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FMG Respondents' Submissions

WAD 37 of 2022

Federal Court of Australia

District Registry: Western Australia

Division: General

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

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

1. The applicant (**YNAC**) claims compensation as trustee of the Yindjibarndi People (**YP**).[1] YNAC's claim is properly under s 123(2) of *Mining Act 1978* (WA) (**MA 1978**) for loss and damage suffered or likely to be suffered from the mining pursuant to the grant under the MA 1978 of mining tenements (**FMG tenements**) by the Minister of the 1st respondent (**State**) to the 2nd to 6th respondents (together **FMG**).[2] This is because the YP are "occupiers" under the MA 1978. Only failing that, YNAC is entitled to claim compensation under Part 2, Div 5 of the *Native Title Act 1993* (Cth) (**NTA**) for the loss or other effect of the grant of the FMG tenements.

2. The NTA (s 51(1)) provides for compensation on just terms to compensate only for the loss, diminution, impairment or other *effect* of the grant of the FMG tenements on the YP's *native title rights and interests*. This does not entitle a claim for royalties calculated by reference to the value of iron ore at the FMG tenements or any rent or royalties paid by FMG to the State. The question that must be answered is: what is the value of the *native title rights and interests* held by the YP that have been lost, diminished, impaired or affected? The answer is not given by considering rent or royalties paid by FMG, or indeed by other mining companies for their mining of other mining tenements in other areas for different mineral resources owned by the State.

3. In any event, s 51(1) is expressly subject to s 51(3) of the NTA. Sec 51(3) applies here and requires the Court (it "must") to apply the principles or criteria for determining compensation set out in s 123 of the MA 1978. Sec 123 satisfies the ***similar compensable interest test*** in the NTA (s 240) because the grant of the FMG tenements, being future acts, concerned an onshore place and compensation would, apart from the NTA, be payable under s 123 of the MA 1978 if it was assumed that the YP instead held ordinary title to the land concerned. Sec 123(2) provides for compensation to be payable to an "owner" or "occupier"; and "ordinary title" includes a freehold estate in fee simple under the NTA (s 253) which falls within "owner" under s 123(2).

4. The principles or criteria in s 123 of the MA 1978 include in s 123(1) the legislative directive that no compensation is payable "in any case", and "no claim lies for compensation", whether under the MA 1978 "or otherwise" in respect of the value of any mineral in the land (s 123(1)(b)); or by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral (s 123(1)(c)). The principles or

[1] YNAC asserts its claim in its Further Amended Points of Claim (**PoC**), filed on 7 July 2023 pursuant to the Court's order of 27 June 2023.

[2] The State and FMG each defend the claim including on the basis that s 123(2) of the MA 1978 directly applies because the YP qualify as "occupier": State's Amended Points of Response (**WA R**); FMG's Further Amended Points of Response (**FMG R**). The 10th respondent (**YMAC**) appears to support YNAC's claim in YMAC's Amended Points of Response.

criteria in s 123 must be applied as the applicable principles or criteria for determining compensation "whether or not on just terms" by the express force s 51(3) of the NTA.

5. Even though expert evidence and lay evidence proposed to be relied on has been filed, YNAC does not appear to propose to adduce evidence as to the *value* of the YP's *native title rights and interests*, which are said to have been affected by the grant of the mining tenements to FMG or by the mining from the mining tenements.

6. This case is not about whether the YP have a valid claim as native title holders to the compensation application area. In *Warrie (formerly TJ) (on behalf of the YP) v WA (No 2)* (***Warrie (No 2)***) [2017] FCA 1299; (2017) 366 ALR 467, the Court determined (**Determination**) that native title in the Determination Area (being the compensation application area) is held by the YP. The true issue in the case is about the value of the compensation payable for the effect on the YP's native title rights and interests. In *Warrie (No 2)*, the Court expressly determined that the YP's native title rights and interests do not confer any rights in relation to minerals (including iron ore) as defined in the *Mining Act 1904* (WA) (**MA 1904**) and the MA 1978 (Determination [5(c)]).

7. The NTA (s 51A) caps the total compensation payable, if payable under Part 2, Div 5, for economic loss to the amount that would be payable if the grant of the FMG tenements were instead a compulsory acquisition of a freehold estate in the land. The freehold value of the land the subject of the FMG tenements, by reference to its highest and best use, will never equate to the amounts payable as royalties to the State for iron ore obtained from the FMG tenements. The iron ore belongs to the State. FMG will file evidence as to the value of the land if there were such a compulsory acquisition.

8. The YP are also entitled to compensation for non-economic or cultural loss if compensation is payable under the NTA, Part 2, Div 5. Such compensation involves a "judgment" of what would be accepted by the Australian community as appropriate, fair or just to be paid for the YP's loss of spiritual connection *to the land*. Such loss cannot be measured by reference to the rent or royalties paid by FMG to the State for the taking of iron ore which is (and always has been) owned by the State and over which the YP never held any native title as expressly determined in *Warrie (No 2)*.

9. Much of the evidence YNAC proposes to adduce appears to be about "social division" or "social disharmony" ***allegedly*** caused by FMG when FMG was seeking to make agreements with the YP *in advance of*, or in the pursuit of, the grant of the FMG tenements or following their grant. Such "social division" or "disharmony" is not compensable either under s 123(4)(f) of the MA 1978 or under Part 2, Div 5 of the NTA. In any event, such social division or disharmony was not ***caused*** by FMG; if different groups within the YP had different views about what agreement should be made, the difference of view cannot properly be said to have been ***caused*** by FMG.

10. Further, the social division or disharmony did not arise as *an effect* of the grant of the FMG tenements; it is that effect that is the focus of the compensatory right in the NTA (s 51(1)). Further, s 51(1) gives a right to compensation for the effect on the YP's "native title rights and interests". The NTA (s 223(1)) defines native title rights and interests as rights and interests under traditional laws and customs "*in relation to land* or waters". The alleged social division cannot affect the YP's *connection* to *land*.

11. The MA 1978 (s 123(4)(f)) gives an owner or occupier a right to compensation for "social disruption". Such "social disruption" refers to social dislocation or concepts akin to that; and does not refer to internal social division of the YP. Mining at the FMG tenements did not cause any such internal social division.

12. YNAC's further or alternative claim that the MA 1978 treats the YP differently to ordinary title holders so that s 10(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**) is engaged should not succeed. The provisions of the MA 1978 do not discriminate against the YP on the basis of race, colour or national or ethnic origin and confer a right to compensation for all loss or damage or likely loss or damage resulting from mining pursuant to the FMG tenements. In any event, if s 10(1) of the RDA is engaged and by force of s 45(1), compensation is payable in accordance with Part 2, Div 5 of the NTA, s 45(2) of the NTA provides that the State (not FMG) is liable for the compensation.

B. AN ENTITLEMENT TO CLAIM COMPENSATION UNDER THE *NATIVE TITLE ACT 1993* (CTH)

13. The NTA recognises and protects native title; and provides that native title cannot be extinguished contrary to the NTA (ss 3, 4(1), 11(1)). The NTA covers "acts" affecting native title; and provides for determining whether native title exists and compensation for acts affecting native title (ss 4(2), 4(7)). Basically, two kinds of "acts" affect native title, namely, ***past acts*** (mainly acts done before the NTA commenced on 1 Jan 1994 that were invalid because of native title); and ***future acts*** (mainly acts done after the NTA commenced that either validly affect native title or are invalid because of native title (s 4(3)).[3] The grant of the FMG tenements are *future acts*.

14. Part 2, Div 2 of the NTA:

    (a) validates past acts attributable to the Commonwealth and provides that the past act extinguished native title wholly or to the extent of inconsistency or not at all, depending on the category (A, B, C or D) of the past act (s 15(1)); and gives the native title holders a right to compensation from the Commonwealth (s 17);

[3] The NTA also contemplates ***intermediate period acts***, but no such acts are relevant here.

(b) as to past acts attributable to the State, relevantly envisages that the State may also validate past acts, provide for a similar extinguishment or non-extinguishment of native title, and provide for a right to compensation from the State (ss 19, 20).

15. Sec 5 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (**TVA**) provides that every past act attributable to the State is valid and is taken to always have been valid. Secs 6, 7, 8 and 9 of the TVA provides for the extinguishment of native title wholly or to the extent of inconsistency or not at all depending on the category (A, B, C or D) of the past act. Sec 12 of the TVA provides that compensation is payable (by the State) because of the validation of the past act attributable to the State; and compensation is determined under Part 2, Div 5 of the NTA.

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

16. Part 2, Div 3 of the NTA deals with ***future acts*** (s 24AA(1)). The NTA (s 233) relevantly provides that an act is a ***future act*** if it takes place after 1 Jan 1994 and is invalid to the extent that it affects native title if not validated by compliance with the NTA. Sec 24AA(2) states that Part 2, Div 3 provides that, to the extent that a future act affects native title, the act will be valid if covered by Div 3, and invalid if not. Part 2, Div 3, Subdivs B, C and D of the NTA validate future acts if permitted under an indigenous land agreement (s 24AA(3)).

17. Importantly, s 24AA(4) of the NTA provides that a ***future act*** will also be valid to the extent covered by provisions falling within Part 2, Div 3, Subdivs F, G, H, I, JA, J, K, L, M and N. Relevantly, Subdiv H (including s 24HA) deals with future acts as to management of water and airspace; and Subdiv M (including s 24MD) deals with future acts that pass the "freehold test", subject to Part 2, Div 3, Subdiv P (s 24AA(4)(j)). (Sec 24AB(2) of the NTA provides that to the extent that a future act is covered by s 24HA, it is not covered by s 24MD. This point is relevant to the s 109 invalidity of MA 1978, s 125A: see [112]-[122] below.)

18. Sec 24AA(5) of the NTA relevantly provides that, in the case of future acts covered by s 24MD, for the act to be valid, it is also necessary to satisfy the requirements of Part 2, Div 3, Subdiv P (which provides a "right to negotiate").

19. Part 2, Div 3 of the NTA provides that, in general, valid future acts are subject to the non-extinguishment principle (see ss 24AA(6), 238). Because s 11(1) of the NTA provides that native title is not able to be extinguished contrary to the NTA, relevantly, Part 2, Div 3, in dealing with future acts, constitutes an exclusive code conformity to which is essential to the effective extinguishment or impairment of native title: *WA v*

*Commonwealth (**Native Title Act Case**)*;[4] ***Fejo** v NT*.[5] (This means that if there is a valid future act under s 24MD(1), even if subject to the right to negotiate under Part 2, Div 3, Subdiv P, once the requirements of Subdiv P are met, there is no residual right to compensation for any failure to reach agreement under Subdiv P. No such residual right is given by the NTA. The point is important for compensation and relevant to the alleged s 109 invalidity of s 123(1) of the MA 1978.)

