



Federal Court of Australia
District Registry: Victoria
Division: General

No VID 198 of 2026

Banjima Native Title Aboriginal Corporation RNTBC

Applicant

State of Western Australia

Respondent

**APPLICANT'S SUBMISSIONS FOR
CASE MANAGEMENT HEARING ON 15 OCTOBER 2026**

Filed on behalf of	The Applicant
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A WHAT THE APPLICANT SEEKS AT THIS HEARING

1 The Applicant's draft order was filed on 12 October 2026 (**Applicant's Order**). It contains the necessary provision through to a trial in March 2028 to outline the procedural architecture the Applicant considers appropriate for the efficient resolution of the dispute.

2 The Applicant proposes only that orders [1]–[12] be made at the 15 October 2026 hearing.

3 The Applicant's Order was provided to the Respondent (**State**) on Monday 12 October 2026. It combines, with amendments in light of the Respondent's position, including proposals for further early discovery, two proposed orders sent to the State on 6 October 2026.

4 The Applicant relies on the affidavit of Peter Gordon affirmed 13 October 2026 (**Gordon Affidavit**). The Applicant seeks orders to protect the confidentiality of certain material annexed to the Gordon Affidavit, which it will seek to agree with the State and provide to the Court ahead of the hearing.

5 In summary, the Applicant seeks the following orders be made at the 15 October 2026 hearing:

5.1 **Machinery:** Applicant's Order [1]–[4] provides for an Amended Statement of Claim (**ASOC**) and Amended Originating Application, short retrospective extensions of time and that the proceeding no longer continue under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). This is not opposed but not expressly agreed by the State: see Position Paper filed 12 October 2026 (**PP**) Items 1–3.

5.2 **Amended Defence/Reply/78B notices:** Applicant's Order [5]–[7] proposes that the State file any Amended Defence by 1 December 2026, with a Reply and any s 78B notices to follow in 7 days. The State, having initially refused in correspondence from its solicitors on 8 October to agree any date for an Amended Defence, then suggested it should have until 24 December 2026. On that approach, it will have had 255 days this year to plead to the allegations against it.

5.3 **Additional early discovery:** The Applicant proposes early discovery be given by 13 November 2026, to ensure the proceeding progresses. The State opposes any discovery being ordered. The categories proposed by the Applicant are:

- (a) **Remediation Documents:** technical documents on remediation known to be in the parties' possession including from the State's defence, which will (amongst other matters) assist to enable the parties to agree or narrow the differences

between them about how remediation of the Affected Areas can be achieved (Applicant's Order [8]–[9]);

- (b) ***Pleading Documents***: documents referred to by the State in the Defence or the existence of which is disclosed or implied by the Defence (Applicant's Order [10]); and

5.4 **Further directions in mid-December 2026**: Applicant's Order [11]–[12] proposes a hearing in the week of 14 December 2026 to enable a timetable to trial to be set and any further discovery to be determined. The State proposes that no dates be set for a further hearing, or anything else beyond close of pleadings.

6 The Applicant submits that the Court should prefer the Applicant's Order to the State's proposals insofar as there is dispute. The Applicant's proposal meaningfully progresses the claim; the State's approach causes delay and sees no real progress. The Applicant's proposal furthers the objects in FCA Act s 37M(1) of just resolution according to law "as quickly, inexpensively and efficiently as possible". The State's approach does not.

7 The Applicant's Order further sets out provisions leading to a trial of all issues in March 2028 that the Applicant considers may be appropriate, including the following steps:

7.1 **Remediation Conference** (Applicant's Order [15]–[24]): A conference of the existing remediation experts (GHD, which the State has involved in investigation of potential remediation for the last 20 years, and ACCIONA and CSI, reports of which the Applicant has provided) by 11 March 2027, with a joint memorandum to follow by 9 April 2027, to identify the points of agreement and disagreement as to how the Affected Area can be remediated (Applicant's Order [11]–[18]) — this suite of orders recognises that the State has had regular expert assistance from GHD since 2006 in relation to remediation and, further, that there is extensive common ground between GHD, ACCIONA and CSI;

7.2 **Discovery** (Applicant's Order [25]–[27] and Sch B): Completion of discovery by March 2028, with categories to be determined in December 2026;

7.3 **Further statement of relief and response** (Applicant's Order [28]–[29]): Applicant to state in further detail what relief it seeks, and the State to respond, in May and June 2027 – hopefully assisted by the Remediation Conference process described in paragraph 7.1 above;

7.4 **Mediation** (Applicant's Order [37]–[38]): To take place by early July 2027;

7.5 **Other mechanics:** Provisions in the Applicant's Order in familiar form for lay evidence ([30]–[33]), an agreed statement of facts ([34]–[36]), expert evidence ([39]–[44]), a further directions hearing in May 2027 to fix expert disciplines and questions ([45]), a list of issues ([46]–[47]), submissions for trial ([48]–[50]) and a pre-trial directions hearing ([51]).

