FMG's Supplementary Submissions on *McArthur River Project Compensation Claim* [2026] FCA 153

WAD 37 of 2022

Federal Court of Australia

District Registry: Western Australia

Division: General

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

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

1. As directed by the Court, FMG makes these supplementary submissions on the effect of the *McArthur River Project Compensation Claim* [2026] FCA 153 (**MR**). Banks-Smith J's view in MR supports FMG's submissions as to how YP's claim for economic loss should be determined. In MR[7], the "unencumbered freehold value comparator approach endorsed in *Griffiths HC*" (see e.g. FMG's closing submissions of 17 Dec 2024 (**FSubs**) [4]) was adopted. The Court declined to adopt a model for compensation based on a "hypothetical comparable bargain" that might have been made and that might have had regard to royalties and other commercial interests (MR[7]). This conclusion was reached by applying the High Court's reasoning in *Griffiths HC*. The conclusion was drawn even without a provision like s 123(1) of the MA 1978 (which makes the position even clearer). (We adopt the defined terms in the FSubs.)

2. The reasoning in MR, if applied here, will lead to the conclusion that YP are not entitled to the claimed amounts for economic loss of $678,088,000, $34,850,000 and $112,140,000 (see YP's amended closing submissions of 13 Nov 2024 (**YPSubs**) [4], [148]-[149], [186], [195], [198]).

3. As to cultural loss, the approach and reasoning in MR, if applied here, would not support YP's ambit claim for $1 billion (MR[9]-[10]) (see YPSubs [4], [617]).

B. ECONOMIC LOSS

4. In MR, the Claim Group's native title rights and interests were non-exclusive rights; and they had no rights to minerals (like YP) (MR[44], [47]). These matters are relevant to economic loss. Although the Court was dealing with a claim for compensation under s 4B of the *McArthur River Project Agreement Ratification Act 1992* (NT), the Court applied *Griffiths HC*. Both s 4B and s 51(1) of the NTA target compensation for interference with native title rights and interests. In each case, the purpose is to compensate for a claimant's loss (MR[557]-[559]).

5. Damages are awarded to compensate, not to permit a claim for restitution or for the gain made by any user of the land the subject of the native title rights and interests (MR[869]-[870]).

Claim Group's alternative arguments

6. The Claim Group's primary case was that economic loss is determined by what they could have demanded in a hypothetical voluntary bargain for their assent to the infringement of their native title rights by the grant of the mineral leases where that bargain might involve revenue sharing (MR[526]). Their alternative case was that loss should be determined by reference to the value of a "hypothetical freehold estate" in

the land (hypothesising that the fee simple estate included mineral rights) (MR[531], [665]). Both approaches were rejected by the Court (MR[665]-[693], [813]-[879]).

Hypothetical comparable voluntary bargain for royalty agreement rejected

7. The Court considered *Griffiths HC* [84]-[86]. Importantly, Banks-Smith J concluded that "the plurality in *Griffiths HC* accepted that the *Spencer* test requires the assessment of compensation for economic loss to result from a two-sided hypothetical transaction for the extinguishment (wholly or in part) of native title rights and interests. In its adaptation, the hypothetical seller is the native title holders. The hypothetical buyer is the Northern Territory. The subject of the transaction, *being the native title rights and interests*, has an economic value to both the hypothetical seller and the hypothetical buyer" [italics added] (MR[544]). The relevant hypothetical bargain is not a bargain about mineral rights.

8. The reasons why the Court rejected the Claim Group's "hypothetical comparable bargain model" may be summarised (MR[813]-[843]). There was evidence from an economist (Mr Houston) about what might be the perceived value of native title rights to a hypothetical buyer including to the effect that there might have been "a risk and value sharing arrangement, such as a royalty agreement contingent on mining outcomes" (MR[821]-[829]). But, the Court did not accept "the legal basis for the hypothetical comparable bargain, and so the evidence of Mr Houston for practical purposes falls away" (MR[836]). The Court preferred "the comparison with freehold approach endorsed in *Griffiths HC* because it is more certain and consistent in its application" (MR[836], [902]).

