, serious dissention within the* [Yindjibarndi People] *as a whole, as to how they should deal with the proposals that have been put to them*" the Tribunal found that it was "*open on the facts to assume that the reason for the dissention within the native title party related not to the machinations of the grantee party, but to genuine disagreement within the group as to whether or not to accept the agreement proposed by the grantee party.*"[560]

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554 CB A.02.015 at [61]; *Sandy (No.4)* at [216] (CB A.09.017.01).
555 *Sandy (No.4)* at [1].
556 See *Sandy (No.4)* at [1119]-[1121]. Section 166-1(1) CATSI Act provides that the Court may make an order under s.166-5 if the conduct, acts, omissions, or resolutions of an Aboriginal and Torres Strait Islander corporation are contrary to the interests of the members as a whole or oppressive, unfairly prejudicial or unfairly discriminatory against a member.
557 *FMG Pilbara Pty Ltd/ Ned Cheedy obo Yindjibarndi People/ Western Australia* [2009] NNTTA 38 at [18]-[19]; and *FMG Pilbara Pty Ltd/ Wintawari Guruma Aborginal Corporation; Ned Cheedy obo Yindjibarndi People / Western Australia* [2009] NNTTA 63 at [27].
558 CB A.02.015 at [56].
559 CB A.02.015 at [177(c) and (d)], [181(c) and (d)], [185(c) and (d)], [189(e) and (f)(i)], [295(e) and (f)(i)] and [299(e) and (f)(i)].
560 *FMG Pilbara Pty Ltd/ Ned Cheedy (obo Yindjibarndi People)/Western Australia* [2011] NNTTA 107 at [37].

D4.6.1.4 First Respondent's scope of liability

278. If, contrary to the First Respondent's submissions, the Court finds a causal nexus exists between the doing of the Compensable Acts, the Split and the consequences that flowed as a result of the Split, it then becomes necessary to consider whether the imposition of liability is appropriate and justified in all the circumstances.[561] The First Respondent submits that it cannot be liable to compensate for either the Split or its flow-on effects.

279. In particular, the First Respondent submits that it cannot be held responsible for the conduct of *grantee parties* in *future act* negotiations. Courts have long recognised policy as forming part of the consideration of "*scope of liability*" issues.[562] In *Travel Compensation Fund v Tambree*, Gleeson CJ stated that "[t]*o acknowledge that, in appropriate circumstances, normative considerations have a role to play in judgments about issues of causation*" is not to "*engage in value judgments at large*." Instead, "*the relevant norms must be derived from legal principle*", and "*the primary task of the Court is to apply the legislative norms to be found*" in the relevant statute.[563] In the case of the NTA, Subdivision P establishes a negotiation process between *grantee parties* and *native title parties*, which does not necessarily require the First Respondent as *government party* to participate.[564] It would not promote the policy behind the NTA to impose liability on the First Respondent for problems emerging in the negotiation processes in relation to which the First Respondent has little or no control and/or involvement.

280. In this proceeding, if the entitlement to compensation arises under the NTA, the First Respondent submits that s.125A MA is effective to 'pass on' the First Respondent's liability for any compensation owed to the Applicant in respect of the Compensable Acts to the FMG Respondents. However, in other cases it may not be possible for the First Respondent to rely on the operation of s.125A MA.[565] If there is a finding in this proceeding that social division caused by a *grantee party* during a *future act* negotiation is a compensable effect of the grant of a mining tenement, then the First Respondent could be held liable for the actions of *grantee parties* should similar circumstances arise in other cases where s.125A MA has no operation. In the First Respondent's submission, that outcome would be to defeat the purpose of the compensation scheme under the NTA, by which a *government party* should only be liable for the effects of its own "*act*" (i.e. the grant of tenure), and not for other collateral effects caused by *grantee parties* in pursuit of the grant.

D4.6.2 Mental distress and psychological injury not compensable as cultural loss

281. As noted above, the Applicant attributes much of the mental distress and trauma suffered by the Yindjibarndi People to the Split. For the reasons outlined in Part D4.6.1.2 above, the First Respondent says that psychological injuries occasioned as a result of the Split are not compensable. In addition to injuries arising from the Split, Dr Nelson also seeks to highlight the distress, grief and sadness felt by Yindjibarndi People in relation to the impacts of mining on Yindjibarndi country and the non-consensual

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561 Only at this juncture does the Applicant's submission in relation to the "*egg-shell skull*" rule (ACS [496]-[497]) need to be considered. This is because the egg-shell skull rule is only relevant to the quantification of compensation once duty, breach and some damage are established (*Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35 at [117]). The First Respondent says the egg-shell rule has no application to the circumstances of this case because the Applicant has failed to establish that the First Respondent owed a duty of care to the Yindjibarndi People to avoid psychological injury.

562 See, for example, *Travel Compensation Fund v Tambree* (2005) 224 CLR 627; [2005] HCA 69 at [28].

563 (2005) 224 CLR 627; [2005] HCA 69 at [29].

564 Section 31(1A) NTA. See also Part D4.2.9 above.

565 For example, assuming the entitlement to compensation arises under the NTA and not the MA, s.125A MA is not effective to pass on the First Respondent's liability to tenement holders in respect of mining tenements granted before 11 January 1999. Section 125A MA also does not apply to mining tenements granted pursuant to Subdivision H and I: see Part F2 below.

circumstances in which the Compensable Acts were done.[566] In the First Respondent's submission, to the extent that these are effects of the Compensable Acts, they do not represent a component of either economic loss or cultural loss, but rather are in the nature of solatium.

282. As discussed at paragraph [115] above, all members of the High Court in *Griffiths* emphasised that cultural loss is not an award in the nature of a solatium: it is not dependent upon the particular subjective distress or mental suffering arising from the disruption that follows from a compulsory, rather than voluntary, deprivation of rights.[567] Edelman J explained that neither economic loss nor cultural loss "*is dependent upon the particular subjective distress or mental suffering arising from the disruption to a person's life that follows the compulsory, rather than voluntary, nature of the deprivation of their rights. That is the province of an award of solatium*."[568]

283. It follows that cultural loss is not an award to cover the distress caused by the compulsory extinguishment or impairment of native title. As observed by the plurality in *Griffiths*, cultural loss "*is not just about hurt feelings.*"[569] Rather, cultural loss is a group-felt loss that, typically, involves a sense of injustice arising out of the damage to country caused by the compensable act.[570] Edelman J described the distinction between this group felt sense of loss and solatium as follows:

> *Although the primary judge spoke of the compensation to the Claim Group for "hurt feeling"…this expression was not used in the sense in which it is used for solatium for two reasons. First, it was not a focus merely upon the compulsory nature of the acquisition or extinguishment. Secondly, the expression was not used to describe a particular mental state. Rather, it was used in the sense in which it had been explained in evidence by Professor Sansom in his 2015 report. He described hurt feeling as an "upset combined with justified indignation" belonging to a mob, and a "group-felt injury", where injury was used in the sense of any injustice or wrong. The "hurt feeling" is professed by a group in recognition of damage to country, which damage has been "taken into possession by the group to be owned by all its members". It is a description of the injustice rather than the mental state after extinguishment.*[571]

284. The First Respondent accepts that there is evidence of a group-felt sense of loss, giving rise to cultural loss (see Part E4 below). However, that is not the same as the subjective distress and mental suffering referred to in Dr Nelson's expert report. No claim is made by the Applicant in this proceeding for solatium and therefore no award ought to be made in respect of the matters raised by Dr Nelson.

285. In any event, in the First Respondent's submission, Dr Nelson's evidence should be disregarded. For the purpose of preparing his first expert report, Dr Nelson spoke with 21 Yindjibarndi People in interviews ranging from 60 to 150 minutes.[572] Of his informants, only 2 were members of WYAC,[573] the majority of the others were Yindjibarndi People who gave evidence in this proceeding, or members of those persons' immediate families. Dr Nelson explained that he considered his informants to be "*clients*", to whom he owed obligations of confidentiality.[574] In many cases, Dr Nelson's notes from his interviews are sparse and the findings expressed in his report are not reflected in his fieldnotes.[575] In respect of some sections in his reports, there are no notes supporting the opinions he expresses.[576] Dr

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566 See, for example, CB E.03.003 at [22], [35], [38] and [39]; CB E.03.007 at [12], [17] and [27]-[28]; ACS at [497].
567 *Griffiths* at [53]-[54] and [312]-[317].
568 *Griffiths* at [272].
569 *Griffiths* at [154].
570 *Griffiths* at [313]-[317].
571 *Griffiths* at [313].
572 CB E.03.003 at [12].
573 CB E.03.003 at [12].
574 CB ZA.07.018 at 862(9-23).
575 For example, Exhibit J (CB E.08.001.002).
576 For example, CB ZA.07.018 at 867(27-33).

Nelson did not make any clinical diagnoses,[577] but rather observed "*diagnosable clusters of symptoms*" in more than 65% of people with whom he spoke[578] (i.e. 14 of the 21 people). Based on his interviews with 21 people, Dr Nelson then purported to extrapolate those findings to the Yindjibarndi community as a whole.[579] In particular, Dr Nelson expressed the view that "*community trauma*" is evident[580] and expressed a "*very quick overview*" of the "*psychological wellbeing*" or "*collective mental health*" of the community.[581] Dr Nelson agreed in cross-examination that a sample group of 21 people cannot statistically reflect the position as it applies to the whole of the Yindjibarndi People.[582]

286. Perhaps most concerningly, the audio tape of Dr Nelson's interview with Michael Woodley (Exhibit M)[583] confirms that Dr Nelson misunderstood his role and duty as an expert witness. Rather than provide impartial evidence in his area of expertise, the tape unequivocally confirms that Dr Nelson viewed himself an advocate for the cause of the Applicant, which extended to him forwarding a draft of his supplementary expert report to Michael Woodley for editing "*before I hand it in.*"[584]

D4.6.3 Effect (if any) of mining on surface and subterranean waters already accounted for

287. The Applicant's lay evidence points to a belief of many of the Aboriginal witnesses that mining activities conducted pursuant to the Compensable Acts have deleteriously affected various watercourses in the Determination Area, in particular *Ganjingaringunha* (Kangeenarina) and *Wirlu-Murra* (Weelumurra) creeks, as well as permanent pools and springs that are connected to the waters of the Fortescue River. The lay witnesses express concern that operations at the mine are interfering with the natural flow of the waterways, leading to a drying of the country, which in turn, they infer, is impacting the presence of vegetation and fauna in and near the Solomon Hub mine.[585]

288. At the centre of this issue is a difficult causation question about whether the lay witnesses' observations of declining water levels and vegetation degradation are effects of the Compensable Acts. There is little common ground between the expert witnesses who were briefed by the Applicant and the FMG Respondents to consider this question. The Applicant's expert hydrologist, Dr Guan, is of the view that the FMG Respondents' mining activities have "*very likely*" caused vegetation degradation in the reach of both Kangeenarina creek and Weelumurra creek; disturbed regional, intermediate and local flow paths in the Hamersley Ranges; and decreased groundwater levels at the locations where degradation of groundwater-dependent terrestrial vegetation has occurred.[586] These opinions are at odds with those expressed by the FMG Respondents' expert hydrogeologist, Dr Evans, who is of the view that the regionally falling groundwater levels are not caused by mine dewatering but are instead due to regional changes in rainfall.[587]

289. The Applicant contends that groundwater abstraction and mining-related changes to the surface catchment areas of Kangeenarina creek and Weelumurra creek on or near the Compensable Acts have impacted the Yindjibarndi People's native title rights and interests, including rights to take water for

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577 CB ZA.07.018 at 861(20).
578 CB E.03.003 at [20].
579 According to Dr Nelson, the Yindjibarndi community is comprised of approximately 1000-1200 people: CB E.03.003 at [13].
580 CB E.03.003 at [25]-[26].
581 CB E.03.003 at [33].
582 CB ZA.07.019 at 909(38-45) – 910(1-16).
583 CB ZE.08.001.017.
584 CB ZE.08.001.017.05. In cross-examination, Dr Nelson denied that he sent Mr Woodley a draft of his supplementary report and that he was instead referring to sending Mr Woodley a copy of his notes of their conversation (ZA.07.019 at 897(15-23)). However, Dr Nelson confirmed that no notes were in fact made from that interview (ZA.07.019 at 897(31-47) – 898(1-3)).
585 See, for example, CB A.05.019 at [23]-[24]; CB A.05.013 at [19]; CB A.05.006 at [51]; CB A.05.010 at [21]; CB A.05.016 at [26] and [51]; CB A.05.008 at [100]; CB A.05.009 at [46].
586 CB E.03.004 at [45].
587 CB E.04.001 at [86].

drinking and domestic use, to hunt, to take flora and other natural resources, and to protect and care for ecologically significant sites.[588] In this regard, the Applicant is describing impacts on the physical or material aspect of their native title rights and interests (i.e. the right to do something in relation to land or waters). These are matters of economic loss and form part of the economic loss quantum. The Applicant also contends that an underground Dreaming story following groundwater flow from Jigalong, through the Fortescue Marshes, via Kangeenarina creek[589] and the Solomon Hub mine, to Millstream has been "*broken*"[590] by the damage caused by Compensable Acts to Kangeenarina Creek. In this regard, the Applicant is describing impacts on the cultural or spiritual aspect of their native title rights and interests (i.e. their connection with the land or waters). These are matters of cultural loss and form part of the cultural loss quantum.

290. In the First Respondent's submission, it is not necessary for the Court to make any findings in relation to the hydrogeology evidence. This is because (with due respect to the experts involved) their evidence is simply not relevant to the Court's assessment of compensation in this proceeding, given the way in which the alleged impacts have been framed by the Applicant. Even if it is the case that the Compensable Acts have, in fact, caused the environmental changes observed by the lay witnesses, their effect on the native title rights and interests as a component of economic loss and/or cultural loss is already taken into account. The Applicant (correctly) does not attribute an additional dollar amount to these effects, as to do so would result in double compensation. If, however, the Court is of the view that a causation analysis in respect of the hydrogeology evidence is necessary (which in effect will require the Court to prefer the evidence of one expert over another), the First Respondent submits that the evidence of Dr Evans ought to be preferred.

D4.6.4 Limited evidence of cultural value of 'sites' the subject of s.18 AHA consents

291. The Applicant contends that "*numerous significant and important Yindjibarndi sites*"[591] have been destroyed. In this regard, the Applicant points to the evidence of the archaeology experts who are in agreement that 249 sites within the "*Solomon Hub Project*"[592] have been subject to s.18 consents under the AHA and that the majority of those sites have been destroyed.[593]

292. To the extent that the s.18 AHA site evidence is relied upon by the Applicant to justify an increase to the award for cultural loss, over and above losses arising from the destruction and damage to the landscape described in Part E4.1.1 below (which the First Respondent accepts constitutes compensable cultural loss), the First Respondent submits it is not enough to point to the mere destruction of a site absent further contextualisation. In this regard, the Applicant has generally[594] not met its evidentiary burden in systematically describing, in relation to each of those 249 sites: (a) the nature and significance to the Yindjibarndi People of the site destroyed (i.e. its cultural value); (b) the nature and extent of the loss (having regard to the content of traditional law and custom); and/or (c) the consequences of destruction on the Yindjibarndi People's spiritual attachment to the country.

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588 ACS at [566] and [568].
589 The First Respondent notes that none of the lay witnesses referred to in footnote 738 of the ACS mention Kangeenarina Creek in the context of this Dreaming story.
590 ACS at [602] and [611].
591 CB A.02.002 at [34A(a)].
592 It is not exactly clear what area the archaeological experts consider to be the "*Solomon Hub Project*", but it is assumed that it is roughly equivalent to the area of the SHM described in footnote 907 below.
593 Archaeological Joint Report at [3].
594 The First Respondent acknowledges that the Applicant has adduced evidence from lay witnesses and Dr Palmer in relation to the cultural significance of those sites visited by the Court during the mine site visit on 14 August 2023: see ACS at [539]-[548].

293. The archaeology experts agree that none of the sites in the Solomon Hub Project, individually, would reach a threshold of "*national significance*" under the *Environmental Protection and Biodiversity Act 1999* (Cth).[595] Further, or in any event, as the Applicant's archaeological experts Professor Veth and Dr Bird point out, the assessment of a site's archaeological significance can "*differ markedly*" from its cultural significance, such that the Applicant must demonstrate the particular cultural value of the sites destroyed and the consequences that any destruction had upon their connection to country.[596]

D5 Application of the MA by s.51(3) NTA not invalid by reason of s.109 of the *Constitution*.

294. Where s.51(3) NTA requires the Court to apply the principles and criteria contained in s.123 MA to determine compensation, the Applicant contends that s.123(1) MA (which provides, *inter alia*, that no compensation is payable in respect of the value of any mineral on the land or by reference to any rent or royalty received) is invalid by reason of s.109 of the *Constitution* because it is inconsistent with the NTA, in particular s.33(1) NTA (which provides, *inter alia*, that the good faith negotiations under s.31(1)(b) may, if relevant, include the possibility of profit sharing or royalty type payments).[597]

295. The First Respondent says that this argument fundamentally misunderstands the operation of s.51(3) NTA (and its interaction with s.123 MA) and the circumstances in which s.109 of the *Constitution* applies. Relevantly, s.109 of the *Constitution* is directed to a circumstance in which a State law and a Commonwealth law are both operative in respect of the same subject matter and it provides a method for resolving any conflict or inconsistency between those laws. However, where s.51(3) NTA applies, the MA is not also operating with respect to the determination of compensation.[598] Rather, s.51(3) NTA assimilates or adopts the relevant portions of the MA as Commonwealth law for the purpose of the compensation determination. In this respect s.51(3) NTA is analogous with the provisions of *Commonwealth Places (Application of State Laws) Act 1970* (Cth) which, *inter alia*, apply State law as Commonwealth law.[599] There can be no s.109 *Constitution* invalidity in those circumstances as the only operative law is the Commonwealth law (i.e. the NTA).

296. If, which is denied, s.123(1) MA is an operative State law that applies where s.51(3) NTA also applies, the First Respondent says that there is no inconsistency between those two laws which would render s.123(1) invalid under s.109 of the *Constitution* for the following reasons.

297. **First**, as discussed in Part D4.2.3 above, when viewed in its statutory context Subdivision P (including s.33(1) NTA) deals with an entirely different subject matter to the assessment of compensation under Part 2, Division 5 NTA. As recognised by Lee J in *Brownley v Western Australia*, a matter on which a *native title party* is entitled to negotiate under s.33(1) NTA "*is not to be confused*" with the entitlement of a native title holder to compensation for the act pursuant to Part 2, Division 5 NTA.[600]

298. **Second**, as discussed in Part D4.2.3 above, the scope of s.33(1) NTA is significantly more limited than that suggested by the Applicant. Section 33(1) is not a mandatory provision that requires a *grantee party* or a *government party* to negotiate about, much less agree, profit sharing or royalty type payments. At most, s.33(1) NTA is an incentive for parties to reach a negotiated agreement given that payments of that kind cannot be imposed by the Tribunal in arbitration. A non-mandatory opportunity to negotiate

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595 Archaeological Joint Report at [9].
596 CB G.01.002 at [171].
597 CB A.02.004 at [4]; CB A.02.005 at [5]; CB A.02.007 at [52]-[56]; and ACS at [61].
598 As discussed at paragraph [46] above, the choice provided by s.24MD(3)(b) is either: (a) compensation is assessed under the State law if the native title holders are provided compensation under that State law; or (b) under the NTA if the State law does not provide compensation to native title holders. See also Part D7.2.2.2 below.
599 See, for example, *R v Holmes* (1988) 93 FLR 405 at 407 and 412.
600 *Brownley v Western Australia* at [53].

about profit sharing or royalty type payments cannot logically form a mandatory basis for the assessment of compensation under Part 2, Division 5 NTA or, as a consequence, invalidate s.123(1) MA.

299. **Third**, as discussed in Part D4.2.7 above, s.123(1) MA finds its origin in the fact that the State owns all the minerals in or under the land. Consistent with general compensation principles (including the 'value to owner' principle), s.123(1) MA merely confirms that an "*owner*" or "*occupier*" of land is not compensated for, or by reference to, the value of the minerals on their land, having never had any right to those minerals in the first place. Similarly, by virtue of s.117 of the *Mining Act 1904,* no native title holder in Western Australia has a right to minerals. In that sense, the validity of s.123(1) MA is somewhat of a moot point: even without its inclusion in the MA, general compensatory principles would not compensate native title holders for, or in respect of, a right or interest they do not hold under Part 2, Division 5 NTA.

300. Further, the NTA itself also recognises, and protects, the Crown's ownership of minerals. For example, the disregarding of prior extinguishment brought about by s.47A(2), s.47B(2) and s.47C(8) NTA is subject to an exception for the creation of an interest that confers or confirms the Crown ownership of natural resources.[601] Therefore, even in areas where ss.47A, 47B or 47C NTA apply, the Crown's right to, and ownership of, minerals and petroleum remains and no native title rights and interests exist in respect of those resources. In this respect, s.123(1) MA is not inconsistent with the NTA's treatment of the State's rights to minerals.

301. **Fourth**, as discussed in Part D4.2.5 above, s.33(1) NTA was relevant only to 12 of the Compensable Acts (being those Compensable Acts subject to the negotiation in good faith requirement contained in s.31(1)(b) NTA). The Applicant has not explained how or why s.123(1) MA (by application of s.51(3) NTA) is invalid in respect of the majority of the Compensable Acts when s.33(1) had no application to those tenements.

302. **Fifth**, it is in error for the Applicant to suggest that s.123(1) MA precludes parties from resolving, by agreement, a native title compensation liability on terms which include payments by reference to profits or productions.[602] Rather, parties may negotiate a native title compensation agreement on any terms they may choose (and without limit). For example, the Subdivision P Agreements discussed above provide that the benefits given under those agreements (which may include payments by reference to profit or production, together with non-monetary benefits) are in full and final satisfaction of any compensation liability (including native title) that a *grantee party* may have.[603] Further, the resolution of a native title compensation liability does not necessarily have to be commenced by way of a compensation application, nor resolved by way of a compensation determination. For example, in many instances, the First Respondent's native title compensation liability has been resolved by way of an *indigenous land use agreement*[604] that provides for payments and benefits (including non-monetary benefits) which the Court could not order under Part 2, Division 5 NTA.[605]

303. To the extent that parties seek a compensation determination to give effect to their agreement, the Court has confirmed that, provided the orders meet the requirements of ss.87 and 94 NTA, the fact that the agreement contains benefits or payments of a kind which the Court could not order under Part 2, Division

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601 Sections 47A(4), 47B(5)(a) and s.47C(10) NTA.
602 *Cf* CB A.02.007 at [55]-[56].
603 See paragraph [186] above.
604 Typically, the ILUA is required to provide aspects of a non-monetary compensation package (such as land grants to native title holders).
605 See, for example, *Taylor v Western Australia* [2020] FCA 42 at [21]-[22] and [34]-[37]; *McGlade v SWALSC (No.2)* (2019) 374 ALR 329; [2019] FCAFC 238 at [3]-[5].

5 NTA, does not prevent the Court from making that determination. A determination of compensation, unlike a determination of native title, is not a determination *in rem* and does not bring with it the same considerations.[606] For example, in *Ward (obo Pila Nature Reserve Traditional Owners) v Western Australia*[607] the parties resolved a compensation application by way of an agreement (the CLPSA) which provided for both monetary benefits and non-monetary benefits, together with an agreement to support the application of s.47C NTA.[608] Colvin J observed that:

> *…to the extent that the CLPSA goes beyond providing for monetary compensation and a recommendation as to transfer of property (see s 51), the jurisdiction of the Court to make orders by consent is not confined to orders of the kind that may be made if the matter had been determined after a contested hearing. In the present circumstances, there is at least jurisdiction conferred by s 87(6)… Where, as here, the parties have reached a comprehensive agreement that deals with both native title and compensation and have done so in a manner that is contemplated by the Preamble which emphasises conciliation and negotiation and the Act taking effect according to its terms as a special law for the descendants of the original inhabitants of Australia, I am satisfied that terms of s 87 confer jurisdiction to make the proposed orders.*[609]

D6 Entitlement to compensation: s.24HA(5) NTA

304. If, which is denied, the WMLs are validated by Subdivision H, s.24HA(5) NTA provides that the Yindjibarndi People are entitled to compensation for those licences in accordance with Part 2, Division 5 NTA. In those circumstances, and for the reasons set out in Part D3.1 above, s.51(3) NTA applies to determine that compensation, on the basis that: (a) the grant of the WMLs was not a compulsory acquisition of native title; and (b) it is agreed by all parties that the *similar compensable interest test* is satisfied in relation to each of the WMLs.[610] The effect of s.51(3) NTA is that, subject to s.51(5) – (8), any entitlement to compensation in respect of the WMLs is to be determined in accordance with the principles or criteria for the assessment of compensation set out in the MA.

D7 Operation of s.10 RDA and s.45 NTA

D7.1 THE APPLICANT'S RDA CASE

305. The Applicant has two alternative cases with respect to the operation of s.10 RDA and s.45 NTA to the Compensable Acts. They may be summarised as follows:

306. **First**, if the Court determines that the condition in s.24MD(3)(b)(ii) NTA is not satisfied (i.e. the MA provides compensation to the Yindjibarndi People as *"owners"* or *"occupiers"*), this results in an unequal treatment of rights which offends the RDA. As a result, the Applicant asserts that s.10 RDA is engaged and s.45 NTA applies to confer an entitlement to compensation in accordance with Part 2, Division 5 NTA where there would otherwise be none.[611] In other words, the Applicant asserts that, despite the effect of s.24MD(3) NTA being that compensation for the Compensable Acts is to be determined under the MA and not the NTA, the RDA nevertheless intervenes to make compensation determinable under the NTA. In its pleadings the Applicant asserted that where s.45 NTA was engaged any determination of compensation under the NTA must be on just terms.[612] The Applicant now asserts

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606 *De Rose v State of South Australia* [2013] FCA 988 at [26].
607 [2022] FCA 689.
608 See recitals to the orders made in WAD 222 of 2020.
609 At [50]-[52].
610 See paragraph [47] above.
611 CB A.02.002 at [22]-[23] and [44]; and ACS at [12].
612 CB A.02.002 at [44].

that where s.45 NTA is engaged compensation is to be determined under s.51(1) and (4) NTA and s.51(3) has no application.[613]

307. **Second**, and alternatively, if the Court determines that the condition in s.24MD(3)(b)(ii) NTA is satisfied (i.e. the Yindjibarndi People are entitled to compensation in accordance with Part 2, Division 5 NTA), the Applicant contends that the operation of s.51(3) NTA (which requires the Court to apply the principles and criteria in the MA for determining compensation) results in the unequal treatment of rights which offends the RDA.[614] In its pleadings the Applicant asserted that, as a result, s.10 RDA is engaged and s.45 NTA applies to confer an entitlement to such additional compensation as may be necessary to provide compensation on just terms.[615] The Applicant now asserts that where s.45 NTA is engaged compensation is to be determined under s.51(1) and (4) NTA and s.51(3) has no application.[616] Whilst this argument is never developed by the Applicant in submission, it remains part of its case.

308. In effect, the Applicant's RDA case appears to reduce to the proposition that: (a) the NTA (in making compensation claimable under, or by reference to, a State law (i.e. the MA)) has a discriminatory effect which offends the RDA; and (b) s.10 RDA and s.45 NTA together operate as a guarantee of compensation on just terms under s.51(1) and (4) NTA. The First Respondent submits that the Applicant's RDA case is fundamentally flawed and that the RDA does not operate in the manner contended for by the Applicant in relation to matters covered by the NTA. In particular, the First Respondent says that:

(a) s.10 RDA is not engaged because: (i) the NTA applies to *future acts* to the exclusion of the RDA; (ii) the NTA is not racially discriminatory so as to engage the RDA; (iii) s.8(1) RDA applies to exclude the operation of s.10 RDA in relation to the NTA; and (iv) the Applicant has failed to establish any inequality of treatment in the operation of the compensation provisions in the NTA based on race that engages s.10 RDA;

(b) s.45 NTA is not engaged with respect to *future acts*; and

(c) even if s.45 NTA was engaged, it does not guarantee that any compensation is to be on just terms assessed under s.51(1) and (4) NTA. Rather compensation remains to be determined under s.51(3) NTA and, in any event, the effect of the application of the compensation provisions in both the MA and/or the NTA is that compensation is on just terms.