B WHERE THE PROCEEDING STANDS

8 The Applicant is the registered native title body corporate for the Banjima People and holds their native title rights on trust. Its claim, principally in nuisance, concerns the blue asbestos (crocidolite) remaining from the former Wittenoom asbestos mines and its continuing spread across the Determination Area. The principal relief sought is a mandatory injunction requiring appropriate remediation. Damages are also claimed, including aggravated and exemplary damages.

9 The steps that have occurred in the proceeding to date are:

Date	Step	Note
24 February 2026	Proceeding commenced by Originating Application and Statement of Claim	Commenced as a Group Proceeding under Part IVA of the <i>FCA Act</i>
14 April 2026	First case management hearing	
15 April 2026	Orders made following the first case management hearing (First CMH Orders)	Orders 9 and 10 imposed discovery obligations in respect of specific document categories on the State and Applicant respectively
31 July 2026	State gives discovery of the documents in Order 9 of the First CMH Orders, namely: - studies and assessments received by the respondent or made any time after 1 January 2023 relating to the nature, extent and spread of asbestos in and from the Affected Area; and - any cost estimates which have been produced or received for the remediation of the Wittenoom, Colonial and Yampire Gorge tailing dumps and mines (however described)	The Applicant has made use of the discovery given to date in the ASOC and Reply
14 August 2026	Defence filed	171 days (over 24 weeks) from claim being issued

Date	Step	Note
1 October 2026	Applicant serves Reply and proposed Amended Statement of Claim (ASOC)	The Reply was initially due 11 September 2026. The State agreed a two-week extension to 25 September 2026, and the Reply and ASOC were ultimately served six days later
6 October 2026	Applicant provides ACCIONA and CSI reports to the State on a without prejudice basis under Order 10 of the First CMH Orders	
9 October 2026	Applicant provides ACCIONA and CSI reports to the State on an open basis (the covering letter being the GL 9 October Letter)	

10 **ASOC:** The ASOC, served on 1 October 2026, adds no new causes of action. The substantive changes to the existing pleading are limited. The ASOC makes four changes of substance:

10.1 *Proposed Removal of Part IV A:* The claim is proposed to continue not under *FCA Act* Part IVA. The Applicant instead claims as trustee for the persons formerly described as group members: ASOC [2], [141]. See **Section E** below.

10.2 *Acts of and activities undertaken by the State:* The Statement of Claim (**SOC**) alleged, at [118], that the continued presence of blue asbestos at the Asbestos Sites was caused by acts of and activities undertaken by the State (or their direct consequences) from around the late 1930s, which were listed in a chronology (SOC Schedule A). The State denied this: Defence [118]. It has invoked s 264 of the *Land Administration Act 1997* (WA) and pleads that the loss claimed was not caused by, and was not a direct consequence of, an act of the Crown or an activity undertaken by the Crown: Defence [149]–[150]. ASOC Schedule B, which is new, contains a narrative statement of the State’s acts and activities, in three periods from 1937 to 2016, for the purposes of the s 264 point and to show the State’s adoption of the nuisance (if necessary). This is relevant also to any argument as to the reasonableness of the State’s conduct. Schedule B is framed in the style of pleaded allegations, such that it is amenable to pleaded response. This will assist substantially in identifying the scope of disputation in respect of a substantial factual realm.

10.3 *Further source site:* The ASOC adds as sources of nuisance contaminant the public roads, buildings and other places in and around the Wittenoom townsite where the State itself used asbestos tailings or permitted them to remain: the “Other State Places” in

new [94A]–[94F], [105A], [105B], [114A]. They are pleaded in similar form to the existing Wittenoom Racecourse and the Wittenoom Airport allegations in the SOC.

10.4 *Further particulars:* Based substantially on discovery, the Applicant has given further particulars of the State’s knowledge at ASOC [111]–[116], of the State’s failure to remediate at [117], of loss and damage at [139] and of the conduct warranting aggravated and exemplary damages at [141(e)], the last of which draws on Schedule B (again highlighting the importance of a responsive plea).

11 As ASOC Schedule B and the matters identified above show, the Applicant has sought to make full use of the discovery it received from the State on 31 July 2026.