9. More importantly, the Court said the "method of assessing economic loss must be tied to the statutory scheme for compensation" (MR[838]). The starting point is *Griffiths HC* including that the "economic component sum calculated by reference to a *Spencer*-type bargain was said to be for an infringement of the claim group's *native title rights and interests* (at [84]). The hypothetical bargain was not directed at a bargain encompassing access to minerals or royalties in which the native title holders have no interest. Nor was it directed at compensation for loss of a process of negotiation. It is the infringement of native title rights and interest[s] that is compensable" [original italics] (MR[839]).

10. The Court rejected the argument (see MR[181]-[194]) that there was a loss of opportunity to bargain under the *Mining Act 1980* (NT) because the *Racial Discrimination Act 1975* (Cth) afforded the Claim Group's native title rights equal treatment as other property rights under the *Mining Act*. Banks-Smith J said that the argument was "inconsistent with compensable loss under s 4B of the *Project Act*, which provides a right to compensation for the extinguishment or diminution of an interest in or right in relation to land (being relevantly native title rights and interests). Such rights and interests were the starting point in *Griffiths HC* at [66]" (MR[841]). Whether under

the NTA or the *Project Act*, "the focus is on compensation for an infringement of native title rights and interests" (MR[842]). "The *Project Act* is not concerned with compensation for 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" (MR[842]). This reasoning supports FSubs [179], [241], [280]-[287], [308]-[311].

11. In *Griffiths HC* [73]-[76], the plurality explained that the RDA does not operate to give native title holders more than a right to parity of treatment. This does not require them to be treated as if they are owners of private land. Private land owners are dealt with separately under the MA 1978 and are given different rights. Sec 10 of the RDA is not engaged. "In sum, what the *Racial Discrimination Act* requires in its application to native title is parity of treatment and there is no disparity of treatment if the economic value of native title rights and interests is assessed in accordance with conventional tools of economic valuation adapted as necessary to accommodate the unique character of native title rights and interests and the statutory context" (*Griffiths HC* [76]). Secs 27-39 of the MA 1978 give an owner of private land different rights (differentiated not on the basis of race, colour or national or ethnic origin). YP have no right of parity of treatment with private land owners because their native title rights and interests are not the same as private land owners. This is the view that Banks-Smith J also reached when considering the *Project Act* (MR[840]-[842]).

Compensation not awarded for alleged loss of right to negotiate

12. The Court rejected arguments that there should be compensation because the Claim Group allegedly lost the value of a right to negotiate a royalty or some other right disconnected with the measure of loss determined by valuing the loss of their native title rights and interests (MR[843]-[857], [873]-[879]).

13. Any statutory right to negotiate is not part of the bundle of native title rights and interests, least of all if negotiations occur and there is no consensual result (MR[843]-[847], [849], [873]-[879]). Any negotiation would not be about economic loss alone but would include cultural loss and the risk of double compensation will not be allayed (MR[848], [850]-[855]). This is consistent with FSubs [113]-[127], [241]-[244].

Hypothetical fee simple estate (ignoring reservation of minerals to the Crown) rejected

14. The Court also rejected the argument that a hypothetical fee simple estate (not subject to the reservation of minerals to the Commonwealth) provided a proper ceiling for the measure of the economic loss for a number of reasons (MR[665]-[693]), consistent with FSubs [245]-[266]. *Royal Sydney Golf Club v FCT* (1955) 91 CLR 610, *Perilya* [2015] NSWCA 400 and the other cases on which the Claim Group (and here YP) relied are not to the point.

15. Those cases were concerned with a hypothetical fee simple for land rate and tax purposes under specific legislation with a different target (MR[669]-[685]). Sec 51A of the NTA does not use the language of "fee simple" but refers to "a freehold estate in the land" where in the Northern Territory (just as in WA), there is a relevant reservation to the Crown of all minerals (MR[686]-[692]).

Value to hypothetical buyer not accepted

16. The Court also considered *Griffiths HC* [104] and the argument that *the value to the Northern Territory* (after the hypothetical bargain) may be relevant to the measure of the economic loss, so that the *Pointe Gourde* principle [i.e., should not consider increased value from planned future use] cannot be applied (MR[546]-[548], [880]-[900]). Banks-Smith J concluded that a focus on *Pointe Gourde* is apt to mislead; and the proper focus is on the value to the owner (not the hypothetical buyer); and compensation for that owner (MR[894], [897]).

