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Yamatji Marlpa Aboriginal Corporation's Opening Submissions

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

WAD 37/2022

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC
Applicant
STATE OF WESTERN AUSTRALIA & ORS
Respondents

A Background

1. Yamatji Marlpa Aboriginal Corporation (ICN: 2001) (**YMAC**) is the native title representative body for the Pilbara region, in which the compensation claim is located. YMAC has statutory functions and powers under Part 11, Division 3 of the *Native Title Act 1993* (Cth) (**NTA**), including to facilitate and assist their constituents[1] with compensation claims.

2. To date, *Northern Territory v Griffiths* [2019] HCA 7; (2019) 269 CLR 1 (***Griffiths HC***), in which YMAC was an intervener, is the only fully litigated and successful native title compensation application brought under the NTA. *Griffiths HC* was largely concerned with the extinguishment of native title, rather than its impairment. In contrast, the determination of this application brought on behalf of the Yindjibarndi People will set a precedent applicable to compensation applications in respect of future acts consisting of mining tenements granted under the ***Mining Act** 1978* (WA). A very large number of such mining tenement grants have occurred, and are continuing to occur, within YMAC's representative body areas, particularly in the Pilbara.

3. In this context, YMAC is concerned with matters of legal principle, rather than matters of fact. As outlined in YMAC's *Amended Position on Points of Claim and Points of Response* (**YMAC Position**), a particular concern for YMAC is the proper construction

[1] As that term is used in s 203BF(2) NTA.

Filed on behalf of Yamatji Marlpa Aboriginal Corporation
Prepared by Colin McKellar
Law firm Yamatji Marlpa Aboriginal Corporation
Tel (08) 9268 7000 Fax (08) 9225 4633
Email cmckellar@ymac.org.au
Address for service Level 8, 12 The Esplanade, Perth WA 6000

and operation of various provisions of the NTA and the *Mining Act* relevant to determining claims to compensation.[2]

4. YMAC's pleadings also set out a generally applicable framework which it says, on the proper interpretation of the NTA and having regards to *Griffiths HC*, is open to the Court to apply in the assessment of a compensation entitlement, and in particular cultural loss, in the context of a claim based on the impairment of native title, rather than its extinguishment.[3] YMAC is not thereby seeking to prosecute a separate case to that of the Applicant in this proceeding. Rather, consistently with its statutory function, YMAC's interest is to seek to ensure that, in making a determination of compensation in this proceeding, the Court takes into account matters of statutory construction that may be of significance to YMAC's other constituents. YMAC otherwise supports the Applicant's claim to compensation, which is made on behalf of the Yindjibarndi People (who are also YMAC's constituents).

5. Pursuant to order 4 made 27 June 2023, YMAC's participation is (until further orders) limited to: (a) filing written submissions in accordance with the timetable for hearing, on matters arising from its pleadings to the extent to which those matters are not already addressed in written submissions of the Applicant; and (b) making oral submissions with the consent of all parties or with leave of the Court. In this document, where YMAC considers that the matters arising from its pleadings on a particular issue have already been substantially addressed in written submissions of the Applicant, YMAC states that it makes no opening submissions on the basis of order 4(a) made 27 June 2023.

6. On the basis of order 4(b) made 27 June 2023, these submissions are not an outline of submissions to be made orally. However, counsel for YMAC proposes to attend the hearing of oral opening submissions, so that they are available to assist the Court with any matters arising from these written submissions, if so requested.

7. YMAC's submissions address some matters arising out of the *Applicant's Further Amended Points of Claim* filed 5 July 2023 (**Applicant Points of Claim**), and the *First Respondent's Amended Points of Response* (**State Response**) and the *FMG Respondents' Further Amended Points of Response* (**FMG Response**), each filed 24 July 2023. YMAC did not consider its own pleadings, filed prior to the amended pleadings of the other parties, required consequential amendment to make such

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2 YMAC Position [7], [12], [18], [20], [23], [24(b)], [26], [30], [33], [34], [38], [40], [42], [44], [45], [47].

3 YMAC Position [38(a)(ii)], [40]-[41], [46], [48(b)].

submissions, and so no leave to amend was sought. However, to the extent any party disagrees, and considers any of the submissions made below require the pleadings to be amended, YMAC will apply for leave accordingly.

B An entitlement to claim compensation under the NTA

B1 The statutory scheme for compensation under the NTA for "future acts"

8. When first enacted in 1993, Part 2, Division 3 of the NTA allowed 'permissible future acts' to take place, such acts being ones that could be done over ordinary (freehold) title land, including the granting of mining interests. Registered native title holders and claimants were given 'the right to negotiate' for some permissible future acts, including relating to mining.

9. The *Native Title* ***Amendment Act 1998*** (Cth) entirely repealed and replaced Part 2, Division 3 of the NTA with a comprehensive scheme containing multiple subdivisions which address different 'types' of future acts. An overview of Part 2, Division 3 of the NTA is provided by s 24AA. Subdivisions A to N of Division 3 provide that certain future acts are valid, notwithstanding their effect on native title. Broadly speaking, where a future act is covered by one subdivision in Division 3, it is not covered by any of Subdivisions A to N that follow it: s 24AB(2). Sections 24FA to 24NA are part of a hierarchy; if an act is within an earlier provision, it cannot be in a later provision.[4]

10. Generally, whether or not native title holders are entitled to compensation in respect of a future act is determined by the Subdivision that covers that act. Subdivision H deals with 'Management of water and airspace'. If a future act is covered by Subdivision H, the native title holders are entitled to compensation for the act in accordance with Division 5: s 24HA(5).

11. Subdivision I of Part 2, Division 3 deals with 'Renewals and extensions etc.' Section 24IC NTA is concerned with an act which is 'a permissible lease etc. renewal'. The application of Subdivision I to the renewal or extension of term of a mining tenement depends upon the initial grant having been done on or before 23 December 1996, or the initial grant having been covered by Subdivision H: s 24IC(b). If a future act is covered by Subdivision I, the native title holders are entitled to compensation for the act in accordance with Division 5: s 24ID(1)(d).

12. Subdivision M of Part 2, Division 3 is concerned with acts passing 'the freehold test' as defined in s 24MB(1). This is broadly consistent with a 'permissible future act' under

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4 ***BHP Billiton*** *Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8; 258 FCR 521 at [29] (North, Dowsett and Jagot JJ).

the NTA as originally enacted. If a future act is covered by Subdivision M, the native title holders are entitled to compensation for the act in accordance with Division 5 *if* the conditions in s 24MD(3)(b) are satisfied.

13. Where Subdivision M applies to an act, the act is valid subject to Subdivision P: ss 24AA(5), 24MD(1). Subdivision P confers 'the right to negotiate', an overview of which is given by s 25 NTA, which relevantly provides that the right to negotiate applies to certain conferrals of mining rights: s 25(1)(a) NTA. Where Subdivision P applies as per s 26, native title holders and claimants are given a right to negotiate in respect of the creation of a right to mine. If the procedures in Subdivision P are not complied with, the act is invalid: s 28 NTA.[5] The right to negotiate since its enactment has been, and remains, an important part of the NTA's fabric.[6]

14. The scheme established by Part 2 Division 3 has been described as having a 'rule-like quality', and is closely related to the grant of exclusive rights for the exploitation of State resources. These matters guide how the Part 2 Division 3 provisions are to be interpreted and understood.[7]

C How is compensation to be determined for the effect of the grant of the FMG tenements?