20. Sec 24AA(6) of the NTA also states that Part 2, Div 3 deals with relevantly compensation for future acts. Sec 24AA(6) does not itself provide that compensation is payable. It is necessary to identify a relevant provision in the relevant subdivision of Part 2, Div 3.

21. Each grant of the FMG tenements was a valid future act either by force of s 24HA(3) as to the Water Management Miscellaneous Licences (defined in FMG R [13(e)]); or by force of s 24MD(1) as to the remaining FMG tenements.

22. As to the Water Management Miscellaneous Licences, s 24HA(2) relevantly provides that s 24HA applies to a future act consisting of the grant of a licence or authority that is valid (including because of the NTA) and relates to the management or regulation of surface and subterranean water. Sec 24HA(2) provides that ***water*** means water in all its forms; and ***management or regulation*** of water includes granting access to water, or taking water. Each of the Water Management Miscellaneous Licences were granted for purposes including:

    (a) "taking water" (L47/302 (expired), L47/361, L47/362, L47/697);

    (b) "taking water" and "a water management facility" (L47/363, L47/367, L47/396 (expired), L47/472, L47/801, L47/813, L47/814);

    (c) "taking water" and "search for groundwater" (L47/914); and

    (d) "taking water", "search for groundwater" and "a water management facility" (L47/919).

23. In ***BHP** Billiton Nickel West v **KN** (deceased)*,[6] the Full Federal Court held that a miscellaneous licence granted under s 91 of the MA 1978 and reg 42B(ia) of the *Mining Regulations 1981* (WA) (**MR 1981**) to search for groundwater is a future act relating to the management or regulation of water under s 24HA(2), even if the miscellaneous licence could be granted only if its purpose was "directly connected with mining" (as required by the MA 1978, s 91(6)). Sec 24HA(2) is engaged, on its express

[4] (1995) 183 CLR 373, 453.

[5] [1998] HCA 58; (1998) 195 CLR 96, 118-119 [15]-[16].

[6] [2018] FCAFC 8; (2018) 258 FCR 521, 534-537 [46]-[64] (North, Dowsett and Jagot JJ).

terms, if there is a grant of a licence for the management or regulation of water, regardless of whether the grant is made under mining or water management legislation. For s 24HA(2) to apply, there is no additional requirement that the right to manage water is given under legislation specific to water. Thus, the Water Management Miscellaneous Licences are covered by s 24HA(2).

24. Because s 24HA applies to the Water Management Miscellaneous Licences, s 24MD does not apply (see [110]-[111] below). Sec 24HA(3) provides that these future acts are valid. Secs 24HA(5) and 24HA(6) provide that the *State* (not the grantee) is liable for compensation for these future acts.

25. As to the remaining FMG tenements, Part 2, Div 3, Subdiv M applies. Sec 24MB(1) provides that Subdiv M applies to each grant of the FMG tenements as future acts because:

(a) the grant was not the making etc of legislation (s 24MB(1)(a));

(b) relevantly, the grant could be done in relation to the land concerned if the YP instead held ordinary title to it (s 24MB(1)(b)(i));

(c) relevantly, a law of the State (namely, the *Aboriginal Heritage Act 1972* (WA) (**AHA**) (see esp. ss 16, 17 and 18)), makes provision as to the preservation or protection of areas, or sites, that may be in the relevant area and may be of particular significance to Aboriginal peoples in accordance with their traditions (s 24MB(1)(c)).

26. An example of a future act covered by Subdiv M is given in the note after s 24MB, which says: "the grant of a mining lease over land in relation to which there is native title when a mining lease would also be able to be granted over the land if the native title holders instead held ordinary title to it". This explains the so-called "freehold test".

27. YNAC pleads and it is common ground (other than as to the Water Management Miscellaneous Licences) that Subdiv M applies to the FMG tenements: PoC [16]-[20], [27]-[28], [30]-[31A]; FMG R [16]-[20], [27]-[28], [30]-[31A]; WA R [198]-[211]. Relevantly, if (and only if) the conditions specified in s 24MD(3)(b) are satisfied, the YP are entitled to compensation for the grant of the FMG tenements (other than the Water Management Miscellaneous Licences) under Part 2, Div 5 of the NTA. The conditions in s 24MD(3)(b) are **not** satisfied (see [30]-[40] below).

C. HOW IS COMPENSATION TO BE DETERMINED FOR THE EFFECT OF THE GRANT OF THE FMG TENEMENTS?

The Part 2 Division 5 compensation provisions

28. Sec 48 of the NTA expressly provides that compensation payable under relevantly Part 2, Div 3 (dealing with future acts including the grant of the FMG tenements) in relation to such future acts is "only" payable in accordance with Part 2, Div 5. Consistently, s 50(1) of the NTA provides that a determination of compensation may "only" be made in accordance with Part 2, Div 5.

29. This means that the criteria for determining compensation of the effect of future acts on native title rights and interests must be found in Part 2, Div 5. It is not appropriate to cut across the criteria specified in Part 2, Div 5 by reference to other provisions of the NTA that apply to different steps in the process required by the NTA for valid future acts (including the requirement to negotiate under Part 2, Div 3, Subdiv P). The point is important as to the alleged s 109 inconsistency of s 123(1) of MA 1978 with s 33 of the NTA (see [63]-[75] below). The critical provisions that set out the criteria for determining compensation are ss 51, 51A and 53 of the NTA.

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

The provision made for compensation under the Mining Act **[Issue 2]**

30. Because there was no extinguishment of native title by compulsory acquisition or by surrender in the course of negotiations within s 24MD(2) or s 24MD(2A) of the NTA, as to the FMG tenements (other than Water Management Miscellaneous Licences), s 24MD(3) of the NTA applies. Sec 24MD(3) provides that the non-extinguishment principle (see s 238) applies to the FMG tenements; and if, and only if, the following conditions are satisfied, the YP are entitled to compensation for the future acts (of the grant of the FMG tenements) in accordance with Part 2, Div 5:

    (a) the "similar compensable interest test" is satisfied in relation to the future acts (s 24MD(3)(b)(i));

    (b) the law mentioned in s 240 (which defines ***similar compensable interest test***) does **not** provide for compensation to the YP for the future acts (s 24MD(3)(b)(ii)).

31. Sec 240 provides that the ***similar compensable interest test*** is satisfied in relation to the future acts of the grant of the FMG tenements if the native title concerned relates to an onshore place; and the compensation would, apart from the NTA, be payable under any law for the future acts on the assumption that the native title holders (the YP)

instead held ordinary title. On the assumption that the YP held "ordinary title" (in effect, a freehold estate in fee simple – s 253), s 123 of the MA 1978 is a law that provides for compensation for the future acts of the grant of the FMG tenements.

32. Sec 123(2) of the MA 1978 provides that *subject relevantly to s 123 itself*, the owner and occupier of any land where mining takes place are entitled according to their respective interests to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining. If the YP held a freehold estate in fee simple, they would qualify as an owner of the land within the compensation application area and would be entitled to compensation for loss or damage resulting from or arising from mining conducted pursuant to the grant of the FMG tenements.

33. This means that the first condition in s 24MD(3)(b)(i) is satisfied in relation to the future acts - the grant of the FMG tenements. In short, there is a State law, satisfying the ***similar compensable interest test***, that gives a right to compensation to ordinary title holders, namely, s 123(2) of the MA 1978.

34. The second condition in s 24MD(3)(b)(ii) is, however, **not** satisfied. For the second condition to be satisfied, the law mentioned in s 240 (namely, here, s 123(2) of the MA 1978) must **not** directly provide for compensation to the YP for the future acts. But, s 123(2) **does** give the YP a right to compensation as "occupiers".

35. Sec 8 of the MA 1978 does not define "***occupier***" but provides that occupier includes any person in actual occupation of land under any lawful title granted by or derived from the "***owner***". Sec 8 relevantly defines "***owner***" as the registered proprietor under the *Transfer of Land Act 1893* (WA) or the owner in fee simple or the person entitled to the equity of redemption. The YP do not fall within the inclusive description of "***occupier***" under the MA 1978, but they may yet qualify as "***occupier***" and be directly entitled to compensation under s 123(2): *WA v* ***Ward***.[7]

36. Sec 123(2) gives a right to compensation if loss or damage is suffered or likely to be suffered as a result of mining. ***Mining*** is inclusively and widely defined in the MA 1978 (s 8) to include all aspects of ***mining operations***. Given the nature of the right to compensation provided by s 123(2), a person, who has a right to occupy; from time to time actually occupies; or who from time to time uses the land, would qualify as "occupier" and be entitled to compensation. Given the nature of the right of compensation conferred by s 123(2), there is no requirement that a person qualifies as "occupier" only if they continuously and actually occupy the land. A person may suffer loss from the mining of land they use from time to time, and not continually.

[7] [2002] HCA 28; (2002) 213 CLR 1, 167-170 [313]-[319] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

37. In *Warrie (formerly TJ) (on behalf of the YP) v WA* (***Warrie (No 1)***),[8] Rares J held that the YP occupied areas 1, 2, 3, 4 and the Reserve (area 5) of the compensation application area so as to satisfy the requirements of s 47B(1)(c) and s 47A(1)(c) of the NTA, to permit the conclusion that these areas were Exclusive Areas *for the purposes* of *determining* native title (not *compensation*)[9]: [231]-[302]. In *Warrie (No 1)*, Rares J held that the YP occupied each area[10] as they had been visited from time to time, and:

    (a) there had been camping, hunting and gathering, and ceremonial activities in area 1 ([234], [243], [260], [262], [265], [267], [289]-[291]);

    (b) ochre and sacred stones had been collected from area 2 ([235], [238], [240], [242], [244], [245], [247]-[249], [251], [260], [263]-[265], [292]-[296]);

    (c) area 3 had been used for hunting and fishing, and traditional spiritual rights had been exercised ([245]-[246], [260], [263], [265], [267], [297]-[298]);

    (d) in area 4 and the Reserve (area 5), there had been camping and living off the land, fishing, hunting and walking ([238]-[239], [252], [260], [263], [265], [267], [299]-[302]).

38. In *Warrie (No 1)*, in short, Rares J held that "occupy" involves the exercise of some physical activity, but it need not be continuous and may be spasmodic or occasional ([270]). On appeal, in *Fortescue Metals Group v Warrie*,[11] the Full Court also concluded that the YP occupied areas 2 and 3, the subject of the appeal: [398]-[526]. Robertson and Griffiths JJ (Jagot and Mortimer JJ ([1]) and White J ([529]) agreeing) rejected the argument that the YP had insufficient actual occupation under principles that were argued to have been established (esp. [431], [462], [483]). Under established principles, "occupy" is not confined, requiring actual and continued possession or legal possession; and the issue depends on context: *NSW Aboriginal Land Council v Minister Administering the Crown Land Acts*.[12]

39. Consistent with *Warrie (No 1)*, in *Warrie (No 2)*, Rares J ordered, declared and determined that the YP have a right to access and remain in the Determination area

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[8] [2017] FCA 803; (2017) 365 ALR 624.

