APPLICANT'S REPLY SUBMISSION ON

THE MCARTHUR RIVER PROJECT COMPENSATION CLAIM

FEDERAL COURT OF AUSTRALIA No. WAD 37 of 2022

DISTRICT REGISTRY: WESTERN AUSTRALIA

DIVISION: GENERAL

YINDJIBARNDI ABORIGINAL CORPORATION RNTBC

APPLICANTS

STATE OF WESTERN AUSTRALIA AND ORS

RESPONDENTS

Economic Loss

1. The FMG Respondents (**FMG**) note at [1] that the *Davey* Court declined to adopt a model for compensation based on the *Davey* Applicant's "hypothetical comparable bargain" approach (citing *Davey* at [7]). FMG develop that argument at [7]-[10]. They refer, in particular, to the Court's rejection of the evidence of Mr Houston, the economist called by the *Davey* claimants. Although this issue has been addressed in the Applicant's Supplementary Submissions (**ASS**), it is further addressed briefly below.

2. The evidence of Mr Houston was that, in his opinion, the most appropriate reference point from which to identify the compensation that would have been likely to arise from a hypothetical bargain involving the *Davey* claimants, is by referring to the terms of comparable bargains: *Davey* [826]. He said that evidence of "comparable bargains" can be drawn upon to identify the nature of a "representative agreement" that would most likely have been agreed in the hypothetical bargain scenario: *Davey* [826]. In his opinion, there was a strong likelihood that some form of royalty arrangement would feature in the hypothetical bargain: *Davey* [827]. However, he did not proceed to assess the value of economic loss on the basis of an alleged representative or hypothetical bargain: *Davey* [832].

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3. In reviewing that evidence, the *Davey* Court said that it may be the case that in other circumstances, economic loss might be assessed having regard to a loss of opportunity to bargain and to the framework proposed by the claimants' economist for a "representative agreement": *Davey* [835]. The Court said that will depend upon the particular statutory compensation rights in issue, "*and the existence and usefulness of comparable bargains*": *Davey* (*ibid*). In *Davey*, the statutory context for assessing compensation was the *Project Act* and the *Mining Act, 1980* (NT), not the NTA. More importantly, however, the *Davey* claimants did not tender *any* evidence of "comparable bargains" and as mentioned at [2] above, Mr Houston did not purport to assess the value of an alleged representative or hypothetical bargain: *Davey* [529], [832]. This created what the Court correctly described as an "evidentiary lacuna": *Davey* [907]. In those circumstances, the *Davey* claimants' "hypothetical comparable bargain" claim, was bound to fail.

4. That is not the case here where the Yindjibarndi people (**Yindjibarndi**) have adduced a considerable body of expert and documentary evidence of comparable bargains which has established that the Yindjibarndi NTRI had a negotiation or exchange value, being what a reasonable miner (or the State) would pay to obtain their assent to the infringement of their NTRI: ACS [175]-[179]. The evidence demonstrated that there is a market with a common or industry standard for what miners in the Pilbara will pay to native title parties and which native title parties will accept, in mining compensation agreements: ACS (*supra*). What the State would pay is determined by s.38 of the *Mining Act*: ACS [138]-[144], [157]; Applicant's Reply Submissions (**ARS**) [126]. Those assessments are unaffected by the non-extinguishment principle (see State's submission at [8]-[15]).

5. FMG (at [4]) and the State (at [5]), reference the fact that the *Davey* claimants' NTRI were non-exclusive. What they fail to acknowledge, however, is that this is a major point of difference between the *Davey* claim and the Yindjibarndi claim.