C1 <u>The Part 2 Division 5 compensation provisions</u>

15. Section 51(1) provides the "entitlement to compensation", which is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on the native title rights and interests. Section 51(1) is the "core provision".[8]

16. Subsections (2) and (4) each provide principles or criteria that the Court "may" have regard to, when making the determination of the entitlement identified in s 51(1), if the compensable act falls within that subsection. Subsection (3) provides principles or

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5 *Harvey v Minister for Primary Industry and Resources* [2022] FCAFC 66; 401 ALR 578 at [49] (Jagot, Charlesworth and O'Bryan JJ).

6 *Charles, on behalf of Mount Jowlaenga Polygon #2 v Sheffield Resources Limited* [2017] FCAFC 218; 257 FCR 29 at [54] (North, Griffiths and White JJ). The *Amendment Act 1998* did not alter the underlying scheme of the NTA in relation to future acts: *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v State of Queensland* [1999] FCA 1633; 95 FCR 14 at [23] (Cooper J), upheld on appeal in *Lardil Peoples v Queensland* [2001] FCA 414; 108 FCR 453.

7 *Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia* [2020] FCAFC 64; 276 FCR 53 at [89]-[93] (Rares, White and Banks-Smith JJ).

8 *Griffiths HC* at [41] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

criteria that the Court "must" have regard to, when making the determination of the entitlement identified in s 51(1), if the compensable act falls within that subsection.[9]

17. Subsections 51(5) to (8) condition the Court's power when making a contested determination of compensation; the Court may only make a determination of monetary compensation, or a recommendation (but not a determination) for non-monetary compensation (if this has been requested by the compensation claimant). The Court's jurisdiction to determine non-monetary compensation is not so confined where agreement has been reached between the parties.[10]

18. YMAC submits that on the proper construction of s 51, the native title holders are, in all circumstances, entitled to be compensated on just terms for any loss, diminution, impairment or other effect of the act on their native title rights and interests. Regard is had to ss 51(2), (3) and (4) to determine the value of that compensation entitlement. None of ss 51(2), (3) or (4) have the effect of altering or diminishing the entitlement established by s 51(1). See further at [C4] below.

C2 Does the Mining Act provide for compensation to native title holders? [Issue 2]

C2.1 The provision made for compensation under the Mining Act [Issue 2]

19. YMAC makes no written opening submissions on the basis of order 4(a) made 27 June 2023.

C2.2 Consideration of the Mining Act's compensation provisions [Issue 2]

20. YMAC makes no written opening submissions on the basis of order 4(a) made 27 June 2023.

C3 Section 51(1) and 'just terms' compensation [Issue 1]

21. Section 51(1) NTA provides that an entitlement to compensation under any of Divisions 2, 2A, 2B, 3 or 4 of the NTA is an entitlement "on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests".

22. The State contends that any entitlement to compensation for cultural loss under the NTA (the existence of which is denied by the State) is determined by reference to the Yindjibarndi People "as a whole". Cultural loss is said to be a "group-felt loss"; an

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9 YMAC Position [34], referring to State Response [247], [251], [254]-[257] and FMG Response [39] and [43].

10 *Ward, on behalf of the Pila Nature Reserve Traditional Owners v State of Western Australia* [2022] FCA 689 at [50] (Colvin J).

entitlement to compensation for cultural loss is said to require evidence of a "group-felt sense of loss".[11]

23. YMAC submits that the entitlement to compensation for cultural loss is not so confined.[12] The entitlement to compensation is a communal or group one.[13] However, this does not mean that a loss must have been 'group felt' to have been experienced by the group, or to be a loss of the group.

24. Native title rights and interests may, within a communal or group title, be distributed on an intramural basis, such that some native title holders have particular knowledge of, and connection to, particular parts of the Claim Area, including due to their age, gender or ritual status.[14] For example, if a senior initiated man has knowledge of a particular sacred site that a young uninitiated boy does not, and that site is destroyed, the senior man is likely to feel the loss associated with that destruction to a greater extent than the young boy, who may not be aware of, or feel, the loss at all. However, the young boy does not need to have felt the loss, in order for the group to have suffered the loss. Destruction of the site causes intergenerational and ongoing loss; what the younger generations, and the future generations, inherit from their predecessors is a permanently diminished connection.[15]

25. Native title holders are entitled to compensation on just terms for "*any* loss, diminution, impairment or *other effect*" on their native title rights and interests: s 51(1). While proof of the loss does not require a focus on the pain and suffering of particular native title holders,[16] nor does it require evidence that a sense of loss is felt equally, or indeed at all, by *all* members of the group (which seems to be what the State means by 'group felt'). To confine the compensation entitlement to 'group-felt' losses is to ignore the plain words of s 51(1).

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11 State Response [280], [285], [287], [289].

12 YMAC Position at [40(d)].

13 *Griffiths HC at* [229] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

14 *Griffiths HC* at [230] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Northern Territory v Alyawarr* [2005] FCAFC 135; 145 FCR 442 at [9], [79]-[81], [111], [151] (Wilcox, French and Weinberg JJ). The native title of the Yindjibarndi People is a communal title: ***Warrie*** *(formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803; 365 ALR 624, [40]-[41]; *TJ (on behalf of the Yindjibarndi People) v State of Western Australia (No 2*) [2015] FCA 1358.

15 *Griffiths HC* at [230] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

16 *Griffiths HC* at [323] (Edelman J).

C4 Section 51(3) and the principles or criteria for determining compensation under the Mining Act [Issue 3]

26. YMAC submits that the *entitlement* to compensation in respect of the FMG tenements is provided by the relevant section within Part 2 Division 3 (e.g. s 24MD(3)) read together with s 51(1) NTA i.e. compensation on just terms for any loss, diminution, impairment or other effect on the native title rights and interests. The *principles or criteria* for determining the compensation entitlement which the Court is required ("must") to apply, whether or not those principles or criteria are on just terms, are supplied pursuant to s 51(3). For the following reasons, s 51(3), on its proper construction and in the context of the *Mining Act*, does not alter or qualify the s 51(1) entitlement to compensation.[17]

27. Section 51(3) provides that if the compensable act is not the compulsory acquisition of native title, and the *similar compensable interest test* is satisfied in relation to the act, the Court must apply the principles or criteria set out in the law mentioned in s 240 in determining compensation. The *similar compensable interest* test is satisfied if the native title concerned is onshore, and compensation would be payable under any law if the native title holders instead held freehold to the land concerned: s 240.

