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Applicant's outline of opening submissions

WAD 37 of 2022

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

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC
Applicant
STATE OF WESTERN AUSTRALIA & ORS
Respondents

(A) BACKGROUND

1. Yindjibarndi Ngurra Aboriginal Corporation RNTBC (**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.[1] Under s.56(3) of the NTA, the Applicant holds in trust the native title rights and interests of the common law holders (**Yindjibarndi People**), the subject of the determination of native title made by the Federal Court on 13 November 2017 in *Warrie (formerly TJ) on behalf of the Yindjibarndi People v Western Australia (No.2)* [2017] FCA 1299; (2017) 366 ALR 467 (***Warrie (No.2)***).[2]

2. In the *'Exclusive Area'* [3] within the *Warrie (No.2)* Determination Area (**Exclusive Area**), 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.[4] The First Respondent (**State**) and the FMG Respondents say that this right to exclusive possession only dates from the date of the *Warrie (No.2)* Determination.[5] In the balance of the *Warrie (No.2)* Determination Area (**non-exclusive area**), the Yindjibarndi People possess the comprehensive rights listed in [7] of the Points of Claim, including the right to conduct activities necessary to give effect to them.

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1 Further Amended Points of Claim (**Points of Claim**) at [1].
2 Points of Claim at [2]. See *Warrie (No.2)* at [23] and [26].
3 *'Exclusive Area'* is defined in [11] of the Determination to mean that part of the Determination Area described in Part 2 of Schedule 1 and depicted on the maps in Schedule 3. It is those parts of the determination area where ss.47A and 47B apply to disregard any prior extinguishment of native title.
4 Points of Claim at [5]. Determination at [4].
5 FMG Response at [5], [6]; First Respondent's Response (**State Response**) at [12].

3. The State has made grants to the FMG Respondents of a variety of mining tenements including 9 Mining Leases, 8 Exploration Licences, 13 Miscellaneous Water Licences and 3 Miscellaneous Licences over unallocated Crown land within the Exclusive Area and in parts of the non-exclusive area covered by the Mount Florance Pastoral Lease (**FMG tenements**).[6] The FMG tenements collectively underpin and provide the legal basis for FMG's hugely profitable iron ore mine known as the Solomon Hub mine, which is located largely on unallocated Crown land (UCL 7) within the Exclusive Area (**FMG's Solomon Project**).[7] The Solomon Hub mine is near a sacred site and freshwater spring that the Yindjibarndi call *Bangkangarra* and that FMG has named 'Satellite Spring'.[8] The Court will hear on-country evidence at *Bangkangarra*, which is a permanent pool, camping place and rock art site.

4. The Yindjibarndi #1 native title claim was filed on 9 July 2003 and accepted for registration on 8 August 2003. The FMG tenements were granted by the State post-2008 and mostly prior to the making of the *Warrie (No.2)* Determination in 2017. Neither the Yindjibarndi #1 applicant / *registered native title claimant* [9] as the representative of the Yindjibarndi People under the NTA prior to the making of the *Warrie (No.2)* Determination nor the Applicant, as their post-determination representative, consented or agreed to or received any compensation for, the grant of any of the FMG tenements, save for one Exploration Licence.[10]

5. The Applicant contends that the effect of the *Warrie (No.2)* Determination is that the native title right to exclusive possession, occupation, use and enjoyment of the Exclusive Area, as well as the non-exclusive rights in the non-exclusive area, existed both before and after the grants of the FMG tenements.[11] Although the State and FMG Respondents take issue with the existence of the right to exclusive possession *prior* to the Determination, there does not appear to be any issue that this right has existed *since* the Determination.[12] Notwithstanding the existence of those native title rights and interests and notwithstanding the lack of Yindjibarndi agreement or consent, the State made the grants of the FMG tenements, the FMG Respondents commenced mining

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6 Points of Claim at [8].
7 Points of Claim at [9]; FMG Response at [9]; *Warrie (formerly TJ) on behalf of the Yindjibarndi People v Western Australia* [2017] FCA 803; (2017) 365 ALR 624 (***Warrie No.1***), per Rares J at [8].
8 *Warrie (No.1)* at [8].
9 Defined in s.253 of the NTA to mean a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant.
10 Points of Claim at [13]; FMG Response at [12]-[13].
11 *Warrie (No.2)* at [5] and [9].
12 State Response at [12]; FMG Response at [5], [6].

activities on the compensation application area in about October 2012 and those activities have continued and have intensified, for more than a decade, without the payment of any compensation to the Yindjibarndi People.[13]

6. The Applicant in this proceeding seeks a determination of compensation to compensate the Yindjibarndi People for the loss, diminution, impairment or other effects of the grants of the FMG tenements on their native title rights and interests. Compensation is sought 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.[14] It will be submitted that compensation should be determined on a collective project-wide basis, as opposed to separately determining compensation for the grant of each of the FMG tenements.

(B) AN ENTITLEMENT TO CLAIM COMPENSATION UNDER THE NTA

7. Section 81 of the NTA confers jurisdiction upon the Federal Court to hear and determine applications that relate to native title, including applications for a determination of compensation. Division 5 of Part 2 of the NTA has the heading, *'Determination of compensation for acts affecting native title etc'* and consists of ss.48 to 54. Section 48 provides that compensation payable under Division 2, 2A, 2B, 3 or 4 of Part 2 of the NTA in relation to an act is only payable in accordance with Division 5. Section 49 states that compensation is only payable once for acts that are essentially the same. Section 50(1) provides that a determination of compensation may only be made in accordance with Division 5.

8. Section 51(1) sets out the criteria for determining compensation. The majority in *Northern Territory v Griffiths* [2019] HCA 7; (2019) 269 CLR 1 (***Griffiths* HC**) at [41] said that s.51(1) is the *'core provision'*. It provides that the entitlement to compensation is an entitlement *'on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests'*. Section 51 is subject to two qualifications. The first is the so-called "*freehold cap*" in s.51A and the second is the alleviating provision contained in s.53. All of these provisions will be discussed later in Part C.

9. Under s.61(1) a *'registered native title body corporate'*[15] may make an application to

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[13] A situation which is the antithesis of what the NTA intends to achieve: see later herein at [12].
[14] Points of Claim at [16], [26].
[15] The term, *'registered native title body corporate'*, is defined in s.253 of the NTA to mean a prescribed body corporate whose name and address are registered on the *National Native Title Register* under s.193.

the Federal Court under s.50(2) for a determination of compensation, if the determination is sought in relation to an area of land or waters in relation to which the registered native title body corporate holds, or is an agent prescribed native title body corporate in relation to, the native title rights and interests. The Applicant is the registered native title body corporate which holds the native title rights and interests in the *Warrie (No.2)* Determination Area.

10. In the 29 years that have passed since the commencement of the NTA on 1 January 1994, *Griffiths* HC is the only fully litigated and successful native title compensation application under that Act. The compensation application in *Griffiths* HC related to the compulsory acquisition by the Northern Territory of native title over 39 lots and 4 roads within the small town of Timber Creek. The compensable acts consisted largely of *previous exclusive possession acts* within the meaning of s.23B of the NTA which resulted in the extinguishment of the non-exclusive native title rights and interests of the Ngaliwurru and Nungali people.[16] Accordingly, they were entitled under s.23J to compensation for the past extinguishment.

11. The compensation application here is very different to the compensation application in *Griffiths* HC. It relates to the grants of mining tenements, which are *future acts*.[17] They are acts which have *affected* (see below) but have not extinguished, the Yindjibarndi People's native title rights and interests. Although *Griffiths* HC does provide some guidance in relation to the assessment of compensation for the impairment as well as for the extinguishment, of native title, it does not deal at all with the assessment of compensation for the grant of a mining tenement.

The statutory scheme for compensation under the NTA for *'future acts'*

12. The Preamble to the NTA[18] *'sets out considerations taken into account by the Parliament of Australia in enacting the law'*. It begins by recognising that Aboriginal Peoples and Torres Strait Islanders have been progressively dispossessed of their lands *'largely without compensation'* or *'lasting and equitable agreement … concerning the use of their lands'*. The majority in *Griffiths* HC observed that the enactment of the

[16] The application also included a claim for compensation for certain *future acts* which were invalidated by the NTA because the procedures required for a valid *future act* had not been followed by the Northern Territory. That aspect of the claim was rejected by the Full Federal Court and was not pursued further in the High Court: *Northern Territory v Griffiths* (2017) 256 FCR 478 at [447]-[448].

[17] NTA s.233 defines "*future acts*".

[18] The Preamble is part of the NTA: *Acts Interpretation Act 1901* (Cth) s.13(2)(b).

NTA was intended to rectify the consequences of those past injustices.[19] The Preamble also relevantly states:

> Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title.[20] However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.
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> It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.

This *'special right to negotiate'* before a *'future act'* is done, is included in Subdivision P of Part 2 Division 3 of the NTA and it *'significantly supplement(s)'* the native title rights and interests recognised by the common law.

13. The Full Federal Court in *Northern Territory v Alyawarr* (2005) 145 FCR 442 said that the Preamble declares the moral foundation upon which the NTA rests.[21] It makes explicit the legislative intention to recognise, support and protect native title.[22] In considering the construction and application of the compensation provisions in the NTA, the stated purpose of the Parliament in enacting the NTA should be kept foremost in mind.[23] In *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [124], McHugh J said that the NTA should be read as having a legislative purpose of wiping away or at all events ameliorating, the *'national legacy of unutterable shame'*[24] that in the eyes of many has haunted the nation for decades. His Honour said that where the Act is capable of a construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.

