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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: WESTERN AUSTRALIA
DIVISION: GENERAL

No. WAD 37 of 2022

YINDJIBARNDI ABORIGINAL CORPORATION RNTBC
APPLICANTS

STATE OF WESTERN AUSTRALIA AND ORS
RESPONDENTS

APPLICANT'S SUPPLEMENTARY SUBMISSION ON THE MCARTHUR RIVER PROJECT COMPENSATION CLAIM

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1. This is the Applicant's supplementary submission on *Davey on behalf of the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples v Northern Territory of Australia (No 5)* [2026] FCA 153 (***Davey***). We adopt the same defined terms used in our earlier submissions.

Economic loss

2. The Court in *Davey* was at pains to stress that whilst determining that compensation for economic loss in that case was to be calculated by reference to the unencumbered freehold value of the land, it did not assume that that was the only method by which economic loss might be assessed. It was simply found to be the appropriate method in that case: *Davey* [7], [556] and [835]. The findings in *Davey* in respect of economic loss are clearly distinguishable, both as to the facts and as to the law. For this reason, *Davey* is of limited use in determining the appropriate methodology to assess compensation for economic loss.

Outline of findings and reasons in *Davey*

3. In *Davey* the Applicant claimed compensation under the *McArthur River Project Agreement Ratification Act 1992* (NT) (**Project Act**) for the relevant compensable acts. One discrete claim, pleaded in the alternative, was for compensation under the NTA for the construction of a road: *Davey* [4], [68]. The area of road was only 2.44 km^2 and the Northern Territory (**NT**) admitted liability to pay compensation under the *Project Act*: *Davey* [69]. However, in relation to the *assessment* of compensation, the parties and the Court approached *Davey* on the footing that s.51 of the NTA created "a relevantly analogous entitlement to compensation" and that the High Court's approach to determining compensation pursuant to s.51 in *Griffiths* HC applied: *Davey* [503], [506]-[515], [516]-[518], [558] and [565].

4. In *Davey*, the Applicant's primary economic loss case was that the loss "... is measured by the loss of what the Claim Group could fairly and justly 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": *Davey* [526] and [817]. Two features of the *Davey* Applicant's primary economic loss case were:
   a. its foundation was an alleged loss of an opportunity to negotiate with the miner and the NT under the *Mining Act* 1980 (NT): *Davey* [840]; and
   b. the Applicant did not provide a calculation of the quantum for its loss and did not adduce any evidence about the terms of "comparable bargains" at trial: *Davey* [529], [832] and [903] – [932].

5. As to the second feature, the Applicant proposed that the assessment of quantum "... should be deferred so that evidence of comparable bargains could be sought and considered": *Davey* [832]. The Applicant foreshadowed an application for a referral to a referee for inquiry and report under s.54A of the *Federal Court of Australia Act* 1976 (Cth). These features are significant points of difference between *Davey* and this proceeding, which we elaborate on below.

6. In *Davey*, the Court acknowledged that different valuation methods could be applied in the context of compensation for loss or diminution of native title rights and interests: *Davey* [7], [556]. This may include the assessment of economic loss having regard to a loss of opportunity to bargain: *Davey* [835]. However, the Court rejected the Applicant's primary economic loss case and applied instead "... the unencumbered freehold value comparator approach endorsed in *Griffiths* HC*": Davey* [7], [535]-[812] and [836]. Two important reasons why the Court did not accept the legal basis for the Applicant's primary economic loss case in *Davey* were:

    a. its findings about the meaning of "compensation" within the Project Act and the High Court's approach to assessing compensation in *Griffiths* HC; and
    b. difficulties which would arise if compensation were to be assessed by reference to a hypothetical outcome of a statutory negotiation process under the *Mining Act* 1980 (NT): *Davey* [559]-[565], [836]-[843], [844]-[856] and [880]-[900]

***Davey* is distinguishable and of limited use**

7. The findings in *Davey* in respect of economic loss are clearly distinguishable from this case, both as to the law and the facts. The Court in *Davey* was at pains to stress that whilst determining that compensation for economical loss in that case was to be calculated by reference to the unencumbered freehold value of the land, it did not assume that that was the only method by which economic loss might be assessed: *Davey* [7]. It was simply found to be the appropriate method in that case: *Davey* [ibid].

8. In relation to the law, the Court in *Davey* said that any entitlement to compensation and the heads of compensation under which it can be assessed depend upon the nature of the statutory scheme: *Davey* [500], [501]. What the Court had before it was not a claim made under the NTA, rather it was a claim for compensation made under the Project Act. The starting point for the Court in determining compensation was that Act, not the NTA: *Davey* [501]. In this respect, the legislative purpose behind the enactment of the Project Act and the enactment of the NTA, as evidenced by the Preamble to the latter Act, are worlds apart. There are material differences in the statutory regimes under

which compensation was claimed in *Davey* and in this proceeding. The most important of these lies in the underlying bases advanced by the Applicant in *Davey* and by the Yindjibarndi Applicant, for their economic loss claims.

