

## NOTICE OF FILING AND HEARING

### Filing and Hearing Details

|                            |                                                                                        |
|----------------------------|----------------------------------------------------------------------------------------|
| Document Lodged:           | Notice of Cross-Appeal - Form 123 - Rule 36.21(1)                                      |
| Court of Filing:           | FEDERAL COURT OF AUSTRALIA (FCA)                                                       |
| Date of Lodgment:          | 15/09/2026 4:14:39 PM AWST                                                             |
| Date Accepted for Filing:  | 16/09/2026 1:14:48 PM AWST                                                             |
| File Number:               | WAD299/2026                                                                            |
| File Title:                | YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC v<br>STATE OF WESTERN AUSTRALIA & ORS |
| Registry:                  | WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA                                |
| Reason for Listing:        | To Be Advised                                                                          |
| Time and date for hearing: | To Be Advised                                                                          |
| Place:                     | To Be Advised                                                                          |



*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.



## Notice of cross-appeal

No: WAD 299 of 2026

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

On appeal from the Federal Court

**YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC**

Appellant

**STATE OF WESTERN AUSTRALIA and others named in the schedule**

Respondents

**FMG PILBARA PTY LTD and others named in the schedule**

Cross-appellants

**YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC and others  
named in the schedule**

Cross-respondents

To the Appellant

The Second to Sixth Respondents appeal from part of the judgment or the orders as set out in this notice of cross-appeal.

The papers in the cross-appeal will be settled before a Registrar at the time and place to be advised.

Date:

Signed by an officer acting with the authority  
of the District Registrar

|                                           |                                                                 |
|-------------------------------------------|-----------------------------------------------------------------|
| Filed on behalf of (name & role of party) | Second to Sixth Respondents and First to Fifth Cross-appellants |
| Prepared by (name of person/lawyer)       | David Jenaway                                                   |
| Law firm (if applicable)                  | Allen Overy Shearman Sterling                                   |
| Tel (08) 6315 5900                        | Fax (08) 6315 5999                                              |
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The Second to Sixth Respondents (together **FMG**) appeal from part of the judgment or the orders of the Federal Court made on 1 July 2026 at Sydney.

### **Details of cross-appeal**

FMG cross-appeals from orders 3 and 4 of the Federal Court made on 1 July 2026.

### **Grounds of cross-appeal**

1. The trial judge's determination under s 51 of the *Native Title Act 1993* (Cth) (**NTA**) that the compensation payable for cultural loss (arising from the grant, renewal or extension of the term of the mining tenements (referred to and defined as **Compensable Acts** in order 1(b) of the Federal Court's orders made on 1 July 2026)) was erroneous or was manifestly excessive by reason of the following errors or alternatively one or more of the following errors.
  - (a) The trial judge erred by failing to assess cultural loss (being the loss of the spiritual relationship which the Yindjibarndi people have with the land) in accordance with the principles from *Northern Territory v Griffiths* [2019] HCA 7; (2019) 269 CLR 1 [216]-[219] and *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. Those principles require the separate but inter-related steps of identification of the Compensable Acts; identification of the Yindjibarndi people's native title rights and interests including their connection with the land or waters by their laws and customs; and then a consideration of the particular and inter-related effects of the Compensable Acts on that connection (*Yindjibarndi Ngurra Aboriginal Corporation RNTBC v State of Western Australia (No 2)* [2026] FCA 585 (J) [35], [1184], [1196]-[1201], [1217], [1219]).

### **Particulars**

- (i) By reason of ground 2 below, the trial judge erred by incorrectly concluding that the Yindjibarndi people have a right to claim compensation on the basis they hold exclusive native title rights and interests within the exclusive area noted in the **Determination Area** (as determined in *Warrie (formerly TJ) v State of Western Australia (No 2)* [2017] FCA 129; (2017) 366 ALR 467 (**Determination**)) with a right

to control access (J [282]) and then relied on such exclusivity to assess the inter-related effects of the Compensable Acts on the Yindjibarndi people's native title rights and interests to determine a manifestly excessive amount as compensation for cultural loss.

