

NOTICE OF FILING

Details of Filing

Document Lodged: Expert Report
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 23/03/2023 3:02:37 PM AWST
Date Accepted for Filing: 23/03/2023 3:02:42 PM 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.



No: WAD 37 of 2022

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

**YINDJIBARNDI NGURRA ABORIGINAL
CORPORATION RNTBC (ICN 8721)**

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

EXPERT PSYCHOLOGICAL REPORT OF DR JEFFREY NELSON

Filed for the Applicant

Law firm: Blackshield Lawyers
Tel: (08) 9288 4515 / 0414257435
Email: simon@blackshield.net

Address for service

Level 28, AMP Tower, 140 St Georges Terrace PERTH WA 6000

<i>Introduction</i>	3
<i>Expert Evidence Practice Note</i>	3
<i>Particulars of Training, Study and Experience</i>	4
<i>Method of Assessment of Psychological Injury in the Yindjibarndi</i>	5
<i>Context</i>	5
<i>Defining Psychological Injury</i>	7
<i>Mental health disorders</i>	8
<i>Trauma</i>	9
<i>Collective trauma</i>	11
<i>Psychological Wellbeing of the Yindjibarndi</i>	14
<i>Retraumatization and Continuous Traumatic Stress</i>	15
<i>Intergenerational Trauma</i>	16
<i>Summary</i>	17
<i>First Phase</i>	20
<i>Second Phase</i>	21
<i>Third Phase</i>	21
<i>Fourth Phase</i>	22
<i>Expert's Declaration</i>	24

Introduction

1. In this section, I will set out my brief and provide an overview of my training, qualifications, and relevant experience.
2. I was briefed in relation to the Yindjibarndi Ngurra Aboriginal Corporation Compensation Claim (WAD 37/2022) by Mr. Simon Blackshield of Blackshield Lawyers, 140 St Georges Terrace, Perth on the 23rd of February 2023. In this, I was asked (see Appendix 1 for the complete set of instructions), to assess concerns about the effects of the Fortescue Metals Group's (FMG) mining activities in the Solomon Hub on the psychological wellbeing of the Yindjibarndi People, who hold exclusive rights under Native Title for most of the mining and exploration tenements.
3. The brief requires expert psychological opinion on whether:
 - a. the grant of the FMG tenements,
 - b. the non-consensual circumstances in which those grants were made,
 - c. the subsequent mining activities, and
 - d. other actions taken by FMG to advance its commercial and mining interests within the compensation area has caused or exacerbated existing psychological trauma or other psychological harm within the Yindjibarndi community, and/or caused or exacerbated social disruption within the community; and whether and if so, what psychological and related services are required to treat the division and the psychological trauma which now exists within the Yindjibarndi community and what it will cost to provide that treatment.
4. Towards the above ends, I have been provided with a body of published and unpublished materials, video footage and documents to assist my research and reporting. This, among other things, relates to the relevant mining leases, native title boundaries, relevant case law. I have enlarged on this with sources I have assembled over the course of my life as a researcher, academic, and clinician. I provide citations for these sources as and when I refer to, or quote from, them.

Expert Evidence Practice Note

5. At the time I was asked to provide my psychological expertise in relation to the Yindjibarndi Ngurra Aboriginal Corporation Compensation Claim, I was provided with the Federal Court Expert Evidence Practice Notes (GPN-EXPT) and its Harmonised

Expert Witness Code of Conduct. I have read these, complied with them, and agree to be bound by them. I have signed a statement to this effect at the end of this report.

Particulars of Training, Study and Experience

6. I hold a Bachelor of Arts with Honours in Psychology, a Clinical Master's Degree in Psychology and a PhD from the University of Western Australia. My PhD focused on assessment of frontal lobe functioning in people at risk of dysfunction.
7. I have been a Senior Lecturer and Associate Professor in the Indigenous Studies Unit at Southern Cross University (Lismore and the Gold Coast) and an Associate Professor at James Cook University in Cairns. I have supervised PhD studies to completion and several master's degree dissertations.
8. I have lectured and mentored many mental health clinicians on how to work effectively with Aboriginal people affected by trauma and other psychological concerns. I currently supervise Indigenous and non-Indigenous clinicians from across Australia working with Aboriginal and Torres Strait Islander clients in the contexts of suicide, out of home care, and psychosis.
9. I have a long history of working as a research psychologist and clinical psychologist with Indigenous communities experiencing distress, in QLD, NT and WA. This has involved undertaking detailed assessments of individual functioning and systems with children, young people, and adults.
10. I have a long history of working as a clinical psychologist with Aboriginal and Torres Strait Islander men who have been charged with serious criminal offending against others in contexts of murder, serious harm, and the rape of adults and children. I am relied upon to provide reports for criminal matters in the Queensland Court System.
11. I am an Aboriginal man who was removed from family at a very early age. I identify as a Kuku Yalandji man from the Cairns region. While I am a proud Aboriginal man, I am also proud of my profession and the work that I do. The opinions expressed in this report are based upon my training, study and experience as a psychologist with a particular specialisation in Indigenous psychology.

Method of Assessment of Psychological Injury in the Yindjibarndi

12. Over a period of three weeks, I met with twenty-one Yindjibarndi people. This included twelve men and nine women. I also spoke with members of the Yindjibarndi Aboriginal Corporation Board of Directors about mining and their relationships with representatives of the Fortescue Metals Group. The interviewees ranged in age from young adults who had recently commenced working up to those who were past retirement age. The conversations took place in Roebourne, Karratha, and Ngurrawaana and ranged in time from 60 minutes to 150 minutes. Invitations to participate in these conversations were provided through email and telephone calls. Invitations were extended to parties on both sides of the FMG debate. Representativeness was a priority to ensure trustworthiness of conclusions. It is unfortunate that more people that were strongly affiliated with the Wirru-Murra Yindjibarndi Aboriginal Corporation did not participate in interviews. All efforts were made to have contact with people from this group – two men participated in interviews and two women agreed to but were unable to be contacted on the day. The description of context and assessment provided below is the result of these conversations and is also informed by my reading of Justice Rares’ judgment in *Warrie (formerly TJ) on behalf of the Yindjibarndi People v Western Australia* [2017] FCA 803, and by an interrogation of other relevant documents, archives, video recordings and literature relating to the Yindjibarndi community and their engagement with FMG.

