

NOTICE OF FILING

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File Title: YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC (ICN 8721) AND STATE OF WESTERN AUSTRALIA & ORS
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

Applicant's Amended Points of Claim

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

Entitlement to make the Application

1. The Applicant is a registered native title body corporate as defined in s.253 of the *Native Title Act 1993* (Cth) (NTA) and is entitled to make this application for a determination of compensation under ss.50(2) and 61(1) of the NTA.
2. Under s.56(3) of the NTA the Applicant 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.
3. The area of the compensation application (**compensation application area**) is identical to the area the subject of the approved determination of native title made by the Court in *Warrie (No.2)*.
4. Pursuant to Reg 8B of the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth), the Applicant, before making the compensation application, consulted and obtained the consent of the Yindjibarndi People at a meeting held in Roebourne on 11 December 2021. The consent was given in

Filed on behalf of the Applicant

Prepared by Simon Blackshield
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

accordance with a process of decision making adopted by the Yindjibarndi People at the meeting for that purpose.

The native title rights and interests

5. In *Warrie (No.2)* the Court determined that in the 'Exclusive Area' as defined in [11] of the determination, 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.
6. The Yindjibarndi People's right to possession, occupation, use and enjoyment of the Exclusive Area to the exclusion of all others has always existed and has not been extinguished: *Warrie (No.2)* at [3]-[9].
7. 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).

The compensable acts

8. The acts in respect of which compensation is sought are the grants by the First Respondent (**State**) to the Mining, Exploration and Related Industries Respondents (**FMG**) of the various mining tenements within the compensation application area which are listed below (**FMG tenements**).

Particulars of FMG tenements

(a) Mining Leases

Tenement #	Date Granted	Grantee
M47/1409-I	26 November 2010	FMG Pilbara Pty Ltd
M47/1411-I	26 November 2010	FMG Pilbara Pty Ltd
M47/1413-I	26 November 2010	FMG Pilbara Pty Ltd
M47/1431-I	8 July 2011	FMG Pilbara Pty Ltd
M47/1453-I	17 January 2013	FMG Pilbara Pty Ltd
M47/1473-I	29 August 2014	FMG Pilbara Pty Ltd
M47/1475-I	29 August 2014	FMG Pilbara Pty Ltd
M47/1513-I	3 December 2018	FMG Pilbara Pty Ltd
M47/1570	31 March 2020	FMG Pilbara Pty Ltd

(b) Miscellaneous Licences

Tenement #	Date Granted	Grantee
L 1SA	29 November 2006	The Pilbara Infrastructure Pty Ltd
L47/302	5 June 2009	FMG Pilbara Pty Ltd
L47/361	11 October 2011	FMG Pilbara Pty Ltd
L47/362	3 May 2011	FMG Pilbara Pty Ltd

L47/363	3 May 2011	FMG Pilbara Pty Ltd
L47/367	2 March 2012	FMG Pilbara Pty Ltd
L47/396	23 May 2012	FMG Pilbara Pty Ltd
L47/472	18 July 2014	FMG Pilbara Pty Ltd
L47/697	2 December 2013	Pilbara Gas Pipeline Pty Ltd
L47/801	24 May 2019	The Pilbara Infrastructure Pty Ltd
L47/813	6 April 2018	The Pilbara Infrastructure Pty Ltd
L47/814	6 April 2018	The Pilbara Infrastructure Pty Ltd
L47/859	6 February 2019	Pilbara Energy Company Pty Ltd
L47/901	26 June 2019	Pilbara Energy (Generation) Pty Ltd
L47/914	15 November 2019	Pilbara Energy Company Pty Ltd
L47/919	10 January 2020	FMG Pilbara Pty Ltd

(c) Exploration Licences

Tenement #	Date Granted	Grantee
E45/2842-I	6 March 2013	FMG Pilbara Pty Ltd
E45/2844-I	11 October 2011	FMG Pilbara Pty Ltd
E47/1319-I	16 March 2012	FMG Pilbara Pty Ltd
E47/1333-I	28 July 2007	FMG Pilbara Pty Ltd
E47/1334-I	2 June 2007	FMG Pilbara Pty Ltd
E47/1349-I	18 May 2012	FMG Pilbara Pty Ltd
E47/1361-I	31 October 2012	FMG Pilbara Pty Ltd
E47/1384-I	7 May 2014	FMG Pilbara Pty Ltd
E47/1397-I	5 March 2014	FMG Pilbara Pty Ltd
E47/1398-I	8 July 2011	FMG Pilbara Pty Ltd