28. It is agreed that the similar compensable interest test is satisfied.[18] The law mentioned in s 240 for the claimed compensable acts (**FMG tenements**) is s 123 of the *Mining Act*.[19] Section 123(4) of the *Mining Act* provides a list of matters as the principles or criteria for determining compensation. Section 123(4) is subject to ss 123(1) and 124(1)[20] but is otherwise inclusive. Consequently, in determining the compensation entitlement in respect of the FMG tenements under s 51(1) NTA, the Court is required by s 51(3) NTA to assess the entitlement by taking into account any of the matters listed in s 123(4) of the *Mining Act*, including being deprived of the possession or use of the land; damage to the land or any part of it; and social disruption.

29. Section 51(1) is expressed as being "subject to" s 51(3) NTA. This does not mean there is necessarily any conflict, or any particular conflict, between the two provisions;

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17 YMAC Position at [42(a)], [44(b)], [45].

18 Applicant Points of Claim [19]; State Response [207]; FMG Response [19]; and YMAC Position [23(k)].

19 YMAC Position at [45(c)(i)].

20 It is also stated to be subject to other provisions in ss 123-125 of the *Mining Act*, however those other provisions relate to land tenures other than freehold. As the similar compensable interest test under the NTA equates native title with freehold, those other provisions are not relevant to assessing compensation for acts that affect native title.

"subject to" simply makes clear which section prevails in the event of a conflict.[21] The text of s 51(1) makes clear that s 51(1) always applies, because it supplies the entitlement to compensation, whereas s 51(3) merely directs what principles or criteria must be applied in determining that compensation. In this case, no conflict arises between ss 51(1) and 51(3) because the principles or criteria in *Mining Act* s 123(4) are consistent with an entitlement to compensation on just terms, and in any event, are inclusive not exhaustive.[22]

30. Whether or not the matters in *Mining Act* s 123(1) are 'principles or criteria' of the kind referred to in s 51(3) is unnecessary to decide. In relation to s 123(1)(a), the context of this claim (and any claim for compensation for a future act) is that the native title holders did not permit entry onto any land for mining purposes. In relation to s 123(1)(b), there is no native title right to the minerals.[23] In respect of s 123(1)(c), s 51(5) NTA requires a determination of a specified amount of compensation.[24] In relation to s 123(1)(d), *Griffiths HC* confirms that loss or damage to native title can be assessed according to common law principles in monetary terms, including cultural loss.

31. Alternatively, if (contrary to the above submissions) s 51(3) NTA does limit the entitlement "on just terms" under s 51(1), s 51(3) only applies to the economic loss component of the entitlement. Section 51(3) is, like s 51A, concerned with equivalency between freehold title and native title. Section 51A entails consideration of what would be payable if the act was done in relation to a freehold estate, and ss 51(2) and (4) are consistent with equating native title with freehold for the purposes of compensation.[25] Section 51(3) NTA directs the Court to apply the principles or criteria found in the law mentioned in s 240, which defines *similar compensable interest test*, which is satisfied if the native title concerned relates to an onshore place, and compensation would – apart from the NTA – be payable under any law for the act on the assumption that the native title holders instead held ordinary title. Sections 51(3) and 51A are to be read as providing that the compensation payable to the native title holders for a grant of a mining tenement which could have been granted over freehold is to be assessed using

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21 *Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd* [2010] WASCA 132; 41 WAR 134 at [52]-[53] (McLure P, Owen and Buss JA agreeing at [73], [74]).

22 YMAC Position at [45(c)].

23 Paragraph 5(c)(i) of the determination in *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia (No 2)* [2017] FCA 1299; 366 ALR 467 (***Warrie No 2***).

24 Subject to the power of the Court to make a recommendation for non-monetary compensation under ss 51(6)-(8) NTA.

25 *Griffiths HC* at [52] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

the same principles or criteria for determining the compensation payable to the holder of a freehold title. However native title has a spiritual or cultural element which is not a component of a freehold title. Accordingly, native title holders are entitled to compensation for economic loss *together with* additional compensation for cultural loss.[26] As the principles or criteria in the law mentioned in s 240 relate to freehold, in respect of which there cannot be cultural loss, s 51(3) applies only to the assessment of the economic loss component of native title compensation. The entitlement under the NTA in respect of cultural loss remains an entitlement on just terms for any loss, diminution, impairment or other effect of the act on the native title.

32. Furthermore, insofar as s 51(3) NTA may limit the just terms nature of the entitlement in s 51(1), it does so only to the extent that the compensation entitlement provided by s 123 of the *Mining Act* accords with the entitlement under s 51(1) NTA. The entitlement under s 123 of the *Mining Act* for the owner of private land is to compensation:

(a) for "all loss and damage suffered or likely to be suffered… resulting or arising from the mining": 123(2);

(b) for injury or depreciation in value, by the mining or any right of way, to land which is adjoining to or in the vicinity of land where mining takes place: s 123(5); and

(c) for damage caused, by mining operations, to land within a mining tenement's boundaries (as distinct from land where mining takes place): s 123(6).

33. Section 123 of the *Mining Act* does not provide an entitlement precisely equivalent to the s 51(1) NTA entitlement for "loss, diminution, impairment" of the native title. The *Mining Act* entitlement is equivalent only to "or other effect of the act", because it is directed towards the conduct of activities pursuant to the grant, not the effects which arise from the grant itself. The entitlement in relation to the "loss, diminution, impairment" of the native title is unaffected, and remains an entitlement on just terms.

34. Section 51(3) is also subject to s 53(1)(a) NTA.

C4.2 Is there a s 109 inconsistency between s 123(1) of the Mining Act and the NTA? [Issue 3]

35. YMAC makes no written opening submissions under this heading on the basis of order 4(a) made 27 June 2023.

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[26] *Griffiths HC* at [54] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); YMAC Position at [45(d)].

C4.3 Does 'social disruption' in s 123(4)(f) of the Mining Act extend to and include social disharmony and conflict within the Yindjibarndi community? [Issue 3]

36. YMAC makes no written opening submissions under this heading on the basis of order 4(a) made 27 June 2023.

C5 Entitlement to compensation under s 10(1) of the RDA [Issue 11]

37. YMAC makes no written opening submissions under this heading on the basis of order 4(a) made 27 June 2023.

C6 The effect of s 51A of the NTA and the freehold cap [Issue 8]

38. YMAC submits that s 51A, on its terms, has no application to this proceeding, as none of the Compensable Acts have extinguished all (or any) native title rights and interests.[27]

39. Alternatively, if – contrary to the provision's plain text – s 51A applies, it is only relevant to compensation for economic loss and does not apply to cultural loss.[28] Furthermore, in a case such as this, s 51A does not cap the actual amount of compensation payable for economic loss. Section 51A in effect equates native title with freehold. Compensation payable to the holder of freehold under s 123 of the *Mining Act* is not capped at any particular amount such as freehold value. Consequently, even if s 51A has some application, it does not reduce the amount of compensation to which the native title holders are entitled.

40. Section 51A also does not apply to the award of interest, as interest does not form part of the compensation.[29]

41. See also [45] below.

C7 Whether grant of lease resulted in acquisition of property; entitlement under s 53(1) of the NTA [Issue 9]

42. A mining lease granted under s 71 of the *Mining Act* conveys to the tenement holder a right to exclude others, including native title holders, from the area of that mining lease in accordance with the *Mining Act* and any conditions on the particular mining lease: s 85. That right is not an unqualified right to exclude for any or no reason, nor a right

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27 *Griffiths HC* at [48], [50] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); YMAC Position [42(b)].