9. In *Davey* the sole underlying basis was the loss of a chance to negotiate a hypothetical bargain with the miner (MIM) and the NT under the *Mining Act* 1980 (NT): *Davey* [840]. The Applicant here has advanced a somewhat similar basis except that it locates the loss of a chance to negotiate in the NTA and has not framed it as the loss of a chance to negotiate with FMG and the State.

10. The YNAC Applicant described the relevant loss in its opening submissions as:

> *As and from [the date of the grant of each the mining leases], the Yindjibarndi people lost their right to negotiate and lost the opportunity to enter into an agreement with another miner or miners on what are the common or standard terms for mining compensation agreements in Western Australia and, more particularly, in the Pilbara.* AOS (A.02.000) [100]

11. The "loss of a chance" basis for economic loss in this proceeding is sourced in the NTA, not the *Mining Act* 1980 (NT) and the Project Act. This is an important difference. It means that some of the Court's reasoning in *Davey* about difficulties which would arise if compensation were to be assessed by reference to a hypothetical outcome of a statutory negotiation process under *Mining Act* 1980 (NT) fall away: *Davey* [844]-[857].

12. Although the *Mining Act* 1980 (NT) included a negotiation process and a right to have compensation assessed if that were unsuccessful, the *Mining Act* 1980 (NT) also provided that, in determining compensation, no account was to be taken of minerals known or supposed to be on or under the land: *Davey* [844]-[845]. That difficulty does not arise for the Yindjibarndi because there is no such prohibition in the NTA. Indeed, to the contrary, s.33(1) of the NTA makes it clear that good faith negotiations under that Act over the grant of a mining tenement (s.26(1)(c)) can include the possibility of including a condition that native title parties are to be entitled to compensation payments worked out by reference to the amount of profits made, any special income derived or any minerals ("things ") produced, as a result of the mining activities.

13. This proceeding is also distinguishable from *Davey* in that the YNAC Applicant has advanced a second, separate if related basis for its economic loss claim, which was not advanced in *Davey.* In its closing submissions it submitted:

> *An essential element of the Applicant's case is that the Yindjibarndi people's NTRI have a significant value in negotiation or exchange when what is being*

> *facilitated with the consent and support of the Yindjibarndi people is a large-scale, greenfield iron ore mining project. This value in negotiation or exchange is the real economic value of the NTRI in the circumstances of this case. And it is appropriate that this economic value form the compensation (or part of the compensation) for economic loss.* ACS [158] (the submission is developed at [159]-[180] and in the reply submissions at [76]-[84])

14. This part of the economic loss claim is important because it addresses another of the Court's main reasons for rejecting the Applicant's primary economic loss case in *Davey* - its findings about the meaning of "compensation" within the Project Act and the High Court's approach to assessing compensation in *Griffiths* HC: *Davey* [559- [565], [836]-[843], and [880]-[900].

15. In answering the question "[what] impairment is the compensation to meet?" the Court in *Davey* said at [839]:

> *The starting point is to return to* Griffiths HC *and recall that compensation including 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 that is compensable.*

16. The Court's focus on the "loss of an opportunity to bargain under the *Mining Act*" in answering the question is understandable given how the Applicant ran its case in *Davey*. The Applicant did not advance the separate negotiation or exchange value of the native title rights and interests as a basis for its primary economic loss claim. It is submitted that this aspect of YNAC's claim for economic loss together with the very different factual circumstances in this proceeding compel a different approach to the assessment of economic loss for the infringement of the Yindjibarndi people's native title rights and interests.

17. As mentioned in our outline of *Davey* above, the Applicant in that case did not tender any evidence of any alleged comparable bargains and did not provide a calculation of the quantum of their claim for economic loss assessed on that basis: *Davey* [529]. The Court said that the absence of evidence of alleged comparable bargains created an evidentiary lacuna. It said that the Court was invited to consider whether the hypothetical comparable bargain methodology might be deployed, but without an understanding of the existence, prevalence or content of any purported comparable

agreements or factual or legal matters relevant to negotiations of any identified bargains which might impact their comparative weight: *Davey* [907]. The Court set out a range of procedural and substantive difficulties it faced owing to the lack of evidence about comparable bargains: *Davey* [922]-[932]. Importantly, the Court observed that these difficulties "compromised my ability to assess whether it would have been appropriate to award compensation on the basis of a hypothetical comparable bargain": *Davey* [929].

18. There are no such difficulties in this proceeding. The Applicant has adduced a substantial body of expert (Mr Murrary Meaton) and documentary (agreements) evidence of comparable bargains. This body of evidence serves two purposes. Firstly, it helps to establish that in the Pilbara region of Western Australia native title rights and interests have a discernible exchange or a negotiation value. Secondly, it provides a basis to make findings about what a reasonable miner acting fairly and justly would be prepared to pay to a native title party in the Pilbara for the infringement of their claimed or determined native title rights and interests

19. In *Davey*, the Court also rejected the Applicant's alternative case which was based upon a valuation of the freehold of the land which included the minerals. The Court said that applying orthodox principles of statutory construction regarding text and purpose to the provisions of the Project Act was sufficient to reject this alternative case: [683]-[685]. In the case of the Yindjibarndi, this Court is dealing with a very different statutory text and statutory purpose. We have addressed this in our written submissions particularly in our submissions on the proper construction of s.51A of the NTA.