E47/1399-I	8 July 2011	FMG Pilbara Pty Ltd
E47/1447-I	2 June 2007	FMG Pilbara Pty Ltd
E47/1611-I	12 June 2007	FMG Pilbara Pty Ltd
E47/1669-I	7 May 2014	FMG Pilbara Pty Ltd
E47/1670-I	7 May 2014	FMG Pilbara Pty Ltd
E47/1673-I	7 June 2012	FMG Pilbara Pty Ltd
E47/1674-I	7 June 2012	FMG Pilbara Pty Ltd
E47/2574-I	22 November 2013	FMG Pilbara Pty Ltd
E47/3205-I	21 September 2016	FMG Pilbara Pty Ltd
E47/3397-I	29 July 2016	FMG Pilbara Pty Ltd
E47/3464-I	24 February 2017	FMG Pilbara Pty Ltd
E47/3483-I	12 July 2017	FMG Pilbara Pty Ltd

(d) Prospecting Licences

Tenement #	Date Granted	Grantee
P47/1945	11 August 2021	FMG Pilbara Pty Ltd
P47/1946	11 August 2021	FMG Pilbara Pty Ltd
P47/1947	11 August 2021	FMG Pilbara Pty Ltd

9. The ~~majority of the~~ FMG tenements collectively underpin and provide the legal basis for FMG's Solomon Hub mine which is located largely on unallocated Crown land within the Exclusive Area of the *Warrie (No.2)* determination area and is near a sacred site and freshwater spring that the Yindjibarndi call Bangkangarra and that FMG has named "Satellite Spring": *Warrie (formerly T J) on behalf of the Yindjibarndi People v Western Australia* [2017] FCA 803; (2017) 365 ALR 642 at [8].

10. Mining operations at the Solomon Hub commenced in May 2013 and the expected life of the mine is 35 years.
11. The Solomon Hub has been hugely profitable for FMG and for FMG's shareholders.

No agreement to the grant of the FMG tenements and no compensation paid

12. The Yindjibarndi #1 native title determination application WAD6005/2003 (**Yindjibarndi #1**), which was the subject of the determination in *Warrie (No.2)*:
 - (i) was entered on the Register of Native Title Claims on 8 August 2003;
and
 - (ii) was determined by the Court on 13 November 2017.
13. Neither the Yindjibarndi #1 registered native title claimant as the representative of the native title claimants prior to the making of the *Warrie (No.2)* determination nor the Applicant as the post-determination representative of the Yindjibarndi People:
 - (i) consented or agreed to;
 - (ii) received any compensation for; or
 - (iii) have an entitlement to compensation under any agreement or award
for,

the grants of the FMG tenements.
14. FMG has entered into financial relationships and agreements in respect of its mining activities with some of the Yindjibarndi People without the consent of the registered native title claimant (prior to 13 November 2017) or of the Applicant (post 13 November 2017). These agreements and relationships are ongoing and have caused serious division within what was once a very close community of native title holders.

15. The Applicant does not know whether any other acts have occurred within the compensation application area in respect of which the Applicant may have an entitlement to claim compensation under the NTA.

Entitlement to compensation

16. Under s.24MD(3)(b) of the NTA and/or under s.10 of the *Racial Discrimination Act (1975)* (Cth) (**RDA**) and s.45 of the NTA and/or under s.53(1) of the NTA, the Yindjibarndi People have an entitlement to compensation in accordance with Division 5 of Part 2 of the NTA for the acts consisting of the grants of the FMG tenements.

An entitlement to compensation under NTA: s.24MD(3)(b)

17. The grant of each of the FMG tenements was a *future act* to which Subdivision M of Division 3 of the NTA applies because each was an act that could be done if the native title holders instead held *ordinary title* (freehold) to the land and waters concerned: NTA s.24MB(1)(b).
18. The entitlement to compensation for the grants of the FMG tenements arises under s.24MD(3)(b) because:
- (i) the *similar compensable interest test* is satisfied in relation to the act; and
 - (ii) the law mentioned in s.240 (which defines the *similar compensable interest test*) does not provide for compensation to the native title holders for the act.
19. The *similar compensable interest test* is satisfied in relation to the grants because:
- (a) the native title concerned relates to an *onshore place* as defined in s.253 of the NTA; and
 - (b) compensation would, apart from the NTA, be payable under the *Mining Act 1978* (WA) (**Mining Act**) on the assumption that the native title holders instead held *ordinary title* (freehold) to the land or waters concerned.