[9] See the submissions below ([127]-[134]).

[10] The areas are depicted in the maps in Schedule 3 of *Warrie (No 2)*, by reference to areas described as unallocated Crown land (UCL). The UCLs are referred to in Schedule 4 of *Warrie (No 2)* and by Rares J in *Warrie (No 1)*. Area 1 consists of UCL 14, UCL 17, UCL 22, and UCL 24 (*Warrie (No 1*) [155]). Area 2 consists of UCL 6 and UCL 7 (except certain areas) (*Warrie (No 1)* [156]). Area 3 consists of UCL 1 (except a mineral lease), UCL 2 (except a mineral lease), UCL 8, UCL 9, UCL 10, UCL 11, UCL 18, UCL 19, UCL 23 and Water1 (except a mineral lease) (*Warrie (No 1)* [158]). Area 4 consists of UCL 4 (*Warrie (No 1*) [159]). Area 5 is Reserve 31428 (*Warrie (No 1)* [154]).

[11] [2019] FCAFC 177; (2019) 273 FCR 350.

[12] [2016] HCA 50; (2016) 260 CLR 232, 251-253 [17]-[24] (French CJ, Kiefel, Bell and Keane JJ); 266-271 [76]-[92] (Gageler J).

(Determination 3(a)). *Warrie (No 2)* establishes that YP have a right as "occupier" within s 123(2) of the MA 1978. This means that the second condition in s 24MD(3)(b)(ii) **cannot** be satisfied. The law mentioned in s 240 of the NTA that defines ***similar compensable interest test*** (namely, s 123 of the MA 1978) provides for compensation to the native title holders (YP) for the future acts.

40. This means that s 24MD(3) does **not** give the YP a right to compensation in accordance with NTA, Part 2, Div 5. This also means that the YP have a right to seek compensation before the Warden's Court under s 123(3). The YP have no right under Part 2, Div 5.

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

41. The above conclusion is not affected when consideration is given to the detail of the compensation provisions in s 123. These provisions give the YP a right to compensation for all loss or damage suffered or likely to be suffered by the reason of the grant of the FMG tenements, and they have a like effect to the entitlement to compensation under s 51 of the NTA.

42. Sec 123(1) is important and provides that since the coming in to operation of the *Mining Amendment Act 1985* (**MA Amendments 1985**) (on 31 Jan 1986),[13] in so far as the mineral is by virtue of s 9 of the MA 1978 the property of the Crown or the mining is authorised under the MA 1978, "no compensation shall be payable" and "no claim lies for compensation, whether under the [MA 1978] or otherwise:

(a) in consideration of permitting on to any land for mining purposes; or

(b) in respect of the value of any mineral which is or may be in, on or under the surface of any land; or

(c) by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral; or

(d) in relation to any loss or damage for which compensation can not be assessed according to common law principles in monetary terms".

43. The right to compensation given to an owner and occupier under s 123(2) is expressly subject to s 123 itself, including s 123(1). The principles or criteria for compensation spelled out in s 123(1) are explicit and clear. No compensation is payable for the permission to enter land for mining; no compensation is payable in respect of the value

[13] *Government Gazette* (WA), 31 Jan 1986, 320. Sec 93 of the *Mining Amendment Act 1985* (WA) introduced s 123(1).

of any mineral in the land; and no compensation is payable by reference to any rent, royalty or other amount assessed in respect of such minerals.

44. This is because, ever since 1 Jan 1899, all minerals in the land (including iron ore) belong to the State, and not to any owner or occupier of land where mining occurs. No owner or occupier is entitled to compensation for something they do not own. There is no discriminatory treatment of native title holders. In any event, here, in *Warrie (No 2)*, Rares J held that the YP had no right to the minerals: Determination 5(c)(i).

45. The reason all iron ore from the FMG tenements belongs to the State, not to any owner or occupier, is apparent when the applicable legislation is considered.

46. Sec 3 of the *Western Australia Constitution Act 1890* (Imp) gave management and control of the waste lands of Western Australia and the proceeds of the sale and disposal of the waste lands (including all royalties, mines and minerals) to the legislature of the colony of Western Australia. Pursuant to the *Land Act WA 1898* (WA), which came into effect on 1 Jan 1899, the waste lands (relevantly being Crown lands) could be conveyed by Crown Grant but with a reservation relevantly for minerals, which continue to belong to the Crown (ss 3, 4, 15). Under s 117 of the MA 1904, relevantly all minerals (including iron ore) on any land that had not been alienated in fee simple before 1 Jan 1899 was the property of the Crown. Pursuant to s 3(1) of the MA 1978, the MA 1904 was repealed but under s 9(1) of the MA 1978, relevantly, all minerals (including iron ore) on any land that had not been alienated in fee simple before 1 Jan 1899 are the Crown's property: *Ward* [165]-[168], [384]-[385].

47. As to the FMG tenements, there was no sale or disposal of any of the land the subject of the FMG tenements before 1 Jan 1899. All of the land the subject of the FMG tenements remains unallocated Crown land or subject to pastoral leases (under which pastoral leases no right to the Crown's minerals was given to the pastoral lessee). There has been no grant of any fee simple estate in any land the subject of the FMG tenements. If there had been any such grant before 31 Oct 1975 when the RDA came into effect, native title would have been wholly extinguished with no right to compensation.

48. Sec 123(4) of the MA 1978 is also *expressly* subject to s 123(1). Sec 123(4) provides that the amount payable under s 123(2) may include compensation for being deprived of possession or use of the land (s 123(4)(a)); for damage to any part of the land (s 123(4)(b)); and for "social disruption" (s 123(4)(f)). There is an issue ([76] below) about the meaning of "social disruption".

49. In any event, s 123(2), which gives a right to compensation to an occupier for loss resultant from mining, and s 123(4), which gives a right to compensation for loss of use

of land and damage to land will give the YP compensation for the effect of the grant of the FMG tenements on their rights and interests.

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

50. If s 123(2) does not give the YP compensation, s 51(1) of the NTA provides that, subject to s 51(3), the entitlement to compensation under relevantly Part 2, Div 3 (including s 24HA(5) and, if its conditions are satisfied, s 24MD(3)(b)) is an entitlement on just terms to compensate the YP for any loss, diminution, impairment or other effect of the act (namely, here, the future act of the grant of the FMG tenements) on their native title rights and interests.

51. Sec 51(1) is the "core provision": *Northern Territory v Griffiths*[14] (***Griffiths HC***). The YP are entitled to compensation because they "hold" native title (see s 224). The focus is on the effect *of the act* (here, the *future acts* of the grant of the FMG tenements) on the YP's *native title rights and interests*. The *act* and the *effect* of the *act* must be considered: *Griffiths HC* [41]-[46]. Sec 51(1) refers to the effect of the "act", dealing indiscriminately between *past acts* and *future acts*. Compensation under Part 2, Div 2 for *past acts*, for example, is claimable only under s 51(1)[15] as are claims for compensation for *future acts*. Thus, the principles established in *Griffiths HC*, even though it dealt with compensation for *past acts*, are directly applicable here.

52. Sec 223(1) defines native title rights and interests as rights and interests "in relation to land or waters" that are possessed under traditional laws and customs where the YP have a connection with the land or waters and the rights and interests are recognised by the common law of Australia. Sec 223(2) provides that, without limitation, ***rights and interests*** includes hunting, gathering, or fishing, rights and interests. Sec 51(1) recognises the *existence* of two aspects of native title rights and interests identified in s 223 – both the physical or material aspect (the right to do something in relation to land) and the cultural or spiritual aspect (the connection with the land): *Griffiths HC* [44]. The effect on both aspects may be different but it is still necessary to focus on the *effect* of the *future acts* on the native title rights and interests. It is inappropriate to shift the focus to anything gained by the grantee of the future act.

53. Sec 51(1) provides that the entitlement to compensation for the effect of the future acts on the YP's native title rights and interests is an entitlement to compensation on just terms. Even though the concept of "just terms" is "somewhat general and indefinite", it ultimately requires the compensation for the *loss* to be fair and just (*Nelungaloo Pty*

[14] [2019] HCA 7; (2019) 269 CLR 1, 43 [41] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

[15] See NTA, s 48; *Griffiths HC* 42-43 [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); 116 [261] (Edelman J).

Ltd v Commonwealth[16]) and the standard is one of fair dealing (*Nelungaloo Pty Ltd v Commonwealth*[17]; *Griffiths v Northern Territory (No 3)*[18]). Compensation on just terms still has to be compensation for the effect on the YP's native title rights and interests, for the only *loss* that is claimable. It is neither fair nor just to award compensation for anything other than the effect on native title rights and interests. That remains the focus imposed by the core provision of s 51(1).

54. Further, s 51(1) is expressly subject to s 51(3). This means that, although the entitlement to compensation for loss or other effect is specified in s 51(1) (the "core provision"), s 51(1) expressly specifies that the principles or criteria referred to in s 51(3) are to be applied in determining that loss or other effect. This also means that when the principles or criteria in s 123 of MA 1978 are applied (by force of the mandate in s 51(3)), the enquiry remains about compensating for the *loss* or other *effect* on native title rights and interests. The required connection to land or water remains.

55. The required connection between the *future acts* of the grant of the FMG tenements and the loss or other effect also remains. The Court rejected YNAC's application to further amend its Points of Claim to add a new para 36A where the claim for the alleged social division was said to be a result of FMG's conduct "in their pursuit of the grant of the FMG tenements" (2 June 2023, ts 47.7-49.45). Such a claim does not fall within s 51(1); it cannot be pursued now because new para 36A was rejected by the Court.

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

56. Sec 51(3) of the NTA provides relevantly that if the future act of the grant of the FMG tenements is not the compulsory acquisition of any native title rights and interests and the ***similar compensable interest test*** is satisfied in relation to the *future act*, the Court must (subject to irrelevant provisions) apply any principles or criteria for determining compensation "(whether or not on just terms)" set out in the law mentioned in s 240 (which defines ***similar compensable interest test***).

57. The similar compensable interest test is satisfied here (see [30]-[33] above) and the relevant law mentioned in s 240 is s 123 of the MA 1978. The *future act* of the grant of the FMG tenements was not the compulsory acquisition of any native title rights and interests. No native title rights and interests were extinguished by the grant of the FMG tenements. The non-extinguishment principle applies to the grants under Subdiv H (s 24HA(4)) and under Subdiv M (s 24MD(3)(a)). Sec 238 of the NTA provides that, once the grants of the FMG tenements cease to operate (after mining ends), the YP's

[16] (1948) 75 CLR 495, 569 (Dixon J).