Context

13. The Yindjibarndi community is made of roughly 1000 to 1200 people with its major population residing in the Roebourne/Karratha region. It became apparent from my conversations with Yindjibarndi, and from my reading of relevant literature that the Yindjibarndi remains strong in its belief that each individual lives as a part *of* its Community and Country – it does not live *in* the community or *on* the country. To lose the connection to either is akin to losing the fullness of their identity. While it is acknowledged that the Yindjibarndi has endured periods of great unrest and challenges to their cultural ways, their ability to reinvigorate culture as a way back to comparative wellbeing is probably not so well known. Traditional lore continues to be practiced each year with the young Yindjibarndi males enthusiastically engaging in initiation ceremonies, and the start of a lifelong process of acquiring important knowledges through connection with their cultural mentors and Country. Participation in the progression of culture is important and viewed as a critical domain of identity formation.
14. The connection between the Yindjibarndi and their traditional Country was tested in the two Native Title hearings, with the outcome validating their claims of continuous and

meaningful connection. I found Justice Rares' judgment to be particularly helpful in providing relevant background and information about Yindjibarndi practices and beliefs. The Yindjibarndi were forcibly moved away from their Country and from places of longer-term employment to first the Aboriginal Village near Roebourne, and then to the Village precinct in the town. The move to Roebourne placed them in the immediate vicinity of the largest licenced premises in the Pilbara at that time, and in a place that was soon to be home to more than 5000 workers, with many spending everything they earned at the Roebourne/Victoria Hotel. In the Village precinct, the Yindjibarndi were required to live in non-Indigenous style houses with modern appliances and expected to live as non-Indigenous people. Tutors were employed to embed non-Indigenous ways of being. A lack of consultation meant that many were forced to live in conditions that broke cultural protocols and caused ongoing distress. Yindjibarndi people were also prevented from having extended visits from family who lived away. This restriction caused a breakdown in their obligations to the *Nyinyaard*, which is their duty of reciprocity and sharing. It was disclosed during interviews that the Yindjibarndi were raised to care for others, to share when there was abundance, and to believe that others would reciprocate, not through obligation but through empathy and compassion.¹ The Yindjibarndi, although trusting and compassionate by nature, grew to mistrust the non-Indigenous people that held power over them. With the mistrust came a sense of powerlessness that negatively affected not only their relationships with people outside of the Yindjibarndi community, but also their contentment, and sense of worth. The move to Roebourne was instigated by the then Government and viewed by the Yindjibarndi as an act of control and disempowerment.²

15. Alcohol has had a significant impact on the Yindjibarndi community. Violet Samson, quoted in *Enough is Enough* (Olive, 2007), provided the following appraisal of the situation at the time: "I was here when the mining people came here working for money and just coming to the pub. They came into Roebourne and turned the town upside down, taking the young girls. It destroyed Aboriginal families". With the 1967 Referendum came access to licenced premises for Aboriginal people, with drinking came intoxication, with intoxication came antisocial and violent behaviour. Several Yindjibarndi women referred to citizenship as 'drinking rights' and labelled it as the worst thing the government did to them³. It is interesting that in Western Australia, other citizen rights did not come into effect until 1971. (Olive, 2007) The increased drinking and intoxication was accompanied by a failing in the structures that had maintained the community and their culture for so long: addiction was increasing exponentially, and families were breaking at the seams.

¹ Conversation with Mr. Michael Woodley.

² Conversation with Mr. Stanley Warrie.

³ Conversation with Mr. Michael Woodley, Ms. Pansy Cheedy.

This was a time of great regret for many of the people that were interviewed for the current report.

16. Notably in the current context, the Yindjibarndi listed the times of the drinking epidemic and the current FMG-related community division as the two periods of greatest threat to their survival as true Yindjibarndi people² – this provides an important yardstick for the degree of psychological injury being experienced due to the FMG intervention. People spoke regrettably about the period of alcohol misuse as being a time when cultural identification took a back seat, but also with pride about how they had overcome this problem through restoring their normal cultural practices. The current division within the community is considered by most as being more concerning than the period of substance misuse³. The threat to the Yindjibarndi culture from alcohol and its effects was managed by reducing access to alcohol and supporting abstinence in the community. The current threats to the Yindjibarndi cannot be remedied by ‘saying no’. Sacred and culturally meaningful sites cannot be reproduced, beliefs about the Wirlu-Murra’s complicity in their loss are not easily overlooked, and mistrust of the Wirlu-Murra will not be forgotten. The psychological injury is greater and ongoing.
17. Against this backdrop we can now turn our attention to understanding the psychological injury caused by the experience with FMG.

Defining Psychological Injury

18. Safe Work Australia defines psychological injury as ‘a range of cognitive, emotional, and behavioural symptoms that interfere with a worker’s life and can significantly affect how they feel, think, behave, and interact with others. Psychological injury may include such disorders as depression, anxiety, or post-traumatic stress disorder. Psychological injury or illness can often lead individuals to feel a lack of control over their circumstances as well as a sense of helplessness, which creates further harm to individuals’ psychological wellbeing’. (Safe Work Australia, 2020). Beyond individual symptomatology, when psychological injury occurs at a group or community level, it can also be evident in systemic disruption to the life of the community with multiplicative rather than simply additive effect⁴. In particular, psychological strength and resilience amongst Aboriginal

² Conversation with Mr. Stanley Warrie and Mr. Middleton Cheedy.

³ Conversation with male and female informants.

⁴ The literature on syndemics is relevant in this context. It recognises that the aggregate effect of multiple traumas on communities is not additive but multiplicative. A syndemic is the aggregation of two or more concurrent or sequential clusters of disease in a population in ways that exacerbate the prognosis and burden of disease. Syndemics develop under health disparity, caused by poverty, stress, or structural breakdown. The syndemic approach departs from the biomedical approach to diseases to diagnostically isolate, study, and treat diseases as

people centres around the wellbeing of community, culture and Country – damage to these pillars of Indigenous life constitutes significant psychological injury to individuals and communities. (Kelly, Dudgeon, Gee, & Glaskin, 2009) Evidence of both individual and collective impacts across each of these pillars will be considered in this report.

19. In the pages that follow I will summarise the expressions of psychological injury that were evident in conversations with the Yinjibarndi and in the gathering of related evidence.

Mental health disorders

20. In my engagement with the Yinjibarndi people, it was clear that diagnosable clusters of symptoms⁵ were apparent in more than 65% of people I spoke with. These included depression, anxiety, adjustment disorders, post-traumatic stress disorder, and others. While incidence⁶ post-FMG is difficult to establish, the high prevalence of such symptoms provides a baseline indication for understanding the extent of individual distress and disruption in the community. Often expression of distress and description of symptoms included reference to FMG activities and the impact on individuals and the community. Notably, a genuine psychological injury may or may not give rise to a formal psychological or psychiatric diagnosis. Minimally, to attain a diagnosis, one would need to have access to psychological or psychiatric services. To date, this has not been available to the Yinjibarndi in any systematic sense. Hence, a lack of formal diagnoses amongst the Yinjibarndi does not speak fully to the presence or absence of psychological injury. When considered in isolation, this gold standard aspect of assessing psychological injury is not entirely fit for purpose in the current context - it does not tell the whole story.

distinct entities separate from other diseases and independent of social contexts. Singer (2000) argued that syndemics are stitched together by three rules: two or more diseases cluster together in time or space; these diseases interact in meaningful ways, whether social, psychological, or biological; and harmful social conditions drive these interactions. An escalation of impact as personal and community resources become increasingly taxed. The FMG case could be seen to be further potentiating a pre-existing syndemic in the Yinjibarndi community.

⁵ The International Classification of Diseases, 11th Edition (ICD11) (World Health Organization, 2019) defines mental, behavioural, and neurodevelopmental disorders as “syndromes characterised by clinically significant disturbance in an individual’s cognition, emotional regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes that underlie mental and behavioural functioning. These disturbances are usually associated with distress or impairment in personal, family, social, educational, occupational, or other important areas of functioning.” The DSM5-TR (American Psychiatric Association., 2022) provides a similar definition but under the title of ‘mental health disorder’.

⁶ Prevalence refers to proportion of persons who have a condition at or during a particular time period, whereas incidence refers to the proportion or rate of persons who develop a condition during a particular time period.

