

## NOTICE OF FILING

### Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	23/05/2025 9:56:30 AM AWST
Date Accepted for Filing:	23/05/2025 9:56:31 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.



# First Respondent's submissions in reply on the effect of the decision in *Commonwealth v Yunupingu* [2025] HCA 6

WAD 37 of 2022

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

## **YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC**

Applicant

## **STATE OF WESTERN AUSTRALIA and others**

Respondents

- 
1. These submissions are filed pursuant to Order 2 of the orders of Burley J dated 14 April 2025, and in reply to the submissions filed on behalf of the FMG Respondents on 16 May 2025 (**FMG Submissions**).
  2. The First Respondent adopts the summary in paragraphs [3] – [17] of the FMG Submissions of the High Court's decision in *Commonwealth v Yunupingu* [2025] HCA 6 (**Yunupingu**). The First Respondent agrees that the question as to whether an act subject to the *non-extinguishment principle*<sup>1</sup> (and which has no extinguishing effect) can nevertheless constitute an acquisition of property was not before, and was not decided by, the High Court in *Yunupingu*.
  3. In light of the decision in *Yunupingu*, the First Respondent no longer relies on paragraph [354] and the first four sentences in paragraph [355] of its written closing submissions filed on 13 December 2024. As to the fifth sentence in paragraph [355], the First Respondent now positively

---

<sup>1</sup> As defined in s.238 of the *Native Title Act 1993* (Cth).

---

Filed on behalf of:	State of Western Australia	Date	26 May 2025
Prepared by:	Alicia Warren / Lauren Italiano		
Law firm:	State Solicitor's Office		
Telephone:	(08) 9264 1188	Fax:	(08) 9264 1440
Email:	a.warren@sso.wa.gov.au / l.italiano@sso.wa.gov.au		
Address for service	David Malcolm Justice Centre, 28 Barrack St, Perth WA 6000		

submits that the High Court's decision in *Yunupingu* is not determinative of the issues in this case, for the reasons subsequently outlined in paragraph [355]. The First Respondent also continues to rely on the submission made by senior counsel for the First Respondent during closing addresses on 21 February 2025 at T1978:46-1979:20.

4. The First Respondent also agrees with paragraph [18] of the FMG Submissions and says further that the decision in *Yunupingu*, so far as it relates to the existence or extinguishment of a native title right to minerals, does not bear on the issues in the present case. Nor does it disturb the High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1 (**Ward**) on the effect of s.117 of the *Mining Act 1904* (WA).<sup>2</sup>
5. Relevantly, in *Yunupingu* it was common ground that s.107 of the *Mining Ordinance 1939* (NT), like s.117 of the *Mining Act 1904* (WA), had the effect of vesting full beneficial ownership of minerals in the Crown and, if valid, would have extinguished any native title rights to minerals that may have existed immediately prior to its enactment.<sup>3</sup> However, the Commonwealth asserted that s.107 of the *Mining Ordinance 1939* (NT) did not extinguish any native title rights to minerals as those rights had already been extinguished by the grant of a pastoral lease in 1903 by the State of South Australia under the *Northern Territory Land Act 1899* (SA).<sup>4</sup>
6. The High Court ultimately held that the reservation of minerals in favour of the Crown in the 1903 pastoral lease did not amount to an appropriation of rights to minerals by the Crown, but merely withheld those rights from the leaseholder. Accordingly, the pastoral lease in question did not operate to extinguish native title rights in respect of minerals.<sup>5</sup> However, importantly, none of the judgements in *Yunupingu* suggest that the reservation of minerals under the 1903 pastoral lease was analogous to the vesting of minerals in the First Respondent by s.117 of the *Mining Act 1904* (WA). Nor did they suggest that the treatment of s.117 of the *Mining Act 1904* (WA) in *Ward*, or the agreed effect of s.107 of the *Mining Ordinance 1939* (NT), was in error.<sup>6</sup>

---

<sup>2</sup> As to which see the First Respondent's written closing submissions filed on 13 December 2024 at paragraphs [207]-[211].

<sup>3</sup> See, for example, *Yunupingu* at [226], [234] (per Gordon J) and [390]-[391] (per Steward J). See also *Yunupingu v Commonwealth* (2023) 298 FCR 160 at [484]-[485].

<sup>4</sup> See, for example, *Yunupingu* at [85]-[86] (per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [107]-[109] (per Gordon J), [247]-[248] (per Edelman J), [322] and [326] (per Steward J).

<sup>5</sup> *Yunupingu* at [97] (per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [203], [219]-[220], [223] (per Gordon J) and [357], [362]-[363] (per Edelman J), although see also at [393]-[394] (per Steward J, in dissent on this point).

<sup>6</sup> For example, Steward J observed (at [391]) that the agreement as to the effect of s.107 of the *Mining Ordinance 1939* (NT) "was consistent with the conclusion of this Court in *Australia v Ward*, which, amongst other issues, addressed the effect of s 117 of the *Mining Act 1904* (WA)". Similarly, Gordon J (at [226] and [234]) accepted that property in all minerals was vested in the Crown by s.107 of the *Mining Ordinance 1939* (NT) and that the enactment of s.107 had the effect of extinguishing any native title rights to minerals.

7. On that basis, nothing in *Yunupingu* upsets the conclusion reached by the High Court in *Ward* that any native title rights and interests to minerals in the State of Western Australia (including iron ore) were wholly extinguished by the introduction of s.117 of the *Mining Act 1904* (WA), including any right to minerals that the Yindjibarndi People may have held.

Dated: 23 May 2025

A handwritten signature in blue ink, appearing to read 'Griff Ranson', written over a horizontal line.

Griff Ranson SC  
FOR: State Solicitor for Western Australia  
Solicitor for the First Respondent