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Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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

Applicant's Further Amended Points of Claim



No: WAD 37 of 2022

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

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC (ICN 8721)

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

Entitlement to make the Application

1. The Applicant is a registered native title body corporate as defined in s.253 of the *Native Title Act 1993* (Cth) (**NTA**) and is entitled to make this application for a determination of compensation under ss.50(2) and 61(1) of the NTA.
2. Under s.56(3) of the NTA the Applicant holds in trust for the common law holders (**Yindjibarndi People**) the native title rights and interests that were recognised in the *Warrie (formerly TJ) on behalf of the Yindjibarndi People v State of Western Australia (No.2)* [2017] FCA 1299; (2017) 366 ALR 467 (**Warrie (No.2)**) determination.
3. The area of the compensation application (**compensation application area**) is identical to the area the subject of the approved determination of native title made by the Court in *Warrie (No.2)*.
4. Pursuant to Reg 8B of the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth), the Applicant, before making the compensation application, consulted and obtained the consent of the Yindjibarndi People at a meeting held in Roebourne on 11 December 2021. The consent was given in

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

The native title rights and interests

5. In *Warrie (No.2)* the Court determined that in the 'Exclusive Area' as defined in [11] of the determination, the native title rights and interests of the Yindjibarndi People confer on them the right to possession, occupation, use and enjoyment of that area to the exclusion of all others.
6. The Yindjibarndi People's right to possession, occupation, use and enjoyment of the Exclusive Area to the exclusion of all others has always existed and has not been extinguished: *Warrie (No.2)* at [3]-[9].
7. In the balance of the *Warrie (No.2)* determination area where a native title right of exclusive possession could not be recognised by reason of prior extinguishment, the Court determined that the Yindjibarndi People possess the following rights, including the right to conduct activities necessary to give effect to them:
 - (a) a right to access (including to enter, to travel over and remain);
 - (b) a right to engage in ritual and ceremony (including to carry out and participate in initiation practices);
 - (c) a right to camp and to build shelters (including boughsheds, mias and humpies) and to live temporarily thereon as part of camping or for the purpose of building a shelter;
 - (d) a right to fish from the waters;
 - (e) a right to collect and forage for bush medicine;
 - (f) a right to hunt and forage for, and take fauna;
 - (g) a right to forage for, and take flora;
 - (h) a right to take and use resources;
 - (i) a right to take water for drinking and domestic use;
 - (j) a right to cook on the land including light a fire for this purpose; and
 - (k) a right to protect and care for sites and objects of significance in the

determination area (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others).

The compensable acts

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

Particulars of FMG tenements

(a) Mining Leases

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

(b) Miscellaneous Licences

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

L47/362	3 May 2011	FMG Pilbara Pty Ltd
L47/363	3 May 2011	FMG Pilbara Pty Ltd
L47/367	2 March 2012	FMG Pilbara Pty Ltd
L47/396	23 May 2012	FMG Pilbara Pty Ltd
L47/472	18 July 2014	FMG Pilbara Pty Ltd
L47/697	2 December 2013	Pilbara Gas Pipeline Pty Ltd
L47/801	24 May 2019	The Pilbara Infrastructure Pty Ltd
L47/813	6 April 2018	The Pilbara Infrastructure Pty Ltd
L47/814	6 April 2018	The Pilbara Infrastructure Pty Ltd
L47/859	6 February 2019	Pilbara Energy Company Pty Ltd
L47/901	26 June 2019	Pilbara Energy (Generation) Pty Ltd
L47/914	15 November 2019	Pilbara Energy Company Pty Ltd
L47/919	10 January 2020	FMG Pilbara Pty Ltd

(c) Exploration Licences

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

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

(d) Prospecting Licences

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

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

10. Mining operations at the Solomon Hub commenced in May 2013 about October 2012 and the expected life of the mine is about 35 years.
11. The Solomon Hub has been hugely profitable for FMG, ~~and~~ for FMG's shareholders and for the State.

