

NOTICE OF FILING

Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 20/03/2024 4:36:43 PM AWST
Date Accepted for Filing: 20/03/2024 4:36:49 PM AWST
File Number: WAD37/2022
File Title: YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC ICN
8721 AND STATE OF WESTERN AUSTRALIA & ORS
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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

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



No: WAD 37 of 2022

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

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

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

Affidavit of: **Simon Charles Blackshield**

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

Occupation: Lawyer

Date: 20 March 2024

Document number	Details	Paragraph	Page
1	affidavit of Simon Charles Blackshield	1 - 3	2
2	Annexure "SCB-1", being an article titled " <i>Native title compensation: we're off to the High Court again</i> "	2	3-14
3	Annexure "SCB-2", being profiles of Tony Denholder, Andrew Gay and Clare Lawrence	3	15-21

Filed on behalf of the Applicant

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


Address for service

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


I, **SIMON CHARLES BLACKSHIELD**, of Level 28, AMP Tower, 140 St Georges Terrace, Perth, in the State of Western Australia, Lawyer, affirm:

1. I am the solicitor on record for the Applicant in this proceeding.
2. Annexed hereto and marked “**SCB-1**” is an article downloaded from the website of the law firm Ashurst, titled “*Native title compensation: we’re off to the High Court again*” and dated 2 August 2023. Authorship of the article is attributed to a number of Ashurst lawyers, the most prominent being Tony Denholder, Andrew Gay and Clare Lawrence,
3. On the sixth page of the printed article, the authors refer without qualification to “*the Pilbara standard of a 0.5% royalty*”. Annexed hereto and marked “**SCB-2**” are profiles for each of Mr Denholder, Mr Gay and Ms Lawrence, which I downloaded from Ashurt’s website on the evening of 19 March 2024.

AFFIRMED by the Deponent)
 at PERTH)
 in the State of Western Australia)
 on 20 March 2024)
 Before me:)



 Simon Charles Blackshield



 Diane Hall, Australian lawyer

“SCB-1”

No: WAD 37 of 2022

Federal Court of Australia

District Registry: Western Australia

Division: General

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

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

This and the following eleven pages is the annexure marked “SCB-1” referred to in the affidavit affirmed by Simon Charles Blackshield at Perth in the State of Western Australia this 20th day of March 2024 before me:



Search

 LEGAL DEVELOPMENT

Native title compensation: we're off to the High Court again

By [Tony Denholder](#), [Andrew Gay](#) and [Clare Lawrence](#)

02 August 2023



Native Title Year in Review 2022-2023

What you need to know

- There are eight active native title compensation claims across Australia (as at 25 July 2023) and a number of compensation settlement agreements being negotiated by the Queensland government under its Native Title Compensation Settlement Framework.

- The Tjiwarl compensation proceedings were largely settled in May 2023 following registration of a comprehensive settlement agreement. This claim was initially regarded as a likely test case on compensation for non-extinguishing acts and the construction and operation of the compensation pass through in section 125A of the *Mining Act 1978* (WA).
- The "potential test case" mantle has now been passed to the Yindjibarndi compensation claim (WA) and the McArthur River Project claim (NT) – both currently listed for hearing.

What you need to do

- Consider whether you should join a compensation claim if it concerns interests granted to you (even if those interests are no longer current). This is particularly relevant where government has made you liable for any compensation payable for that interest or tenure.
- The likelihood and outcome of any compensation claim can also be a key metric to inform the decision whether to engage in agreement - making for legacy projects not yet the subject of an agreement with the benefit of a contractual compensation release.
- Keep up to date with the progress of active native title compensation claim test cases, as they may have ramifications for land users around Australia.

Developments since Timber Creek

This year we saw an extremely significant development in the law relating to native title compensation with the Full Federal Court's decision in the Gumatj claim (*Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC

The High Court's judgment in *Northern Territory v Griffiths* (2019) 269 CLR 1 (Timber Creek) remains the only judicial consideration of principles relating to the calculation of native title compensation.

We have regularly published on developments following the High Court's Timber Creek decision: see our *Native Title Year in Review 2021-2022* article "[Native title compensation Not much to see but plenty happening below the surface](#)" and our *Native Title Year in Review 2020* article "[Native title compensation update: no claims tsunami but the tide has turned](#)".

There are currently eight active native title compensation claims across Australia (as at 25 July 2023).

We summarise significant developments from the last 12 months below.

Active compensation claims

Gumatj Compensation Claim – Northern Territory

In November 2019, Dr Galarrwuy Yunupingu filed a native title compensation claim (NTD43/2019) on behalf of the Gumatj Clan seeking compensation from the Commonwealth and the Northern Territory in respect of the acquisition of land and minerals in the Gove Peninsula from the 1930s to the 1960s.

