

## NOTICE OF FILING

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*Sia Lagos*

Registrar

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# FMG Respondents' Points of Response

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

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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		
Prepared by (name of person/lawyer)	Mark van Brakel		
Law firm (if applicable)	Allen & Overy		
Tel	(08) 6315 5900	Fax	(08) 6315 5999
Email	mark.vanbrakel@allenoverly.com		
Address for service (include state and postcode)	Level 12, Exchange Tower, 2 The Esplanade PERTH, Western Australia, 6000		

**A. YNAC'S APPLICATION**

1. As to paragraph 1 of the Amended Points of Claim (**Points of Claim**), the 2<sup>nd</sup> to 6<sup>th</sup> Respondents (**FMG Respondents**) agree that:
  - (a) the Applicant (**YNAC**) is a registered native title body corporate as defined in s 253 of the *Native Title Act 1993* (Cth) (**NTA**);
  - (b) YNAC may make an application for a determination of compensation under ss 50(2) and 61(1) of the NTA.
2. As to paragraph 2 of the Points of Claim:
  - (a) in *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)**), the Court ordered that:
    - (i) there be a determination of native title in terms of the attached Determination (**Determination**) in *Warrie (No 2)* (order 1);
    - (ii) YNAC shall hold the determined native title in trust for the native title holders, namely, the Yindjibarndi People, pursuant to s 56(2)(b) of the NTA (order 2, Determination [2]);
  - (b) pursuant to s 56(3) of the NTA, YNAC holds the rights and interests from time to time comprising the native title in trust for the Yindjibarndi People.
3. As to paragraph 3 of the Points of Claim, the FMG Respondents agree that the area of the compensation application (**compensation application area**) is identical to the area the subject of the Determination made by the Court in *Warrie (No 2)*.
4. The FMG Respondents cannot agree (because they do not know the alleged facts) to paragraph 4 of the Points of Claim.

**B. YINDJIBARNDI PEOPLE'S NATIVE TITLE RIGHTS AND INTERESTS**

5. As to paragraph 5 of the Points of Claim:
  - (a) in the Determination in *Warrie (No 2)* the Court ordered, declared and determined that:
    - (i) native title exists in the Determination Area (i.e., the compensation application area) (Determination [1]);

- (ii) subject to paragraphs 4, 5, 6 and 9 of the Determination, the nature and extent of the native title rights and interests in relation to the compensation application area are that they confer certain itemised rights on the Yindjibarndi People including a right to access, a right to engage in ritual and ceremony, a right to forage, and a right to protect and care for sites and objects of significance (Determination [3]);
  - (iii) ss 47A and 47B of the NTA apply to disregard any prior extinguishment in relation to the land and waters described in Schedule 4 of the Determination and, by reason of that matter, subject to paragraph 5 of the Determination, in the Exclusive Area (described in Part 2 of Schedule 1 of the Determination and depicted on the maps in Schedule 3 of the Determination) the native title rights and interests confer the right to possession, occupation, use and enjoyment of that area to the exclusion of all others (Determination [4], [7], [11], Schedule 1, Schedule 3);
  - (iv) the native title rights and interests set out in paragraphs 3 and 4 of the Determination:
    - (A) are subject to and exercisable in accordance with relevantly the laws of the State and the Commonwealth (Determination [5(a)(i)]);
    - (B) do not confer any rights in relation to minerals as defined in the *Mining Act 1904* (WA) (repealed) and in the *Mining Act 1978* (WA) (***Mining Act 1978***) (Determination [5(c)(i)]);
  - (v) subject to paragraph 4 of the Determination, the native title rights and interests set out in paragraph 3 of the Determination do not confer:
    - (A) possession, occupation, use and enjoyment on the Yindjibarndi People to the exclusion of all others; or
    - (B) a right to control the access to, or use of, the land and waters of the compensation application area or its resources (Determination [6]);
- (b) in the application for the Determination (the subject of *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v Western Australia* [2017] FCA 803; (2017) 365 ALR 624 (***Warrie (No 1)***) and *Fortescue Metals Group v Warrie* [2019] FCAFC 177; (2019) 273 FCR 350 (***Warrie (FC)***)), the Yindjibarndi People agreed in a document entitled “Agreed List of Tenure and

Extinguishment Topics in Dispute” dated 21 January 2016 and filed with the Court on 29 January 2016 that the nature and extent of extinguishment of native title in the compensation application area and the operation of ss 47A and 47B of the NTA are as set out in a document prepared by the First Respondent (**State**) entitled “Amended First Respondent’s Statement on the effect of tenure material on the existence and available existence of native title” (**Amended Statement on the effect of tenure**) dated 4 December 2015 and filed with the Court on 7 December 2015;