12 The State has indicated that it does not oppose the orders permitting the proposed amendments, as reflected in Applicant’s Order [1]:¹ PP Issue 1.

13 Applicant’s Order [5] seeks that the State properly responds to ASOC Schedule B, in circumstances where the State failed to plead any response to SOC Schedule A. As noted above, this will reduce the extent of dispute and, potentially, of the required discovery. The State’s Draft Order provided on 12 October 2026 (**State’s Order**) removes this from [5]. No explanation has been provided. That requirement should remain.

14 **Amended Originating Application:** The changes in the Amended Originating Application are formal, to reflect the move out of Part IVA.

15 **Reply:** The Reply raises amongst other things matters under the *Judiciary Act 1903* (Cth) and the *Constitution*. They present a uniform response to various defences in the Defence. Section 78B notices will be necessary in due course — see Section D.3 below.

C KEY BACKGROUND — THE REMEDIATION OF THE AFFECTED AREA

C.1 The remediation question is narrower than the size of the Affected Area suggests

16 The site to be remediated, the Affected Area as defined in the ASOC, is large and the works will be substantial. But the Court is not being asked to begin from nothing or itself to design public works. The State has its own body of expert work on what remediation is required, which has been built up over almost twenty years.

¹ Applicant’s Order [1] refers to leave being granted “[i]nsofar as leave is required” because the Applicant is in principle able to amend the Originating Application and Statement of Claim under r 16.51(1). However, an order is undoubtedly required under *FCA Act* s 33N, as explained in Section E below, and the proposed amendments assume such an order.

- 17 GHD — engineering and occupational hygiene experts — has advised the State on the remediation of Wittenoom and the Asbestos Sources (as defined in the ASOC) since 2006. Between 2011 and 2015, GHD produced a series of reports for the State, culminating in a conceptual design and costing for encapsulation of the principal tailings dumps. The ASOC refers to these reports: see, eg, ASOC [117]. That work went to a “Core Working Group” of State officials from the State’s own “Wittenoom Steering Group” (also known as the Inter-Departmental Committee, referred to in Defence [152]) in March 2016 and then to the Minister for Lands in November 2016.
- 18 The State’s Defence records that the Core Working Group agreed in March 2016 that a revised remediation approach should be designed and costed, that the end-point was still to be determined, and that the end use of the area needed to be determined in association with the traditional owners: Defence [152(a)(ii)(E), (H)] and [152(b)].
- 19 Almost 10 years later, in December 2025, GHD delivered a further report to the State (**GHD25**), which reviews and carries forward the earlier work. GHD25 addresses each of the three matters identified above. GHD25 itself records that, after 2015, progress on remediation “practically stalled”: see ASOC [117] particular (7).
- 20 What matters for case management purposes is that (i) GHD’s analysis and its basis will be important in the litigation and (ii) the starting point for framing relief is the current framework of GHD, the State’s own consultant and adviser in respect of remediation.
- 21 In the GL 9 October Letter, the Applicant has indicated to the State which findings and positions in GHD25 it is willing to adopt as a workable basis for framing injunctive orders, where the Applicant’s position goes beyond GHD25, and what positions the Applicant reserves. This is naturally subject to further discovery, evidence and expert evidence.
- 22 The Applicant’s position goes beyond GHD25 in five respects; namely;
- 22.1 the State’s internal budget and governance processes are not a precondition of injunctive relief;
 - 22.2 the unsealed Nanutarra–Munjina Road should be treated as a priority site;
 - 22.3 the relief sought is not confined to the Tailings Dumps, Wittenoom Racecourse and Wittenoom Airport (as defined in the ASOC), but rather to the areas to which blue asbestos has spread, being the Affected Area as defined in the ASOC;
 - 22.4 the option of refilling the mines with a cementitious paste of asbestos tailings and mine waste proposed by CSI should be considered; and

22.5 the adoption of an endpoint of safe, managed access for the Banjima People is without prejudice to the claim for damages.