Future acts

14. Division 3 of Part 2 of the NTA deals with *future acts* which are defined in s.233 as

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[19] At [26] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ. Their Honours also referenced *Acts Interpretation Act 1901* (Cth), s.13(2)(b). See too *The Nyamal Palyku Proceeding (No.7)* [2023] FCA 528 at [85]-[86], per Colvin J.

[20] This portion of the preamble is quoted in the majority judgment in *Griffiths* HC at [26].

[21] *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [63] per Wilcox, French and Weinberg JJ.

[22] *Northern Territory v Alyawarr* (2005) 145 FCR 442 (ibid). See too the first two of the *'main objects'* of the NTA set out in s.3(a),(b).

[23] *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [62], where the Court made comments to that effect in relation to the construction and application of the definition of *'native title'* in s.223.

[24] *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 104.

acts which *affect* native title. Acts which do not *affect* native title are not *future acts* and therefore the Division does not deal with them: s.24AA(1). Sections 226 and 227 explain and provide the meaning of *'acts'* that *'affect'* native title. An act *affects* native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise. There is no issue that the grant of each of the FMG tenements was a *future act.*

15. Division 3 provides that, to the extent that a *future act affect(s)* native title, it will be valid if covered by the provisions of that Division and invalid if not: ss.24AA(2), 24OA. That is, the NTA does not empower the State and Territory governments to do certain acts (*future acts*), rather it sets up a code that must be followed if those acts are to validly *affect* native title rights and interests.

16. A *future act* will be valid, *inter alia*, if covered by the provisions in respect of:

    (i) the parties to an Indigenous Land Use Agreement consent to the doing of the act (ss.24BA-24EC);

    (ii) water and air space (s.24HA);

    (iii) renewals and extensions (ss.24IA-24ID);

    (iv) acts that pass the freehold test, subject to the right to negotiate (ss.24MA-24MD, 25-44).

17. Division 3 provides that, in general, valid *future act(s)* are subject to the *non-extinguishment principle* (which is defined in s.238): s.24AA(6). The native title rights and interests will continue to exist but those rights and interests will have no effect in relation to the *future act*: NTA s.238(1)-(4). Subsection 238(8) provides an apt example of the operation of the principle.

18. Whether a *future act* extinguishes or merely suppresses native title rights and interests, the native title holders are entitled to compensation for the act: see ss.24AA(6), 24MD(2), 24NA(6) where native title has been extinguished and ss.24FA(1)(b), 24GB(7), 24GD(4), 24GE(4), 24HA(5), 24ID(1)(d), 24JAA(8), 24JB(4), 24KA(5), 24MD(3) and 24NA(6) where the non-extinguishment principle applies and hence the native title rights and interests are suppressed.

19. If the *future act* is attributable to the Commonwealth, the compensation is payable by the Commonwealth, if it is attributable to a State or Territory, the compensation is payable by that State or Territory. In either case, provision is made in a number of

instances for the Commonwealth or for the relevant State or Territory, to make legislative provision for a person other than the Crown to be liable to pay compensation for the act.[25] The State has sought to include such a provision in the *Mining Act 1978* (WA) (***Mining Act***) by the insertion of s.125A.

The grants of the FMG tenements were valid future acts

20. The grant of a mining tenement is an act to which Subdivision M of Division 3 (acts passing the freehold test) will apply, provided that the relevant grant could be made over the land concerned if the native title holders instead held *ordinary title* to the land: s.24MB(1)(b)(i) and if a law of the Commonwealth, State or Territory makes provision in relation to the preservation or protection of areas or sites that may be in the area of the grant and of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions: s.24MB(1)(c).

21. The note to s.24MB(1) says that an example of a future act covered by this subsection is the grant of a mining lease over land in relation to which there is native title when a mining lease would also be able to be granted over the land if the native title holders instead held *ordinary title* to it. Section 253 of the NTA defines *ordinary title* as a freehold estate in fee simple. The FMG tenements could have been granted if the Yindjibarndi People instead held *'ordinary title'* (freehold) because under s.29 of the *Mining Act*, a *'mining tenement'* [26] can be granted in respect of *'private land'*, which is defined in s.8 to include freehold land. The condition in s.24MB(1)(b)(i) is satisfied. The State also has legislation, the *Aboriginal Heritage Act 1972* (***Heritage Act***), which makes provision in relation to the preservation or protection of Aboriginal sites and hence, on the face of it, s.24MB(1)(c) also appears to be satisfied.

22. The validity of the FMG tenements was not challenged in the *Warrie (No.1)* proceedings and those tenements are listed in the *'Other Interests'* (s.225(c) NTA) in Schedule 5 of the Determination. The grant of each of those tenements was a valid *future act*. There is, however, an issue as to whether the grants of the Water Management Miscellaneous Licences (**WMML**) and the extensions of term of 8 of the Exploration Licences, were *future act(s)* covered by Subdivision M of Part 2 Division

[25] For a *future act* covered by s.24MB(1)(b) consisting of the grant of a mining lease that could have been granted if the native title holders instead held *'ordinary title'* (freehold), the relevant provision in relation to liability to pay compensation is s.24MD(4).

[26] A *'mining tenement'* is defined in s.8 of the *Mining Act* as a prospecting licence, exploration licence, retention licence, mining lease, general purpose lease, or a miscellaneous licence granted or acquire under that Act.

3 of the NTA or by Subdivisions H and I, respectively.[27]

An entitlement to compensation under the NTA for the grant of a mining tenement

23. Subsection 24MD(1) provides that if Subdivision M applies to a *future act* then, subject to Subdivision P (which deals with the right to negotiate), the act is valid. Subdivision P creates a statutory right for native title holders and registered native title claimants, to negotiate in respect of certain *future acts* including the creation, renewal or extension of, a right to mine:[28] NTA ss.25(1)(a), 26(1A)(c),(1)(c)(i). Compliance with the procedures set out in Subdivision P condition the validity of any future act to which the right to negotiate applies: see ss.24OA, 28(1) and *Smith v Western Australia* (2001) 108 FCR 442 (French J) at 444.

24. Pursuant to s.29 of the NTA, before any such *'act'* is done, the Government party must give notice of it in accordance with that section to, inter alia, a *'native title party'*, which includes any registered native title body corporate and any registered native title claimant: s.29(2)(b). Section 31(1) is enlivened by the sending of a notice under s.29. It imposes an obligation on the Government party to give native title parties an opportunity to make submissions *'regarding the act'* (s.31(1)(a)), and an obligation on the *negotiation parties* (as defined in s.30A) to negotiate in good faith with a view to obtaining the agreement of the native title party to *'the doing of the act'*, with or without conditions (s.31(1)(b)). Subsection 33(1) provides that the negotiations may include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to the amount of profits made, any income derived or any things produced by, the grantee party, as a result of doing anything in relation to the land or waters concerned.

25. If at least six months have passed since the *'notification day'*[29] and *'no agreement of the kind mentioned in s.31(1)(b) has been made in relation to the act'*, a negotiation party may apply under s.35(1), to the *'arbitral body'* for a determination under s.38 as to whether the *'act'* may or may not be done. This is the course that the FMG Respondents took to obtain the grants of their 9 Mining Leases and 3 of their Exploration Licenses. Applications were made to the National Native Title Tribunal (**Tribunal**) for a (contested) determination that the *'act(s)'* may be done.[30]

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[27] FMG Response at [13(e)], [16(a),(c),(f),(i)], [17(b),(c)], [18], [19], [29(c),(d),(g)(iii)(A)&(B)] and [41(c)].
[28] The definition of *'mine'* in s. 253 includes *'explore or prospect for things that may be mined'*.
[29] See s.29(4)(a).
[30] NTA s.38(1)(b); Points of Claim at [13A], [13B]; FMG Response at [13(c)].

26. Subsection 24MD(3) provides that in the case of any *future act* to which Subdivision M applies that is not a compulsory acquisition of the native title rights and interests:

(a) the *non-extinguishment principle*[31] applies to the act; and

(b) if the following conditions are satisfied:

(i) the *similar compensable interest test* is satisfied in relation to the act; and

(ii) the law mentioned in s.240 (which defines *similar compensable interest test*) does not provide for compensation to the native title holders for the act:

the native title holders are entitled to compensation for the act in accordance with Division 5.

27. The *similar compensable interest test* which is referred to in s.24MD(3)(b)(i) is satisfied in relation to a *future act* if:

(a) the native title concerned relates to an *onshore place*;[32] and

(b) the compensation would, apart from the NTA, be payable under any law for the act on the assumption that the native title holders instead held *ordinary title*[33] to any land or waters concerned and to the land adjoining, or surrounding, any waters concerned.[34]

28. In the case of the FMG tenements, the *similar compensable interest test* in s.240 is satisfied because the *Warrie (No.2)* Determination Area is within an *'onshore place'* as defined in s.253 of the NTA and, under s.123 of the *Mining Act,* compensation would, apart from the NTA, be payable on the assumption that the native title holders instead held *ordinary title* (freehold) to the land or waters concerned. Accordingly, the precondition under s.24MD(3)(b)(i) for an entitlement to compensation is satisfied. That then leaves for consideration whether the pre-condition under s.24MD(3)(b)(ii) is also satisfied.[35] This is contested by the State but not by the FMG Respondents.

29. Under s.24MD(3)(b)(ii) the entitlement to compensation under the NTA for the grant of a mining tenement that is covered by s.24MD(3) is subject to the further condition that the law under which the grant is made does *not* provide compensation to the native title holders for the act. Although some States and Territories have amended their mining legislation to provide that native title holders are *'owners'*, *'occupiers'* or

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31 The *non-extinguishment principle* is defined in s.238 of the NTA.