17. The Court said the authorities to which *Griffiths HC* [104] referred, "are consistent with an approach to compensation that focusses on the value to the owner of the land and not on the measure of benefits that might be reaped by an acquirer who is able to exploit or otherwise gain from its acquisition"; and "what is said at [104] of *Griffiths HC* is consistent with the *Spencer* test, adapted for the purpose of considering native title rights and interests, which recognises that both a notional seller and a notional buyer are taken to know what can be known about the land at the date of the relevant transaction. Such knowledge in turn may influence what a willing purchaser may be willing to pay. What is said about regard to the position of the Northern Territory as acquirer at [104] is limited and does not, in my view, purport to convert the compensation task to one which is based on an assessment of benefits, profits or revenue that might be received by a successful purchaser" (MR[897]-[899]).

C. CULTURAL LOSS

Griffiths HC and Timber Creek

18. There are now two cases where the Court has determined compensation for cultural loss. In *Griffiths HC*, the award was $1.3 million for compensable acts that extinguished native title in an area that had become a township. Mansfield J in *Griffiths TJ* had found that native title holders were linked to the area, observed rituals and ceremonies, respected and protected Dreaming sites and felt a duty to look after country. Dreamings had been affected and there was a loss of spiritual connection and damage or destruction of significant sites (see FSubs [382]).

McArthur River – impact at mine and port areas

19. At McArthur River, Banks-Smith J identified the cultural landscape at the mine area. Her Honour made findings that there were a number of Dreamings connected to the area (including Rainbow Snake Dreamings, the Stinking Turtle Dreaming and the Barramundi Dreaming) (MR[967]-[1001]). The "old McArthur River Station in the vicinity of the mine was 'historically a focus for a major centre of Aboriginal ceremonial life and related every day living activities'" (MR[1000]). There were ancestral, family and other connections to the mine area (MR[1016]-[1018]). The mine area was previously a place of unrestricted access for fishing, hunting and important for ceremonies (MR[1021]-[1030]).

20. There were also Dreamings in the port area (including the Winter Rain Dreaming, the Sea Turtle Dreaming, the Black Nose Python Dreaming and the Groper Dreaming) (MR[1002]-[1014]). There were also ancestral, family and other connections to the port area (MR[1019]-[1020]). The port area was previously (before a gate was installed in the late 1980s) a place of unrestricted access with a strong tradition of hunting, fishing and camping where families and children congregated peacefully (MR[1031]-[1043]).

21. The mine and the port "were both important areas of cultural significance, rich in Dreamings and with associated spiritual nodes and sacred sites", and "the spiritual connection with those areas remains" (MR[1015]). The Dreamings were pervasive at both areas. There were numerous protected sacred sites. Particular sites of the Dreamings were described as "nodes" for spiritual significance. The context and concept of the pervasiveness of the Dreamings meant that its spiritual significance extends beyond particular pathways and sites and covers the whole landscape of the claim area (MR[1045]-[1053]). There was harm in both the mine and port areas that impacted the Dreamings (MR[1054]-[1068], [1087]-[1090]).

22. When the river was diverted, this irreversibly cut the Rainbow Snake Dreaming (MR[1057]-[1062], [1405]). Mining had a dramatic physical effect at the mine and port area (MR[1069]-[1073], [1091]-[1096]). The Claim Group were emotionally and physically affected (MR[1074]-[1086], [1097]-[1111]).

23. In FSubs [444]-[447], FMG submits that a relevant consideration for cultural loss is the fact that YP can still perform cultural activities; that there were earlier grants of rights to the area; and account should be taken of YP's loss of connection to the country in the late 1960s, well before mining. Similar arguments were made and were treated as relevant but not decisive (MR[1153]-[1174]).

24. Banks-Smith J accepted that where the compensable acts have in part, but not fully, permanently suppressed the exercise of native title rights and interests, there should be a small reduction to the compensation for cultural loss because there is no permanent extinguishment (MR[1293]). This is consistent with FSubs [237]-[239], [430].

25. Banks-Smith J rejected an argument that the area affected by mining and port activities was small compared with the whole of the Claim Group's area. This was because "the mine area and the port area are not 'just any areas'. Each was of high cultural value to the native title holders, with a rich cultural landscape". The Court was prepared to take the issue into account but not with "any purported mathematical exercise" (MR[1294]-[1304]).