D7.2 S.10 RDA IS NOT ENGAGED

D7.2.1 Overview of the RDA

D7.2.1.1 Operation of s.10 RDA

309. The RDA implements in Australia the *International Convention on the Elimination of All Forms of Racial Discrimination 1966* (**the Convention**). Section 10(1) RDA deals with the operation of Commonwealth, State and Territory laws and provides, *inter alia*, that if a person of a particular race does not enjoy a right (or enjoys it to a more limited extent) than persons of another race then that person "*shall, by force of this section, enjoy that right to the same extent as persons of that other race…*" Pursuant to s.10(2) RDA, a reference to a "*right*" in s.10(1) RDA includes a reference to a right of the kind in Article 5 of the Convention. Article 5 of the Convention relevantly provides that those rights

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613 ACS at [12] and [25].
614 CB A.02.002 at [43]; ACS at [18(a)(ii)].
615 CB A.02.002 at [44]; ACS at [18(a)].
616 ACS at [18(a)(ii)] and [25].

include "*the right to own property alone as well as in association with others*"[617] and "*the right to inherit.*"[618] "*Property*" in this context includes interests in land and extends to native title rights and interests.[619] Indeed, in *Ward* the plurality explained that it is because native title is characteristically held by members of a particular race that interference with its enjoyment may be capable of amounting to discrimination for the purpose of s.10 RDA.[620]

310. Section 10 RDA is directed at the enjoyment of protected human rights.[621] As described by Mason J in *Gerhardy v Brown*, s.10 RDA "*is expressed to operate where persons of a particular race, colour or origin do not enjoy a right that is enjoyed by persons of another race, or do not enjoy the right to the same extent*."[622] Thus the question posed by s.10 RDA is whether the "*practical operation and effect*" of the impugned law is an unequal enjoyment of protected human rights by persons of different races.[623] Accordingly, the operation of s.10 RDA is not limited to instances where the law in question has a discriminatory purpose, is 'aimed' at a particular race or, in its terms explicitly makes a distinction based on race.[624] As the plurality in *Ward* explained, s.10 RDA is directed to:

> *... the enjoyment of rights by some but not by others or to a more limited extent by others; there is an unequal enjoyment of rights that are or should be conferred irrespective of race, colour or national or ethnic origin.* "*Enjoyment*" *of rights directs attention to much more than what might be thought to be the purpose of the law in question…It is therefore wrong to confine the relevant operation of the RDA to laws whose purpose can be identified as discriminatory.*[625]

311. In circumstances where the operation and effect of a law results in the unequal enjoyment of rights by persons of different races, s.10 RDA operates to enhance the enjoyment of those rights to the extent necessary to eliminate the inequality.[626] As observed by Mason J in *Gerhardy v Brown,* s.10 RDA "*seeks to ensure a right to equality before the law by providing that persons of the race discriminated against by a discriminatory law shall enjoy the same rights under that law as other persons*."[627] The plurality in *Ward*[628] identified that the RDA may do this in one of two ways.

312. **First**, it may operate to enhance or 'top up' rights to the level needed to eliminate any inequality in the enjoyment of those rights which would otherwise exist between persons of different races. This most commonly occurs where the impugned law omits to make the enjoyment of the right universal. In other words, where legislation fails to confer a right on persons of a particular race, s.10 RDA operates to confer that right on persons of the relevant race. In those circumstances, the right conferred by the RDA is considered complementary to the right created by the impugned law and the impugned law will not be rendered invalid.[629] For example, in the native title context, the doing of an act under State law may extinguish or otherwise affect native title in circumstances where s.10 RDA is not engaged to invalidate the act (i.e. the act may be valid despite the existence of native title). However, if the State law provides compensation only to the holders of non-native holders for the doing of that act, s.10 RDA will be

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617 Article 5(d)(v) of the *Convention*.
618 Article 5(d)(vi) of the *Convention*.
619 *Ward* at [116]; *Western Australia v Commonwealth* (1995) 183 CLR 373; [1995] HCA 47 (**Native Title Act Case**) at 437.
620 *Ward* at [117].
621 *Gerhardy v Brown* (1985) 159 CLR 70; [1985] HCA 11 (**Gerhardy v Brown**) at 97 and 99; *Mabo v Queensland (No.1)* (1988) 166 CLR 186; [1988] HCA 69 (**Mabo (No.1)**) at 198-199, 216-219 and 231-232.
622 *Gerhardy v Brown* at 99. See also *Mabo (No.1)* at 231; *Ward* at [105] and [115].
623 *Ward* at [115]; See also *Mabo (No.1)* at 231.
624 *Maloney v The Queen* (2013) 252 CLR 168; [2013] HCA 28 at [11].
625 *Ward* at [105].
626 *Mabo (No.1)* at 217.
627 *Gerhardy v Brown* at 94.
628 *Ward* at [108].
629 *Gerhardy v Brown* at 98. See also *Mabo (No.1)* at 217 and 232; *Ward* at [108].

engaged to confer the same right to compensation on native title holders as that enjoyed by non-native title holders.[630]

313. **Second**, in circumstances where the impugned law imposes a discriminatory burden or prohibition on persons of a particular race, s.10 RDA cannot operate to 'top up' the rights in question consistent with the impugned law. In the case of a State law, the State law will be inconsistent with s.10 RDA and, accordingly, invalid under s.109 of the *Constitution*. In other words, invalidating the State law is the only manner in which the discriminatory burden or prohibition can be removed or nullified.[631] For example, in the native title context, where a State law extinguishes only native title and leaves other non-native titles intact the "*discriminatory burden of extinguishment is removed because the operation of the State law is rendered invalid by s.109 of the Constitution*."[632]

D7.2.1.2 Special Measures: s.8 RDA

314. Section 10 RDA must be read in conjunction with s.8(1) RDA. Relevantly, s.8(1) RDA excludes from the operation of s.10 "*special measures*" to which paragraph (4) of Article 1 of the Convention applies. Article 1(4) of the Convention states:

> *Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*

315. Accordingly, if a law qualifies as a "*special measure*" it is not invalidated or restricted in its operation by reason of the RDA, even if the law is discriminatory in its operation or effect.

D7.2.2 Interaction between the NTA and the RDA

316. As discussed above, it is common ground that the Compensable Acts are *future acts*.[633] Whilst there is dispute about which Subdivision of Part 2, Division 3 NTA applies to make them valid, the parties agree that the Compensable Acts are valid in accordance with the NTA.[634] Accordingly, being valid *future acts*, any entitlement to compensation for the Compensable Acts is to be determined in accordance with the relevant provisions of the NTA. Even in circumstances where the NTA operates to make the entitlement to compensation claimable under, or referable to, the provisions of a State law (such as the MA), it is the NTA that has that effect, not the relevant State law. Accordingly, the question posed in this case is not whether the MA is inconsistent with the RDA but, rather, whether the NTA in making the entitlement to compensation for the Compensable Acts claimable under, or referable to, the MA is inconsistent with the RDA.

317. In the First Respondent's submission, the RDA does not have a residual operation in relation to matters with which the NTA deals. In particular, the RDA does not intervene, or operate, to produce a different compensation entitlement (or different principles and criteria by which compensation is to be

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630 See, for example, *Ward* at [250]-[254] (vesting of reserves under s.33 of the *Land Act 1933 (WA)*) and [309]-[321] (mining leases).
631 *Gerhardy v Brown* at 98-99; See also *Ward* at [108]-[109]; *Mabo (No.1)* at 232-233.
632 *Ward* at [108]. See also *Mabo (No.1)* at 195, 201 and 214-215 (where the State law would have extinguished all native title rights and interests (without compensation) whilst confirming the validity of, and leaving intact, all non-native title rights and interests in that land); and *Native Title Act Case* at 437-8 (where the State law purported to extinguish any native title rights and replace them with statutory rights of traditional usage).
633 See footnote 2 above.
634 See footnote 2 above.

determined) than that provided by the NTA. To suggest otherwise is not a correct, nor logical, interpretation of the interaction and effect of the RDA and the NTA.

D7.2.2.1 NTA operates to the exclusion of the RDA

318. The *Native Title Act Case* settled the following principles regarding the interaction between the NTA and the RDA.

319. **First**, the NTA governs the recognition, protection, extinguishment and impairment of native title. It contains a more specific and more complex regime for the protection of native title than previously afforded by the RDA.[635] In particular, the NTA removed the vulnerability of native title to defeasance at common law by providing a comprehensive code, conformity with which is essential to effectively extinguish or impair native title.[636] By contrast, whilst native title was substantially protected upon the introduction of the RDA, the RDA did not alter the common law relating to native title. In particular, its protection is limited to ensuring that native title holders are able to enjoy their rights and interests equally with the enjoyment of the holders of ordinary title (i.e. it protected native title holders only against the *discriminatory* extinguishment or impairment of native title).[637] The NTA, on the other hand, protects native title holders against *any* extinguishment or impairment of native title, subject to the "*specific and detailed exceptions which* [the NTA] *prescribes and permits*."[638]

320. **Second**, contrary to what otherwise might follow from the fact that the NTA is a later Commonwealth Act, the provisions of s.7(1) NTA[639] make clear that the NTA did not impliedly repeal any provisions of the RDA. Specifically, after the introduction of the NTA, the RDA continued to operate on subjects outside of the NTA in precisely the same way it operated before the NTA came into operation. However, to the extent necessary, the general provisions of the RDA must yield to the specific provisions of the NTA. As explained by the plurality in the *Native Title Act Case*:

> *... even if the Native Title Act contains provisions inconsistent with the Racial Discrimination Act, both Acts emanate from the same legislature and must be construed so as to avoid absurdity and to give to each of the provisions a scope for operation. The general provisions of the Racial Discrimination Act must yield to the specific provisions of the Native Title Act in order to allow those provisions a scope for operation... (emphasis added).* [640]

Thus, only to that extent does the NTA affect the operation of the RDA.[641]

321. **Third**, and relatedly, s.7 NTA does not make the NTA subject to the RDA nor does the RDA operate to alter the effect of the NTA's provisions.[642] Thus in *State of Queensland v Central Queensland Land Council Aboriginal Corporation* Kiefel J (with whose reasons Beaumont and Lee JJ agreed) relevantly held that:

> *Section 7(1) of the NTA, which was amended subsequent to that decision, now confirms that whilst the NTA is to be read as subject to the RDA, this means only that provisions of the RDA apply to the performance of functions and exercise of powers conferred under the Act and that the Act should,*

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635 *Native Title Act Case* at 462.
636 *Native Title Act Case* at 453.
637 *Native Title Act Case* at 463.
638 *Native Title Act Case* at 463.
639 s.7(1) NTA as originally enacted (and considered in the *Native Title Act Case*) provided "[n]*othing in this Act affects the operation of the Racial Discrimination Act 1975*."). Section 7 NTA has since been amended to reflect the decision in the *Native Title Act Case* and currently provides "[t]*his Act is intended to be read and construed subject to the provisions of the Racial Discrimination Act 1975*". However, both forms of s.71(1) NTA are broadly to the same effect.
640 *Native Title Act Case* at 484.
641 *Native Title Act Case* at 483-484. See also *Ward* at [99].
642 *Native Title Act Case* at 484. See also footnote 301 at 453 where the plurality notes that "[a]*lthough nothing in the Native Title Act affects the operation of the Racial Discrimination Act, nothing in the Racial Discrimination Act is capable of affecting the operation of the Native Title Act truly construed*."

> *in its terms, be construed consistently with the RDA if there is ambiguity. It does not provide that the RDA operates so as to alter the provisions of the NTA and the procedures it provides to protect native title.*[643] (emphasis added)

322. **Fourth**, one of the main objectives of the NTA was to allow the validation[644] of acts which may otherwise be invalid by reason of being inconsistent with the RDA.[645] As noted by the plurality in *Ward, "the effect of the validation achieved by the NTA is to displace the invalidity which otherwise flowed from the operation of the RDA.*"[646] Similarly in *Griffiths (No.3)* Mansfield J considered that the NTA prevailed with respect to the validation of acts that may extinguish or impair native title contrary to the RDA[647] and there was "*no basis for qualifying their proper construction or application by reason of any primacy of the RDA or its terms*".[648]

323. It follows from the above that the RDA and the NTA have effect within their separate and concurrent fields, with the RDA yielding to the extent necessary to give the NTA scope to operate. In particular, the exclusive code contained in the NTA in respect of *future acts* (including provisions as to their validity, effect on native title, procedural rights and entitlement to compensation) applies on its terms and its effects cannot be altered by s.10 RDA (even if those provisions are inconsistent with the RDA). There is no basis for qualifying or altering their construction by reason of the RDA or its terms. Accordingly, where the NTA operates to make an entitlement to compensation for a *future act* claimable under, or referable to, the provisions of a State law (such as the MA), that must be given effect, regardless of the provisions of the RDA (which must defer to the operation of the NTA in this respect).

D7.2.2.2 Operation of the NTA is not discriminatory

324. Even if, which is denied, there is scope for the RDA to operate so as to alter the effect of the NTA's compensation provisions, those compensation provisions do not have a discriminatory effect so as to engage the RDA. As the plurality observed in the *Native Title Act Case*:

> *…it is not easy to detect any inconsistency between the Native Title Act and the Racial Discrimination Act… But if there were any discrepancy in the operation of the two Acts, the Native Title Act can be regarded either as a special measure under s.8 of the Racial Discrimination Act or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the Racial Discrimination Act or the International Convention on the Elimination of All Forms of Discrimination.*[649] (emphasis added, citations omitted)

325. As noted by Edelman J in *Griffiths,* a general precept underlying the NTA is equality of treatment between native title rights and other rights and interests where those are equivalent (the *"parity principle*").[650] In other words, the scheme of the NTA requires equality of treatment between native title holders and the holders of ordinary title, including in relation to compensation. Parliament's concern was to ensure that, whether under the NTA or under State law, native title holders receive the same entitlement to compensation as non-native title holders. As the High Court explained in the *Native Title Act Case*:

> *The Native Title Act provides the mechanism for regulating the competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair the rights and interests of the holders of native title. In regulating those competing rights and obligations, the Native Title Act*

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643 (2002) 125 FCR 89; [2002] FCAFC 371 at [150].
644 "*valid*" being defined in the s.253 NTA as "*includes having full force and effect*".
645 See *Native Title Act Case* at 453-456 and ss.14 and 19 NTA. It is noted that the *Native Title Act Case* predated the 1998 amendments to the NTA which introduced provisions validating *intermediate period acts* (ss.22A and 22F NTA).
646 *Ward* at [99].
647 Relevantly *past acts* and *intermediate period acts.*
648 *Griffiths (No.3)* at [104]. This was not considered upon appeal.
649 *Native Title Act Case* at 483-484.
650 *Griffiths* at [265] and [332] (Edelman J).

> *adopts the legal rights and interests of persons holding other forms of title as the benchmarks for the treatment of the holders of native title.*[651]

326. The parity principle can be seen with respect to the operation of s.24MD(3)(b) NTA. As discussed above, in circumstances where Subdivision M applies to an act, if the State law satisfies the *similar compensable interest test* (i.e. it provides that compensation is payable to the holders of ordinary title for the act), s.24MD(3)(b)(ii) gives rise to two possible compensation entitlements, depending upon the operation of the State law.

327. If ordinary title holders would be entitled to compensation under the State law but the State law does not make similar provision for native title holders, s.24MD(3)(b) provides that native title holders are entitled to compensation under the NTA. In this way, the NTA operates similarly to how the RDA operated before the NTA was enacted. Further, the effect of s.51(3) NTA is that the Court must apply the principles and criteria of the State law when making a determination of compensation. In other words, the NTA adopts the holders of ordinary title under the State law as the benchmark for its determination of compensation, thereby treating native title holders and non-native title holders equally.

328. However, if ordinary title holders would be entitled to compensation under the State law and native title holders also have that same entitlement, the effect of s.24MD(3)(b) is that native title holders are not entitled to compensation under the NTA because they are treated the same as ordinary title holders under State law. Before the commencement of the NTA, the RDA would not have been engaged in these circumstances because there is no discriminatory treatment in relation to the right to compensation. Now, the NTA is not engaged for essentially the same reason. Further, in those circumstances, the RDA does not have any residual operation that would have the effect of substituting the entitlement to compensation under State law and making that compensation claimable under the NTA. Thus, in *Ward* the plurality considered that if the native title holders were "*owners*" or "*occupiers*" within the meaning of s.8 MA they would have been entitled to compensation under the MA as such and noted "[t]*his consequence would flow apart from the RDA, which would not be engaged.*"[652]

329. Accordingly, there is nothing in the relevant compensation provisions of the NTA which is discriminatory. Regardless of where the entitlement to compensation is ultimately determined to arise (i.e. under the MA or the NTA) there is no scope for the RDA to operate in the manner contended for by the Applicant. This is because:

    (a) if s.24MD(3)(b)(ii) NTA is satisfied (and the native title holders are entitled to compensation in accordance with Part 2, Division 5 NTA) the general provisions of the RDA must yield to the specific provisions of the NTA which apply to determine the compensation (including by making that determination referable to the principles and criteria of s.123 MA under s.51(3) NTA); and

    (b) if, alternatively, the condition in s.24MD(3)(b)(ii) NTA is not satisfied (i.e. the Yindjibarndi People meet the statutory definitions of "*owners*" or "*occupiers*" in the MA) on the authority of *Ward*,[653] the RDA is not engaged in those circumstances either and compensation is to be determined under s.123 MA.

330. In substance, the NTA is doing no more in respect of the Compensable Acts than what the RDA would have done prior to the commencement of the NTA. As noted by the plurality in *Ward*, prior to the introduction of the NTA, the RDA was only ever capable of operating to ensure that compensation to

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651 *Native Title Act Case* at 483.
652 *Ward* at [319]. See also *James v Western Australia* (2010) 184 FCR 582; [2010] FCAFC 77 at [54] and *Griffiths* at [74]-[76].
653 *Ward* at [319].

native title holders in respect of the grant of mining tenements under the MA would be that determined under s.123 MA.[654]

D7.2.2.3 The NTA is a special measure to which s.10 RDA does not apply

331. Further, and in any event, the NTA is a "*special measure*" for the purpose of s.8(1) RDA. The Preamble to the NTA includes a statement of Parliament's intention that the NTA be a "*special measure*" for the purpose of the RDA.[655] Consistent with the Preamble, in *Durham Holdings Pty Ltd v State of New South Wales*,[656] the NSW Court of Appeal relied on the observations of the High Court in the *Native Title Act Case*[657] to find that the NTA, including its provisions in relation to compensation, is a special measure for the purposes of s.8(1) RDA. Accordingly, the court held that s.10 RDA did not apply to the NTA.[658] While *Durham Holdings* was decided in different circumstances to the present case, the effect of s.8(1) RDA is the same. The operation of s.10 RDA is excluded in relation to the NTA and its application. Accordingly, the Applicant's RDA case must necessarily fail.

D7.2.3 Unequal enjoyment of rights based on race not established

332. Even if the Applicant was able to establish that the RDA has some residual operation in respect of the NTA, it has failed to identify or establish any particular inequality of treatment in the operation of the NTA's compensation provisions based on race which engages s.10 RDA. In particular, the Applicant has failed to identify or establish: (a) the nature and extent of the relevant right said to be enjoyed by the native title holders as Aboriginal people; (b) the extent to which that same right is said to be enjoyed by non-Aboriginal people; and (c) the differential enjoyment of those rights as between Aboriginal and non-Aboriginal people by operation of the NTA.

333. The Applicant provides particulars of a range of provisions of the MA which are said to give rise to disparity in treatment between an "*owner*" or "*occupier*" of "*private land*" under the MA and native title holders.[659] However, none of that explains how the NTA is said to be relevantly discriminatory. Rather, those distinctions appear to be directed primarily at an argument that the Yindjibarndi People are not "*owners*" or "*occupiers*" such that the MA does not provide compensation to native title holders (and that, as a result, s.24MD(3)(b)(ii) is met and compensation is to be determined under the NTA). As a result, the Applicant has not engaged with the fundamental element of its case: whether the effect of the application of the compensation provisions of the NTA in the particular circumstances of this case (which results either in the entitlement to compensation being determined in accordance with s.123 MA and not the NTA, or under the NTA but according to the principles or criteria in the MA) results in unequal treatment so as to engage s.10 RDA.

334. The First Respondent submits that there is no disparity of treatment between native title rights and interests and the equivalent non-native title rights and interests under s.123 MA (or s.51(3) NTA in applying the principles and criteria of s.123 MA). To the contrary, the First Respondent accepts that

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654 *Ward* at [321]. This was either because the native title holders were "*owners*" or "*occupiers*" within the meaning of s.8 MA and hence entitled to compensation under the MA (i.e. the RDA would not be engaged) or, if not "*owners*" or "*occupiers*" s.10 RDA would operate to confer the right to compensation upon those holders of native title, to the same extent as the MA confers the right upon "*owners*" or "*occupiers*" (at [319]-[320]).

655 Relevantly, the Preamble provides that: "*The* [NTA]*, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Racial Discrimination Act 1975, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians*."

656 (1999) 47 NSWLR 340; [1999] NSWCA 324 (**Durham Holdings**).

657 At 483 – 484.

658 *Durham Holdings* at [74]-[85].

659 CB A.02.007 at [39]-[44]; ACS at [51].

exclusive native title holders are "*owners*" (and "*occupiers*") whilst non-exclusive native title holders are "*occupiers*" for the purposes of s.123 MA and that, as such, both are to be fully compensated according to the value of their loss. As discussed at Part D3.2 above, the assessment of that compensation is to take place in accordance with ordinary compensation principles, in particular, those set out by the High Court in *Griffiths*. Importantly, as discussed at Part D8.2.2 below, the application of the *Griffiths* principles amounts to compensation on just terms to native title holders.

335. Further, as discussed at Part D2.3.3 above, compensation is not to be assessed as if the Yindjibarndi's native title was instead "*private land*", so as to include an allowance for such compensation as might become payable to the owner of private land under the various provisions of the MA. The categorisation of land as "*Crown land*", "*reserve land*" or "*private land*" under the MA does not alter the entitlement of an "*owner*" or "*occupier*" to compensation under s.123(2) MA (which entitlement arises in respect of "*any land*" where mining takes place and is not limited to "*private land*").

336. Additionally, it must be remembered that the effect of s.10 RDA is only to provide parity with the holders of equivalent non-native title rights and interests. This means, for example, that:

    (a) the parity comparison required by s.10 RDA is not between native title holders who have agreements under Subdivision P and those who don't: it is between native title holders ("*persons of a particular race*") and equivalent non-native title holders ("*persons of another race*");

    (b) in relation to the Non-Exclusive Native Title, the effect of s.10 RDA is not to provide parity of treatment with the holders of freehold title: it is to provide parity of treatment with the holders of equivalent, non-exclusive, non-native title rights and interests;[660] and

    (c) section 10 RDA has no work to do in respect of s.38 MA as there is no disparity of treatment under the MA between the Yindjibarndi People's native title rights and interests and equivalent non-native title rights and interests. As discussed at Part D4.2.7 above, s.38 MA applies only to the holders of a pre-1899 freehold grant who have a right to the minerals in or upon their land (excluding gold, silver and precious metals). After the commencement of s.117 of the *Mining Act 1904* ownership of all minerals was vested in the Crown, such that the owners of freehold land since that time have had no rights to the minerals in or upon their land. Equally, the Yindjibarndi People's native title rights and interests expressly do not include any rights in relation to minerals.[661] Accordingly, s.10 RDA does not work to equate the Yindjibarndi People (who do not have a right to minerals) with the holders of pre-1899 freehold grant (who do have a right to minerals).

337. Accordingly, whether compensation in this case is determined under the MA, or under the NTA by reference to the MA's provisions, native title holders are compensated equally with every other "*owner*" or "*occupier*" (adapted as necessary to accommodate the unique features of native title as contained in s.223 NTA) and in a manner which amounts to just terms.[662] Thus s.10 RDA is not engaged.

D7.3 SECTION 45 NOT ENGAGED

338. As discussed above, in certain circumstances where a relevant State law makes provision for compensation for the doing of an act only to an ordinary title holder, s.10 RDA may operate to provide that same right of compensation to native title holders (i.e. so as to confer upon the native title holders

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660 *Griffiths* at [67]-[76].
661 Yindjibarndi Determination at [5(c)]. As discussed at Part D4.2.7.1 above any native title rights and interests to minerals which may have existed were wholly extinguished by the introduction of s.117 of the *Mining Act 1904*.
662 See Part D8.2.2 below.

the same rights as the holders of other forms of title). Section 45(1) NTA provides, in effect, that where such a right exists by operation of the RDA, compensation is to be determined in accordance with s.50 NTA "*as if entitlement to compensation arose under the NTA*". As described by the plurality in *Ward*, s.45 NTA "*takes what otherwise would be a right to compensation under State or Territory law, being a right brought into existence by the operation of the RDA upon that law, and transmutes it into a right to compensation under Div 5 of Pt 2 (ss 48 – 54) of the NTA*."[663]

339. However, by its terms, s.45 NTA applies only to an entitlement to compensation that arises outside the NTA. While the reference to "*an act that validly affects native title to any extent*" might be thought broad enough to include a *past act*, *intermediate period act* or a *future act*, the qualification "*as if the entitlement arose under this Act*" excludes that possibility. Rather, as discussed at Part D7.2.2.1 above, the NTA provides a specific and complex regime which comprehensively deals with the validity, effect on native title and any entitlement to compensation in respect of *past acts*, *intermediate period acts* and *future acts*, such that it cannot be said that any entitlement to compensation for those acts arises outside of the NTA.

340. As a practical matter, s.45 NTA only applies in relation to acts done between the introduction of the RDA (on 31 October 1975) and the NTA (on 1 January 1994) that were not invalid by reason of the RDA[664] but, in respect of which, the RDA conferred a right to compensation upon native title holders. As noted in the Explanatory Memorandum to the *Native Title Bill 1993* (Cth), s.45 NTA:

> *...deals with a situation where past acts have not been rendered invalid by the operation of the RDA, but rather that Act, in particular section 10, has given to native title holders a right to compensation for the effect of the act on their title. Where there is such an entitlement to compensation for a valid past act arising not from this Bill but from the operation of the RDA, this entitlement can be pursued under the procedures in this Bill.*[665]

341. Accordingly, s.45 NTA has no application with respect to the Compensable Acts. As discussed above, the Compensable Acts are subject to the exclusive code contained in the NTA in respect of *future acts*, including those provisions in relation to compensation. No entitlement to compensation for the Compensable Acts arises under s.10 RDA outside the NTA so as to engage s.45 NTA.

D7.4 RDA NOT CAPABLE OF CONFERRING COMPENSATION ON JUST TERMS

342. As discussed above, the Applicant's RDA case includes an assertion that s.10 RDA and s.45 NTA together operate as a guarantee of compensation on just terms under s.51(1) and (4) NTA. However, even taken at its highest, the Applicant's RDA case would not provide a guarantee of compensation on just terms.

343. If the entitlement to compensation for the Compensable Acts arises under the MA, even if the Applicant establishes that s.10 RDA operates to engage s.45 NTA, s.45 NTA does not operate to confer an entitlement to compensation on just terms. Rather, s.45 provides that, where it applies, the entitlement to compensation "*is to be determined in accordance with*" s.50 NTA. Section 50 NTA provides that a determination of compensation is only to be made in accordance with Part 2, Division 5 NTA. In other

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663 *Ward* at [12].

664 *Ward* identified a number of categories of acts done during the relevant period that were not invalid by reason of the RDA, including: the creation of reserves over non-exclusive possession native title (at [222]); the vesting of reserves under s.33 of the *Land Act 1933* (WA) (at [253]); resumptions under s.18 *Public Works Act 1902* (WA) (at [278]-[280]) and the grant of mining tenements over non-exclusive possession native title (at [309]-[321]).

665 NTA, *Explanatory Memorandum*, Part B, cl 43. See also *Australian Native Title Law*, 2nd ed, Perry & Lloyd (eds) (2018) at [45.10]. The use of the expression "*past act*" in the *Explanatory Memorandum* is intended to refer to acts that occurred prior to the *Native Title Bill* and not *past acts* as defined in s.228 NTA (which are, by definition, acts invalid by reason of the operation of the RDA).

words, the effect of s.45 NTA is to require any determination of compensation to be made in accordance with the provisions of Part 2, Division 5 NTA.