The claim stands to be a test case for whether certain pre-1975 acts of the Commonwealth are compensable as an acquisition of property other than on "just terms" as required by section 51(xxxi) of the Constitution.

In the light of the Commonwealth's application for special leave to appeal to the High Court, it will be some years before the pre-1975 question is finally resolved.

(a claim contested by other clans) and that there is a native title right to take and use minerals. Finally, the extent to which any native title holders have already been compensated for the Government's acts is also a live issue.

We expect that this claim will not be resolved for a number of years.

McArthur River Project Compensation Claims – Northern Territory

The McArthur River Project Compensation Claim (NTD25/2020) was commenced in December 2020 by the Gudanji, Yanyuwa and Yanyuwa-Marra People in respect of the effects of various acts associated with the McArthur River Mine and Bing Bong Port. The applicants claim compensation against the Northern Territory for a range of post-1993 acts to which the non-extinguishment principle is said to apply.

In March 2023, the court refused an application for leave to amend the geographic area of the claim, on the basis that it would have been contrary to section 64(1) of the *Native Title Act* to include areas not covered by the original compensation application ([Davey on behalf of the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples v Northern Territory of Australia](#) [2023] FCA 303).

Accordingly, in June 2023, the applicants filed a second compensation claim over the expanded geographic area (NTD16/2023, called the McArthur River Project Compensation Claim 2).

The hearing of the original claim occurred from 5 to 23 June 2023 and continues from 21 to 23 November 2023.

The second claim is yet to be listed.

together (WAD141/2020, WAD142/2020 and WAD269/2020), were commenced in June 2020 (**Tjiwarl Compensation Claims**).

The Tjiwarl people claimed compensation in respect of the grant of a number of interests in Western Australia's Goldfields region – including roads, pastoral leases, water bores, easements, mining tenements and groundwater licences. The compensable acts are all acts to which the non-extinguishment principle applies – in other words, acts which did not have the effect of completely extinguishing native title.

A timetable was set for the resolution of the proceedings which saw an August 2022 trial. However, the timetable was vacated in December 2021 to allow settlement discussions to continue.

On 22 May 2023, the Western Australian government confirmed that it had reached "a historic settlement" for all three of the Tjiwarl Compensation Claims and had entered into an Indigenous Land Use Agreement with the Tjiwarl Aboriginal Corporation – known as the 'Tjiwarl Palyakuwa (Agreement)' ([Media statement, 22 May 2023](#)).

The State has made the [Tjiwarl Palyakuwa \(Agreement\)](#) publicly available. It provides for the full and final settlement of the State's liability for compensation to the Tjiwarl people in relation to the acts the subject of the Tjiwarl compensation proceedings (and other acts), and for the resolution of the compensation proceedings to the extent they claim compensation against the State of Western Australia.

Under the agreement, the Western Australian government made a number of commitments, including to:

- provide monetary compensation in the amount of \$25.5 million;
- transfer ownership of a number of land parcels to the Tjiwarl people;

- support Tjiwarl-specific future act processes (eg for the granting of certain resource tenements on Tjiwarl country); and
- provide funding to open up further economic opportunities for Tjiwarl native title holders.

Notably, the Agreement expressly excludes compensation liability that mining tenement holders may have for mining tenements granted or renewed after the commencement of section 125A of the *Mining Act 1978* (WA) on 11 January 1999 to which Part 2, Division 3, Subdivision M of the *Native Title Act 1993* (Cth) applies. This remains a live issue.

Yindjibarndi Ngurra Compensation Claim – Western Australia

In February 2022, the Yindjibarndi Ngurra Aboriginal Corporation RNTBC – a registered native title body corporate for the Yindjibarndi people – filed a native title compensation claim (WAD37/2022) in respect of the grants of various mining tenements associated with the FMG Solomon Hub mining operations in the Pilbara region of Western Australia.

The media has reported ([AFR](#) and [West Australian](#), both 24 February 2023) that the applicant is seeking a 10% royalty, which would amount to approximately \$500 million per year. This is in stark contrast to the Pilbara standard of a 0.5% royalty. Given Fortescue's highest settlement offer (as at 25 February 2023) was \$4 million per year over the life of the mine (which is estimated to last at least another 20 years), it is evident that the expectations of the parties are a long way apart.

This claim may well become the important test case for the Western Australian mining industry.

The matter has been listed for a hearing from 7 to 25 August 2023, and a conference from 18 to 22 September 2023.

