

NOTICE OF FILING

Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	16/05/2025 10:16:39 AM AWST
Date Accepted for Filing:	16/05/2025 10:16:44 AM AWST
File Number:	WAD37/2022
File Title:	YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC ICN 8721 AND STATE OF WESTERN AUSTRALIA & ORS
Registry:	WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

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.



FMG Respondents' Submissions

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		
Prepared by (name of person/lawyer)	Mark van Brakel		
Law firm (if applicable)	A&O Shearman		
Tel	(08) 6315 5900	Fax	(08) 6315 5999
Email	mark.vanbrakel@aoshearman.com		
Address for service (include state and postcode)	Level 12, Exchange Tower, 2 The Esplanade PERTH, Western Australia, 6000		

1. In the light of *Commonwealth of Australia v Yunupingu* [2025] HCA 6 (**Y HC**), FMG maintains its argument that the grant of the FMG Mining Leases did not result in an acquisition of property within s 51(xxxi) of the *Constitution*. This is the effect, and the subject, of FMG's closing submissions of 17 Dec 2024 (**FMG Subs**) [180]-[187] and FMG's oral submissions (T2111-2113). (At the end of these submissions, we refer to a couple of paragraphs in the FMG Subs that are no longer maintained.)
2. It is important to appreciate that Y HC was an appeal that dealt with 3 specific grounds of appeal relating to the answers given by the Full Federal Court (**FFC**) to separate questions (as if on a demurrer) in *Yunupingu v Commonwealth* [2023] FCAFC 75; (2023) 298 FCR 160 (X.01.244) (**Y FFC**): Y HC [1], [110]-[111], [239]. It is necessary to identify the separate questions and the relevant factual context. No decision was made by the High Court that, whenever there is a grant of a mining lease, it must involve an acquisition within the *Constitution*, s 51(xxxi). That was not a relevant question before the FFC or the High Court. The separate questions and the FFC's answer to them are in the annexure to Gordon J's judgment: Y HC, p91.
3. In the High Court, there were 3 grounds of appeal, challenging some of the FFC's answers to the separate questions. Ground of appeal **1** (e.g. Y HC [2], [18]) raised the issue of whether the constitutional limit on legislative power imposed by s 51(xxxi) applied to a Northern Territory law enacted pursuant to s 122 of the *Constitution* including the *Northern Territory (Administration) Act 1910* (Cth). We describe this issue as ***whether s 51(xxxi) just terms requirement applies to s 122 laws***. (There is no just terms requirement that affected Western Australia's exercise of legislative power to appropriate minerals before the enactment of the NTA.)
4. Ground of appeal **2** (e.g. Y HC [2], [53]) raised the issue of whether, because native title was inherently susceptible to extinguishment by a valid exercise of the Crown's sovereign powers, a grant of a right by the Crown could never involve any acquisition of property within s 51(xxxi). We describe this issue as ***whether native title is inherently susceptible to extinguishment***. (We explain ground of appeal **3** below ([11]), which concerns historic pastoral leases, when dealing with question 2(a).)
5. Separate question (1) relates to the Mission Lease. The Mission Lease was a lease granted in 1938 to the Methodist Missionary under s 14 of the *Aboriginals Ordinance 1918* (NT). The claim about the Mission Lease is pleaded in the claimants' statement of claim in *Yunupingu* (**YSoC**) [171]-[189]. It is pleaded that the Mission Lease was not inconsistent with, and did not extinguish, non-exclusive native title rights: YSoC [173]-[178]. Those rights are pleaded to include a right to minerals: YSoC [52(b)(iv)]. Compensation was not paid on the grant of the Mission Lease: YSoC [179]. It is pleaded that, if the Mission Lease gave the lessee exclusive possession, that would have been an acquisition within s 51(xxxi): YSoC [180]-[183]. The issue about whether the Mission Lease involved an acquisition of property within s 51(xxxi) was not decided by the FFC. It was not the subject of any appeal ground.