Trauma

21. Beyond psychiatric diagnosis, psychological injury can occur in the presence of trauma⁷. Trauma can share many of the symptoms of psychological disorders but is commonly perceived as resulting from event(s) or circumstances that are experienced by an individual as emotionally harmful and/or life threatening. It can have lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being even at sub-clinical levels (Briere & Scott, 2006). Living in geographically and socially isolated communities, lessens access to support services and can heighten the impact trauma has on normal everyday living. It can also increase the likelihood of 'trauma contagion' with community members having continued exposure to others' symptoms. Individuals who have experienced trauma, especially those who show signs of post-trauma symptoms, are a highly vulnerable group – often open to undue influence by others and to a magnification of impact of stressors.

22. In the conversations that I undertook, notably *all* interviewees reported stories of significant individual trauma – some of these predated the FMG involvement or did not directly relate to it, but many were clearly connected by interviewees to the FMG experience and the subsequent community disruption and damage to country. Traumas related to impact on community, culture and also Country. Specific examples from interviewees include:
 - a. Stories included examples of trauma relating to the granting of the FMG tenements per se and the growing awareness of the impacts and likely future impacts of those commitments and the ways in which it breaches Yindjibarndi commitments to care for Country and to accountability for these decisions in the afterlife; as well as tangible examples of how the decision split the community and has led to continuing unrest and disruption of community and culture.
 - b. Feeling very traumatised by the non-consensual circumstances in which those grants were made including a very adversarial meeting that occurred in Roebourne which set Yindjibarndi on Yindjibarndi, which is a situation that has always been avoided. Video footage of the meeting makes clear that the impact on community cohesion was immediate and remains ongoing.

⁷ The evidence on trauma in Australia's Aboriginal and Torres Strait Islander communities is substantial and broad and highlights the statistical reality that its prevalence is significantly and disproportionately higher in these communities than of other Australian contexts. In terms of psychological injury, the effects of being exposed to a potentially traumatic experience include, but are not limited to, differences in the following aspects of human functioning – suicidality, emotional (externalisation, depersonalisation), physical (somatisation, hyperarousal, neurological functioning), cognitive (shame-based thinking, triggering, reliving, dissociation, re-enactment), behavioural (self-harm, substance misuse, avoidance, isolating) and interpersonal (isolating from others, mistrust) (Substance Abuse and Mental Health Services Administration, 2014).

- c. Escalating distress when subsequent mining activities began and the implications became clearer including the likely impact of future mining activities on the destruction of Country, consequent impact on culture and the growing divisions in the community.
 - d. There was also significant distress expressed about other actions taken by FMG seemingly to advance its commercial and mining interests such as media stories that seemed designed to undermine public perceptions of the Yindjibarndi community.
23. The ubiquity of these stories of trauma should not be glossed over and speaks to the extent of psychological injury experienced. Examples provided by interviewees included the distress that comes with feeling like a stranger in your own land; like a child that has stepped over an invisible boundary. Two of the older interviewees spoke about the feeling of returning to their Country and realising for the first time that sites with high cultural significance are no longer present and the terrain which once housed them is also no longer present. While there were warnings about the changes in Country that mining had caused, when abstract became reality it became overwhelming and many tears were shed. Going back to Country and to sites that have special meaning for you is rejuvenating and an important process when people are getting older. For this respected elder the site is no longer available, and, in his mind, an essential part of this belief system has been stolen⁸. The older interviewees also recalled being on Country to visit significant sites and having the experience of mining personnel herding them into one area so that blasting could continue. They explained that the feeling of having your Country destroyed while you were present is devastating and a memory that does not fade.⁹
24. I also observed clear signs of grief relating to disconnection from former friends and family members who have been split as a result of the FMG involvement. An example of the trauma that this disconnection has caused came from Mr. Kevin Guinness, who spoke of a funeral for a young man he called son under the Galharra¹⁰ (skin group) system. Kevin approached the young man's biological father to pay his respects only to be intentionally ignored. When Kevin approached, the father turned his head away and closed a window in his face. This incident occurred many years ago but the emotion that Kevin continues to feel is as raw as it was on the day of the funeral. There were also other stories of behaviour at funerals that are not consistent with accepted Yindjibarndi ways and were clearly attributable to the YAC – WMYAC division.

⁸ Mr Stanley Warrie.

⁹ Pansy Cheedy.

¹⁰ Through our *Galharra* relationships, all Yindjibarndi are connected like an extended family, where with clear rules of respect and discipline. enables everyone to relate they can work out whether you are brother, auntie, cousin, nephew or whatever. If you don't know your *Galharra*, then you'd be lost wherever you go.

Collective trauma

25. Community trauma, also referred to as collective trauma, is “an aggregate of trauma experienced by community members or an event that impacts a few people but has structural and social traumatic consequences.” (Pinderhughes, Davis, & Williams, 2015) The causes of community trauma vary; however, research suggests that, rather than resulting from a single event, it is typically rooted in a complexus of social inequities such as racism, poverty, oppression, and the systematic dismantling of cultures and communities (e.g., forced assimilation) – in the case of the Yindjibarndi, there is evidence of both event-related and systems-related collective trauma. Just as adverse childhood experiences are understood as a part of individual trauma, adverse community environments/experiences are recognized as a part of community trauma. Adverse community environments refer to community-level inequities (e.g., limited economic opportunities, lack of social services, poor housing conditions, systemic racism, and prevalent violence) that traumatise entire communities (Lopez-Zeron & Parra-Cardona, 2015). The existence and impact of these factors in the Yindjibarndi community pre-FMG is well established. Community trauma creates widespread vulnerability and openness to undue influence in effected communities and the individuals that live within them.
26. Collective trauma resulting from interactions with FMG is also evident, and impacts widespread and concerningly ubiquitous, in the Yindjibarndi community. This is both in the form of the experiencing of specific traumatic events that impact multiple people (indeed the entire Yindjibarndi community in some instances), as well as the cumulative impact of individual trauma experienced as secondary to the FMG-related events as described above. The behaviour that occurred at 2011 FMG meeting is a perfect example of how the behaviour created a collective traumatic memory that continues today, impacting individuals and the community¹¹.
27. The Yindjibarndi people to whom I spoke appeared generally accepting of the idea that mining is inevitable in the Pilbara and that their best strategy is to find ways to limit avoidable destruction of their Country. Their apparent acceptance of the premise was not interpreted by me as evidence that they had undertaken a process of reasoned adaptive decision-making and that this was the outcome. It appeared to me that this view was reflective of the view shared very widely across the Pilbara with saturation exposure to mining in all facets of daily living. The second and perhaps more relevant concern is that the ‘passive acceptance’ of the inevitability of mining reflects a more general

¹¹ (https://www.youtube.com/watch?v=6w_fb7e0WCY)
(https://www.youtube.com/watch?v=3xa1eX_E0p8&t=706s)

powerlessness (actual and perceived) that has been internalised over the years of prescription and oppression by non-Indigenous systems.