C.2 The extensive common ground in the three reports

- 23 Exhibited to the Gordon Affidavit are three documents that address how remediation can be achieved: GHD25, the ACCIONA report of 17 August 2026 and the CSI report, which are now all open documents. None was prepared as an expert report under Part 23 of the *Federal Court Rules 2011* (Cth). ACCIONA and CSI may each in due course have an interest in seeking to carry out the works. The Applicant reserves its right to adduce expert evidence in the usual way.
- 24 The three reports indicate agreement on the following important matters:
- 24.1 remediation is feasible — it is a large civil works program of a kind which can be designed and implemented;
 - 24.2 the blue asbestos should be contained on country, isolated from wind and water, and not carried out of the region;
 - 24.3 the priority sources, in particular the tailings dumps, should be remediated first;
 - 24.4 the endpoint is land made safe for a restricted use, being safe, managed access by Banjima People, and not a return to background or pre-mining conditions;
 - 24.5 further investigation must precede a final design for the works; and
 - 24.6 the occupational and environmental hygiene of the works is the first priority in every choice of method.
- 25 None of the three reports presents a design on which works could be ordered immediately. GHD25 is a decision-making framework. The ACCIONA and CSI reports are contractors' concept proposals, each with a method, a schedule and a price.
- 26 The Schedule to the GL 9 October Letter sets out the passages in each report on which those propositions rest and identifies key questions that remain open. A copy of the table is Schedule A to the Applicant's Order.
- 27 The open questions are questions of method: whether tailings should be placed in the former mine workings, how much of the tailings mass should be handled, the scope and duration of the works, and their cost. They are engineering and industrial/environmental hygiene questions.

- 28 The Applicant submits that the technical approach to remediation is best addressed by the existing experts — GHD, CSI and ACCIONA — conferring, rather than by an adversarial exchange of reports a year or more from now. This motivates the Applicant’s proposal for the Remediation Conference.
- 29 A meeting between relevant representatives of GHD, CSI and ACCIONA would cost comparatively little and potentially provide critical and early remediation guidance by experts already familiar with the remediation objectives and challenges. To the extent they agree, the dispute about relief narrows. To the extent they do not, the joint report tells the parties and the Court where they differ, well before expert evidence is prepared. The Remediation Conference will aid the refinement of any injunctive relief sought.
- 30 Allied to the Remediation Conference is the Applicant’s proposal that, following the Remediation Conference and filing of lay evidence (but, again, before any expert evidence), it provides a further detail on the relief it seeks.

D WHAT ORDERS SHOULD BE MADE NOW AND WHY

- 31 As set out above, the Applicant proposes that Applicant’s Order [1]–[12] be made at this hearing.
- 32 It has, however, set out a full set of orders through to trial, to convey what the Applicant sees as a realistic timetable and approach. The Applicant would welcome engagement from the State on this litigation framework. The State has to this point declined to engage, basing itself in part on the late provision by the Applicant of the without prejudice ACCIONA and CSI reports and on the fact that the State must plead to the ASOC: see the State’s 8 October 2026 letter at [9] (PG-1/26–27) and the State’s 12 October 2026 letter at [13]–[17] (PG-1/52). That material requires consideration, but this does not prevent the key steps being identified and sensible dates being set.
- 33 The orders in Applicant’s Order [1]–[12] are summarised in [5] above. They should be made for the following reasons:
- 34 **Applicant’s orders further s 37M(1) object:** The Applicant’s orders meaningfully progress the claim, and thereby pursue the s 37M(1) object: see [6] above.
- 35 **Delay is not neutral:** The State admits that the asbestos tailings at the Eastern Gorge Tailings Dump, Colonial Tailings Dumps and Yampire Tailings Dumps have never been covered, contained, sealed or otherwise remediated (Defence [22(a)], [47(a)], [71(a)]), that blue asbestos continues to spread from these and the other Asbestos Sources, and that the inhalation of

respirable blue asbestos is a risk and danger to human health (Defence [121(a)]). GHD25 p 8 records that the priority sources in the gorges are unstable and eroding and continue to disperse asbestos downstream. The Applicant's case is that the nuisance is continuing and the Affected Area is growing: ASOC [95]–[109]. There can thus be no dispute that delay seriously prejudices the Applicant. In addition, the Applicant may wish to rely on evidence of senior Banjima People, some of whom are becoming elderly or otherwise unwell. Time matters for that evidence, as explained in the Gordon Affidavit at [16]–[17].

36 **The risk is present and daily:** The risk presented by blue asbestos is significant and pervasive in the Affected Area, and Banjima People are afraid to enter areas of the Affected Area because of its spread. Indeed, a 2016 epidemiological study found that Indigenous people in Western Australia had the highest mortality rate from malignant mesothelioma of any population internationally, and that about two-thirds of the Aboriginal cases resulted from the mining of crocidolite at Wittenoom and the contamination of the surrounding lands.² Its lead author was a then Senior Scientific Officer in the State's Department of Health. As the ASOC pleads, the study identified Indigenous people, principally the Banjima People, as having the highest per capita incidence of mesothelioma in the world: [141(e)] particular (7).