6. It is also pleaded that, the NTA apart, the grant of the Mission Lease would have been invalid because of the native title rights and the constitutional limit on legislative power imposed by s 51(xxxi): YSoC [184]. If the Mission Lease was thereby invalid, it would then (and only then) be a *past act* within s 228 of the NTA, rather than a valid historical act (see T2006.21-2007.9).
7. Question (1)(a) raised a question about whether the Mission Lease validly extinguished any native title rights in the claim area, rather than involving a grant that was sufficiently not inconsistent with native title. The FFC held that the answer to question (1)(a) was “No”; and this was not challenged before the High Court: Y HC [107(1)]. Question (1)(b)(i) raised the question of *whether s 51(xxxi) just terms requirement applies to s 122 laws*. Question (1)(b)(ii) raised the question of *whether native title is inherently susceptible to extinguishment*.
8. The High Court held that the answer to the question of *whether s 51(xxxi) just terms requirement applies to s 122 laws* was that s 122 laws were subject to the just terms requirements of s 51(xxxi): Y HC [2], [14]-[45] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); [114], [176]-[202] (Gordon J); [251]-[277] (Edelman J). The High Court held that the answer to the question *whether native title is inherently susceptible to extinguishment* was that native title was a property right that *could be* acquired and it was wrong to treat native title rights as so inherently fragile that they become inherently defeasible: Y HC [46]-[84]; [145]-[175]; [278]-[321].
9. The High Court did not decide whether if native title is like any other property right capable of acquisition, the Mission Lease or any other act, in fact and law, involved an acquisition of property within s 51(xxxi). Instead, having decided the above 2 threshold questions, the joint judgment concluded the “theory of the claim is sound”: Y HC [84].
10. Separate question (2) relates to the *Mining Ordinance 1939* (NT) (**1939 Ordinance**), s 107. The claim about the 1939 Ordinance is pleaded in the YSoC [190]-[202]. It is relevantly pleaded that s 107 provided that gold, silver and all other minerals on or below the surface are deemed the property of the Crown (YSoC [191]); that this purported to vest title to minerals in the Commonwealth but without compensation, effecting an extinguishment at least of the native title claimed over the minerals, resulting in an acquisition other than on just terms within s 51(xxxi) (YSoC [193]-[196]); and that, apart from the NTA, this was invalid so that there was a *past act* (YSoC [197]-[199]), giving rise to a right to compensation (YSoC [200]-[202]).
11. Question (2)(a) raised a question about whether the claim under the 1939 Ordinance failed because, before its enactment, the native title claimed over the minerals had already been extinguished by the reservation of those minerals in pastoral leases granted between 26 Jan 1886 and 21 Sept 1903 (**pastoral lease reservations**). Ground of appeal 3 (e.g. Y HC [85]) raised the issue of whether the pastoral lease reservations extinguished the claimed native title over the minerals so that the 1939 Ordinance did

not extinguish native title and effect an acquisition other than on just terms. The High Court held that the pastoral lease reservations did not extinguish the claimed native title because the pastoral leases reserved a right to minerals on the assumption that they were vested in the Crown, rather than themselves effecting an appropriation to the Crown: Y HC [85]-[98]; [205]-[235]; [322]-[371]. The determination of this issue is not presently relevant. Question 2(b) also raised a presently irrelevant issue about whether the claim under the 1939 Ordinance failed because the native title claimed had already been extinguished by the Mission Lease. Question (2)(c) raised the questions about *whether s 51(xxxi) just terms requirement applies to s 122 laws* and about *whether native title is inherently susceptible to extinguishment*. Question 2(c), as well as questions 3(b) and 4(b) (see below [13], [15]) were dealt with by the High Court as set out above ([8]).

12. Separate question (3) relates to the *Minerals (Acquisition) Ordinance 1953 (NT) (1953 Ordinance)*, s 3. The claim about the 1953 Ordinance is pleaded in the YSoC [213]-[231]. It is relevantly pleaded that, by s 3 of the 1953 Ordinance, all minerals other than minerals already the property of the Commonwealth Crown were acquired and vested in the Crown, and by s 4, the Commonwealth was liable to pay compensation but compensation had to be claimed within 6 months etc: YSoC [214]-[215]. Similar to the pleading as to the 1939 Ordinance but addressing amendments and why s 4 did not provide for compensation on just terms, it is pleaded that, if the 1953 Ordinance applied to the claimed minerals, there was an invalid *past act*, entitling a claim for compensation: YSoC [216]-[231].
13. Question (3)(a) raised a question about whether the claim under the 1953 Ordinance failed because, before its enactment, the native title claimed over the minerals had already been extinguished by the pastoral lease reservations or the Mission Lease or the 1939 Ordinance. The answer to question (3)(a) is not presently relevant. Question (3)(b) raised the questions about *whether s 51(xxxi) just terms requirement applies to s 122 laws* and about *whether native title is inherently susceptible to extinguishment*.
14. Separate question (4) relates to the grants of 5 special mineral leases identified in YSoC [232], [255] and [293]. The terms and effects of special mineral lease 1 are pleaded (YSoC [232]-[254]) including a claim that its grant resulted in an acquisition of property within s 51(xxxi) because the grant conferred on the holder rights to occupy and use in priority to the claimants and diminished or impaired native title rights (YSoC [246]); that this was not on just terms (YSoC [247]); and that there was an invalid *past act*, entitling a claim for compensation (YSoC [248]-[253]). Similar claims are made as to the other 4 special mineral leases: YSoC [255]-[278], [293]-[315].
15. Question 4(a) raised a question about whether the claim under the special mineral leases failed because before their grant all native title had already been extinguished by the Mission Lease. The answer to this question is presently irrelevant. Question (4)(b)

raised the questions about *whether s 51(xxxi) just terms requirement applies to s 122 laws* and about *whether native title is inherently susceptible to extinguishment*.