- (ii) The trial judge failed to have proper regard to the compensation for cultural loss ordered in *Griffiths* (\$1.3 million) and ordered in *McArthur River* (\$60 million) when determining the compensation for cultural loss ordered in this case (\$150 million).
  - (iii) Further or in the alternative, the trial judge erred by:
    - (A) considering that “the exercise of applying a rate per hectare provides a form of check on parameters” (even though this should be done with “considerable caution”) and considering that “prior cases provide a point of comparison that may provide some normative standard when quantifying cultural loss, but they cannot go further” (J [1196]); and
    - (B) then failing properly to make any “check on parameters” and failing to consider any “normative” considerations arising from the compensation ordered for cultural loss (of \$60 million) for an affected land area of 124.4km<sup>2</sup> in *McArthur River* (J [1198]) and the compensation the trial judge considered appropriate for cultural loss in this case (of \$150 million) for a similar affected land area of 135.48km<sup>2</sup> (J [35], [1196]-[1201], [1219]); and
    - (C) thereby, concluding that cultural loss in this case should be compensated at a manifestly excessive amount of \$150 million.
  - (b) Further or in the alternative, the trial judge failed to give adequate reasons for his conclusion that compensation for cultural loss in this case should be \$150 million.
2. The trial judge erred in concluding that the operation of ss 47A and 47B of the NTA is to enable the Yindjibarndi people to claim compensation for both economic loss and cultural loss on the basis that they hold exclusive native title rights and interests within the exclusive area noted in the Determination by reason of the following errors or alternatively one or more of the following errors.

- (a) The trial judge erred in failing properly to construe and give effect to the text, context and purpose of ss 47A and 47B of the NTA (J [256]-[271], [276]-[282], [284]) in that:
- (i) the text of each of ss 47A and 47B expressly provides that they apply only with respect to a “***claimant application***” (namely, by force of the definition in s 253 of the NTA, a native title determination application as described in s 61 of the NTA) and not to a “compensation application” as described in s 61 of the NTA;
  - (ii) in their context, the text of each of ss 47A and 47B:
    - (A) where it refers to “[f]or all purposes under [the NTA] in relation to the application” despite the width of the words “in relation to” cannot extend the operation of ss 47A and 47B which are expressly confined to deal with only a “***claimant application***” made in relation to an area (J [258]-[259]);
    - (B) where it refers to any prior interest that “must be disregarded”, despite the width of the word “disregarded”, cannot extend the operation of ss 47A and 47B which are expressly confined to deal with only a “***claimant application***” made in relation to an area (J [268]);
  - (iii) the context in which ss 47A and 47B operate (including ss 47 and 61 of the NTA) makes it apparent that ss 47A and 47B are not directed to a “compensation application” as described in s 61 of the NTA, particularly where ss 47A and 47B do not give a right to recover compensation if there is a determination of native title rights and interests as to a “***claimant application***”;
  - (iv) the purpose of each of ss 47A and 47B makes it apparent that they were statutory mechanisms to allow native title claimants who are in occupation of land the subject of a “land rights” type of grant to overcome the effect of past extinguishment to permit a determination of native title;



- (v) the purpose of ss 47A and 47B:
  - (A) was to permit a determination of native title despite any past extinguishment if the native title claimants occupy the land; and
  - (B) was not to give the native title claimants a right to compensation on an assumption that any prior extinguishment of the exclusive right to control access (for which they may have a separate claim relating to the creation of any prior interest) would become compensable as if this was a “loss, diminution, impairment or other effect” (within s 51(1) of the NTA) of a later “future act” affecting their native title rights and interests.
- (b) The trial judge erred:
  - (i) in first treating native title rights determined by force of ss 47A and 47B of the NTA as “revived” or as a “restoration of the previously extinguished native title” (J [261]-[262]);
  - (ii) by then concluding that:
    - (A) this did not “itself necessarily fully compensate for the effects of an extinguishing grant” (J [262]); and
    - (B) because “restoration alone of native title through ss 47A and 47B is not compensation for a *future act* done post-restoration”, there was an entitlement to compensation for such a future act under s 51 of the NTA (even though that future act was not the cause of the extinguishment of the exclusive right to control access arising from the creation of any prior interest) (J [263]).
- (c) The trial judge erred by:
  - (i) concluding that the prior pastoral leases and exploration licences in the Determination Area had little appreciable impact on the Yindjibarndi people’s native title rights and interests (J [263], [1208]);
  - (ii) thereby failing to apply established authority that:
    - (A) the nature and content of the rights under the prior pastoral leases and exploration licences are to be ascertained objectively

by reference to the rights they conferred and not by reference to the way in which they might have been exercised;