20. The pre-condition under s.24MD(3)(b)(ii) of the NTA is satisfied because the *Mining Act* does not provide for compensation to the native title holders for the grant of the FMG tenements.

An entitlement to compensation under NTA: s.45

21. Further, or in the alternative, if the *Mining Act* does provide for compensation to native title holders for the grants of the FMG tenements, it does not provide them with parity of treatment with the holders of *ordinary title* land and nor does it provide compensation that has regard to the unique character of native title rights and interests:

Particulars of disparity of treatment

- (a) native title land is not “*private land*” as defined in s.8 of the *Mining Act*, and hence native title holders do not receive parity of treatment with those who hold *ordinary title* (freehold) to the land and waters on which mining occurs;
- (b) under s.123(3) of the *Mining Act*, it is only an “*owner*” of “*private land*” and an “*occupier*” of “*private land*” or “*Crown land*” who can apply to the warden’s court for a determination of compensation under s.123(2);
- (c) under s.123(5) of the *Mining Act*, it is only an “*owner*” and an “*occupier*” of “*private land*” adjoining or in the vicinity of land where mining takes place, who has an entitlement to compensation if the land or an improvement thereon, is injured or depreciated in value by mining;
- (d) under s.123(6) of the *Mining Act*, it is only an “*owner*” and an “*occupier*” of “*private land*” the surface of which is damaged by mining operation who has an entitlement to further compensation for that damage;
- (e) under s.35(1) of the *Mining Act*, the holder of a mining tenement cannot commence any mining on the natural surface or within a depth of 30 metres from the lowest part of the natural surface of any “*private land*” unless and until any compensation payable has been paid or

tendered to the “owner” and the “occupier” of that “private land”;
and

- (f) in the very broad circumstances set out in s.29(2) of the *Mining Act*, the “owner” and the “occupier” of “private land” have a right of veto over surface mining.

22. Subsection 10(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**) will operate to confer a right of compensation on the Yindjibarndi People to eliminate the disparity which would otherwise exist under the *Mining Act* between the enjoyment of their native title rights and interests and the enjoyment of *ordinary title*.
23. Under s.45 of the NTA that right of compensation under the RDA is to be determined in accordance with s.50 of the NTA as if the entitlement arose under the NTA.

An entitlement to compensation under NTA: s.53(1)

24. Further or in the alternative, under s.53(1) of the NTA, native title holders will have an entitlement to compensation or to further “top up” compensation if the doing of any *future act* or the application of any of the provisions of the NTA would result in a paragraph 51(xxxi) acquisition of the property of the native title holders, other than on paragraph 51(xxxi) just terms.
25. The Applicant says that the grants of the FMG Mining Leases identified in [8(a)] are *future acts* which have resulted in a paragraph 51(xxxi) acquisition of the property (native title rights and interests) of the Yindjibarndi People because the tenements:
- (i) confer on FMG exclusive possession of the land for mining purposes;
and
 - (ii) suppress the Yindjibarndi People’s native title rights and interests.

26. The Yindjibarndi People are entitled to such compensation or further compensation as is necessary to ensure that the acquisition of their native title rights and interests is made on paragraph 51(xxxi) just terms.

Liability to pay compensation

27. Under s.24MD(4)(b) of the NTA, if a *future act* that is covered by s.24MD(3) is attributable to a State or Territory, the native title holders may recover the compensation from:

- (i) 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; or
- (ii) if not – the Crown in right of the State or Territory.

28. The grant of each of the FMG tenements was a *future act* that was covered by s.24MD(3) of the NTA and was attributable to the State.

29. Section 125A of the *Mining Act* which was in force when each of the FMG tenements was granted, provides that if compensation is payable to native title holders for or in respect of the grant of a mining tenement, the person liable to pay the compensation is the applicant for the grant of, or the holder of, the mining tenement at the time a determination of compensation is made.

30. The Applicant contends that by reason of s.24MD(4)(b)(i) of the NTA and s.125A of the *Mining Act*, FMG as the grantee or the holder of the FMG tenements, is liable to pay the compensation.

31. In the alternative, if s.125A of the *Mining Act* does not have the effect of making FMG liable to pay the compensation, the State is liable to pay the compensation under s.24MD(4)(b)(ii) of the NTA.

32. Further or in the alternative, the State will be liable to pay compensation or “top up” compensation, under s.53(1) of the NTA if:

- (i) either the grant of the FMG tenements or the application of any of the provisions of the NTA, would result in a paragraph 51(xxxi)

acquisition of the property (native title rights and interests) of the Yindjibarndi People other than on paragraph 51(xxxi) just terms; and

- (ii) s.125A of the *Mining Act* does not have the effect of making FMG as the grantee or the holder of the FMG tenements, liable to pay that compensation.