September 2021 in relation to a small area in the eastern Kimberley region of Western Australia. Notably, this claim relates to only one compensable act – being the grant (and any extensions of the term) of an exploration licence in 2016 to Kimberley Granite Holdings Pty Ltd.

The limited nature of this claim initially ensured speedy progress through the Federal Court. Preservation evidence was taken in late 2021, and the matter was set down for hearing in late 2022.

These dates were however vacated in mid-2022 and the matter is subject to mediation before the Federal Court Registrar.

Antakirinja Matu-Yankunytjatjara Compensation Claim – South Australia

The Antakirinja Matu-Yankunytjatjara Aboriginal Corporation RNTBC is the only active compensation claim in South Australia. It covers over 60,000 square kilometres of land in central South Australia (SAD61/2022). The application seeks compensation for over 1,000 freehold grants, pastoral leases, Crown leases, mining tenements and the construction of public works and roads in the claim area, and potentially stands as a test case for compensation in South Australia.

The parties are currently preparing for a hearing of preservation evidence.

Pitta Pitta Compensation Claim – Queensland

The Pitta Pitta Compensation Claim (QUD327/2020) is the only active compensation claim in Queensland. It has been beset by difficulties relating to authorisation and legal representation and has not progressed significantly in the last 12 months.

The claim relates to hundreds of compensable acts spanning three million hectares of land in Queensland. It has the potential to be a test case on the assessment of compensation for the granting of

summarily dismiss it on the basis of lack of authorisation or lack of standing.

These applications were dismissed in April 2022 (see more about the decision in our *Native Title Year in Review 2021-2022* article "[Native title compensation: Not much to see but plenty happening below the surface](#)"). In August 2022, the Full Court dismissed the RNTBC's application for leave to appeal (*Pitta Pitta Aboriginal Corporation RNTBC v Melville on behalf of the Pitta Pitta People* [2022] FCAFC 154).

The matter was then set for the hearing of lay evidence in mid-2023 and expert evidence in late 2023. Unfortunately, the applicant then lost its legal representation in early 2023 and the court vacated the hearing dates.

In the meantime, the matter has been in mediation before Federal Court Registrars McGregor and Ingram since May 2023.

Queensland Government Native Title Compensation Settlement Framework

The Queensland government has released the Native Title Compensation Settlement Framework that we wrote about in our *Native Title Year in Review 2021-2022* article "[Native title compensation Not much to see but plenty happening below the surface](#)".

According to the Queensland government, the **Framework** offers a pathway for native title holders seeking to negotiate and settle native title compensation by agreement. The negotiation process supports the principles of self-determination and the right to free, prior and informed consent when making agreements.

The framework is guided by six principles:

- Settlement of compensation is by negotiation rather than litigation where possible.

- Arrangements are monetary but can include non-monetary components if requested by the claimants and agreed by both parties.
- Settlements are financially sustainable and provide opportunities for self-determination for native title holders now and in the future.
- Settlement agreements are registered with the National Native Title Tribunal for accountability and transparency.

We are aware of at least two compensation agreement negotiations to date:

- **Jangga:** The Jangga people are negotiating an agreement in partial satisfaction of the State's compensation liability and have arranged an authorisation meeting to discuss it (see public notice: <https://koorimail.com/wp-content/uploads/NNTT-802-1.pdf>).
- **Iman:** The Iman People have reached in principle agreement for an interim payment in partial satisfaction of the State's compensation liability and held an authorisation meeting to discuss it in June 2023 (see public notice: <https://koorimail.com/wp-content/uploads/NNTT-802-1.pdf>).

Claims dismissed in 2022–2023

In the past 12 months, a number of compensation claims have been dismissed for lack of authorisation or failure to identify compensable acts.

Wirrilimarra Compensation Claim – Western Australia

The Wirrilimarra Compensation Claim (WAD157/2021) was commenced in July 2021 by Archie Tucker on behalf of the

application on the basis that it had "some fatal flaws" that could not be cured (*Tucker v State of Western Australia* [2022] FCA 1379, [6]). Namely, the absence of lawful authorisation for the compensation application required under section 61(1) of the *Native Title Act* together with the failure to identify any compensable act rendered the application without any reasonable prospect of success.

Yilka Compensation Claim – Western Australia

The Yilka Compensation Claim (WAD266/2020) was commenced by a single applicant, Mr Bruce Smith, whose authority was questioned by the State and the PBC. We wrote about the authorisation problems in our Native Title Year in Review 2021–2022 article "[Native title compensation: Not much to see but plenty happening below the surface](#)".

The compensation application was consequently dismissed on 19 August 2022 (*Smith on behalf of the Wati Tjilpi Ku on behalf of the Yilka Sullivan Edwards People v State of Western Australia (No 2)* [2022] FCA 959).

