FMG's Submissions in Answer to YNAC's Supplementary Submissions of 7 April 2026 on *McArthur River Project Compensation Claim* [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 & ORS

Respondents

Filed on behalf of (name & role of party)	FMG Pilbara Pty Ltd, Pilbara Energy (Generation) Pty Ltd, Pilbara Energy Company Pty Ltd, Pilbara Gas Pipeline Pty Ltd and The Pilbara Infrastructure Pty Ltd
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A. ECONOMIC LOSS

1. As directed by the Court, FMG makes these submissions in answer to YNAC's supplementary submissions (**YPSS**) on the *McArthur River Project Compensation Claim* [2026] FCA 153 (***McArthur River*** or **MR**), adopting the defined terms in FMG's Closing Submissions of 17 Dec 2024 (**FSubs**). In MR, Banks-Smith J considered the applicable compensatory principles that apply both to s 4B of the *McArthur River Project Agreement Ratification Act 1992* (NT) and s 51(1) of the NTA.

2. Re YPSS [2], [6], [7], [8]: It is incorrect and inappropriate to gloss over the Court's reasoning to draw a conclusion that the compensatory principles applied by the Court in *McArthur River*, adopting the reasoning and analysis in *Griffiths HC*, was a "one-off" peculiar application of principle on the particular facts that arose in *McArthur River*. It is true that the Court said that it cannot be assumed that the "unencumbered freehold value comparator approach endorsed in *Griffiths HC*" is the "only method" (MR [7]); and that at "a *general level*, it can be accepted that different valuation methods could be applied" [italics added] (MR [556]). But, Banks-Smith J then said that "in other circumstances, economic loss might be assessed having regard to a loss of opportunity to bargain and to the framework Mr Houston proposes for a representative agreement" and that will depend upon the particular "*statutory compensation rights* in issue and the existence and *usefulness of comparable bargains*" [italics added] (MR [835]).

3. Banks-Smith J's conclusion (without glossing over it) was that, "In this case, I do not accept the legal basis for the hypothetical comparable bargain, and so the evidence of Mr Houston for practical purposes falls away. However, *even had I accepted that basis*, *I would prefer and would implement* the comparison with freehold approach endorsed in *Griffiths HC* because *it is more certain and consistent in its application*. In contrast, the hypothetical comparable bargain involves the deferral of the question of economic loss to an undeveloped notion of a reference under which it is unclear whether comparable bargains would be identified. It also separates the determination of compensation for economic and cultural loss in circumstances where there may well be overlapping matters to be taken into account" [italics added] (MR [836]). It cannot be said that the Court was at pains to leave the issue open, as if the compensatory principles that informed the Court's close analysis are up for grabs (MR [559]-[568]). Banks-Smith J had already analysed these issues and determined that the hypothetical bargain to which *Griffiths HC* refers is a hypothetical bargain about native title rights and interests (MR [544]), not about what might or might not have been agreed through a process of negotiation dealing with broader commercial issues (MR [838]-[843]).

4. Indeed, Banks-Smith J said the "method of assessing economic loss must be tied to the statutory scheme for compensation"; and the starting point was *Griffiths HC*

(MR [838], [839]). This requires considering a hypothetical *Spencer*-type bargain for the infringement of *native title rights and interests*. That 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" (MR [839]).

5. Re YPSS [3], [8]: Both s 4B of the *Project Act* and s 51(1) of the NTA provide a right to *compensation* relevantly for the impact on native title rights and interests. That is why Banks-Smith J applied the principles as to compensation as determined by *Griffiths HC*. The compensatory principles apply because in each case that is the right given by the relevant provision. The principles apply "by analogy" not because different but related questions are involved but because the different provisions are expressed in different terms but target the same thing. They each target the same type of relief or compensation (MR [557]-[558], [565], [842]). The relevant statutory purpose of both s 4B and s 51(1) are not "worlds apart" (cf. YPSS [8]); each provide for compensation (MR [558]).

6. Re YPSS [4], [5], [17], [18]: The Court did not apply the compensatory principles from *Griffiths HC* only because the Claim Group had not adduced sufficient evidence about alleged "comparable" bargains, and had sought a reference to a referee. Banks-Smith J instead rejected the Claim Group's argument as a matter of principle (MR [836], [838]-[843], [897]-[899]).

7. Re YPSS [9], [10], [11], [12], [13], [14], [15], [16]: The argument that there is a difference between the Claim Group's submissions in *McArthur River* about their loss of opportunity to negotiate (where they could not negotiate compensation for the value of minerals (MR [845])) and the YP's claim in this case, relying on s 33(1) of the NTA, must fail. Section 33(1) does not inform the right to compensation under s 51(1) and s 51(3) of the NTA. Sec 123(1) of the MA 1978 equally precludes compensation by reference to mineral rights. Banks-Smith J's rejection of the argument that there can be compensation for the loss of a negotiation right applies with equal force in this case (MR [836], [839]-[856]). Native title rights and interests do not include any right to negotiate as has been held authoritatively as regards the NTA itself (MR [843]; *State of Queensland v Central Queensland Land Council Aboriginal Corporation* (2002) 125 FCR 89 [151]-[153]; see FSubs [112]-[127], [194], [240]-[244]).