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

12. The Yindjibarndi #1 native title determination application WAD6005/2003 (**Yindjibarndi #1**), which was the subject of the determination in *Warrie (No.2)*:

- (i) was entered on the Register of Native Title Claims on 8 August 2003; and
- (ii) was determined by the Court on 13 November 2017.

13. With the exception of the grant of E47/3464.I, which was consented to by the Yindjibarndi Aboriginal Corporation (YAC) as the agent of the Yindjibarndi #1 Applicant and for which no compensation has been paid, Neither the Yindjibarndi #1 Applicant registered native title claimant nor it's agent, YAC, as the representatives of the native title claimants under the NTA prior to the making of the Warrie (No.2) determination, nor the Applicant as the post-determination representative of the Yindjibarndi People:

- (i) consented or agreed to;
- (ii) received any compensation for; or
- (iii) have an entitlement to compensation under any agreement or award for the grants of the FMG tenements.

- 13A. Since May 2007 FMG has made applications to the National Native Title Tribunal (NNTT) under s.35 of the NTA for determinations under s.38 in relation to the grants of the following FMG tenements, all of which were opposed by the Yindjibarndi #1 Applicant and YAC on behalf of the Yindjibarndi People:

- (a) M47/1413-I;
- (b) M47/1409-I and M47/1411-I;

- (c) M47/1431-I, E47/1398-I and E47/1399-I;
- (d) E47/1319-I;
- (e) M47/1453-I;
- (f) M47/1475-I and M47/1473-I;
- (g) M47/1513-I; and
- (h) M47/1570-I.

13B. Below is a list of all the NNTT determinations relating to these mining tenements:

- (a) M47/1413-I - FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia [2009] NNTTA 38 (24 April 2009);
- (b) M47/1409-I and M47/1411-I - FMG Pilbara Pty Ltd / Wintawari Guruma Aboriginal Corporation; Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia [2009] NNTTA 63 (23 June 2009);
- (c) M47/1413-I - FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia [2009] NNTTA 80 (31 July 2009) and FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia [2009] NNTTA 91 (13 August 2009);
- (d) M47/1409-I and M47/1411-I - FMG Pilbara Pty Ltd / Wintawari Guruma Aboriginal Corporation / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia [2009] NNTTA 99 (27 August 2009);
- (e) M47/1431-I, E47/1398-I and E47/1399-I - FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People v Western Australia [2011] NNTTA 107 (17 June 2011);
- (f) E47/1319-I - FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People v Western Australia [2012] NNTTA 11 (7 February 2012);

- (g) M47/1453-I - FMG Pilbara Pty Ltd / NC (deceased) and Others on behalf of the Yindjibarndi People v Western Australia [2012] NNTTA 142 (19 December 2012);
- (h) M47/1475-I and M47/1473-I - FMG Pilbara Pty Ltd and Another v Yindjibarndi #1 [2014] NNTTA 79 (31 July 2014);
- (i) M47/1513-I - FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another [2018] NNTTA 64 (25 October 2018); and
- (j) M47/1570-I - FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another [2020] NNTTA 8 (5 February 2020).

14. FMG has entered into financial relationships and agreements in respect of its mining activities within the compensation application area with some of the Yindjibarndi People without the consent of the Yindjibarndi #1 Applicant ~~registered native title claimant~~ (prior to 13 November 2017) or of the Applicant (post 13 November 2017). Those agreements and relationships are in respect of business services, including heritage related services. They are ongoing and have caused serious division within what was once a unified and very close community of native title holders.
15. The Applicant does not know whether any other acts have occurred within the compensation application area in respect of which the Applicant may have an entitlement to claim compensation under the NTA.

Entitlement to compensation

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

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

17. The grant of each of the FMG tenements was a *future act* to which Subdivision M of Division 3 of the NTA applies because each was an act that could be done

if the native title holders instead held *ordinary title* (freehold) to the land and waters concerned: NTA s.24MB(1)(b).

18. The entitlement to compensation for the grants of the FMG tenements arises under s.24MD(3)(b) because:
 - (i) the *similar compensable interest test* is satisfied in relation to the act; and
 - (ii) the law mentioned in s.240 (which defines the *similar compensable interest test*) does not provide for compensation to the native title holders for the act.

