First Respondent's submissions on the effect of *Davey v Northern Territory of Australia (No 5)* [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 and others

Respondents

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1. These submissions are filed pursuant to the Court's invitation to file supplementary submissions concerning the effect of the decision in *Davey v Northern Territory (No 5)* [2025] FCA 153[1] (***McArthur River***). The First Respondent continues to rely on its submissions dated 13 December 2024 (***State's Closing Submissions***).

2. The decision in *McArthur River* aligns with the *State's Closing Submissions* in many respects. Of particular note, the Court in *McArthur River* emphasised that compensation is "*concerned with and connected to a claimant's loss*".[2] The Court declined to assess economic loss by reference to what the claimants could fairly and justly have demanded in a hypothetical voluntary bargain for their assent to the infringement of their native title rights.[3] Further, consideration of a hypothetical fee simple (as that concept is dealt with in the context of cases dealing with ratings and tax statutes) has limited relevance to valuations for native title compensation purposes, because those cases arise in a particular statutory context, and because there is no indication in *Northern Territory v Griffiths*[4] (***Griffiths***) that the High Court intended for an unencumbered freehold to mean a hypothetical fee simple.[5]

3. Accordingly, these submissions will only address the effect of the following aspects of the *McArthur River* decision:

   (a) the discount to be applied from freehold value to reflect the claimants' non-exclusive native title rights and interests;

   (b) the relevance of the non-extinguishment principle as a factor in assessing any discount to the economic value of the native title rights and interests; and

   (c) the amount of cultural loss compensation awarded.

Proper discount to be applied to reflect the non-exclusive nature of the native title rights and interests

4. As discussed in the *State's Closing Submissions*,[6] where the native title rights and interests are non-exclusive, *Griffiths* requires a percentage discount from full freehold value to represent the comparative limitations of the non-exclusive native title rights and interests relative to exclusive native title. In considering the nature and extent of the native title rights and interests held by the

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[1] *Davey on behalf of the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples v Northern Territory of Australia (No 5) (McArthur River Project Compensation Claim)* [2026] FCA 153 (**McArthur River**).

[2] *McArthur River* [2025] FCA 153 at [559]; see also *State's Closing Submission*s at [73]-[82], [126]-[129].

[3] *McArthur River* [2025] FCA 153 at [526], [568]; see also *State's Closing Submissions* at [130]-[133] and [155]-[157].

[4] *Northern Territory v Griffiths* (2019) 269 CLR 1 (***Griffiths***).

[5] *McArthur River* [2025] FCA 153 at [669]-[693]; see also *State's Closing Submissions* at [240]-[245].

[6] *State's Closing Submissions* at [100]-[102].

applicant in *Griffiths*, the High Court noted that "*the native title was devoid of rights of admission, exclusion and commercial exploitation*". Accordingly, the High Court held that "*on any reasonable view of the matter*" the economic value of those non-exclusive native title rights and interests "*could certainly have been no more than 50 per cent*".[7]

5. In *McArthur River*, there was an issue between the parties about the proper discount to be applied to reflect the nature of the claimants' non-exclusive native title rights and interests. The only "*difference of substance*" between the non-exclusive native title in *McArthur River* and the non-exclusive native title in *Griffiths* was that the *McArthur River* native title holders held the right to share or exchange resources and were not prevented from exercising this native title right "*for a commercial or business purpose*".[8] In those circumstances, the Court in *McArthur River* concluded that the economic value of the native title was 55% of the freehold value.[9]

6. In the First Respondent's submission, the evaluation conducted by the Court in *McArthur River* properly focuses on the nature and extent of the native title rights and interests held by the claimants in that case. However, the finding in *McArthur River* does not particularly assist the Court in this matter. The nature and extent of the non-exclusive native title rights and interests held by the Yindjibarndi People are no more expansive than the non-exclusive native title rights and interests held by the native title holders in *Griffiths*.[10] As in *Griffiths,* the Yindjibarndi People's non-exclusive native title is similarly "*devoid of rights of admission, exclusion and commercial exploitation*".

7. It follows that there is no reason in this case to depart from the High Court's conclusion in *Griffiths*. The economic value of the Yindjibarndi People's non-exclusive native title rights and interests should be no more than 50% of freehold value. This is particularly so given the suggestion in the plurality's reasons in *Griffiths* that 50% of freehold value was the upper limit (and that the appropriate discount might have been more than 50% but for the fact that no party suggested that the percentage should be set at below 50%).[11]

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[7] *Griffiths* (2019) 269 CLR 1 at [106].