37 Against that background, the Applicant addresses below the orders that should be made.

D.1 Amended Defence to be served by 1 December 2026 with a Reply to follow promptly

38 The State had from 24 February to 14 August 2026 — 171 days or over 24 weeks — to plead its Defence. If the State has until 1 December 2026 to provide an Amended Defence, it will have 61 days (almost 9 weeks) from service of the ASOC (and Reply) to respond. That is more than adequate. Moreover:

38.1 the State is not coming from a standing start — it is just pleading back to the matters identified in [10.2]–[10.3] above, having already pleaded its Defence;

38.2 the ASOC, including Schedule B, has been particularised insofar as possible, so the State can see the case it has to meet;

38.3 the further matters the State must now address:

- (a) arise from its own defence of the claim, in particular Schedule B to the Defence, and its positive case that:

² Franklin and others, “*Incidence of malignant mesothelioma in Aboriginal people in Western Australia*” (2016) 40(4) *Australian and New Zealand Journal of Public Health* 383 at PG-1/344 ff.

- (i) its acts and activities did not cause, or did not have direct effects that caused, the harm complained of (Defence [117]–[118]); and
- (ii) it has taken the actions in Defence Schedule B, which is headed “Steps Taken by the State to Manage the Risk to Human Health Posed by the Asbestos from Historical Mining at Wittenoom”, which is pleaded in Defence [35], [60], [82], [88], [94] and [117]–[118] in answer to the corresponding paragraphs of the (A)SOC;

(b) were live already because of (A)SOC [117]–[118] and Schedule A, albeit the State chose not to engage with those matters, presented in the form of a chronology;

38.4 as the particulars to ASOC Schedule B show, the matters raised are drawn in large part from documents which the State produced or otherwise possesses.

39 As explained further below, the Applicant’s proposal allows a hearing in December to progress the claim. If no pleading is required until 24 December, as the State proposes, the 2026–2027 holiday period is lost and little further progress will be made until March 2027 or later.³

40 The only reasons given for the proposed date in the State’s 12 October 2026 letter at [4]–[5] (PG-1/50) do not justify this course:

40.1 The State refers to the issues raised in the ASOC but, as just explained, they are not new and, in any case, can be addressed in 61 days or over 8 weeks.

40.2 The State says that the date it proposes has been reached “in consultation with” proposed additional counsel. But there is no specificity to this, and the State can no doubt obtain capable counsel able to plead an Amended Defence by 1 December.

41 The Applicant anticipates being able to file an Amended Reply promptly, within 7 days of receipt of the Amended Defence.

D.2 Further early discovery and a December 2026 hearing to progress the proceeding

(a) Further directions hearing in December 2026

42 The Applicant’s proposal means that pleadings and further early discovery (see below) are complete such that a further case management hearing can take place in the week of 14

³ Indeed, it would seem that under *Federal Court Rules 2011* (Cth) r 1.61(5), the State’s proposal would give it until 15 January 2027 to file the Amended Defence.

December 2026, assuming the Court can accommodate this (if not, the dates may need to move forward).

43 A further hearing in the week of 14 December 2026 enables a timetable to trial and any outstanding discovery issues to be addressed this year, not in (say) February or March 2027. This will make a meaningful difference: it would allow discovery to be given by March 2027 rather than (say) May/June 2027, with further consequential steps occurring sooner.

44 To this end, the Applicant proposes that the parties confer by 10 December 2026 on discovery categories: Applicant's Draft [11]. The State opposes this because the pleadings will be open: PP Item 11. But the State will by this point have a good idea of its position (in particular of any further admissions it will make), and will be able meaningfully to engage. If its Amended Defence raises further issues for discovery, these can be addressed in the period from 1 December when it is served.⁴

(b) Further early discovery by November 2026

45 As noted in [5.3] above, the further early discovery the Applicant proposes to be given by 13 November 2026 arises as follows:

46 **GHD/equivalent reports (Applicant's Order [8]–[9]):**

46.1 The GHD reports since 2006 form a body of consistent expert advice for the State on remediation: see Section C above. The State pleads in Defence Schedule B item B.36 that it commissioned a report from GHD Parsons Brinckerhoff in relation to Wittenoom asbestos management. The Applicant has some but (it believes) not all of the reports or outputs,⁵ and does not have any of the materials that underlie them, like instructions, materials provided, drafts, and comments, save for some such materials in respect of GHD25.

46.2 Further, Defence Schedule B item B.41 refers to the State having commissioned “a series of technical, environmental, geotechnical and remediation planning studies” between 2011 and 2015. The State must know what these are. If this goes beyond the GHD reports/outputs and their underlying materials, any equivalent reports/outputs the State has commissioned and their underlying materials should be provided.