32 An *onshore place* is defined in s.253 of the NTA to mean land or waters within the limits of a State or Territory.

33 The expression *'ordinary title'* is relevantly defined in s.253 of the NTA as a freehold estate in fee simple.

34 NTA s.240.

35 The Applicant and the FMG Respondents agree that the pre-condition is satisfied but the State says that it is not.

'landholders' as the case may be, with a view to expressly including them in the class of persons who are entitled to compensation under that legislation,[36] Western Australia has not done so. The High Court in *Western Australia v Ward* (2002) 213 CLR 1 (***Ward* HC**) discussed the issue but left it unresolved.[37] The majority said that, depending upon the circumstances, the *Mining Act* may provide compensation for native title holders equivalent to the compensation provided to the holders of other rights and interests in land which are affected by mining.[38] If the *Mining Act* does so provide, then the native title holders' entitlement to compensation will fall to be determined under that Act and not under the NTA.

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

The Part 2 Division 5 compensation provisions

30. Where native title holders are entitled to claim compensation under the NTA, whether for past or future extinguishment or impairment of their native title rights and interests, it is to be determined in accordance with Part 2 Division 5. The relevant provisions have been briefly described earlier above at [7]-[9].

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

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

31. Compensation under the *Mining* Act for loss or damage occasioned by mining activities is dealt with in Part VII of that Act. Section 123 which sets out the entitlement to compensation of an *'owner'* or *'occupier'* of land where mining activities occur. The terms *'owner'*, *'occupier'* and *'private land'* are defined in s.8 of the *Mining Act*.

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

32. Land in relation to which native title rights and interests exist, including the land within the *Warrie (No.2)* Determination Area, does not fall within the definition of *'private land'* in the *Mining Act*. If, as is the case here in relation to the Exclusive Area, native title holders have a right to possession, occupation, use and enjoyment to the exclusion of all others, they may arguably appear to fall within par (c) of the definition of *'owner'*, that is, *'the person who for the time being, has the lawful control and management'* of

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[36] *Mining Act 1992* (NSW) – Dictionary; *Mineral Titles Act 2010* (NT) at s.14; *Mining Act 1971* (SA) at s.6; *Mineral Resources Act 1989* (Qld) at Schedule 2 – Dictionary; *Native Title (Queensland) Act 1993* at s.152; *Mineral Resources Development Act 1995* (Tas) at s.3.

[37] *Ward* HC per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [316]-[319]; McHugh J at [559] and Callinan J at [854]-[855].

[38] *Ward* HC per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [317]-[318].

the land.[39] Native title holders whose native title rights and interests are not exclusive of the rights of others, as is the case here with the rights of the Yindjibarndi People in relation to the non-exclusive area, would not fall within the definition of *'owner'* but they may or may not, fall within the definition of *'occupier'*. Although the holders of non-exclusive native title rights and interests would not fall within the definition of *'occupier'* as *'any person in actual occupation of the land under any lawful title granted by or derived from the owner of the land'*, the majority in *Ward* HC pointed out at [318] that the definition of *'occupier'* is expressed to be inclusive, rather than exclusive and it may be that the *Mining Act* does not limit what otherwise might be meant by the term *'occupier'*. That was the view taken by Callinan J:

> It can be seen that the definition of *'occupier'* is expressed inclusively and does not exclude occupation according to its ordinary meaning of being in possession by having a physical presence on the land.[40]

33. Although McHugh J expressed general agreement with the reasons of Callinan J, his Honour specifically rejected those comments about the word *'occupier'*:

> The matter to which I refer is the statement in his Honour's judgment that native title holders come within the definition of *'occupier'* in the *Mining Act 1978 (WA).* I do not think that it can be said that the title of native title holders has been *'granted by or derived from the owner of the land'*.[41]

34. It is implicit from this comment that McHugh J concluded that the definition of *'occupier'* in the *Mining Act* is constrained by the words *'under any lawful title granted by or derived from the owner of the land'*. That is, the expression *'actual occupation ...* ***under*** *any lawful title'* represents a more definitive form of occupancy than actual occupation.[42] The Applicant submits that the linking of *'actual occupation'* to *'any lawful title'* conveys the intention that only those who meet both parts of the definition are *'occupiers'*. A more expansive construction would result in *'actual occupation'*, without more, falling within the definition and this would render the qualifying words *'under any lawful title'* redundant. Given that every person in *'actual occupation under any lawful title'* would, by necessity, be in *'actual occupation'*, the words of qualification would never apply. Finally, the requirement that actual occupation be under lawful title granted by or derived from the owner of land is consistent with the objects of the *Mining Act*. It cannot have been intended that any person in actual

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39 *Ward* HC at [317] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; Callinan J at [854] expressed the same view regarding par (c) of the definition of *'owner'* in s.8 of the *Mining Act*.
40 *Ward* HC at [854].
41 *Ward* HC at [559].
42 See *Tisala Pty Ltd v Hawthorn Resources Ltd* [2022] WASC 109 at [80]-[95], per Hill J.

occupation of Crown land, even a trespasser, would be entitled to compensation. If that is the correct view, it is clear that the *Mining Act* does not provide compensation to the Yindjibarndi People in relation to the grant of the FMG tenements where the native title rights and interests are or were non-exclusive.

35. Whether the *Mining Act* does or does not provide compensation to native title holders for the grant of a mining tenement cannot be determined simply by looking at the definitions of *'owner'* or *'occupier'* in that Act. Those definitions have to be read in their statutory context. It will be submitted that when that is done, s.123, on its proper construction, does not confer an entitlement to compensation on native title holders. In the alternative, it will be submitted that if the *Mining Act* does provide for compensation to native title holders, 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.[43]

36. Section 123(2) of the *Mining Act* states that the *'owner and occupier of **any** land'* where mining takes place are entitled, *'according to their respective interests'* to compensation for all loss or damaged suffered or likely to be suffered by them resulting or arising from mining. On the face of that subsection, if native title holders fall within the definition of an *'owner'* under s.8, they would appear to be treated on an equal footing with an *'owner'* of *'private land'*. If, on the other hand, they fall within the definition of an *'occupier'* under s.8, they would appear to be entitled to compensation on an equal footing with an *'occupier'* of Crown land or *'private land'*.

37. The starting point for the interpretation of s.123(2), however, is not to read that provision in isolation but rather to read it in the context of the whole of s.123 and, indeed, in the context of the *Mining Act* as a whole:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined *'by reference to the language of the instrument viewed as a whole'*.[44]

38. This contextual approach may result in a limitation of the effect of the expression *'owner and occupier of any land'* in s.123(2), even though *'owner'* and *'occupier'* are

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[43] Points of Claim at [21].

[44] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] per McHugh, Gummow, Kirby and Hayne JJ; see too *Statutory Interpretation in Australia*, 9th ed, Pearce at 4.2.

terms defined in the Act.[45] When s.123(2) is *'read with and accommodated to the rest of the section*',[46] in particular s.123(3), (5) and (6), and also s. 123(1), it is clear that the expression *'owner and occupier of any land'* in s.123(2), is not intended to extend to and include native title holders.[47]

39. That is because, *first*, the entitlement to compensation under s.123(2) is for loss and damage suffered or likely to be suffered, resulting or arising *'from the mining'*. It is not an entitlement to compensation *'for any loss, diminution, impairment or other effect'* which the grant of the mining tenement may have on native title rights and interests. *Second*, the term *'owner'* in s.123(2) is directed only to an *'owner'* of *'private land'*, because it is only an *'owner'* of *'private land'*, along with an *'occupier'* of *'private land'* or Crown land, who can apply to the warden's court under s.123(3) for a determination of the compensation referred to in s.123(2). A native title holder who might otherwise arguably appear to fall within the definition in par (c) of an *'owner'*, because their native title confers upon them *'lawful control and management'* of the land cannot, under s.123(3), institute proceedings in the warden's court to obtain a determination of compensation, because the land in relation to which native title exists, does not come within the definition of *'private land'* in s.8.

40. *Third*, there are other parts of s.123 which expressly limit the entitlement to compensation for certain loss or damage, to an *'owner'* and an *'occupier'* of *'private land'*. Section 123(5) confers on an *'owner'* and on an *'occupier'* of *'private land'*, adjoining or in the vicinity of land where mining takes place, an entitlement to compensation if the land or an improvement thereon, is injured or depreciated in value by mining. Section 123(6) confers on an *'owner'* and on an *'occupier'* of *'private land'*, the surface of which is damaged by mining operations, an entitlement to further compensation for that damage. Those compensation entitlements under ss.123(5) and 123(6), are not conferred upon native title holders, because land in which native title exists is not *'private land'*. *Fourth*, the restrictions placed upon claims for compensation by s.123(1)(a), (b) and (c) of the *Mining Act* are inconsistent with the negotiation rights conferred on native title holders by s.33(1) of the NTA.

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45 *Statutory Interpretation in Australia*, 9th ed, Pearce at 4.3; *Hall v Jones* (1942) 42 SR (NSW) 203; *Gidaro v Secretary, Department of Social Security* (1998) 83 FCR 139 at [150]; *Palos Verdes Estates Pty Ltd v Carbon* (1991) 72 LGRA 414 at [442].

46 *Taylor v Public Service Board* (1976) 137 CLR 208 at 213 per Barwick CJ, a passage quoted *Statutory Interpretation in Australia*, 9th ed, Pearce at 4.3 p139.