19. The *similar compensable interest test* is satisfied in relation to the grants because:
 - (a) the native title concerned relates to an *onshore place* as defined in s.253 of the NTA; and
 - (b) compensation would, apart from the NTA, be payable under the *Mining Act 1978 (WA) (Mining Act)* on the assumption that the native title holders instead held *ordinary title* (freehold) to the land or waters concerned.

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

An entitlement to compensation under NTA: s.45

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

Particulars of disparity of treatment

- (a) native title land is not “*private land*” as defined in s.8 of the *Mining Act*, and hence native title holders do not receive parity of treatment with

those who hold *ordinary title* (freehold) to the land and waters on which mining occurs;

- (aa) under s.38 of the *Mining Act* it is only the “owner” of “private land” alienated before 1 January 1899 who is entitled to receive all rents and royalties received by the Crown for any minerals (except gold and silver) mined from the land, less one tenth;
- (b) under s.123(3) of the *Mining Act*, the amount of compensation payable to the “owner” of “private land” or to an “occupier” of “Crown land” or “private land” may be determined by agreement and it is only an “owner” of “private land” and an “occupier” of “private land” or “Crown land” who can, on default of agreement, apply to the warden’s court for a determination of compensation under s.123(2);
- (bb) under s.29(7)(c) of the *Mining Act* it is only the “owner” and “occupier” of “private land” whose consent is required before the holder of a mining tenement can fell trees, strip bark or cut timber;
- (c) under s.123(5) of the *Mining Act*, it is only an “owner” and an “occupier” of “private land” adjoining or in the vicinity of land where mining takes place, who has an entitlement to compensation if the land or an improvement thereon, is injured or depreciated in value by mining;
- (d) under s.123(6) of the *Mining Act*, it is only an “owner” and an “occupier” of “private land” the surface of which is damaged by mining operation who has an entitlement to further compensation for that damage;
- (e) under s.35(1) of the *Mining Act*, the holder of a mining tenement cannot commence any mining on the natural surface or within a depth of 30 metres from the lowest part of the natural surface of any “private land” unless and until any compensation payable has been paid or tendered to the “owner” and the “occupier” of that “private land”; and
- (f) in the very broad circumstances set out in s.29(2) of the *Mining Act*, the “owner” and the “occupier” of “private land” have a right of veto over surface mining.

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

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

24. Further or in the alternative, under s.53(1) of the NTA, native title holders will have an entitlement to compensation or to further “top up” compensation if the doing of any *future act* or the application of any of the provisions of the NTA would result in a paragraph 51(xxxi) acquisition of the property of the native title holders, other than on paragraph 51(xxxi) just terms.
25. The Applicant says that the grants of the FMG Mining Leases identified in [8(a)] are *future acts* which have resulted in a paragraph 51(xxxi) acquisition of the property (native title rights and interests) of the Yindjibarndi People because the tenements:
- (i) confer on FMG exclusive possession of the land for mining purposes: *Mining Act* s.85; and
 - (ii) suppress the Yindjibarndi People’s native title rights and interests: NTA s.24MD(3)(a) and s.238(3), (4), (8).
26. The Yindjibarndi People are entitled to such compensation or further compensation as is necessary to ensure that the acquisition of their native title rights and interests is made on paragraph 51(xxxi) just terms.