⁴ The State's Consolidated Draft Order at [8]–[9] does not show the Applicant's position.

⁵ ASOC [117] particulars A1–5 and 7 refer to GHD reports in 2013, October 2015, December 2015 and 2025, and to an exchange between the Department of Lands and GHD in 2015.

46.3 Given the terms of the State’s Defence and their importance and repeated consideration, these materials must be readily to hand and identifiable. Their discovery will significantly assist the Applicant.

46.4 The Applicant proposes, reciprocally, to provide further material from CSI and ACCIONIA it has received: Applicant’s Order [8.2].

46.5 The State complains (12 October 2026 letter [11]) in vague terms that “aspects” of Applicant’s Order [8] are “broader and seek all communications over a period exceeding 20 years”. This does not do justice to Applicant’s Order [8], which is targeted to require discovery of:

- (a) GHD reports and the materials (including communications with GHD) that explain their final form,⁶ and other communications with GHD (only) in respect of the Wittenoom Asbestos Management Area;⁷
- (b) the results of and underlying documents for the technical work pleaded in Defence Schedule B item B.41;⁸
- (c) additional studies of the Wittenoom Asbestos Management Area including those pleaded in Defence Schedule B item B.48;⁹ and
- (d) specific datasets the Applicant understands the State to have.¹⁰

47 As mentioned above, the Applicant will seek at the hearing orders that prevent the disclosure to third parties and collateral use of the CSI report annexed to the Gordon Affidavit (including that it not be placed on the Open Access File), because it contains commercially confidential and sensitive material: see Gordon Affidavit [23]–[25].

48 **Particular points in Defence (Applicant’s Order [10]):** The Defence either refers to specific documents or indicates that such documents must exist. They have presumably been gathered in and considered so as to enable the State to plead its case as it has done on a proper basis. Specifically:

48.1 *Tenements and interests:* The State pleads various positive contentions or certain non-admissions as to various grants of tenements over the land in issue: see Defence [30],

⁶ Applicant’s Order [8.1(a)]–[8.1(b)].

⁷ Applicant’s Order [8.1(c)].

⁸ Applicant’s Order [8.1(d)].

⁹ Applicant’s Order [8.1(e)].

¹⁰ Applicant’s Order [8.1(f)].

[34], [55], [59], [67], [81]. Once targeted discovery as to these has been given, these matters will likely be capable of agreement, from the documents, as background fact.

48.2 *Acts to prevent the spread of blue asbestos:* The State denies that it has not taken any or any adequate step to prevent, contain or remediate blue asbestos at the Asbestos Sources and positively asserts that it has engaged in the activities in Schedule B to address the spread of blue asbestos from the Asbestos Sites: see, again, the invocation of Schedule B in Defence [35], [60], [82], [88], [94] and [117]–[118].

49 Each of the documents or categories in Applicant’s Order [10] relates directly to the State’s pleaded case. This is explained in detail in the **Appendix** to these submissions, with reference to the relevant paragraph(s) of the Defence.

50 The State makes (12 October 2026 letter [12]) generalised complaints, none of which bears weight:

50.1 consultation as to discovery categories should occur once pleadings are closed, and the State may amend its Defence — these appear to be arguments that any further discovery must await the State’s further pleading, but the direction of its Defence is clear and the subjects of these requests (principally mining tenements and the State’s case of positive acts to remediate) are not directly affected by the ASOC;

50.2 in some cases ministerial or departmental files are sought — this is correct of some categories,¹¹ but the Applicant has framed requests in this way because existing discovery tends to suggest that a file for each *Mining Act* tenement or specific administrative decision exists and is readily identifiable (insofar as the State retains it), and that the Interdepartmental Committee’s file is extensive. In short, the request for a file does not mean the request is overbroad and makes the request simple;

50.3 some categories are not time limited — it is again correct that some categories do not have express time limitations, but they are instead defined by reference to mining

¹¹ Applicant’s Order [10.2], [10.4], [10.6] (grants and dealings with the Wittenoom Mining Tenements, Colonial Mining Tenements and Yampire Mining Tenements), [10.3], [10.5], [10.7] (grants and dealings with or creation of and changes to the further interests or Reserves the State alleges to exist in those locations), [10.8]–[10.9] (creation of and changes to the Reserves affecting Wittenoom Racecourse and Wittenoom Airport), [10.12] (classification of the Wittenoom Asbestos Management Area under the *Contaminated Sites Act 2003* (WA)), [10.13] (file relating to the alleged decision of 30 November 2016 by the Minister for Lands), [10.14(a)] (file of the Interdepartmental Committee, which appears to be a key repository of the State’s documents relating to the Asbestos Sources).

tenements, Reserves or events giving rise to documents, so are appropriately constrained;

50.4 the State does not yet know if the documents exist and will require time to review them — the State need only carry out a reasonable search, and will have, on the Applicant's proposal, a month.