6. In this respect, the State (at [5]-[7]) refers only to those parts of the *Warrie (No.2)* Determination Area where the NTRI of the Yindjibarndi are non-exclusive. The State does not refer at all to the Exclusive Area of the *Warrie (No.2)* Determination where the NTRI of the Yindjibarndi confer upon them a right of exclusive possession: AOS [2], ACS [30]. Nor does it refer to the fact that FMG's Solomon Hub Mine is located largely on the Exclusive Area: AOS [3], ACS [34]. Mr Meaton took those factors into account, along with the fact that the Yindjibarndi were determined native title holders as opposed to native title claimants, in his assessment of the quantum of economic loss: ACS [177]-[178].

7. Contrary to the FMG submission at [11], the RDA does require that the *Mining Act* provide the Yindjibarndi with parity of treatment with the holders of "ordinary title". If it does not, s.10(1) of the RDA will supply an entitlement to compensation which is to be determined as if it arose under the NTA: NTA s.45: AOS [39], [40], [42]-[44]; ACS [8], [55]; ARS [26], [32]-[33].

8. Contrary to FMG's submission at [15], not all minerals are reserved to the Crown in Western Australia: *Mining Act* s.38 and see too (a) of the definition of "private land" in s.8. The State acknowledges that the *Mining Act* only applies to pre-1899 freehold in relation to the mining of gold and silver and not to other minerals: ARS [123]-[124]. The Yindjibarndi right of exclusive possession, which is equivalent to freehold, has existed from a time well before 1899: (*ibid*).

9. FMG submit at [16]-[17] that the *Davey* Court concluded at [894], [897], that the proper focus is on the value to the owner (not the hypothetical buyer) and compensation for that owner. In reply, the Applicant says, first, that the real economic value to the "owner" (Yindjibarndi) of their NTRI was their negotiation or exchange value: ASS [13], [10].

10. Second, as the plurality observed in *Griffiths* HC at [104], the "benefit" of the grant of the FMG tenements to the State and FMG is relevant insofar as it would have informed the amount which each would have been prepared to pay to have those grants made. Banks-Smith J said at [899], that this passage from *Griffiths* HC 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 and that such knowledge in turn may influence what a willing purchaser may be willing to pay.

Cultural Loss

11. It was not in issue in *Davey* that compensation for cultural loss was to be assessed at a monetary figure arrived at as the result of a social judgment to be made by the Court of what in the Australian community at this time, is an appropriate award for what has been done: *Davey* [934] referring *Griffiths* HC [237]. Neither the State nor FMG question the correctness of the statement in *Davey* at [1386], that where there is no algorithm, no tariff and little precedent, forming a reasoned view as to a figure that the Australian community would rightly regard as an appropriate award is complex and reasonable judicial minds might differ on the same evidence, as to the appropriate level of compensation. They nonetheless seek to obtain some precedent value from the facts in *Davey* and *Griffiths* HC.

12. The State's submissions at [17]-[21] seek to draw a comparison between the facts in *Davey* and the facts in *Griffiths* HC. On the basis of that comparison, the State says (at [18]), that it is not readily apparent why the impact of the compensable acts in *Davey* "*greatly exceed*[ed]" the impact of the compensable acts in *Griffiths* HC.

13. FMG, on the other hand, seeks to draw a comparison between the facts in *Davey* and the evidence in this case to support its submission (at [36]), that the cultural loss to the Yindjibarndi is "*much, much less*" than the cultural loss in *Davey*.

14. The State's and FMG's approach in seeking to make comparisons and draw conclusions about the assessment of cultural loss in this case from the evidence in other cases, is misguided. Valuation cases are, of themselves, highly evidence and fact dependent: ACS [67]. The essentially factual nature of valuation cases is compounded here because native title is itself, "*highly fact specific*": *Western Australia v Ward* (2000) 99 FCR 316 at [58], Beaumont, von Doussa JJ. In *Sampi v Western Australia* [2010] FCAFC 26; 266 ALR 537 at [71]-[73], North and Mansfield JJ observed that the circumstances of each native title application are different. They depend *heavily* upon the facts and "*it is not useful to compare the facts in one case to others*".

17 April 2026

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Vance Hughston SC

Counsel for the Applicant

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