Liability to pay compensation

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

- (i) if a law of the relevant State or Territory provides that a person other than the Crown in any capacity is liable to pay the compensation – that person; or
 - (ii) if not – the Crown in right of the State or Territory.
- 28. The grant of each of the FMG tenements was a *future act* that was covered by s.24MD(3)(b) of the NTA and was attributable to the State.
- 29. Section 125A of the *Mining Act* which was in force when each of the FMG tenements was granted, provides that if compensation is payable to native title holders for or in respect of the grant of a mining tenement, the person liable to pay the compensation is the applicant for the grant of, or the holder of, the mining tenement at the time a determination of compensation is made.
- 30. The Applicant contends that by reason of s.24MD(4)(b)(i) of the NTA and s.125A of the *Mining Act*, FMG as the grantee or the holder of the FMG tenements, is liable to pay the compensation.
- 31. In the alternative, if s.125A of the *Mining Act* does not have the effect of making FMG liable to pay the compensation, the State is liable to pay the compensation under s.24MD(4)(b)(ii) of the NTA.
- 31A. Further or in the alternative, if the grants of any of the Miscellaneous Licenses listed earlier herein at [8(c)] and/or the renewal or extension of term of any of the FMG tenements, are *future acts* that are not covered by s.24MD of the NTA and if s.125A of the *Mining Act* does not have the effect of making FMG liable to pay the compensation for those acts, the State will be liable to pay the compensation under either s.24HA(6)(b) or s.24MD(4)(b)(ii) of the NTA for the grants of the Miscellaneous Licenses and under s.24ID(4)(d) or s.24MD(4)(b)(ii) of the NTA for any renewals or extensions of term.
- 32. Further or in the alternative, the State will be liable to pay compensation or “top up” compensation, under s.53(1) of the NTA if:
 - (i) either the grant of the FMG tenements or the application of any of the provisions of the NTA, would result in a paragraph 51(xxxi) acquisition

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

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

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

- 33. The Yindjibarndi People's native title rights and interests have been wholly or partially suppressed and hence significantly diminished and impaired by, the grants of the FMG tenements within the areas of those tenements and will remain suppressed, impaired and diminished for however long those tenements remain on foot.
- 34. The Yindjibarndi People believe that:
 - (i) During the Yindjibarndi Dreaming or creation time (Ngurra Nyujunggamu) Spiritual beings Minkla and Marrga created Yindjibarndi People and put them in their country;
 - (ii) The Minkla and Marrga performed the first ceremonies and gave Yindjibarndi People their enduring ritual song cycle, the Bundud as well as their laws and customs, the most important of which is Birdarra law;
 - (iii) Minkla, Marrga and other spiritual beings, including the spirits of the Yindjibarndi ancestors, remain present in Yindjibarndi country;
 - (iv) Yindjibarndi country, including the compensation application area, is redolent with spirituality commemorated by senior male members through mytho-ritual traditions and in particular their unique *Birdarra* law;
 - (v) Yindjibarndi People share the same spirituality as their country and are indissolubly linked to the country through this spiritual correspondence;
 - (vi) a Yindjibarndi person is defined and has his or her identity and authority framed by virtue of their relationship with Yindjibarndi country;
 - (vii) country is sentient and is cognisant of danger or harm;

- (viii) Yindjibarndi People have both dominion over their country to the exclusion of all others and a responsibility to protect and manage their country;
- (ix) Yindjibarndi People have a duty to look after the country and the spirits that are believed to reside there and there will be consequences of a supernatural nature if they fail in their responsibility;
- (x) those who are not Yindjibarndi, and are consequently identified as *manjangu* (stranger), must seek permission from a Yindjibarndi elder or elders to enter and carry out activity for a particular reason on Yindjibarndi country; and
- (xi) the granting of the FMG tenements and related mining activities is a contravention of the Yindjibarndi law in that *manjangu* are present without permission, they are acting destructively on country and they are acting as if they and not the Yindjibarndi People, are the owners of that country.

34A. As a result of the grants of the FMG tenements and FMG's subsequent mining activities having occurred without consent or agreement of the Yindjibarndi #1 Applicant or YAC, prior to 13 November 2017 or of the Applicant post 17 December 2017 as the only representatives of the Yindjibarndi People under the NTA, the Yindjibarndi People have had their law broken and have been unable to protect the land and the surface and subterranean waters of their country from being damaged and destroyed and have been unable to protect ancient occupation, cultural and Dreaming sites and Dreaming tracks, many of which have suffered serious damage or destruction.