344. In Part 2, Division 5 NTA, whilst s.51(1) NTA provides an entitlement to compensation on just terms, that section is expressly subject to s.51(3) NTA. As all parties agree that the criteria in s.51(3)(a) and (b) have been met in respect of the Compensable Acts,[666] the effect of Part 2, Division 5 NTA is that compensation is to be determined under s.51(3) NTA (with the result that the principles or criteria for determining compensation in the MA would be determinative, whether or not those principles or criteria result in compensation on just terms). The express words of s.51(1) and 51(3) (and their combined operation) are not supplanted, or given a different effect, by s.45 NTA. Further, given the concession by the Applicant that the criteria in s.51(3) NTA have been met with respect to the Compensable Acts, s.51(4) has no operation (as s.51(4)(a) provides that the section only applies where neither s.51(2) or s.51(3) apply).[667]

345. Alternatively, if the entitlement to compensation arises under s.51(3) NTA, the Applicant's second RDA argument is hopelessly circular. If applying the principles and criteria of the MA pursuant to s.51(3) NTA also engages s.10 RDA and s.45 NTA, the only place those provisions can lead back to is s.51(3) itself for the reasons discussed above.

346. In any event, as discussed in Part D8.2.2 below, the effect of the application of the compensation provisions in both the MA and/or the NTA provides that compensation is on just terms in any event.

D8 Entitlement to compensation: s.53(1) NTA

D8.1 INTRODUCTION

347. Section 53(1) NTA provides for an additional entitlement to compensation where the doing of a *future act* or the application of any provision of the NTA would result in a *paragraph 51(xxxi) acquisition of property* other than on *paragraph 51(xxxi) just terms*.[668] As noted by the High Court in *Griffiths,* s.53(1) is a "*shipwrecks clause*" designed to ensure the constitutional validity of the compensation provisions in Part 3, Division 5 NTA.[669] It does so by conferring a 'top up' of compensation in circumstances where the compensation provided under the NTA, or under a State law by operation of the NTA, fails to meet the constitutional guarantee of *paragraph 51(xxxi) just terms*. It is not, therefore, a free-standing entitlement to compensation.

348. The Applicant appears to make two claims with respect to the operation of s.53(1) NTA. The first claim (which is the only case addressed in the ACS) is said to arise where the MA provides compensation to the Yindjibarndi People for the Compensable Acts and s.10 RDA and s.45 NTA do not operate to alter this outcome. In those circumstances the Applicant says that the grants of the Compensable Acts involved the "*doing of any future act*" which resulted in a *paragraph 51(xxxi) acquisition of property* other than on *paragraph 51(xxxi) just terms*. Accordingly, s.53(1) NTA is engaged to confer an entitlement to compensation, or such additional compensation as may be necessary to satisfy *paragraph 51(xxxi) just terms*.[670] The Applicant's second claim under s.53(1) NTA is said to arise if the entitlement to compensation arises under s.51(3) NTA but that a determination made in accordance with s.51(3) (in

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666 See paragraph [70] above.
667 *Cf* ACS at [25].
668 The references to *paragraph 51(xxxi) just terms* and *paragraph 51(xxxi) acquisition of property* in section 53(1) NTA are to be construed by reference to paragraph 51(xxxi) of the *Constitution*: see s.253 NTA.
669 *Griffiths* at [49].
670 ACS at [9] and [13].

applying s.123 MA) results in compensation other than on *paragraph 51(xxxi) just terms*. This claim was contained only in the Applicant's pleadings and has not been developed by way of written or oral argument.[671]

349. Having regard to the terms of s.53(1) NTA, both of the Applicant's claims are necessarily claims for compensation in addition to that provided by s.51(3) NTA or s.123 MA. That is because both claims are said to arise on the assumption that the compensation provided by s.51(3) NTA or s.123 MA is inadequate (i.e. because such awards would not provide for *paragraph 51(xxxi) just terms*). However, the adequacy of the compensation provided under s.51(3) NTA or s.123 MA will only become apparent if (or when) the Federal Court or the Warden's Court makes an award of compensation in the Applicant's favour. Only then is it possible to consider whether s.53(1) NTA is engaged in respect of the Compensable Acts. In particular, even if (which is denied), there was a *paragraph 51(xxxi) acquisition of property*, s.53(1) NTA would apply only if the award of compensation made by the Federal Court or the Warden's Court was not on *paragraph 51(xxxi) just terms.*[672] Even then, it would only 'top up' that amount as required to achieve *paragraph 51(xxxi) just terms*. In other words, s.53(1) NTA does not replace the operation of s.51(3) NTA or s.123 MA, it merely supplements the award of compensation made under those provisions "*as is necessary*."

350. This has two consequences for the Applicant's s.51(3) NTA claims. First, if the MA provides compensation to the Yindjibarndi People for the Compensable Acts (and s.10 RDA and s.45 NTA do not alter this outcome) the Court must dismiss the Application and cannot continue to consider whether s.53(1) NTA applies. This is because, until the Warden's Court makes the relevant compensation award under s.123 MA, this Court cannot possibly know whether *paragraph 51(xxxi) just terms* will be provided to the Applicant under the MA. Accordingly, the Court cannot assess whether s.53(1) NTA operates and, if it does, it cannot calculate the quantum of the additional compensation required to ensure *paragraph 51(xxxi) just terms* (i.e. because it does not know the base quantum from which it is working).

351. Second, if the entitlement to compensation arises under s.51(3) NTA and the Court determines that s.53(1) NTA applies, s.53(1) NTA acts only to 'top up' the difference in compensation between that determined under s.51(3) NTA and what would be required to provide *paragraph 51(xxxi) just terms*. Understanding the 'top up' nature of s.53(1) NTA is particularly relevant where, as here, the party liable for the compensation determined under s.51(3) NTA (i.e. the FMG Respondents) may be different to the party who is liable to 'top up' that amount under s.53(1) NTA (i.e. the First Respondent).[673] In those circumstances, the Court will be required to identify both: (a) the amount of compensation arising under s.51(3) and; (b) the additional amount required under s.53(1) NTA to provide *paragraph 51(xxxi) just terms*. The First Respondent is only liable under s.53(1) NTA for the difference (i.e. the 'top up').

352. In light of the above, this Part only considers the operation of s.53(1) NTA in the second scenario i.e. where the entitlement to compensation arises under s.51(3) NTA and the Court has determined the compensation payable under that provision. Nevertheless, in the event that the Court holds that it can consider the operation of s.53(1) in the Applicant's first scenario, given that s.51(3) NTA applies the principles and criteria of s.123 MA, the same considerations would apply.

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671 CB A.02.002 at [43].
672 *Griffiths (No.3)* at [66].
673 As to which see Part F1 below.

D8.2 WHERE THE ENTITLEMENT TO COMPENSATION ARISES UNDER S.51(3) NTA

D8.2.1 Not a "*paragraph 51(xxxi) acquisition of property*"

353. The First Respondent accepts that native title rights and interests are capable of being understood as *"property"* in the paragraph 51(xxxi) sense[674] but says there has been no *paragraph 51(xxxi) acquisition of property* so as to enliven s.53(1) NTA.

354. The law in relation to whether native title rights and interests are capable of being "*acquired*" within the meaning of a *paragraph 51(xxxi) acquisition of property* is currently uncertain. The First Respondent accepts that the Full Court in *Yunupingu v Commonwealth*[675] (**Yunupingu (FC)**) took a liberal approach to the question of when an act extinguishing native title may constitute an "*acquisition*" in the *paragraph 51(xxxi) acquisition of property* sense and both: (a) declined to draw a clear distinction between acts which have an extinguishing effect amounting to mere "*deprivation*" versus "*acquisition*"; and (b) rejected the Commonwealth's submissions about the inherent defeasibility of native title to contrary acts and grants by the Crown.[676]

355. Those aspects of *Yunupingu (FC)* were the subject of an appeal to the High Court.[677] The appeal was heard on 7 – 9 August 2024 and the High Court has reserved its decision. For present purposes, the First Respondent adopts the position taken by the Commonwealth before the Full Court and the High Court and submits that the extinguishment of native title is not capable of amounting to an "*acquisition*" in the *paragraph 51(xxxi) acquisition of property* sense due to the inherent susceptibility of native title to a valid exercise of the Crown's sovereign power (derived from its radical title) to grant interests in land. Pending the outcome of the High Court's consideration of these issues, it may be necessary for the parties to provide supplementary submissions on this point. However, and in any event, the High Court's decision in *Commonwealth v Yunupingu* is unlikely to be determinative of the issues in this case because: (a) the acts in that case were extinguishing; and (b) the relevant Northern Territory laws were of different effect to the MA. Relevantly, unlike the acts in consideration in *Yunupingu (FC)*, the grant of each Compensable Act was the grant of a mining tenement that was a *future act* to which the *non-extinguishment principle* applied.

356. As identified by French CJ and Crennan J in *Akiba v Commonwealth,* the *non-extinguishment principle* as contained in s.238 NTA is a "*statutory construct*" which is "*underpinned*" by a particular proposition, namely "*that a particular use of a native title right can be restricted or prohibited by legislation without that right or interest itself being extinguished*."[678] Accordingly, the *non-extinguishment principle* affects or modifies the common law rules with respect to the recognition and extinguishment of native title in that it provides for the "*temporary non-recognition of native title rights and interests in land affected by an act*" in circumstances where, at common law, that act may have otherwise extinguished native title.[679] The effect of the *non-extinguishment principle* was summarised by O'Loughlin J in *Risk v Williamson* as follows:

> *Broadly speaking, its effect is three-fold: first, notwithstanding* [the act to which the non-extinguishment principle applies]*, the native title rights and interests continue to exist but they have no effect in relation to the* [act]*; secondly, despite the* [act]*, the traditional owners of the rights and interests continue to be the native title holders; thirdly, if the act… or its effects are later wholly*

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674 See, for example, *Yunupingu (FC)* at [444]-[446].
675 (2023) 298 FCR 160; [2023] FCAFC 75.
676 In a lengthy consideration at [304]-[480].
677 *Commonwealth v Yunupingu* (High Court of Australia No D5 of 2023).
678 (2013) 250 CLR 209; [2013] HCA 33 at [26].
679 *Lardil Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 414 at [46].

> *removed or otherwise wholly cease to operate, the native title rights and interests will again have full effect*.[680]

Similarly, the plurality in *Ward* described the effect of the *non-extinguishment principle* in general terms as involving "*the suspension*" of inconsistent native title rights and interests until the act in question ceased to operate or its effects were removed.[681] Further, the reference in s.238 NTA to the native title rights and interests having no effect "*in relation to the act*" indicates that native title holders are not prevented from exercising their native title rights and interests in relation to other acts on the land.[682]

357. Accordingly, it is clear that none of the Compensable Acts extinguished any native title rights or interests or were otherwise inconsistent with the existence of those native title rights and interests. Further, the extent to which the Compensable Acts were inconsistent with the native title rights and interests possessed by the Yindjibarndi People is a question of fact. There may be little or no inconsistency between the exercise and enjoyment of native title rights and interests and those of the holder of a tenement under the MA.[683] Relevantly, some of the Compensable Acts appear to have been minimally (and only temporarily) inconsistent with the native title rights and interests which existed as at the date they were done.[684]

358. In light of the above, the Applicant does not explain how the application of the *non-extinguishment principle* to the Compensable Acts in this case constituted a *paragraph 51(xxxi) acquisition of property*. It is not sufficient to contend that the native title rights have been "*diminish*[ed]" and that FMG (a third party) has received "*a benefit*".[685] The passages from *Yunupingu (FC)* and *Griffiths* referred to by the Applicant[686] were concerned with acts that extinguished native title and, in any event, were addressing specific submissions made in those cases that the extinguishment of native title is not an "*acquisition*" due to its inherent defeasibility to acts of the Crown. Unlike in *Yunupingu (FC)*, the effect of the Compensable Acts is not that native title has been "'*cleared*' *as burden on the* [Crown's] *radical title to the land*."[687] It continues to exist and, in respect of some Compensable Acts, remains exercisable in its entirety.[688] Further, the Applicant's submissions[689] with respect to *Wurridjal v Commonwealth*[690] (**Wurridjal**) are also inapposite to this case as *Wurridjal* was expressly not concerned with extinguishment or suspension of native title rights and interests.[691]

D8.2.2 Acquisition was on "*paragraph 51(xxxi) just terms*"

359. If, which is denied, the doing of the Compensable Acts amounted to a *paragraph 51(xxxi) acquisition of property*, the First Respondent says that the determination of compensation under s.51(3) NTA is on *paragraph 51(xxxi) just terms*, such that s.53(1) NTA is not engaged in any event.[692] The term *paragraph 51(xxxi) just terms* is to be construed by reference to s.51(xxxi) of the *Constitution*. Section 51(xxxi)

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680 (1998) 87 FCR 202; [1998] FCA 640 at 226-227.
681 *Ward* at [7].
682 See, for example, Explanatory Memorandum Part B, *Native Title Bill 1993* at p.92.
683 See, for example, *Western Australia v Brown* at [57] and [63]-[64]. See also paragraphs [104]-[106] above.
684 See paragraphs [429]-[432] below. The Applicant also (correctly) accepts that a distinction can be drawn between Compensable Act mining leases and miscellaneous licences and all other Compensable Acts: ACS at [89].
685 CB A.02.007 at [70]-[71] (adopted in ACS at [73]).
686 CB A.02.007 at [70] (adopted in ACS at [73]).
687 *Yunupingu (FC)* at [463].
688 See, for example, paragraphs [430] – [432] below.
689 CB A.02.007 at [69]-[71] (adopted in ACS at [73]).
690 *Wurridjal v Commonwealth* (2009) 237 CLR 309; [2009] HCA 2.
691 *Wurridjal* at [145] and [352], *cf* CB A.02.007 at [71] (adopted in ACS at [73]). *Wurridjal* concerned the effect of the *Northern Territory National Emergency Response Act 2007* (Cth) which permitted the grant of a lease over freehold titles held pursuant to the *Aboriginal Land Rights (Northern Territory) Act* 1976. No question was raised in the proceeding with respect to the operation of s.51(2) of the *Emergency Response Act* which applied the *non-extinguishment principle* (as defined in the NTA) to the acts done under that legislation.
692 CB A.02.003 at [218] and [306].

serves a dual purpose: to provide the Commonwealth with power to acquire property and to protect individuals against governmental interferences with their property without proper recompense.[693]

360. As set out in Part D3.2.2 above, an entitlement to "*compensation*" is a right to the full money equivalent of that which the owner has been deprived. However, a question arises whether, in the constitutional context, compensation on *paragraph 51(xxxi) just terms* requires anything more. One line of authority suggests that "*compensation*" is synonymous with *paragraph 51(xxxi) just terms*.[694] In other words, *paragraph 51(xxxi) just terms* simply requires full compensation for loss.[695] For example Brennan J in *Georgiadis v Australian & Overseas Telecommunications Commission* stated:

> *In determining the issue of just terms, the Court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.*[696]

361. However, the High Court has also had a broader conception of *paragraph 51(xxxi) just terms* which evokes the notion of "*fair dealing*" and involves a consideration of what is fair, equitable and just as between the community and the owner of the thing taken.[697] For example, in *Nelungaloo* Dixon J observed that, unlike "*compensation*" which connotes full money equivalence, the expression "*just terms*" evokes the notion of "*fair dealing*" and the measure of just terms involves a consideration of what is fair, equitable and just as between the community and the owner of the thing taken.[698] Similarly, in *Grace Brothers Pty Ltd v Commonwealth*[699] Dixon J also observed that:

> *Under that paragraph* [s.51(xxxi)] *the validity of any general law cannot, I think, be tested by inquiring whether it will be certain to operate in every individual case to place the owner in a situation in which in all respects he will be as well off as if the acquisition had not taken place. The inquiry rather must be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country.*[700] (emphasis added)

362. Under this conceptualisation of *paragraph 51(xxxi) just terms*, the essential question is whether the acquisition is on terms amounting to a true attempt to provide fair and just standards of compensating the owner of the property, as between the owner and the government.[701] In that inquiry, it is appropriate to consider the interests of the community as well as of the person whose property is acquired.[702] What in practice comprises *paragraph 51(xxxi) just terms* will depend upon the circumstances of each case and there is no precise formula that must be adopted to ensure that an acquisition is on just terms. Rather, it is for the Parliament, exercising its legislative function, to determine the appropriate level of compensation with respect to an acquisition.[703] Section 51(xxxi) of the *Constitution* does not deprive

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693 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1; [1948] HCA 7 at 349, cited with approval in *JT International SA v Commonwealth* (2012) 250 CLR 1; [2012] HCA 43 at [313].
694 See, for example, *Commonwealth v Western Australia* (1999) 196 CLR 392; [1999] HCA 5 at [193] (citing *Andrews v Howell* (1941) 65 CLR 255 at 264, 270 and 282); *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 216.
695 William Isdale, *Compensation for Native Title* (The Federation Press, 2022) at 167.
696 *Georgiadis v Australian & Overseas Telecommunications Commission* (1994) 179 CLR 297 at 310-311. Cited with approval in *Smith v ANL Ltd* (2000) 204 CLR 493 at 500-501.
697 William Isdale, *Compensation for Native Title* (The Federation Press, 2022) at 164.
698 *Nelungaloo* at 569.
699 (1946) 72 CLR 269; [1946] HCA 11 (**Grace Brothers**).
700 *Grace Brothers* at 290. See also *Nelungaloo* at 600.
701 *Grace Brothers* at 290 (cited with approval in *Cunningham & Ors v Commonwealth* (2016) 259 CLR 536; [2016] HCA 39 at [57]); *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151; [1993] FCA 876 at 168.
702 *Grace Brothers* at 280.
703 *Commonwealth v Tasmania* (1983) 158 CLR 1 (**Tasmanian Dam Case**) at 289 (citing *Grace Brothers* at 295); *Minister for State for the Army v Dalziel* (1944) 68 CLR 261 (**Dalziel**) at 291; *McClintock v Commonwealth* (1947) 75 CLR 1 at 24.

Parliament of all discretion in determining what is just.[704] Accordingly, the terms of an acquisition are matters for legislative judgment and discretion.[705] A law is not rendered invalid simply because it alters, limits or departs from established principles of compensation,[706] or because the Court is able to conceive of a more just or fairer legislative scheme.[707] Parliament retains a legislative discretion in relation to compensation except to the extent that a "*reasonable man could not regard the terms ... as being just.*"[708]

363. Despite this, many commentators have observed that much of the jurisprudence on s.51(xxxi) of the *Constitution* tends to equate "*just terms*" with "*compensation*".[709] The relationship between the two understandings of "*just terms*" was summarised by Perry J in *Spencer v Commonwealth of Australia,* where her Honour explained the just terms requirement as follows:

> *Finally, the requirement of just terms is concerned with fairness... This requires that the terms be actually just, and not merely those which the Parliament considers to be just...As a general rule, the principle for a determination of just terms compensation is "the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired… In other words, just terms are generally afforded where the price paid for the property reflects its market value by reference to the price that a willing but not anxious purchaser would pay to a willing but not anxious vendor before notice was given of the intention to compulsorily acquire…*
>
> *In its submissions, the Commonwealth points to differences of view in the authorities as to whether full monetary compensation or some process directed to that outcome is required by s 51(xxxi)… [I]t is unnecessary to consider that issue here. As I later hold, no error is shown in the primary judge's finding that the appellant was offered the current market value of the land. There is nothing to suggest that anything more was required to compensate him for the full monetary value of his land.* [710] (citations omitted)

In other words, whilst what in practice comprises *paragraph 51(xxxi) just terms* will depend upon the circumstances of each case, just terms will generally have been provided where a person receives "*full monetary value*" in return for that which was acquired.

364. In this proceeding the Applicant fails to identify, or explain, how the application of s.51(3) NTA in respect of the Compensable Acts is not on *paragraph 51(xxxi) just terms* such that section 53(1) is engaged. Rather, the Applicant merely seems to assume that this is the case.[711] The only reason which appears to be given is that the doing of the Compensable Acts had the result that the Yindjibarndi People were "*dispossessed of their traditional land without compensation and without any lasting and equitable agreement*."[712] However, it is clearly not the case that the Applicant has been denied an entitlement to compensation with respect to the Compensable Acts.[713] Similarly, the circumstances in which the Compensable Acts could be done were governed by the terms of the NTA and it is agreed that the grant of each of the Compensable Acts was a valid *future act* (regardless of whether those acts occurred with, or without, the consent of the Yindjibarndi People).

365. In any event, any determination of compensation for the Compensable Acts under s.51(3) NTA (i.e. by the application of the principles and criteria under s.123 MA) is on *paragraph 51(xxxi) just terms* such that s.53(1) is not engaged. As discussed in Part D7.2.2.2 above, a general precept underlying the NTA

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704 *Grace Brothers* at 279-80, 290, 285 and 295.
705 *Dalziel* at 291.
706 *Dalziel* at 291; *Grace Brothers* at 285.
707 *Grace Brothers* at 280; *Tasmanian Dam Case* at 289-90.
708 *Grace Brothers* at 280 (cited with approval in *McClintock v Commonwealth* (1947) 75 CLR 1 at 24).
709 See, for example, commentators cited in William Isdale, *Compensation for Native Title* (The Federation Press, 2022) at 166.
710 *Spencer v Commonwealth* (2018) 262 FCR 344; [2018] FCAFC 17 at [341]-[342].
711 See, for example, CB A.02.002 at [43]-[46]; CB A.02.007 at [72] (adopted in ACS at [73]).
712 ACS at [76]; CB A.02.007 at [72].
713 All parties agree that the Applicant has an entitlement to compensation with respect of the Compensable Acts: see paragraph [1] above.

is the "*parity principle*" which requires equality of treatment, including in relation to compensation, between native title holders and the holders of equivalent other rights and interests. This principle is reflected in the operation of s.24MD(3)(b) NTA and s.51(3) NTA which, together, provide that if compensation is payable under a State law to ordinary title holders, but not to native title holders: (a) native title holders are to be given an entitlement to compensation under the NTA; and (b) that compensation should be assessed using the same principles and criteria which apply to the ordinary title holder under the State law. In other words, s.51(3) NTA adopts the holders of ordinary title under the State law as the benchmark for its determination of compensation, thereby treating native title holders and non-native title holders equally.

366. Accordingly, the effect of s.51(3) NTA in this proceeding (in applying the principles and criteria contained in s.123 MA) is that the Yindjibarndi People, like the holders of ordinary title under the MA, are entitled to "c*ompensation*" for "*all loss and damage suffered or likely to be suffered*" by them, even where the nature of their loss or damage may be different from that of an ordinary title holder. In particular, the assessment of the compensation for the Compensable Acts under s.51(3) NTA requires an application of the principles identified by the High Court in *Griffiths* for native title compensation.

367. The application of s.51(3) NTA in this way demonstrates the existence of *paragraph 51(xxxi) just terms* in that it provides both: (a) parity of treatment between native title holders and ordinary title holders; and (b) "*compensation*" in the ordinary sense, being the full money equivalent of the thing which was acquired. The clear implication from the reasons of the plurality in *Griffiths* is that the Court was satisfied that the principles it identified for the assessment of compensation (i.e. a bifurcated assessment of economic and cultural loss) resulted in parity of treatment between native title holders and the holders of equivalent non-native title rights and, accordingly, amounted to just terms.[714] Whilst *Griffiths* concerned an entitlement to compensation on just terms under s.51(1) NTA there is nothing in their Honours' reasons to suggest that, in circumstances where native title holders are treated no less favourably than ordinary title holders under s.51(3) NTA and where compensation is assessed on *Griffiths* principles, that would not also amount to *paragraph 51(xxxi) just terms*. Further, the determination of cultural loss under the *Griffiths* principles specifically requires the Court to consider whether the amount would be "*accepted by the Australian community as appropriate, fair or just*."[715]

368. To the extent that *paragraph 51(xxxi) just terms* may require something other than 'full compensation' (i.e. that it requires a fair process <u>for</u> compensation, in addition to a fair amount <u>of</u> compensation), it is submitted that the NTA provides such a fair process. Relevantly, as discussed above, the First Respondent and the FMG Respondents complied with all requirements of Part 2, Division 3 NTA prior to the doing of the Compensable Acts (including having negotiated in good faith where the right to negotiate applied). The NTA provided a right of compensation for the Compensable Acts (whether under the NTA or the MA) and, to the extent that the entitlement to compensation arose under the NTA, the NTA provided for claims for compensation to be lodged with the Federal Court and to be overseen and determined by the Court. There is nothing unfair in the NTA's processes. Even if the Applicant could conceive of a legislative scheme that it says would be fairer or more generous, that does not mean that the scheme for compensation provided by the NTA (and s.51(3) NTA in particular) is not on *paragraph 51(xxxi) just terms*.

369. In those circumstances, if a compensation entitlement arises under the NTA and is determined in accordance with s.51(3) (by application of the principles and criteria contained in s.123 MA), the

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[714] See, for example, *Griffiths* at [73]-[76].
[715] *Griffiths* at [237].

Applicant would be fully compensated according to the value of their loss to a fair and just standard. As a result, s.53(1) NTA is not engaged.

D9 Construction and operation of s.49 NTA

D9.1 ACTS THAT ARE "*ESSENTIALLY THE SAME*"

370. The construction and operation of s.49 NTA is agitated as an issue for resolution in this proceeding by YMAC. Contrary to YMAC's pleadings and opening,[716] the First Respondent does not understand any of the parties to be contending that s.49(a) NTA precludes an application being brought on behalf of other native title groups seeking an award of compensation in respect of any of the Compensable Acts insofar as they extend partly into other determination areas and affect other groups' native title. Rather, the issue actually in dispute is a narrow one and arises from a submission made by the FMG Respondents in its opening that "*s.49(a) precludes YNAC from seeking compensation for the effect of the grant of the FMG tenements where they overlap with other FMG tenements*."[717]

371. Section 49(a) NTA provides that compensation is only payable once under the NTA for acts that are essentially the same. The Explanatory Memorandum in relation to clause 47 of the *Native Title Bill 1993* (Cth) (which became s.49) explains the effect of that provision as being that "*where a series of acts has an effect on native title, compensation is payable only once for that series of related acts. Compensation is not payable in relation to each act.*" In the First Respondent's submission, s.49 NTA is directed at situations such as those which arose in *Ward (obo Pila Nature Reserve Traditional Owners) v Western Australia*.[718] In that matter, the vesting of a reserve (which was the compensable act in question) was immediately preceded by acts comprising the reservation of the land and its classification as a class 'A' reserve under the *Land Act 1933* (WA). To the extent the reservation and classification are compensable, the three acts were "*essentially the same*" act for the purposes of s.49 NTA. The First Respondent agrees with the YMAC CS[719] that s.49(a) NTA was not intended to address a situation where there are multiple tenements covering wholly or partly the same area.

D9.2 ASSESSING COMPENSATION ON PROJECT-WIDE BASIS

372. The Applicant contends that s.49 NTA requires compensation to be assessed on a "*project wide basis*".[720] The Applicant does not provide any explanation or analysis as to why it says s.49 NTA operates in this way and the First Respondent does not understand the basis for the Applicant's submission. Whilst the First Respondent has admitted that some of the Compensable Acts form part of a single project or operation, known as the Solomon Hub project,[721] the First Respondent does not agree that it is appropriate for the Court to assess economic loss on a project-wide (as opposed to a lot-by-lot) basis.[722]

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716 CB A.02.006 at [20(b)(ii)-(iii)]; CB A.02.010 at [46] and [51]-[53].
717 CB A.02.009 at [109]; YMAC CS at [38]-[39].
718 [2022] FCA 689 (see notation 2 to the orders made 15 June 2022 in WAD 222/2020 and notation 5 to the orders made 15 June 2022 in WAD 174/2021).
719 At [40].
720 CB A.02.007 at [73] (adopted in ACS at [77]).
721 CB A.02.003 at [190].
722 *Cf* YMAC CS at [46]-[47]. See paragraphs [99] and [196] above.