47 Section 125A is also relevant to this construction issue and is discussed later under Issue 10.

41. When s.123(2) is read in context with ss.123(1)(a),(b)&(c), (3), (5) and (6) it is clear that the expression *'the owner and occupier of **any** land'* in s.123(2) does not include native title holders. There are other provisions in the *Mining Act* which are consistent with s.123(3), (5) and (6) in that the compensation and related rights which they confer, are only conferred on an *'owner'* and an *'occupier'* of *'private land'*. Those rights are not conferred on native title holders. Those other provisions, which are discussed below, are a further indication that the definition of *'owner'* and *'occupier'* is not intended to extend to include native title holders.

42. *First*, under s.35(1), 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'*.[48] The right under s.35 to be paid compensation by the miner before the commencement of any surface mining is a valuable right. It is not a right which is conferred on native title holders because the land in relation to which their native title rights and interests exist, does not fall within the definition of *'private land'*. There is a similar prohibition under s.29(7)(c) on the holder of a mining tenement, felling trees, striping bark or cutting timber on *'private land'* without the consent in writing of the *'owner and the occupier of the private land'* or except in connection with mining carried out on the *'private land',* to remove earth or rock therefrom.

43. *Second*, although s.123(1) states that no compensation shall be payable in any case and no claim lies for compensation in respect of the value of, any mineral to be mined (s.123(1)(b)) or by reference to any rent or royalty assessed in respect of the mining of the mineral (s.123(1)(c)), the *'owner'* and the *'occupier'* of *'private land'* have, in the very broad circumstances set out in s.29(2), a right of veto over surface mining which can be used to obtain compensation based upon the value of minerals to be mined and hence far in excess of the compensation entitlements under s.123 of the *Mining Act*.[49]

44. The term *'land under cultivation'* in s.29(2)(a) is defined in s.8(1) in distinctly non-Indigenous terms to mean land being used for agricultural purposes and includes land (whether cleared or uncleared) used by a person for the grazing of stock in the ordinary course of management of that person's land. *'Agricultural'* is defined to include

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[48] We note that FMG's Solomon Project involves extensive surface mining.

[49] That is the view expressed by the learned authors of *Hunt on Mining Law of Western Australia*, 5th ed, Hunt, Kavenagh and Hunt at 3.4.6.

cropping or pasturing purposes: s.8(1). Finally, the words *'burial ground'* are defined to mean an area of land reserved or demarcated exclusively for the purpose of burial: s.8(1). That definition would not extend to include a traditional Aboriginal burial ground. Like the right conferred on *'owner(s)'* and *'occupier(s)'* by s.35(1), the right under s.29 to veto surface mining on *'private land'*, including land that is used for no higher purpose than grazing stock, is a valuable property right. It is not a right which is afforded to the holders of native title, because native title land does not fall within the definition of *'private land'*. Even where the native title confers upon the holders a right of exclusive possession, equivalent to the rights possessed by a freehold owner, native title holders are denied those valuable property rights.

45. In short, the Applicant will submit that the *Mining Act* does not provide compensation to native title holders because, properly construed, the entitlement to compensation under s.123(2) does not extend to include the holders of native title rights and interests, hence the native title holders will have an entitlement to compensation under s.24MD(3)(b) of the NTA. If it is held that the *Mining Act* does provide the native title holders with an entitlement to compensation, the Applicant will submit that it is a lesser entitlement to that conferred on the holders of other interests in land and does not have regard to the unique character of native title. Section 10 of the RDA will operate therefore so as to confer a right of compensation either against the State or, depending on the effect of s.125A of the *Mining Act*, against the FMG Respondents. Section 45 of the NTA provides that where a right of compensation exists under the RDA, the compensation is to be determined in accordance with s.50 of the NTA. Alternatively, s.53 will apply so as to ensure that the compensation payable is on *'just terms'*.

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

46. The majority judgment in *Griffiths* HC stated that the system established by the NTA to address, in a practical way, the consequences of acts impacting native title rights and interests is complex.[50] As noted earlier above at [8], their Honours' said that s.51(1) is the *'core provision'*.[51] Section 51(1), in its terms, recognises the *existence* of the two aspects of native title rights and interests identified in s.223(1) – the physical or material aspect (the right to do something in relation to land) and the cultural or spiritual aspect (the connection with the land) – as well as the fact that the *manner* in which each aspect

[50] *Griffiths* HC at [27].
[51] *Griffiths* HC at [41].

may be affected by a compensable act may be different.[52] Both aspects are addressed in terms of s.51(1) providing for an entitlement on just terms to compensation to the native title holders for *'any loss, diminution, impairment* ***or other effect*** *of the act on their native title rights and interests'*.[53]

47. The majority said that s.51(1) thus recognises that the consequences of a compensable act are not and cannot be uniform – the act and the effect of the act must be considered.[54] The subsection also recognises not only that each compensable act will be *'fact specific'* but that the *'manner'* in which the native title rights and interests are affected by the act will vary according to what rights and interests are affected and according also to the native title holders' identity and connection to the affected land.[55] The High Court agreed with the primary judge that s.51(1) does not require that the consequence *'directly'* arise from the compensable act.[56]

48. The majority in *Griffiths* HC said that the equality of treatment mandated by s.10(1) of the RDA, as reflected in s.51 of the NTA, necessitates that the assessment of just compensation for the infringement of native title rights and interests in land include both a component for the objective or economic effects of the infringement (being in effect, the sum which a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to obtain the latter's assent to the infringement, or, to put it another way, what the claim group could *fairly and justly* have demanded for their assent to the infringement) and a component for non-economic or cultural loss (being a *fair and just* assessment, in monetary terms, of the sense of loss of connection to country suffered by the claim group by reason of the infringement).[57]

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

49. Under s.51(3), if the compensable act is not a compulsory acquisition[58] and compensation would be payable under any law on the assumption that the native title holders instead held *ordinary title* (freehold), the Court *must* apply any principles or criteria for determining compensation (whether or not on just terms) set out in that law.

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52 *Griffiths* HC at [44].
53 *Griffiths* HC at [45].
54 *Griffiths* HC at [46].
55 *Griffiths* HC (ibid).
56 *Griffiths* HC (ibid).
57 *Griffiths* HC at [84].
58 This is a reference to compulsory acquisitions that extinguish native title and which are dealt with in ss.24MD(2) and 51(2) of the NTA.

With the exception of the grants of the WMMLs, the FMG Respondents agree with the Applicant that the grants of the FMG tenements are all future acts to which s.51(3) applies.

50. Section 51(3) is in contrast to s.51(4), which was considered by the High Court in *Griffiths* HC. Section 51(4) says that the determination of compensation on just terms *'may'*, not *'must'*, have regard to the principles or criteria set out in the relevant Commonwealth State or Territory compulsory acquisition law. Although *Griffiths* HC was not concerned directly with the determination of compensation which attracted the criteria under s.51(3), the majority said that it was the equality of treatment mandated by s.10(1) of the RDA, as reflected in the language of s.51(1), which necessitates that the assessment of *just* compensation include both a component for economic loss and a component for cultural loss.[59] If the principles or criteria that must be applied under s.51(3) cannot be interpreted so as to provide compensation for both economic and cultural loss, they will not provide *'just compensation'*. In this respect, the principles or criteria in the *Mining Act* do not expressly include '*cultural loss*'.

51. Under s.123(2) of the *Mining Act*, the '*owner*' and *'occupier'* of any land where mining takes place are entitled to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining and a person mining thereon is liable to pay compensation in accordance with that Act for any such loss or damage, or likely loss or damage. The amount of compensation payable under s.123(2) *'may include compensation for'* the matters listed in s.123(4). The list of compensable damage in s.123(4) does not refer to the kind of cultural loss but the list is expressed to be inclusive, not exhaustive. The Tribunal has said that it does *'not, expressly or by necessary implication, exclude consideration of any special or unique aspects of the links which the native title holders have to an area of land'*.[60] In *Re Koara People* (1996) 132 FLR 73 at 88, it has also said that in applying the principles or criteria set out in the *Mining Act*, the Act *'should not be read narrowly but should be applied to the actual circumstances of native title holders'*. If the *Mining Act* does not compensate native title holders for cultural loss then s.10 of the RDA and s.45 of the NTA or s.53(1) of the NTA will be engaged.

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[59] *Griffiths* HC at [84].
[60] *Western Australia v Thomas* (1996) 133 FLR 124 at 191.

Is there a s.109 inconsistency between s.123(1) of the Mining Act *and the* NTA*?*

52. Under s.123(1), no claim lies for compensation, *'whether under this Act* ***or otherwise****'*:

(a) in consideration of permitting entry onto any land for mining purposes; or
(b) in respect of the value of any mineral which is or may be in, on or under the surface of any land (s.123(1)(b)); or
(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 cannot be assessed according to common law principles in monetary terms (s.123(1)(d)).

53. The Respondents say that the prohibitions in s.123(1) are *'principles or criteria for determining compensation'* which the Court *'must',* under s.51(3), apply in determining compensation. The Applicant says that the only *principles or criteria* that must be applied are those in s.123(4). In the alternative, as discussed below, s.123(1) is invalidated by s.109 of the *Constitution*, because it is inconsistent with the NTA.