- (c) in the Amended Statement on the effect of tenure, the State stated that:
  - (i) native title had been completely extinguished in some parts of the claim area and described those areas in Table 1 of the Amended Statement on the effect of tenure (para 1); and
  - (ii) any native title rights of exclusive possession had been extinguished throughout the whole of the claim area and described those areas in Table 2 of the Amended Statement on the effect of tenure (para 2);
- (d) the Amended Statement on the effect of tenure was further amended by the State in a document entitled “Further Amended First Respondent’s Statement on the effect of tenure material on the existence and available existence of native title” (**Further Amended Statement on the effect of tenure**) dated, and filed with the Court on, 5 August 2016;
- (e) the Further Amended Statement on the effect of tenure did not change the position as stated and agreed by the Yindjibarndi People as set out in paragraphs 5(b) and 5(c) above;
- (f) ss 47A(2) and 47B(2) of the NTA do not apply to an application for the determination of compensation under ss 50(2) and 61(1) of the NTA and the Court may not, in determining compensation, disregard any prior extinguishment of the native title rights and interests in the compensation application area in that:
  - (i) ss 47A(2) and 47B(2) of the NTA expressly provide that any such prior extinguishment must be disregarded only in relation to an application for a determination of native title in relation to an area;
  - (ii) s 48 of the NTA provides that compensation payable under Part 2, Division 2, 2A, 2B, 3 or 4 in relation to an act is only payable in accordance with Part 2, Division 5 of the NTA and ss 47A(2) and 47B(2) are not within Part 2, Division 5 of the NTA;

(iii) s 50(1) of the NTA provides that a determination of compensation may only be made in accordance with Part 2, Division 5 of the NTA;

(g) by reason of the matters set out in paragraphs 5(a)-5(f) above, YNAC's claim for compensation as to the acts in respect of which YNAC seeks compensation, namely, the grant by the State to the FMG Respondents of mining tenements (**FMG tenements**), must be assessed on the basis that any native title rights of exclusive possession had been extinguished throughout the whole of the compensation application area before the grant of those mining tenements.

6. As to paragraph 6 of the Points of Claim, the FMG Respondents repeat paragraph 5 above.

7. As to paragraph 7 of the Points of Claim, the FMG Respondents repeat paragraph 5 above.

**C. FMG TENEMENTS – FUTURE ACTS**

8. As to paragraph 8 of the Points of Claim, the FMG Respondents accept that the acts in respect of which compensation is sought for the Yindjibarndi People are the grants by the State to the FMG Respondents of the FMG tenements listed in paragraph 8.

9. As to paragraph 9 of the Points of Claim:

(a) the Solomon Hub mine is operated by the FMG Respondents or their related entities in part:

(i) in areas of land that are not the subject of the compensation application area;

(ii) in the FMG tenements (other than L47/302, L47/396, L47/361, L47/363, L47/367, L47/472, L47/697, L47/801, L47/813, L47/814, L47/914, L47/919, E47/1319, E47/1333, E47/1334, E47/1398, E47/1447, E47/3205, E47/3464, P47/1945, P47/1946, P47/1947, M47/1513);

(iii) in the Exclusive Area (described in Part 2 of Schedule 1 of the Determination in *Warrie (No 2)* and depicted on the maps in Schedule 3 of the Determination);

(b) the FMG Respondents repeat paragraph 5 above;

- (c) the FMG Respondents do not dispute that the Solomon Hub mine is near a sacred site and fresh water spring that the Yindjibarndi People refer to as Bangkangarra and that the FMG Respondents refer to as “Satellite Spring”.

- 10. As to paragraph 10 of the Points of Claim, mining operations commenced at the Solomon Hub mine in about October 2012 and the expected life of the mine is about 33 years.
- 11. As to paragraph 11 of the Points of Claim, the FMG Respondents agree that the mining operations at the Solomon Hub mine have generated revenue and profit for the FMG Respondents or their related entities.

**D. NO COMPENSATION PAID BUT FMG TENEMENTS VALID**

- 12. The FMG Respondents agree with paragraph 12 of the Points of Claim.
- 13. As to paragraph 13 of the Points of Claim:
  - (a) the FMG Respondents agree that, save for FMG tenement E47/3464-I (which is the subject of an agreement made on 1 March 2017 between the second respondent (FMG Pilbara Pty Ltd) and The Yindjibarndi Aboriginal Corporation RNTBC as trustee for the Yindjibarndi People), neither the Yindjibarndi #1 registered native title claimant as representative of the native title claimants prior to the Determination in *Warrie (No 2)* nor YNAC have consented or agreed to the grant of the FMG tenements;
  - (b) the FMG Respondents agree that neither the Yindjibarndi #1 registered native title claimant as representative of the native title claimants prior to the Determination in *Warrie (No 2)* nor YNAC have received any compensation for, or have an entitlement to compensation under any agreement or award for, the grant of the FMG tenements;
  - (c) further, each of the following FMG tenements, which are mining leases (**FMG Mining Leases**) or exploration licences, were granted by the State after a determination by the National Native Title Tribunal (NNTT) under s 38(1)(c) of the NTA, after taking into account the effect on native title rights and interests under s 39 of the NTA, so that each of these future acts under the NTA were valid pursuant to ss 24AA(4), 24MB(1), 24MD(1), 25(3) and 26(1) of the NTA, and YNAC retained a right to thereafter make an application for a determination of compensation under ss 50(2) and 61(1) of the NTA:
    - (i) M47/1409, the subject of the NNTT’s determination in *FMG Pilbara Pty Ltd v Wintawari Guruma Aboriginal Corporation v Ned Cheedy*

*and Others on behalf of the Yindjibarndi People / Western Australia* [2009] NNTTA 99 (**[2009] NNTTA 99**);