E. CLAIMED EFFECTS ON THE NATIVE TITLE RIGHTS AND INTERESTS

E1 Introduction

373. If the Court determines that the entitlement to compensation for the Compensable Acts arises under the NTA (and not the MA), it will be necessary for the Court to apply, by virtue of s.51(3) NTA, the principles and criteria for the assessment of compensation contained in s.123 MA. This requires an application of the principles for the assessment of compensation identified by the High Court in *Griffiths* (i.e. a bifurcated assessment of economic and cultural loss).[723] The application of the *Griffiths* principles to the evidence in this proceeding (together with the applicable quantum of compensation) is set out below in Part E3 (for economic loss) and Part E4 (for cultural loss). However, as the entitlement to compensation under the NTA is a right to "*compensation*" for any "*loss, diminution, impairment or other effect*" of "*an act*" on the "*native title rights and interests*", before any consideration of the economic and cultural loss incurred as a result of the Compensable Acts it is necessary for the Court to determine the content of the native title rights and interests which exist in respect of the area subject to any particular Compensable Act. Relevantly, the operation and effect of s.47B NTA in this proceeding must be determined by the Court in order to establish the native title rights and interests which exist, and may have been affected by, the Compensable Acts.

E2 Operation and effect of s.47B NTA

E2.1 INTRODUCTION

374. In the Yindjibarndi Determination, the Court determined that s.47B NTA applied to certain land and waters within the area of the Yindjibarndi Claim[724] (which formed the majority of the Exclusive Area[725]). Two issues have arisen in relation to the application of s.47B NTA in this proceeding. The first concerns whether s.47B can operate in relation to a compensation application, as distinct from a native title determination application.[726] The second relates to the point in time when Exclusive Native Title existed in the Exclusive Area.[727]

375. The ACS contends that the Applicant "*does not rely on ss.47A and 47B*" and instead relies on the Yindjibarndi Determination "*which determined that the Yindjibarndi people possess and have always possessed, a right of exclusive possession in the Exclusive Area*."[728] However it is, with respect, plainly impossible for the Applicant to "*not rely on ss.47A and s.47B*" and, instead rely on "*the terms of the* [Yindjibarndi] *Determination*",[729] in circumstances where that determination makes clear that the recognition of Exclusive Native Title in the Exclusive Area was entirely due to the operation of ss.47A and/or 47B NTA.[730] This position also appears to be in contrast with the Applicant's pleadings and opening in which the Applicant seemed to accept that s.47B NTA applied in respect of the Yindjibarndi

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723 See Parts D3.2.4, D3.3 and D3.4 above.
724 Being native title determination application WAD 6005 of 2003.
725 Yindjibarndi Determination at [4], [7], Schedule 1 Part 2 and Schedule 4. The only part of the Exclusive Area which is not subject to the application of s.47B NTA is Reserve 31428 (which is subject to s.47A). Reserve 31428 is not located near the Compensable Acts and, accordingly, is not relevant for present purposes.
726 CB A.02.013 at [5(f)-(g)]; CB A.02.007 at [88]-[91]; CB A.02.008 at [112]-[113].
727 CB A.02.003 at [12]; CB A.02.004 at [1(a) and (c)].
728 ACS at [78]-[79].
729 ACS at [78]-[80].
730 Yindjibarndi Determination at [4], [7], [11] (definition of Exclusive Area), Part 2 of Schedule 1 (description of the Exclusive Area) and Schedule 4 (Areas to which s.47A and 47B apply). Note that the Exclusive Area as described in Part 2 of Schedule 1 is identical to the areas to which s.47A and 47B apply in Schedule 4.

Determination but asserted the effect of s.47B NTA was that the Yindjibarndi People's right to possession, occupation, use and enjoyment of the Exclusive Area to the exclusion of all others has *always* existed and has not ever been subject to prior extinguishment.[731]

376. Whatever argument the Applicant may now be making on this issue, the First Respondent submits that the effect of s.47B NTA in this proceeding (and with respect to the Yindjibarndi Determination) is that:

(a) Compensable Acts done in the Application Area (whether in the Exclusive Area or the Non-Exclusive Area) before the date of the Yindjibarndi Determination on 13 November 2017 (**Determination Date**) are compensable for their effect on the Non-Exclusive Native Title only; and

(b) when the Yindjibarndi Determination was made, s.47B NTA (and s.47A) applied to the Yindjibarndi Claim so to enable Exclusive Native Title to be recognised in the Exclusive Area. As a result, Compensable Acts done in the Exclusive Area after the Determination Date are compensable for their effect on the Exclusive Native Title (but only to extent that those acts overlap the Exclusive Area).

E2.2 OBJECT AND PURPOSE OF S.47B NTA

377. Section 47B NTA is said to provide a "*qualified revival of native title against prior historical extinguishment*."[732] As described by the Explanatory Memorandum to the *Native Title Amendment Bill 1997* (Cth), s.47B NTA is "*a statutory mechanism designed to allow native title claimants who are in occupation of vacant Crown land to overcome the effect of past extinguishment and have their claim determined by the court*", and noted that it had a similar operation to s.47 NTA (which applies to pastoral lease land).[733] Relevantly, s.47B NTA enables the Court to make a determination in a claimant application that native title exists where it otherwise could not.[734] It also enables the Court to make a determination that exclusive native title exists where only non-exclusive native title could otherwise have been recognised. Section 47B, and other complementary provisions of the NTA,[735] do this by: (a) overcoming the prohibition on making a claimant application in relation to an area where native title has been extinguished by a *previous exclusive possession act*;[736] (b) overcoming the prohibition on making a claimant application that seeks recognition of exclusive rights in relation to an area where native title has been partially extinguished by a *previous non-exclusive possession act*;[737] (c) requiring the Court to disregard any extinguishment by the creation of any prior interest[738] when making a determination of native title on a claimant application; and (d) applying the *non-extinguishment principle* to the creation of any prior interest in relation to the area to enable the determination to be made.[739]

E2.3 FIRST ISSUE: CAN S.47B NTA OPERATE IN RELATION TO A COMPENSATION APPLICATION

378. The decision of Mansfield J at first instance in *Griffiths (No.1)* is authority that s.47B NTA applies only in relation to a claimant application and not to a compensation application.[740] In *Griffiths (No.1)*, the

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731 CB A.02.002 at [6]; CB A.02.007 at [88]-[91]; CB A.07.005 at 50(16)-51(21).
732 *Northern Territory v Alyawarr* (2005) 145 FCR 442; [2005] FCAFC 135 at [57].
733 [5.56] (on p.57). Section 47 commenced on 1 January 1994.
734 *Griffiths (No.1)* at [74]. See also *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 at [71] (citing *Native Title Amendment Bill 1997 (No.2)* (Cth) Explanatory Memorandum at [5.56]).
735 As to which see *Roberts on behalf of the Widjabul Wia-Bal People v Attorney-General of New South Wales* (2020) 277 FCR 170; [2020] FCAFC 103 at [45]-[46].
736 Section 61A(4)(a) NTA.
737 Section 61A(4)(a) NTA.
738 Section 47B(2) NTA.
739 Section 47B(3)(b) NTA.
740 *Griffiths (No.1)* at [67].

relevant compensable acts were the grant of 3 grazing licences[741] issued on 15 July 1980, 1 July 1981 and 1 March 1988 over the area of Lots 56, 57, 73 (part) and 109.[742] Prior to the grant of those grazing licences, exclusive native title had been extinguished over the relevant lots by the grant of a pastoral lease on 14 December 1901.[743] On 28 August 2006, when the relevant native title determination was made, the native title holders were recognised as holding exclusive native title rights and interests in Lots 56, 57, 73 (part) and 109 by reason of the operation of s.47B NTA.[744] The Northern Territory contended that the grazing licences were not compensable as they had no greater effect on native title than the earlier pastoral lease (which had already extinguished any exclusive native title).[745] However, the Applicant asserted that s.47B NTA had the effect that compensation fell to be assessed on the basis that exclusive native title existed and that the *non-extinguishment principle* applied to the grazing leases (with the result that the grazing leases were compensable under s.20 NTA).[746]

379. Mansfield J ultimately concluded that, although s.47B NTA applied in the determination proceedings with the effect that the claim group was entitled to a determination that they hold exclusive native title rights and interests in an area from the date of the determination, the effect of this determination should be ignored when assessing compensation, thus treating the native title as having already been partially extinguished as at the date of the grant of the 3 grazing licences.[747] Accordingly, the grants of those grazing licences were not compensable (and the compensation application was ultimately dismissed in relation to them).[748] Mansfield J arrived at this conclusion as a result of an analysis of the text of s.47B NTA, as well as its context.[749] Important in his Honour's conclusion on the statutory construction point was: (a) the definition and meaning of *claimant application* and the distinction the NTA draws between an application to determine native title and an application to determine an entitlement to compensation;[750] (b) the text of s.47B NTA itself which is not expressed in terms that would accommodate a compensation application;[751] and (c) that idiosyncratic outcomes that may arise on a contrary construction, including recovering twice for the one loss.[752] His Honour concluded:

> *…in my view s 47B permits claims for a determination of native title by claimants in occupation of vacant Crown land to proceed despite past extinguishment of their native title rights and interests in the specified circumstances, but limited to obtaining a determination of native title. That accords with the introductory words of s 47B(2): "[f]or all purposes under this Act in relation to the application", and with the focus in s 47B(3) upon "the determination on the application" that the claim group hold the rights and interests claimed. The application of the non-extinguishment principle by s 47B(3)(b) therefore is for the purpose of permitting a determination of native title rights and interests where there otherwise could not be one.* [753] (emphasis in original)

380. On that basis, Mansfield J rejected the construction contended for by the applicant in that case, finding that the qualifying words in s.47B(1)(a) ("*a claimant application is made*") were carefully selected and confine the operation of s.47B NTA. His Honour explained the limited operation of s.47B as follows:

> *The application of s. 47B in* [relation to the claimant application] *meant that native title was found to exist where, but for that section, it would not have existed. But it does not follow that, on a*

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741 Described in the judgment as acts 37, 38 and 39: see *Griffiths (No.1)* at [38].
742 *Griffiths (No.1)* at [38] and [61]-[62].
743 *Griffiths (No.1)* at [46] and annexed Table (Parties' Positions on Claimed Compensable Acts) at Items 37-39 (on pp.47-49)
744 See paragraph (a) of the Schedule A to the native title determination (as amended) annexed to *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391; [2007] FCAFC 178.
745 *Griffiths (No.1)* at [37].
746 *Griffiths (No.1)* at annexed Table at Items 37-39 (on pp.47-49).
747 *Griffiths (No.1)* at [67].
748 See order 2 made on 24 August 2016 in NTD 18/2011. See also *Griffiths (No.3)* at [468] (draft order 2).
749 *Griffiths (No.1)* at [68]-[77].
750 *Griffiths (No.1)* at [68]-[71].
751 *Griffiths (No.1)* at [72].
752 *Griffiths (No.1)* at [73].
753 *Griffiths (No.1)* at [74].

> *subsequent compensation application, that section may apply to further extend its scope to the eligibility for compensation.*[754]

381. *Griffiths (No.1)* is the only authority on whether s.47B NTA applies to a compensation application. As a decision of a single judge of this Court, it ought to be followed unless it is demonstrated to be plainly wrong,[755] which is unlikely where questions of law and statutory construction are concerned.[756] The decision was not subject to appeal (in circumstances in which many other aspects of the case were). The decision is, with respect, correct.[757] It is also consistent with the principles for the determination of compensation as settled in *Griffiths.* In particular, it is consistent with the principle that the entitlement to compensation arises when the act is done and, for economic loss, is assessed by reference to: (a) the legal nature and content of the rights and interests held as at that date;[758] and (b) a hypothetical transaction that takes place on that day. In other words, for the purposes of considering the application of the provisions of the NTA when doing an act, including in relation to any compensation liability, the parties are to rely on the state of affairs as they exist when the act is done (and not by reference to a later intervening event i.e. the application of s.47B NTA).

382. Practically, that means that Compensable Acts done in the Exclusive Area *before* the Determination Date are compensable for their effect on the Non-Exclusive Native Title only. That is an appropriate outcome in this case. Adopting the language of Mansfield J in *Griffiths (No.1)*, it would be an idiosyncratic outcome for s.47B NTA to operate in a way that would enable the native title holders to obtain both an approved determination of exclusive native title where there otherwise could not be one, and a determination of compensation for the creation of a prior interest before the determination was made on the basis that the prior interest subsequently affected their 'restored' native title. "*Such an outcome would result in the claim group recovering twice for the one loss*."[759]

383. However, the effect of s.47B NTA applying in relation to the claimant application the subject of the Yindjibarndi Determination must be considered for the purposes of determining compensation for Compensable Acts done in the Exclusive Area *after* the Determination. This is discussed below.

E2.4 SECOND ISSUE: THE POINT IN TIME IN WHICH EXCLUSIVE POSSESSION AROSE

384. Whilst the analysis above leads to the same conclusion, it is clear from the result in *Griffiths (FC)* that, regardless of whether s.47B NTA applies in respect of a compensation application, Exclusive Native Title in relation to the Exclusive Area existed only on and from the Determination Date.[760] In other words, the reviving effect of s.47B NTA is only engaged at the point in time at which the determination of native title is made.[761]

385. In *Griffiths (FC)*, the relevant compensable act was the grant of Crown Lease 624 on 21 November 1986 over Lot 47.[762] Prior to the grant of that Crown Lease, exclusive native title had been extinguished over Lot 47 by the grant of a pastoral lease on 14 December 1901.[763] On 28 August 2006, when the relevant native title determination was made, the native title holders were recognised as holding exclusive native

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754 *Griffiths (No.1)* at [77].
755 *AVN20 v Federal Circuit Court of Australia* [2020] FCA 584 (**AVN20**) at [104] (citing *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234; [2007] FCAFC 157 at [83]-[89] and *Tjiwarl (FC)* at [43]).
756 *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No.2)* (2003) 133 FCR 190; [2003] FCA 1263 at [52]. Also cited in *AVN20* at [104].
757 *Cf* CB A.02.010 at [77]-[80].
758 *Griffiths* at [43] and [56]; see also [264] (Edelman J).
759 *Griffiths (No.1)* at [73].
760 *Cf* ACS at [78] and [80].
761 *Cf* CB A.02.010 at [83]-[84].
762 Described in the judgments as 'act 34'.
763 *Griffiths (No.1)* at annexed Table: Item 34 (on p.46).

title rights and interests in Lot 47 by reason of the operation of s. 47B NTA. At first instance, Mansfield J determined that, notwithstanding that exclusive native title existed in relation to Lot 47 by virtue of the application of s.47B, the grant of Crown Lease 624 was to be treated as having wholly extinguished only the non-exclusive native title which existed at the time of its grant[764] and was compensable on that basis.[765]

386. This finding was not appealed. However, the Commonwealth did appeal from Mansfield J's finding that interest on the compensation awarded for economic loss for the grant of Crown Lease 624 was payable up to the date of judgment. The Full Court agreed with the Commonwealth that, from the date of the native title determination, the native title holders ceased to suffer any loss and, accordingly, should not receive interest on the compensation awarded for economic loss from that time. The Full Court held that, "[f]*rom the making of the determination on 28 August 2006 the exclusive native title rights and interests of the Claim Group in lot 47 were recognised. The Claim Group ceased to suffer any loss from the compensable act*".[766] The Full Court's decision is an endorsement of the approach of the primary judge in that, firstly, s.47B NTA did not apply in relation to the compensation application (i.e. the effect of Crown Lease 624 was to be determined having regard to the nature and content of the native title rights and interests held as at the date of grant of the lease (and not by reference to the application of s.47B NTA)) and, secondly, that for the purposes of compensation, the effect of s.47B NTA was that exclusive rights were recognised in relation to the land only on and from the date of the determination.

387. The analysis above is consistent with the general position that the application of s.47B NTA, following a judicial finding that the statutory pre-conditions have been met, has the effect of creating new rights.[767] In particular, given that the effect of extinguishment (at both common law[768] and under the NTA[769]) is that the relevant native title rights and interests cease to exist on and from the date of the extinguishing act (and cannot revive even if the act that caused the extinguishment ceases to exist), it must be accepted that s.47B NTA 'creates' or 'revives' those rights and can only do so following the judicial finding that the statutory preconditions have been met (i.e. from the date of the determination). In other words, s.47B is prospective in its operation. Whilst it may disregard prior extinguishment, thereby allowing for the revival of extinguished native title rights and interests, it has that effect only from the date on which the Court determines that the statutory preconditions have been met.

388. In light of the above, the dicta of Rares J in the reasons accompanying the Yindjibarndi Determination that "*by force of ss 11(1), 47A(2) and 47B(2) no extinguishment of native title rights and interests ever occurred…*"[770] is, in the First Respondent's respectful submission, wrong at law.[771] It is clear from the cases cited above that the effect of s.47B NTA is to disregard or ignore the extinguishment which did occur so as to allow a determination of exclusive native title (where there otherwise could not be one), not to treat that extinguishment as never having happened for all times and all purposes. Further, Rares J's reliance upon s.11 NTA in coming to this conclusion is, with respect, misplaced. Notwithstanding s.11(1) NTA (which provides that native title is not able to be extinguished contrary to the NTA) the

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764 Exclusive native title having been already extinguished by the earlier pastoral lease.
765 *Griffiths (No.3)* at [468(1)].
766 *Griffiths (FC)* at [233].
767 *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50 at [268] (cited with approval in *Griffiths (No.1)* at [77]).
768 *Fejo v Northern Territory* (1998) 195 CLR 96; [1998] HCA 58 at [43], [58] and [106]: "*Given the legal character of fee simple, reconciliation of such an interest with native title is impossible. This is not something ascertained over time. It is fixed at the moment of the grant of legal rights incompatible, of their nature, with the survival of native title in the same land. The one expels the possibility of the other*" (at [108]) (emphasis added).
769 See: s.237A NTA (*extinguishment*); s.23C(1)(b) NTA (*previous exclusive possession acts*); 23G(1)(c) NTA (*previous non-exclusive possession acts*); *Griffiths (No.3)* at [134]-[135], [167], [169] and [172]; *Griffiths* at [43], [56] and [264].
770 *Warrie (formerly TJ) v State of Western Australia (No.2)* [2017] FCA 1299 at [6].
771 See *Griffiths (FC)* at [229], [231] and [233] and, in particular, references therein to exclusive native title rights being restored / recognised from the date of the determination.

NTA does not constitute a comprehensive code of extinguishment. Rather, s.11 is prospective in its operation.[772] Acts done before the enactment of the NTA which were: (a) wholly valid when done; (b) not within the definition of a *previous exclusive possession act* or a *previous non-exclusive possession act*; and (c) effective to extinguish native title at common law, are unaffected by the NTA and will have the extinguishing effect on native title rights and interests given to them by the common law.[773] Where, as here, the right of exclusive possession was extinguished at common law, that extinguishment occurred outside of the NTA and s.11 NTA has no operation (see paragraph [390] below).

E2.5 NO ESTOPPEL

389. No issue of *res judicata* or issue estoppel arises in this matter as a result of the observations made by Rares J in reasons accompanying the Yindjibarndi Determination.[774] Regardless of the correctness of his Honour's comment that "*no extinguishment of native title rights and interests ever occurred in respect of* [the] *areas of land and waters"*, that statement was directed towards the application of ss.47A and 47B in the context of a "*claimant application*" and the making of a determination of exclusive rights. It is not authority for the proposition that any subsequent compensation application is to be determined as if no extinguishment ever occurred. Even if it were, the analysis above reveals that is not the position at law. Further, and in any event, Rares J's observation is *dicta* in that it is an observation relating to a matter which would not have changed the content of the Yindjibarndi Determination. It was not a matter which would sensibly have founded an appeal (directed only at challenging the reasons, but not the orders or the result). Accordingly, the fact the First Respondent did not appeal the reasons accompanying the Yindjibarndi Determination does not mean that it is now estopped from contending that: (a) s.47B NTA has no application in respect of a compensation application and/or (b) the reviving effect of s.47B NTA is engaged at the point in time at which the determination of native title is made.

E2.6 FACTUAL CONCLUSIONS

390. It is not in dispute that, prior to the Compensable Acts, the entirety of the Application Area had been the subject of grants or reservations that had the effect of extinguishing any right of exclusive possession held by the Yindjibarndi People.[775] At the latest, any right of exclusive possession was extinguished over the entirety of the Application Area by the grant of Oil Prospecting Area (OPA) 20H[776], being a licence to prospect for mineral oil granted on 13 September 1921 pursuant to s.6 of the *Mining Act Amendment Act 1920* (WA).[777] Accordingly, the recognition of the Exclusive Rights over the Exclusive Area flows solely from the application of s.47B NTA, which permitted the Court in the determination proceedings to disregard the effects of prior extinguishment in relation to the earlier tenure grants, including OPA 20H.

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772 *Karpany v Dietman* (2013) 252 CLR 507; [2013] HCA 47; at [19]; *Jango* at [34].
773 *Native Title Act Case* at 454.
774 at [5] – [6]: *Cf* ACS at [81]; CB A.02.005 at [1(b)]; CB A.02.007 at [90].
775 Including pastoral leases, Crown reserves, temporary reserves created under the *Mining Act 1904* (WA), licences to prospect for mineral oil and permits to explore granted under the *Petroleum Act 1936* (WA): see the following tenure / extinguishment pleadings filed in the Yindjibarndi Claim: CB C.02.001 at [2] and Table 2; CB C.02.002 at [2]; CB C.02.003; CB C.02.004 at [2] and Table 2. See also CB E.01.002 (Annexure XPM4) Workspace.
776 CB A.02.015 at [173]. See also CB A.05.037 (Exhibit A): map showing the extent of OPA 20H; and CB E.01.002 (Annexure XPM4) Workspace which includes the spatial location and supporting tenure documents for OPA 20H.
777 As OPA 20H was granted prior to 31 October 1975, no question of invalidity by reason of the RDA arose and the grant of OPA 20H did not require validation by the NTA. As the grant was not within the definition of a *past act*, *intermediate period act*, *previous exclusive possession act* or a *previous non-exclusive possession act* any extinguishing effect falls to be determined in accordance with the common law. In *Daniel v Western Australia* [2003] FCA 666 (at [850] to [852]) and *Banjima v Western Australia (No.2)* [2013] FCA 868 (at [1948]) the Court held that the grant of OPA 20H extinguished any exclusive native title rights and interests. More generally, see *Ward v Western Australia (No.3)* [2015] FCA 658 at [99]-[100] for a consideration of the effect of the grant of OPAs.

391. Given the discussion above, the First Respondent submits that the practical effect of the application of s.47B NTA in this proceeding is that:[778]

(a) Compensable Acts done over the Application Area (including the now Exclusive Areas) before the Determination Date are compensable for their effect on the Non-Exclusive Native Title only. Those Compensable Acts are:

Tenement	Grant Date
M 47/1409-I	26 November 2010
M 47/1411-I	26 November 2010
M 47/1413-I	26 November 2010
M 47/1431-I	8 July 2011
M 47/1453-I	17 January 2013
M 47/1473-I	29 August 2014
M 47/1475-I	29 August 2014
L 1SA	10 August 2011[780]
L 47/302[781]	5 June 2009
L 47/361	11 October 2011
L 47/362	3 May 2011

Tenement	Grant Date
L 47/363	3 May 2011
L 47/367	2 March 2012
L 47/396[779]	23 May 2012
E 47/1319-I	16 March 2012
E 47/1333-I	28 July 2007
E 47/1334-I	2 June 2007
E 47/1398-I	8 July 2011
E 47/1399-I	8 July 2011
E 47/1447-I	2 June 2007
E 47/3205-I	21 September 2016
E 47/3464-I	24 February 2017

(b) Compensable Acts done over the Exclusive Areas after the Determination Date are, to the extent that they are located within the Exclusive Area, compensable for their effect on the Exclusive Native Title. Where those Compensable Acts were also done over the Non-Exclusive Area they are, to the extent that they are located within the Non-Exclusive Area, compensable for their effect on the Non-Exclusive Native Title only. Those Compensable Acts are:

Tenement	Grant Date	% Exclusive Area[782]
M 47/1513-I[783]	3 December 2018	36.24%
M 47/1570	31 March 2020	24.58%
L 47/801	24 May 2019	1.84%
L 47/813	6 April 2018	66.12%
L 47/814	6 April 2018	45.61%
L 47/914	15 November 2019	5.08%
L 47/919	10 January 2020	45.61%

778 *Cf* YMAC CS at [49]. The information contained in the tables below is located in CB A.02.015 at Part H.
779 This tenement was surrendered on 7 January 2013 (prior to the Yindjibarndi Determination): CB A.02.015 at [240].
780 This is the date on which the area of L 1SA was extended into the Application Area: CB A.02.015 at [213]-[215].
781 This tenement was surrendered on 7 January 2013 (prior to the Yindjibarndi Determination): CB A.02.015 at [220].
782 This column indicates, to extent that a tenement is within the Application Area, the extent to which the tenement is within the Exclusive Area.
783 This tenement was surrendered on 31 March 2020: CB A.02.015 at [202].

(c) Compensable Acts not done in the Exclusive Area (regardless of date), are compensable for their effect on the Non-Exclusive Native Title only. Those Compensable Acts are:

Tenement	Grant Date
L 47/472	18 July 2014
L 47/697	2 December 2013
L 47/859	6 February 2019
L 47/901	26 June 2019

Tenement	Grant Date
P 47/1945	11 August 2021
P 47/1946[784]	11 August 2021
P 47/1947[785]	11 August 2021

E3 Calculation of the quantum of economic loss

392. If, which is denied, the entitlement to compensation for the Compensable Acts arises under the NTA (and not the MA), it will be necessary for the Court to apply, by virtue of s.51(3) NTA (in applying the principles and criteria contained in s.123 MA), a bifurcated assessment of economic and cultural loss in the manner identified by the High Court in *Griffiths*.

393. In particular, having regard to Part D3.3 above, the determination of economic loss requires the Court to undertake the following steps:

(a) Step One: identify the nature and extent of the native title rights and interests held in relation to the land affected by the relevant Compensable Act as at the date of that act;

(b) Step Two: determine the economic value of an unencumbered freehold estate in that land as a proxy for the economic value of exclusive native title in relation to the land and, where the native title rights and interests identified in Step One are non-exclusive only, apply a percentage reduction (50%) to represent the comparative limitations of the non-exclusive rights; and

(c) Step Three: because the Compensable Acts were subject to the *non-extinguishment principle*, apply a further percentage reduction to represent the extent to which the native title has been impaired short of extinguishment.

394. Each of these steps is outlined further below. The relevant economic loss calculations in respect of each Compensable Act are included in the table which appears at Annexure A of this document (**Economic Loss Table**). It is noted that, whilst the calculations in the Economic Loss Table draw on conclusions reached by Mr Preston, Mr Preston did not consider the application of s.47B NTA in the manner discussed above. Accordingly, it has been necessary for the First Respondent to mathematically calculate some of the required values. All assumptions made and data sources utilised in respect of the First Respondent's calculations are set out below.

E3.1 STEP ONE: NATURE AND EXTENT OF THE NATIVE TITLE

395. The nature and extent of the native title rights and interests as at the date of each Compensable Act are set out in paragraph [391] above. Save for the seven Compensable Acts identified at paragraph [391(b)], the native title rights and interests as at the date of the grant of the relevant Compensable Acts comprised Non-Exclusive Native Title only. Accordingly, to the extent that the Applicant asserts[786] that its loss comprised a "*loss of dominion*" or a "*loss of the right to be asked*" (which can only be understood as a

[784] This tenement expired on 14 March 2022: see CB A.02.015 at [316].
[785] This tenement expired on 14 March 2022: see CB A.02.015 at [320].
[786] See, for example, ACS at [316(a) and (b)] and [318]-[334].

loss of Exclusive Native Title)[787] those were not rights the Yindjibarndi held in respect of most of the Compensable Acts. Further, in respect of the seven Compensable Acts identified at paragraph [391(b)], the native title rights and interests include both Exclusive Native Title and Non-Exclusive Native Title (such that no Compensable Act is wholly subject to Exclusive Native Title). The native title rights and interests do not include any right to minerals as defined in the *Mining Act 1904* and the MA.[788]

396. This information is depicted in the Economic Loss Table at Columns 3 to 6 (coloured yellow). Column 3 ("*Area within Claim Area*") depicts the area of land (in hectares (**HA**)) subject to the Compensable Act that is within the Application Area (noting that not all Compensable Acts fall wholly within the Application Area).[789] Column 4 ("*% Exclusive Area*") depicts the percentage of that area which is within the Exclusive Area.[790] Based on the data contained in Columns 3 and 4, Columns 5 (*Exclusive Area (HA)*) and 6 (*Non-Exclusive Area (HA)*) are then mathematical calculations of the area (in HA) of Exclusive Native Title and Non-Exclusive Native Title to which each Compensable Act is subject.