[8] *McArthur River* [2025] FCA 153 at [573]. See also *Top End Aboriginal Corporation RNTBC v Northern Territory of Australia* [2022] FCA 74.

[9] *McArthur River* [2025] FCA 153 at [807].

[10] *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia (No 2)* [2017] FCA 1299, Determination cl 3; *Griffiths v Northern Territory of Australia (No 2)* [2006] FCA 1155, Determination cl 5.

[11] *Griffiths* (2019) 269 CLR 1 at [106].

Relevance of the non-extinguishment principle

8. In *McArthur River*, there was also an issue between the parties as to whether any compensation award should be discounted to reflect the fact that the compensable acts (other than a road constructed between the mine and the port by the Northern Territory) had suppressed, rather than extinguished, the native title rights and interests.[12]

9. The Court concluded that, apart from the pre-1996 pastoral use permits, there should not be any adjustment to the compensation awarded for economic loss on the basis of a temporal or geographic limitation.[13] While accepting that the suppression of the native title rights and interests would end at some point, the Court concluded it was "*speculative*" as to how the removal of the compensable acts would affect the economic value of the native title rights and interests "*some 50 years down the track*."[14] The Court took the view that the length of time over which the effects of the compensable acts continued was more properly considered in the assessment of cultural loss.[15]

10. In the First Respondent's submission, the purpose of compensation is to give to the owner the "*full money equivalent of the thing of which* [they have] *been deprived*".[16] Compensation under the NTA has the same meaning.[17] Fundamentally, if a person has not been entirely deprived of a thing, they are not entitled to be compensated for the full value of that thing. So also, where native title rights and interests have not been extinguished, native title holders should not be entitled to be compensated for the full economic value of their native title rights. Or, as the plurality stated in *Griffiths*, "*the total compensation payable for an act which extinguishes native title must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters*".[18] It follows that the total compensation payable for an act which does not extinguish native title must be something less than the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate.

11. As a point of principle, this is particularly important for three reasons. First, it ensures that compensation under the NTA appropriately reflects the general principles of compensation, where any award of compensation is determined by reference to what has in fact been lost.[19] Second, it

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[12] *McArthur River* [2025] FCA 153 at [53]-[71], [160], [206] and [1283].
[13] *McArthur River* [2025] FCA 153 at [638], [640] and [642].
[14] *McArthur River* [2025] FCA 153 at [643].
[15] *McArthur River* [2025] FCA 153 at [662] and [1283]-[1293].
[16] *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495, 571, cited in *Griffiths* (2019) 269 CLR 1 at [87] and *McArthur River* [2025] FCA 153 at [560].
[17] *State's Closing Submissions* at [85]-[87].
[18] *Griffiths* (2019) 269 CLR 1 at [86].
[19] *Griffiths* (2019) 269 CLR 1 at [87].

ensures that compensation under the NTA achieves parity of treatment between native title holders and non-native title holders, consistent with the "*parity principle underlying the* [NTA]".[20] Third, it ensures that compensation under the NTA achieves parity of treatment as between different native title holders. The plurality in *Griffiths* observed that to treat "*non-exclusive native title as a lesser interest in land than a full exclusive native title ... is to treat like as like*".[21] To treat non-extinguishment of native title rights and interests (or their suppression or impairment for a finite period of time) as a lesser loss or effect than full extinguishment of native title rights and interests is to also "*treat like as like*".

12. Any assessment of the extent of loss, diminution, impairment or other effect of the compensable acts on native title holders' native title rights and interests is a question of fact. While allowance certainly can (and should) be made for the effect of acts that continue for a long period and permit a significant impact on land or waters (such as the grant of mining leases), this must be subject to the understanding that extinguishment is the maximum possible effect on the native title.[22]

13. To the extent that the Court in *McArthur River* considered there was no basis to discount the award of compensation for economic loss to reflect the fact that there would be an end point to the suppression of the native title rights and interests, that was not correct.[23] It is more consistent with the principles for assessing economic loss set out by the High Court in *Griffiths* to discount an award of compensation for economic loss so as to recognise that non-extinguishment has a lesser effect on the native title rights and interests than extinguishment.