- (ii) M47/1411, the subject of the NNTT's determination in [2009] NNTTA 99;
- (iii) M47/1413, the subject of the NNTT's determination in *FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia* [2009] NNTTA 91;
- (iv) M47/1431, the subject of the NNTT's determination in *FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia* [2011] NNTTA 107 (**[2011] NNTTA 107**);
- (v) M47/1453, the subject of the NNTT's determination in *FMG Pilbara Pty Ltd / NC (deceased) and Others on behalf of the Yindjibarndi People / Western Australia* [2012] NNTTA 142;
- (vi) M47/1473, the subject of the NNTT's determination in *FMG Pilbara Pty Ltd and Another v Yindjibarndi #1* [2014] NNTTA 79 (**[2014] NNTTA 79**);
- (vii) M47/1475, the subject of the NNTT's determination in [2014] NNTTA 79;
- (viii) M47/1513, the subject of the NNTT's determination in *FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another* [2018] NNTTA 64;
- (ix) M47/1570, the subject of the NNTT's determination in *FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTB and Another* [2020] NNTTA 8;
- (x) E47/1319, the subject of the NNTT's determination in *FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia* [2012] NNTTA 11;
- (xi) E47/1398, the subject of the NNTT's determination in [2011] NNTTA 107;
- (xii) E47/1399, the subject of the NNTT's determination in [2011] NNTTA 107;



(d) each of the following FMG tenements, which are exploration licences or prospecting licences, were granted by the State after the State gave notice under s 29(7) of the NTA that it considered these future acts attract the expedited procedure in s 32 of the NTA without the need for a determination by the NNTT, so that each of these future acts under the NTA were valid pursuant to ss 24AA(4), 24MB(1), 24MD(1) and 26(1) of the NTA, and YNAC retained a right to thereafter make an application for a determination of compensation under ss 50(2) and 61(1) of the NTA:

(i) E47/1333;

(ii) E47/1334;

(iii) E47/1447;

(iv) E47/3205;

(v) E47/3464;

(vi) P47/1945;

(vii) P47/1946;

(viii) P47/1947;

(e) each of the following FMG tenements, which are miscellaneous licences (**Water Management Miscellaneous Licences**), were granted by the State and are valid future acts pursuant to ss 24AA(4), 24HA(2) and 24HA(3) of the NTA, and YNAC retained a right to thereafter make an application for a determination of compensation under ss 50(2) and 61(1) of the NTA:

(i) L47/302;

(ii) L47/361;

(iii) L47/362;

(iv) L47/363;

(v) L47/367;

(vi) L47/396;

(vii) L47/472;

(viii) L47/697;

- (ix) L47/801;
  - (x) L47/813;
  - (xi) L47/814;
  - (xii) L47/914;
  - (xiii) L47/919.
- (f) each of the following FMG tenements, which are miscellaneous licences, were granted by the State and are valid future acts pursuant to ss 24AA(4), 24MB(1) and 24MD(1) of the NTA, to which Part 2, Division 3, Subdivision P of the NTA did not apply by force of ss 24MD(6B)(b) and 26(1)(c) of the NTA, and YNAC retained a right to thereafter make an application for a determination of compensation under ss 50(2) and 61(1) of the NTA:
- (i) L 1SA;
  - (ii) L47/859;
  - (iii) L47/901.

14. As to paragraph 14 of the Points of Claim:

- (a) from time to time, the FMG Respondents or their related entities have made arrangements with some of the Yindjibarndi People to enable the FMG Respondents or their related entities to conduct heritage surveys required for the purposes of the *Aboriginal Heritage Act 1972 (WA)*;
- (b) from time to time, the FMG Respondents or their related entities have made arrangements with some of the Yindjibarndi People so that the Yindjibarndi People are able to provide goods or services relating to the mining activities at the Solomon Hub mine;
- (c) the FMG Respondents dispute that:
  - (i) any “financial relationships and agreements”, whether “in respect of [the FMG Respondents’] mining activities” or otherwise, made with some of the Yindjibarndi People have caused serious division among the native title holders;
  - (ii) the consent of the registered native title claimant (before 13 November 2017) or YNAC (after 13 November 2017) was required for any of these “financial relationships and agreements”;

- (d) the FMG Respondents rely on paragraphs 36, 42 and 46 below and, by reason of those paragraphs, the Yindjibarndi People are not entitled to compensation for the alleged “serious division”.

15. As to paragraph 15 of the Points of Claim:

- (a) the FMG Respondents repeat paragraph 5 above;
- (b) the complete or partial extinguishment of native title rights and interests in the compensation application area before the grants of the FMG tenements as set out in paragraph 5 above may (subject to the NTA) entitle the Yindjibarndi People to claim compensation under the NTA from the State by reason of that earlier complete or partial extinguishment;
- (c) s 49 of the NTA provides that despite anything in Part 2, Division 2, 2A, 2B, 3 or 4 of the NTA:
  - (i) compensation is only payable under the NTA once for acts that are essentially the same; and
  - (ii) the Court must take into account any compensation awarded for essentially the same act.

**E. ENTITLEMENT TO COMPENSATION DEPENDS ON WHICH NTA, PART 2, DIVISION 3, SUBDIVISION APPLIES**

16. As to paragraph 16 of the Points of Claim:

- (a) s 24AA(4) of the NTA provides that a future act will be valid to the extent covered by any of a list of 11 types of future acts, including under:
  - (i) s 24AA(4)(e), a future act covered by s 24HA (management of water and airspace);
  - (ii) s 24AA(4)(f), a future act covered by s 24IA (acts involving renewals and extensions etc. of acts); and
  - (iii) s 24AA(4)(j), a future act covered by s 24MD (acts that pass the freehold test);
- (b) pursuant to s 24AB(2) of the NTA, to the extent that a future act, including relevantly the grant of a mining tenement, is covered by a particular section in the list in s 24AA(4), it is not covered by a section that is lower in the list;
- (c) s 24MD of the NTA is lower than s 24HA and s 24IA in that list;