[17] (1952) 85 CLR 545, 600 (Kitto J).

[18] [2016] FCA 900; (2016) 337 ALR 362, 383 [97]-[98] (Mansfield J).

native title rights and interests will again have full effect (subject, of course, to any earlier permanent extinguishment of any part of their native title rights and interests – see s 237A – which occurred before the grants of the FMG tenements).

58. In ***Yunupingu*** *on behalf of the Gumatj Clan or Estate Group v Commonwealth*,[19] the applicant accepted that, by reason of the grant of pastoral leases, the claimants' *exclusive* native title rights in respect of the claim area were extinguished but that they continued to hold *non-exclusive* native title rights including the right to take and use the resources in the claim area. The applicant's argument was that, in the period from 1911 to 1978, there were a number of grants or legislative acts which may have been inconsistent with the continued existence of the claimants' *non-exclusive* native title rights and may have extinguished them at common law and, apart from the NTA, such grants or acts were invalid because they failed to provide just terms as required by s 51(xxxi) of the *Constitution* (and s 51(xxxi) applied to the Northern Territory legislation enacted under s 122 of the *Constitution*). The applicant argued that this meant that the grants or acts were *past acts* within s 228(2) of the NTA; and that the NTA validated those past acts and gave the claimants an entitlement to compensation under the NTA in respect of the acquisition of property: [8].

59. To address the above issues, in *Yunupingu*, the Full Court analysed the concept of acquisition of property at some length to deal with the Commonwealth's argument that there had been no *acquisition* of the claimants' native title rights and concluded that, because there had been extinguishment of native title rights, there could be an acquisition: [285]-[297], [304]-[480]. Special leave to appeal has been sought.

60. Regardless, here, in contrast to *Yunupingu*, there has been no extinguishment by the grant of the FMG tenements of the YP's non-exclusive native title rights and interests, and those native title rights and interests do not include any right to minerals. There was no acquisition of property here resulting from the future acts of the grant of the FMG tenements. By reference to Brennan CJ's judgment in *Commonwealth v WMC Resources*,[20] in *Yunupingu*, Mortimer CJ, Moshinsky and Banks-Smith JJ explained that if there is an extinguishment of native title, as an interest in land, there could be an acquisition of property because it "necessarily results in the enhancement of [radical] title which was subject to the interest extinguished": [373]. Here, because there was no extinguishment (at all) of the YP's native title rights and interests by the grant of the FMG tenements, there was no acquisition of any property. This means that all of the conditions for s 51(3) to apply have been satisfied. This appears to be common ground: PoC [41]; FMG R [41]; WA R [245]-[248].

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[19] [2023] FCAFC 75 (Mortimer CJ, Moshinsky and Banks-Smith JJ).

[20] [1998] HCA 8; (1998) 194 CLR 1, 18 [20].

61. Sec 51(3) expressly provides that when s 51(3) is applicable, the principles or criteria relevantly under s 123 of the MA 1978 "must" (not may) be applied. This means that the principles in s 123(1), which do not permit a claim for compensation by reference to the value of minerals, rent for mining tenements, or royalty paid by reference to minerals obtained, must be applied. The YP cannot claim compensation by reference to these matters. This stands to reason because the YP do not have any rights to the minerals in the subject land. The YP's claim for compensation is for loss or other effects on their native title rights and interests. That loss has to be quantified; it cannot be assumed to be related to rent or royalties paid by FMG and received by the State.

62. Sec 51(3) requires s 123 of the MA 1978 to be applied regardless of whether s 123 gives compensation on just terms. Meaning and effect must be given to "(whether or not on just terms)" as it appears in s 51(3). Consistently, in *Native Title Bill 1993* (HR), Explanatory Memorandum Part B (**EM 1993**), 29, it was said that, "If the native title act involves the grant of an interest which can be granted over ordinary title land, such as a mining interest, subclause (3) provides that compensation is to be assessed under the same regime as that for the holders of ordinary title. This is the exception to the entitlement to just terms compensation".

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

63. Despite accepting that s 51(3) is applicable here,[21] YNAC now contends that s 123(1) of the MA 1978 is invalid because it is inconsistent with the NTA, particularly s 33(1).

64. The future acts of the grants of the FMG tenements are valid by force of s 24HA(3) (as to the Water Management Miscellaneous Licences) and s 24MD(1) as to the remaining FMG tenements if Part 2, Div 3, Subdiv P (dealing with the right to negotiate) was complied with (if required by Subdiv P) (see [21] above). FMG complied with the requirements of Subdiv P and was granted the FMG tenements including, following negotiations, by determinations of the NNTT under s 38(1)(c) of the NTA.[22] Without complying with the requirements of Subdiv P, FMG would not have been granted the FMG tenements to which Subdiv P applies.

65. Sec 25 provides an overview of Subdiv P including that it applies to certain future acts (including certain conferrals of mining rights) (s 25(1)(a)); before the future act is done,

[21] PoC [41].

[22] See *FMG Pilbara / Wintawari Guruma Aboriginal Corporation / Ned Cheedy & ors on behalf of the YP / WA* [2009] NNTTA 99; *FMG Pilbara / Ned Cheedy and ors on behalf of the YP / WA* [2009] NNTTA 91; *FMG Pilbara / Ned Cheedy and ors on behalf of the YP / WA* [2011] NNTTA 107; *FMG Pilbara / NC (deceased) and ors on behalf of the YP / WA* [2012] NNTTA 142; *FMG Pilbara v Yindjibarndi #1* [2014] NNTTA 79; *FMG Pilbara v YNAC* [2018] NNTTA 64; *FMG Pilbara v YNAC* [2020] NNTTA 8; *FMG Pilbara / Ned Cheedy and ors on behalf of the YP / WA* [2012] NNTTA 11.

the parties must negotiate with a view to reaching an agreement (s 25(2)) and if no agreement is reached, relevantly, the NNTT may make a determination about the future act instead (s 25(3)); and if Subdiv P is not complied with, the future act will be invalid to the extent that it affects native title (s 25(4)). Sec 26(1) provides that Subdiv P applies relevantly to a future act if Subdiv M applies, and the future act is the creation of a right to mine. Sec 28(1)(g) relevantly provides that, subject to the NTA, a future act to which Subdiv P applies is invalid to the extent that it affects native title, unless before it is done, a determination is made under s 38 that the future act may be done or may be done subject to conditions.

66. Secs 29-31 deal with the requirements for notice, and negotiation in good faith. Sec 31(2) provides that if any of the negotiation parties (see s 30A) refuses or fails to negotiate about matters unrelated to the effect of the future act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith, as required. Thus, if FMG would not negotiate about matters unrelated to the YP's native title rights and interests (including about any commercially agreed royalty amount), that is not a failure to negotiate in good faith.

67. In the above context, s 33(1) provides that, without limiting the scope of any negotiations, there may be an agreement for payments to be made by reference to profits, income derived or any things produced by the grantee as a result of doing anything in relation to the land or waters concerned after the future act is done. This does not mean that the loss or effect on native title is properly determined by reference to such profits, income derived, or any things produced. The negotiation parties are able to negotiate a commercial agreement, without limit. The NTA does not confuse the nature and extent of commercial agreements that may be made with the compensable value of native title rights and interests.

68. This was confirmed in ***Brownley*** *v WA (No 1)*.[23] In *Brownley*, Lee J held that a matter on which a registered native title claimant is entitled to negotiate, provided for in s 33, is not to be confused with the entitlement of a native title holder to obtain compensation under the NTA (then provided by s 23 of the NTA) for the doing of a future act.

69. Further, in *Fejo*,[24] land was granted to Mr Benham by a grant dated 20 April 1882 pursuant to ss 6 and 8 of the *Northern Territory Land Act 1872* (SA), which was acquired by the Commonwealth pursuant to the *Lands Acquisitions Act 1906* (Cth) and the *Lands Acquisition Ordnance 1911* (NT); and s 16 of the 1906 Act provided that it vested in the Commonwealth freed and discharged from all interests so that the *legal estate* in it vested in the Commonwealth: [8]-[12]. The appellants brought proceedings

[23] [1999] FCA 1139; (1999) 95 FCR 152, 169.

[24] [1998] HCA 58; (1998) 195 CLR 96.

in the Federal Court seeking declarations that "native title exists" in relation to the land and that, before any lease could be granted as to the land, the Northern Territory was obliged by the NTA to negotiate or to compulsorily acquire native title: [4]. The High Court held that the grant of the fee simple to Mr Benham in 1882 extinguished native title because the rights in fee simple were inconsistent with the native title holders continuing to hold any rights or interests, and native title could not be revived: [42]-[48]; [56]-[58]. The High Court dealt with the right to negotiate and held that the obligation to negotiate applied only to certain future acts.

70. Also, in *Fejo*, the High Court rejected an argument that the NTA gave rise to a general obligation to negotiate: [18]-[25]. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said "neither the value of the right to negotiate nor the possibility of its exercise before determination of a native title claim are matters that affect in any way the strength of the claim to native title that lies behind the right to negotiate": [25]. Again, the difference between the requirement to negotiate under Subdiv P and the value of loss or other effect on native title rights and interests is evident. Any failure to negotiate is not compensable as a loss or other effect on native title rights and interests.

71. Sec 35(1) permits an application to the NNTT, in effect, if no agreement is made within 6 months. Sec 36(2) provides that if any negotiation party satisfies the NNTT that any other party (other than a native title party) did not negotiate in good faith, the NNTT must not make a determination permitting the future act. Here, despite applications under s 36(2),[25] the NNTT did not find that FMG had failed to negotiate in good faith.

72. Sec 38 of the NTA relevantly provides that the NNTT must determine either that the future act must not be done or that it may be done subject to compliance with conditions. Importantly, s 38(2) provides that the NNTT must not determine a condition that has the effect that native title parties are entitled to payments worked out by reference to profits, income derived, or any things produced by the grantee as a result of doing anything in relation to the land or waters concerned after the future act is done. Again, it is apparent that the NTA expressly does not correlate native title rights and interests with profits, income or any things produced by the grantee party. Instead, the NTA specifically provides that compensation for loss or other effect of native title rights and interests may only be determined under Part 2, Div 5, relevantly if there are valid future acts. The NTA does not conflate and confuse what might be the subject matter of a commercially negotiated agreement effected in compliance with Subdiv P with the compensatory right specified by the core provision in s 51(1).