Banks-Smith J's determination of compensation for cultural loss

26. Banks-Smith J reasoned that "there is no algorithm, no tariff and little precedent" to determine what would be regarded as an appropriate amount of compensation for cultural loss (MR[1386]). A mathematical comparison of the land area affected in *Griffiths HC* with the land area affected in *McArthur River* should be approached with "caution" even though it might provide a "form of check" (MR[1387]-[1390]). "Cultural loss is not dependent upon size. Size is relevant in that substantive infrastructure is likely to be undertaken on larger tracts of land. However, if there had already been development in the area, there may already have been a diminution in the sense of connection. On the other hand, land may be remote with a strong sense of uninterrupted connection maintained (*Griffiths HC* at [217])" (MR[1391]).

27. The reasons for Banks-Smith J's conclusion that compensation for cultural loss should be $60 million (from which was subtracted $6 million paid under the Indigenous Land Use Agreement (**ILUA**)) are important and may be summarised.

28. The Claim Group submitted that *Griffiths HC* was distinguishable: there were more limited impacts on Dreamings in *Griffiths HC*; vastly different impacts on landscape and the development of infrastructure; an inability to access certain sacred sites; and most of the sites of significance were not "nodes of Dreaming tracks" (MR[1388]).

29. There may be more sacred sites and Dreaming paths in a larger area but, in contrast, there may be a concentration of sacred sites and cultural law in a small area, and minimal connection with a larger area (MR[1392]). These matters are more relevant and diminish the appropriateness of adopting a per hectare rate (MR[1393]). The focus should be on the scale of impact. The Claim Group's claim of $225 million (starting with $133.79 million based on a comparison with the land area in *Griffiths HC* and then adding nearly $100 million because of the greater impact) was "excessive, having regard to all the circumstances" (MR[1387], [1396]).

30. The Claim Group's connection to country "is complex and founded in Dreamings. There is a wealth of sacred sites and Dreamings centred around [the] areas" (MR[1400]). "The Dreamings give meaning to each area, give rights and responsibilities, and are pervasive". The people share an "internal spiritual essence with the land and its Dreamings. There are obligations to look after country" (MR[1401]).

31. The impact in the mine area is striking and affected the Dreamings; and the impact flows on to the activities at the mine and port, and beyond (MR[1405]-[1408]). There is a sense of shame and guilt (MR[1410]-[1411]). Even though the Claim Group exercise aspects of their law and culture in other areas, this does not make up for the diminution of their rights and interests as to specific areas of the claim area where the damage has been the deepest – the mine and port areas. This is so even though those rights and interests have not been extinguished or permanently suppressed (MR[1418]-[1419]).

32. In the end, Banks-Smith J's view that compensation for cultural loss should be $60 million (less the $6 million paid under the ILUA) was based on the significance of the impact to the Dreamings and the significance of the impact on the Claim Group of their loss of connection to country, including their inability to meet their obligations to the country. Banks-Smith J rejected a claim for cultural loss of $225 million and of $133.79 million.

Cultural loss in YP's case

33. Here, for the reasons developed in FSubs [376]-[579], YP's ambit claim for $1 billion is not based on a process of reasoning like that adopted by Banks-Smith J in MR.

34. Furthermore, unlike at McArthur River, locations of cultural significance to YP (like Millstream, Woodbrook and Bilin Bilin) remain (FSubs [438], [453]); the evidence was not that the nodes of the Dreamings were centred around the mining areas. Indeed, Bangkangarra (a site of cultural significance) remains intact (FSubs [438]).

35. Regardless, although the issue of cultural loss needs to be determined on a case by case basis, the reasons in MR do not support a conclusion that cultural loss should be awarded at $1 billion.

36. The evidence would promote a conclusion that cultural loss to YP is much, much less than that decided by Her Honour in McArthur River (FSubs [19], [384], [386], [609]). The magnitude of cultural loss at McArthur River appears to have been far more significant when the evidence in this case is considered, including the fact that the compensation application area was not occupied for a number of years when YP moved to Roebourne.

Dated: 7 April 2026

Brahma Dharmananda SC | Tim Russell SC

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