- (d) s 24HA(5) of the NTA relevantly provides that the native title holders concerned are entitled to compensation for a future act constituting the grant of a licence, permit or authority under legislation (including the *Mining Act 1978*) that:
- (i) is a valid future act; and
  - (ii) relates to the management or regulation of surface and subterranean water (in all of its forms), where management or regulation includes granting access to, or taking, water;
- (e) s 24MD(3) of the NTA relevantly provides that native title holders are entitled to compensation in accordance with Part 2, Division 5 of the NTA for the future act of the grant of mining tenements under the *Mining Act 1978* if the ***similar compensable interest test*** is satisfied in relation to the future act and the law mentioned in s 240 of the NTA does not provide for compensation to native title holders for the future act;
- (f) by reason of the matters set out in paragraphs 16(a)-16(e) above:
- (i) pursuant to s 24HA(5) of the NTA, the Yindjibarndi People have an entitlement to compensation in accordance with Part 2, Division 5 of the NTA for the grant of the Water Management Miscellaneous Licences (referred to in paragraph 13(e) above) and do not have an entitlement to compensation pursuant to s 24MD(3) of the NTA;
  - (ii) pursuant to s 24MD(3) of the NTA, the Yindjibarndi People have an entitlement to compensation in accordance with Part 2, Division 5 of the NTA for the grant of the FMG tenements referred to in paragraphs 13(c), 13(d) and 13(f) above;
- (g) pursuant to s 45 of the NTA, if compensation is payable under s 10 of the *Racial Discrimination Act 1975* (Cth) (**RDA**), the compensation, insofar as it relates to the effect on native title, is to be determined in accordance with s 50 of the NTA as if the entitlement arose under the NTA;
- (h) s 53 of the NTA, in effect, provides that if the doing of a future act would result in an acquisition of property within the meaning of paragraph 51(xxxi) of the *Constitution* other than on just terms within the meaning of that paragraph 51(xxxi), there is an entitlement to such compensation, or compensation in addition, if the compensation in respect of a future act is attributable to the State, from the State, to ensure the acquisition is on such just terms.

17. As to paragraph 17 of the Points of Claim:
- (a) the FMG Respondents repeat paragraphs 13 and 16 above;
  - (b) as to the grant of the Water Management Miscellaneous Licences, each of the grant of these FMG tenements was a *future act* to which Part 2, Division 3, Subdivision H of the NTA applies because the future act relates to the management or regulation of surface and subterranean water (in all of its forms), where management or regulation includes granting access to, or taking, water within s 24HA(2)(b)(i) of the NTA;
  - (c) as to the grant of the FMG tenements referred to in paragraphs 13(c), 13(d) and 13(f) above, each of them was a *future act* to which Part 2, Division 3, Subdivision M of the NTA applies because each was a future act that could be done if the native title holders instead held *ordinary title* to the land and waters concerned within s 24MB(1)(b) of the NTA.
18. As to paragraph 18 of the Points of Claim:
- (a) the FMG Respondents repeat paragraphs 13, 16 and 17 above;
  - (b) as set out in paragraphs 16 and 17 above, as to the Water Management Miscellaneous Licences, there is no entitlement to compensation under s 24MD(3)(b) of the NTA.
19. The FMG Respondents agree with paragraph 19 of the Points of Claim but repeat paragraphs 13, 16 and 17 above.
20. As to paragraph 20 of the Points of Claim:
- (a) the FMG Respondents repeat paragraphs 13, 16 and 17 above;
  - (b) as set out in paragraph 21 below, the FMG Respondents dispute the allegation that the preconditions under s 24MD(3)(ii) of the NTA are not satisfied as to the FMG tenements referred to in paragraphs 13(c), 13(d) and 13(f) above;
  - (c) further, the preconditions under s 24MD(3)(ii) of the NTA are not relevant to the Water Management Miscellaneous Licences.
21. As to paragraph 21 of the Points of Claim:
- (a) the FMG Respondents dispute that:
    - (i) s 123 of the *Mining Act 1978* does not provide native title holders with parity of treatment with holders of *ordinary title*;

- (ii) s 123 of the *Mining Act 1978* does not provide compensation that has regard to the character of native title rights and interests;
- (b) even though native title land may not be “*private land*” as defined in s 8 of the *Mining Act 1978*, that does not mean that s 123(2) of the *Mining Act 1978* cannot apply in that:
- (i) pursuant to s 123(2) of the *Mining Act 1978*, a right to compensation for all loss and damage suffered or likely to be suffered by any “owner” or “occupier” resulting or arising from mining is given to the “owner” or “occupier” regardless of whether the land is “*private land*”;
  - (ii) the right to compensation under s 123(2) of the *Mining Act 1978* confers rights on native title holders if they are the “owner” or “occupier” and s 123(2) does not discriminate by reference to a particular race, colour or national or ethnic origin within s 10(1) of the RDA;
  - (iii) the general right to compensation under s 123(2) of the *Mining Act 1978* is not cut down by the other provisions of s 123, including ss 123(3), 123(5) and 123(6) of the *Mining Act 1978*;
  - (iv) further, pursuant to s 123(3) of the *Mining Act 1978*, the amount of compensation payable may be determined by agreement or in default of agreement, by the Warden’s Court, and such compensation is claimable by an “occupier” of Crown land, such that it includes an occupier of native title land;
- (c) even though, pursuant to s 35(1) of the *Mining Act 1978*, the holder of a mining tenement may not commence any mining on the natural surface or within a depth of 30m 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*”, this does not mean that, as regards the existence or extent of any right to compensation, native title holders are discriminated against by reference to a particular race, colour or national or ethnic origin and do not enjoy a right that is enjoyed by others within s 10(1) of the RDA;
- (d) even though, pursuant to s 29(2) of the *Mining Act 1978*, the consent in writing of the owner and occupier of “*private land*” is required in the circumstances specified in s 29(2), this does not mean that, as regards the existence or extent of any right to compensation, native title holders are discriminated against by reference to a particular race, colour or national or ethnic origin and do not enjoy a right that is enjoyed by others within s 10(1) of the RDA;