51 If slightly longer is truly required, the Applicant does not oppose this. But putting all discovery on ice while the State pleads its Amended Defence is not appropriate.

D.3 Section 78B notices (Applicant's Order [7])

52 While s 78B notices will be necessary, the Applicant proposes that these be served once an Amended Defence is filed: Applicant's Order [7], read with [5]–[6].

53 The State says that it does not oppose this order (PP Item 5), but it has moved the date for its Defence to 24 December 2026, after the date for the notices on the Applicant's proposal. The pleadings will distil with precision the issues to be identified in the s 78B notices. The Applicant should file and serve s 78B notices alongside and at the time of any Amended Reply, to avoid any unnecessary issues being raised and multiple rounds of notices.¹²

D.4 A provisional trial date of early 2028 should be targeted

54 The Court may wish to consider identifying March 2028 at least provisionally as the intended trial date. In that regard, Central Practice Note (CPN-1) states that the Court will endeavour to set a hearing date as early as reasonably possible and identifies the setting and keeping of an early trial date as a case management imperative: CPN-1 at [8.4], [8.5(i)]. The proceeding has been on foot since February 2026. A trial date in March 2028 will focus the attention and efforts of the parties and provide a fixed point from which to work back in setting interlocutory steps.

D.5 Inchoate points raised by the State

55 **Possibility of preliminary issues:** The State in PP Item 9 says that consideration will need to be given to whether any matters could be identified for preliminary decision. That is commonly the case in litigation. However, no specific issues have been identified, no considered proposal has been made, nor any procedural vehicle or timetable suggested. Be that as it may, a pleading by the State by 1 December and a directions hearing in mid-

¹² Contrary to the Respondent's Consolidated Draft Order, this is not agreed.

December will enable any suitable issues to be identified and any application to be made promptly.

- 56 **Possible joinder of third parties:** The State in PP Item 10 says that it wishes to consider the joinder of third parties “whether by cross claim or some other process”. Presumably joinder was always under consideration, and none of the amendments in the ASOC could have altered the position of the State in this regard. Again, if the State wishes to apply to join a third party, much better that it does so soon and such an application is determined (or at least argued) this year.

E CONTINUATION OF THE CLAIM NOT UNDER PART IVA OF THE *FCA Act*

- 57 The Applicant asks the Court to make an order, of its own motion, that the proceeding no longer continue under Part IVA of the *FCA Act*, pursuant to s 33N: Applicant’s Order [2]. The facts relied on are in the Gordon Affidavit at [30]–[38].

- 58 Section 33N(1) provides relevantly:

“The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:

...

(b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; ...”

- 59 Section 33N(1) calls for a comparison between the existing Part IVA proceeding and the hypothetical or proposed alternative vehicle and the relief available to group members in each.¹³ Case law specifically on paragraph (1)(b) is scarce, with Jacobson J in *Multiplex* observing at [180] that the express terms of s 33N(1)(b) “would seem to apply to every representative proceeding”. However, an example of its invocation is *Kikuyu v Hazard* [2022] FCA 310 at [4], [7]–[8] (Lee J).

- 60 Because an order under s 33N(1) can only be made on application by the respondent or of the Court’s own motion, most of the jurisprudence regarding the provision has emerged from applications by respondents seeking to “de-class” a group proceeding. Unsurprisingly then, the comparison ordinarily made in s 33N(1) applications is between the existing Part IVA proceeding and the spectre of hypothetical multiple individual proceedings which might be brought by group members. Consideration of s 33N(1) is not usually aided by a comparator

¹³ See *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, [2007] FCAFC 200 at [13] (Lindgren J), [126], [128]–[129] (Jacobson J).

proposed pleading presented by the applicant and demonstrating satisfaction of the condition for exercise of the power invoked (here the condition specified in s 33N(1)(b)).