28 *Griffiths HC* at [54] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

29 *Griffiths HC* at [151] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

of exclusive possession.[30] The mining lease conveys to the tenement holder exclusive rights for mining purposes in relation to the land over which the lease was granted, empowering the tenement holder to exclude others while exercising their rights to engage in mining operations (a very large expression) and other actions necessary for the meaningful exercise of the right to engage in mining operations. Such a right is inconsistent with any native title right to control access[31] which is a right of a proprietary nature.[32]

43. Those mining leases that fell partly or wholly within the Exclusive Area,[33] upon grant, wholly suppressed the native title right of the Yindjibarndi People to exclude the tenement holder(s) from the Exclusive Area: ss 24MD(a), 238 NTA. The effect of the grant – together with the operation of ss 24MD(3)(a) and 238 NTA – was to acquire the right to control access, to the advantage of the tenement holder, for the duration of the term of the tenement.[34]

44. Native title holders are entitled to the protection of their native title rights, and the country over which they hold those rights, as against persons without any lawful entitlement to enter or conduct activities on that country.[35] Upon the grant of the mining leases, the tenement holders acquired an entitlement to exercise and enjoy the rights associated with leases, without interference from others, and the subsisting native title was made vulnerable to interference from the tenement holders acting in accordance with the rights granted to them by the leases.[36] Accordingly, the grant of the mining leases resulted, in both the Exclusive Area and the Non-Exclusive Area,[37] in the native title holders' entitlement to exercise and enjoy their native title rights and interests without interference by others being subjugated to the rights of the tenement holder: ss 24MD(3)(a) and 238 NTA.

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30 *Western Australia v Brown* [2014] HCA 8; 253 CLR 507 at [46] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

31 *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 (***Ward HC***) at [308] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

32 *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75 at [444] (Mortimer CJ, Moshinsky and Banks-Smith JJ).

33 Defined at YMAC Position [2(h)].

34 YMAC Position at [27(b)].

35 *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1 at 61 (Brennan J), at 113 (Deane and Gaudron JJ); *Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96 at [33], [39] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); and *Ward HC* at [291].

36 YMAC Position at [27(b)].

37 Defined at YMAC Position at [2(r)].

45. YMAC's submission at [C6] above is that s 51A NTA does not apply in these proceedings. In the alternative, if ss 24MD(3)(b) and 51(1) confer an entitlement to compensation on just terms, but s 51A(1) limits the compensation such that it is not on just terms, then for the reasons immediately above YMAC submits that s 53 is engaged on the basis that a paragraph 51(xxxi) acquisition other than on just terms has been effected by s 51A. Section 51A(2) expressly recognises the operation of s 53 in respect of s 51A(1). If s 53 is engaged, the native title holders are entitled to receive a 'top up' of the compensation so that just terms are afforded.

C8 <u>The construction and operation of s 49 NTA [Issue 6]</u>

46. FMG Response [15(c)] pleads the words of s 49(a) NTA, but not their effect. Consequently, YMAC Position [20(b)] denies a possible construction of s 49(a) which would deprive native title holders other than the Yindjibarndi People of any compensation entitlement in respect of the FMG tenements, to the extent they fall partly outside of the Claim Area.

47. Section 49(a) NTA provides that compensation is only payable once under the NTA for acts that are essentially the same. The Explanatory Memorandum in relation to clause 47 of the *Native Title Bill 1993* (Cth) (which became s 49) explains the effect of that provision as being that "*where a series of acts has an effect on native title, compensation is payable only once for that series of related acts. Compensation is not payable in relation to each act*". That is consistent with s 44H NTA, which says compensation is payable for the grant of a lease but not separately for each action taken under the lease. Another analogous situation is the creation of a reserve and then use of the reserve.

48. A further example is that, where the creation and vesting of a reserve involves multiple different acts done on a single day with a view to achieving a single outcome, those acts are "essentially" the same. Consequently, if the creation of the reserve caused partial extinguishment of native title, and the vesting (on the same day) caused the total extinguishment of all remaining native title, the compensation for those acts can be assessed as if there was a single act, resulting in the total extinguishment of all native title.[38]

49. Another possible operation of s 49(a) is that it prevents a single group of native title holders making multiple claims to further compensation once the entitlement to

[38] See *Ward, on behalf of the Pila Nature Reserve Traditional Owners v State of Western Australia* [2022] FCA 689 at notation 2 to the orders made 15 June 2022 in WAD 222/2020 and notation 5 to the orders made 15 June 2022 in WAD 174/2021.

compensation of that native title holding group in respect of a particular future act has been determined (unlike what is contemplated by, for example, s 123(8) of the *Mining Act*).

50. Thus s 49(a) reflects the general principles that: compensation to particular affected native title holders should be assessed 'once for all';[39] and that native title holders should not be able to recover more than their actual loss.[40] The section is a general safeguard given the novel nature of native title and the unique legislative scheme under the NTA. This understanding of the 'mischief' to which s 49(a) is directed, is supported by the Parliamentary debates.[41]

51. However s 49(a), properly construed, does *not* mean that where a future act is done over an area of land and waters subject to two or more adjoining native titles, the Court can only determine the compensation payable in respect of the whole of the future act once, notwithstanding a claim to compensation has only been made by one of the native title holding groups.

52. For example, in respect of M47/1409-I, which falls partly in the determination area of the Yindjibarndi People and partly in the native title determination area of the Eastern Guruma people, s 49(a) does *not* have the consequence that a determination that compensation is payable to the Yindjibarndi People for the grant of M47/1409-I to the extent it is within the Claim Area the subject of this proceeding results in the Eastern Guruma people being unable to claim, or have determined, compensation in respect of that portion of the tenement that falls within their native title area. That is, any determination of compensation in this proceeding in respect of M47/1409-I is only in relation to the effect of that part of M47/1409-I that affects the Yindjibarndi native title, and will not deprive the Eastern Guruma native title holders of an entitlement to compensation in respect of the part of M47/1409-I that affects their native title.

53. If, contrary to YMAC's submissions above, s 49(a) NTA were construed in that manner, the compensation regime would be unworkable. A compensation claim in respect of one determination area could involve multiple acts which overlapped adjoining areas (including areas where there was not yet a determination of native title), thus requiring the adjoining native title holders (or claimants) to bring their own compensation claims,

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39 *Blair v Curran* [1939] HCA 23; 62 CLR 464 at 531–2; *Sutherland Shire Council v Heyman* [1985] HCA 41; 157 CLR 424 at 491-493 (Brennan J).

40 *Manser v Spry* [1994] HCA 50; 181 CLR 428 at 434-435; *Fightvision Pty Ltd v Onisforou* [1999] NSWCA 323; 47 NSWLR 473 at [276].