- (e) further, in *Warrie (No 1)* and/or *Warrie (FC)*, it was held that the Yindjibarndi People “occupy” the Exclusive Area (described in Part 2 of Schedule 1 of the Determination and depicted on the maps in Schedule 3 of the Determination), within the meaning of “occupy” in ss 47A(1)(c) and 47B(1)(c) of the NTA.
22. As to paragraph 22 of the Points of Claim, the FMG Respondents repeat paragraph 21 above.
23. As to paragraph 23 of the Points of Claim, the FMG Respondents repeat paragraphs 16 and 21 above.
24. As to paragraph 24 of the Points of Claim:
- (a) the FMG Respondents repeat paragraph 16 above and agree that s 53(1) of the NTA provides that native title holders are entitled to compensation, or compensation in addition to any compensation otherwise provided by the NTA, if the doing of any *future act* or the application of any provision 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;
- (b) further, if the compensation is in respect of a future act attributable relevantly to the State, the State is liable for such compensation, or such additional compensation.
25. As to paragraph 25 of the Points of Claim:
- (a) pursuant to s 85(2) of the *Mining Act 1978*, subject to that Act and any conditions to which the mining lease is subject, the lessee of a mining lease:
- (i) is entitled to use, occupy and enjoy the land in respect to which the mining lease was granted for mining purposes; and
- (ii) owns all minerals lawfully mined from the land under the mining lease;
- (b) pursuant to s 85(3) of the *Mining Act 1978*, the rights conferred by s 85 of the *Mining Act 1978* are exclusive rights for mining purposes in relation to the land in respect to which the mining lease was granted;
- (c) further, it is a condition of the FMG Mining Leases (other than M47/1570) that any right of the native title party to access or use the land the subject of each the FMG Mining Leases is not to be restricted except in relation to those parts of the land which are used for exploration or mining operations or for safety or security reasons relating to those activities;

- (d) by reason of the matters set out in paragraphs 25(a), 25(b) and 25(c) above, the FMG Respondents dispute that the FMG Mining Leases confer on them “exclusive possession” of the land;
  - (e) the FMG Respondents dispute that the FMG Mining Leases “suppress” the Yindjibarndi People’s native title rights and interests;
  - (f) the FMG Respondents dispute that the FMG Mining Leases have resulted in a paragraph 51(xxxi) acquisition of the Yindjibarndi People’s property, namely, their native title rights and interests.
26. As to paragraph 26 of the Points of Claim, the FMG Respondents repeat paragraphs 24 and 25 above and dispute the claimed entitlement to compensation or additional compensation.

**F. STATE LIABLE TO PAY COMPENSATION, NOT FMG RESPONDENTS**

27. The FMG Respondents agree with paragraph 27 of the Points of Claim but repeat paragraphs 20 and 21 above.
28. As to paragraph 28 of the Points of Claim:
- (a) the FMG Respondents repeat paragraphs 13, 16, 17, 20 and 21 above;
  - (b) the FMG Respondents dispute the claim that the grant of each of the FMG tenements was a future act covered by s 24MD(3) of the NTA;
  - (c) the FMG Respondents agree that the grant of each of the FMG tenements was a *future act* attributable to the State.
29. As to paragraph 29 of the Points of Claim:
- (a) the FMG Respondents repeat paragraphs 13, 16, 17, 20 and 21 above;
  - (b) s 125A(1) of the *Mining Act 1978* relevantly purports to provide 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 compensation is, in this case, the mining tenement holder, namely, the FMG Respondents as regards the FMG tenements;
  - (c) a mining tenement may be granted under the *Mining Act 1978* and it may be a future act the subject of any of Part 2, Division 3, Subdivision H or Subdivision I or Subdivision M and if the mining tenement is the subject of either Subdivision H or Subdivision I, s 24HA(6) or s 24ID(2) provides that



compensation is relevantly payable by the Crown in right of the State if the future act is attributable to the State, and not any grantee of the mining tenement;