54. The right to negotiate provisions under Subdivision P of Part 2, Division 3 of the NTA, which apply to the grant of a mining tenement, make provision for compensation agreements negotiated under that Act to include conditions that are inconsistent with the statutory prohibitions in s.123(1) of the *Mining Act*. Section 33(1) of the NTA expressly provides that (*good faith*)[61] negotiations between the prospective grantee of a mining tenement and the native title holders / registered claimants, may include the possibility of including a condition that has the effect that native title holders are to be entitled to payments worked out by reference to the amount of profits made, or any income derived or any things produced by, the grantee party as a result of doing anything in relation to the land or waters concerned. The right to include any such condition or conditions in the negotiations for an award or determination of compensation would be prohibited by the terms of s.123(1), if valid.

55. Section 33(1) is in the same terms as s.33 of the original NTA. This had been added as a Greens (WA) amendment, agreed to by the Government in the Senate Debate on the 1993 Bill to make it clear that negotiations between native title holders or claimants and mining companies could include profit-sharing arrangements.[62] If the parties reach agreement on compensation for a *past* or a *future act*, the Court may make a consent determination of compensation in terms of the agreement reached, provided that the

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[61] See NTA s.31(1)(b).
[62] Commonwealth *Parliamentary Debates*, Senate, 16 December 1993, pp.5301-5304; referred to in *Australian Native Title Law* (2nd ed), Perry & Lloyd at [33] 10.

Court is satisfied that a determination in the terms sort by the parties would be both within the power of the Court and it would be appropriate to make the determination: ss.86G(1)(b), 87(1)(c),(1A); *De Rose v South Australia (No.3)* [2013] FCA 988. If the Court makes an order that compensation is payable, the order must set out the method for determining the amount or kind of compensation: s.94(b).

56. Section 51 sets out the principles to be applied by the Court in making a determination of compensation. Where s.51(3) applies, the Court *must*, in making the determination, apply any principles or criteria for determining compensation set out in the *Mining Act.* If the parties have agreed on the payment of compensation which is to be worked out by reference to the amount of profits to be made or income derived or any things produced by, a grantee party as a result of doing anything in relation to the land or waters concerned, pursuant to s.33(1) of the NTA, s.123(1) of the *Mining Act*, if valid, would prevent the Court from making that determination. Section 123(1) is therefore invalid by reason of s.109 of the *Constitution*, because it is inconsistent with the NTA. It is inconsistent because it would *'alter'*, *'impair'* or *'detract'* from, the rights created by the NTA and from the object or purpose sought to be achieved by the NTA, which is to resolve compensation and *future act* applications through negotiation and agreement, including negotiation and agreement on conditions of the kind set out in s.33(1).[63] NTA s.86A(2)(b) also contemplates that there may be agreement as to "*the amount or kind of **any** compensation*" (emphasis added).[64]

Does 'social disruption' in s.123(4)(f) of the Mining Act extend to and include social disharmony and conflict within the Yindjibarndi community? [65]

57. In *Ward* HC at [316], the majority said that it is significant that the compensation payable under the *Mining Act 'includes compensation for the loss of use of the land and for "social disruption" which may be particularly apposite in respect of any compensation for native title holders'*. In *Warrie (No.1)* at [391], Rares J found that there was *'a deep and unfortunate internal division that emerged relatively recently within the Yindjibarndi people over whether, and, if so, on what terms, they should cooperate with FMG developing and operating what is now the Solomon Hub Mine'*.

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[63] *New South Wales v The Commonwealth & Carlton* (1983) 151 CLR 302 at 330, per Mason J; *Jemina Asset Management (No.3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525, per French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ. That this is the object or purpose sought to be achieved by the NTA is expressed in the Preamble.

[64] *Ward on behalf of the Pila Nature Reserve traditional owners v State of Western Australia* [2022] FCA 689 at [51]-[52], Colvin J.

[65] Points of Claim at [14] and [36].

FMG Respondents provided significant financial and other support to a minority breakaway group, Wirlu-Murra Yindjibarndi Aboriginal Corporation, who were prepared to support the development of the Solomon Hub Project on FMG Respondents' terms.[66] That deep social division has given rise to significant social disruption which Dr Palmer says is an example of cultural loss.[67]

58. The evidence of the Yindjibarndi lay witnesses and that of Dr Palmer will establish that the Yindjibarndi People have suffered significant *'social disruption'*, as a result of the Solomon Hub Mine and the actions of the FMG Respondents. A small close-knit traditional community has been shattered by these events.

Entitlement to compensation under s.10(1) of the *Racial Discrimination Act* (1975) (Cth) [Issue 11] [68]

59. Section 10(1) of the RDA will confer a right of compensation on native title holders for a *future act*, where the provision of such a right is necessary to eliminate a disparity which would otherwise exist between the enjoyment of native title rights and interests and the enjoyment of other rights and interests in land. Section 45 of the NTA provides that where a right of compensation exists under the RDA, the compensation is to be determined in accordance with s.50 of the NTA as if the entitlement arose under the NTA. The judgment in *Ward* HC at [12] states that s.45:

> takes what otherwise would be a right to compensation under State or Territory law, being a right brought into existence by the operation of the RDA upon that law, and transmutes it into a right to compensation under Div 5 of Part 2 (ss.48-54) of the NTA.

60. In the majority judgment in *Griffiths* HC, their Honours said, at [75], that the point made in both *Western Australia v Commonwealth* (1995) 183 CLR 373 (***Native Title Act case***) and *Ward* HC in relation to the RDA was that, although native title rights and interests have different characteristics from common law land title rights and interests, native title holders are not to be deprived of their native title rights and interests or to have those interests impaired to a point short of extinguishment, without payment of just compensation.[69] What the RDA requires in its application to native title is *'parity of treatment'* and which also has regard to *'the unique character of native title rights*

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66 *Warrie (No.1)* at [391]-[396]; *TJ (on behalf of the Yindjibarndi People) v State of Western Australia (No.2)* [2015] FCA 1358.
67 Dr Palmer's report dated August 2022, Chapter 3.
68 Points of Claim at [21]-[23].
69 *Griffiths* HC at [74].

and interests'.[70]

61. For the reasons given earlier herein at [39]-[45], it will be submitted that under the *Mining Act* there is a significant disparity in treatment between the holders of ordinary title and native title, because it denies to native title holders, the rights which are given to the *'owner'* and to the *'occupier'* of *'private land'*. It will be further submitted that parity of treatment requires that native title holders whose native title rights and interests have existed since a time before sovereignty, are treated in the same way as the *'owner'* of *'private land'* that was alienated before 1 January 1899.[71]

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

62. Section 51A of the NTA provides that the total compensation payable for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters. It does not cap the compensation payable as the market value. The market value is only one component of the freehold value.

63. Just terms compensation is based on the value to the owner. What this recognises is that land may have a value to a current owner over and above the market value of the land. This *special value* is what a willing but not anxious buyer, pays for the land rather than fail to attain it.[72] This special value to the owner is confined to economic value only. Dixon CJ observed in *Turner v Minister for Public Instruction*:[73]

> Indeed, *Spencer's case* itself does not provide the ultimate test of compensation. An observation made in *Minister for Public Works v Thistlethwayte* [1954] AC 474, 491, shows that it does not. *'It must not be forgotten'* said Lord Tucker for the Privy Council, *'that it is the value of the land to the owner that has to be ascertained, and that the willing seller and purchaser is merely a useful and conventional method of arriving at a basic figure to which must be added, in appropriate cases, further sums for disturbance, severance, special value to the owner and the like'*.

64. There are two further important qualifications on the operation of s.51A. *First*, it only has effect subject to s.53, which deals with the requirement to provide *'just terms'* compensation.[74] *Second*, it only applies to economic loss.[75]

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70 *Griffiths* HC at [76].
71 *Mining Act*, s.38; Points of Claim at [21(aa)].
72 *Pastoral Finance Corporation v The Minister* [1914] AC 1083, 1088 (Lord Moulton).
73 (1956) 95 CLR 245 at 267.
74 NTA s.51A(2).
75 *Griffiths* HC at [54].

Whether grant of lease resulted in acquisition of property; entitlement under s.53(1) of the NTA [Issue 9] [76]

65. Section 53 will operate to remedy an unjust result that may otherwise be occasioned if s.51A operates to significantly constrain an award of compensation or if s.51(3) requires the application of laws that fail to provide *'just terms'* compensation.

66. Section 53 provides that where the doing of any future act, or the application of any provision of the NTA, would result in a paragraph 51(xxxi) acquisition of property of a person other than on just terms, the person is entitled to such compensation, or compensation in addition to any otherwise provided, as is necessary to ensure that the acquisition is made on paragraph 51(xxxi) just terms. If the compensation is in respect of a *future act* attributable to a State or Territory, the State or Territory will be liable to pay that compensation and in any other case, the Commonwealth will be liable. The Applicant will submit that, for the reasons given below, the grant of a mining tenement over native title land and in particular, a mining lease which confers on the grantee exclusive possession of the land for mining purposes[77] and suppresses native title[78] is a paragraph 51(xxxi) acquisition of property.

67. In *Mabo v Queensland (No.2)* (1992) 175 CLR 1 at 111, Deane and Gaudron JJ had no doubt that native title rights and interests were property the acquisition of which would attract the protection of s.51(xxxi):

> Our conclusion that rights under common law native title are true legal rights which are recognised and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s.51(xxxi).[79]

68. The Courts have given a liberal construction to the term, *'acquisition'*, eschewing any requirement that there be a precise correspondence between what is lost and what is gained:

> … the word *'acquisition'* is not to be pedantically or legalistically restricted to a physical taking of title or possession. Once it is appreciated that *'property'* in s.51(xxxi) extends to all types of *'innominate and anomalous interests'* it is apparent that the meaning of the phrase *'acquisition of property'* is not to be confined by reference to traditional conveyancing principles and procedures…

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[76] Points of Claim at [24]-[26].
[77] *Mining Act* s.85; *Ward* HC at [308].
[78] NTA ss.24MD(3)(a), read in conjunction with the definition of the *non-extinguishment principle* in s.238.
[79] A passage quoted with approval by the Full Court in *Yunupingu* at [422], per Mortimer CJ, Moshinsky and Banks-Smith JJ.