E3.2 STEP TWO: ECONOMIC VALUE OF AN UNENCUMBERED FREEHOLD ESTATE

397. The economic value of an unencumbered freehold estate in the land the subject of each Compensable Act was provided by Mr Preston.[791] The First Respondent submits that Mr Preston's calculations should be accepted by the Court given that: (a) the Applicant's calculation of the freehold value in its second and third economic loss cases is incorrect;[792] and (b) the Applicant led no evidence to establish an alternative freehold value of the land concerned (i.e. Mr Preston's evidence is the only evidence before the Court).

398. Having determined the area of each Compensable Act subject to Exclusive Native Title and/or Non-Exclusive Native Title it is then necessary to determine the economic value of that land, having regard to: (a) the price (or the "*market value*") per HA of an unencumbered freehold estate in that land[793] (as identified by Mr Preston); and (b) the application of 50% reduction on the price per HA where the native title is Non-Exclusive Native Title only (to represent the comparative limitations of the non-exclusive rights as opposed to the Exclusive Native Title).[794] In mathematical terms this involves the following calculation: *Economic Value = [Price per HA × ENT] + [(Price per HA × 50%) x NENT]* where ENT refers to the area of Exclusive Native Title (in HA) and NENT refers to the area of Non-Exclusive Native Title (in HA).

399. This information is depicted in the Economic Loss Table at Columns 8 to 10 (coloured green). Column 7 ("*Market Land Value (per HA)*") depicts the value of an unencumbered freehold estate in the land the subject of the Compensable Act (on a price per HA basis) as calculated by Mr Preston.[795] Column 8 ("*Market Value (Exclusive Area)*") depicts the value of that portion of the Compensable Act subject to Exclusive Rights.[796] Column 9 ("*Market Value 50% (Non-Exclusive Area)*") depicts the value of that

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787 A "*right to be asked*" or "*dominion*" over country are not rights held by the Yindjibarndi People in those terms: see Yindjibarndi Determination at [3] and [4]. However, they are generally characteristics of a right of exclusive possession: see *Ward* at [52], [88], [89], [95] and [192]. See also footnote 51 above.

788 See Yindjibarndi Determination at [5(c)]. See also Part D4.2.7.1 above.

789 The data in column 3 was obtained from CB A.02.015 at Part H and, where not available from that document, from CB E.04.002 at 10 (Table) ("*Compensation application area Overlap (HA)*" column).

790 Where the Compensable Act was done before the Yindjibarndi Determination this value is 0. Where the Compensable Act was done after the Yindjibarndi Determination the data in Column 4 was obtained from CB A.02.015 at Part H.

791 CB E.04.002 at 10 (Table) ("*Market Land Value per Ha*" and "*100% Market value*" columns).

792 See Parts D4.3 and D4.4 above.

793 As at the date of the Compensable Act.

794 See paragraphs [100]-[102] above.

795 CB E.04.002 at 10 (Table) ("*Market Land Value per Ha*" and "*100% Market value*" columns).

796 Being the price per HA amount from Column 7 multiplied by the area (in HA) subject to Exclusive Native Title contained in Column 5.

portion of the Compensable Act subject to Non-Exclusive Rights.[797] Column 10 depicts the total value of the land the subject of the Compensable Act (by adding together Columns 8 and 9).

E3.3 STEP THREE: FURTHER REDUCTION FOR NON-EXTINGUISHING ACTS

400. As discussed at paragraphs [103] – [106] above, in circumstances where the relevant compensable act does not extinguish native title rights and interests but, rather, is subject to the *non-extinguishment principle*, it is necessary to apply a further percentage reduction to the amount calculated in Step Two to represent the extent to which the native title has been impaired short of extinguishment and taking into account the prospect of native title again having effect.

401. This percentage reduction is not amenable to a mathematical calculation or a formulaic approach (such as that taken by Mr Jaski). Rather, having regard to *Griffiths,* it is an evaluative judgment which takes into account: (a) the rights and interests conferred, and the activities permitted, by the compensable act,[798] having regard to the overall regulatory regime applicable to the act (including any conditions or discretions) and assuming that the grantee does not act in breach of its obligations; (b) the extent of the inconsistency between the rights held under the compensable act and the native title rights and interests; (c) the geographical extent of any inconsistency; and (d) the duration of the compensable act and the contingency that any native title rights and interests will again have full or partial effect. For example, the Applicant (correctly) accepts that: (a) it is only where there is an inconsistency between the Compensable Acts (and activities done under them) with the native title rights and interests that native title will be suppressed;[799] and (b) a distinction can be drawn between the Compensable Act mining leases and miscellaneous licences (where mining operations take place and access is restricted) and all other Compensable Acts.[800]

402. Set out below is a description of the factors which the Court should consider in its evaluative judgment at Step Three, together with the relevant percentage reduction which the First Respondent submits is appropriate having regard to those factors.

E3.3.1 Mining leases authorised for iron

E3.3.1.1 Term of a mining lease

403. A mining lease, once granted, remains in force for a period of 21 years.[801] The holder of that lease has an option to renew, as of right, for a further term of 21 years.[802] Subsequently, the Minister has a discretion to renew the term of the mining lease for successive periods, each of not more than 21 years.[803] It is agreed that whilst the FMG Respondents have no fixed date for the cessation of mining upon the Compensable Act mining leases, current modelling suggests that those tenements are expected to have an operational life until 2045.[804] Consequently, the Compensable Act mining leases are anticipated to have a term of between 25 – 35 years (depending upon the date of initial grant).[805]

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797 Being 50% of the price per HA amount contained in Column 7 multiplied by the area (in HA) subject to Non-Exclusive Native Title contained in Column 6.
798 Consistent with s.44H NTA.
799 ACS at [88].
800 ACS at [89].
801 Section 78(1)(a) MA.
802 Section 78(1)(b) MA.
803 Section 78(2) MA.
804 CB A.02.015 at [20].
805 The oldest Compensable Act mining leases were done in 2010 (being M 47/1409-I, M 47/1411-I, M 47/1413-I) whilst the newest Compensable mining lease was done in 2020: CB A.02.015 at [9(a)].

E3.3.1.2 Rights conferred by a mining lease

404. Subject to the MA, and the conditions on which the mining lease is granted, a mining lease authorises the holder to: use, occupy and enjoy the land of the lease for mining purposes;[806] mine for, and dispose of, any minerals located in or on the land; and do all things that are necessary to effectively carry out mining operations.[807] A mining lease also confers rights to take and divert certain waters and sink wells and bores (subject to the provisions of the *Rights in Water and Irrigation Act 1914* (WA) (**RIWI Act**)).[808] The holder of the mining lease owns all minerals lawfully mined on their lease.[809]

405. However, the right to mine, and the title to, all minerals conferred by a mining lease is subject to two exceptions. First, a mining lease does not permit the holder to mine for iron unless the Minister authorises the holder to do so (and endorses the lease accordingly).[810] Second, the Minister may, having regard to the location of the lease and the public interest, grant a mining lease that authorises mining only for specified minerals.[811] In this proceeding all of the Compensable Act mining leases, save for M 47/1570, have been endorsed with an authority to mine for iron.[812] Given this distinction, M 47/1570 is dealt with separately in Part E3.3.2 below.

406. The rights outlined in paragraphs [404] and [405] above are exclusive rights for mining purposes such that no other mining tenement, save for a miscellaneous licence, can be granted over a mining lease.[813] However, as discussed in *Western Australia v Brown*, this does not equate to a "*right to exclude any and everyone from that land for any reason or no reason at all*." Rather it is an exclusive right to "*go into and under the land, during the currency of the… lease, and to get and take away the iron ore… found there*."[814] Further, the conditions attached to the Compensable Act mining leases also provide that "*any right of the native title party…to access or use the land the subject of the mining lease is not to be restricted except in relation to those parts of the land which are used for exploration or mining operations or for safety or security reasons relating to those activities.*"[815]

407. Whilst the MA gives the holder of a mining lease a broad right to mine for, and dispose of, minerals, the rights attaching to a mining lease are not unrestrained. Any right to mine is not, for example, exercisable anywhere upon the lease, at any time, or by any means. Rather, a mining lease is subject to the conditions specifically imposed by the Minister under s.71 MA, together with certain standard conditions that are deemed to apply under s.82(1) MA and r.28 *Mining Regulations*. These include:

408. No ground disturbance without approval: s.82(1)(ca) MA provides that the holder of a mining lease is not permitted to use ground disturbing equipment on that lease unless a programme of work (**PoW**) has

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806 Section 85(2)(a) MA.
807 Section 85(1)(a),(b) and (d) MA.
808 Section 85(1)(c) MA.
809 Section 85(2)(b) MA.
810 Section 111 MA.
811 Section 110 MA. For example, the conditions placed on M 47/1513-I and M 47/1570 do not permit the mining of uranium ore.
812 CB A.02.015 at [174(d)], [178(d)], [182(c)], [186(c)], [190(d)], [194(c)], [198(c)] and [202(c)].
813 Section 85(3) MA. See also s.91(8) MA. It is also possible for a special prospecting licence to be granted over the area of a mining lease, but this is subject to consent of the holder of the mining lease: see s.85B MA.
814 *Western Australia v Brown* at [44] – [45].
815 CB E.01.002 (Annexure XPM4): Copies of the lease documents are located in the "*pdf*" subfolder of the "*Tables*" folder. See: M 47/1409-I (cond. 13); M 47/1411-I (cond. 9); M 47/1413-I (cond. 10); M 47/1431-I (cond. 12); M 47/1453-I (cond. 8); M 47/1473-I (cond. 8); M 47/1475-I (cond. 7). M 47/1513-I did not have this condition. However, M 47/1513-I is no longer live. It was only current for approximately 1 year and was ultimately surrendered in favour of M 47/1570: CB A.02.015 at [202]. M 47/1513-I had no infrastructure constructed, or proposed to be constructed, upon it and no iron ore was extracted or obtained from it: see CB A.02.015 at [10]; CB C.01.001; CB A.06.001.16; CB A.06.001.30.

been approved or the use of such equipment is dealt with in an approved mining proposal.[816] The Compensable Act mining leases are also subject to additional conditions that provide: (a) the construction and operation of the project, including measures to protect the environment, must be carried out in accordance with certain named mining proposals or PoWs;[817] (b) no development, mining or construction activity (including altering or expanding a project) is to be commenced until a plan of operations and a programme to safeguard the environment has been approved;[818] and (c) the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or excavation is prohibited without prior approval.[819]

409. Environment and rehabilitation: At the time of granting a mining lease (or at any subsequent time) the Minister may impose reasonable conditions for the purpose of preventing, reducing or making good, injury to the land of the lease or any consequential damage to any other land.[820] Relevantly, the Compensable Act mining leases are subject to a number of conditions of this nature which provide, *inter alia*, that on completion of operations all waste, equipment, buildings and structures must be removed and all mining related landforms must be rehabilitated to integrate them with the surrounding landscape. The management of the mine closure must also be undertaken in accordance with the latest, relevant, approved Mine Closure Plan.[821] The Mine Closure Plan for the Solomon Hub indicates that:

> [the] *connection to land* [of Traditional Owners]*, including access to sites of significance within the mine disturbance envelope, will be maintained as a post-mining land use. This land-use outcome will be achieved by removing infrastructure and rehabilitating the land to a safe, geotechnically stable, non-contaminating and ecologically viable landscape that is congruous with the adjacent land uses and can be managed similarly to adjacent areas. Fortescue has committed to maintain flow to Kangeenarina Creek to maintain riparian habitat features during operations and at closure… Where groundwater connection has been lost to maintain permanent groundwater fed pools in Weelumurra and Kangeenarina Creek, supplementation has commenced to main*[sic] *these systems. Supplementation will remain until such time that below water table pits (Queens, Kings and Trinity) are backfilled and groundwater flows to permanent pools are self sustaining. Where access to significant places where access has been lost due to mine development, access will be reinstated in agreement with Traditional Owners.*[822]

410. Other regulatory conditions: In addition to the constraints imposed by the MA, the Compensable Act mining leases (and mining tenements more generally) are also subject to a broader regulatory regime which restricts the exercise of rights and interests on a tenement by its holder.[823]

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816 Section 82(1)(ca) MA. A mining proposal is a document which, *inter alia*, contains information of the kind required by the guidelines published by DMIRS (at https://www.dmp.wa.gov.au/Documents/Environment/REC-EC-114D.pdf) about the proposed mining operations and must include a mine closure plan (being information about the decommissioning of the mine and the rehabilitation of the land): see s.70O(1) MA.

817 Such PoWs and mining proposals are specifically named in each lease document: see CB E.01.002 (Annexure XPM4): M 47/1409-I (cond. 17); M 47/1411-I (cond. 37); M 47/1413-I (cond. 14); M 47/1431-I (cond. 15); M 47/1453-I (cond. 13); M 47/1473-I (cond. 12); and M 47/1475-I (cond. 11); Copies of those PoWs and proposals are generally publicly available at: https://minedex.dmirs.wa.gov.au/Web/home. M 47/1513-I does not have this condition as it was never mined i.e. no PoW or mining proposal was approved in respect of it.

818 CB E.01.002 (Annexure XPM4): M 47/1409-I (cond. 8, 18); M 47/1411-I (cond.6, 38); M 47/1413-I (cond. 6, 15); M 47/1431-I (cond. 8, 17); M 47/1453-I (cond. 6, 14); M 47/1473-I (cond. 6); M 47/1475-I (cond. 6, 12); and M 47/1513-I (cond. 10)

819 CB E.01.002 (Annexure XPM4): condition 5 (all mining leases).

820 Section 84(1) MA.

821 CB E.01.002 (Annexure XPM4): M 47/1409-I (cond. 2-4, 19-24, 50, 56, 60); M 47/1411-I (cond. 2-4, 39-44, 47, 54, 56, 58); M 47/1413-I (cond. 2-4, 16-21, 30, 36, 38, 40); M 47/1431-I (cond. 2-4, 18-23, 25, 35, 37, 39); M 47/1453-I (cond. 2-4, 15-19, 21, 26, 32, 34, 36); M 47/1473-I (cond. 2-4, 13-18, 27, 29, 31); M 47/1475-I (cond. 2-4, 13-17, 21, 23, 29, 31, 33); and M 47/1513-I (cond.1-2: as noted, M 47/1513-I does not have the same conditions as the other mining leases as it was never mined or had infrastructure constructed upon it).

822 CB D.01.002 at 290 (at [6.1]).

823 This regime includes: the AHA; the *Environmental Protection Act 1986* (WA) and the *Environmental Protection (Clearing of Native Vegetation) Regulations* 2004 (WA) (which provide for the protection of all native vegetation from damage without prior permission); the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (which prohibits actions that will have an impact on nationally significant animals, plants, habitats and places without approval); and the RIWI Act, the *Country Areas Water Supply Act 1947* (WA) and the *Waterways Conservation Act 1976* (WA) (which regulate (including prohibiting) the taking and using of certain water resources).

E3.3.1.3 Extent of works approved

411. The extent of works undertaken on the Compensable Act mining leases in accordance with the MA and the conditions attached to those leases is visually depicted at CB A.06.001.16 and described in CB C.01.001.[824] It is noted that:

(a) no active mining occurred on M 47/1513-I prior to its surrender and no iron ore was extracted or obtained from this tenement. Further, no infrastructure was constructed, or disturbance caused, pursuant to the rights granted under M 47/1513-I;[825]

(b) no active mining is occurring, or has occurred, on M 47/1473-I and no iron ore has been extracted or obtained from this tenement.[826] Any infrastructure presently located upon M 47/1473-I (haul road(s)) is attributable to the overlapping Compensable Act miscellaneous licence;[827]

(c) no active mining is occurring, or has occurred, on that portion of M 47/1411-I which is located within the Application Area and no iron ore has been extracted from that portion of M 47/1411-I (the mine on M 47/1411-I being located outside of the Application Area);[828]

(d) not all portions of the land subject to the Compensable Act mining leases have been, or are, impacted by mining operations or associated infrastructure. For example, to the extent that they are located in the Application Area, approximately half of M 47/1409-I, M 47/1411-I and M 47/1475-I, currently have no development attributable to those mining leases on them;[829] and

(e) to the extent that the Solomon Hub project may expand in the future, the expansion within the Compensable Acts Area appears to be generally localised to areas already affected by the existing mining operations and infrastructure.[830]

E3.3.1.4 Appropriate percentage reduction

412. As discussed above, the rights held under the Compensable Act mining leases co-exist with Yindjibarndi People's native title rights and interests.[831] Further, the conditions attached to the Compensable Act mining leases provide that the Yindjibarndi People's rights to access the area of those tenements is not to be restricted, except in relation to those parts of the land that are used for mining operations or for safety or security reasons.

413. The First Respondent accepts that in areas of intensive activities upon the land the subject of the Compensable Act mining leases the Yindjibarndi People are effectively prevented from exercising any of their rights and interests and likely will be for the duration of those activities (potentially until approximately 2045).[832] However, after that time, the native title rights and interests (where suppressed) will revive and can be exercised again. The Applicant accepts that when the Compensable Act mining

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824 It is noted that CB C.01.001 attributes all infrastructure within the Solomon Hub to the Compensable Act mining leases and miscellaneous licence L 1SA. However, the Compensable Act miscellaneous licences wholly or partially overlap those mining leases and L 1SA. Where the relevant infrastructure is within the purpose for which a Compensable Act miscellaneous licence has been granted that infrastructure has been attributed to the licence and not the mining lease: see paragraph [421] below.

825 CB A.02.015 at [10]. To the extent that an access road and/or powerline infrastructure may be located on M 47/1513-I those are attributable to L 47/367 and/or L 47/919: CB C.01.001; CB E.01.002 (Annexure XPM4) Workspace; CB A.06.001.16-20; CB A.06.001.30.

826 CB A.02.015 at [11].

827 Namely L 47/362, as to which see paragraph [421] below. See also CB E.01.002 (Annexure XPM4) Workspace; CB A.06.001.16 – 20; CB A.06.001.30.

828 CB C.01.001 at [10]-[11]; CB A.06.001.16 – 17; CB A.06.001.30.

829 CB A.06.001.16 – 17; CB A.06.001.30.

830 CB E.03.002 at Figure 2 and 5 (pp.12 and 15).

831 *Western Australia* v *Brown* at [46], [57] and [63]-[64]. See also *Ward* at [284]-[296] where the plurality concluded that the grant of a mining lease was not inconsistent with, and does not extinguish, non-exclusive native title.

832 Save for M 47/1513-I which was surrendered in 2020.

leases come to an end, native title will revive.[833] The fact that native title rights and interests may be enjoyed again is a key element which must be factored into the Court's consideration of Step Three.

414. Further, the conditions attached to the Compensable Act mining leases require that, on completion of operations, all infrastructure must be removed and mining related landforms must be rehabilitated in a manner which integrates them into the surrounding landscape and allows them to support ecosystems of suitable local flora and fauna. Whilst it is accepted that any rehabilitation of the mine pits themselves may not return the land to the same state as prior to mining, the Mine Closure Plan (compliance with which is a condition on the Compensable Act mining leases) indicates an intention to reinstate access to the area by the Yindjibarndi People following completion of mining.

415. In those circumstances, the First Respondent submits that the appropriate percentage reduction for Step Three in respect of the Compensable Act mining leases should be 20% (i.e. the total amount of economic loss should be 80% of the amount calculated in Step Two). This information is depicted in the Economic Loss Table at Columns 11 to 12 (coloured orange) where Column 11 ("*Impact Factor*") depicts the appropriate reduction for Step Three and Column 12 depicts the total economic loss for the tenement (obtained by multiplying the "*Total Market Value*" amount in Column 10 (the outcome of Step Two) by Column 11).

E3.3.2 Mining leases not authorised for iron

416. M 47/1570 confers the same rights, and is subject to the same conditions, as the Compensable Act mining leases discussed above, save that the Minister has not given an authorisation to mine for iron under s.111 MA.[834] In the context of the Solomon Hub project this is a significant limitation upon the use to which M 47/1570 may be put. It is not possible, for example, for any mine to be constructed on M 47/1570 to extract iron ore and future plans for the Solomon Hub do not anticipate an expansion of the project into this area.[835] It is also agreed that no active mining is occurring, or has occurred, on M 47/1570 and no iron ore has been extracted or obtained from this tenement.[836] Further, no infrastructure has been constructed, or disturbance caused, pursuant to the rights granted under M 47/1570.[837] In those circumstances, the First Respondent submits that the appropriate percentage reduction for Step Three in respect of M 47/1570 is 30% (i.e. the total amount of economic loss should be 70% of the amount calculated in Step Two).

E3.3.3 Miscellaneous licences

E3.3.3.1 Term of a miscellaneous licence

417. A miscellaneous licence, once granted, remains in force for a period of 21 years.[838] The holder of that licence has an option to renew, as of right, for a further term of 21 years.[839] Subsequently, the Minister has a discretion to renew the term of the miscellaneous licence for successive periods, each of not more

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833 ACS at [93].
834 CB E.01.002 (Annexure XPM4): M 47/1570 (cond. 1-3, 6, 11-17, 25, 27-29).
835 CB E.03.002 at Figure 2 and 5 (pp.12 and 15). Whilst it is somewhat difficult to locate the area of M 47/1570 on these Figures, when read with the maps at CB A.06.001.16 and CB A.06.001.17 it is clear that M 47/1570 is located to the southeast of the areas marked to be mined 2020-2040 (and is largely off the Figure).
836 CB A.02.015 at [11].
837 CB A.06.001.16; CB A.06.001.15; CB C.01.001 at [22]. To the extent that an access road and/or powerline infrastructure may be located on M 47/1570 those are attributable to L 47/367 (which has the same area as M 47/1570) and/or L 47/914: CB E.01.002 (Annexure XPM4) Workspace; CB A.06.001.18 – 20; CB A,06.001.30.
838 Section 91B(2) MA.
839 Section 91B(3)(a) MA.

than 21 years.[840] The Compensable Act miscellaneous licences are anticipated to have a term of between 26 – 35 years (depending upon the date of initial grant).[841]

E3.3.3.2 Rights conferred by a miscellaneous licence

418. Unlike other tenements, a miscellaneous licence may be granted over land the subject of an existing tenement.[842] In those circumstances the tenements apply concurrently to the land and, if one of the tenements is surrendered, forfeited or expires, the land continues to be subject to the other mining tenement.[843] As discussed in paragraph [37] above, s.91(1) MA provides that a miscellaneous licence may be granted for any one or more of the purposes prescribed in r.42B *Mining Regulations* (which must be directly connected with mining).[844] Once granted, it must be continuously used for that purpose.[845] The purposes of the Compensable Act miscellaneous licences are set out in CB A.02.015 at Part H. The rights attached to a miscellaneous licence are not unrestrained. A miscellaneous licence is subject to the conditions imposed upon it under s.94(2) MA, together with certain standard conditions that are deemed to apply under s.92 MA and r.41 *Mining Regulations*. A miscellaneous licence is also subject to the broader regulatory regime outlined at paragraph [410] above.

419. No ground disturbance without approval: ss.46(aa) and 92 MA provide that the holder of a miscellaneous licence is not permitted to use ground disturbing equipment unless a PoW has been approved. The Compensable Act miscellaneous licences are subject to additional conditions providing that: (a) a plan of proposed operations, and measures to safeguard the environment, must be approved prior to any development or construction; and/or (b) the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment is prohibited without prior approval.[846] Some Compensable Act miscellaneous licences are subject to an additional condition that any works or measures to protect the environment must be carried out in accordance with named PoW(s) or mining proposals.[847]

420. Environment and rehabilitation: The MA provides that all holes, pits, trenches and other disturbances to the surface of the land that are likely to endanger the safety of any person or animal must be filled in or otherwise made safe.[848] It also requires the holder of a miscellaneous licence to take all necessary steps to prevent fire and damage to trees, property or livestock (including by the discharge of firearms or the use of vehicles).[849] In addition, at the time of granting a miscellaneous licence (or at any subsequent time) reasonable conditions for the purpose of preventing, reducing, or making good, injury to the land the subject of the miscellaneous licence, or any consequential damage to any other land, may be imposed. [850] The Compensable Act miscellaneous licences are also subject to various other conditions

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840 Section 91B(3)(b) MA.
841 See paragraph [403] above and CB A.02.015 at [20]. The oldest Compensable Act miscellaneous licence was done in 2009 (being L 47/302) whilst the newest miscellaneous licence was done in 2010 (being L47/919): see CB A.02.015 at [9(b)].
842 Section 91(1) and (7) MA. This modifies ss.18, 23 and 27 MA (which would otherwise exclude land from an application for a miscellaneous licence if it is already the subject of a mining tenement). Conversely, another mining tenement may be granted over land the subject of an existing miscellaneous licence: ss.94A(1) MA. This modifies ss.18, 23, 27 and 43 MA (which would otherwise exclude land from an application for a mining tenement if it is already the subject of a miscellaneous licence).
843 Sections 91(8), 94A(2) and 94B MA. However, the grant of a miscellaneous licence over an existing mining tenement may not confer rights that injuriously affect the rights of the holder of the underlying tenement: s.117 MA. A miscellaneous licence may be refused on those grounds: see *FMG Chichester Pty Ltd v Hancock Prospecting Pty Ltd* [2008] WAMW 13.
844 Section 91(6) MA.
845 Section 91(3)(b) and r.41(b) *Mining Regulations*.
846 CB E.01.002 (Annexure XPM4): L 1SA (cond. 22); L 47/302 (cond. 1); L 47/361 (cond. 1-2, 30); L 47/362 (cond. 1); L 47/363 (cond. 1); L 47/367 (cond. 1-2); L 47/396 (cond. 1-2); L 47/472 (cond. 1-2); L 47/697 (cond. 1-2); L 47/801 (cond. 3, 7); L 47/814 (cond. 8); L 47/859 (cond. 1); L 47/901 (cond. 1); L 47/914 (cond. 3, 5); L 47/919 (cond. 1).
847 CB E.01.002 (Annexure XPM4): L 1SA (end. 4-5); L 47/361 (cond. 35-36); L 47/362 (cond. 21-22); L 47/363 (cond. 19-20); L 47/367 (cond. 26-27); L 47/801 (cond. 21-22); L 47/859 (cond. 7-8); L 47/901 (cond. 6-7); L 47/914 (cond. 10-12).
848 Sections 46(b) and 92 MA.
849 Sections 46(c) and 92 MA.
850 Sections 46A(1) and 92 MA.

that relate to rehabilitation and/or environmental protection.[851] They also have additional endorsements or conditions with respect to taking and using water on the miscellaneous licence.[852]

E3.3.3.3 Extent of works approved

421. The extent of works undertaken on the Compensable Act miscellaneous licences in accordance with the purposes and conditions attached to those licences[853] consists primarily of: haul and/or access roads(s);[854] conveyor belt(s) to transport ore;[855] systems to store ore;[856] power line infrastructure;[857] power station(s);[858] optic figure cabling;[859] water bore(s)[860] and water pipelines.[861] Compensable Act miscellaneous licence L 1SA contains the rail network (and associated infrastructure) connecting the Solomon Hub with Port Hedland.[862]

E3.3.3.4 Appropriate percentage reduction

422. For similar reasons to those expressed at paragraphs [412] – [414] above, but taking into account that compared to the Compensable Act mining leases: (a) the infrastructure constructed pursuant to the Compensable Act miscellaneous licences is less intensive (both in nature and environmental effects) and is more readily removable following the cessation of operations; and (b) rehabilitation of the Compensable Act miscellaneous licence infrastructure is, as a result of (a), more likely to return the land to its original state, the First Respondent submits that the appropriate percentage reduction for Step Three in respect of the Compensable Act miscellaneous licences should be 30% (i.e. the total amount of economic loss should be 70% of the amount calculated in Step Two).[863]

E3.3.4 Exploration licences

E3.3.4.1 Term of an exploration licence

423. An exploration licence, once granted, remains in force for a period of five years.[864] If satisfied that the prescribed grounds contained in r.23AB of the *Mining Regulations* exist, the Minister may extend the

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851 CB E.01.002 (Annexure XPM4): L1SA (cond. 7-10, 17, 23); L 47/302 (cond. 1, 3, 5, 11-12, 19, 21, 23); L 47/361 (cond. 1, 2, 8-11, 17, 28-32, 37-46, 51, 53, 55); L 47/362 (cond. 1, 3-6, 12, 20, 23-28, 30, 33, 37, 39, 41, 43); L 47/363 (cond. 1-5, 11, 18, 21-26, 28, 31, 34, 36, 38, 40); L 47/367 (cond. 1, 2, 7-10, 16, 23, 28-32, 35, 38, 40, 42, 44); L 47/396 (cond. 1, 2, 7, 12); L 47/472 (end. 8, 10-12, cond. 1, 2, 9, 16); L 47/697 (end. 9, 11-13, cond. 1, 2, 10, 19); L 47/801 (end. 7-10, 12-13, cond. 3, 7, 8, 12, 23-28, 31, 34, 36, 38, 40); L 47/813 (end. 7, 9-11, 13, cond. 7); L 47/814 (end. 6, 8-10, 12, cond. 15); L 47/859 (end. 6, 9, 11-12, cond. 1, 6, 9, 12-22); L 47/901 (end. 6, 8-9, 11-12, cond. 1, 8-21); L 47/914 (end. 7, 9-10, 12-13, cond. 3, 5, 6, 13, 16-23, 25, 26); L 47/919 (end. 6, 8-9, 11-12, cond. 1, 14, 16-17).