- (d) as to the Water Management Miscellaneous Licences, s 24HA(6) provides that the compensation payable for the future act within Part 2, Division 3, Subdivision H of the NTA is payable by the Crown in right of the State if the future act is attributable to the State;
- (e) as to the FMG tenements other than the Water Management Miscellaneous Licences, s 24MD(4)(b) of the NTA provides that the native title holders may recover compensation from, relevantly, if the future act is within Part 2, Division 3, Subdivision M of the NTA and is attributable to the State:
  - (i) if a law of the State 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;
- (f) Part 2, Division 3, Subdivision M of the NTA does not apply to the Water Management Miscellaneous Licences;
- (g) on its proper construction, s 125A of the *Mining Act 1978*:
  - (i) does not differentiate between the grant of mining tenements falling within Part 2, Division 3, Subdivision M and falling within other Subdivisions of the NTA including Part 2, Division 3, Subdivision H and Subdivision I of the NTA;
  - (ii) purports to provide that, with respect to each and every grant of a mining tenement, the mining tenement holder is liable to pay compensation if the grant of the mining tenement is attributable to the State, regardless of whether the grant of the mining tenement falls within Part 2, Division 3, Subdivision M or any other Subdivision;
  - (iii) is a law of the State that is wholly inconsistent with a law of the Commonwealth including:
    - (A) s 24HA(6) of the NTA, which provides that for the grant of mining tenements falling within Part 2, Division 3, Subdivision H, compensation is relevantly payable by the State (not the mining tenement holder);

(B) s 24ID(2) of the NTA, which provides that for the grant of mining tenements falling within Part 2, Division 3, Subdivision I, compensation is relevantly payable by the State (not the mining tenement holder);

(C) s 53(1) of the NTA, which provides that any compensation or additional compensation to ensure that any compulsory acquisition is on just terms within s 51(xxxi) of the *Constitution* is relevantly payable by the State (not the mining tenement holder);

(h) by reason of the matters set out in this paragraph 29:

(i) s 125A of the *Mining Act* is invalid by force of s 109 of the *Constitution*;

(ii) the FMG Respondents are not liable to pay any compensation payable to YNAC and, instead, the State is liable.

30. As to paragraph 30 of the Points of Claim:

(a) the FMG Respondents repeat paragraphs 13, 16, 17 and 29 above;

(b) the FMG Respondents dispute the contention that the FMG Respondents are liable to pay the claimed compensation.

31. As to paragraph 31 of the Points of Claim:

(a) the FMG Respondents repeat paragraphs 13, 16, 17 and 29 above;

(b) the FMG Respondents agree that the State is liable to pay the claimed compensation.

32. As to paragraph 32 of the Points of Claim:

(a) the FMG Respondents repeat paragraphs 13, 16, 17 and 29 above;

(b) the State (and only the State) is liable to pay any compensation required to be paid under s 53(1) of the NTA.

**G. NATURE AND QUANTUM OF YINDJIBARNDI PEOPLE'S COMPENSATION CLAIM NOT CLEAR**

33. As to paragraph 33 of the Points of Claim:

(a) the FMG Respondents repeat paragraphs 5 and 10 above;

- (b) the FMG Respondents dispute that the Yindjibarndi People’s native title rights and interests have been wholly “suppressed”, “significantly diminished and impaired by” by the grants of the FMG tenements.

34. As to paragraph 34 of the Points of Claim:

- (a) the FMG Respondents repeat paragraph 5 above;
- (b) the Yindjibarndi People believe that:
  - (i) Yindjibarndi country, including the compensation application area, is redolent with spirituality commemorated by senior male members through mytho-ritual traditions and in particular their unique *Birdarra* law (*Warrie (No 1)* 641-643 [40]);
  - (ii) under the traditional laws and customs of the Yindjibarndi, a person who does not belong to Yindjibarndi country and cannot assert rights to it is identified as *manjangu*, and, in the past, must have sought permission from a Yindjibarndi elder or elders to enter and carry out activity on Yindjibarndi country (*Warrie (No 1)* 641-643 [40], 648-649 [54]-[55], 654-655 [85]-[89]);
- (c) the FMG Respondents dispute that the granting of the FMG tenements and related mining activities is a contravention of Yindjibarndi law;
- (d) the FMG Respondents otherwise do not know the detail about what is alleged about what the Yindjibarndi People believe.

35. As to paragraph 35 of the Points of Claim:

- (a) the FMG Respondents repeat paragraph 13 above;
- (b) the economic value of the Yindjibarndi People’s native title rights and interests may have been diminished or impaired because of the grant of the FMG tenements to the FMG Respondents and because of the effect of the grant of the FMG tenements on the Yindjibarndi People’s native title rights and interests but the FMG Respondents:
  - (i) do not know the nature and extent of such economic loss; and
  - (ii) do not understand how such economic loss is claimed or how it is calculated.

36. As to paragraph 36 of the Points of Claim:

- (a) the FMG Respondents repeat paragraphs 8 and 14 above;
- (b) the FMG Respondents dispute that:
  - (i) the FMG Respondents caused the alleged division and the alleged consequences;
  - (ii) the grant of the FMG tenements has caused the alleged division with the alleged consequences;
- (c) as set out in paragraph 39 below, Part 2, Division 5 of the NTA gives a right to compensation for any loss, diminution, impairment or other effect of the grant of the FMG tenements on the Yindjibarndi People's native title rights and interests;
- (d) if the alleged consequences were caused by the FMG Respondents (which is denied), there is no right to compensation for these alleged consequences under Part 2, Division 5 of the NTA.

37. As to paragraph 37 of the Points of Claim:

- (a) the FMG Respondents repeat paragraphs 5, 13 and 34 above;
- (b) the Yindjibarndi People may have suffered cultural loss because of the grant of the FMG tenements to the FMG Respondents and because of the effect of the grant of the FMG tenements on the Yindjibarndi People's native title rights and interests but the FMG Respondents:
  - (i) do not know the nature and extent of such cultural loss; and
  - (ii) do not understand how such cultural loss is claimed or how it is calculated.