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[25] *FMG Pilbara / Ned Cheedy and ors on behalf of the YP / WA* [2009] NNTTA 38; *FMG Pilbara / Wintawari Guruma Aboriginal Corporation; Ned Cheedy and ors on behalf of the YP / WA* [2009] NNTTA 63; *FMG Pilbara / Ned Cheedy and ors on behalf of the YP / WA* [2011] NNTTA 107.

73. Sec 39 of the NTA sets out the matters that the NNTT had to take into account before it determined that the FMG tenements could be granted on conditions. Those matters include the effect on native title rights and interests, the opinions and wishes of native title parties as to the management, use or control of the land or waters, the economic or other significance of the future act to Australia and the State, and any public interest. Sec 42 permits a determination of the NNTT to be overruled by the Minister but only in the national interest or the State's interests and only within 2 months after the NNTT's determination. The NNTT's determination is otherwise sufficient and makes valid the relevant future acts.

74. Thus, s 33(1) deals with what may be the subject of negotiations required under Subdiv P and Part 2. Div 5 deals (relevantly) with an entirely different subject matter, namely, when and for what compensation may be obtained for the loss or other effect of a future act on native title rights and interests. Hence, the argument that the principles or criteria in s 123(1) of the MA 1978 (mandated to be applied by force of s 51(3)) are inconsistent with the NTA (esp. s 33(1)) should be rejected.

75. Sec 123(1) does not "alter, impair or detract from" the full and complete operation of Subdiv P, including s 33(1): *Victoria v Commonwealth*.[26] There is no conflict, nor clash, between s 33(1) of the NTA and s 123(1) of the MA 1978. They can operate concurrently in different fields bearing in mind the text, operation, policy and purpose of the NTA and s 123(1) of the MA 1978: *Jemema Asset Management (3) Pty Ltd v Coinvest Ltd*;[27] *Native Title Act Case*.[28]

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

76. As mentioned ([48]), s 123(4)(f) provides that an owner or occupier may be entitled to compensation for "social disruption". In context, when the words "social disruption" are used to found a claim on an owner or occupier, the words connote and refer to dislocation of the owner or occupier from the land the subject of the mining. The words do not, in context, refer to social disharmony or "social division" amongst a number of owners or occupiers who may have differing views about whether mining tenements should be granted, and mining should occur, as to the owners or occupiers' land.

77. The alleged "social division" amongst the YP is alleged to have occurred not because of the grant of the FMG tenements or mining, but because the YP disagreed about what should happen when FMG proposed to obtain the grant of the FMG tenements, i.e., in the "pursuit" of such grants and because FMG has entered into commercial

[26] (1937) 58 CLR 618, 630 (Dixon J).

[27] [2011] HCA 33; (2011) 244 CLR 508, 523-526 [36]-[45].

[28] (1995) 183 CLR 373, 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

arrangements with some of the YP. The alleged "social division" or social disharmony does not fall within the proper construction of "social disruption" as used in s 123(4)(f).

78. Sec 123(4) of the MA 1978 was repealed and re-enacted including with the insertion of s 123(4)(f) by s 93 of the MA Amendments 1985. The MA Amendments 1985 arose after an inquiry into aspects of the MA 1978. In *Western Australia Report on the Inquiry into Aspects of the Mining Act (1983) to the Hon Minister for Minerals and Energy of the State* by Michael W Hunt (Chairman Mining Act Inquiry Committee), the genesis of and the reasons for the insertion of s 123(4)(f) is explained; that explanation supports the above construction of "social disruption" as used in s 123(4)(f).[29] In that report, it is said (100):

> "In addition to the value of the land, the farmer must also be compensated for social disruption to him and his family, for costs of relocation and any interim loss of earnings. Compensation should bear in mind the fact that the farmer may need to relocate in a district with which he is not familiar."

79. On the proper construction of "social disruption" as used in s 123(4)(f), the words do not refer to internal "social division" or social disharmony among a group of owners or occupiers if they disagree about whether mining should occur and about what, if any, commercial agreement should be made with the proposed grantee of mining tenements.

80. Because the YP are allegedly in dispute, it cannot be assumed that this was caused by FMG. In any event, the alleged "social division" is not loss or other effect of the grant (s 51(1)) of the FMG tenements. There is no right to compensation for this alleged "social division" or disharmony by reference to the principles or criteria in s 123(4)(f).

81. The alleged "social division" or disharmony is not compensable under the core provision in s 51(1) because loss following from such social division is not a loss or other effect of the grant of the FMG tenements on the YP's "native title rights and interests". Sec 223 defines native title rights and interests as the YP's rights and interests "in relation to land or waters" including where the YP by their "laws and customs" "have a connection with the lands or waters". The YP's native title rights and interests including their spiritual connection with the land should not be confused with their alleged disharmony arising from their dealings with FMG, including allegedly caused by FMG's "pursuit" of the FMG tenements.

Entitlement to compensation under s 10(1) of the *Racial Discrimination Act 1975* (Cth) [Issue 11]

82. YNAC asserts a further or alternative claim that if the MA 1978 does provide for compensation to the YP for the grants of the FMG tenements (e.g., because the YP are

[29] See Hansard (WA), Legislative Assembly, 13 March 1985, 885, 887.

"occupiers" under s 123(2)), the MA 1978 does not provide the YP with parity of treatment when compared to holders of *ordinary title* and does not provide compensation having regard to the "unique character" of the YP's native title rights and interests, engaging s 10(1) of the RDA to fill the void: PoC [21]-[23]. The claim is founded on alleged disparity of treatment under the MA 1978 (namely, by s 8 ["private land"], s 29(2), s 29(7)(c), s 35(1), s 38, s 123(3), s 123(5), s 123(6)).

83. Sec 45(1) of the NTA provides that if the RDA has the effect that compensation is payable to native title holders in respect of an act that validly affects native title to any extent, the compensation in so far as it relates to the effect on native title, is to be determined in accordance with s 50 as if the entitlement arose under the NTA. Sec 226(2)(a) of the NTA provides that an "***act***" includes the making, amendment or repeal of any legislation. The "act" to which YNAC makes reference is the provisions of the MA 1978 that give rise to the alleged disparity.

84. Sec 10(1) of the RDA relevantly provides that if, by reason of a provision of a law of the State, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that State law, the first-mentioned persons shall, by force of s 10(1) enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

85. In *Gerhardy v Brown*,[30] the issue was whether s 18 of the *Pitjantjatjara Land Rights Act 1981* (SA) (which gave unrestricted rights of access to certain land to the Pitjantjatjara people) and s 19 of that Act (which prohibited any non-Pitjantjatjara person from entering the land without permission) discriminated so that s 10 of the RDA was engaged to give a non-Pitjantjatjara person a right of access without committing an offence. It was held that these provisions were a "special measure" within s 8(1) of the RDA and, therefore, s 10 of the RDA did not apply. In that context, Mason J said if a State law gives a right only to people of a particular race, s 10 would operate to confer that right on people of other races so that they may enjoy an equal right (98). Mason J also said that if a State law prohibits only people of a particular race from enjoying a human right or fundamental freedom, s 10 would again operate so that the prohibition would not apply because the prohibition under the State law would be invalid under s 109 of the *Constitution* (98-99). The approach taken by Mason J as to the effect of s 10(1) of the RDA has been adopted in subsequent cases.

[30] (1985) 159 CLR 70.

86. In the *Native Title Act Case*,[31] the High Court held that s 7 of the *Land (Titles and Traditional Usage) Act 1993* (WA), which extinguished native title to land and created a statutory right of traditional usage, was inconsistent with s 10(1) of the RDA because the holders of s 7 rights did not enjoy the same security of enjoyment of rights as did holders of "title", and s 7 was invalid to the extent of the inconsistency because of s 109 of the *Constitution*. Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said (438), "If, by virtue of the WA Act, Aborigines on whom s 7 rights are conferred do not enjoy the same security of enjoyment of those rights as do the holders of 'title', there is an inconsistency between the WA Act and s 10(1) of the [RDA]. And, if there be such an inconsistency the WA Act is invalid to the extent of the inconsistency".

87. In *Ward*,[32] the High Court considered the meaning and effect of s 10(1) of the RDA in the context of a claim for a determination of native title over about 7,900km^2 in the East Kimberley. The Court considered several pieces of legislation that regulated WA land law to determine whether native title had been extinguished by that legislation. In that context, Gleeson CJ, Gaudron, Gummow and Hayne JJ ([104]-[134]) held:

(a) s 10(1) is directed to the "*enjoyment*" of rights by people of one race but not others and, in that event, s 10 gives that right, and it is incorrect to consider merely the purpose of the law that deprives people of one race from the enjoyment of the rights, so as to give s 10 a narrower effect ([105], [115]);

(b) (i) if a State law forbids the enjoyment of a human right without differentiating between racial groups, s 10(1) does not operate because there is no discrimination ([108]); (ii) if a State law provides for the extinguishment of land titles but provides for compensation only in respect of non-native title, the extinguishment remains but s 10(1) will give a right to compensation to native title holders ([108], [124]); (iii) if a State law extinguishes only native title, this discriminatory burden of extinguishment is removed by force of s 10(1) and the State law is rendered invalid by s 109 of the *Constitution* ([108]).

88. In ***James** v Western Australia*,[33] the question was whether mining leases etc granted under the MA 1978 before 1 Jan 1994 (when the NTA commenced) but after 31 Oct 1975 (when the RDA commenced) were "past acts" within s 228(2) of the NTA. Sec 228(2) relevantly defines ***past act*** as an act that took place before 1 Jan 1994 when native title existed in relation to particular land or waters and where, apart from the NTA, the act was invalid to any extent but would have been valid to that extent if native title did not exist. In essence, something is a ***past act*** within the NTA if it would have

[31] (1995) 183 CLR 373.

[32] [2002] HCA 28; (2002) 213 CLR 1.

[33] [2010] FCAFC 77; (2010) 184 FCR 582.

been invalid, for example, because of s 10(1) of the RDA, apart from the operation of the NTA. The Full Federal Court held that the grant of the mining leases were past acts because they would have been invalid by force of s 10(1) of the RDA.

89. In *James*, Sundberg, Stone and Barker JJ said, by applying *Gerhardy v Brown*[34] and *Ward*,[35] that s 10(1) operates in two kinds of cases involving State laws: (1) where a State law omits to make the enjoyment of rights universal, in which event, the State law is not invalid but s 10 will confer a complementary right; (2) where a State law imposes a prohibition forbidding the enjoyment of a human right or fundamental freedom enjoyed by persons of another race or deprives them of a right or freedom previously enjoyed by all, in which event, s 10(1) confers a right on the persons prohibited or deprived, rendering the State law invalid under s 109 of the *Constitution* to the extent of the inconsistency.