28. The Yindjibarndi interviewees shared that the tenements that FMG were presently controlling in the Solomon Hub were originally owned by Rio Tinto but only as exploration licences. The transfer across to FMG did not cause any additional stress for the Yindjibarndi in the first instance but it is apparent that relationships became strained very early in the negotiation process regarding financial compensation and ongoing agreements. Almost all of the interviewees shared that they were displeased almost to a point of disbelief about Andrew Forrest's behaviour and that of his people. Stanley Warrie is a strongly cultural and Christian man. His description of Andrew Forrest as the 'devil' and the Wirlu-Murra as his 'demons' showed his level of frustration and resentment. In conversations with a younger group of interviewees, the consensus was that FMG were by far the least preferred of all of the mining companies that they had dealt with, and that Rio Tinto and Hancock Prospecting had always maintained good relationships with the Yindjibarndi.
29. While the division can be conceptualised as a product of a disagreement about mining on Country and compensation for such, it is also, in my opinion, a source of collective trauma for the Yindjibarndi people. The fact that there is a community division conflicts strongly with the principles of the Galharra and the Nyinyaard, and is recognised as a significant threat to the continued strength of the Yindjibarndi people. People from both sides of the division have shared with me their views that their community is suffering and that it is the division that is causing so much distress. The Yindjibarndi's environment since the arrival of FMG has had a shadow of uncertainty, mistrust, and division and it is clear, through conversation, that it has taken a substantial toll on its members' sense of wellbeing at the individual and community levels. Being exposed to the behaviours and responses of highly traumatised people erodes the resilience of even the most psychological grounded people. Several female informants shared that they had left the Roebourne region because of the toxicity that came with the division that was triggered by FMG and their establishment of Wirlu-Murra.
30. The reasons they offered for moving away included that they and family members did not feel physically safe, that they could not control their anxiety, that observing family turning against family distressed them, and that they refused to take sides in this matter.¹² They also spoke about growing tired of negotiating the verbal and physical assaults that were taking place in all levels of the community (children were physically assaulting other

¹² Conversations with Ms. Donelle Ranger, Ms. Estelle Guinness.

children, men and women were fighting in the streets) and no-one appeared to be able to relax and get along. They did not attribute the violence to drug and alcohol misuse, jealousy, or general disrespect: they attributed it to the division but believed that people were not that sure of why they were fighting against each other. They were also frustrated by the fact that the dispute was not about stopping or controlling the mining, it was about compensation for an activity that they were all, in their view, obligated to oppose; that is, the destruction of their Country.¹³

31. There is always a risk, in my opinion, when there is a division as significant and long-term as this one, that the perception of difference will grow and that the level of rupture will increase. When people are confused about their reasons for not associating with another, especially if they are living in a small community or the 'other' is a family member, peer pressure will usually act to preserve the division and convince those who are confused to generate their own justifications. The younger men who participated in interviews view the division as childish and something not to be taken too seriously; even though they shared that they are always wary when passing people from the 'other' faction on the street. When speaking to the leaders of YAC and WMYAC¹⁴, it was interesting to observe both sharing positive comments about each other but being surprised to hear that there is a mutual respect. There is a strong cultural connection between these men but also, it appears, a strong commitment to the division. It has been suggested that FMG's financial support of Wirilu-Murra is conditional and that maintaining the division is one of the conditions.¹⁵

32. The task of discussing the emotional effects of the division within the Yindjibarndi was difficult for several of the interviewees¹⁶. They were sad, they were teary, they were frustrated, they struggled to accept how toxic it had become, they were almost in disbelief that the animosity had become so exaggerated. For one respected Yindjibarndi elder¹⁷, it was probably the first time she had fully focused on what the division actually meant for her, her family, and her people. Specifically, she acknowledged for the first time that she would prefer that her children settled down with partners from outside of the Yindjibarndi rather than with one from the other side of the division. Ideally, they would marry from within their side of the division. The division would become very serious if this view was shared too broadly: with such a small population, the likelihood is that choice would be

¹³ Conversations with Ms. Estelle Guinness, Ms. Debra Coppin.

¹⁴ Mr. Michael Woodley and Mr. John Sandy.

¹⁵ Mr. Michael Woodley.

¹⁶ Mr. Kevin Guinness, Mr. Middleton Cheedy, Ms. Lorraine Coppin.

¹⁷ Ms. Pansy Cheedy.

limited or the number of Yindjibarndi couples settling down would diminish – this is a very tangible example of an intergenerational impact for community and culture.

Psychological Wellbeing of the Yindjibarndi

33. It is not often that one gets the opportunity to focus specifically on the collective psychological wellbeing of a community. It is a community with a long history of being disadvantaged by government and commercial interests, of being debilitated for an extended period by a cycle of addiction, poor behaviour, and comparative disconnection with culture, and of moving past that period and into a comparatively stable, but impoverished, existence. The Yindjibarndi acknowledges the difficulties it has faced but is not yet able to celebrate its successes due to the continued conflicts and division within the community that originated in the period of first contact with FMG. If pushed to provide a very quick overview of the community's collective mental health, it is reasonable to opine that it is characterised by a high prevalence of trauma-affected individuals, a comparative inability to trust and be comfortable with others, and levels of hypervigilance not usually encountered. People in general show symptoms of high anxiety, emotional oversensitivity, hypervigilance to threat, and mistrust at all levels of peer, family, and community relationship. Maintaining this level of protective overview is incredibly taxing and would perhaps account for a part of the reason that people appear physically and mentally fatigued; the other major contributing factors are likely poverty and the struggles of subsistence living.

34. In establishing the extent of impact of these events on community, there is opportunity to compare across Aboriginal and Torres Strait Islander communities, especially when a specific stressor has been identified. My experience as an Aboriginal clinical psychologist who has worked extensively in communities across five Australian states allows comparisons to be made at the levels of first impressions, clinical presentations, and rates and degrees of recovery. My initial impressions of the Yindjibarndi in Roebourne reminded me quickly and unintentionally of working in a discrete Aboriginal community that had been seriously harmed by significant traumatic events. The younger members of this community grew up with expectations that they too would experience such events in their own lives. Abhorrent behaviour in this community had been normalised. The most recent information available is that the comparison community remains in a state of disarray with many individuals carrying undiagnosed and untreated trauma-related pathologies. It should be noted that interventions with this community were not at a level where recovery would be reasonably expected. The similarities in prevalence between the two communities in trauma-related behaviours and responding is noteworthy. There is a lesson to be learnt in understanding that while there may be a chasm of difference in the

aetiologies (or contributors to trauma), that they give rise to similar fear responses, intrusive thoughts and dreams, and comparative inability to maintain healthy relationships. The Yindjibarndi people remain capable of genuine reconnection, but it would be unlikely without desire from within the community and longer-term support at individual and community levels.