38. As to paragraph 38 of the Points of Claim:

- (a) the FMG Respondents repeat paragraphs 5, 13, 25, 34, 35, 36, and 37 above;
- (b) other than those parts of the FMG tenements which are used for exploration or mining operations or for safety and security reasons relating to those activities, the FMG Respondents dispute that the Yindjibarndi People are unable to access and use the country that is the subject of the FMG tenements.

#### **H. APPLICABLE PRINCIPLES OR CRITERIA FOR COMPENSATION DETERMINATION**

39. As to paragraph 39 of the Points of Claim:

- (a) the FMG Respondents repeat paragraphs 16, 24, 29 and 32 above;
- (b) the criteria for determining compensation are relevantly set out in s 51 (including, in particular, ss 51(1), 51(3), 51(5)), s 51A and s 53 of the NTA;
- (c) s 51A(1) of the NTA provides that the total compensation payable under Part 2, Division 5 of the NTA for relevantly a future act that extinguishes completely all native title as 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;
- (d) by force of s 51A of the NTA, if there has been a partial or total extinguishment of native title because of the grant of the FMG tenements to the FMG Respondents and because of the effect of the grant of the FMG tenements on the Yindjibarndi People's native title rights and interests, the most the Yindjibarndi People may obtain as compensation for the economic loss they have suffered as a result is the amount that would be payable by the State if, instead, the land the subject of each of the FMG tenements is assumed:
  - (i) not to have been the subject of the grant of each of the FMG tenements;
  - (ii) to be a freehold estate;
  - (iii) to have been compulsorily acquired by the State,
 and the compensation is determined under s 241 of the *Land Administration Act 1997* (WA) on those assumptions;
- (e) by reason of the matters set out in this paragraph 39, for the purposes of s 51A of the NTA and to determine the most the Yindjibarndi People may possibly obtain as compensation for the economic loss they have suffered, the land the subject of each of the FMG tenements should be valued by determining what the value of the land would be, based on the assumptions set out in paragraph 39(d) above, by applying the approach in *Spencer v Commonwealth* (1907) 5 CLR 418, and considering the land's highest and best use as a freehold estate.

40. As to paragraph 40 of the NTA:

- (a) the FMG Respondents repeat paragraphs 16, 24, 29, 32 and 39 above;
- (b) the FMG Respondents agree with paragraph 40.

41. As to paragraph 41 of the NTA:

- (a) the FMG Respondents repeat paragraphs 13, 16, 17, 24, 29, 32 and 39 above;
- (b) the FMG Respondents agree that s 51(3) of the NTA applies to the making of the determination of compensation in this case;
- (c) s 24MD(3)(b)(i) of the NTA does not apply to the Water Management Miscellaneous Licences.

42. As to paragraph 42 of the NTA:

- (a) the FMG Respondents repeat paragraphs 13, 16, 17, 24, 29, 32 and 39 above;
- (b) the FMG Respondents agree that:
  - (i) s 51(3) of the NTA applies to the making of the determination of compensation in this case;
  - (ii) s 51(3) of the NTA provides that the Court must apply the principles or criteria for determining compensation set out in the *Mining Act 1978* in this case;
- (c) s 123 of the *Mining Act 1978* sets out such principles or criteria including that:
  - (i) pursuant to s 123(1), no compensation is payable, and no claim lies for compensation whether under the *Mining Act 1978* or otherwise:
    - (A) in consideration of permitting entry on to any land for mining purposes (s 123(1)(a));
    - (B) in respect of the value of any mineral which is or may be in, on or under the surface of any land (s 123(1)(b));
    - (C) by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral (s 123(1)(c)); or
    - (D) in relation to any loss or damage for which compensation can not be assessed according to common law principles in monetary terms (s 123(1)(d));
  - (ii) pursuant to s 123(2), subject relevantly to s 123, the owner or occupier of any land where mining takes place is 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;

- (iii) pursuant to s 123(4), subject relevantly to s 123(1), the amount payable under s 123(2) to which an owner or occupier may be found to be entitled may include compensation for, among other things:
  - (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 (s 123(4)(a));
  - (B) damage to the land or any part of the land (s 123(4)(b));
  - (C) severance of the land or any part of the land from other land of, or used by, that person (s 123(4)(c));
  - (D) “social disruption” (s 123(4)(f));
  - (E) any reasonable expense properly arising from the need to reduce or control the damage resulting or arising from the mining (s 123(4)(h));
- (d) on the proper construction of s 123(4)(f) of the *Mining Act 1978*:
  - (i) the “social disruption” to which s 123(4)(f) refers is “social disruption” caused by the mining permitted by the grant of a mining tenement;
  - (ii) “social disruption” refers to the mining causing the owner or occupier or the relevant person to be dislocated from the area the subject of the mining, and does not refer to internal disharmony among any such owners, occupiers or relevant persons.