Bodney Compensation Claims – Western Australia

The Bodney 1 (Burswood) (WAD 6289/1998), Bodney 2 (Kings Park) (WAD 6290/1998) and Bodney 3 (Bold Park) (WAD 6291/1998) compensation claims date from 1998 but were never notified. On 13 June 2022, the court ordered that, if no submissions were received, the claims would be dismissed. As no submissions were filed, the claims were dismissed on 27 July 2022.

Where to from here?

It is not clear whether the next 12 months will see any additional new law in this space, with several likely claims being settled or moving to Federal Court mediation rather than hearing.

title compensation by agreement in order to promote reconciliation with Aboriginal and Torres Strait Islander peoples. The National Guiding Principles can be read in full here: <https://www.niaa.gov.au/sites/default/files/publications/national-guiding-principles-native-title-compensation-agreement-making.pdf>.

With the settlement of the Tjiwarl compensation claims, the "potential test case" mantle has now been passed to the Yindjibarndi compensation claim (WA) and the McArthur River Project claim (NT) – both currently listed for hearing.

We also await the outcome of the possible High Court decision on the Commonwealth's liability for pre-1975 acts in the Gumatj compensation claim appeal.

Authors: *Leonie Flynn, Expertise Counsel; Joel Moss, Senior Associate; and Leanne Mahly, Lawyer.*

The information provided is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying it to specific issues or transactions.

Key Contacts



Tony Denholder

Partner
Brisbane

Call Mail

“SCB-2”

No: WAD 37 of 2022

Federal Court of Australia

District Registry: Western Australia

Division: General


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

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

This and the following six pages is the annexure marked “SCB-2” referred to in the affidavit of Simon Charles Blackshield affirmed at Perth in the State of Western Australia this 20th day of March 2024 before me:



Tony Denholder

Partner based in Brisbane



Tony Denholder is a partner in our projects practice



[What we do](#)

[Insights](#)

[People & Locations](#)

[Who we are](#)

[Careers](#)

He has advised companies in the mining sector for over 15 years including Rio Tinto. His practice focuses on the development of new mine and related infrastructure projects, including port and rail developments.

Tony is also the joint Practice Head of Ashurst's Native Title practice, the only practice in Australia ranked Band 1 by Chambers Asia-Pacific every year since 2007.



[Accessibility](#)

[Terms of Use](#)

[Privacy Policy](#)

[Contact Us](#)

[Cookies](#)

[Fraud Alerts](#)

[Remote Workers](#)

[Mailing list sign-up](#)

[Modern Slavery](#)

[Legal Notices](#)

© Ashurst. All rights

[Statement](#)

reserved

Andrew Gay

Partner based in Perth



Andrew Gay is a partner in our projects practice

He advises on tenure strategies, land acquisitions and divestments, development projects and planning matters. Andrew also advises on complex matters involving commercial leases and land access arrangements, including compulsory acquisitions.

Andrew also advises clients on native title and cultural heritage matters, including appearing for corporate respondent party clients in native title claims proceedings, and advising on and negotiating native title and cultural heritage agreements between clients and traditional owner groups.

Andrew has negotiated some of Australia's largest and most comprehensive native title and Aboriginal heritage agreements. He also regularly appears for clients in native title-related litigation in the Federal Court.

Clare Lawrence

Partner based in Melbourne



Clare Lawrence is a partner in our projects practice


[What we do](#)
[Insights](#)
[People & Locations](#)
[Who we are](#)
[Careers](#)

She acts for government, traditional Owners, and private sector clients in the infrastructure, telecommunications, power and utilities, mining, and oil and gas industries. Her work takes her from remote sites to board rooms, as poor management of Indigenous heritage protection has emerged as a key business risk.

Clare continues to cement her status as a market leader in this space by contributing to the reform of key legislation in the field, and spearheading Ashurst's native title thought leadership and seminar programs, which includes our annual publication, *Native Title Year in Review*.

She has been ranked as a leading lawyer in Native Title by *Chambers Asia-Pacific*, since 2015, and was awarded 2023 Native Title Lawyer of the Year (Melbourne) by Best Lawyers. In the Ashurst Melbourne Office, Clare is a Reconciliation Champion working to deliver the outcomes from Ashurst's stretch Reconciliation Action Plan in the Victorian context.


[Accessibility](#)
[Terms of Use](#)
[Privacy Policy](#)
[Contact Us](#)
[Cookies](#)
[Fraud Alerts](#)
[Remote Workers](#)
[Mailing list sign-up](#)
[Modern Slavery](#)
[Legal Notices](#)

© Ashurst. All rights

[Statement](#)

reserved