Retraumatization and Continuous Traumatic Stress

35. In the Yindjibarndi case, there is clear evidence of collective and individual trauma that will continue to unfold as a result of the ongoing mining activities and related community distress. This goes beyond re-traumatization from loss already suffered – it relates to, for example, the ongoing destruction of new sites and new damage to Country and culture throughout the lifetime of the mine. This constitutes a significant, knowable risk for psychological injury to future generations of the Yindjibarndi.
36. “Retraumatization” has been defined as "one's reaction to a traumatic exposure that is coloured, intensified, amplified, or shaped by one's reactions and adaptational style to previous traumatic experiences" (Danieli, 2010 p. 195). Although the exposure may not be inherently traumatic and may only carry reminders of the original traumatic event or relationship, retraumatization typically refers to the re-emergence of symptoms previously experienced as a result of the trauma.” (Alexander, 2012).
37. Continuous traumatic stress (CTS) is understood to occur in contexts in which danger and threat are largely faceless and unpredictable, yet pervasive and substantive. A common context for CTS is that of chronic community violence and threat, especially where confrontation is difficult to understand or predict and where the threat has endured over a longer period. Symptoms include hypervigilance, general apathy, insufficient and broken sleep, inability to trust, and the presence of ongoing stressors. (Eagle & Kaminer, 2013)
38. Mr Middleton Cheedy brought my attention to the psychological difficulty he experiences when required to wait at a railway crossing. The trains carrying ore to the ports are up to 2.4 km long and carry up to 30000 tonnes at a time. In his mind, that is 30000 tonnes of his Country that has been violently removed and is in the process of being moved to another country to be transformed into a building material. He suggested that most people would not realise how distressing this experience is or how often you are held up in the Pilbara by these trains. He added that the FMG trains are labelled as such so you have a fair idea of where the ore has originated. It is noted that this damage to Country and to significant sites is irreversible even with ‘rehabilitation efforts’ at the conclusion of mining – the Country is gone.

39. The younger men who had experience working in the mines¹⁸ and an older Yindjibarndi woman¹⁹ who spent time caring for family members who had worked in the mines shared their experiences of being on Country when blasting was taking place. They described an experience of being doubled over by a level of somatic symptomology that made them vomit and have to leave the mine site. The men who described these symptoms could not continue working on their own Country as they interpreted the sickness as punishment by their ancestors for not meeting their cultural obligations. Others who had previously worked on the ports shared that the impact of Country being removed was not as severe because they did not really see the ore or have to be reminded about what they were participating in. There is real concern in these men about whether they will be punished by their ancestors at a later time²⁰.
40. It is my opinion, based on conversations with community members, that the ongoing nature of the mining on Yindjibarndi land and the community conflict that surrounds it is triggering recurrent traumatisation and that this process will continue for so long as the mining continues, and the community conflict remains. When asked, a view was expressed by all interviewees (from both sides) that given a free choice, they would want the mining to stop, in spite of the potential financial cost of doing so. In my view, this speaks to the extent of impact of these events on individuals, community, culture, and Country.

Intergenerational Trauma

41. In psychology, it is an accepted fact that intergenerational transmission of trauma occurs behaviourally as well and physiologically and neurologically. Physiological and brain-based indicators of heightened stress sensitivity can be found in the offspring of traumatised parents.
42. In speaking to the mothers and fathers of children who were born into the Yindjibarndi community after engagement with FMG, and the subsequent division, it is clear that the trauma of the FMG experience is both palpable and potent for the emerging generations. Parents describe their children's relationships with those from the other side as being supporting of their stance – in that they do not have a relationship with them. When the young people are sober the others are either targets of antagonism or strangers, and if one or all of them are intoxicated the others are enemies that must be confronted.

¹⁸ Conversations with Mr. Fabian Cheedy Junior, Mr. Doyle Lee, Mr. Isiah Walker, Mr. Landon Punch, Mr. Charlie McDonald, and Mr. Aaron Wilson.

¹⁹ Conversation with Ms. Bigali Hanlon.

²⁰ Conversation with Mr. Kevin Guinness.

43. There is an assortment of stories from parents about their children's slide into addiction (alcohol, cannabis, methamphetamines), antisocial and unlawful behaviours (usually included physical violence), and an onset of a psychosis-related illness. While there is acknowledgement of the potential influence of the division in the community on their children's trajectory, there is also a reluctance perhaps because of their realisation that they, as parents, have supported the division and the behaviour consequences that followed.
44. Initiation is a celebration of achieving an age that allows access to important cultural knowledges and ways of being. It is described by most to whom I spoke as a time that young males look forward to with excitement. It is a community event with family members assisting with preparation and the actual ceremony. My informants said that since the division, it is no longer a unifying community event. Initiation for the young people is now conducted in separate ceremonies, one for those affiliated with the WMYAC and one for those affiliated with YAC. In my opinion, in cases where the division has split families, the underdeveloped mind of the young person is unable to understand why he or she is prohibited from being with his or her family member at this time and more generally.
45. The evidence on intergeneration effects of trauma is clear that the impacts are cumulative and enduring. This is a current reality and a knowable future risk for psychological injury unless the root causes are addressed, the impacts remediated, and in this case, the community coming back together as one. The young people of the Yindjibarndi have never experienced their community as one.

Summary

46. The current report has sought to inform the four main questions contained in the Brief. The primary concern was about the effect, if any, on the psychological wellbeing of the Yindjibarndi people from their interactions with representatives of the Fortescue Metals Group. Specifically, did their interactions cause or exacerbate existing psychological trauma or other psychological harm or cause or exacerbate social division within the community. The four domains of potential harm included a) the grant of the FMG tenements, b) the non-consensual circumstances in which those grants were made, 3) the subsequent mining activities, and 4) other actions taken by FMG to advance its commercial and mining interests within the compensation area.
47. The opinions provided in this report are diagnostic in nature. They are based on a relatively small sample from the community, but a sample that was seeking positive change in their

community and living conditions. In psychology it is accepted that people who volunteer “have greater self-assessed psychological wellbeing, self-esteem, happiness, and satisfaction with life, with lower symptoms of depression and anxiety, and with lower indicators of suicide risk”²¹. Knowing this correlation has made me more confident to extrapolate and argue that the prevalence of trauma in the community is disproportionately high. In most cases, interviewees spoke broadly about their experiences, experiences of family members and friends, and idiosyncratic behaviours that they believed were indicators of stress and poor mental health. It felt as though there is a strong want for education about mental health first aid and how to manage crisis in their own families.

48. The report also raises the question about the effects of earlier traumatic experiences on current wellbeing levels, specifically as it contributes to current trauma-responses and feelings of powerlessness. In regard to the first two domains of concern (granting of tenements, and the non-consensual nature of this process), the report acknowledges the existence of a passive acceptance of the inevitability of mining and an almost disinterest in who was operating the mine on their Country. This is in direct contrast to the interviewees’ wishes for their Country to remain intact and for mining not to occur. The Yindjibarndi’s history of being negatively affected by decisions made about them (and not with them) by government and commercial interests has, in my opinion, created a sense of learned helplessness²². Even at this late stage, there were interviewees that felt as though the struggle was too much, that it was pointless, and that they would be left with no compensation, no community, and no Country. While it was a relief to see this balanced with the positivity of others, it will become more concerning if the compensation matter is not resolved in a timely manner.

49. It is clear in the evidence presented that each of the four domains of potential harm referred to in [46] has had a widespread, deeply felt and ongoing impact for individuals and for the community as a whole. It is clear to me that the psychological injury caused by those factors involves damage to individual wellbeing as well as the wellbeing of community, culture and Country - the three foundational pillars of wellbeing for the Yindjibarndi community. In combination, these factors have further disrupted a longstanding way of living and longstanding relationships between and within families. It has further potentiated pre-existing challenges faced by the community - a knowable outcome of adding stressors to an already vulnerable community with a history of trauma and the

²¹ <https://www.volunteeringaustralia.org/wp-content/uploads/Evidence-Insights-Volunteering-and-mental-healthFinal.pdf>

²² Learned helplessness is a state that occurs after a person has experienced a stressful situation repeatedly. They come to believe that they are unable to control or change the situation, so they do not try — even when opportunities for change become available.

impacts of colonisation, geographic dislocation, the introduction of alcohol and other events.