> The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property. For there to be an *'acquisition of property'*, there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property.[80]

69. There is no requirement that the native title rights and interests be extinguished for them to have been acquired for the purposes of s.51(xxxi). Where an existing valuable right is modified or diminished, producing a corresponding benefit or advantage to a government or other party, it is an *'acquisition of property'* for the purposes of s.51(xxxi).[81] The following passage from the judgment of French CJ in *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal* HC**) at [87] underscores the very broad understanding of what may constitute an *'acquisition of property'* for the purposes of s.51(xxxi):

> Section 51(xxxi) has been given a liberal construction which informs both the content of the power it confers and the limitation on that power. In *The Commonwealth v New South Wales*,[82] Knox CJ and Starke J said that *'property'* was *'the most comprehensive term that can be used'* and that no limitation was placed by the Constitution on the property in respect of which the Parliament could legislate.[83] In *Minister of State for the Army v Dalziel*[84] the taking of possession and occupation of land for a period was held to be an acquisition of property for the purposes of par (xxxi) notwithstanding that no legal or equitable estate was acquired. Latham CJ in that case described s.51(xxxi) as *'plainly intended for the protection of the subject'* and said that it should be liberally interpreted.[85] Starke J described the concept of property in par (xxxi) as extending to *'every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action'*.[86] To acquire any such right would be rightly described as an *'acquisition of property'*.[87]

70. Recently in *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75 (***Yunupingu***), the Full Court said that it is clear that native title rights and interests are proprietary rights and interests in land.[88] Their Honours accepted the submission made to them that laws that *diminish* native title confer an identifiable proprietary benefit on others and that is an acquisition of property within s.51(xxxi).[89] They said that the proposition is also made good by *Griffiths* HC at

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80 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 184-5, per Deane and Gaudron JJ.
81 *Wurridjal* HC at [297], per Kirby J; see too at [103], per French CJ.
82 (1923) 33 CLR 1; [1923] HCA 34.
83 (1923) 33 CLR 1 at 20-21.
84 (1944) 68 CLR 261; [1944] HCA 4.
85 (1944) 68 CLR 261 at 276.
86 (1944) 68 CLR 261 at 290.
87 (1944) 68 CLR 261 at 290.
88 *Yunupingu* at [411], [444], per Mortimer CJ, Moshinsky and Banks-Smith JJ.
89 *Yunupingu* at [461], per Mortimer CJ, Moshinsky and Banks-Smith JJ.

[75].[90] The premise in *Griffiths* HC was that native title was *'acquired'*. That is, the Northern Territory received a benefit because the claimants' native title was *'cleared'* as a burden on the Territory's radical title to the land, which in turn was taken into account by placing the Territory in the position of the hypothetical purchaser for the purposes of the test in the *Spencer case*.[91]

71. The FMG Respondents have been granted a variety of mining tenements which confer a benefit on them and which diminish the Yindjibarndi People's native title rights and interests. The circumstances of the lease in *Wurridjal* HC were analogously similar to the circumstances of the mining leases here: the lease in *Wurridjal* HC would *'give the government the unconditional access to land and assets required to facilitate early repair of buildings and infrastructure'*, and native title in respect of the leased land would be *'suspended but not extinguished'*.[92]

72. Neither the State nor the FMG Respondents have paid any compensation, let alone *just terms* compensation, to the Yindjibarndi People for the *acquisition* of their native title rights and interests. The Points of Claim at [46] sets out what would be *just terms* compensation for the acquisition of those native title rights and interests.

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

73. Section 49 ensures that compensation is payable only once for acts that *'are essentially the same'*:

> … where a series of acts has an effect on native title, compensation is payable only once for that series of related acts. Compensation is not payable in relation to each act.[93]

In short, compensation must be assessed on *'a project wide basis'*.[94]

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90 *Yunupingu* at [462], per Mortimer CJ, Moshinsky and Banks-Smith JJ.
91 *Yunupingu* at [463], per Mortimer CJ, Moshinsky and Banks-Smith JJ.
92 *Wurridjal* HC at [6], per French CJ; *Queensland v Congoo* (2015) 256 CLR 239, per French CJ and Keane J at [20] and see too at [6].
93 *Native Title Bill 1993* (HR), Explanatory Memorandum - Part B at p.28 in relation to Clause 47 (which became s.49 of the NTA).
94 *Western Australia v Thomas* [1999] NNTTA 99 at 45 (Sumner); see too NTA s.44H.

(D) COMPENSATION PAYABLE BY STATE OR FMG RESPONDENTS [Issue 10][95]

Are the WMML covered by Subdivision H or Subdivision M of Part 2 Division 3 of the NTA?

74. FMG Response at [13(e)] says that the grants of the 13 WMML are valid *future acts* under ss.24AA(2), 24HA(2) and 24HA(3). If the grants of the WMML were *future acts* covered by s.24HA, they will not be covered by s.24MD: see FMG Response at [16(a)-(c)] which relies upon ss.24AA(4)(e), (j) and 24AB(2) of the NTA.

75. FMG Response at [13(e)], says that the Applicant retained the right to make an application for a determination of compensation under ss.50(2) and 61 of the NTA in respect of the grants of the WMMLs. It later says that, pursuant to s.24HA(5), the Yindjibarndi People have an entitlement to compensation in accordance with Part 2, Division 5 of the NTA: see FMG Response at [16(f)(i)]. That entitlement is an entitlement against the State: see s.24HA(6).

76. Part C1.2 of the State Response lists the purposes for which each of the WMML was granted. None of them were granted solely for one or more of the purposes set out in s.24HA(2)(b). In those circumstances it is submitted that the grants of the WMML were not valid *future acts* covered by s.24HA. If s.24HA(3) does not apply to the grants of the WMMLs, the grants will be *future acts* covered by s.24MD. The grants pass the *freehold test* in s.24MB(1)(b)(i), because they could have been made if the native title holders instead held *'ordinary title'* to the land.[96] If that is the correct view and if s.125A of the *Mining Act* is valid, the FMG Respondents are liable to pay the compensation for the *affect* of those grants. The Applicant repeats and adopts the submissions by Yamatji Marlpa Aboriginal Corporation on this issue.

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

77. Section 24MD(4) of the NTA provides that, if a *future act* to which s.24MD(3) applies is attributable to a State or Territory and if a law of that State or Territory provides that if a person other than the Crown is liable to pay the compensation, then that person will be liable to pay the compensation, or if not, the State or Territory will be liable. It was presumably in response to this provision that the *Mining Act* was amended in 1998 by the insertion of s.125A into that Act by the *Acts Amendment (Land Administration,*

[95] Points of Claim at [27]-[32].
[96] *Mining Act* s.29(1), read in conjunction with the definition of a *'mining tenement'* in s.8.

Mining and Petroleum) Act 1998 (WA).

78. Section 125A contains the only references to *'native title holders'* or to the *'grant of a mining tenement'* in the *Mining Act*. It will be submitted that it would have been unnecessary to insert s.125A into the *Mining Act* if s.123(2) of that Act already provided native title holders with an entitlement to compensation as *'owner(s)'* or *'occupier(s)'*, enforceable against the *'person'* carrying out the mining. Section 125A is premised on the assumption that native title holders do not have an entitlement to compensation under s.123(2), rather, their entitlement to compensation arises under the NTA for or in respect of, the *'grant of a mining tenement'*. The purpose of s.125A is to ensure that the entitlement of native title holders to compensation under the NTA for the grant of a mining tenement that would otherwise be payable by the State, will be payable by the grantee of the tenement: NTA s.24MD(4).

79. That this is the purpose of s.125A is confirmed in the Minister's second reading speech of the Bill which introduced s.125A into the *Mining Act.* In this respect, under s.19(2)(f) of the *Interpretation Act 1984* (WA), regard may be had to the second reading speech to confirm or determine the meaning of the section:

> The result of this is to put this compensation regime in the same position as if it were mining on any other form of land: for example, farming land – the compensation is payable by the mining company to the farmer … If compensation is payable to native title holders, it is payable by the mining company … Who has the obligation to pay? The Native Title Act says that the State has the obligation to pay. This legislation seeks to make the mining company responsible for the payment. However, if the mining company no longer exists, the State remains liable to pay under the Native Title Act.

80. During the second reading speech the Minister was asked whether the government would not, in principle, oppose an amendment to make it absolutely clear that the State was finally liable for compensation. The Minister responded by saying:

> I cannot see the point in rewording what is already in the Native Title Act … Why restate what is already the law and run the risk of winding up with some sort of incompatibility between the two?

81. If, as submitted above, s.123 of the *Mining Act* does not provide compensation to native title holders for the grant of mining tenements but rather, through s.125A, provides that the miner and not the State will be liable to pay any compensation that may become payable under the NTA, then the condition in s.24MD(3)(b)(ii) of the NTA[97] is satisfied. In those circumstances, the Yindjibarndi People are entitled to compensation

[97] Section 24MD(3)(b)(ii) is discussed earlier in this Advice at [28]-[32].

in accordance with Division 5 of Part 2 of the NTA and FMG will be liable to pay that compensation. There is an issue as to whether the State or the FMG Respondents will be liable for any compensation payable under ss.49 or 53(1).