41 Regarding what was clause 47 of the Native Title Bill 1993. See Hansard, Senate, 18 December 1993, pp 5171, 5174, 5199-5200, 5205; Hansard, Senate, 21 December 1993, p 5357.

which could then trigger a domino effect.[42] A further example would be a legislative future act that applied throughout the whole State. Parliament should not be taken to have intended that once one native title holding group obtained a determination of compensation, s 49(a) would deprive all other affected native title holders of any entitlement to compensation in respect of the same act.

54. YMAC's construction is also consistent with the requirement in the NTA that a compensation application specify an area of land the subject of the application, which area is then the subject of the notification regime under the NTA.[43]

D Compensation payable by the State or FMG Respondents [Issue 10]

55. In summary, YMAC's submissions[44] are that:

(a) if (which is denied) the grants of the Water Management Miscellaneous Licences are not covered by s 24MB(1) NTA, but are covered by s 24HA(2) NTA, then ss 24HA(5) and 24HA(6)(b) NTA apply and s 125A of the *Mining Act* does not apply, such that the State is liable to pay the compensation;

(b) if any renewal or extension of term of any of the FMG tenements is a future act that is not covered by s 24MB(1) NTA, but is covered by s 24IC (or s 24IB) NTA, then ss 24ID(1)(d) and 24ID(2)(b) NTA apply and s 125A of the *Mining Act* does not apply, such that the State is liable to pay the compensation in respect of that renewal or extension;

(c) if any renewal or extension of term of any of the FMG tenements is a future act that is covered by s 24MB(1) NTA, then the conditions in s 24MD(3)(b) NTA are satisfied and s 24MD(4)(b)(i) NTA and s 125A of the *Mining Act* each apply, such that the FMG respondents are liable to pay the compensation in respect of that renewal or extension.

56. The basis for these submissions is below.

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42 This potential complexity was noted in *Drury on behalf of the Nanda People v State of Western Australia* [2020] FCAFC 69; 276 FCR 203 at [86] (Mortimer and Colvin JJ); see also [197] (White J in dissent).

43 See NTA s 61(1); ss 62(1)(b), (2)(a) and (b), (3)(b), (5)(b); *Native Title (Federal Court) Regulations 1999* (Cth) Form 4 Schedules B and C; *Saunders v Queensland (No 2)* [2021] FCA 190 at [76]-[85] (Rangiah J); *Davey on behalf of the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples v Northern Territory of Australia* [2023] FCA 303 at [20]-[37], [75] (Banks-Smith J).

44 In response to Applicant Points of Claim [30]-[31A]; FMG Response [30]-[31A]; and State Response [237]-[238A].

D2 Are the Water Management Miscellaneous Licences covered by Subdivision H or Subdivision M of Part 2 Division 3 of the NTA? [Issue 10]

57. The miscellaneous licences identified by FMG as Water Management Miscellaneous Licences (**WMMLs**) at FMG Response [13(e)] are said by FMG to be valid *future acts* pursuant to s 24HA(3) NTA. This is denied by YMAC.[45]

58. FMG says that if the WMML grants were future acts covered by s 24HA(2) NTA, then the Applicant is entitled to compensation in respect of the WMML grants pursuant to s 24HA(5), in accordance with Part 2, Division 5 NTA.[46] That entitlement is an entitlement against the State: s 24HA(6). If the WMML grants are covered by s 24HA(2), they will not be covered by s 24MB.[47] So much is agreed.[48]

59. However contrary to FMG Response at [16(d)(ii)] and [17(b)], for s 24HA(2) to apply it is not sufficient for the future act itself to relate to the management or regulation of surface and subterranean water (**water management**); rather, the WMMLs must each have been granted *under legislation* that relates to water management. That is, what must be characterised for the purposes of s 24HA(2) is not the licence, but the legislative provisions which authorise its grant.

60. Pursuant to s 91(1) of the *Mining Act*, a miscellaneous licence may only be granted for one or more prescribed purposes, which must be directly connected with mining. The purposes are prescribed in regulation 42B of the ***Mining Regulations*** *1981* (WA). Characterisation of the legislative provisions pursuant to which the WMMLs were granted for the purposes of s 24HA(2) requires, firstly, identification of the purpose(s) of each WMML, and secondly, identification of the particular legislative provision(s) that permit a grant for the purpose(s).

61. As to the first step, Part C1.2 of the State Response accurately sets out the prescribed purposes for which each WMML was granted, except that the purposes for L47/362 and L47/363 appear to have been transposed.[49] None of the WMMLs were granted for purposes relating only to water management; each were also granted for purposes

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45 YMAC Position [18].

46 FMG Response at [16(f)(i)]; Applicant's *Reply to FMG Respondents' Further Amended Points of Response*, filed 21 July 2023 at [2].

47 FMG Response at [16(a)-(c)] which relies upon ss 24AA(4)(e), (j) and 24AB(2) NTA.

48 Applicant Points of Claim [30]-[31A]; FMG Response [30]-[31A]; and State Response [237]-[238A].

49 See State Response at [84(b)] and [88(b)] as against items 3 and 4 in the table from YMAC Position at [18(b)] and paragraphs [37] and [48] of the affidavit of David Crabtree made 16 June 2023 and filed 6 July 2023.

prescribed by one or more of the following paragraphs of reg 42B: (a), (c), (d), (e), (f), (g), (k), (n), (p), (q), (u), (v), (x).

62. As to the second step, what is meant by 'legislation' in s 24HA(2) NTA is the specific legislative provisions which authorise the grant of the future act.[50] For the purposes of ascertaining the application of s 24HA(2) to a grant, the relevant legislative provisions pursuant to which the grant is made must relate to water management. Thus the grant of a miscellaneous licence solely for the purpose 'search for groundwater' is an act covered by s 24HA(2), on the basis that s 91(1) of the *Mining Act* and reg 42B(ia) of the *Mining Regulations* are, together, legislation that relates to water management, as provisions which authorise the grant of the licence pursuant to which the licence holder may search for groundwater.[51]

63. However s 24HA(2) does not apply to a future act where *only some* of the legislative provisions authorising the grant of the future act relate to water management, i.e. where the licence is granted under legislation that only partly relates to water management. For example, a miscellaneous licence granted for the purpose of 'search for groundwater' *and* for the purpose of 'road' is not a future act subject to s 24HA(2), because reg 42B(a) of the *Mining Regulations* which — together with reg 42B(ia) – authorises the grant does not relate to water management. Similarly, none of regulations 42B(a), (c), (d), (e), (f), (g), (k), (n), (p), (q), (u), (v), (x) are a legislative provision which relates to water management.

D3 <u>The construction and operation of s 125A of the Mining Act [Issue 10]</u>

64. To the extent that each of the compensable acts was a future act for which the Yindjibarndi People are entitled to compensation in accordance with s 24MD(3)(b) NTA, s 24MD(4)(b)(i) provides that the Yindjibarndi People may recover the compensation from the State, or if a law of the relevant State or Territory provides that a person other than the Crown in any capacity is liable to pay the compensation, that person.