43. As to paragraph 43 of the Points of Claim:

- (a) the FMG Respondents repeat paragraphs 13, 16, 17, 18, 20, 24, 25, 28, 29, 30, 31, 32, 39, 41 and 42 above;
- (b) the principles or criteria set out in s 123 of the *Mining Act 1978* provide for compensation on just terms in that pursuant to s 123(2) of the *Mining Act 1978* the entitlement to compensation is “for all loss or damage suffered or likely to be suffered” “resulting or arising from the mining”;
- (c) further, in this case, because there is no resultant acquisition of property within s 51(xxxi) of the *Constitution* (the subject of s 53(1) of the NTA), s 51(3) of the NTA obliges the principles or criteria set out in s 123 of the *Mining Act 1978* to be applied for determining compensation, and:

- (i) this is expressly required by s 51(3) of the NTA, in that s 51(3) expressly applies “(whether or not on just terms)”;
  - (ii) s 51(1) of the NTA is expressly stated to be “Subject to” s 51(3) of the NTA;
- (d) because s 45 of the NTA provides that if the RDA has the effect that compensation is payable in respect of relevantly a future act that validly affects native title to any extent, that compensation is determined as if the entitlement to compensation arose under the NTA by the application of the principles in Part 2, Division 5 of the NTA, s 45 does not require any extra compensation on “just terms” if such extra compensation is not obtainable under s 51(3) of the NTA;
- (e) pursuant to ss 51(1), 51(3) and 240 of the NTA, compensation for the unique character of native title rights and interests (namely, compensation as provided for by s 51(1) for any loss, diminution, impairment or other effect of relevantly the future acts in this case on the Yindjibarndi People’s native title rights and interests) is expressly to be determined by applying the principles or criteria set out in s 123 of the *Mining Act 1978* on the assumption that the Yindjibarndi People instead held ordinary title to the compensation application area.

44. As to paragraph 44 of the Points of Claim:

- (a) the FMG Respondents repeat paragraphs 13, 16, 17, 18, 20, 24, 25, 28, 29, 30, 31, 32, 39, 41, 42 and 43 above;
- (b) the FMG Respondents dispute that if s 45 of the NTA applies then, under s 51(1) of the NTA, the determination of compensation must be on just terms.

45. As to paragraph 45 of the Points of Claim:

- (a) the FMG Respondents repeat paragraphs 13, 16, 17, 18, 20, 24, 25, 28, 29, 30, 31, 32, 39, 41, 42, 43 and 44 above;
- (b) because there is no resultant acquisition of property within s 51(xxxi) of the *Constitution* (the subject of s 53(1) of the NTA), the FMG Respondents dispute the allegation that s 53(1) of the NTA applies in this case;
- (c) further, if s 53(1) of the NTA applies in this case (which is disputed):
  - (i) the FMG Respondents dispute that then, under s 51(2) of the NTA, the Court may, not must, have regard to the principles or criteria for determining compensation set out in s 123 of the *Mining Act 1978*;



- (ii) the Yindjibarndi People would be entitled to compensation or additional compensation under s 53(1) to ensure that the compensation they recover is on just terms from the State, not the FMG Respondents.

46. As to paragraph 46 of the Points of Claim:

- (a) the FMG Respondents repeat paragraphs 13, 16, 17, 18, 20, 24, 25, 28, 29, 30, 31, 32, 35, 37, 39, 41, 42, 43, 44 and 45 above;
- (b) in any determination of compensation under Part 2, Division 5 of the NTA, the Yindjibarndi People would be entitled to the economic value of the native title rights and interests that have been lost, diminished, impaired or affected by the grant of the FMG tenements, being the *economic* effects of that loss, diminution, impairment or other effect of the grant of the FMG tenements;
- (c) the determination of compensation under Part 2, Division 5 of the NTA:
  - (i) would include a component for the objective or economic effects of the infringement of the Yindjibarndi People's native title rights and interests;
  - (ii) the objective or economic effects of the infringement may be assessed by, in effect, determining the sum which a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious party in the position of the Yindjibarndi People to obtain the Yindjibarndi People's assent to the loss, diminution, impairment or other effect of the grant of the FMG tenements on their native title rights and interests;
  - (iii) is not to be made by determining 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 rights to the FMG tenements (*Northern Territory of Australia v Griffiths (Timber Creek (HC))* [2019] HCA 7; (2019) 269 CLR 1, 56-58 [83]-[85]);
- (d) as set out in paragraph 35 above, the FMG Respondents:
  - (i) do not know the nature and extent of this component of the Yindjibarndi People's claim for economic loss; and
  - (ii) do not understand how such economic loss is claimed or how it is calculated;

- (e) the determination of compensation under Part 2, Division 5 of the NTA would also include a component for the non-economic or cultural loss occasioned by any diminution in the Yindjibarndi People's connection to country (*Timber Creek (HC)*, 56-57 [84], 85-86 [152]-[154]);
- (f) as set out in paragraph 37 above, the FMG Respondents:
  - (i) do not know the nature and extent of this component of the Yindjibarndi People's claim for non-economic or cultural loss; and
  - (ii) do not understand how such non-economic or cultural loss is claimed or how it is calculated;
- (g) the FMG Respondents dispute that the component for non-economic or cultural loss will include compensation for the alleged fragmentation of Yindjibarndi society and the alleged serious social disruption, disharmony and conflict allegedly caused by the grant of the FMG tenements;
- (h) the FMG Respondents dispute that the Yindjibarndi People are entitled to the claimed compound interest (*Timber Creek (HC)*, 66-79 [108]-[137]).

Dated: 20 February 2023



Brahma Dharmananda SC



Marina Georgiou



Stefan Tomasich

These Points of Response were settled by Brahma Dharmananda SC, Marina Georgiou and Stefan Tomasich.

**Certificate of lawyer pursuant to Federal Court Rules r 16.01(c)**

I, Mark van Brakel, certify to the Court that in relation to these Points of Response, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the Points of Response;
- (b) each denial in the Points of Response; and
- (c) each non-admission in the Points of Response.



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Mark van Brakel

Lawyer for the Respondent

Date: 20 February 2023