Is s.125A inconsistent with the NTA and therefore invalid because of s.109 of the Constitution?

82. The Applicant says that there is no inconsistency between s.125A of the *Mining Act* and the NTA. If it is held that the grants of the WMML were *future acts* covered by s.24HA and not by s.24MD, s.125A can be read down so that it is valid for the grants of the FMG tenements other than the grants of the WMML. If it is held that the renewals or extensions of any FMG tenements were *future acts* covered by s.24IA, then s.125A should be similarly read down.[98]

(E) THE CLAIMED LOSS, DIMINUTION, IMPAIRMENT OR OTHER EFFECT ON THE NATIVE TITLE RIGHTS AND INTERESTS [99]

The effect of the grants of the FMG tenements on the native title rights and interests

83. The nature and extent of the diminution, impairment or other effect of the grants of the FMG tenements on the Yindjibarndi People's native title rights and interests are as described in [33]-[38] of the Points of Claim.

84. The lay evidence will be given in Roebourne from 9-11 August and at Bangkangarra from 14-19, 21-23 August 2023. The Court has heard preservation evidence from Mrs Tootsie Daniel and from a senior elder who has since passed away. A further seventeen Yindjibarndi, one Ngarluma and four non-Indigenous witnesses will give evidence for the Applicant. The Applicant will take the Court to the Solomon Hub Project mine site on 14 August 2023 and will adduce evidence about the destruction of country, including the destruction of important sites. Restricted men's evidence of connection to the compensation application area including songs, dances and Dreaming stories will be given at Bangkangarra on 17 August 2023.

85. The Yindjibarndi witnesses will be Charlie (Fabian) Cheedy, Lyn Cheedy, Middleton Cheedy, Lorraine Coppin, Judith Coppin, Estelle Guinness, Isaac Guinness, Kevin Guinness, Jean Norman, Margaret Ranger, Isiah Walker, Kaye Warrie, Stanley Warrie, Sonia Wilson, Michael Woodley, and Wimiya Woodley. The non-Yindjibarndi witnesses will be Ricky Smith, Christine Halls, Janet Kapetas, Angus Mack, Joan

[98] Points of Claim at [7]-[31A].
[99] Points of Claim at [33]-[38].

Maddison and Michael Nikakis.

86. The Yindjibarndi witnesses will give evidence about spiritual loss, environmental damage, social disruption, the loss of water and the destruction of sites. Their evidence will demonstrate that the grants of the FMG tenements and subsequent mining activities, have caused significant damage to the Yindjibarndi normative system, including kinship (*Galharra*), reciprocity (*Nyinyard*) and ritual practice (*Birdarra*). The perceived theft and destruction of their country informs feelings of deep cultural loss that relate to identity, autonomy and personal status.[100]

87. In addition to the expert evidence of Mr Meaton and of the valuer on economic loss, Dr Kingsley Palmer, an eminent anthropologist who has extensive experience working with the Yindjibarndi and other First Nation's groups in the Pilbara, will give expert evidence about cultural loss. Dr Peter Veth, will give expert archaeological evidence about the destruction of important ancient occupation and cultural sites. Dr Jeffrey Nelson, a psychologist, will give evidence about the psychological harm suffered by the Yindjibarndi as a result of the deep social division caused by the development of FMG's Solomon Project. Evidence will be led from Richard Nixon, a hydrogeologist, as to the effect mining activities have had upon the subterranean waters.

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

88. The Applicant says that in the *'Exclusive Area'* of the *Warrie (No.2)* Determination, the Yindjibarndi People have the right to possession, occupation, use and enjoyment of that area to the exclusion of all others.[101] The State and FMG Respondents were both parties to the *Warrie (No.2)* proceeding. They say that the right to exclusive possession only dates from the date of the *Warrie (No.2)* Determination.[102] Their argument is that 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.[103]

89. The Applicant says, *first*, that in *Warrie (No.2)* at [3]-[9] (pleaded in the Points of Claim

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[100] Dr Palmer's Report at [202]-[221].
[101] Points of Claim at [5].
[102] FMG Response at [5], [6]; State Response at [12].
[103] FMG Response at [5(f)]; see too State Response at [12(b)] which says, *'The Exclusive Native Title was determined to exist in relation to the Exclusive Area on and from the date of the* [Warrie (No.2)] *Determination'*.

at [6]), Rares J rejected the FMG Respondents' argument that the Determination should include a note to identify what would have been the native title rights and interests in the Exclusive Area had he not found that ss.47A and 47B applied to that area. His Honour said, at [5], that the argument is untenable. It ignores the express words of ss.47A and 47B that requires that any extinguishment *'must be disregarded'* for *'all purposes under this Act'*. Accordingly, there are no situations in which anyone can have had any rights or interests in land or waters to which ss.47A and 47B might apply prior to a determination of native title that are inconsistent with the rights and interests as recorded in the determination itself: *Warrie (No.2)* at [5].

90. Rares J said that he found that the Yindjibarndi had established that one or more members of the claim group had occupied the relevant land and waters and that those prior interests did not operate to extinguish native title over land and waters that each affected: *Warrie (No.2)* at [6]. Accordingly, by force of ss.11(1), 47A(2), and 47B(2), *no* extinguishment of native title rights and interests ever occurred in respect of those areas of land and waters: *Warrie (No.2)* at [6]. That finding was correct and was not appealed. There is now *res judicata* or *issue estoppel* on that issue and it is an abuse of process to raise the issue in this proceeding: *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Tomlinson v Ramsay Food Proceedings Pty Ltd* (2015) 256 CLR 507[26]; *UBS AG v Tyne* (2018) 265 CLR 77 at [2] and [72].

91. *Second*, there can be no question that post the determination, the Yindjibarndi People possess a right to exclusive possession in the Exclusive Area and since that time, their native title right to exclusive possession has suffered and will continue to suffer, *'loss, diminution, impairment or other effect'*, from the grant of the FMG tenements.

Do the native title rights and interests have a *'market value'*?

92. Section 33(1) of the NTA provides that native title holders may negotiate with miners for compensation based upon the amount of profits made, the income derived or any things produced. Since the commencement of the NTA, many such compensation agreements have been entered into. It will be submitted that if the FMG Respondents are liable to pay compensation, the determination of that compensation should be based on what miners commonly agree to pay to native title claimants and native title holders, to obtain their assent to mining and to the grant of mining tenements. The large number of mining agreements that have been entered into establish that there is a market value which miners are prepared to pay to obtain the assent of native title claimants / holders to the infringement of their native title rights and interests.

93. The native title rights and interests recognised in the *Warrie (No.2)* Determination therefore have a unique economic value to the Yindjibarndi People. The land has a *'special value'* which they could have expected to be able to exploit by entering into a mining agreement with a miner or government party acting fairly and justly.[104] That valuable opportunity has now been lost.[105] The economic value of the Yindjibarndi People's native title rights and interests is what they could have expected to receive from a fair and reasonable miner in return for their assent to the grant of the FMG tenements.[106]

94. In *Griffiths* HC at [86], the majority recognised that there may be exceptions to the binary approach of dividing the value of native title rights and interests into economic and non-economic components. They said that, *ordinarily* the only way of achieving the degree of precision envisaged by s.51A of the NTA which stipulates that the total compensation payable must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate, is by the determination of economic value according to established precepts for the valuation of interest in land. Their Honours then said:

> Given that there is no range of decided comparable cases such as those which may be called in aid, for example, in sentencing or when fixing damages for personal injuries, an holistic approach would mean that the determination of the economic value of native title rights and interests would be largely dependent on idiosyncratic notions of what is fair and just.

95. The facts of this case are very different from the facts in *Griffiths* HC. The Applicant will be calling evidence from a minerals economist, Mr Murray Meaton. Mr Meaton will say that there is a range of comparable compensation agreements entered into by mining companies and native title holders / claimants which may be called in aid of determining the economic value of the Yindjibarndi People's native title rights and interests. Mr Meaton has had extensive experience since 2004 in the negotiation of native title mining and access agreements, including mining and access agreements in the Pilbara. He will say that he is aware from his experience in the industry that mining agreements mostly include a mix of benefits with fixed cash payments, royalties on the value of minerals sold, employment and training, and business development

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[104] *Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaide Petroleum NL* (1992-1994) 179 CLR 332 at 348, per Mason CJ, Dawson, Toohey and Gaudron JJ.
[105] (*ibid*).
[106] *Griffiths* HC at [84]; Points of Claim at [46(a)].

assistance.[107] In Mr Meaton's expert opinion, it would be reasonable to expect that a negotiated mining agreement in respect of the compensation application area would have included a mix of all those benefits.[108] Mr Meaton's report is confined to a consideration of the royalty payments which the Yindjibarndi People could have expected to receive in accordance with what is the common or standard practice for land or mining access agreements with Aboriginal groups in the Pilbara.

96. In Mr Meaton's opinion, in the event that the FMG Respondents had reached an agreement with the Yindjibarndi People for the payment of royalties in accordance with common or standard practice for such agreements in the Pilbara, the Yindjibarndi People could have expected to receive royalties of $339 million for iron ore produced to December 2022.[109] Mr Meaton has calculated simple interest of $56 million on that figure.[110] Compensation for the loss of royalties for future production is estimated by Mr Meaton to be $107 million.[111] The total value therefore of economic loss based solely on the loss of royalties that the Yindjibarndi People could have expected to receive is $502 million. They have, of course, received nothing. To this amount there must be added compensation for significant cultural loss. The Applicant intends to obtain a report from a valuer which it is anticipated will be supportive of Mr Meaton's approach to the valuation of the Yindjibarndi People's economic loss.