852 CB E.01.002 (Annexure XPM4): L 1SA (end. 12-13, 15); L 47/302 (cond. 6-9); L 47/361 (cond. 12-13); L 47/362 (cond. 7-8); L 47/363 (cond. 6-7); L 47/367 (cond. 11-12); L 47/396 (end. 6-7); L 47/472 (end. 7, 9, 13); L 47/697 (end. 8, 10, 12, 14); L 47/801 (end. 8, 11, 14); L 47/813 (end. 8, 12, 14); L 47/814 (end. 7, 11, 13); L 47/859 (end. 7, 10, 13); L 47/901 (end. 7, 10, 13); L 47/914 (end. 8, 11, 14); L 47/919 (end. 7, 10, 13).

853 For the extent of works undertaken see: CB C.01.001; CB A.06.001.16 – CB A.06.001.20; CB A.06.001.30. It is noted that CB C.01.001 attributes all infrastructure within the Solomon Hub to the Compensable Act mining leases and miscellaneous licence L 1SA. However, the Compensable Act miscellaneous licences wholly or partially overlap those mining leases and L 1SA: see A.02.003 (Part C1.2); CB A.06.001.18; CB A.06.001.30; CB E.01.002 (Annexure XPM4) Workspace. Where the relevant infrastructure is within the purpose for which the Compensable Act miscellaneous licence has been granted that infrastructure has been attributed to the licence.

854 L 47/302; L 47/361; L 47/362; L 47/363; L 47/367; L 47/396; L 46/472; L 47/697; L 47/813; L 47/814; L 47/914 and L 47/919.

855 L 47/302; L 47/361; L 47/362.

856 L 47/361; L 47/362 (namely run-of-mine (ROM) stockpile areas for unprocessed ore and stockyards and product stockpiles for processed ore).

857 L 47/302; L 47/361; L 47/362; L 47/367; L 46/472; L 47/697; L 47/814; L 47/859; L 47/901; L 47/914 and L 47/919.

858 L 47/859 and L 47/901.

859 L 46/472; L 47/813; L 47/814; L 47/914 and L 47/919.

860 L 47/396; L 47/813; L 47/814; and L 47/919.

861 L 47/302; L 47/361; L 47/362; L 47/396; L 46/472; L 47/813; L 47/814; and L 47/919.

862 CB C.01.001 at [33] and CB A.06.001.16.

863 As with the Compensable Act mining leases, the Applicant also accepts that when the Compensable Act miscellaneous licences come to an end, native title will revive: ACS at [93].

864 Section 61(1) MA.

term of the exploration licence for one further period of five years and by a further period(s) of two years.[865] However, if the exploration licence is renewed, before the sixth anniversary of the exploration licence the holder must surrender 40% of the area held in the licence.[866]

E3.3.4.2 Rights conferred by an exploration licence

424. Subject to the MA, and the conditions on which the exploration licence is granted, an exploration licence authorises its holder to enter the land to explore for minerals with any agents, employees, vehicles, machinery and equipment that may be necessary or expedient.[867] It also permits the carrying on of any operations or works that are necessary for that purpose, including sinking bores and digging pits, trenches, holes and tunnels.[868] The holder of an exploration licence may excavate, extract or remove earth, soil, rock, stone, fluid or mineral bearing substances not exceeding a prescribed amount (being a total of 1,000 tonnes over the life of the licence)[869] or such greater amount as the Minister may approve.[870] An exploration licence also confers rights to take and divert certain waters and sink wells and bores (subject to the provisions of the RIWI Act).[871]

425. However, the rights to explore for minerals conferred by an exploration licence do not permit the holder to explore for iron unless the Minister authorises the holder to do so (and endorses the licence accordingly).[872] All of the Compensable Act exploration licences have been endorsed with an authority given by the Minister for Mines under s.111 MA to explore for iron.[873] The rights attaching to an exploration licence are not unrestrained. An exploration licence is subject to the conditions specifically imposed upon it by the Minister under s.57(1) MA, together with certain standard conditions that are deemed to apply to each licence under s.63 MA. In addition, an exploration licence is also subject to the broader regulatory regime outlined at paragraph [410] above and the following conditions.

426. Expenditure: The holder of an exploration licence must comply with the prescribed expenditure conditions unless an exemption has been obtained.[874]

427. No ground disturbance without approval*:* s.63(aa) MA provides that the holder of an exploration licence is not permitted to use ground disturbing equipment unless a PoW has been approved. Consistent with this provision and other licence conditions,[875] Mr Badock gave evidence that prior to conducting exploration the FMG Respondents are required to gain approval for a PoW from DMIRS and, if approval is given, carry out the exploration activity in accordance with it.[876] The FMG Respondents have developed a number of internal procedures to ensure compliance with the PoW (and any other relevant heritage, environmental or land approvals).[877]

428. Environment and rehabilitation: s.63 MA provides that all holes, pits, trenches and other disturbances to the surface of the land that are likely to endanger the safety of any person or animal must be filled in

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865 Section 61(2) MA.
866 Section 65 MA
867 Section 66(a) MA.
868 Section 66(b) MA.
869 Regulation 20 *Mining Regulations*.
870 Section 66(c) MA.
871 Section 66(d) MA.
872 Section 111 MA.
873 CB A.02.015 at [280(d)], [284(d)], [288(d)], [292(d)], [296(d)], [300(d)], [304(d)] and [308(d)].
874 Section 62(1). Annual expenditure required in the first three years of an exploration licence starts at not less than $1,000/block, increasing in two yearly intervals to $3,000/block after year eight of the licence: s.63 MA, r.21 *Mining Regulations*.
875 CB E.01.002 (Annexure XPM4): E 47/1319-I (cond. 4); E 47/1333-I (cond. 4, 24); E 47/1334-I (cond. 4, 22, see also 8); E 47/1398-I (cond. 4, see also 16); E 47/1399-I (cond. 4, see also 16); E 47/1447-I (cond. 4, 8); E 47/3205-I (cond. 2); E 47/3464-I (cond. 2, see also 10).
876 CB E.02.002 at [24] – [25].
877 See, for example, CB E.02.002 at [26] – [27] and [34].

or otherwise made safe.[878] It also requires the holder of an exploration licence to take all necessary steps to prevent fire and damage to trees, property or livestock (including by the discharge of firearms or the use of vehicles).[879] In addition, s.63AA MA provides that at the time of granting an exploration licence (or at any subsequent time), the Minister may impose reasonable conditions for the purpose of preventing, reducing, or making good, injury to the land the subject of the exploration licence, or any consequential damage to any other land. The Compensable Act exploration licences are also subject to a number of additional environmental and rehabilitation conditions.[880] Mr Badock gave evidence as to the measures FMG personnel take to comply with the rehabilitation conditions.[881]

E3.3.4.3 Extent of works approved.

429. Mr Badock gave evidence that FMG has reached a point in its operations where it has identified the areas that are economical for it to mine. In particular, any exploration that has been conducted outside of the existing Solomon Hub mining leases (i.e. on the Compensable Act exploration licences) has generally not produced promising or positive results. Accordingly, FMG has determined that any iron ore resources (particularly those located to the north of the existing mining leases i.e. on E 47/1334-I, E 47/1318-I and E 47/1447-I) do not have the estimated size to make them viable or economical to mine.[882] Similarly, Mr Oppenheim gave evidence that FMG did not intend to undertake mining operations within the Bangkangarra sub-catchment[883] (located on E 47/1319-I)[884] as it was "*barren*" of iron ore.[885] Consequently, whilst the FMG Respondents still engage in exploration activities across the Compensable Act exploration licences, those activities have been "*modest*" and limited to that which is necessary to meet the expenditure conditions imposed by the MA. These activities may include geological mapping, heritage and environment work, exploration drilling, or rehabilitation work.[886] Mr Badock stated that since 2011, FMG has only conducted three exploration drilling operations in the area subject to the Compensable Act exploration licences.[887]

E3.3.4.4 Appropriate percentage reduction

430. Given the large size of the Compensable Act exploration licences, the low-scale and infrequent exploration activities conducted upon them by the FMG Respondents and the general lack of evidence from the Yindjibarndi People as to the effect of the exploration licences on the exercise of their Non-Exclusive Native Title,[888] the First Respondent submits that those licences have not had, and do not appear likely to have, any real disruptive effect upon the exercise of Yindjibarndi People's Non-Exclusive Native Title.

431. Although it would be possible, from time to time, for the FMG Respondents and the Yindjibarndi People to come across one another in the course of their activities on the Compensable Act exploration licences, it is not apparent that the activities of the Yindjibarndi People have been, or will be, prevented or disrupted to any substantial extent by the Compensable Act exploration licences. Many of the Non-

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878 Section 63(b) MA.
879 Section 63(c) MA.
880 CB E.01.002 (Annexure XPM4): E 47/1319-I (cond. 1-4); E 47/1333-I (cond. 1-4, 14, 25, 27); E 47/1334-I (cond. 1-4, 9, 12, 23, 25-28); E 47/1398-I (cond. 1-4, 17); E 47/1399-I (cond. 1-4, 17, 20, 26, 27); E 47/1447-I (cond.1-4, 9, 11, 12, 13 15); E 47/3205-I (cond. 1-2); E 47/3464-I (cond. 1-2, 11, 13).
881 CB E.02.002 at [35] and [38]-[39].
882 CB E.02.002 at [37], [40] and [42].
883 See CB E.02.003 at CILO-7 pp.07 for a location of the sub-catchment.
884 CB A.06.001.30; CB A.06.001.21.
885 CB ZA.07.019 at 988(24-32); CB E.02.003 at [79(d)].
886 CB E.02.002 at [14] and [43]-[44].
887 CB E.02.002 at [45]-[48].
888 As discussed at paragraph [391] above, at the time of grant, only Non-Exclusive Native Title existed in the area of the Compensable Act exploration licences.

Exclusive Native Title rights and interests are, by their nature, inherently capable of coexistence with exploration activities. This is particularly so where the exploration activities undertaken by the FMG Respondents have been limited to three small drilling operations (which occurred 7 – 10 years ago) and given that any future exploration will be similarly limited.

432. Irrespective of the evidentiary position, given the limited nature of the rights held by an exploration licensee, there is little prospect of the Yindjibarndi People's access to the area of the Compensable Act exploration licences being prevented in any substantial way. An exploration licence does not carry a right to control access to land. At most, there is a slight risk that employees of the FMG Respondents, exercising their full rights under the licences, might physically be in the way of a member of the Yindjibarndi People in relation to the small area of land where they are operating on any given day. However, and in any event, as noted by the Tribunal when considering the grant of E 47/1319-I "*given the intermittent nature of exploration activities which generally occur over small areas or short periods of time, the interference with the exercise of registered native title rights and interests is only temporary.*"[889] In other words if there is any inconsistency it is likely to be minimal in impact and localised in area and time. Further, all exploration works are required to be, and have been, rehabilitated immediately following the cessation of exploration.

433. In those circumstances, the First Respondent submits that the appropriate percentage reduction for Step Three in respect of the Compensable Act exploration licences should be 85% (i.e. the total amount of economic loss should be 15% of the amount calculated in Step Two).

E3.3.5 Prospecting licences

E3.3.5.1 Term and area of a prospecting licence

434. A prospecting licence, once granted, remains in force for a period of four years.[890] If satisfied that the prescribed grounds contained in r.16A of the *Mining Regulations* exist, the Minister may extend the term of the prospecting licence for one further period of four years.[891] A prospecting licence may not exceed 200 hectares.[892]

E3.3.5.2 Rights conferred by a prospecting licence

435. Subject to the MA, and the conditions on which the prospecting licence is granted, a prospecting licence authorises its holder to enter the land for the purpose of prospecting with any agents, employees, vehicles, machinery and equipment that may be necessary or expedient.[893] It also permits the carrying on of any operations or works that are necessary for that purpose, including sinking bores and digging pits, trenches, holes and tunnels.[894] The holder of a prospecting licence may excavate, extract or remove from the licence: earth, soil, rock, stone, fluid or mineral bearing substances not exceeding a prescribed amount (being a total of 500 tonnes over the life of the licence[895]) or such greater amount as the Minister may approve.[896] A prospecting licence also confers rights to take and divert certain waters and sink wells and bores (subject to the RIWI Act).[897]

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889 *FMG Pilbara Pty Ltd/ Ned Cheedy (obo Yindjibarndi People)/ Western Australia* [2012] NNTTA 11 at [51].
890 Section 45(1) MA.
891 Section 45(1a) MA.
892 Section 40(2) MA. This is one of the main differences between a prospecting licence and an exploration licence. Due to the size limitation of a prospecting licence they are intended for small-scale operations, while an exploration licence is suitable for larger scale operations (as they can apply over large areas of land).
893 Section 48(a) MA.
894 Section 48(b) MA.
895 Regulation 14 *Mining Regulations*.
896 Section 48(c) MA.
897 Section 48(d) MA.

436. However, the rights to prospect for minerals conferred by a prospecting licence do not permit the holder to prospect for iron unless the Minister authorises the holder to do so (and endorses the licence accordingly).[898] None of the Compensable Act prospecting licences have such an endorsement and, accordingly, the FMG Respondents are not entitled to prospect for iron ore on them.[899] Further, the rights attaching to a prospecting licence are not unrestrained. Rather, a prospecting licence is subject to the conditions specifically imposed upon it under s.40(1) MA, together with certain standard conditions which are deemed to apply to each prospecting licence under s.46 MA. In addition, a prospecting licence is also subject to the broader regulatory regime outlined at paragraph [410] above. The conditions imposed by the MA include the following.

437. No ground disturbance without approval: s.46(aa) MA provides that the holder of a prospecting licence is not permitted to use ground disturbing equipment when prospecting unless a PoW has been approved.[900] The Compensable Act prospecting licences are also subject to a specific condition that the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance is prohibited without prior approval.[901]

438. Environment and rehabilitation: s.46 MA provides that all holes, pits, trenches and other disturbances to the surface of the land that are likely to endanger the safety of any person or animal must be filled in or otherwise made safe.[902] It also requires the holder of a prospecting licence to take all necessary steps to prevent fire and damage to trees, property or livestock (including by the discharge of firearms or the use of vehicles).[903] Further, s.46 MA provides that at the time of granting a prospecting licence (or at any subsequent time) reasonable conditions for the purpose of preventing, reducing, or making good, injury to the land the subject of the prospecting licence, or any consequential damage to any other land, may be imposed.[904] The Compensable Act prospecting licences are also subject to a number of additional conditions of this nature.[905]

E3.3.5.3 Appropriate percentage reduction

439. For similar reasons to those expressed at paragraphs [430] – [432] above, the Compensable Act prospecting licences have not had, and do not appear likely to have, any real disruptive effect upon the exercise of the Yindjibarndi People's Non-Exclusive Native Title.[906] Further, given the Compensable Act prospecting licences are not authorised for iron (which is a significant limitation in the context of the Solomon Hub project) and carry less rights than the Compensable Act exploration licences, the First Respondent submits that the appropriate percentage reduction for Step Three in respect of the Compensable Act prospecting licences should be 90% (i.e. the total amount of economic loss should be 10% of the amount calculated in Step Two).

E3.4 TOTAL QUANTUM

440. Having regard to the above, as set out in the Economic Loss Table, the First Respondent says that economic loss for the Compensable Acts is **$128,114.28**.

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898 Section 111 MA.
899 CB E.01.002 (Annexure XPM4): P 47-1945; P 47/1946; P 47/1947.
900 Section 46(aa) MA. See also CB E.01.002 (Annexure XPM4): P 47-1945 (cond. 8); P 47/1946 (cond. 8); P 47/1947 (cond. 5).
901 CB E.01.002 (Annexure XPM4): P 47-1945 (cond. 3); P 47/1946 (cond. 3); P 47/1947 (cond. 3).
902 Section 46(b) MA.
903 Section 46(c) MA.
904 Section 46A MA.
905 CB E.01.002 (Annexure XPM4): P 47-1945 (cond. 1-3, 9); P 47/1946 (cond. 1-3, 9); P 47/1947 (cond. 1-3, 6).
906 As discussed above at paragraph [391(c)], at the time of grant, only Non-Exclusive Native Title existed in the area of the Compensable Act prospecting licences.

E4 Calculation of the quantum of cultural loss

E4.1 RELEVANT EVIDENCE

441. As noted at Part D3.4 above, quantification of cultural loss is not amenable to a mathematical calculation or a formulaic approach. Rather, the assessment of compensation for cultural loss requires an intuitive judgment involving a multifactorial approach. The First Respondent does not dispute that the Compensable Acts have compromised and diminished the Yindjibarndi People's sense of connection, by their traditional laws and customs, to the area of the **SHM**.[907] It also does not dispute that some of the effects of the SHM will continue for a period of time into the future. The First Respondent's submissions on cultural loss in this section are largely directed to the evidence which *should* be taken into account (as opposed to the evidence which the First Respondent says is not relevant to an assessment of cultural loss and therefore should *not* be taken into account) in arriving at an amount which the Australian community would consider fair and just for the effects of the Compensable Acts.

442. Relevantly, much of that evidence can be found in the expert anthropological evidence of Dr Palmer. The First Respondent accepts Dr Palmer's articulation of the cosmological world view that underpins the Yindjibarndi People's relationship with country, in particular: (a) the essentially spiritual nature of the relationship between the Yindjibarndi People and their country;[908] (b) the "*inter-dependent*" nature of the various parts of the Yindjibarndi religious system and the lack of divide, in spiritual terms, between one part of Yindjibarndi country and another ("*the indissoluble whole*");[909] and (c) the experience of "*epic emotions*" in response to the loss of, or damage to, things of cultural value.[910]

443. The amount of the cultural loss described by Dr Palmer in this case is strikingly similar to the account of the evidence of Dr Palmer and the lay witnesses set out by Mansfield J in *Griffiths (No.3)*.[911] Dr Palmer himself in his expert report makes that point by, for example, identifying Mansfield J's findings about the emotional effect of the damage to country in Timber Creek as being consistent with his opinions in this case.[912] Similarly to his evidence for the native title holders in *Griffiths*, Dr Palmer's evidence in this proceeding (insofar as the First Respondent submits it is relevant) is to the effect that the Yindjibarndi People's connection to country (and the spiritual integrity of that country) has been compromised or diminished by the Compensable Acts which have: (a) destroyed or damaged country; (b) impeded the practise of traditional laws and customs, including access to, and use of, the country and its resources around the SHM, with a consequential diminishment of culturally related activities; and (c) interfered with the integrity of the *Bundut* song line and two Dreaming tracks. Each of these effects on the cultural value of country is considered in further detail below.

E4.1.1 Destruction and damage to country

444. The First Respondent acknowledges that the effects of the SHM on the local landscape are considerable. That is an inescapable conclusion from any development of that kind. The First Respondent accepts that the damage to country has resulted in a loss and diminishment of the Yindjibarndi People's spiritual

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907 Being the maximum area in which mining activity will be conducted/located on the Compensable Acts (referred to as the "*disturbance envelope*" in *Statutory Guidelines for Mining Proposals)* which area is generally depicted on CB A.06.001.17.
908 CB E.03.001 at [90]-[97]; ACS at [256].
909 CB E.03.001 at [98]-[100; ACS at [260].
910 CB E.03.001 at [101]-[105]; ACS at [261]-[262].
911 The Court might compare, for example: CB E.03.001 at [93] / *Griffiths (No. 3)* at [335] (link between country and personal identity); CB E.03.001 at [96]-[97] / *Griffiths (No. 3)* at [334] (duty to protect the country); CB E.03.001 at [98]-[100] / *Griffiths (No. 3)* at [363] ("the indissoluble whole"); CB E.03.001 at [101]-[105] / *Griffiths (No. 3)* at [351]-[359] ("epic emotions"); CB E.03.001 at [263]-[265] / *Griffiths (No. 3)* [381] (sense of failed responsibility); CB E.03.001 at [284]-[285] / *Griffiths (No. 3)* at [372] (damage to country equals damage to persons).
912 CB E.03.001 at [101]-[105].

relationship with country. The native title holders' sense of loss stems from their appreciation of the totality of country and the degree to which it has been diminished, fractured or destroyed. It is accepted that Yindjibarndi People apprehend the loss and diminishment of their spiritual relationship with country as a diminishment of themselves as persons, given the interconnectedness of person and country. It is accepted that the physical destruction and the damage sustained to the spiritual integrity of country has given rise to group-felt anguish, anger, powerlessness and frustration ("*epic emotions*"[913]) and affected peoples' *wirrard*.[914]

445. Encapsulated within this aspect of loss is an acknowledgement that some culturally significant places within the SHM have been affected in various ways. These include: (a) a sacred site where two *Marrga* fought over a woman, which was found by the Tribunal to be a site of particular significance to Yindjibarndi People within the area of what is now Compensable Act mining lease M47/1411-I;[915] and (b) a stone arrangement/grinding stone site; *Gurdiwirndanha Wurndu* (a site created by the actions of the *Marrga*); *Manggurla thalu* (a baby increase site); *wundu* (watercourse/spring) in a gorge; and *Ganjingaringunha* (Kangeenarina) *wundu*, each of which was found by the Tribunal to be sites of particular significance to Yindjibarndi People within the area of what is now the Compensable Act mining leases M47/1475-I and M47/1473-I.[916]

446. A mitigating factor, relevant to the exercise of the Court's discretion, is the fact that senior members of the Yindjibarndi People (albeit who were not aligned with the Applicant and/or YAC) were consulted in relation to cultural heritage and Yindjibarndi site matters in connection with the SHM.[917] The evidence reveals that the FMG Respondents sought to consult over an extended period with the Applicant and YAC in relation to heritage matters,[918] however their invitations were rarely accepted. Compensation should not be assessed as if that had not occurred.

E4.1.2 Interference with the practice of traditional laws and customs

447. As discussed in Part D3.2.3 above, there is a fundamental distinction between compensation for economic loss (which compensates for the loss or impact of the right to do something in relation to the land) and cultural loss (which compensates for the loss or impact of connection with the land).[919] To the extent that the Applicant seeks compensation for the loss of "*dominion*" or the "*right to be asked*" (i.e. Exclusive Native Title), the "*right to teach others*" and the "*right to look after country*",[920] any effect on those rights by Compensable Acts is already compensated as part of economic loss[921] and should not also be compensated as cultural loss. Rather, cultural loss is concerned with the group-felt sense of loss of connection to country that arises when the integrity of the land or waters is disrupted in a way that is attributable to the Compensable Acts.[922]

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913 CB E.03.001 at [101]-[105].
914 CB E.03.001 at [284].
915 See *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) (CB: A.09.009) at [47].
916 See *FMG Pilbara Pty Ltd v Yindjibarndi #1* [2014] NNTTA 79 (31 July 2014) (CB. A.09.012) at [122], [125], [133], [135] and [136]. The First Respondent notes that a number of other areas/sites, recorded in the Affidavit of Philip Davies sworn 4 March 2014 (CB A.05.029) and referred to in the ACS at [218], were also considered by the Tribunal but not found to be sites of particular significance.
917 According to the ACS at [442], "*From the* [sic] *late 2010 onwards WYAC worked very closely with FMG in relation to cultural heritage*".
918 CB B.04.001 – B.04.025.
919 *Griffiths* at [44] and [84].
920 See ACS under the Heading "*Loss of Rights and Duties of an Owner of Country*" at [315]-[346].
921 i.e. because they are rights which are rights to do something in relation to the land.
922 *Griffiths* at [84], [214] and [218].

448. The First Respondent accepts that, as a result of the SHM, there are physical limitations on access to certain areas by Yindjibarndi People. It is acknowledged that this in turn affects the way in which Yindjibarndi People are able to connect and engage with their country and gain spiritual and material sustenance from the land. It affects how the Yindjibarndi People's relationships with country are perceived and executed. For example, Yindjibarndi People are unable to perform their duty in respect of *manjangu* (strangers) who seek to enter country within the area of the SHM by performing a ritual of introduction to ensure their safety by managing the spiritual presences within the landscape.[923] There is evidence that the Yindjibarndi People's ability to access ochre and Gandi stones, both of which are said to be culturally significant resources due to their use in initiation ceremonies, has been affected by the SHM.[924] The Yindjibarndi People contend that their ability to perform the rituals is diminished because the totality of the link with Yindjibarndi country, which the use of these resources in part symbolises, has been broken. Restrictions on access to areas within the SHM also affect the ability of the Yindjibarndi People to ensure the intergenerational transmission of cultural beliefs and knowledge, the teachings of which rely upon close referencing to country and the places within it. The First Respondent acknowledges that all of this represents cultural loss.

449. However, balanced against this is the fact that the Yindjibarndi People's connection to country, and ability to practice their traditional laws and customs, has not been affected over the whole of the Compensable Acts Area,[925] the whole of the Application Area or the whole of Yindjibarndi country. For example, there are other places within Yindjibarndi country where oche and Gandi stones can be found.[926] Further, as Mansfield J observed in *Griffiths (No.3)* "*compensation must be assessed having regard to the spiritual and usufructuary significance and area of the land affected, but relative to the other land that remained available to the Claim Group for the exercise of the native title rights and interests*".[927] That approach was approved by the appellate courts.[928] The area subject to the Compensable Act mining leases[929] (of which the SHM is a smaller part[930]) comprises 4.88% of the Application Area[931] (noting that the Application Area itself is just part of the area where Yindjibarndi People hold native title rights and interests[932]). By contrast, in *Griffiths* the compensable acts comprised over 6% of the area previously determined to be land in relation to which native title exists.[933]

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923 CB E.03.001 at [63] and [240].
924 CB E.03.001 at [332].
925 As to which see Part E3.3 above.
926 CB E.03.001 at [332]. In *FMG v Cheedy* (CB A.09.008), the Tribunal stated as follows: "*My impression of the evidence from the native title party is that Gandi can be found throughout Yindjibarndi country, including those areas within the proposed lease* [mining lease M47/1413]*, but by no means limited to that area*" (at [69]; see also at [72]). Similarly, in *FMG Pilbara Pty Ltd and Another v Yindjibarndi #1* [2014] NNTTA 79 (31 July 2014) (CB. A.09.012), the Tribunal stated as follows in relation to ochre source sites identified by the *native title party*: "*What is compelling for my decision-making is that there is evidence from the native title party that there are many such sites on the proposed leases, as well as within the claim area itself. This is also reinforced in comments made by the native title party in the Heritage Information Submission Form. There is no evidence to suggest these sites are more important or special to the native title party than other similar sites*" (at [121]; see also at [124] in relation to Gandi).
927 *Griffiths (No.3)* at [302].
928 *Griffiths (FC)* at [370]-[373]; *Griffiths* at [223].
929 Being approximately 120.2 square kilometres: ACS at [204]. See also E.02.006.003 (at column E).
930 As to which see footnote 907 above and CB A.06.001.17.
931 The Application Area is approximately 2462.3 square kilometres: https://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/details.aspx?NTDA_Fileno=WP2022/001.
932 See *Yindjibarndi Aboriginal Corporation RNTBC v Western Australia* [2020] FCA 1416 at [3(b)] and First Schedule, Attachment 2, Map 1.
933 *Griffiths* at [6].