50. In terms of the extent of impact, it was deeply concerning that *all* persons interviewed, across age groups, showed signs of trauma and mental distress, irrespective of which side of the FMG debate they fell. Impacts include distress about events past, about current circumstances and, perhaps equally concerning about likely future events still to be caused by ongoing mining and associated growing fractures in the community. These impacts include current evidence of intergenerational trauma and likely future intergenerational transmission of the effects of these events. There is ongoing trauma and psychological injury being experienced by current community members due to the ongoing nature of the mining events and the now more tangible understanding of the impact on irremediable impact on Country and culture. Community members have communicated to me that they hold no hope that they have the power to overturn the mining rights on their land and a sense of helplessness and hopelessness about the future of the community.
51. I have also been asked to address in this report the question of what psychological and related services are required to treat the division and the psychological trauma which now exists within the Yindjibarndi community and what it will cost to provide that treatment. In sum, the cost of the solution is commensurate with the impact of the described events and cumulative current and future effects of ongoing circumstances. Intervention must address individual and community need. It must work to address deep and devastating cultural fracture and seek to do the same to address the irremediable loss of Country. Compensation should aim to directly address these issues and address the corollaries of these impacts which include further entrenched poverty, ill health, mental fragility and environmental harms.
52. While in some senses the damage to Country is done and cannot be undone, the damage to people, to community, and to culture, in my opinion, does require urgent and commensurate care and attention. My opinion on the nature of the intervention required is set out below.

Intervention

53. I have set out my professional view that the Yindjibarndi is a divided community that would benefit from assistance to reduce the impact of trauma on its members and to assist a restoration of the cohesiveness that has supported the community through a series of significant challenges. It is my opinion that the current division in the community is a real threat to the future of the Yindjibarndi as a united entity. This section outlines a proposed

five-year structured approach to community rebuilding and individual recovery. It is based on the belief that there will be a desire to bring the community back together and that the community can work collaboratively for the benefit of all of its members.

54. Principles that will drive the Intervention:

- a. Patience and perseverance are necessary, not preferred. With the levels of mistrust and hypervigilance that have been developed over the time of the division, meaningful and sustainable change can only occur as a function of patience and perseverance. Actions must be well thought out, implemented optimally, and be allowed enough time to initiate change. Online monitoring and review are important, but premature judgement needs to be avoided.
- b. Collaboration at all levels of interaction is required, not preferred. Collaboration with the Yindjibarndi People, Government and non-Government agencies, and other interested parties must be encouraged. Collaboration must be non-judgemental and authentic.
- c. The therapeutic framework must honour Indigenous and non-Indigenous worldviews. In accordance with the United Nations Declaration on Rights of Indigenous Peoples – the Yindjibarndi will have their perspectives, values, and knowledges central to process of community restoration and individual recovery.
- d. Resources to be made available as required and justified. Initiatives of this magnitude are expensive in terms of funding, time, and energy. The Yindjibarndi cannot be invited to participate in a program that will only support partial recovery. The work must be allowed to reach its natural endpoint.

First Phase

Commissioning an organisation with experience in community-led healing initiatives:

- a. Commissioning processes may take some time and require appropriate resources to ensure the commissioned organisation is fit for purpose,
- b. Commissioning for organisations that are culturally responsive for Aboriginal and Torres Strait Islander peoples and are skilled in addressing complex, historical, and compounded trauma.
- c. Commission for a 5-year strategy that encompasses community and individual recovery and the development of a healing centre.
- d. Estimated cost: \$240,000.

Engagement with community:

- a. Collaborate with community leaders in facilitating trustworthy discussions about psychological recovery.
- b. Establish groups that include members from each family to talk through suggested initiatives.
- c. Support a series of community meetings (open days) to commence the engagement process.
- d. Community engagement can improve the uptake of services and the sustainability of programs that are introduced into community.
- e. Engagement allows for the community to support and contribute to the implementation, sustainability, and adoption of wellbeing practices.
- f. Helps to build relationships – these will be foundational to support community healing efforts.
- g. Estimated cost: \$240,000.

Good Communication Systems and Approach:

- a. Establish a communication strategy that engages informs community about decisions or supports that will involve them,
- b. The community will require information updates, education, and regular communications,
- c. Raising community awareness, but also managing community expectations, health professional expectations and individuals and families' expectations,
- d. Estimated cost: \$120,000.

Second Phase

Consultation with Community:

- a. Helps to assess the needs for resources, gaps in services, and current resources,
- b. Consultation with community about the intentions of intervention with the community,
- c. Consultation will help to identify the key partners,
- d. Consultation will help to identify the issues within community that are causing disharmony and ongoing trauma,
- e. Helps to identify community issues and increase the understanding of what may be needed to address such issues.
- f. Estimated cost: \$170,000

Third Phase

Establishing the longer-term team:

- a. Education and Training for the health professionals serving the community:
- b. Health professionals need to know the community they are serving and define the outcomes with not only the community, but also the individual and families with whom they work,
- c. Social and Emotional wellbeing team with virtual and in person attendance to support community for 5 years,
- d. Social and Emotional wellbeing team with virtual and in person attendance to support community for 5 years,
- e. Ensuring that there are the right skills mix for the health professionals such as gender balance, cultural competence, experience with complex trauma and complicated grief, risk assessment, and ability to work across the lifespan (ages of 0 – 80 years).
- f. Estimated cost: \$2,400,000.

Integrated services:

- a. Build an integrated, multidisciplinary network of providers and resources to assist community with psychological supports and or warm referrals to other services.
- b. Support the development of a community wellness plan for prevention, intervention and for ongoing sustainability.
- c. Estimated cost: \$160,000.

Fourth Phase

Healing Centre:

- a. Scoping, consulting with community, and identifying a space to support healing for the community. This environment will be community owned and operated with activities developed by the community. It could be established in an existing premises but needs to be fit for purpose.
- b. The place for healing incorporates both traditional and mainstream practices and therapies, and at a site of significance.
- c. Staffed by those who can address healing and trauma through a holistic and whole of life approach.
- d. The Healing Centre has a commitment to social justice, self-determination and has the main goal to support families and by extension the community on their recovery journey.
- e. Time is taken to name the healing centre.
- f. Estimated cost: \$4000000 for building and then recurrent funding for staffing

3. Total Estimated Cost over 5 years: \$7,330,000 + recurrent funding.

References:

- Alexander, P. C. (2012). Retraumatization and revictimization: An attachment perspective *Retraumatization: Assessment, treatment, and prevention*. (pp. 191-220). New York, NY, US: Routledge/Taylor & Francis Group.
- American Psychiatric Association. (2022). *Diagnostic and statistical manual of mental disorders* (5th, text revision. ed.). Washington, DC.: American Psychiatric Association.
- Briere, J., & Scott, C. (2006). *Principles of trauma therapy: a guide to symptoms, evaluation, and treatment*. Thousand Oaks, CA: Sage Publications.
- Danieli, Y. (2010). Fundamentals of working with (re)traumatized populations *Creating spiritual and psychological resilience: Integrating care in disaster relief work*. (pp. 195-210). New York, NY, US: Routledge/Taylor & Francis Group.
- Eagle, G., & Kaminer, D. (2013). Continuous traumatic stress: Expanding the lexicon of traumatic stress. *Peace and Conflict Journal of Peace Psychology*, 19(2), 85. doi:10.1037/a0032485
- Kelly, K., Dudgeon, P., Gee, G., & Glaskin, B. (2009). *Living on the edge: Social and emotional wellbeing and risk and protective factors for serious psychological distress among Aboriginal and Torres Strait Islander people, Discussion Paper No. 10*. Retrieved from Darwin:
- Lopez-Zeron, G., & Parra-Cardona, J. R. (2015). Elements of change across community-based trauma interventions. *Journal of Systemic Therapies*, 34(3), 60-76.
- Olive, N. (2007). *Enough is enough: A history of the Pilbara mob*. North Fremantle: Fremantle Arts Centre Press.
- Pinderhughes, H., Davis, R. A., & Williams, M. S. (2015). *Adverse community experiences and resilience: A framework for addressing and preventing community trauma*. Retrieved from Oakland, CA.:
- Rares J, Warrie (formerly TJ) on behalf of the Yindjibarndi People v Western Australia [2017] FCA 803
- Safe Work Australia. (2020). Taking Action: A best practice framework for the management of psychological claims in the Australian workers' compensation sector.
- Singer, M. (2000). A dose of drugs, a touch of violence, a case of AIDS: conceptualizing the SAVA syndemic. *Free inquiry in creative sociology*, 28(1), 13-24.
- Substance Abuse and Mental Health Services Administration. (2014). *Trauma-Informed Care in Behavioral Health Services*. . Rockville, MD: Substance Abuse and Mental Health Services Administration.
- World Health Organization. (2019). *International statistical classification of diseases and related health problems* (11th ed.).

Expert's Declaration

I have made all the inquiries which I believe are desirable and appropriate and no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Court.

A handwritten signature in black ink, consisting of a circular scribble followed by a long horizontal stroke.

Dr Jeffrey Nelson

22nd March 2023

Appendix 1.

17 February 2023

Tanja Hervonin and Dr Jeffrey Nelson
PO Box 272 Booval Fair QLD 4305 and
50 Rushton Street
Burswood WA 6100

[By email: mjeff@psychwb.com](mailto:mjeff@psychwb.com)

Dear Ms Hervonin and Dr Nelson

**BRIEF TO PREPARE AN EXPERT REPORT FOR USE BY THE APPLICANT IN PROCEEDINGS WAD
37/2022 – Yindjibarndi Ngurra Aboriginal Corporation Compensation Claim**

Introduction

1. Under s.56(3) of the *Native Title Act 1993* (Cth) (**NTA**) the Yindjibarndi Ngurra Aboriginal Corporation (**YNAC**) holds in trust for the common law holders (**Yindjibarndi People**) the native title rights and interests that were recognised in the *Warrie (formerly TJ) on behalf of the Yindjibarndi People v State of Western Australia (No.2)* [2017] FCA 1299; (2017) 366 ALR 467 (**Warrie (No.2)**) determination.
2. On 18 February 2022, YNAC, as the representative of the Yindjibarndi People, filed an application in the Federal Court for a determination of compensation under s.50(2) of the NTA for any loss, diminution, impairment or other effect on the Yidjibarndi People's native title rights and interests, of the grants made by the State of Western Australia (**State**) between 2006 and 2020 to FMG Pilbara Pty Ltd, Pilbara Energy Company Pty Ltd, Pilbara Gas Pipeline Pty Ltd and the Pilbara Infrastructure Pty Ltd (**FMG**), of various mining tenements within the *Warrie (No.2)*

determination area (**FMG tenements**). Applications by FMG for further mining tenements appear to be ongoing.

3. The area of the compensation application (**compensation application area**) is identical to the area the subject of the *Warrie (No.2)* determination area. The FMG tenements collectively underpin and provide the legal basis for FMG's Solomon Hub Mine which is located largely within the 'Exclusive Area' as defined in [11] of the determination. **Attachment 1** to this Brief is a copy of a document filed with the Court by FMG entitled "FMG Respondents' mining tenements and infrastructure (provided in compliance with the Court's Order 3 of 11 October 2022 filed 13 February 2023)", which shows the nature, location and extent of the FMG tenements, as well as the infrastructure, including the Kings, Trinity, Firetail North and Firetail South Mine Pits, constructed or established by FMG pursuant to the rights granted by the FMG tenements. Mining operations commenced in about October 2012 and the expected life of the Mine is 33 years.
4. Neither the Yindjibarndi #1 registered native title claimant, as the representative of the Yindjibarndi People (prior to the making of the *Warrie (No.2)* determination on 13 November 2017), nor YNAC (as the post determination representative of the Yindjibarndi People), consented or agreed to or received any compensation for, the grant of any of the FMG tenements.
5. FMG has entered into financial relationships and agreements in respect of its mining activities with some Yindjibarndi People without the consent of the registered native title claimant (prior to 13 November 2017) or of YNAC (post-13 November 2017). These financial relationships and agreements are ongoing and have caused division in the Yindjibarndi community.
6. Also included with this Brief, at **Attachment 2**, is a copy of the Applicant's Amended Points of Claim filed on 5 December 2022, which sets out a detailed description of the compensation claim (**Points of Claim**). Please note, however, that the State and FMG have filed Responses to the Points of Claim in which they each take issue with a number of the facts and with the law, as asserted in the Points of Claim.

Further Background

7. In *Warrie (No.2)*, the Court determined that in the 'Exclusive Area' referred to in [3] above, the native title rights and interests of the Yindjibarndi People confer on them the right to possession, occupation, use and enjoyment of that area to the exclusion of all others. YNAC claims that the grant of the FMG tenements necessarily diminished or impaired the Yindjibarndi People's right of exclusive possession in the Exclusive Area.

8. In the balance of the *Warrie (No.2)* determination area where a native title right of exclusive possession could not be recognised by reason of prior extinguishment, the Court determined that the Yindjibarndi People possess the following rights, including the right to conduct activities necessary to give effect to them:
- (a) a right to access (including to enter, to travel over and remain);
 - (b) a right to engage in ritual and ceremony (including to carry out and participate in initiation practices);
 - (c) a right to camp and to build shelters (including boughsheds, mias and humpies) and to live temporarily thereon as part of camping or for the purpose of building a shelter;
 - (d) a right to fish from the waters;
 - (e) a right to collect and forage for bush medicine;
 - (f) a right to hunt and forage for, and take fauna;
 - (g) a right to forage for, and take flora;
 - (h) a right to take and use resources;
 - (i) a right to take water for drinking and domestic use;
 - (j) a right to cook on the land including light a fire for this purpose; and
 - (k) a right to protect and care for sites and objects of significance in the determination area (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others).
9. These rights have been diminished or impaired to the extent to which they are inconsistent with and thus must yield to, the rights and interests granted to FMG.
10. It is important to note however, that native title is more than just the rights and interests recorded in a determination of native title. In *Yanner v Eaton* (1999) 201 CLR 351 at 372-3 [37], four Justices of the High Court stated in a joint judgment, that native title rights and interests not only find their origin in Aboriginal laws and customs, “*they reflect connection with the land*”. Their Honours quoted with approval the comments of Brennan J in *R v Toohey & Anor, ex parte Meneling Station Pty Ltd* (1983) 158 CLR 327 at 358 that “*Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights*”.