Particulars of the destruction of sites

- (a) There have been numerous significant and important Yindjibarndi sites destroyed by FMG;
- (b) Since July 2010 FMG has only engaged with Wirru-Murra in relation to cultural heritage and Yindjibarndi site matters in connection with the Solomon Hub mine;

- (c) Since December 2010 FMG has made numerous applications under the *Aboriginal Heritage Act* to excavate Yindjibarndi sites or to destroy them which Wirlu-Murra has on many occasions supported, whilst the Yindjibarndi #1 Applicant and YAC have strenuously opposed them;
- (d) Set out below is a list of FMG applications made under s 16 or s 18 of the *Aboriginal Heritage Act* between December 2010 and December 2019:
- (i) s 16 Firetail Priority Mining and Infrastructure dated 10 December 2010;
 - (ii) s 18 Firetail Priority Mining Area dated 17 March 2011;
 - (iii) s 18 Firetail Priority Infrastructure Area dated 17 March 2011;
 - (iv) s 18 Firetail Conveyors and Trinity Tailings Storage Facility dated 19 August 2011;
 - (v) s 18 Firetail Central West and Rail Loop dated 26 August 2011;
 - (vi) s 18 Firetail West and Trinity dated 5 October 2011;
 - (vii) s 18 Firetail West and Trinity OPF dated 2 November 2011;
 - (viii) s 16 Firetail and Trinity Tailings and Storage Facility dated 9 December 2011;
 - (ix) s 18 Conveyors and Infrastructure Phase 2 dated 14 December 2010;
 - (x) s 18 Firetail Central West and Rail Loop Firetail Laydown dated 8 February 2012;
 - (xi) s 18 Solomon Mining and Infrastructure, Phase 7 dated 16 February 2012;
 - (xii) s 18 Solomon Mining and Infrastructure, Phase 8 dated 17 February 2012;
 - (xiii) s 16 Firetail Phase 4 dated 1 March 2012;
 - (xiv) s 18 Firetail Phase 4 dated 23 March 2012;
 - (xv) s 18 Solomon Mining and Infrastructure, Phase 9 dated 20 April 2012;

- (xvi) s 16 dated 24 April 2012
- (xvii) s 18 Solomon Mining and Infrastructure, Phase 10 dated 14 March 2013;
- (xviii) s 18 Solomon Mining and Infrastructure, Phase 11 dated 14 March 2013;
- (xix) s 18 Solomon Mining and Infrastructure, Phase 12 date unknown;
- (xx) s 18 Solomon Mining and Infrastructure, Phase 13 dated 15 May 2013;
- (xxi) s 18 Solomon Mining and Infrastructure, Phase 14 dated 18 May 2013;
- (xxii) s 18 Solomon Mining and Infrastructure, Phase 15 dated 19 September 2013;
- (xxiii) s 18 Solomon Mining and Infrastructure, Phase 16 dated 6 November 2013;
- (xxiv) s 18 Solomon Mining and Infrastructure, Phase 17 dated March 2014;
- (xxv) s 18 Solomon Mining and Infrastructure, Phase 18 dated September 2014;
- (xxvi) s 18 Solomon Mining and Infrastructure, Phase 19 date unknown;
- (xxvii) s 18 Solomon Mining and Infrastructure, Phase 20 dated 21 July 2016;
- (xxviii) s 18 Solomon Mining and Infrastructure, Phase 21 dated 20 October 2016;
- (xxix) s 18 Solomon Mining and Infrastructure, Phase 22 dated 20 October 2016;
- (xxx) s 18 Solomon Mining and Infrastructure, Phase 23 dated 12 December 2017;
- (xxxi) s 18 Solomon Mining and Infrastructure, Phase 24 dated 17 September 2019;

(xxxii) s 18 Solomon Mining and Infrastructure, Phase 25 dated 10 December 2019.

35. The economic value of the Yindjibarndi People's native title rights and interests, including the right to negotiate under Subdivision P of Part 2, Division 3 of the NTA, has been diminished or impaired because the FMG tenements were granted and mining and related activities have proceeded, without FMG or the State reaching any agreement with either the Yindjibarndi #1 Applicant or YAC prior to the *Warrie (No 2)* determination, or the Applicant, post that determination, to pay compensation to the Yindjibarndi People for their assent to the infringement of their native title rights and interests.
36. The Applicant repeats the contents of [14] and says that the consequences of the destruction of country and of the social disruption and division within the Yindjibarndi community caused by FMG and FMG's mining activities, include hurt and suffering, combined with anger and feelings of lack of control and helplessness.