8. Furthermore, compensation is not properly assessed by reference to some commercial bargain that might have been made between the YP and a third party miner (cf. YPSS [9], [10]) because such a hypothetical bargain is not a native title right and interest, nor is it relevant to compensation for the grant of the FMG tenements (see FSubs [242]-[244], [363]-[369]).

9. Re YPSS [19], [20]: It is incorrect to assert the Court is presently "dealing with a very different statutory text and statutory purpose" so that the cases on land rates and tax are not distinguishable in this case as well. Banks-Smith J treated them as not relevant to compensation (MR [665]-[693]) because there was in *McArthur River*, as there is in this case, no right to minerals, nor a right to compensation by reference to the value of the minerals.

10. The assertion that there was never private land in the Northern Territory with a fee simple right to minerals (unlike private land alienated in WA before 1 January 1899) is not supported by MR [138], [690]. In the Northern Territory, minerals were reserved in favour of the Crown by the *Northern Territory Crown Lands Act 1890* (SA) (s 8). Before then, at least from the enactment of the *Northern Territory Crown Lands Consolidation Act 1882* (SA) (s 6; also s 19), land was able to be demised including with rights to minerals. "Some early Crown grants of land in the [Northern] Territory did not contain a reservation to the Crown of the minerals" but this later changed including by force of the *Minerals (Acquisition) Ordinance 1953* (NT): G R Nicholson, "Legislative Regulation of Mining in the Northern Territory Some Constitutional and Legal Aspects" (1991) 10(3) AMPLA Bulletin 176, 177-178. That is, by 1953, pursuant to what is now the *Minerals (Acquisition) Act 1953* (NT) (s 3), all minerals, if not already the property of the Commonwealth, were acquired and vested absolutely in the Crown in right of the Commonwealth.

11. Regardless, nothing distinguishes the position as it presently applies with respect to the FMG tenements and the land the subject of *McArthur River*. In this case, there is no right to compensation by reference to mineral rights by force of s 51(1) and s 51(3) of the NTA; and s 123(1) of the MA 1978. The assertion in the last sentence of YPSS [20] ignores the limits on compensation imposed by these provisions applicable in WA.

B. CULTURAL LOSS

12. Re YPSS [22]: A relevant difference between the facts in *McArthur River* and the facts here is that the YP did not occupy the relevant area continuously (FSubs [76]-[77], [227]-[229]).

13. Re YPSS [23]: The argument that there is a "big difference" between *McArthur River* and the present case because there is "cultural loss consequential upon social disruption" is an argument that is against (not in favour of) the YP. As already submitted at the trial, no compensation is payable for the alleged "social disruption" (FSubs [15], [128]-[161], [474], [475]).

    (a) The alleged social disharmony is not an *effect* or *impact* on *native title rights and interests* within s 51(1) of the NTA in that it is not something that affects

the YP's connection to land: FSubs [15], [138]-[140], [474]. In YNAC's oral closing submissions, YNAC could not explain how the "split" is a matter that relates to the YP's native title rights and interests nor why it was asserted that FMG's conduct was the cause, even if were accepted that the split had caused deep and soul-wrenching disputes within the community (T1808.32-1817.15).

(b) The *grant* of the FMG tenements cannot be said to have *caused* the alleged division: FSubs [141]-[161], [475]. The YP's claim for compensation for the alleged social disharmony is not a claim for loss or damage arising from the *grant* of the FMG tenements. YNAC was refused leave to amend to make a claim that FMG's alleged conduct in the *pursuit* of its development of its mining operations is compensable: FSubs [15], [131].

(c) "Social disruption" in the MA 1978 is a reference to "dislocation". It does not refer to conflict or division: FSubs [15], [128]-[130], [474].

14. Re YPSS [24], [25], [26]: In YNAC's oral closing submissions:

(a) Senior Counsel confirmed that the YP were not seeking an additional amount for cultural loss by reason of the impact on the number of sites involved (T1768.15-1769.7; T1783.40).

(b) Senior Counsel accepted that YNAC was not claiming that FMG had deliberately caused "dissension", and that there was no suggestion that there was any illegal or unlawful conduct by FMG (T1808.7-1808.30). Senior Counsel also accepted that the process followed under s 18 of the *Aboriginal Heritage Act 1972* (WA) was not wrong in law and there had been compliance, even though WMYAC (who are also YP) had been involved (T1812.19-1813.3).

15. In the above circumstances, it cannot be said that the number of sites involved can change the compensation for cultural loss.

16. Re YPSS [27]: The NTA does not require consent to mining by the native title holder because, if there is no agreement following good faith negotiations, the NNTT can nevertheless decide that a mining tenement may be granted (FSubs [85]). Sec 51(1) and s 51(3) of the NTA do not provide extra compensation if there was no consent.

Dated: 17 April 2026

Brahma Dharmananda SC Tim Russell SC Stefan Tomasich Essie Dyer Amelia Ikin

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