14. Save where the effect and duration of a non-extinguishing act is so significant and indefinite as to amount to, effectively, a permanent and complete suppression of native title (such as was the case with certain Crown to Crown freehold grants considered in *Griffiths*[24]) it is a fact that native title rights and interests will again have full force and effect. They have not been lost and, accordingly compensation for economic loss should not be awarded as if they were.

15. For example, in the present case, though there is no fixed date for the Solomon Hub Mine closure, it is expected that the mine will only have an operational life until 2045.[25] Some mining tenements, such as the exploration licences and prospecting licences have a much shorter lifespan.[26] Some Compensable Act tenements have already expired or been surrendered, and the native title rights

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[20] *Griffiths* (2019) 269 CLR 1 at [332] and see also at [265].
[21] *Griffiths* (2019) 269 CLR 1 at [74].
[22] *State's Closing Submissions* at [103]-[106].
[23] *McArthur River* [2025] FCA 153 at [640]-[642].
[24] *Griffiths v Northern Territory of Australia* [2014] FCA 256 at [94] and [112]-[121].
[25] CB A.02.015 at [20].
[26] *State's Closing Submissions* at [423], [434].

and interests suppressed by them again have full force and effect.[27] In those circumstances, the First Respondent respectfully submits that the Court's assessment for economic loss should apply a further percentage discount to represent the extent to which native title has been impaired, short of extinguishment, by the Compensable Acts.

Amount of cultural loss compensation

16. The Court in *McArthur River* awarded $60 million to the claimants for cultural loss.[28] This award is approximately 46 times the amount of cultural loss that was awarded in *Griffiths*.[29] It is also approximately 44 times more than the freehold value of the land in question ($1,369,500).[30]

17. The evidence in *McArthur River* demonstrated that the mine and port areas were "*of high cultural value*".[31] There were multiple Dreamings in the area of the mine and the port (including where the mine barges went out to sea)[32] and evidence that the compensable acts had cut a Rainbow Snake Dreaming[33] and were too close to others.[34] Witnesses gave evidence that their parents and grandparents had been born, conceived or worked in the area of the mine or the port[35] and that they had frequently moved around the area for work, hunting, fishing and ceremonies.[36] Witnesses stated that they were no longer able to access the fenced area of the mine or the port and no longer camped at two main former camping areas.[37] Witnesses were fearful that ongoing access to parts of the area would be compromised because of alteration and pollution.[38] They also gave evidence that they felt sick when they looked at the country and experienced a sense of shame or guilt.[39] Whilst there was evidence that earlier acts (such as those associated with pastoral leases and prior exploration) had some impact and caused some damage to sacred sites, those earlier acts did not significantly limit the claimants' access to or exercise of their native title rights and interests over those areas.[40]

18. The Court in *McArthur River* concluded that "t*he Australian community would readily accept that the impact of the compensable acts ... greatly* [exceeded those] *considered in Griffiths*".[41]

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[27] CB A.02.105 at [202(f)], [220(e)], [240(d)], [316(d)], [320(d)].
[28] *McArthur River* [2025] FCA 153 at [1420].
[29] *Griffiths* (2019) 269 CLR 1 at [3], [237].
[30] *McArthur River* [2025] FCA 153 at [810(a)].
[31] *McArthur River* [2025] FCA 153 at [130].
[32] *McArthur River* [2025] FCA 153 at [978]-[1015].
[33] *McArthur River* [2025] FCA 153 at [1062].
[34] *McArthur River* [2025] FCA 153 at [1064]-[1066], [1068], [1089].
[35] *McArthur River* [2025] FCA 153 at [1016]-[1020].
[36] *McArthur River* [2025] FCA 153 at [1021]-[1044].
[37] *McArthur River* [2025] FCA 153 at [1116]-[1138].
[38] *McArthur River* [2025] FCA 153 at [1281]-[1289].
[39] *McArthur River* [2025] FCA 153 at [1076]-[1083], [1097]-[1104].
[40] *McArthur River* [2025] FCA 153 at [1153]-[1173].
[41] *McArthur River* [2025] FCA 153 at [1394].