65. Section 125A of the *Mining Act* is a law of the kind referred to in s 24MD(4)(b)(i) NTA.[52] The effect of s 125A of the *Mining Act* is that, to the extent that any of the compensable acts are subject to s 24MD(3)(b) NTA, the FMG Respondent that is the holder (or last holder) of the relevant mining tenement is liable to pay the compensation.

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50 *BHP Billiton* at [57] (North, Dowsett and Jagot JJ).

51 *BHP Billiton* at [62] (North, Dowsett and Jagot JJ).

52 YMAC Position at [28], [30(e)].

66. An exception is that if, at the time of the compensation determination, the relevant FMG Respondent is unable to pay the compensation to which the native title holders are entitled, then the State remains liable to pay the compensation entitlement. Section 24MD(4) NTA says that, for acts attributable to the State, the native title holders "may recover" the compensation to which they are entitled pursuant to s 24MD(3)(b) from the persons identified in subsection (b). Subsection (b)(i) says that where a law of the State "provides" that "a person" other than the Crown in any capacity is liable to pay the compensation, the native title holders may recover the compensation from that person. If, for the purposes of s 125A of the *Mining Act*, there is no person who meets the description in either subsection (a) or (b) of s 125A who can pay the compensation, then s 125A has not provided a person from whom the native title holders may recover the compensation. Further or alternatively, s 125A would then be inconsistent with the NTA in its operation and effect because in practical terms it would result in there being no entitlement to compensation, contrary to s 24MD(3) NTA. Consequently, in such a situation, s 24MD(4)(b)(ii) NTA applies, and the native title holders may recover the compensation from the State.

67. This construction of s 24MD(4)(b) NTA and s 125A of the *Mining Act* is consistent with the Minister's second reading speech of the Bill introducing s 125A into the *Mining Act*, to which the Court may have regard,[53] in which the Minister said: "This legislation seeks to make the mining company responsible for the payment. However, if the mining company no longer exists, the State remains liable to pay under the Native Title Act". It is also consistent with the general presumption that legislation does not authorise interference with property rights without affording compensation, and with the duty of governments in relation to Aboriginal people in the native title context, particularly as the party to whom the grant of future acts is attributable.[54]

68. The alternative construction (i.e. that by enacting s 125A the State ceases to be liable to pay compensation in any circumstances) would give rise to a potential for native title holders to be left uncompensated for the effects of the grant of a mining tenement on their native title including, for example, where a miner transferred the relevant tenement into a company with no assets shortly before the tenement expired or was surrendered before the Court made a compensation determination. Such a result would be unjust

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53 Section 19(2)(f) of the *Interpretation Act 1984* (WA).

54 See generally *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 especially at [365] (Callinan J); *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 at [17], [20], [22], [47] (Jagot J); *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75 at [455] (Mortimer CJ, Moshinsky and Banks-Smith JJ).

and capricious, particularly in circumstances where the State is responsible for the tenement's grant, and the tenement may well have been granted without the native title party's agreement and/or over their objections.[55]

69. YMAC anticipates the issue of impecunious or defunct (former) tenement holders may arise regularly in the regions for which it is the representative body. It is not submitted that any of the FMG Respondents would fail, or be unable, to pay any compensation determination for which they are found liable. Rather, YMAC makes the above submissions as the Court is asked to determine the construction and operation of s 24MD(4)(b) NTA and s 125A of the *Mining Act*.[56]

D4 Is s 125A inconsistent with the NTA and therefore invalid because of s 109 of the Constitution?

70. Except to the extent submitted in paragraph 66 above, YMAC makes no written opening submissions under this heading on the basis of order 4(a) made 27 June 2023.

E The claimed loss, diminution, impairment or other effect on the native title rights and interests [Issue 7]

E1 The effect of the grants of the FMG tenements on the native title rights and interests [Issue 7]

71. YMAC makes no written opening submissions under this heading on the basis of order 4(a) made 27 June 2023.

E2 Is there an entitlement to compensation for the effect of the grants of the FMG tenements on a native title right of exclusive possession in the Exclusive Area? [Issue 5]

72. YMAC submits that, for acts done in the Exclusive Area, the Yindjibarndi People are entitled to compensation for any loss, diminution, impairment or other effect of the acts on the native title rights and interests described in paragraph [4] of the Determination, being the right to possession, occupation, use and enjoyment of the Exclusive Area to the exclusion of all others (**exclusive native title**).

73. This is because any prior *extinguishment* of native title rights and interests in relation to the Exclusive Area is to be disregarded for the purposes of a determination of

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55 *Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors* [2017] VSCA 194; 223 LGERA 135 at [112], [153], [157]; ss 24MD(4)(b), 28, 32, 35, 38, 41 NTA.

56 Applicant Points of Claim [30]-[31]; FMG Response [30]-[31]; and State Response E1.2.1, [236]-[238A].

compensation for a future act done in the Exclusive Area, by operation and effect of ss 47A and 47B NTA. The effect of ss 47A and 47B is that the exclusive native title has always existed in the Exclusive Area, subject to the application of the non-extinguishment principle to any prior interests which existed in the Exclusive Area: ss 47A(3) and 47B(3) NTA.[57] Alternatively, the exclusive native title has existed in the Exclusive Area since 9 July 2003, and each one of the acts for which compensation is claimed was done after 9 July 2003.[58]

74. The relevance of s 47B NTA in the context of a compensation claim was addressed in *Griffiths v Northern Territory of Australia* [2014] FCA 256 (***Griffiths 2014***). The compensation claim in *Griffiths* included areas where native title had been found to exist and to be exclusive of other interests on the basis of s 47B NTA: *Griffiths 2014* at [12]. At [67]-[77] of *Griffiths 2014*, Mansfield J set out why s 47B NTA "does not apply to an application for the determination of compensation for the extinguishment, whether partial or title [sic – total], of native title rights and interests". Broadly, his Honour's reasoning was:

(a) there is a distinction between an application to determine native title, and an application to determine an entitlement to compensation;

(b) there is a purposeful distinction between s 47 and s 47B, noting that s 47(1)(a) refers to "an application under section 61 is made in relation to an area" (which would include a compensation application), while s 47B(1)(a) uses the phrase "a claimant application is made in relation to an area" (as does s 47A(1)(a)), suggesting that s 47B has a deliberate and narrower scope than s 47. The phrase "a claimant application is made" in s 47B(1)(a) constitutes qualifying words, carefully selected, which confine the application of s 47B;

(c) the statutory pre-conditions required by s 47B are not met where the application is for compensation, as distinct from an application for the determination of native title (a 'claimant application');

(d) the contrary construction "may produce apparently idiosyncratic outcomes" by allowing for an approved determination of native title unaffected by prior extinguishment through s 47B *and* a determination of compensation for the effects of acts upon those native title rights and interests also unaffected by any extinguishment by prior interests. This "would result in the claim group

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57 YMAC Position [12(f)(i)].

58 YMAC Position [12(f)(ii)]; Attachment I to the Form 4.

recovering twice for the one loss, albeit there is scope to adjust the level of compensation" (at [73]).