20. In *Davey*, the Court was also swayed by the fact that minerals in the Northern Territory are not and never have been, privately owned: *Davey* [138], [690]. That is not the case in Western Australia. Again, this is already addressed in our written submissions. The *Davey* Court also gave weight to the fact that in determining the amount of compensation to be awarded under the Mining Act, no account could be taken of the minerals on or under the land: *Davey* [184]. There is no such limit placed upon the assessment of compensation under the NTA.

Cultural loss

21. There are factual similarities between *Davey* and this proceeding that are relevant to the assessment of cultural loss. Like Solomon Hub the mine in *Davey* was a greenfields

project that started as an underground mine, which later developed into an open pit mining operation. Like the mining operations at Solomon Hub, the mining operations in *Davey* involved the destruction of part of a waterway.

22. On the steps to assessing cultural loss laid down by the High Court in *Griffiths* HC – identification of the nature of the native title holding group's connection to their country and the effect of the compensable acts on this connection – the cases are also similar because there was a substantial body of relevant evidence in each. As in *Davey*, the Court will be able to make detailed findings in relation to these steps.

23. A big difference between the cultural loss in *Davey* and in this proceeding is the extent of the Yindjibarndi people's cultural loss consequential upon social disruption. This goes to the second of the two steps already referred to – the effect of the compensable acts on the Yindjibarndi people's connection to their country. The YNAC Applicant led substantial evidence in relation to the split in the Yindjibarndi community caused by the mining and related activities of the FMG Respondents and the ensuing division and social disruption over many years. The social disruption suffered by the Yindjibarndi people in connection with the development and operation of Solomon Hub has had a profound, long-lasting effect on them as a native title holding group *and* on their connection to their country. The two things cannot be separated. This aspect of the Yindjibarndi people's claim for cultural loss, by itself, justifies a substantial assessment of compensation.

24. The protection of sacred sites and consultations conducted by a statutory authority in the Northern Territory in relation to them was a matter that the Court considered in *Davey*. The statutory authority was the Aboriginal Areas Protection Authority (**AAPA**). The Applicant adduced evidence of eleven sacred sites registered under the *Sacred Sites Act* 1993 (NT), 9 of which were located within boundaries of the mineral leases the subject of that case and 2 of which were located close to the boundaries: *Davey* [1310]. The NT tendered applications to the AAPA to register sacred sites, accompanied by anthropological reports in support of such applications and other material. The issue in *Davey* was what to make of this evidence. The NT submitted "…to the extent the cultural loss claim rested on damage to sacred sites, it is necessary to take into account that prior consultation was undertaken about the various stages of work and their potential impact with senior members of the Claim Group": *Davey* [1311].

25. The Applicant in *Davey* suggested that the NT relied on the consultations carried out by AAPA as evidence that the native title holders approved the mining project or works required for its development and operation. The NT disavowed any such reliance and instead "…relied on the fact that the AAPA consultations had been undertaken with native title holders about sacred sites and said such history should not be overlooked in the assessment process": *Davey* [1322]. The NT submitted "that the consultations supported an understanding that the cultural landscape is complex, with some parts of more significance than others; and that the consultations resulted in steps being taken to protect certain sites from damage: *Davey* [1322]. The Court accepted this narrow submission: *Davey* [1375].

26. In this proceeding, the evidence relating to the FMG Respondents' consultations with Yindjibarndi people in relation to applications under s.18 of the *Aboriginal Heritage Act* 1972 (WA) are not relevant in the same way. This is because those consultations were mostly done with a splinter group (WYAC) over many years, which is an important feature of the division and social disruption within the Yindjibarndi people: ACS [441]-[448]. In summary, in almost all of the FMG Respondents' applications under s.18 of the *Aboriginal Heritage Act* 1972 (WA) that were approved, the relevant Yindjibarndi Prescribed Body Corporate (YAC and later YNAC) was not consulted by the ACMC. In the result, approximately 200 "Aboriginal sites" have been impacted.

27. Although the mining agreements in evidence provide compensation for both economic and cultural loss, the Yindjibarndi people should receive additional compensation for cultural loss because they do not have an agreement under which they have consented to the grant of the mining tenements and under which they have consultation and heritage survey rights. The nature and the extent of cultural loss in circumstances where the traditional owners have given their informed consent to a miner accessing their country is very different to the cultural loss likely to be occasioned where the State has granted mining tenements in circumstances where there is no such agreement and the grants are opposed by the Yindjibarndi people's Prescribed Body Corporate. The Yindjibarndi people have been dispossessed of country against their will and the country has suffered significant physical and spiritual damage for which the Yindjibarndi people hold themselves responsible.

7 April 2026

		
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