90. Because s 123(2) of the MA 1978 gives the YP a right to compensation as "occupiers" for all loss or damage suffered or likely to be suffered from mining pursuant to the grant of the FMG tenements, there is no disparity or differentiation in any sense, so as to engage s 10(1) of the RDA. The provisions of the MA 1978 to which YNAC refers do not give rise to any disparity, based on race etc, of treatment as between native title holders and ordinary title holders to trigger s 10(1).

91. Even though ***private land*** is defined in s 8 of the MA 1978 to include relevantly an estate of freehold and even though the definition does not include native title land, that is insufficient to trigger s 10(1) when s 123(2) of the MA 1978 gives native title holders, as "occupiers", a full right to compensation. The "unique character" of native title is not ignored by s 123(2) in that it gives a right to "compensation for all loss and damage suffered or likely to be suffered". These are words of width. They are words that have a similar effect to the words used in s 51(1) of the NTA which entitles compensation for "any loss, diminution, impairment or other effect" on native title rights and interests. An occupier with native title rights and interests may claim all loss or damage suffered from mining; this would compensate for any loss said to arise from the unique character of the occupier's connection, interests or rights. The true issue is about the quantum of such loss; the true issue is not about disparity of treatment.

92. Further, the express rights in ss 123(4)(a) and 123(4)(b) of the MA 1978 to obtain compensation for being deprived of possession or use and damage to any part of the land are rights given to all occupiers. These rights will compensate the YP, in the same way as any other owner or occupier would be compensated if relevant loss is shown.

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[34] (1985) 159 CLR 70.

[35] [2002] HCA 28; (2002) 213 CLR 1.

Nothing in the MA 1978 provides that a claim for non-economic or cultural loss cannot be made.

93. As submitted ([44]-[47]), the conferral of the right on an owner of private land alienated before 1 Jan 1899 under s 38 of the MA 1978 to royalties received by the Crown from minerals (except gold, silver and precious metals) does not give rise to any disparity of treatment, discriminating on racial grounds. The YP do not have any right to minerals as expressly determined in *Warrie (No 2)*. The particular right given to owners of land that obtained title before 1 Jan 1899 is not a right that is relevant to the YP. All people, not just native title holders (to the extent to which they had native title rights and interests in the minerals), lost rights to minerals as of 1 Jan 1899 by force of the legislation referred to above ([44]-[47]). As was held in *Ward*[36] ([108]), this is a situation where a State law forbids the enjoyment of a right without differentiating between racial groups, such that s 10(1) of the RDA does not operate.

94. There is no disparity of treatment in s 123(3) of the MA 1978. The YP qualify as an "occupier" of Crown land so that they may agree compensation and, failing that, compensation will be determined by the Warden's Court on their application.

95. Sec 29(7)(c) of the MA 1978 provides that as to a mining tenement granted in respect of any private land, the consent of the owner or occupier is required before a miner may fell trees, strip bark or cut timber. Sec 29(7)(c) does not differentiate on racial grounds. Further, s 29(7)(c) is about consent being needed for certain matters. It does not deprive the YP of their entitlement to compensation under s 123(2) of the MA 1978.

96. The fact that certain rights are given to the owner or occupier of private land under ss 123(5) and 123(6) of the MA 1978 does not mean there is any disparity of treatment of the YP. There is no differentiation on racial grounds and the right to compensation under s 123(2) of the MA 1978 remains intact.

97. The fact that s 35(1) of the MA 1978 provides that a mining tenement holder cannot commence mining on any "private land" unless and until compensation has been paid to the owner or occupier does not mean there is any disparity of treatment of the YP on racial grounds, depriving them of a right to compensation under s 123(2).

98. The fact that s 29(2) of the MA 1978 requires the consent of the owner and occupier of private land in specified circumstances, again, does not treat the YP differently on racial grounds. The YP have a right to compensation, like all owners and occupiers, under s 123(2).

[36] [2002] HCA 28; (2002) 213 CLR 1.

99. Furthermore, if there is any disparity and s 10(1) of the RDA operates, s 45(2) of the NTA provides that the State (not FMG) is liable for any compensation arising.

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

100. Sec 51A(1) provides that the total compensation payable under Div 5 for relevantly a future act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the future act were instead a compulsory acquisition of a freehold estate in the land or waters.

101. In *Griffiths HC*, it was held that s 51A provides a cap on compensation as to the economic value of the native title rights and interests because s 51A equates full native titles rights and interests with freehold for the purposes of compensation ([50]-[52], [54]). The *Native Title Amendment Bill 1997* (HR), Explanatory Memo (**EM 1997**) confirms that s 51A "equates native title with freehold title for the purpose of the compensation provisions but … it does not mean that compensation would be payable at the capped level … [and the] compensation needs to be assessed on a case-by-case basis having regard to the nature of the native title rights and interests affected": [24.8].

102. Given the equation with freehold title if there is extinguishment of all native title, any argument that s 51A does not apply to cap compensation if there is a claim for loss arising from a partial impact on native title would not be accepted. It is true that s 51A has effect subject to s 53 of the NTA. But, s 53 requires compensation on just terms only if there is a resultant acquisition of property for the purposes of s 51(xxxi) of the *Constitution*. As submitted ([57]-[60]), there is no such acquisition here.

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

103. YNAC claims that the grant of the FMG tenements which are mining leases (**FMG Mining Leases**) are future acts which have resulted in an acquisition of property within s 51(xxxi) of the *Constitution*. This claim should be rejected.

104. In *Ward*,[37] the High Court considered the nature of the rights created by a mining lease granted under the MA 1978 including the meaning and effect of ss 71, 78, 79, 82, 84 and 85: [287]-[296], [306]-[309]. In particular, as to s 85(3) of the MA 1978, which provides that the right to use, occupy and enjoy the land in respect to which the mining lease was granted for "mining purposes" are exclusive rights for mining purposes in relation to the land, the High Court held that this protects the grantee to prevent any person from interfering with the exercise of *those mining rights* ([291]) but "it cannot be said that the grants of mining leases are necessarily inconsistent with the continued

[37] [2002] HCA 28; (2002) 213 CLR 1.

existence of all native title rights and interests" ([296]); and "it does not follow that all native title rights and interests have been extinguished" ([308]); see also *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)*.[38]

105. This was because, as was explained in *Ward*, the grant of exclusive possession for mining purposes is not directed to prevent the exercise of native title rights and interests and a mining lease is not inconsistent with native title, save for one exception: [306]-[308]. The exception is important. The exception is that native title rights to control access to land are inconsistent with the exclusive rights of access given under mining leases granted before the RDA and the enactment of the NTA. When the right to control access was granted under mining leases (and pastoral leases) before the RDA and the enactment of the NTA, they extinguished native title to control access because any native title right to control access is inconsistent with the right conferred by mining leases and pastoral leases. Once extinguished, the native title right to control access does not revive after the mining lease or pastoral lease comes to an end: *Ward* [309];[39] see also NTA, s 237A.

106. Given the above ([57]-[60], [104]-[105]), the grant of the FMG Mining Leases did not involve the compulsory acquisition of anything. Native title rights to control access had already been extinguished, as submitted below ([127]-[128]); and the grant of the FMG Mining Leases did not involve the acquisition of any native title right or interest.

107. It follows that there is no right to compensation under s 53(1) of the NTA, which applies to provide compensation (or top up compensation) on just terms only if a future act would result in an acquisition of property within s 51(xxxi) of the *Constitution*. In any event, if there is a right to compensation under s 53(1), the compensation is payable by the State (not FMG).

The construction and operation of s 49 NTA [Issue 6]

108. Sec 49(a) of the NTA provides, despite anything relevantly in Part 2, Div 3 (dealing with future acts), compensation is "only" payable under the NTA "once for acts that are essentially the same". The evident statutory purpose of s 49 is to ensure compensation is not payable in relation to each act "where a series of acts has an effect on native title" because "compensation is payable only once for that series of related acts": EM 1993, 28.

109. An issue is raised by YMAC about whether s 49(a) precludes other native title holders from claiming compensation in relation to the effect of the FMG tenements. The issue does not arise as between YNAC, the State and FMG. It need not be decided. But,

[38] [2010] HCA 49; (2010) 241 CLR 576, 588-589 [34]-[35]

[39] See also *Ward* [191]-[194].

s 49(a) precludes YNAC from seeking compensation for the effect of the grant of the FMG tenements where they overlap with other FMG tenements.

D. COMPENSATION PAYABLE BY STATE OR FMG RESPONDENTS [ISSUE 10]

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

110. As submitted ([17]-[24]), s 24HA(2) of the NTA applies to the Water Management Miscellaneous Licences because they relate to the management or regulation of water, regardless of the fact that the grant was made under the MA 1978: *BHP v KN*.[40] In particular, s 24AB(2) relevantly provides that to the extent that a future act is covered by s 24HA, "it is not covered by a section that is lower in the list" in s 24AA(4), namely, s 24MD. The note to s 24AB(2) states that, "It is important to know under which particular provision a future act is valid because the consequences in terms of compensation and procedural rights may be different".

111. Under s 24HA(6), relevantly, the State pays compensation. In contrast, under s 24MD(4), the State may make a law providing that a person other than it is liable to pay. Without ignoring the force, purpose and effect of s 24AB(2), it cannot be concluded that the Water Management Miscellaneous Licences are covered by s 24MD. They are covered by s 24HA.

The construction and operation of s 125A of the *Mining Act* [Issue 10]

112. Sec 125A(1) of the MA 1978 provides that if compensation is payable to native title holders for or in respect of a mining tenement, the person liable to pay the compensation is, relevantly, the holder of the mining tenement at the time a determination of compensation is made. Sec 125A does not differentiate between the grant of a mining tenement covered by s 24HA and by s 24MD. Also, s 125A does not limit its operation so that the holder of a mining tenement is not liable to pay compensation required to be paid by force of s 10(1) of the RDA and s 45 of the NTA, or of s 53(1) of the NTA.

113. On the proper construction of s 125A, giving meaning to each of the words used in it and having regard to its statutory purpose, it provides that the grantee of a mining tenement is liable to pay any and all compensation payable to native title holders "for or in respect of" the future act of a grant of a mining tenement. The words "for or in respect of" are wide and cannot be read down, without imputing a contrary intention to the Parliament other than impermissibly by reference to extraneous material or apparent subjective intent.

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[40] [2018] FCAFC 8; (2018) 258 FCR 521, 534-537 [46]-[64] (North Dowsett and Jagot JJ).

114. Even though the Court may, by reference to statutory purpose, depart from the language used in a provision, the change in language cannot be "too far reaching"; and the "inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the *Constitution*": ***Taylor** v The Owners-Strata Plan No 11564*.[41] Gageler and Keane JJ dissented (only in the result, not on principle). They said, "The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy legislative inattention. Construction is not speculation, and it is not repair" ([65]).