75. Mansfield J's ruling in respect of the relevant claimed acts, as outlined at [9] of *Griffiths v Northern Territory of Australia (No 2)* [2015] FCA 443 (***Griffiths 2015***), was that:

(a) Section 47B does not apply to an application for the determination of compensation. As such prior partial extinguishment by the grant of pastoral leases is not to be disregarded.

(b) At the time of the later claimed compensable acts, exclusive native title was not "revived" and the relevant native title interests were non-exclusive.

(c) Consequently, acts 37, 38 and 39 (grants of grazing licences) had no greater effect than the historic pastoral leases and were not compensable. The appropriate order would be for dismissal of the compensation claim in relation to those three acts.

76. The decision that s 47B NTA does not apply to a compensation claim also led Mansfield J to decide in respect of a fourth act that, notwithstanding a determination that native title existed in the area of act 34 on the basis of s 47B, for the purposes of the compensation application, act 34 was to be treated as a previous exclusive possession act and as extinguishing non-exclusive native title at the time of the grant, such that compensation was payable: [15] of *Griffiths 2015*; order [1(6)] at Annexure A to *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900; 337 ALR 362 (***Griffiths TJ***).

77. A single judge of this Court should follow an earlier decision of another single judge of the Court unless persuaded that it is plainly wrong.[59] Respectfully, YMAC submits that the aspects of *Griffiths 2014*, *Griffiths 2015* and *Griffiths TJ* identified at paragraphs 74-76 above are plainly wrong.

78. The consequence of meeting the pre-conditions in ss 47A(1) or 47B(1) is that "any extinguishment" must be disregarded. Those provisions concern the recognition of native title. However, an entitlement to compensation under s 51(1) NTA is not merely compensation for the withdrawal of recognition by the creation of prior inconsistent interests (i.e. extinguishment), but rather for "any loss, diminution, impairment or other effect" on the native title rights and interests.[60] Restoration of the previously

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[59] *AVN20 v Federal Circuit Court of Australia* [2020] FCA 584 at [104] (Kenny J) and the cases cited therein.

[60] This is consistent with the operation of the non-extinguishment principle (ss 47A(3)(B), 47B(3)(b), 238 NTA) where the distinction is drawn between the existence of inconsistent rights, and the enjoyment and exercise of inconsistent rights.

extinguished native title through ss 47A or 47B NTA does not necessarily fully compensate for the effects of an extinguishing grant, including the dispossession suffered by the native title holders between the time of the grant and the time of the restoration of the native title, or the effects of activities undertaken during that time. Further, restoration of native title through ss 47A or 47B NTA is not compensation for a future act done post-restoration, particularly when there is no relationship between the earlier extinguishing act and the later future act.

79. Respectfully, Mansfield J also appears to have wrongly assumed that what was sought – or what was required – was a fresh application of s 47B NTA to the compensation application, rather than compensation for effects of compensable acts on the full extent of the rights that had already been determined as a result of s 47B NTA. On a proper analysis, the conditions in s 47B NTA did not need to be met, but rather the rights as determined simply relied upon (retrospectively as well as prospectively).

80. Justice Mansfield's ruling regarding s 47B was not directly challenged on appeal in *Northern Territory of Australia v Griffiths* [2017] FCAFC 106; 256 FCR 478 (***Griffiths FC***). The Full Court did consider the operation of s 47B in respect of interest, in response to the Commonwealth's contention that interest should not be payable in respect of the s 47B area beyond the date of the native title determination. The Full Court accepted the Commonwealth's argument, finding that from the making of the native title determination the exclusive native title rights and interests in the relevant area were recognised, and *from that date* the claim group ceased to suffer any loss: at [233]. Thus on the Full Court's view the rights *as determined* were relevant to calculating interest on the compensation for the act the extinguishing effect of which was disregarded under s 47B. In *Griffiths HC*, Edelman J at [260] recognised the Full Court held that "the effect of the determination should not have been ignored".

81. Native title rights and interests do not "come into existence" from or on the basis of the determination; rather they are recognised by the determination, and at the point of recognition are found to always have existed.[61] Further, a native title determination has effect *in rem* (i.e. for all purposes). A party may not, in later proceedings, seek to contradict a determination of native title or findings which were essential to that determination.[62]

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61 ***Starkey*** *on behalf of the Kokatha People v State of South Australia* [2018] FCAFC 36; 261 FCR 183 at [198]-[233], and in particular [202] (Reeves J, White J agreeing: [401]). *Starkey* [198] was cited with apparent approval in *Malone on behalf of the Western Kangoulu People v State of Queensland* [2021] FCAFC 176; 287 FCR 240 at [208] (Rangiah, White and Stewart JJ).

62 *Starkey* [201]-[204] (Reeves J), and [279]-[280], [289]-[291] (Jagot J).

82. Sections 47A and 47B NTA did not change the character of the acts which caused the prior extinguishment, nor other acts which were subject to ss 47A(3) and 47B(3) (such as, in this proceeding, the FMG tenements to the extent they are within the Exclusive Area). Rather the effect of ss 47A and 47B was to apply the non-extinguishment principle to those acts not only for the purpose of the claimant application, but generally. Consequently, there is an entitlement to compensation in respect of the effect of the acts on the determined native title (which, in the Exclusive Area, is the exclusive native title).

83. In the alternative, the relevant effect on native title which is to be assessed for the purposes of compensation should take into account the effect of ss 47A or 47B NTA from the date ss 47A or 47B applied – which is not the determination date, but rather the relevant test time. Sections 47A and 47B NTA are not discretionary, and do not require a determination in order to operate. That is, ss 47A(1) and 47B(1) outline when each section applies; if the factual pre-conditions are met, then any *extinguishment* of the native title in the relevant area "must be disregarded".[63] The relevant 'test time' for the pre-conditions in ss 47A(1) and 47B(1) is the date of the making of the claimant application – not the date of the determination: ss 47A(1)(b), 47B(1)(b), "when the application is made". If the Court is required to make findings as to whether ss 47A or 47B NTA applies, it is concerned with factual matters such as occupation at the test time. If the pre-conditions are met at that stage, then the extinguishment must be, and thereby is, disregarded. Consequently, the determination merely recognises (and determines *in rem*) that ss 47A or 47B NTA has been enlivened by the bringing of a claimant application in certain conditions. The point at which the section operates remains the test time.

84. The claim which gave rise to the Yindjibarndi#1 Determination (determination application WAD6005/2003) was filed on 9 July 2003. That date is the test time for the purposes of ss 47A and 47B.[64] Each of the compensable acts was done after 9 July 2003. Consequently, to the extent that each of the Compensable Acts was done in the Exclusive Area, the effect of the grant was on the exclusive native title.

E3 <u>Do the native title rights and interests have a "market value"? [Issue 7]</u>

85. YMAC makes no written opening submissions under this heading on the basis of order 4(a) made 27 June 2023, other than to the extent set out at [E4] below.

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63 *Gumana v Northern Territory of Australia* [2005] FCA 50; 141 FCR 457 at [268] (Selway J).

64 *Warrie* at [152].