E4.1.3 Interference with the integrity of the *Bundut* song line and Dreaming tracks

450. The *Bundut* is conceptualised by Dr Palmer as a creative journey which records the progress of ordaining songs across the countryside. *Bundut* ascribes a spiritual quality to country which it created. The spiritual attributes are now believed to inform the natural and social world of the Yindjibarndi. The *Bundut* is said to provide the continuing basis for a significant aspect of the relationship between the Yindjibarndi People and their country through the belief in their spiritual correspondence with it. *Bundut* has cultural significance because it provides the basis for the induction of boys into manhood and the perpetuation of knowledge and teaching of the creative events that the *Bundut* occasioned. It is therefore a ritual that serves to sustain and perpetuate the cultural values, normative references and ritual knowledge that lie at the heart of what it is to be a Yindjibarndi person.[934] A section of the *Bundut* song line intersects the area of the SHM. This section relates to the activities of the *Barnga* (sand goanna),[935] which is said to have travelled up the *Ganjingaringunha* (Kangeenarina) creek to *Bangkangarra*, where *Barnga* made the spring, pool and other natural features of the gorge.[936] Dr Palmer also described the significance of the *Barrimirndi* (mythic serpent or snake), a creative being that is said to have created the Fortescue River, pools and other natural features, and is now commemorated in oral narratives and songs.[937]

451. The First Respondent accepts that portions of the *Bundut* song line relating to the activities of the *Barnga* (sand goanna), as well as part of the track of *Barrimirndi*, in the vicinity of *Ganjingaringunha* (Kangeenarina) creek, have been affected by the SHM. The evidence of the effect on the *Bundut* and Dreaming tracks of the *Barnga* and *Barrimirndi* is comparable to Dr Palmer's evidence in *Griffiths* insofar as he documented the travels of major Dreamings and the sites they visited (and imbued with spirituality) in the town of Timber Creek. The First Respondent acknowledges that the interference caused by the SHM means the integrity of the song lines and narratives that the *Bundut* and mythical beings represent are diminished by the damage to parts of *Ganjingaringunha*, which equates to cultural loss. However, the Aboriginal evidence taken at *Bangkangarra* confirms the *Bundut* songs are still known and sung. Michael Woodley encapsulated the effect of the evidence by explaining that the operation and passing on of the song cycle continues, but that references in the cycle to places that have been mined now carry a different, negative, connotation.[938]

E4.2 QUANTUM

452. The Applicant's claim for cultural loss is calculated on the simplistic basis that there are 1000 people in the Yindjibarndi community, and they are each entitled to $1 million.[939] There is, however, no legal basis for cultural loss awards to reflect the number of native title holders. In *Griffiths*, the plurality endorsed the position of the parties, who had agreed that "*…it would not be appropriate for the award to reflect the number of native title holders at the time that native title was determined to have existed given that the cultural loss would be suffered by the native title holders as a whole and because of the inter-relationships between members of related country groups and their relationships to the countries of those groups…*".[940] Edelman J was of a similar view, stating that "*…it was correctly assumed by the parties that the loss of culture would be unaffected by the size of the Claim Group…*".[941]

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934 CB E.03.006 at [142]-[144].
935 CB E.03.006 at [127].
936 CB E.03.001 at [348].
937 CB E.03.001 at [65]-[66].
938 CB A.07.011 at 512-513.
939 ACS at [617].
940 *Griffiths* at [157]; see also [214].
941 *Griffiths* at [323].

453. At this early stage of the development of native title compensation jurisprudence, *Griffiths* serves as a benchmark. The effects of the compensable acts in *Griffiths* were described by Mansfield J as causing "*gut-wrenching pain*".[942] The Full Court described the effects of the grants as having an impact on the claim group at a "*very high level*" and having "*a severe and lasting impact*" and noted that any award must be "*sufficient to recognise the severity of the impact of the loss and impairment*."[943] The Full Court held that $1.3 million reflected, in money terms recognised by the community, a substantial acknowledgement of a high level of damage done to the native title holding group.[944] The plurality in the High Court referred to Mansfield J's findings, which they noted were based on strong and compelling evidence, about the severe pain and anxiety suffered by the members of the claim group as supporting his Honour's assessment of the quantum of cultural loss.[945] Edelman J described "*the extinguishment of rights of immense cultural value*" and a loss of spiritual sustenance derived from the land "*the product of the Dreaming … considered to be inviolable*".[946] The High Court found that $1.3 million for cultural loss was an appropriate award.

454. The Applicant's claim for an award of $1 billion for cultural loss is 769 times greater than the $1.3 million award for cultural loss in *Griffiths* and is more than 1,200 times greater than freehold value.[947] Whilst it is acknowledged that awards of compensation will vary depending on the facts of each case, the First Respondent submits that the Applicant's cultural loss claim is manifestly excessive when viewed through the lens of what the High Court considered was fair, reasonable or just in *Griffiths*. This is particularly so in circumstances where the evidence of loss of spiritual connection suffered by the Yindjibarndi People, as outlined above, is strongly comparable to the evidence in *Griffiths*.

455. The First Respondent does, however, accept that the geographic scale and severity of physical damage to the landscape in this case is greater than in *Griffiths*. This is a distinguishing feature of the present case which justifies a reasonable uplift from the cultural loss award in *Griffiths*. It is on this basis that an award for cultural loss within the range of **$5 million - $10 million** would, in the First Respondent's submission, appropriately reflect what the Australian community would consider is fair, reasonable or just.

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942 *Griffiths (No.3)* at [350].
943 *Griffiths (FC)* [395]-[396].
944 *Griffiths (FC)* at [396].
945 *Griffiths* at [194] and see generally [197]-[227].
946 *Griffiths* at [252], [328].
947 For the purpose of this comparison, the freehold value is taken to be $800,873, being the highest economic value assuming exclusive native title existed over the entirety of the Compensable Acts Area (which it does not). The submission being made here is not that there must be a relationship between economic and cultural loss. Rather, the submission is intended to highlight the manifestly excessive nature of the Applicant's claim for cultural loss in the same way that Edelman J undertook that comparison in *Griffiths* at [321]-[322] when assessing whether the award of $1.3 million was manifestly excessive.

F. LIABILITY TO PAY COMPENSATION

F1 Liability to pay by operation of s.24MD(3)(b) NTA

456. If, which is denied, an entitlement to compensation under the NTA arises in relation to any of the Compensable Acts by operation of s.24MD(3)(b) NTA, s.24MD(4)(b) NTA provides that compensation is payable by the First Respondent unless "*a law of the State ... provides that a person other than the Crown in any capacity is liable to pay the compensation*", in which case that person is liable to pay. Section 125A MA is a law of the State of the kind referred to in s.24MD(4)(b)(i) NTA.[948] As all of the Compensable Acts were done after the introduction of s.125A MA on 11 January 1999,[949] the person liable to pay compensation in respect of each of the Compensable Acts is the person described in s.125A MA (being the relevant FMG Respondent).[950]

457. The FMG Respondents assert that s.125A MA is invalid by force of s.109 of the *Constitution* on the basis that it does not differentiate between compensation for the grant of mining tenements falling within Subdivision M and those falling within other Subdivisions of the NTA (such as Subdivision H) which do not have a provision in similar terms to s.24MD(4)(b)(i) NTA.[951] In other words, as s.125A MA does not specifically refer to itself as being a law of the kind referred to in s.24MD(4)(b)(i) NTA, the FMG Respondents assert that it applies to compensation for the grant of all mining tenements, whether covered by Subdivision M or not.

458. For the avoidance of doubt, the First Respondent does not assert that s.125A MA has any effect in respect of compensation for mining tenements that do not fall under Subdivision M.[952] Rather, in circumstances where the NTA only permits the introduction of a provision such as s.125A MA in respect of *future acts* to which Subdivision M applies, s.125A MA must be read to only apply to *future acts* under Subdivision M. This is consistent with s.7 of the *Interpretation Act 1984* (WA).[953] Further, it is clear from the second reading speech[954] for the *Acts Amendment (Land Administration, Mining And Petroleum) Bill 1998* (WA) that s.125A MA was intended to be directed only at those circumstances where the NTA allowed a State or Territory to 'pass on' its liability:

> *The Bill also contains amendments to the Mining Act, the Petroleum Act and the Petroleum (Submerged Lands) Registration Fees Act. These amendments shift the compensation liability of future acts onto the holder of the mining or petroleum title. The Native Title Act provides that when compensation is payable to native title holders, it shall be paid by the State unless the liability has been passed on to another party. This amendment will provide a statutory basis for passing that liability onto title holders.*[955] (emphasis added)

459. Consistent with s.18 of the *Interpretation Act 1984* (WA), s.125A MA should be construed in a manner which promotes this underlying purpose or object i.e. that it passes the State's liability to pay for compensation to native title holders onto tenement holders in circumstances where the NTA allows that

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948 CB A.02.003 at [232].
949 Section 125A MA was introduced into the MA by s.16 of the *Acts Amendment (Land Administration, Mining and Petroleum) Act 1998* (WA).
950 See CB A.02.003 at [233]. See also CB A.02.003 at [237(b)(ii)] for the FMG Respondent liable in respect of each of the Compensable Acts.
951 CB A.02.013 at [29(g)(i),(ii) and (iii)].
952 See, for example CB A.02.003 at [238A(b)-(c)].
953 It provides that "[e]very *written law shall be construed subject to the limits of the legislative power of the State and so as not to exceed that power to the intent that where any enactment thereof, but for this section, would be construed as being in excess of that power, it shall nevertheless be valid to the extent to which it is not in excess of that power*."
954 Pursuant to s.19(2)(f) of the *Interpretation Act 1984* (WA) regard may be had to a second reading speech to assist in the ascertainment of the meaning of a provision.
955 Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 October 1998 at 2188. See also Western Australia, *Parliamentary Debates*, Legislative Council, 1 December 1998 at 4489.

to occur (and not more broadly). Further, or in any event, even if s.125A MA could be construed as having an operation beyond *future acts* covered by Subdivision M, it is incorrect to suggest that the effect of s.109 of the *Constitution* would be to invalidate the whole of s.125A MA. Rather, s.109 provides that "*when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*" Although s.109 uses the term "*invalid*", the authorities make clear that the position is not irreversible; it "*is not the equivalent of null, or void, or nugatory*".[956] Rather, the operation of the invalid State law is rendered inoperative only to the extent of the inconsistency and only for as long as the inconsistency continues.[957] This was explained by the plurality in the *Native Title Act Case* as follows:

> …[T]*he effect of s 109 on a State law that is inconsistent with a law of the Commonwealth is not to impose an absolute invalidity. On the contrary, the State law remains valid though it is rendered inoperative to the extent of the inconsistency, but only for so long as the inconsistency remains. The extent of the inconsistency depends on the text and operation of the respective laws.*[958] (citations omitted).

460. Accordingly, under s.109 of the *Constitution*, only those parts of a law of the State which are inconsistent with a law of the Commonwealth will be considered invalid, provided that the separation of the inconsistent parts of the State law will not produce results the State Parliament never intended to enact. As Dixon J explained in *Wenn v Attorney-General (Vict)*:

> …[W]*hile s 109 invalidates State legislation only so far as it is inconsistent, the question whether one provision of a State Act can have any operation apart from some other provision contained in the Act must depend upon the intention of the State legislation, ascertained by interpreting the statute. ... No doubt s 109 means a separation to be made of the inconsistent parts from the consistent parts of a State law. But it does not intend the separation to be made where division is only possible at the cost of producing provisions which the State Parliament never intended to enact.*[959]

461. If the Court finds that s.125A MA purports to apply to compensation for the grant of mining tenements not subject to Subdivision M, the effect of s.109 of the *Constitution* would be to limit the operation of s.125A MA to compensation for mining tenements subject to Subdivision M, rather than invalidate s.125A in its entirety. It is also clear that limiting the operation of s.125A MA to *future acts* to which Subdivision M applies would not have an effect that the State Parliament "*never intended to enact*."[960] To the contrary, it is clear from the second reading speech that s.125A MA was introduced in light of s.24MD(4)(b)(i) NTA (the only provision in the NTA which allows a State's compensation liability to be 'passed on') and was intended to operate only in those circumstances in any event.

F2 Liability to pay by operation of Subdivision H or s.53(1) NTA

462. If the Court finds that the entitlement to compensation arises by operation of s.24HA(5) NTA, the First Respondent concedes that, by operation of s.24HA(6)(b) NTA, the person liable to pay that compensation is the State and s.24MD(4)(b) NTA and/or s.125A MA have no application.[961] If the Court finds that s.53(1) NTA operates, it acts as a 'top up' provision in the manner discussed in paragraph [351] above.

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956 *Lamb v Cockatoo Docks & Engineering Co Pty Ltd* (1960) 61 SR (NSW) 459; [1961] NSWR 197 at 468.
957 *Heli-Aust Pty Limited v Cahill* (2011) 194 FCR 502; [2011] FCAFC 62 at [55].
958 *Native Title Act Case* at 465.
959 (1948) 77 CLR 84; [1948] HCA 13 at 122.
960 See *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84; [1948] HCA 13 at 122.
961 CB A.02.003 at [238A(b)].

G. INTEREST

463. In *Griffiths,* the plurality found that the Court had power to award interest on the economic loss component of the compensation payable under the NTA.[962] That power derived from equity, by analogy with the operation of equitable principles concerning the compulsory acquisition of property where no provision for interest was made by statute.[963] In those cases, interest is awarded on the principle that the acquirer cannot keep both the property and the money. Rather, equity requires that interest must be paid on the retained compensation, computed from the time of the acquisition.[964] Accordingly, "*an award* [of interest] *is not compensation for the extinguishment of native title but… is compensation for being kept out of that amount which the Claim Group should have received at the time of extinguishment*."[965] However, as the plurality in *Griffiths* emphasised, this equitable rule provides for the payment of simple interest only "*and there is no suggestion in any of the authorities, or apparent reason in principle, to extend it to compound interest*."[966] The fact a native title holder may have been "*kept out*" of compensation for a considerable period was not sufficient to award interest on a compound basis.[967]

464. Equity may allow for an award of compound interest: (a) where monies have been obtained, withheld or misapplied by fraud or in breach of trust or other fiduciary duty;[968] (b) on a restitutionary basis to redress unjust enrichment;[969] or (c) if the evidence suggests that, had the monies been received earlier, they would have been put to work at a profit or used to defray the costs of doing business[970] (by analogy with the principles identified in *Hungerfords v Walker*[971]). The plurality in *Griffiths* considered that the first two scenarios did not arise in the native title compensation context.[972] As for the last scenario, whilst acknowledging it may be possible for compound interest to be awarded on that basis, the plurality held that "*the point need not be decided*" as there was "*sparse evidence*" that the compensation would have been invested at a profit and no suggestion that the claim group had incurred costs that could have been avoided with the aid of an earlier payment of the compensation.[973]

465. In this case, there is some evidence from witnesses Stanley Warrie, Angus Mack and Michael Woodley about various commercial structures and entities established by YAC and the Applicant;[974] however there is also evidence from a number of witnesses to the effect that they would use compensation money for a variety of different personal and community purposes, none of which involve investing the money for a profit or defraying business costs.[975] The evidence before the Court of the Applicant engaging in commercial activity is insufficient to support a finding that the Applicant would have invested money received from the FMG Respondents on a compound basis or in Yindjibarndi enterprises that would have been productive of economic earnings at such levels. In particular, there is no financial evidence of the profits generated by Yindjibarndi businesses which would satisfy the Court that, had the Applicant already received the compensation money, it would have used that money by investing it without any

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962 The NTA does not expressly provide for the payment of interest on compensation.
963 *Griffiths* at [128]. This equitable power to award interest was considered independent of the power to award interest conferred by s.51A of the *Federal Court of Australia Act 1976* (Cth): at [115].
964 *Griffiths* at [128]. See also [113], [116]-[119] and [122].
965 *Griffiths* at [150].
966 *Griffiths* at [128]. See also [113], [116]-[118] and [122]-[123].
967 *Griffiths* at [122], [125] and [134]-[137].
968 *Griffiths* at [122] and [125].
969 *Griffiths* at [134]-[137].
970 *Griffiths* at [133].
971 (1989) 171 CLR 125; [1989] HCA 8 (**Hungerfords**).
972 *Griffiths* at [126]-[130] and [135]-[137].
973 *Griffiths* at [133]; see also at [255] and [341]-[342] (per Edelman J).
974 CB A.05.008 at [13]-[15]; CB A.05.017 at [19]-[21]; CB A.05.022 at [252]-[254] and [260]-[265].
975 For example: CB A.04.001 at [12]-[15]; CB.A.05.002 at [7]; CB A.05.007 at [26]-[28]; CB A.05.009 at [9]-[13]; CB A.05.012 at [53].

expenditure, accumulating the interest year by year, to the present time; or alternatively, would have used the money so received to undertake a commercial activity which would have been profitable to the same or a greater degree.[976] Accordingly, in the First Respondent's submission, and similar to the situation in *Griffiths*, the evidence does not justify the imposition of compound interest, even for a period of time, between the dates on which the Compensable Acts were done and judgment.

466. In any event, the analogy with the principles identified in *Hungerfords* is of limited scope when considered in context. In *Hungerfords*, compound interest was awarded as part of the award of damages because the loss of the use of the money was "*so directly related to the wrong that the loss cannot be classified simply as due to the late payment of damages*."[977] Accordingly, to obtain compound interest on the basis of the principles identified in *Hungerfords*, the Applicant would need to not only demonstrate that they would have invested the compensation money and earned interest on it but also that the "*loss from the failure to invest was an 'effect of the* [compensable] *act on their native title rights and interests*".[978] The Applicant has not done so.

467. In *Griffiths (No.3)*, simple interest was awarded at the rate set out in the Federal Court's *Interest on Judgments Practice Note (GPN-INT)* (**Practice Note**). No party contended that this was in error on appeal.[979] An award of simple interest on economic loss, calculated in accordance with the Practice Note, is appropriate here. Simple interest on economic loss should be calculated over the period between the date on which the Compensable Act was done and: (a) for those Compensable Acts that are no longer in force:[980] the date on which the Compensable Act ceased to have effect and the Applicant was restored to the enjoyment of the native title rights and interests that had been temporarily impaired by those Compensable Acts;[981] and (b) for all of the other Compensable Acts: the date of judgment.[982] The relevant interest calculations in respect of the economic loss (as assessed by the First Respondent) are included in the table which appears at Annexure B of this document. The total interest is $**92,957.31**.

468. If, which is denied, the Court considers that compound interest is appropriate, the Applicant has not properly identified the relevant interest rate and/or the intervals at which that interest is to be compounded. Mr Meaton states that he has used the "*Federal Court rate of interest*" to calculate compound interest.[983] Given the Federal Court does not have a compound interest rate, this suggests that Mr Meaton may have used the Practice Note (but that is not clear). Further, the interval(s) at which interest was compounded by Mr Meaton is not stated and Mr Meaton has not provided the calculations which support the figures contained in his report.

Dated: 13 December 2024

Griff Ranson SC
FOR: State Solicitor for WA
Solicitor for First Respondent

Alicia Warren
FOR: State Solicitor for WA
Solicitor for First Respondent

Emma Owen
FOR: State Solicitor for WA
Solicitor for First Respondent

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976 *Griffiths (No.3)* at [277].
977 *Hungerfords* at 145-6.
978 *Griffiths* at [341].
979 *Griffiths* at [140].
980 L 47/396, L 47/302, M 47/1513-I, P 47/1946 and P 47/1947.
981 For the same reasons identified by the Full Court in *Griffiths (FC)* in respect of the payment of interest on Crown Lease 624, namely that interest ceased to be payable from the date on which the native title holders ceased to suffer any loss. In that case it was from the determination date (when s.47B revived the native title holders' exclusive possession): see paragraph [386] above.
982 *Griffiths* at [108].
983 Murray Meaton, *Compound Interest Royalty Calculation* dated 15 October 2024 filed on 5 November 2024.

ANNEXURE A: ECONOMIC LOSS TABLE

	1. Tenement	2. Valuation / Grant Date	3. Area within Claim Area (HA)	4. % Exclusive Area	5. Exclusive Area (HA)	6. Non Excluive Area (HA)	7. Market Land Value (per HA)	8. Market Value (Exclusive Area)	9. Market Value 50% (Non Exclusive Area)	10. Total Market Value	11. Impact Factor	12. Total Economic Loss
MINING LEASES												
1	M47/1409-I	26 November 2010	5,080.0	0.00%	0.0	5080.0	$5.14	$0.00	$13,055.60	$13,055.60	80%	$10,444.48
2	M47/1411-I	26 November 2010	177.0	0.00%	0.0	177.0	$5.14	$0.00	$454.89	$454.89	80%	$363.91
3	M47/1413-I	26 November 2010	1,045.0	0.00%	0.0	1045.0	$5.14	$0.00	$2,685.65	$2,685.65	80%	$2,148.52
4	M47/1431-I	8 July 2011	2,961.0	0.00%	0.0	2961.0	$5.53	$0.00	$8,187.17	$8,187.17	80%	$6,549.73
5	M47/1453-I	17 January 2013	727.0	0.00%	0.0	727.0	$6.38	$0.00	$2,319.13	$2,319.13	80%	$1,855.30
6	M47/1473-I	29 August 2014	472.0	0.00%	0.0	472.0	$6.85	$0.00	$1,616.60	$1,616.60	80%	$1,293.28
7	M47/1475-I	29 August 2014	525.0	0.00%	0.0	525.0	$6.85	$0.00	$1,798.13	$1,798.13	80%	$1,438.50
8	M47/1513-I	3 December 2018	700.0	36.24%	253.7	446.3	$9.12	$2,313.56	$2,035.22	$4,348.78	80%	$3,479.02
9	M47/1570	31 March 2020	1,033.0	24.58%	253.9	779.1	$10.52	$2,671.15	$4,098.01	$6,769.15	70%	$4,738.41
										$41,235.09		**$32,311.16**
MISCELLANOUS LICENCES												
10	L1SA	10 August 2011	2,310.0	0.00%	0.0	2310.0	$18.50	$0.00	$21,367.50	$21,367.50	70%	$14,957.25
11	L47/302	5 June 2009	247.0	0.00%	0.0	247.0	$4.79	$0.00	$591.57	$591.57	70%	$414.10
12	L47/361	11 October 2011	4,292.0	0.00%	0.0	4292.0	$5.53	$0.00	$11,867.38	$11,867.38	70%	$8,307.17
13	L47/362	3 May 2011	3,494.0	0.00%	0.0	3494.0	$5.53	$0.00	$9,660.91	$9,660.91	70%	$6,762.64
14	L47/363	3 May 2011	721.0	0.00%	0.0	721.0	$5.53	$0.00	$1,993.57	$1,993.57	70%	$1,395.50
15	L47/367	2 March 2012	1,229.0	0.00%	0.0	1229.0	$5.94	$0.00	$3,650.13	$3,650.13	70%	$2,555.09
16	L47/396	23 May 2012	216.0	0.00%	0.0	216.0	$5.94	$0.00	$641.52	$641.52	70%	$449.06
17	L47/472	18 July 2014	965.0	0.00%	0.0	965.0	$6.85	$0.00	$3,305.13	$3,305.13	70%	$2,313.59
18	L47/697	2 December 2013	95.0	0.00%	0.0	95.0	$12.04	$0.00	$571.90	$571.90	70%	$400.33
19	L47/801	24 May 2019	570.0	1.84%	10.5	559.5	$9.80	$102.78	$2,741.61	$2,844.39	70%	$1,991.07
20	L47/813	6 April 2018	428.0	66.12%	283.0	145.0	$9.12	$2,580.90	$661.23	$3,242.13	70%	$2,269.49
21	L47/814	6 April 2018	875.0	45.61%	399.1	475.9	$9.12	$3,639.68	$2,170.16	$5,809.84	70%	$4,066.89
22	L47/859	6 February 2019	6.0	0.00%	0.0	6.0	$18.50	$0.00	$55.50	$55.50	70%	$38.85
23	L47/901	26 June 2019	11.0	0.00%	0.0	11.0	$18.50	$0.00	$101.75	$101.75	70%	$71.23
24	L47/914	15 November 2019	209.0	5.08%	10.6	198.4	$18.50	$196.42	$1,835.04	$2,031.46	70%	$1,422.02
25	L47/919	10 January 2020	875.0	45.61%	399.1	475.9	$10.52	$4,198.40	$2,503.30	$6,701.70	70%	$4,691.19
										$74,436.37		**$52,105.46**

	1. Tenement	2. Valuation / Grant Date	3. Area within Claim Area (HA)	4. % Exclusive Area	5. Exclusive Area (HA)	6. Non Excluive Area (HA)	7. Market Land Value (per HA)	8. Market Value (Exclusive Area)	9. Market Value 50% (Non Exclusive Area)	10. Total Market Value	11. Impact Factor	12. Total Economic Loss
EXPLORATION LICENCES												
26	E47/1319-I	16 March 2012	5,540.6	0.00%	0.0	5540.6	$11.21	$0.00	$31,055.06	$31,055.06	15%	$4,658.26
27	E47/1333-I	28 July 2007	666.9	0.00%	0.0	666.9	$7.84	$0.00	$2,614.25	$2,614.25	15%	$392.14
28	E47/1334-I	2 June 2007	9,514.3	0.00%	0.0	9514.3	$7.84	$0.00	$37,296.06	$37,296.06	15%	$5,594.41
29	E47/1398-I	8 July 2011	21,511.7	0.00%	0.0	21511.7	$10.44	$0.00	$112,291.07	$112,291.07	15%	$16,843.66
30	E47/1399-I	8 July 2011	6,203.5	0.00%	0.0	6203.5	$10.44	$0.00	$32,382.27	$32,382.27	15%	$4,857.34
31	E47/1447-I	2 June 2007	10,153.4	0.00%	0.0	10153.4	$5.53	$0.00	$28,074.15	$28,074.15	15%	$4,211.12
32	E47/3205-I	21 September 2016	5,118.0	0.00%	0.0	5118.0	$14.93	$0.00	$38,205.87	$38,205.87	15%	$5,730.88
33	E47/3464-I	24 February 2017	773.7	0.00%	0.0	773.7	$16.04	$0.00	$6,205.07	$6,205.07	15%	$930.76
										$288,123.81		**$43,218.57**
PROSPECTING LICENCES												
34	P47/1945	11 August 2021	140.3	0.00%	0.0	140.3	$21.35	$0.00	$1,497.70	$1,497.70	10%	$149.77
35	P47/1946	11 August 2021	163.5	0.00%	0.0	163.5	$21.35	$0.00	$1,745.36	$1,745.36	10%	$174.54
36	P47/1947	11 August 2021	145.0	0.00%	0.0	145.0	$21.35	$0.00	$1,547.88	$1,547.88	10%	$154.79
									TOTAL	**$4,790.94**		**$479.09**
TOTALS										**$408,586.21**		**$128,114.28**

DATA SOURCE

2. CB A.02.015 at Part H
3. CB A.02.015 at Part H, or, where not included in that document, CB E.04.002 at p.10 Table (Column entitled "*Compensation application area Overlap (HA)* ")
4. CB A.02.015 at Part H (where the Compensable Act was granted after the Yindjibarndi Determination)
7. CB E.04.002 at p.10 Table (Column entitled "*Market Land Value per HA* ")