The claimed loss, diminution, impairment or other effect on the native title rights and interests

33. The Yindjibarndi People's native title rights and interests have been wholly suppressed and hence significantly diminished and impaired by, the grants of the FMG tenements within the areas of those tenements and will remain suppressed, impaired and diminished for however long those tenements remain on foot.

34. The Yindjibarndi People 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;

- (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.
35. The economic value of the Yindjibarndi People's native title rights and interests has been diminished or impaired because the FMG tenements were granted and mining and related activities have proceeded, without FMG or the State reaching any agreement with either the registered native title claimant prior to the *Warrie (No 2)* determination, or the Applicant, post that determination, to pay compensation to the Yindjibarndi People for their assent to the infringement of their native title rights and interests.
36. The Applicant repeats the contents of [14] and says that the consequences of the division within the Yindjibarndi community caused by FMG and FMG's mining activities, include hurt and suffering, combined with anger and feelings of lack of control and helplessness.
37. The denial of the Yindjibarndi People's dominion over their country and the denial of their rights to access, use, protect and manage their country cuts the essentiality of Yindjibarndi religious belief that identifies and defines the Yindjibarndi People as an autonomous people, identified by reference to their country and consequently informs deep feelings of cultural loss.
38. A practical consequence of the inability of the Yindjibarndi People to access and use the country that is subject to the FMG mining activities is a consequential diminishment of culturally related activities.

The principles or the criteria to be applied for determining compensation

39. The criteria for determining compensation are set out in ss.51(1), (2), (3) and 53(1) of the NTA.
40. Subsection 51(1) of the NTA provides that, subject to subsection (3), the entitlement to compensation under Division 3 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.
41. Subsection 51(3) of the NTA applies to the making of the determination of compensation because:
- (a) the native title concerned relates to an onshore place; and
 - (b) compensation would, apart from the NTA, be payable under the *Mining Act* on the assumption that the Yindjibarndi People instead held ordinary title (freehold) to any land or waters concerned: ss.24MD(3)(b)(i), 240.
42. Subsection 51(3) provides that the Court must, in making the determination of compensation, apply any principles or criteria for determining compensation set out in the *Mining Act*.
43. The Applicant says, however, that to the extent to which the application of s.51(3) and/or the application of any principles or criteria for determining compensation set out in the *Mining Act* would result in a determination of compensation that was other than on just terms or which has not had regard to the unique character of native title rights and interests, ss.45 and/or 53(1) will apply to ensure that the determination is made on just terms.
44. If s45 of the NTA applies then, under s51(1) of the NTA, the determination of compensation must be on just terms.
45. If s53(1) of the NTA applies then, under s51(2) of the NTA, the Court may, not must, in making the determination of compensation on just terms, have

regard to any principles or criteria for determining compensation set out in the *Mining Act*, being the law under which the compulsory acquisition took place.

46. In the premises, the determination of compensation must be on just terms and should include:
- (a) a component for the objective or economic effects of the infringement of the native title rights and interests, being the sum which a reasonable miner or Government party, acting fairly and justly, would have been prepared to pay to the Yindjibarndi People to obtain their assent to the grants of the FMG tenements, or to put it another way, what the Yindjibarndi People could fairly and justly have demanded for their assent to the infringement of their native title rights and interests: *Northern Territory v Griffiths* [2019] HCA 7; (2019) 269 CLR 1 at [84];
 - (b) a component for non-economic or cultural loss, being compensation for that aspect of the value of the land to the native title holders which is inherent in the thing which has been lost, diminished, impaired or otherwise affected by the compensable acts: *Northern Territory v Griffiths* [2019] HCA 7; (2019) 269 CLR 1 at [84] and [153]-[154];
 - (c) the component for non-economic or cultural loss will include compensation for the fragmentation of Yindjibarndi society and the serious social disruption, disharmony and conflict caused by the grant of the FMG tenements; and
 - (d) compound interest on that portion of the economic loss component of the compensation that has accrued from the date of the first compensable act up to the date when the determination of compensation is made.

Date: ~~25 October~~ 5 December 2022



Signed by Simon Blackshield
Solicitor for the Applicant

This pleading was prepared by Simon Blackshield, lawyer.

Certificate of lawyer

I Simon Blackshield certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~25 October~~ 5 December 2022



Signed by Simon Blackshield