11. Their Honours acknowledged (at 373 [38]) that the spiritual, cultural and social connection of Aboriginal people with the land is an important aspect of native title.²³

“Native title rights and interests must be understood as what has been called ‘a perception of socially constituted fact’ as well as ‘comprising various assortments of artificially defined jural rights’ and an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.”

12. Native title thus has a physical or material aspect (the right to do something in relation to land) and a cultural or spiritual aspect (the connection with the land). Both aspects are addressed in terms of s.51(1) of the NTA providing for an entitlement on just terms to compensation to the native title holders for *“any loss, diminution, impairment or other effect of the act on their native title rights and interests”*.²⁴

13. On the cultural or spiritual aspect of native title, the Yindjibarndi People have a strong connection with their traditional country. They believe that:

- (i) Yindjibarndi country, including the compensation application area, is redolent with spirituality commemorated by senior male members through mytho-ritual traditions and in particular their unique *Birdarra* law;
- (ii) Yindjibarndi People share the same spirituality as their country and are indissolubly linked to the country through this spiritual correspondence;
- (iii) a Yindjibarndi person is defined and has his or her identity and authority framed by virtue of their relationship with Yindjibarndi country;
- (iv) country is sentient and is cognisant of danger or harm;
- (v) Yindjibarndi People have both dominion over their country to the exclusion of all others and a responsibility to protect and manage their country;
- (vi) Yindjibarndi People have a duty to look after the country and the spirits that are believed to reside there and there will be consequences of a supernatural nature if they fail in their responsibility;

²³ These passages from *Yanner v Eaton* were cited with approval by the Full Federal Court in *Northern Territory v Alyawarr* (2005) 145 FCR 442 at 463 [68].

²⁴ *Northern Territory v Griffiths* (2019) 269 CLR 1; [2019] HCA 7 at [45].

- (vii) those who are not Yindjibarndi, and are consequently identified as *manjangu* (stranger), must seek permission from a Yindjibarndi elder or elders to enter and carry out activity for a particular reason on Yindjibarndi country; and
 - (viii) the granting of the FMG tenements and related mining activities is a contravention of the Yindjibarndi law in that *manjangu* are present without permission, they are acting destructively on country and they are acting as if they and not the Yindjibarndi People, are the owners of that country.
14. The NTA may also require that the Court, in making a determination of native title compensation, apply the principles or criteria set out in the *Mining Act 1978 (WA)*. Section 123(2) of that Act states that the owner (or occupier) of the land is entitled to compensation for “*all loss or damage*” suffered or likely to be suffered as a result of or arising from, the mining actually carried out. Section 123(4) states that the amount payable under s.123(2) “*may include*” compensation for the items then specified. Those items include, but are not limited to, compensation for:
- (i) being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land;
 - (ii) damage to the land or any part of the land; and
 - (iii) social disruption.

Nature and scope of the consultancy services

15. This Brief requires you to write an expert psychological report based on desk top research and on fieldwork conducted with Yindjibarndi People in which you express your expert opinion as a psychologist, on:
- (a) whether and if so, how and to what extent:
 - (i) The grant of the FMG tenements;
 - (ii) The non-consensual circumstances in which those grants were made;
 - (iii) The subsequent mining activities; and
 - (iv) Other actions taken by FMG to advance its commercial and mining interests within the compensation application area,
- has caused or exacerbated existing psychological trauma or other psychological harm within the Yindjibarndi community and/or has caused or exacerbated social disruption within the community; and

- (b) whether and if so, what psychological and related services are required to treat the division and the psychological trauma which now exists within the Yindjibarndi community and what it will cost to provide that treatment
16. You should undertake interviews with Yindjibarndi People within the time available. You should also conduct a review of any literature relevant to indigenous peoples' trauma in circumstances such as the present. You will need to put aside enough time to draft notes from each interview (these notes are likely to be discoverable by the parties to the proceeding) as well as drafting the report.
17. In undertaking this task, please note that your report will be filed in the Federal Court and served on the parties to the proceedings. It is likely that you will be required to attend the Federal Court in Perth to give expert evidence on the issues addressed in your report.

Preparation of the Report

18. You should use defensible and sound methodologies in your report to support your opinions.
19. In preparing and compiling your report, you are asked to:
- (a) review and critically assess the material provided with this Brief to the extent that it is relevant; and
 - (b) conduct further research, or request YNAC to conduct further research, to obtain additional material required in order to provide a proper and informed basis for any opinions expressed. Such further research may include, if required by YNAC or requested by you, a field trip to the Solomon Hub Mine area.
20. You are then, based upon the material provided and further research conducted, to:
- (a) provide YNAC with a draft of your Report, prepared in accordance with the Federal Court's *Expert Evidence Practice Note (GPN-EXPT)* dated 25 October 2016 annexing the Harmonised Expert Code of Conduct (a copy is **Attachment 3** to this Brief), in which your expert opinion regarding the nature and the quantum of compensation is set out and justified by no later than 10 March 2023;
 - (b) consider any comments or feedback by YNAC on the draft report which may be provided to you on or before 13 March 2023;
 - (c) having reviewed the comments / feedback provided by YNAC, provide a final Report to YNAC, by no later than 15 March 2023;

- (d) attend a conference of experts, if required, during the week of 18 September 2023 with any expert or experts that may be engaged by the State or FMG and where you will be asked to identify:
 - (i) the matters upon which the experts agree;
 - (ii) the matters upon which the experts do not agree; and
 - (iii) the reasons for any disagreement; and
 - (e) attend at the Federal Court in Perth, if required, in the weeks of 3-6 and 9-12 October 2023, to give expert evidence on the issues addressed in your report.
21. FMG and the State may brief and provide expert reports from their own experts. Part of your Brief, therefore, will be to consider and provide comments to YNAC on any such reports relevant to your expertise and background within a timeframe to be agreed (but in any event before your attendance at any experts' conference).

The form and content of the Report

22. The Report must:
- (a) give details of your qualifications and experience, and of the literature and other materials used in writing the report;
 - (b) clearly and fully state all assumptions of fact which you have made in arriving at the conclusions expressed in your report;
 - (c) identify with precision the factual premises upon which your opinions are based;
 - (d) explain the process of reasoning by which you reached the opinions expressed in your report; and
 - (e) clearly differentiate between the facts upon which your opinions are based and the opinions themselves.
23. If you are assisted by any others in the preparation of the report, the nature of that assistance must be identified with details given of the work carried out by, and the qualifications of, each such person who has assisted.
24. The report should be set out in numbered paragraphs and should append a copy of this Brief. It would also be desirable if you could set out very early in the report, a short description of the materials that you have had regard to and the methodology employed in the preparation and the writing of the report.

25. You should also provide an explanation of the way in which your specialised knowledge, based upon your training, study and experience, has equipped you to provide expert opinion evidence on the issues that are addressed in your report.

Conclusion

26. If you have any questions in relation to this Brief, please contact Simon Blackshield on **0414 257 435** or at simon@blackshield.net

Yours sincerely

SIMON BLACKSHIELD