115. Consistently, in *HFM043 v Republic of Nauru*,[42] Kiefel CJ, Gageler and Nettle JJ said, "The task of construction of a statute is of the words which the legislature has enacted. Any modified meaning must be consistent with the language in fact used by the legislature. Words may be implied to explain the meaning of its text. The constructional task remains throughout to expound the meaning of the statutory text, not to remedy gaps disclosed in it or repair it" (180 [24]).

116. If the Parliament intended to deal only with compensation payable under s 24MD(4) only where the NTA permits the State to provide that a person other than the State is liable, that intention is not apparent from the words used in s 125A; the Parliament appears to have ignored the applicability of s 24HA(6), s 45 and s 53(1) of the NTA which all explicitly provide that the State is liable for the compensation; and do not permit a State law to provide that someone else would be liable.

117. On the proper construction of s 125A, it provides that FMG is liable for compensation "for or in respect of the grant of" each of the FMG tenements, even though compensation is claimed to be payable under s 45 and s 53 of the NTA, or is payable under s 24HA(6) and not under s 24MD(4) of the NTA, by the State (and no-one else).

Is s 125A inconsistent with the NTA and therefore invalid because of s 109 of the Constitution? [Issue 10]

118. As mentioned ([75]), if a State law, if valid, would alter, impair or detract from the operation of a Commonwealth law, then it is invalid to that extent: *Victoria v Commonwealth*.[43] The issue is whether s 125A of the MA 1978 is inconsistent and invalid only to the extent that it refers indifferently to mining tenements that might be granted under s 24HA or s 24MD and does not address the fact that only the State is

[41] [2014] HCA 9; (2014) 253 CLR 531, 547-549 [35]-[40] (French CJ, Crennan and Bell JJ).
[42] [2018] HCA 37; (2018) 359 ALR 176, 180.
[43] (1937) 58 CLR 618, 630 (Dixon J).

liable to compensation under s 45 or s 53(1) of the NTA. The issue turns on what the State Parliament intended by the enactment of s 125A.

119. In ***Wenn*** *v Attorney-General (Victoria)*,[44] the question was whether a State law (*Discharged Servicemen's Preference) Act 1943* (Vic)) was invalid because it was inconsistent with the *Re-Establishment and Employment Act 1945* (Cth). In effect, the Commonwealth Act provided for the reinstatement of members of the Forces in civil employment but did not deal with promotions thereafter, whilst the Victorian Act provided that promotion should be given to suitable and competent discharged servicemen. The High Court held that the Commonwealth Act, in effect, covered the field and invalidated the Victorian Act which had a rule for promotions excluded by the Commonwealth Act. Dixon J (Rich J agreeing) also held that no part of the Victorian Act was saved because the Victorian Parliament's intention was that it would operate as a whole and not to the extent consistent with the Commonwealth Act. Dixon J said that if the intention of the State legislation, ascertained by interpreting it, was that it was intended to apply as a whole, s 109 would operate to make the whole provision invalid (122).

120. *Wenn* was applied in ***Bell*** *Group NV (in liq) v WA*.[45] It was held that the whole of the so-called Bell Act was invalid because the Parliament did not intend for it to operate piecemeal and the Bell Act was inconsistent with the *Income Tax Assessment Act 1936*.[46] Gageler J said that s 109 "does not render an inconsistent State law invalid to the extent that the State law has an operation consistent with a Commonwealth Law *provided that the State law operating to that more limited extent remains an expression of the legislative will of the State Parliament*" [italics added]: [77].

121. As submitted ([112]-[117]), the State Parliament intended the mining tenement holder to pay compensation whenever compensation "for or in respect of the grant of a mining tenement" is payable under the NTA. The legislative will of the State Parliament was for s 125A to operate in this broad way. There is nothing capable of being saved in s 125A. It is invalid by force of s 109 because it provides that a mining tenement holder is liable for compensation when the NTA expressly provides that the State is liable for the compensation (under ss 24HA(6), 45 and 53(1)).

122. Also, ss 52(5) and 52A(4) of the NTA provide that if a condition that security by bank guarantee be given, or money be held on trust, was imposed under Subdiv P by the NNTT in permitting a grant under Subdiv M (see ss 36A, 36C(5)(b), 38, 41(5), and 42(5)(B)(b)), and there is then a determination of compensation, where there is a

[44] (1948) 77 CLR 84.

[45] [2016] HCA 21; (2016) 260 CLR 500.

[46] 527 [70] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

shortfall in the amount required for compensation, the *State* is required to pay that shortfall. Sec 125A ignores the requirement for the *State* to pay the shortfall even though there is no provision in s 52(5) or s 52A permitting the State to make the mining tenement holder liable for the shortfall. Again, s 125A seeks to impose liability on the mining tenement holder, as a whole, in a manner that is inconsistent with the NTA.

E. THE CLAIMED LOSS, DIMINUTION, IMPAIRMENT OR OTHER EFFECT ON THE NATIVE TITLE RIGHTS AND INTERESTS [ISSUE 7]

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

123. As submitted ([2], [50]-[55]), the YP are entitled to compensation for loss or other effects on their native title rights and interests. This should not be confused with the State's rights to the minerals in the compensation application area land. The effect of the grant of the FMG tenements does not include the alleged social division or disharmony (see [9]-[11], [55], [76]-[81]).

124. The Determination in *Warrie (No 2)* sets out the outer boundaries of the nature and extent of the native title rights and interests held by the YP: NTA, ss 94A, 225. In the Determination ([5(b)]), the Court expressly ordered, declared and determined that the YP's native title rights and interests (Determination [3] & [4]) do **not** confer exclusive rights in relation to water in any "watercourse", "wetland" or "underground water source" as defined in the *Rights in Water and Irrigation Act 1914* (WA). That Act defines "watercourse" widely to include any river, creek, or stream in which water flows (s 3(1)); "wetland" to include a natural collection of water, whether permanent or temporary on the land's surface (s 2(1)); "underground water source" to include water that percolates from the ground into a well (s 2(1)).

125. Also, in the Determination ([5(c)(iv)]), the Court expressly determined that the YP's native title rights and interests do not confer any rights in relation to water captured by the holders of the Other Interests pursuant to those Other Interests. The Other Interests include the rights and interests held under the FMG tenements (as granted at the time of the Determination, other than L47/396): Determination [11], Schedule 5.

126. The YP's recent assertions about how FMG may have affected water flows cannot ground a claim for compensation. The YP have no exclusive native title right and interest as to water nor any right to resist FMG's capture of water. The YP's native title rights and interests include a right to protect and care for sites and objects of significance (Determination [3(k)]) but this does not extend to protect water use.

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

127. Before the commencement of the RDA on 31 Oct 1975, native title rights and interests were able to be extinguished by a valid exercise of sovereign power inconsistent with the continued enjoyment of native title, and the pre-eminent criterion for extinguishment of native title rights is inconsistency: *Mabo v Queensland (No 2)*;[47] *Native Title Act Case*;[48] *Fejo*;[49] *Ward*;[50] *Akiba v Commonwealth*;[51] *WA v* ***Brown***;[52] ***Ward*** *v Western Australia* ***(No 3)***.[53] As submitted, the grant of pastoral leases and other rights before 31 Oct 1975 would be inconsistent with "a native title right to control access to land (for any purpose or no purpose)": *Ward*;[54] *Brown*;[55] *Ward (No 3)*.[56]

128. Here, as to the whole of the compensation application area, it was not in dispute before Rares J in *Warrie (No 1)* and *Warrie (No 2*) that there had been tenure reserved or granted before the grant of the FMG tenements (including Crown reserves, pastoral leases, temporary reserves, oil licences and permits to explore) that had the effect of extinguishing the YP's rights of exclusive possession or their right to control access to any part of the area.[57]

129. In *Warrie (No 1)* and *Warrie (No 2)*, Rares J concluded that the YP had exclusive possession rights over the Exclusive Areas by reason of ss 47A and 47B. In essence, and relevantly, ss 47A and 47B require the Court to disregard any prior extinguishment of native title if, when the application for the determination of native title is made (as to an area of land held for the benefit of Aboriginal people or reserved for their benefit or as to land not covered by a freehold estate or a lease or used for public purposes or

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[47] (1992) 175 CLR 1, 64 (Brennan J); 110-111 (Deane and Gaudron JJ).

[48] (1995) 183 CLR 373, 439 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[49] [1998] HCA 58; (1998) 195 CLR 96, 126 [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[50] (2002) 213 CLR 89, [78]; 91 [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[51] [2013] HCA 33; (2013) 250 CLR 209, 231 [35] (French CJ and Crennan J); 236-237 [50]-[52], 240 [61]-[63] (Hayne, Kiefel and Bell JJ).

[52] [2014] HCA 8; (2014) 253 CLR 507, 521-523 [31]-[39] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

[53] [2015] FCA 658; (2015) 233 FCR 1, 18-24 [108]-[151] (Barker J).

[54] (2002) 213 CLR 89,166 [309] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[55] (2014) 253 CLR 507, 525 [46] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

[56] [2015] FCA 658; (2015) 233 FCR 1, 28 [179], 32 [200] (Barker J).

[57] Amended First Respondent's Statement on the effect of tenure material on the existence and available existence of native title (filed 7 Dec 2015 in WAD 6005/2003); Applicant's Amended Further Response to the Amended First Respondent's Statement on the effect of tenure material on the existence and available existence of native title (filed 24 Dec 2015 in WAD 6005/2003); Agreed List of Tenure and Extinguishment Topics in Dispute (filed 29 Jan 2016 in WAD 6005/2003); Further Amended First Respondent's Statement on the effect of tenure material on the existence and available existence of native title (filed 5 Aug 2016 in WAD 6005/2003). See affidavit of Xavier Peter Marszal, affirmed on 3 Feb 2023, annexure XPM4 for copies of extinguishing past tenure.

subject to a resumption process), the area is occupied by the claim group. The Court ignored prior extinguishment in the Exclusive Areas only because of ss 47A and 47B.

130. EM 1997 makes it plain that ss 47A and 47B were enacted to allow native title claimants who are currently in occupation of land subject to a "land rights" type entitlement or who are in occupation of vacant Crown land to overcome the effect of extinguishment, so that their *current* occupation could be recognised: [5.45]-[5.61]. The statutory purpose was narrow. It is reflected in the language used in ss 47A(2) and 47B(2), which provide that for all purposes under the NTA "*in relation to the application*" for the *determination* of native title, prior extinguishment must be disregarded. The provisions do not refer to an application for *compensation*.