Particulars of social disruption and division

- (a) Between May 2007 and August 2010 FMG was engaged in negotiation and litigation with the Yindjibarndi #1 Applicant and YAC concerning the grant of mining tenure that underpins the Solomon Hub mine;
- (b) In 2008 YAC was appointed as the agent of the Yindjibarndi #1 Applicant under s 84B of the NTA;
- (c) In 2010 division emerged in the Yindjibarndi community about how to engage with FMG in relation to cultural heritage and the negotiation of a Land Access Agreement;
- (d) In August 2010 some members of the Yindjibarndi community announced that they wanted to separate from YAC and go their own way;
- (e) FMG supported this group to establish Wirlu-Murra Aboriginal Corporation (Wirlu-Murra) and to build its operational capacity;

- (f) Wirlu-Murra had no role or status under the NTA to represent the Yindjibarndi People or to consent on their behalf to acts that affect the Yindjibarndi People's native title rights and interests;
- (g) Despite that lack of legal authority or capacity, Wirlu-Murra, without YAC's knowledge or consent, negotiated a Land Access Agreement with FMG entitled "FMG-Yindjibarndi Land Access Agreement" (FMG Wirlu-Murra Agreement) which purported to grant to FMG full access for mining purposes to what was then the Yindjibarndi #1 Application area (now the compensation application area) as well as the Daniel determination area¹ where the Yindjibarndi People's determined native title rights and interests were held in trust by YAC under s.56(3) of the NTA;
- (h) Although the parties to the proposed FMG Wirlu-Murra Agreement were stated to be FMG, the Yindjibarndi #1 Applicant and YAC, the monies payable under that agreement were to be paid to Wirlu-Murra;
- (i) FMG and Wirlu-Murra stood behind and supported FMG's attempts to have the Yindjibarndi community resolve at Yindjibarndi meetings held in December 2010 and March 2011, to have the Yindjibarndi #1 Applicant and YAC enter into the FMG Wirlu-Murra Agreement;
- (j) Meetings of the Yindjibarndi People held in December 2010 and March 2011 did not result in the Yindjibarndi #1 Applicant or YAC executing the FMG Wirlu-Murra Agreement;
- (k) In June 2011, with the backing and support of FMG and Wirlu-Murra, three members of the Yindjibarndi #1 Applicant – Mavis Pat, Sylvia Allan and Aileen Sandy – commenced proceedings against YAC in the Western Australian Supreme Court (Aileen Sandy proceeding). This was an attempt by FMG and Wirlu-Murra to apply pressure on YAC and the remaining members of the Yindjibarndi #1 Applicant with a view to having them execute the FMG Wirlu-Murra Agreement;

¹ The determination of native title made in *Daniel v State of Western Australia* [2005] FCA 536 as varied by *Moses v Western Australia* [2007] FCAFC 78, (2007) 160 FCR 148.

- (l) June 2011 marked the beginning of a related series of events. These were the steps taken by Wirilu-Murra with FMG's support to arrange for more than 300 people to apply to YAC for membership with a view to taking control of YAC affairs in general meetings. Disputes arising out of these membership applications comprised a significant part of the Aileen Sandy proceeding. This issue also manifested in members of the Todd family being joined as a respondent party to the Yindjibarndi #1 claim in 2013 on the basis that they claimed to be Yindjibarndi people. Wirilu-Murra paid the Todd respondents' legal costs;
- (m) The Aileen Sandy proceeding was one of four proceedings against YAC in the Supreme Court brought by YAC members who were associated with Wirilu-Murra. FMG stood behind and supported the plaintiffs in their claims in each of those proceedings;
- (n) FMG and Wirilu-Murra also stood behind and supported two attempts to replace the Yindjibarndi #1 Applicant. The first was in September 2011 and the second was in July 2015;
- (o) FMG stood behind and supported Wintawari Guruma Aboriginal Corporation and a number of Guruma people in attempts to be joined as respondent parties to the Yindjibarndi #1 claim and to make a native title claim over part of the Yindjibarndi #1 claim area in late 2015;
- (p) These legal proceedings caused YAC to expend considerable financial and other resources responding to them;
- (q) Since July 2010 FMG's relationship with the Yindjibarndi people who separated from YAC, and later with Wirilu-Murra, has included support for FMG's mining operations in the compensation application area including:
 - (i) Aboriginal cultural heritage;
 - (ii) NNTT inquiries concerning the grant of mining tenure for the Solomon Hub mine; and
 - (iii) business contracting in connection with the Solomon Hub mine and possibly FMG's other mining operations;