However, in the First Respondent's respectful submission, while there was considerable evidence about cultural loss in *McArthur River*, it is not readily apparent why the impact of the compensable acts in *McArthur River* "*greatly exceed*[ed]" the impact of the compensable acts in *Griffiths*. In Griffiths, the effects of the compensable acts were described at first instance as causing "*gut-wrenching pain*", by the Full Court as having an impact on the claim group at a "*very high level*" and having "*a severe and lasting impact*", and by Edelman J in the High Court as effecting "*the extinguishment of rights of immense cultural value*".[42]

19. Rather, there are considerable similarities between the cultural loss suffered in *Griffiths* and *McArthur River*. In *Griffiths* there was evidence that the native title holders were linked to the claim area through ancestral ties, that they observed essentially the same rituals and ceremonies as had been practised by their ancestors more than a century ago, and that those ritual and ceremonial practices were largely and inextricably bound up with the land and waters around Timber Creek.[43] There were four major travelling Dreamings through Timber Creek and multiple sacred sites.[44] There was evidence that compensable acts had "*cut the life*" out of, and "*damaged for good*" a "*very important*" Dreaming, evidence of other interference with other Dreamings and sites of significance (including a ritual ground which could no longer be used), feelings of guilt and shame about what had happened, and a sense of responsibility for loss and damage.[45] Further, in *Griffiths*, many of the compensable acts extinguished native title either wholly or in part, with the inevitable result that the effect of those acts would be perpetual.[46]

20. Whilst the size of the affected area differed between *Griffiths* (127ha) and *McArthur River* (13,053.2ha),[47] consistent with the principles set out in *Griffiths*, the Court in *McArthur River* observed that cultural loss is not dependent on size, and so this factor did not form the basis for distinguishing *McArthur River* from *Griffiths*.[48]

21. *Griffiths* and *McArthur River* did, however, differ in respect of the geographic scale and severity of the physical damage to the landscape, which was greater in *McArthur River*. As previously submitted, this distinction can justify some uplift from the amount awarded for cultural loss in *Griffiths*.[49] But in light of other similarities between the two cases, it is not apparent on what basis the Court in *McArthur River* departed so significantly from the award of $1.3 million in *Griffiths*.

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[42] See also *State's Closing Submissions*, [453].
[43] *Griffiths v Northern Territory* (2016) 337 ALR 362 at [329].
[44] *Griffiths* (2019] 269 CLR 1 at [171]; see also the map attached to the judgment.
[45] *Griffiths* (2019] 269 CLR 1 at [180]-[182], [191]-[192]; *Griffiths v Northern Territory* (2016) 337 ALR 362 at [356], [361].
[46] *Griffiths v Northern Territory* (2016) 337 ALR 362 at [427], Annexure A.
[47] *McArthur River* [2025] FCA 153 at [703]; *Griffiths* (2019] 269 CLR 1 at [6].
[48] *McArthur River* [2025] FCA 153 at [1391]-[1393].
[49] *State's Closing Submissions* at [455].

22. Further, as recognised by *Griffiths,* "*a general precept of the* [NTA] *is equality of treatment between native title rights and other rights and interests where equivalent*".[50] It is acknowledged that awards of compensation will vary depending upon the facts of each case. But where, because of the amount awarded for cultural loss, the total native title compensation payable greatly exceeds (by many multiples) the amount that could have be awarded to a freeholder for the compulsory acquisition of the same land[51] this may suggest that the cultural loss amount is manifestly excessive and not one which would be "*accepted by the Australian community as appropriate, fair or just*."[52] For example, in *Griffiths,* Edelman J noted that an award of $1.3 million for cultural loss in respect of land that had a freehold value of $640,500 "*might appear to be excessive,*" had the cultural loss been assessed at the same date as the economic loss.[53]

23. In all of the circumstances, the First Respondent submits that an award for cultural loss within the range of $5 – 10 million would appropriately reflect what the Australian community would consider is fair, reasonable or just in this case.

Griff Ranson SC
FOR: State Solicitor for Western Australia
Solicitor for the First Respondent

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[50] *Griffiths* (2019) 269 CLR 1 at [265].
[51] Including non-economic loss for things such as severance, injurious affection, disturbance, special value and solatium.
[52] *Griffiths* (2019) 269 CLR 1 at [237].
[53] *Griffiths* (2019) 269 CLR 1 at [320]-[322] and [327]-[328]. Edelman J ultimately concluded that the cultural loss award was not manifestly excessive because, if it had been assessed at the date of the compensable acts, it would have been approximately $338,381, which was "*little more than half of the freehold value*". I.e. the cultural loss amount of $1.3 million in "*present day dollars*" was equivalent to $338,381 at the date of compensable acts (c. 1994) plus interest since that time.

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