131. Consistently, it has been held that prior extinguishment for inconsistency is not to be disregarded when there is an application for compensation: *Griffiths v Northern Territory of Australia*.[58] It follows that the YP's claim for compensation cannot be determined on the supposition that they have exclusive possession over the Exclusive Areas and have a right to compensation for the loss of controlling access.

132. Also, ss 47A(4) and 47B(5) expressly provide that the creation of any prior interest that would otherwise have extinguished native title rights and interests which should be disregarded in determining native title does not include the creation of an interest that confirms ownership of natural resources by the Crown, and the Crown's ownership is not to be disregarded. The State's rights to minerals were never to be disregarded even by force of ss 47A and 47B. There is no right to compensation by reference to such minerals.

133. In *Warrie (No 2)*, Rares J rejected an argument that as to the Exclusive Areas, it should be noted that ss 47A and 47B "revived" native title, essentially because native title is not created by the Court, but the Court recognises existing rights and interests: [3]-[9]. That ruling is not the issue here where, as to compensation, there is no provision in the NTA that permits the prior loss of exclusive possession or the right to control access to be ignored in determining compensation.

134. The common law, the NTA and the TVA recognise that native title, including the right to control access, could be extinguished by acts and past acts occurring before 31 Oct 1975: FMG R [34A]. There is no issue estoppel, cause of action estoppel or abuse of process for FMG to rely on such prior extinguishment, in resisting the claim for

[58] [2014] FCA 256 [63]-[81] (Mansfield J). See also *Northern Territory v Griffiths* [2017] FCAFC 106; (2017) 256 FCR 478, 540 [229]-[231] (North ACJ, Barker and Mortimer JJ).

compensation. The issue decided in *Warrie (No 2)* is not the same as the compensation issue.[59]

Do the native title rights and interests have a "market value" [Issue 7]

135. In *Griffiths HC*, the High Court considered the Claim Group's claim for compensation when native title had been impaired or extinguished in the town of Timber Creek. Pastoral leases had been granted over an area including the town in the 19th century, and the claimed compensable acts were the grants of development leases (with a right to obtain freehold), a grant of a Crown lease, freehold grants to government authorities, for public works; and public works were also constructed without underlying tenure: [6]. The "historic grant of the pastoral leases extinguished the Claim Group's traditional right to control access to the land and to decide how the land should be used; and, once so extinguished, the right did not revive" and thereafter the Claim Group had no right to control the conduct of others on the land and had only non-exclusive rights and interests: [9], [69], [78]-[79]. The High Court valued the Claim Group's remaining non-exclusive native title rights and interests. The principles that the High Court described and applied in determining compensation are authoritative and apply here.

136. In *Griffiths HC*, Kiefel CJ, Bell, Keane, Nettle and Gordon JJ held: (a) the economic value of the native title rights and interests must begin with "the identification of those rights and interests" ([67]-[68]); (b) starting with the fact that an estate in fee simple is the most ample estate that can exist in land conferring the greatest rights with ordinarily the greatest economic value, the economic value of native title rights and interests are to be valued by making an evaluative judgment of the percentage reduction from full exclusive native title with full freehold value being a proxy for the economic value of full exclusive native title ([67]-[70]); and (c) there is no transgression of s 10(1) of the RDA in valuing non-exclusive native title rights and interests at a value less than full freehold value because this is to treat "like as like" ([71]-[76]).

137. With this analysis, in *Griffiths HC*, Kiefel CJ, Bell, Keane, Nettle and Gordon JJ then accepted that the approach to the adjustment of just compensation should be bifurcated to first determine the economic value of the native title rights and interests that had been extinguished and then estimate the additional, non-economic or cultural loss occasioned by the consequent diminution in the Group's connection to country: [84].

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[59] *Blair v Curran* (1939) 62 CLR 464, 531-533 (Dixon J); *O'Donel v Road Transport and Tramways Commissioner* (1938) 59 CLR 744, 759 (Latham CJ); *Kuligowski v Metrobus* [2004] HCA 34; (2004) 220 CLR 363, 379-381 [40], [45]-[47] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Tomlinson v Ramsey Food Processing* [2015] HCA 28; (2015) 256 CLR 507, 516-517 [22]-[22], 519 [25] (French CJ, Bell Gageler and Keane JJ); *UBS AG v Tyne as trustee of Argot Trust* [2018] HCA 45; (2018) 265 CLR 77, 81 [1] (Kiefel CJ, Bell and Keane JJ); 101 [62] (Gageler J).

138. Then, in *Griffiths HC*, the joint judgment said, as to economic loss, that the economic effect of the infringement is, in effect, the sum which a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to obtain the vendor's assent to the infringement or, put differently, what the Claim Group could fairly and justly have demanded for their assent to the infringement: [84]. This was a statement of the *Spencer* test.[60] The focus is on what a reasonable vendor of native title rights and interests would be willing to receive for the surrender of native title rights and interests. The hypothetical meeting at a price or value between the hypothetical purchaser and hypothetical vendor is to give a price or value to the native title rights and interests that had been extinguished. The plurality recognised there was a degree of artificiality about applying the *Spencer* test when the Claim Group would not be prepared to assent to the extinguishment of their native title rights and interests, but held that the *Spencer* test is applicable as it is when there is a compulsory extinguishment of a general law easement or profit à prendre: [85].

139. The plurality also said there should be no discount to account for the inalienability of native title rights and interests because s 51A of the NTA equates the economic value of full exclusive native title to the economic value of unencumbered, freely alienable freehold title, thus practically deeming irrelevant the inalienability of full exclusive native title: [99]-[102].

140. The analysis applying the *Spencer* test is about identifying the value of the impairment or loss to the YP's native title rights or interests. The analysis cannot shift into an analysis about the value that a hypothetical purchaser might obtain from taking natural resources from the land; those natural resources do not belong to the YP and belong to the State.

141. As to the non-economic or cultural component, the plurality held that this should involve a fair and just assessment, in monetary terms of the sense of loss of connection to country suffered by reason of the infringement: [84]. Compensation for cultural loss is about valuing the loss of the spiritual connection to the country: [152]-[154]. This "connection is spiritual. That is, the connection is something over and above and separate from 'enjoyment' in the sense of the ability to engage in activity or use. Spiritual connection identifies and refers to a defining element of life and living. It is not to be equated with loss of enjoyment of life or other notions and expressions found in the law relating to compensation for personal injury": [187]. There may be a different "*effect of the act of native title rights and interests*" depending on the native title holders' connection with the land or waters, which may vary depending on the facts; and the "sense of connection to country may have declined in developed areas": [217]. In the end, the plurality derived a monetary figure for cultural loss by considering what

[60] *Spencer v Commonwealth* (1907) 5 CLR 418, 432 (Griffith CJ), 440-441 (Issacs J).

would be accepted by the Australian community as appropriate, fair or just compensation for the loss of the spiritual connection to country: [237].

142. It follows that the loss that is compensable under s 51(1) of the NTA is loss or other *effect* on *native title rights and interests* and this has a component of economic loss (capped at the value of full freehold estate) and has a component for cultural loss, being a loss of the spiritual connection to country. It also follows that there is no "market" value that may be applied "off the shelf" in determining the loss or other effect on the YP's native title rights and interests.

143. In particular, it is inappropriate to use as a relevant comparison what other mining companies or the State have been prepared to pay or what the State has received by way of rent or royalties. Other mining companies with respect to other native title rights and interests may have made commercial agreements for the parties' mutual benefit taking into account any number of personal factors. There is no market rate or trade for the surrender of native title rights, particularly when they are, as a matter of traditional law, inalienable. In *Santos NSW v Gomeroi People*,[61] the NNTT rejected arguments that there was a "market" even for the Gomeroi People's s 31 agreement for the grant of petroleum leases and any comparability with agreements made in other contexts.

Compensation for economic loss [Issue 7]

144. As submitted, the YP's entitlement to economic loss is properly determined by valuing the YP's native title rights and interests that have been affected by the grant of the FMG tenements. YNAC does not appear to propose to adduce any evidence about this economic loss. The economic loss will, in any event, be capped by reference to the compulsory acquisition value of a freehold estate in the land the subject of the grants of the FMG tenements. FMG proposes to adduce expert evidence as to such value.

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

145. As submitted, the YP's entitlement to non-economic or cultural loss is an entitlement to an amount that, from Australian community standards, is appropriate, fair or just compensation for the YP's loss of connection to country caused by the grant of the FMG tenements. In *Griffiths HC*, the High Court awarded $1.3 million for the loss the Claim Group suffered when their rights were impacted in the Timber Creek township.

146. The monetary value of cultural loss could never be determined by considering what other mining companies may have been prepared to pay in a commercial agreement for mutual commercial benefit in different circumstances. Any mining companies' preparedness to pay an amount connected to the production of the minerals from their

[61] [2022] NNTT 74 (19 Dec 2022) (The Hon JA Dowsett AM KC) [266], [277]-[352], [373]-[450], [465]-[467].

mining tenements cannot be used to value appropriately, fairly or justly the loss of *spiritual* connection to land.

Interest [Issue 12]

147. In *Griffiths HC*, Kiefel CJ, Bell, Keane, Nettle and Gordon JJ held that interest should be awarded on the economic value of the impaired or extinguished native title rights and interests but that interest should be calculated on a simple basis not a compound basis because, as a matter of principle, under the general law (including equity), compound interest is not ordinarily awarded when there is an award of compensation for loss: [108]-[138]. There is no basis for a claim for any compound interest in this case and *Griffiths HC* precludes it.

F. CONCLUSIONS

148. The YP are entitled to claim compensation for the grant of the FMG tenements under s 123 of the MA 1978; and should have properly claimed before the Warden's Court.

149. If that is incorrect, the YP are entitled to compensation under the NTA for the loss or other *effect* on their native title rights and interests caused by the grant of the FMG tenements. The economic component of this loss is not measured by reference to a royalty rate paid for the iron ore obtained from the FMG tenements nor by reference to rent or royalty rates paid by other mining companies with respect to other projects. The economic component must focus on what a hypothetical reasonable purchaser would pay to a hypothetical reasonable vendor for the impairment or extinguishment or surrender of the YP's native title rights and interests. No amount of compensation is payable for the YP's right to control access to the Exclusive Areas. The YP are entitled to simple interest on the economic component of their compensation claim.

150. The cultural component of this loss is measured by determining, according to Australian community standards, what is appropriate, fair or just to be paid for the YP's loss of spiritual connection to the land the subject of the FMG tenements.

151. The claim is for compensation. It is not, and should not be treated as, a renewal or rehash of the claim for the determination of native title rights and interests. The evidence YP proposes to adduce seems to extend beyond demonstrating the loss or other effect caused by the grant of the FMG mining tenements.

Dated: 24 July 2023

Brahma Dharmananda SC | Marina Georgiou | Stefan Tomasich | Essie Dyer