97. On the other hand, if the State is liable to pay the compensation, the economic value of the Yindjibarndi People's native title rights and interests, is what a government party in the position of the State, acting fairly and justly, would have been prepared to pay to obtain their assent to the grants of the FMG tenements.[112] Evidence will be produced by the State of the amount of royalties and rents paid to it by the FMG Respondents in respect of the 9 mining leases within the compensation application area.[113] That evidence will enable the Court to apply the formula in s.38 of the *Mining Act* to calculate economic loss. Alternatively, the amount of royalties and rents received can inform the Court of the amount that the State would have been prepared to pay for the consensual impairment of the native title rights and interests.[114]

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[107] Expert Report of Murray Meaton at [27].
[108] Expert Report of Murray Meaton at [28].
[109] Expert Report of Murray Meaton at [4].
[110] Expert Report of Murray Meaton at (*ibid*).
[111] Expert Report of Murray Meaton at [5].
[112] *Griffiths* HC at [84]; Points of Claim at [46(a)].
[113] Item 23 in the Timetable attached to the Orders made on 27 June 2023.
[114] *Griffiths* HC at [104].

98. It is submitted that the *sui generis* aspects of native title means that the principles ordinarily applied to compensate for the loss of non-native title rights and interests are inapt in the native title context. However, as Callinan J observed in *Boland v Yates Corporation Pty Ltd* (1999) 167 ALR 375 at [280]:

> There is no legal principle that purports to close for all time the categories of methods of valuation which might be acceptable in a particular case … Valuation practice is, however, like legal practice, an evolving discipline.

Compensation for economic loss [115]

99. In *Griffiths* HC, the date on which the economic value of the native title was to be determined was not in dispute.[116] Accordingly, the matter was conducted on the basis that the economic value of the native title that had been extinguished ought to be determined according to the rights and interests actually held by the claim group as at the date that extinguishment took place.[117] The High Court there dealt with the *extinguishment* of native title rights and interests whereas this Court is dealing with the continuing *suppression* of native title and must, under s.51(3) of the NTA *'apply any principles or criteria for determining compensation (whether or not on just terms) set out in the* [Mining Act]*'*. Those criteria or principles provide compensation for the economic loss suffered as a result of mining and related activities conducted after the grant of the relevant mining tenement. That is, compensation is not directed to, let alone limited to, economic loss suffered on the date when the grant was made.

100. That does not, of course, detract from the fact that the Yindjibarndi People suffered significant economic loss as and from the date of the grant of each of the mining leases to the FMG Respondents. As and from that date or dates, Yindjibarndi People lost their right to negotiate and lost the opportunity to enter into an agreement with another miner or miners on what are the common or standard terms for mining compensation agreements in Western Australia and, more particularly, in the Pilbara.[118] How the compensation for economic loss is to be assessed has already been largely addressed in the preceding section dealing with the *'market value'* of the native title rights and interests. Ancient occupation sites and Dreaming sites also have an economic value, not just to the Yindjibarndi People but to the nation.[119] The destruction of or damage to

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[115] Points of Claim at [46(a)-(aaaa)].
[116] *Griffiths* HC at [56]-[57].
[117] *Griffiths* HC at (ibid).
[118] *Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaide Petroleum NL* (1992-1994) 179 CLR 332 at 348, per Mason CJ, Dawson, Toohey and Gaudron JJ.
[119] *Compensation for Economic Loss*, Jagot J (2022) 96 ALJ 832 at 834 and 843.

those sites gives rise to an entitlement to compensation. The Applicant does not have full information about the destruction of or damage to sites because based on the documents which the Applicant does have, the FMG Respondents do not appear to have kept records of all of the sites that have destroyed or damaged. Dr Veth will providee an archeological report that will describe the nature and the extent of the destruction and damage that has occurred.

Compensation for non-economic or cultural loss [120]

101. The majority in *Griffiths* HC commenced their consideration of the compensation payable for non-economic or cultural loss by quoting with approval the well-known observations made by the plurality in *Ward* HC at [14] where the Court referred to the religious or spiritual connection which is paramount in the connection which Aboriginal peoples have with their land.[121] The majority said that compensation for the non-economic effect of compensable acts is compensation for that aspect of the value of land to native title holders which is inherent in the thing that has been lost, diminished, impaired or otherwise affected by the compensable acts.[122] Their Honours said that it is not just about hurt feelings, although the strength of feeling may have evidentiary value in determining the extent of it.[123] They said that it is better described as *'cultural loss'* and agreed with the trial judge that his task was to determine the essentially spiritual relationship which the claimants have with their country and to translate the spiritual hurt from the compensable acts into compensation.[124]

102. The majority said that in assessing non-economic loss it is not appropriate to adopt a lot-by-lot approach because, under the claimants' traditional laws and customs, ancestral spirits, the people, the country and everything that exists on it are to be viewed as one indissoluble whole; the consequences were necessarily incremental and cumulative; it is not possible to establish the comparative significance of one act over another; and the loss was significant and keenly felt, and the effects of the acts had ongoing present day repercussions.[125] The majority set out, with apparent approval, the particular considerations identified by the trial judge in his assessment of the appropriate compensation for non-economic loss including that: the Aboriginal spiritual

[120] Points of Claim at [46(aaaa)-(ccc)].
[121] *Griffiths* HC at [153].
[122] *Griffiths* HC at [154].
[123] *Griffiths* HC at (ibid).
[124] *Griffiths* HC at [155].
[125] *Griffiths* HC at [198].

relationship to land encompasses all of the country of a particular group, and not just *'sacred sites'*; the destruction of a particular sacred site may have implications beyond its physical footprint because of the spiritual potency of the site or because of the level of responsibility or accountability for the site which has not been honoured; the relationship of the claimants to their country is a spiritual and metaphysical one which is not confined and not capable of assessment on an individual small allotment basis.[126]

103. The majority noted, again with apparent approval, the trial judge's explanation that an impairment of an Aboriginal person's spiritual connection to land is not to be understood by reference to what occurs on a particular lot or lots.[127] Each act affected native title rights and interests with respect to a particular piece of land but each act was also to be understood by reference to the *whole* of the area over which the relevant rights and interests had been claimed.[128] The majority agreed with that approach stating that although each of the compensable acts affected native title rights and interests with respect to a particular piece of land, each act was also to be understood by reference to the whole of the area over which the rights and interests had been claimed.[129] In this case, that area would extend well beyond the land and waters covered by the FMG tenements.

104. The majority in *Griffiths* HC explained how the effects of the compensable acts on the claimant's connection to the land were to be translated into a monetary figure:

> What, in the end, is required, is a monetary figure arrived at as the result of a social judgment, made by the trial judge and monitored by appellate courts of what, in the Australian community, at this time, is an appropriate award for what has been done; *what is appropriate, fair or just.*[130] (emphasis added)

105. What is *'appropriate, fair or just'* should have regard to the commercial returns received by the State and the FMG Respondents from the iron ore extracted from the application area, as well as to what other miners would be expected to have paid. It also needs to take account of the fact that the core of traditional laws and customs is as much about responsibilities as rights. The Yindjibarndi hold their country or *ngurra* as a sacred and inviolable trust. The lay and expert evidence will demonstrate that the well-being of the Yindjibarndi People and their divinely ordained spiritual link or connection to country have been profoundly affected by their inability to discharge their

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[126] *Griffiths* HC at [199].
[127] *Griffiths* HC at [204].
[128] *Griffiths* HC (ibid).
[129] *Griffiths* HC at [219].
[130] *Griffiths* HC at [237].

responsibility to protect the country from significant physical and spiritual harm.

106. Writing extra-judicially, Jagot J said that even brief exposure to evidence about traditional laws and customs of Australia's First Nations Peoples shows that it is a deeply held moral, spiritual and existential responsibility of the bearers of the traditional culture to protect the land from harm, to nurture the land, to protect and nurture the culture, and to transmit the knowledge to enable this protection and nurturing of land and culture to continue from time ever memorial.[131] Her Honour said that compensation for non-economic loss suffered by native title holders should be understood as compensation for whatever (further) pain, suffering, hurt, humiliation, diminution, degradation and even destruction of the people, their inherited way of life and their way of being in a relationship to their country which may be caused by an act which partially or totally extinguishes their rights and interests.[132]

Interest

107. It was common ground in *Griffiths* HC that interest should be awarded on the economic component of the compensation to reflect the time between when the entitlement to compensation arose, that is, when the native title rights were extinguished, and the date of the judgment.[133] The interest awarded was calculated on a simple basis rather than on a compound basis, although it was recognised that, in an appropriate case, compound interest may be awarded. The High Court upheld the trial judge's finding that on the facts of that case, the claim group did not have an entitlement to compound interest.[134] In this respect, the trial judge had not been persuaded that the claim group would have invested the moneys without expenditure, accumulating interest year by year or that they would have used the money to undertake any sort of commercial activity that would have been profitable to the same, or greater, degree.[135] Here there will be evidence that the Yindjibarndi People would have invested the monies received.

Dated: 24 July 2023

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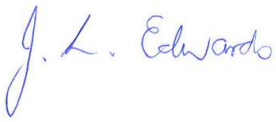
131 *Compensation for Economic Loss*, Jagot J (2022) 96 ALJ 832 at 833.
132 (*ibid*).
133 *Griffiths* HC at [8].
134 *Griffiths* HC at [9].
135 *Griffiths* HC at [10].



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