- (r) Since July 2010 Yindjibarndi people who separated from YAC, and later Wirlu-Murra, have participated in cultural heritage surveys and have generally supported FMG's applications made under the *Aboriginal Heritage Act 1972* (WA) (*Aboriginal Heritage Act*) to destroy Yindjibarndi sites. The Yindjibarndi #1 Applicant and YAC have participated in very few cultural heritage surveys and have opposed many of FMG's applications. This has been a very significant and long running area of dispute between FMG and Wirlu-Murra on the one hand the Yindjibarndi #1 Applicant and YAC on the other. The Yindjibarndi #1 Applicant and YAC have expended considerable financial and other resources opposing the destruction of Yindjibarndi sites;
 - (s) There have been many NNTT determinations relating to the grant of mining tenure to FMG for the Solomon Hub mine. The Yindjibarndi #1 Applicant and YAC have opposed FMG applications to the NNTT and lodged a substantial amount of affidavit and other material in opposition to them. With FMG's encouragement and support Wirlu-Murra has supported FMG's applications on several occasions. The Yindjibarndi #1 Applicant and YAC have expended considerable financial and other resources opposing these applications;
 - (t) FMG has awarded business contracts to Wirlu-Murra and Wirlu-Murra associated entities since around 2013; and
 - (u) There have been several unsuccessful attempts since 2012 to reconcile and heal the division within the Yindjibarndi community.
37. The denial of the Yindjibarndi People's dominion over their country and the denial of their rights to access, use, protect and manage their country cuts the essentiality of Yindjibarndi religious belief that identifies and defines the Yindjibarndi People as an autonomous people, identified by reference to their country and consequently informs deep feelings of cultural loss.
38. A practical consequence of the inability of the Yindjibarndi People to access and use the country that is subject to the FMG mining activities is a consequential diminishment of culturally related activities.

The principles or the criteria to be applied for determining compensation

39. The criteria for determining compensation are set out in ss.51(1), (2), (3) and 53(1) of the NTA.
40. Subsection 51(1) of the NTA provides that, subject to subsection (3), the compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.
41. Subsection 51(3) of the NTA applies to the making of the determination of compensation because:
- (a) the native title concerned relates to an onshore place; and
 - (b) compensation would, apart from the NTA, be payable under the *Mining Act* on the assumption that the Yindjibarndi People instead held ordinary title (freehold) to any land or waters concerned: ss.24MD(3)(b)(i), 240.
42. Subsection 51(3) provides that the Court must, in making the determination of compensation, apply any principles or criteria for determining compensation set out in the *Mining Act*. Those principles or criteria are inclusive, not exhaustive. They must have regard to the unique character of native title rights and interests and they must not be inconsistent with the NTA.
- 42A. The following principles or criteria for determining compensation that are set out in s.123(4) of the *Mining Act* are not inconsistent with the NTA:
- (a) being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land;
 - (b) damage to the land or any part of the land;
 - (c) severance;
 - (d) any loss or restriction of a right of way; and
 - (f) social disruption.
43. The Applicant says, however, that to the extent to which the application of s.51(3) and/or the application of any principles or criteria for determining compensation set out in the *Mining Act* would result in a determination of compensation that was other than on just terms or which has not had regard to

the unique character of native title rights and interests, ss.45 and/or 53(1) will apply to ensure that the determination is made on just terms.