- (B) the grant of prior pastoral leases and exploration licences results in the loss of a right of exclusive possession and a right to control access; and
  - (iii) thereby concluding that the “dangers of double counting” compensation relating to the creation of any prior interest and the “future act done post-restoration” were “far less relevant” in this case (J [263]).
  - (d) The trial judge erred by distinguishing *Griffiths v Northern Territory of Australia* [2014] FCA 256 [63]-[81] on the basis that *Griffiths 2014* concerned “past acts” whilst this case concerns “future acts” (J [269]) because Division 5 of Part 2 of the NTA (particularly s 51 of the NTA) draws no distinction between past acts and future acts in providing for the entitlement to compensation.
  - (e) The trial judge erred (“with some hesitation”) in concluding that Mansfield J’s decision in *Griffiths 2014* was “plainly wrong” (J [270]).
3. The trial judge erred in awarding compound interest for the Yindjibarndi people’s economic loss (J [513]-[524]) in that:
- (a) as a matter of principle, any loss of use of money in the period between the grant of the Compensable Acts and judgment is not a “loss, diminution, impairment or other effect” on native title rights and interests, within the meaning of s 51(1) of the NTA;
  - (b) further or in the alternative, there was insufficient evidence to demonstrate such a loss of use of money.
4. If the Appellant (**YNAC**) succeeds on Ground 3 of its Notice of Appeal (which is not accepted), any compensation to which YNAC or the Yindjibarndi people will be entitled for economic loss on just terms pursuant to s 53(1) of the NTA is an entitlement against the First Respondent (**State**) (not FMG):
- (a) the trial judge will have erred by failing to determine that the State is liable for such compensation; and



- (b) the trial judge will then have erred by failing to determine the amount of compensation for which:
    - (i) the State is liable to pay pursuant to s 53(1) of the NTA; and
    - (ii) FMG is liable to pay pursuant to s 24MD(4)(b) of the NTA and s 125A of the *Mining Act 1978* (WA) (**Mining Act**).
5. If YNAC succeeds on Ground 4 of its Notice of Appeal (which is not accepted), any compensation to which YNAC or the Yindjibarndi people will be entitled for economic loss on just terms under s 51(1) of the NTA is an entitlement against the State pursuant to s 45(2) of the NTA (not FMG):
- (a) the trial judge will have erred by failing to determine that the State is liable for such compensation; and
  - (b) the trial judge will then have erred by failing to determine the amount of compensation for which:
    - (i) the State is liable to pay pursuant to s 45(2) of the NTA; and
    - (ii) FMG is liable to pay pursuant to s 24MD(4)(b) of the NTA and s 125A of the Mining Act.

### **Orders sought**

1. The cross-appeal is allowed.
2. Orders 3 and 4 of the orders of the Federal Court made on 1 July 2026 are set aside.
3. The parties confer and provide a draft minute of orders giving effect to the reasons of the Full Court of the Federal Court of Australia within 28 days.

### **Second to Sixth Respondents' address**

The Second to Sixth Respondents' address for service is:

Place: c/ A&O Shearman, Level 12 Exchange Tower, 2 The Esplanade PERTH WA  
6000

Email: [mark.vanbrakel@aoshearman.com](mailto:mark.vanbrakel@aoshearman.com) / [david.jenaway@aoshearman.com](mailto:david.jenaway@aoshearman.com)



The Second to Sixth Respondents' address is Ground Floor, 256 St Georges Terrace PERTH  
WA 6000.

**Service on the Appellant and the Cross-Respondents**

It is intended to serve this notice of appeal on the Appellant and the Cross-Respondents.

Date: 15 September 2026

A handwritten signature in blue ink, appearing to be "David Jenaway", is written over a horizontal dotted line.

Signed by David Jenaway

Lawyer for the Second to Sixth Respondents  
and First to Fifth Cross-appellants



## **Schedule**

No. WAD 299 of 2026

Federal Court of Australia

District Registry: Western Australia Registry

Division: General

### **Respondents**

|                     |                                        |
|---------------------|----------------------------------------|
| Second Respondent:  | FMG PILBARA PTY LTD                    |
| Third Respondent:   | PILBARA ENERGY (GENERATION) PTY LTD    |
| Fourth Respondent:  | PILBARA ENERGY COMPANY PTY LTD         |
| Fifth Respondent:   | THE PILBARA INFRASTRUCTURE COMPANY LTD |
| Sixth Respondent:   | PILBARA GAS PIPELINE PTY LTD           |
| Seventh Respondent: | YAMATJI MARLPA ABORIGINAL CORPORATION  |

### **Cross-appellants**

|                         |                                        |
|-------------------------|----------------------------------------|
| Second Cross-appellant: | PILBARA ENERGY (GENERATION) PTY LTD    |
| Third Cross-appellant:  | PILBARA ENERGY COMPANY PTY LTD         |
| Fourth Cross-appellant: | THE PILBARA INFRASTRUCTURE COMPANY LTD |
| Fifth Cross-appellant:  | PILBARA GAS PIPELINE PTY LTD           |

### **Cross-respondents**

|                          |                                       |
|--------------------------|---------------------------------------|
| Second Cross-respondent: | STATE OF WESTERN AUSTRALIA            |
| Third Cross-respondent:  | YAMATJI MARLPA ABORIGINAL CORPORATION |