E4 Compensation for economic loss [Issue 7]

86. YMAC submits that economic loss is to be assessed on the basis of the objective economic value of the native title rights and interests. The objective economic value of the native title is the sum which the Applicant could fairly and justly have demanded for its assent to the infringement of the native title. What the Applicant can fairly and justly have demanded can be assessed as, or by reference to, any identifiable market value for a native title group's assent to the infringement of their native title, being an amount a willing but not anxious party seeking the assent would be prepared to pay, and a willing but not anxious native title group would be prepared to accept, for their assent.[65] Agreements entered into between tenement holders and native title parties for the assent to the grant of future acts, or to dispose of any liability the tenement holders have (or may have) in connection with granted tenure, are relevant to ascertaining this market value.

87. FMG says that such agreements cannot be called in aid to determine the compensation payable to the Yindjibarndi People, including because such agreements were made in different circumstances for different purposes by miners so as to make a commercial agreement in advance for mutual commercial benefit.[66] Characterising such agreements as 'commercial' does not make them irrelevant to ascertaining a market value, nor does the fact that such agreements include the giving of consent by the native title party; to the contrary, it is the fact that a 'bargain' has been reached in other instances which makes those instances relevant to ascertaining what a reasonable native title party in the position of the Applicant and a reasonable tenement holder in the position of FMG would do in a hypothetical negotiation. Whether other agreements are sufficiently analogous to assist in ascertaining what hypothetical bargain would have been reached in this case, is ultimately a question of fact and degree. Precise equivalence is not necessary, as extrapolations can be made from similar but not identical instances (just as the market value of a particular residential property can be extrapolated from various other sales of residential properties which are not identical in size, quality or other attributes).

88. The fact other agreements may have been reached in the context of the 'Right to Negotiate' under Part 2 Division 3 Subdivision P of the NTA does not make them irrelevant to ascertaining the hypothetical bargain that would have been reached in this

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65 YMAC Position at [38(a)].

66 FMG Response at [46(i)], [46(m)].

case, nor does it involve valuing that statutory right rather than the native title itself.[67] The mining leases in this case were granted in accordance with the procedures in Subdivision P. That Subdivision contains (relevantly) two alternatives: a negotiated agreement or an arbitral determination. In the case of an arbitral determination, compensation may then be determined in accordance with Part 2 Division 5 of the NTA. Agreements reached in other instances involving that same statutory regime are likely to be the best indicator of what bargain would have been reached in a hypothetical negotiation between a willing but not anxious native title party in the position of the Applicant and a willing but not anxious miner in the position of FMG. Furthermore, the native title that existed at the time of the future acts the subject of this proceeding was a native title recognised and protected by the NTA. The assessment of compensation cannot be divorced from the statutory context in which the native title exists, just as an assessment of the value of a residential property cannot be divorced from the statutory context in which the property exists and is part of a market (such as its zoning, any restrictive covenants etc).

89. In ascertaining the value of the economic loss suffered by the native title holders as a result of the grant of the tenements, the Court can also take into account the benefit of the impairment etc. of the native title achieved by the mining tenements, to the State and FMG.[68] The fact that royalties and rent will be paid to the State, and FMG will extract valuable minerals from the mining operations, are relevant to assessing what amount a willing but not anxious party seeking the assent of the native title holders to the infringement of the native title would be prepared to pay.[69] As submitted at paragraph 30 above, that does not involve a payment of compensation by reference to any rent, royalty or other amount assessed in respect of the mining of the minerals: cf. s 123(1)(c) *Mining Act*. The assessment under the NTA is a monetary amount that represents the outcome of a hypothetical bargain. Insofar as other agreements said to reflect a market value for a native title party's assent to the infringement of its native title rights and interests may involve payment of compensation calculated by reference to a royalty or rent, the compensation under those agreements may be converted to a single monetary amount. The ascertainment of that amount in each instance, and whether in each instance it is sufficiently certain and analogous so as to inform the assessment of the outcome of a hypothetical bargain in this case, are questions of fact.

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67 Cf State Response [296(ba), (bb)].

68 YMAC Position at [38(a)(iii)].

69 *Griffiths HC* at [104] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

E5 Compensation for non-economic or cultural loss [Issue 7]

90. YMAC submits that cultural loss should be assessed as a monetary amount which fully compensates the Yindjibarndi People for the effect of the granting of the tenements on the spiritual aspects of their native title, considered in light of what society would rightly regard as appropriate, fair and just.

91. There is an issue on the pleadings as to what is encompassed by the term 'cultural loss'. YMAC submits that cultural loss can arise from the conduct of physical activities pursuant to the grant of future acts; this sort of loss is what YMAC termed in its pleadings 'effects cultural loss'. However, even if no activities have been or are ever conducted on a mining tenement, cultural loss is suffered. This is because the grant of the mining tenement confers rights on the tenement holder, and subjugates the native title rights to the tenement holder's rights in the event of any inconsistency: ss 24MD(3), 238 NTA.[70] At the point of grant, the extent to which the native title rights and interests are recognised and protected is thereby diminished, and the native title holders are not able to protect their native title rights against interference by the tenement holder.[71] YMAC referred to this form of loss in its pleadings as 'dispossession cultural loss'. Another way of describing it is 'subjugation cultural loss'. To confine cultural loss only to effects of physical activities pursuant to the future acts post-grant would fail to recognise the entitlement under s 51(1) NTA to compensation for loss, diminution and impairment of the native title *rights and interests*, of which the spiritual connection of the Yindjibarndi People to the Claim Area is an inherent component.

92. For the avoidance of doubt, YMAC does not say that the Court is *required* to approach the assessment of cultural loss in the manner set out at YMAC Position [41(b)]. However, YMAC respectfully submits that conceiving of cultural loss both in terms of the loss associated with the fact of grant (subjugation) and the loss associated with the actual conduct of activities in accordance with the grant (effects) ensures that the assessment takes into account the full spectrum of cultural loss.

93. Further to paragraphs 86-87 above, YMAC submits that agreements entered into between tenement holders (or associated entities) and native title parties which relate to securing the consent of a native title party to the grant of mining tenements, or disposing of any liability the tenement holder may have to the native title party in connection with granted tenure, can be taken into account by the Court when assessing

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70 YMAC Position at [41].

71 Applicant Points of Claim at [37].

what the Australian community would consider as appropriate, fair and just compensation for cultural loss.[72]

94. Similarly, when assessing the quantum of compensation to which the Yindjibarndi People are entitled, the Court can take into account the economic benefits obtained by the State and FMG.[73] The State granted the FMG tenements, and acquired direct financial benefits, in the form of royalties and rent, as a result. FMG admits that the mining operations at Solomon Hub mine have generated revenue and profit for the FMG Respondents and their related entities.[74] The fact these benefits have accrued at the expense of cultural loss to the Yindjibarndi People is a matter which, YMAC submits, is relevant to an assessment of what the Australian community would consider as appropriate, fair and just.

E6 <u>Interest [Issue 12]</u>

95. YMAC makes no written opening submissions on the basis of order 4(a) made 27 June 2023.

Dated: 24 July 2023

Stephen Wright SC

Tessa Herrmann

72 YMAC Position [41(a)].

73 YMAC Position [38(a)(iii)].

74 FMG Response at [11].