44. If s45 of the NTA applies then, under s51(1) of the NTA, the determination of compensation must be on just terms.
45. If s53(1) of the NTA applies then, under s51(2) of the NTA, the Court may, not must, in making the determination of compensation on just terms, have regard to any principles or criteria for determining compensation set out in the *Mining Act*, being the law under which the compulsory acquisition took place.
46. In the premises, the determination of compensation must be on just terms and should include:
 - (a) a component for the objective or economic effects of the infringement of the native title rights and interests, being the sum which a reasonable miner or Government party, acting fairly and justly, would have been prepared to pay to the Yindjibarndi People to obtain their assent to the grants of the FMG tenements, or to put it another way, what the Yindjibarndi People could fairly and justly have demanded for their assent to the infringement of their native title rights and interests: *Northern Territory v Griffiths* [2019] HCA 7; (2019) 269 CLR 1 at [84];
 - (aa) a reasonable miner acting fairly and justly would have been prepared to pay a mix of benefits including:
 - (i) cash payments whether as “defined benefit” or “milestone” payments;
 - (ii) royalties on the FOB value of the iron ore produced;
 - (iii) payments for Aboriginal heritage surveys; and
 - (iv) payments for damage to or destruction of ancient occupation, cultural and Dreaming sites and Dreaming tracks;
 - (aaa) there is a range of comparable agreements between miners and native title holders or native title claimants which can be called in aid of determining what a reasonable miner would have been prepared to pay;

(aaaa) further, or in the alternative to (aa), a reasonable Government party acting fairly and justly would have been prepared to pay:

- (i) a percentage of the rents received from the tenement holder(s);
- (ii) a percentage of the royalties received by the Crown for the iron ore produced;
- (iii) parity of treatment with an owner of freehold land granted before 1 January 1899 would require the payment of all rents and royalties received by the Crown less one tenth: *Mining Act* s.38; and
- (v) payments for damage to or destruction of ancient occupation, cultural and Dreaming sites and Dreaming tracks;

(aaaaa) the principles or criteria for determining compensation referred to in (aa)-(aaaa) above, may be seen either as applying to the determination of compensation for economic loss alone or, in the alternative, as applying as an aid to the determination of compensation for both economic and non-economic loss;

- (b) a component for non-economic or cultural loss, being compensation for that aspect of the value of the land to the native title holders which is inherent in the thing which has been lost, diminished, impaired or otherwise affected by the compensable acts: *Northern Territory v Griffiths* [2019] HCA 7; (2019) 269 CLR 1 at [84] and [153]-[154];
- (c) the component for non-economic or cultural loss will include compensation ~~for the fragmentation of Yindjibarndi society and the serious social disruption, disharmony and conflict caused by the grant of the FMG tenements;~~
 - (i) damage to and destruction of country and of ancient occupation, cultural and Dreaming sites and Dreaming tracks; and
 - (ii) social disruption and the resulting damage to and impairment of important cultural practises and norms including social relationships (*Galharra*), reciprocity and mutual care

(Nyinyaard) and ritual practise (Birdarra Law), all of which underpin Yindjibarndi society and are believed to have a common origin in the events of the Dreaming or Ngurra Nyujunggamu, and the loss of connection to land.

(cc) what in the end is required is a monetary figure that the Australian community would consider as appropriate, fair and just in the circumstances: Northern Territory v Griffiths [2019] HCA 7; (2019) 269 CLR 1 at [237];

(ccc) although each case must depend on its own facts, guidance on what is a fair and just figure in the circumstances of this case, can be obtained by looking at what other miners have been prepared to pay to native title claimants and to native title holders in Western Australia and elsewhere for their assent to the infringement of their native title rights and interests (see (aa) above);

(d) compound interest on that portion of the economic loss component of the compensation that has accrued from the date of the first compensable act up to the date when the determination of compensation is made.

Date: ~~25 October 5 December 2022~~ 15 June 2023



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Signed by Simon Blackshield
Solicitor for the Applicant

This pleading was prepared by Simon Blackshield, lawyer.

Certificate of lawyer

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

Date: ~~25 October 2022~~ 15 June 2023



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Signed by Simon Blackshield