

NOTICE OF FILING

Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	25/06/2025 10:52:53 AM AWST
Date Accepted for Filing:	25/06/2025 10:52:56 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.



**Applicant's Submissions in Reply on the effect of *Commonwealth v Yunupingu*
(on behalf of the Gumatj Clan or Estate Group) [2025] HCA 6**

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

WAD 37 of 2022

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

1. These submissions are filed pursuant to Order 3 of the Orders of Burley J dated 14 April 2025 and are in reply to the FMG Respondents' Submissions filed in accordance with Order 1 and the First Respondent's Submissions filed in accordance with Order 2.
2. The High Court in *Commonwealth v Yunupingu (on behalf of the Gumatj Clan or Estate Group)* [2025] HCA 6 (***Yunupingu HC***) confirmed the correctness of the Full Court's decision in *Yunupingu v The Commonwealth* (2023) 298 FCR 160 (***Yunupingu FC***), that the extinguishment of native title by or under a law of the Commonwealth constituted an *acquisition* of property within the meaning of s.51(xxxi) of the *Constitution*.¹ The High Court judgment does not say anything different to the Full Court. In particular, it does not alter or redress in any way those parts of the Full Court's judgement which are relied upon in the Applicant's Opening Submissions at [71]-[72] and Reply Submissions at [54]-[58].
3. The FMG Respondents' submission² that there is no *acquisition* (by which they mean *extinguishment*), of native title and therefore s.51(xxxi) cannot apply, goes beyond addressing the effect of the judgment in *Yunupingu HC*. This issue has already been addressed in the Applicant's Opening Submissions at [69]-[72] and Reply Submissions at [54]-[58].

¹ *Yunupingu HC* at [2].

² FMG Respondents' Submissions at [17]-[22].

4. The FMG Respondents submit that neither the High Court nor the Full Court dealt with the question whether the grant of the special mineral leases could and did amount to a s.51(xxxi) “acquisition of property”.³ Whilst accepting that the Full Court found that the grants of the special mineral leases “*diminished or impaired*” the claimants’ non-exclusive native title rights and interests,⁴ they say that the separate questions and the appeal to the High Court were not directed to the question of whether this “*partial impact*” could and did involve an “*acquisition of property*” within s.51(xxxi).⁵ The FMG Respondents submit that the question remains undecided.⁶
5. That submission is incorrect. The *Yunupingu* Applicant submitted before the Full Court that although the grants of the special mineral leases had not extinguished native title, they had “*diminished and impaired*” the non-exclusive rights and interests which constituted an *acquisition* of property within the meaning of s.51(xxxi).⁷ The Full Court accepted that submission saying that laws which *diminish* native title confer an identifiable proprietary benefit on others and thus constitute an acquisition of property within s.51(xxxi).⁸
6. The fact that the grants of the FMG Mining Leases are subject to the non-extinguishment principle does not distinguish those grants from the grants of the special mineral leases considered in *Yunupingu*.⁹ In *Yunupingu* FC and *Yunupingu* HC, the Applicant contended that each of the compensable acts was a *past act* within the terms of s.228 of the NTA.¹⁰ One of the four sets of compensable acts consisted of the grant of the five special mineral leases.¹¹ If the grants were *past acts*, they were *category C past acts*¹² to which the *non-extinguishment principle*¹³ would apply.¹⁴ As such, the grants would not *extinguish* the claimants’ non-exclusive native title rights and interests

³ FMG Respondents’ Submissions at [16].

⁴ FMG Respondents’ Submissions at [17]. See *Yunupingu* FC at [37], [39] and [54].

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Yunupingu* FC at [460].

⁸ *Yunupingu* FC at [460], [461], [462] and [467].

⁹ FMG Respondents’ Submissions at [19]-[22]; First Respondent’s Submissions at [2].

¹⁰ *Yunupingu* FC at [40].

¹¹ *Yunupingu* FC at [36], [37].

¹² NTA s.231 states-“A *category C past act* is a past act consisting of the grant of a mining lease.”

¹³ Defined in NTA s.238. As noted in the FMG Respondents’ Submissions at [19], NTA s.238(8) says that an example of the operation of the section is its application to a *category C past act* consisting of the grant of a mining lease.

¹⁴ NTA s.15(1)(d).

but they would be inconsistent with the continued *exercise* of those rights and interests.¹⁵

7. It was on that basis that the *Yunupingu* Applicant contended that, if valid, each of the special mineral leases would have “*diminished and impaired*” the surviving native title rights of the claimants.¹⁶ By reason of this *impairment*, the Applicant contended in respect of each special mineral lease, that the grant of the lease, if valid, would have resulted in an *acquisition* of property within the meaning of s.51(xxxi) and that it was other than on just terms.¹⁷
8. Before the Full Court the Commonwealth contended, inter alia, as reflected in Separate Question 4, that they relied upon the *Wurridjal* argument and the inherent defeasibility argument.¹⁸ The Full Court rejected the Commonwealth’s two constitutional arguments and said that Separate Question 4(b) should therefore be answered “no”.¹⁹ That is, the Mining Ordinances under which the special mineral leases were granted *were* relevantly subject to the just terms requirement in s.51(xxxi).

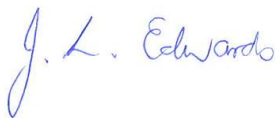
Dated: 25 June 2025



Vance Hughston SC



Tina Jowett SC



Justin Edwards SC

¹⁵ *Yunupingu* FC at [54].

¹⁶ *Yunupingu* FC at [39].

¹⁷ *Yunupingu* FC at [54].

¹⁸ *Yunupingu* FC at [55(b)].

¹⁹ *Yunupingu* FC at [64].