ANNEXURE B: INTEREST CALCULATIONS

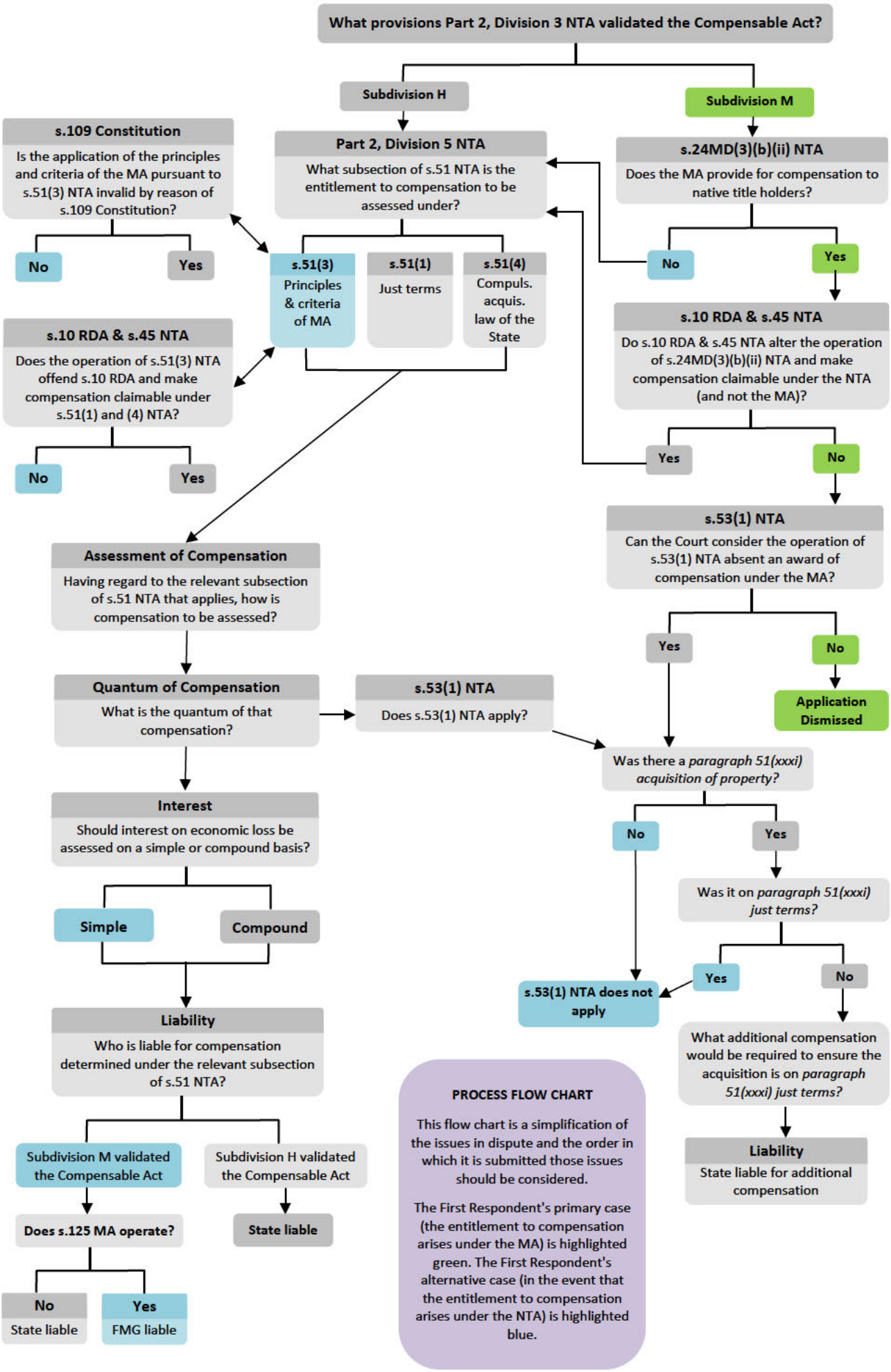
SIMPLE INTEREST											
Federal Court	**Tenement**		**M47/1409-I**	**M47/1411-I**	**M47/1413-I**	**M47/1431-I**	**M47/1453-I**	**M47/1473-I**	**M47/1475-I**	**M47/1513-I**	**M47/1570**
	Grant Date		26/11/2010	26/11/2010	26/11/2010	08/07/2011	17/01/2013	29/08/2014	29/08/2014	03/12/2018	31/03/2020
	Expiry Date									31/03/2020	
	Days in 1st Interest Period		35	35	35	176	164	124	124	28	91
	Days in Last Interest Period									91	
	Economic Loss		**$10,444.48**	**$363.91**	**$2,148.52**	**$6,549.73**	**$1,855.30**	**$1,293.28**	**$1,438.50**	**$3,479.02**	**$4,738.41**
Period	**Rate**	**Days**									
1 Jan 2007 to 30 Jun 2007	10.25%	181									
1 Jul 2007 to 31 Dec 2007	10.25%	184									
1 Jan 2008 to 30 Jun 2008	10.75%	182									
1 Jul 2008 to 31 Dec 2008	11.25%	184									
1 Jan 2009 to 30 Jun 2009	8.25%	181									
1 Jul 2009 to 31 Dec 2009	7.00%	184									
1 Jan 2010 to 30 Jun 2010	7.75%	181									
1 Jul 2010 to 31 Dec 2010	8.50%	184	$85.13	$2.97	$17.51						
1 Jan 2011 to 30 Jun 2011	8.75%	181	$453.19	$15.79	$93.23						
1 Jul 2011 to 31 Dec 2011	8.75%	184	$460.70	$16.05	$94.77	$276.34					
1 Jan 2012 to 30 Jun 2012	8.25%	182	$428.48	$14.93	$88.14	$268.70					
1 Jul 2012 to 31 Dec 2012	7.50%	184	$393.81	$13.72	$81.01	$246.96					
1 Jan 2013 to 30 Jun 2013	7.00%	181	$362.55	$12.63	$74.58	$227.36	$58.35				
1 Jul 2013 to 31 Dec 2013	6.75%	184	$355.40	$12.38	$73.11	$222.87	$63.13				
1 Jan 2014 to 30 Jun 2014	6.50%	181	$336.66	$11.73	$69.25	$211.12	$59.80				
1 Jul 2014 to 31 Dec 2014	6.50%	184	$342.24	$11.92	$70.40	$214.62	$60.79	$28.56	$31.77		
1 Jan 2015 to 30 Jun 2015	6.50%	181	$336.66	$11.73	$69.25	$211.12	$59.80	$41.69	$46.37		
1 Jul 2015 to 31 Dec 2015	6.00%	184	$315.91	$11.01	$64.99	$198.11	$56.12	$39.12	$43.51		
1 Jan 2016 to 30 Jun 2016	6.00%	182	$311.62	$10.86	$64.10	$195.42	$55.35	$38.59	$42.92		
1 Jul 2016 to 31 Dec 2016	5.75%	184	$301.92	$10.52	$62.11	$189.33	$53.63	$37.38	$41.58		
1 Jan 2017 to 30 Jun 2017	5.50%	181	$284.86	$9.93	$58.60	$178.64	$50.60	$35.27	$39.23		
1 Jul 2017 to 31 Dec 2017	5.50%	184	$289.58	$10.09	$59.57	$181.60	$51.44	$35.86	$39.88		
1 Jan 2018 to 30 Jun 2018	5.50%	181	$284.86	$9.93	$58.60	$178.64	$50.60	$35.27	$39.23		
1 Jul 2018 to 31 Dec 2018	5.50%	184	$289.58	$10.09	$59.57	$181.60	$51.44	$35.86	$39.88	$14.68	
1 Jan 2019 to 30 Jun 2019	5.50%	181	$284.86	$9.93	$58.60	$178.64	$50.60	$35.27	$39.23	$94.89	
1 Jul 2019 to 31 Dec 2019	5.25%	184	$276.42	$9.63	$56.86	$173.34	$49.10	$34.23	$38.07	$92.08	
1 Jan 2020 to 30 Jun 2020	4.75%	182	$246.70	$8.60	$50.75	$154.71	$43.82	$30.55	$33.98	$41.09	$55.96
1 Jul 2020 to 31 Dec 2020	4.25%	184	$223.16	$7.78	$45.91	$139.94	$39.64	$27.63	$30.74	$0.00	$101.24
1 Jan 2021 to 30 Jun 2021	4.10%	181	$212.35	$7.40	$43.68	$133.17	$37.72	$26.29	$29.25	$0.00	$96.34
1 Jul 2021 to 31 Dec 2021	4.10%	184	$215.87	$7.52	$44.41	$135.37	$38.35	$26.73	$29.73	$0.00	$97.94
1 Jan 2022 to 30 Jun 2022	4.10%	181	$212.35	$7.40	$43.68	$133.17	$37.72	$26.29	$29.25	$0.00	$96.34
1 Jul 2022 to 31 Dec 2022	4.85%	184	$255.36	$8.90	$52.53	$160.14	$45.36	$31.62	$35.17	$0.00	$115.85
1 Jan 2023 to 30 Jun 2023	7.10%	181	$367.73	$12.81	$75.65	$230.60	$65.32	$45.53	$50.65	$0.00	$166.83
1 Jul 2023 to 31 Dec 2023	8.10%	184	$426.48	$14.86	$87.73	$267.44	$75.76	$52.81	$58.74	$0.00	$193.48
1 Jan 2024 to 30 Jun 2024	8.35%	182	$433.67	$15.11	$89.21	$271.96	$77.04	$53.70	$59.73	$0.00	$196.75
1 Jul 2024 to 31 Dec 2024	8.35%	184	$438.44	$15.28	$90.19	$274.95	$77.88	$54.29	$60.39	$0.00	$198.91
SUB TOTALS			**$9,226.55**	**$321.48**	**$1,897.98**	**$5,435.83**	**$1,309.38**	**$772.54**	**$859.29**	**$242.73**	**$1,319.64**
TOTAL		**$92,957.31**									

SIMPLE INTEREST											
Federal Court	**Tenement**		**L1SA**	**L47/302**	**L47/361**	**L47/362**	**L47/363**	**L47/367**	**L47/396**	**L47/472**	**L47/697**	**L47/801**
	Grant Date		10/08/2011	05/06/2009	11/10/2011	03/05/2011	03/05/2011	02/03/2012	23/05/2012	18/07/2014	02/12/2013	24/05/2019
	Expiry Date			07/01/2013					07/01/2013			
	Days in 1st Interest Period		143	25	81	58	58	120	38	166	29	37
	Days in Last Interest Period			7					7			
	Economic Loss		**$14,957.25**	**$414.10**	**$8,307.17**	**$6,762.64**	**$1,395.50**	**$2,555.09**	**$449.06**	**$2,313.59**	**$400.33**	**$1,991.07**
Period	**Rate**	**Days**										
1 Jan 2007 to 30 Jun 2007	10.25%	181										
1 Jul 2007 to 31 Dec 2007	10.25%	184										
1 Jan 2008 to 30 Jun 2008	10.75%	182										
1 Jul 2008 to 31 Dec 2008	11.25%	184										
1 Jan 2009 to 30 Jun 2009	8.25%	181		$2.34								
1 Jul 2009 to 31 Dec 2009	7.00%	184		$14.61								
1 Jan 2010 to 30 Jun 2010	7.75%	181		$15.91								
1 Jul 2010 to 31 Dec 2010	8.50%	184		$17.74								
1 Jan 2011 to 30 Jun 2011	8.75%	181		$17.97		$94.03	$19.40					
1 Jul 2011 to 31 Dec 2011	8.75%	184	$512.75	$18.27	$161.31	$298.30	$61.55					
1 Jan 2012 to 30 Jun 2012	8.25%	182	$613.62	$16.99	$340.80	$277.43	$57.25	$69.11	$3.85			
1 Jul 2012 to 31 Dec 2012	7.50%	184	$563.96	$15.61	$313.22	$254.98	$52.62	$96.34	$16.93			
1 Jan 2013 to 30 Jun 2013	7.00%	181	$519.20	$0.56	$288.36	$234.75	$48.44	$88.69	$0.60			
1 Jul 2013 to 31 Dec 2013	6.75%	184	$508.96	$0.00	$282.67	$230.11	$47.49	$86.94	$0.00		$2.15	
1 Jan 2014 to 30 Jun 2014	6.50%	181	$482.12	$0.00	$267.76	$217.98	$44.98	$82.36	$0.00		$12.90	
1 Jul 2014 to 31 Dec 2014	6.50%	184	$490.11	$0.00	$272.20	$221.59	$45.73	$83.72	$0.00	$68.39	$13.12	
1 Jan 2015 to 30 Jun 2015	6.50%	181	$482.12	$0.00	$267.76	$217.98	$44.98	$82.36	$0.00	$74.57	$12.90	
1 Jul 2015 to 31 Dec 2015	6.00%	184	$452.41	$0.00	$251.26	$204.55	$42.21	$77.28	$0.00	$69.98	$12.11	
1 Jan 2016 to 30 Jun 2016	6.00%	182	$446.27	$0.00	$247.85	$201.77	$41.64	$76.23	$0.00	$69.03	$11.94	
1 Jul 2016 to 31 Dec 2016	5.75%	184	$432.37	$0.00	$240.14	$195.49	$40.34	$73.86	$0.00	$66.88	$11.57	
1 Jan 2017 to 30 Jun 2017	5.50%	181	$407.94	$0.00	$226.57	$184.44	$38.06	$69.69	$0.00	$63.10	$10.92	
1 Jul 2017 to 31 Dec 2017	5.50%	184	$414.71	$0.00	$230.32	$187.50	$38.69	$70.84	$0.00	$64.15	$11.10	
1 Jan 2018 to 30 Jun 2018	5.50%	181	$407.94	$0.00	$226.57	$184.44	$38.06	$69.69	$0.00	$63.10	$10.92	
1 Jul 2018 to 31 Dec 2018	5.50%	184	$414.71	$0.00	$230.32	$187.50	$38.69	$70.84	$0.00	$64.15	$11.10	
1 Jan 2019 to 30 Jun 2019	5.50%	181	$407.94	$0.00	$226.57	$184.44	$38.06	$69.69	$0.00	$63.10	$10.92	$11.10
1 Jul 2019 to 31 Dec 2019	5.25%	184	$395.85	$0.00	$219.86	$178.98	$36.93	$67.62	$0.00	$61.23	$10.60	$52.70
1 Jan 2020 to 30 Jun 2020	4.75%	182	$353.29	$0.00	$196.22	$159.73	$32.96	$60.35	$0.00	$54.65	$9.46	$47.03
1 Jul 2020 to 31 Dec 2020	4.25%	184	$319.58	$0.00	$177.49	$144.49	$29.82	$54.59	$0.00	$49.43	$8.55	$42.54
1 Jan 2021 to 30 Jun 2021	4.10%	181	$304.10	$0.00	$168.90	$137.49	$28.37	$51.95	$0.00	$47.04	$8.14	$40.48
1 Jul 2021 to 31 Dec 2021	4.10%	184	$309.14	$0.00	$171.70	$139.77	$28.84	$52.81	$0.00	$47.82	$8.27	$41.15
1 Jan 2022 to 30 Jun 2022	4.10%	181	$304.10	$0.00	$168.90	$137.49	$28.37	$51.95	$0.00	$47.04	$8.14	$40.48
1 Jul 2022 to 31 Dec 2022	4.85%	184	$365.69	$0.00	$203.10	$165.34	$34.12	$62.47	$0.00	$56.57	$9.79	$48.68
1 Jan 2023 to 30 Jun 2023	7.10%	181	$526.62	$0.00	$292.48	$238.10	$49.13	$89.96	$0.00	$81.46	$14.09	$70.10
1 Jul 2023 to 31 Dec 2023	8.10%	184	$610.75	$0.00	$339.21	$276.14	$56.98	$104.33	$0.00	$94.47	$16.35	$81.30
1 Jan 2024 to 30 Jun 2024	8.35%	182	$621.05	$0.00	$344.93	$280.80	$57.94	$106.09	$0.00	$96.06	$16.62	$82.67
1 Jul 2024 to 31 Dec 2024	8.35%	184	$627.88	$0.00	$348.72	$283.88	$58.58	$107.26	$0.00	$97.12	$16.81	$83.58
SUB TOTALS			**$12,295.17**	**$120.00**	**$6,705.19**	**$5,719.52**	**$1,180.25**	**$1,977.04**	**$21.38**	**$1,399.33**	**$258.47**	**$641.82**
TOTAL		**$92,957.31**										

SIMPLE INTEREST											
Federal Court	**Tenement**		**L47/813**	**L47/814**	**L47/859**	**L47/901**	**L47/914**	**L47/919**	**E47/1319-I**	**E47/1333-I**	**E47/1334-I**	**E47/1398-I**
	Grant Date		06/04/2018	06/04/2018	06/02/2019	26/06/2019	15/11/2019	10/01/2020	16/03/2012	28/07/2007	02/06/2007	08/07/2011
	Expiry Date											
	Days in 1st Interest Period		85	85	144	4	46	172	106	156	28	176
	Days in Last Interest Period											
	Economic Loss		**$2,269.49**	**$4,066.89**	**$38.85**	**$71.23**	**$1,422.02**	**$4,691.19**	**$4,658.26**	**$392.14**	**$5,594.41**	**$16,843.66**
Period	**Rate**	**Days**										
1 Jan 2007 to 30 Jun 2007	10.25%	181									$43.99	
1 Jul 2007 to 31 Dec 2007	10.25%	184								$17.18	$289.07	
1 Jan 2008 to 30 Jun 2008	10.75%	182								$20.96	$299.06	
1 Jul 2008 to 31 Dec 2008	11.25%	184								$22.18	$316.41	
1 Jan 2009 to 30 Jun 2009	8.25%	181								$16.04	$228.87	
1 Jul 2009 to 31 Dec 2009	7.00%	184								$13.84	$197.41	
1 Jan 2010 to 30 Jun 2010	7.75%	181								$15.07	$215.00	
1 Jul 2010 to 31 Dec 2010	8.50%	184								$16.80	$239.72	
1 Jan 2011 to 30 Jun 2011	8.75%	181								$17.01	$242.74	
1 Jul 2011 to 31 Dec 2011	8.75%	184								$17.30	$246.77	$710.66
1 Jan 2012 to 30 Jun 2012	8.25%	182							$111.30	$16.09	$229.51	$691.00
1 Jul 2012 to 31 Dec 2012	7.50%	184							$175.64	$14.79	$210.94	$635.09
1 Jan 2013 to 30 Jun 2013	7.00%	181							$161.70	$13.61	$194.19	$584.68
1 Jul 2013 to 31 Dec 2013	6.75%	184							$158.51	$13.34	$190.36	$573.15
1 Jan 2014 to 30 Jun 2014	6.50%	181							$150.15	$12.64	$180.32	$542.92
1 Jul 2014 to 31 Dec 2014	6.50%	184							$152.64	$12.85	$183.31	$551.92
1 Jan 2015 to 30 Jun 2015	6.50%	181							$150.15	$12.64	$180.32	$542.92
1 Jul 2015 to 31 Dec 2015	6.00%	184							$140.90	$11.86	$169.21	$509.46
1 Jan 2016 to 30 Jun 2016	6.00%	182							$138.98	$11.70	$166.92	$502.55
1 Jul 2016 to 31 Dec 2016	5.75%	184							$134.66	$11.34	$161.72	$486.90
1 Jan 2017 to 30 Jun 2017	5.50%	181							$127.05	$10.70	$152.58	$459.39
1 Jul 2017 to 31 Dec 2017	5.50%	184							$129.16	$10.87	$155.11	$467.01
1 Jan 2018 to 30 Jun 2018	5.50%	181	$29.07	$52.09					$127.05	$10.70	$152.58	$459.39
1 Jul 2018 to 31 Dec 2018	5.50%	184	$62.92	$112.76					$129.16	$10.87	$155.11	$467.01
1 Jan 2019 to 30 Jun 2019	5.50%	181	$61.90	$110.92	$0.84	$0.04			$127.05	$10.70	$152.58	$459.39
1 Jul 2019 to 31 Dec 2019	5.25%	184	$60.06	$107.63	$1.03	$1.89	$9.41		$123.28	$10.38	$148.06	$445.78
1 Jan 2020 to 30 Jun 2020	4.75%	182	$53.61	$96.06	$0.92	$1.68	$33.59	$104.72	$110.03	$9.26	$132.14	$397.85
1 Jul 2020 to 31 Dec 2020	4.25%	184	$48.49	$86.89	$0.83	$1.52	$30.38	$100.23	$99.53	$8.38	$119.53	$359.88
1 Jan 2021 to 30 Jun 2021	4.10%	181	$46.14	$82.69	$0.79	$1.45	$28.91	$95.38	$94.71	$7.97	$113.74	$342.46
1 Jul 2021 to 31 Dec 2021	4.10%	184	$46.91	$84.06	$0.80	$1.47	$29.39	$96.96	$96.28	$8.10	$115.63	$348.13
1 Jan 2022 to 30 Jun 2022	4.10%	181	$46.14	$82.69	$0.79	$1.45	$28.91	$95.38	$94.71	$7.97	$113.74	$342.46
1 Jul 2022 to 31 Dec 2022	4.85%	184	$55.49	$99.43	$0.95	$1.74	$34.77	$114.70	$113.89	$9.59	$136.78	$411.82
1 Jan 2023 to 30 Jun 2023	7.10%	181	$79.90	$143.19	$1.37	$2.51	$50.07	$165.17	$164.01	$13.81	$196.97	$593.04
1 Jul 2023 to 31 Dec 2023	8.10%	184	$92.67	$166.06	$1.59	$2.91	$58.07	$191.55	$190.21	$16.01	$228.44	$687.78
1 Jan 2024 to 30 Jun 2024	8.35%	182	$94.23	$168.86	$1.61	$2.96	$59.04	$194.79	$193.42	$16.28	$232.29	$699.38
1 Jul 2024 to 31 Dec 2024	8.35%	184	$95.27	$170.72	$1.63	$2.99	$59.69	$196.93	$195.55	$16.46	$234.84	$707.07
SUB TOTALS			**$872.81**	**$1,564.05**	**$13.15**	**$22.61**	**$422.23**	**$1,355.80**	**$3,589.70**	**$465.29**	**$6,725.97**	**$13,979.09**
TOTAL		**$92,957.31**										

SIMPLE INTEREST									
Federal Court	**Tenement**		**E47/1399-I**	**E47/1447-I**	**E47/3205-I**	**E47/3464-I**	**P47/1945**	**P47/1946**	**P47/1947**
	Grant Date		08/07/2011	02/06/2007	21/09/2016	24/02/2017	11/08/2021	11/08/2021	11/08/2021
	Expiry Date							14/03/2022	14/03/2022
	Days in 1st Interest Period		176	28	101	126	142	142	142
	Days in Last Interest Period							73	73
	Economic Loss		**$4,857.34**	**$4,211.12**	**$5,730.88**	**$930.76**	**$149.77**	**$174.54**	**$154.79**
Period	**Rate**	**Days**							
1 Jan 2007 to 30 Jun 2007	10.25%	181		$33.11					
1 Jul 2007 to 31 Dec 2007	10.25%	184		$217.59					
1 Jan 2008 to 30 Jun 2008	10.75%	182		$225.11					
1 Jul 2008 to 31 Dec 2008	11.25%	184		$238.17					
1 Jan 2009 to 30 Jun 2009	8.25%	181		$172.28					
1 Jul 2009 to 31 Dec 2009	7.00%	184		$148.60					
1 Jan 2010 to 30 Jun 2010	7.75%	181		$161.84					
1 Jul 2010 to 31 Dec 2010	8.50%	184		$180.44					
1 Jan 2011 to 30 Jun 2011	8.75%	181		$182.72					
1 Jul 2011 to 31 Dec 2011	8.75%	184	$204.94	$185.75					
1 Jan 2012 to 30 Jun 2012	8.25%	182	$199.27	$172.76					
1 Jul 2012 to 31 Dec 2012	7.50%	184	$183.15	$158.78					
1 Jan 2013 to 30 Jun 2013	7.00%	181	$168.61	$146.18					
1 Jul 2013 to 31 Dec 2013	6.75%	184	$165.28	$143.29					
1 Jan 2014 to 30 Jun 2014	6.50%	181	$156.57	$135.74					
1 Jul 2014 to 31 Dec 2014	6.50%	184	$159.16	$137.99					
1 Jan 2015 to 30 Jun 2015	6.50%	181	$156.57	$135.74					
1 Jul 2015 to 31 Dec 2015	6.00%	184	$146.92	$127.37					
1 Jan 2016 to 30 Jun 2016	6.00%	182	$144.92	$125.64					
1 Jul 2016 to 31 Dec 2016	5.75%	184	$140.41	$121.73	$90.93				
1 Jan 2017 to 30 Jun 2017	5.50%	181	$132.48	$114.85	$156.30	$17.67			
1 Jul 2017 to 31 Dec 2017	5.50%	184	$134.67	$116.76	$158.89	$25.81			
1 Jan 2018 to 30 Jun 2018	5.50%	181	$132.48	$114.85	$156.30	$25.39			
1 Jul 2018 to 31 Dec 2018	5.50%	184	$134.67	$116.76	$158.89	$25.81			
1 Jan 2019 to 30 Jun 2019	5.50%	181	$132.48	$114.85	$156.30	$25.39			
1 Jul 2019 to 31 Dec 2019	5.25%	184	$128.55	$111.45	$151.67	$24.63			
1 Jan 2020 to 30 Jun 2020	4.75%	182	$114.73	$99.47	$135.36	$21.98			
1 Jul 2020 to 31 Dec 2020	4.25%	184	$103.78	$89.98	$122.45	$19.89			
1 Jan 2021 to 30 Jun 2021	4.10%	181	$98.76	$85.62	$116.52	$18.92			
1 Jul 2021 to 31 Dec 2021	4.10%	184	$100.39	$87.04	$118.45	$19.24	$2.39	$2.78	$2.47
1 Jan 2022 to 30 Jun 2022	4.10%	181	$98.76	$85.62	$116.52	$18.92	$3.05	$1.43	$1.27
1 Jul 2022 to 31 Dec 2022	4.85%	184	$118.76	$102.96	$140.12	$22.76	$3.66	$0.00	$0.00
1 Jan 2023 to 30 Jun 2023	7.10%	181	$171.02	$148.27	$201.77	$32.77	$5.27	$0.00	$0.00
1 Jul 2023 to 31 Dec 2023	8.10%	184	$198.34	$171.95	$234.01	$38.01	$6.12	$0.00	$0.00
1 Jan 2024 to 30 Jun 2024	8.35%	182	$201.69	$174.85	$237.96	$38.65	$6.22	$0.00	$0.00
1 Jul 2024 to 31 Dec 2024	8.35%	184	$203.90	$176.78	$240.57	$39.07	$6.29	$0.00	$0.00
SUB TOTALS			**$4,031.26**	**$5,062.89**	**$2,693.03**	**$414.90**	**$32.99**	**$4.22**	**$3.74**
TOTAL		**$92,957.31**							

ANNEXURE C: FLOW CHART


What provisions Part 2, Division 3 NTA validated the Compensable Act?
Subdivision H
Subdivision M
s.109 Constitution
Is the application of the principles and criteria of the MA pursuant to s.51(3) NTA invalid by reason of s.109 Constitution?
No
Yes
Part 2, Division 5 NTA
What subsection of s.51 NTA is the entitlement to compensation to be assessed under?
s.51(3) Principles & criteria of MA
s.51(1) Just terms
s.51(4) Compuls. acquis. law of the State
s.24MD(3)(b)(ii) NTA
Does the MA provide for compensation to native title holders?
No
Yes
s.10 RDA & s.45 NTA
Do s.10 RDA & s.45 NTA alter the operation of s.24MD(3)(b)(ii) NTA and make compensation claimable under the NTA (and not the MA)?
Yes
No
s.10 RDA & s.45 NTA
Does the operation of s.51(3) NTA offend s.10 RDA and make compensation claimable under s.51(1) and (4) NTA?
No
Yes
s.53(1) NTA
Can the Court consider the operation of s.53(1) NTA absent an award of compensation under the MA?
Yes
No
Application Dismissed
Assessment of Compensation
Having regard to the relevant subsection of s.51 NTA that applies, how is compensation to be assessed?
Quantum of Compensation
What is the quantum of that compensation?
s.53(1) NTA
Does s.53(1) NTA apply?
Was there a paragraph 51(xxxi) acquisition of property?
No
Yes
Was it on paragraph 51(xxxi) just terms?
Yes
No
s.53(1) NTA does not apply
What additional compensation would be required to ensure the acquisition is on paragraph 51(xxxi) just terms?
Liability
State liable for additional compensation
Interest
Should interest on economic loss be assessed on a simple or compound basis?
Simple
Compound
Liability
Who is liable for compensation determined under the relevant subsection of s.51 NTA?
Subdivision M validated the Compensable Act
Subdivision H validated the Compensable Act
Does s.125 MA operate?
State liable
No
State liable
Yes
FMG liable
PROCESS FLOW CHART
This flow chart is a simplification of the issues in dispute and the order in which it is submitted those issues should be considered.
The First Respondent's primary case (the entitlement to compensation arises under the MA) is highlighted green. The First Respondent's alternative case (in the event that the entitlement to compensation arises under the NTA) is highlighted blue.

NOTICE OF FILING

Details of Filing

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Registrar

Important Information

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

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