16. Neither the High Court nor the FFC dealt with the factual and legal question about whether the special mineral leases could and did amount to an “acquisition of property” within s 51(xxxi). This was not a ground of appeal before the High Court. Before the FFC, the Commonwealth submitted that if it was “unsuccessful in relation to the separate questions” then “at an appropriate time, the Commonwealth will also contend that the pleaded effect of the grants of the special mineral leases on the enjoyment or exercise of the non-exclusive native title rights did not amount to an ‘acquisition of property’ within the meaning of those words in s 51(xxxi)”. The FFC accepted that this “issue is not before the Court now because the Commonwealth and the applicant were unable to reach agreement on a form of pleading that the Commonwealth considered could support a demurrer on that point”: Y FFC [496].
17. The determination of the questions about *whether s 51(xxxi) just terms requirement applies to s 122 laws* and about *whether native title is inherently susceptible to extinguishment* cleared the way for the legal and factual question about whether the native title claimants’ claimed right to minerals, once taken away, did amount to an acquisition of property within s 51(xxxi). Thus, it may be accepted that the special mineral leases did not extinguish but diminished or impaired native title: Y FFC [37], [39], [54]. But, the separate questions and the appeal to the High Court were not directed to the question of whether this partial impact (both as to the native title rights and as to the duration of impact) could and did involve as a matter of fact and law an “acquisition of property” within s 51(xxxi). That question remains undecided.
18. Further, in Y HC and Y FFC, unlike the present case, the claimants claimed a right to minerals. There is no such claim in this case. The YP have no right to any minerals in the Determination Area. This means that even if the claims the subject of the YSoC effected an acquisition of property (relevantly, minerals) within s 51(xxxi) (which has not yet been decided), any such finding will be irrelevant here. Here, the question is whether the grant of the FMG Mining Leases effected an “acquisition of property” within s 51(xxxi) as to the native title rights specified in the Determination [3], bearing in mind the Determination [5(c)] which excludes any right to minerals (*Warrie (No 2)* [2017] FCA 1299; (2017) 366 ALR 467; X.01.013).
19. FMG thus maintains its submission that the *future act* grant of the FMG Mining Leases did not involve an acquisition of property. This is also because of the non-extinguishment principle set out in the NTA, s 238. If an act affects native title either wholly or partly and is wholly or partly inconsistent with the native title, it nevertheless continues to the extent of inconsistency (s 238(2), s 238(3), s 238(4)); once the act or its effect is wholly removed or ceases, the native title has full effect again (s 238(6)); and if the act or its effect is removed or ceases to an extent, the native title has effect again to that extent (s 238(7)). Sec 238(8) is explicit and important, in

providing an example of how s 238 operates. Sec 238(8) provides, as an example, if there was a category C past act (namely, a mining lease – see s 231) that confers exclusive possession, “the native title rights and interests will continue to exist but will have no effect in relation to the lease while it is in force” and after the lease expires, “the rights and interests again have full effect”.

20. The non-extinguishment principle applies to all *future acts* and to category C and category D *past acts*. Neither the High Court nor the FFC had to consider the legal and factual question about whether there can be an acquisition of property that is the subject of the non-extinguishment principle. The focus in Y HC and Y FFC was on threshold questions about *whether s 51(xxxi) just terms requirement applies to s 122 laws* and about *whether native title is inherently susceptible to extinguishment*. But, the joint judgment did say that s 238 modifies the common law rule of native title recognition: Y HC [83]; see also Y HC [57], footnote 94.
21. The way in which the NTA is structured as to acts (particularly *future acts* but also some *past acts*) belies a conclusion that there would be an acquisition of property whenever a *future act* has a partial or temporal impact on native title, or a category C or category D *past act* had such an impact. *Future acts* are validated if the requirements of the NTA are complied with (i.e. the requirements in Part 2, Division 3, Subdivisions AA to P). If there is a *future act* (whether valid or not), there is a right to compensation under Part 2, Division 5. The idea that there is a right to compensation as if a *future act* that has a partial or temporal impact on native title involves an acquisition or transfer of property, which after that impact ends, would by force of s 238 involve a retransfer back to the native title holders, does not make sense. It does not appear to reflect the structure of the NTA. The idea of an acquisition and an apparent retransfer by force of s 238 does not fit the NTA’s structure. Sec 53(1) is a “shipwreck” provision that ensures constitutional validity. But, its premise is not that any *future act* that has a partial or temporal impact must involve an acquisition of property within s 51(xxxi). Regardless, if s 53(1) of the NTA is triggered, the State of Western Australia must pay compensation, not FMG.
22. Given the above, FMG maintains its submission that the grant of the FMG Mining Leases did not involve an “acquisition of property” within s 51(xxxi). However, in the light of Y HC, FMG no longer relies on the second sentence in FMG Subs [181]; and the first sentence in FMG Subs [182]. The submission in FMG Subs [186] about Y FFC is maintained but the relevant principles are now captured by Y HC and the reasoning in Y FFC, which is different (see Y HC [116]), is no longer as relevant.

Dated: 16 May 2025

Brahma Dharmananda SC

Tim Russell SC

Stefan Tomasich