- 61 In this case, the ASOC clearly presents the alternative proceeding, and demonstrates that the condition specified in s 33N(1)(b) for the exercise of power under section 33N(1) is satisfied, and that it is in the interests of justice that it be exercised.
- 62 **First**, all the relief the Applicant seeks is available by way of a claim brought by it as the trustee for the native title rights (as defined in the ASOC), so the requirement of s 33N(1)(b) is satisfied. BNTAC is both the trustee of the native title rights and interests of the Banjima People and the representative Applicant in the proceeding as presently constituted. In both capacities it brings the proceeding for the benefit of the Banjima People. On the proposed amendments, the current “Group Members” become the “Relevant Beneficiaries” in respect of whose interests BNTAC claims. The same interests are accordingly protected: see Gordon Affidavit at [33]. (Claims of those who have suffered personal injury were always expressly excluded: see ASOC [2(e)].)
- 63 The Applicant’s main purpose is to compel the State, by injunction, to remediate dangerous blue asbestos in the Affected Area, for which the Applicant says the State is responsible. The Applicant also seeks damages, including aggravated and exemplary damages. All that relief is available outside of Part IVA: see, eg, *FCA Act* ss 22, 23, 53A and 54A. The Applicant advances the interests of the Relevant Beneficiaries, so (if ultimately entitled) it will obtain the same injunction and same damages whether or not they are (also) group members.
- 64 In short, all the relief sought can be obtained by a proceeding other than a representative proceeding under s 33N(1)(b), as was the case in *Kikuyu v Hazzard* [2022] FCA 310 at [4], [7]–[8] (Lee J).
- 65 **Second**, no Group Member/Relevant Beneficiary is worse off by the conversion from Part IVA proceeding to trustee proceeding. The State by its Defence takes the point that, due to *FCA Act* s 33B, no relief can be sought under Part IVA in respect of any cause of action which accrued before 4 March 1992¹⁴ (Defence [141]) and further alleges that causes of action do not accrue from day to day (Defence [157]). While neither point is conceded, the Applicant wishes to avoid unnecessary disputation as well as the risk attending any pleaded defence, and the proposed amendment achieves this.

¹⁴ This is the date on which the *Federal Court of Australia Amendment Act 1991* (Cth) commenced.

66 **Third**, the State suffers no prejudice and has indicated that, while it does not agree with the Applicant, it does not oppose the s 33N order being made: PP Item 2.

67 Section 33N(1) requires an order on the application of a Respondent or on the Court's own motion. In those circumstances, the Applicant asks the Court so to order.¹⁵ On the order being made, the proceeding continues as a proceeding by the Applicant on its own behalf: s 33P(a).

F CONCLUSION

68 For the foregoing reasons, the Court is respectfully invited to make the Applicant's Orders.

Date: 13 October 2026

BF Quinn

DOF Heaton

B Paull

Counsel for the Applicant

Gordon Legal, Solicitors for the Applicant

¹⁵ The Applicant relies on s 33ZF insofar as this is necessary, but submits that it is tolerably clear that s 33N suffices.

Appendix: Requests in Applicant's Order [10] against pleaded issues

Terms defined in the ASOC are used without further definition

App Order Ref	Defence (or Other) Ref	Reason why early discovery required
10.1	[17], [41], [66] Sch B item B.32	Relevant to whether the openings to Mines were properly sealed in 1996, this being one of the activities the State says it has undertaken to remediate, and will shed light on the remediation considered to be required at that stage.
10.2	[12], [24], [25], [27], [30], [31], [32], [34]	• Relevant to the circumstances in which the Wittenoom Mining Tenements were granted, transferred and otherwise dealt with, in particular the State's decision not to or failure to impose conditions that limited the spread of blue asbestos (which Defence [34] puts in issue). • Relevant to the State's understanding of whether the operation of Wittenoom Mine was consistent with the Wittenoom Mining Tenements, which Defence [12(b)] raises. • Relevant to the State's understanding of whether the Eastern Gorge Tailings Dump was wholly within the area subject to Tailings Lease 1, which Defence [31(c)] raises. • Relevant to the basis on which ABA applied for Tailings Lease 1, which Defence [33(c)] raises. • Will show what, if any exemptions and allowances were made regarding the Wittenoom Mining Tenements. • Will enable agreement on the basic matters of the grants, transfers and other dealings with the Mining Tenements, which in some cases are not wholly agreed.
10.3	[30(b)]	Relevant to identify (and likely to enable agreement on) other statutory permissions on land that was the subject of the Wittenoom Mining Tenements, which that the State raises in the Defence, their terms and whether there is any relevant consequence of this.
10.4	[36], [50], [51], [52], [53], [56], [58], [59]	As for App Order [10.2] in respect of the Colonial Mining Tenements, including Tailings Lease 2 (see, for the corresponding issues raised by the State, Defence [36], [56(c)], [58(d)]).
10.5	[55(b)]	As for App Order [10.3] in respect of the Colonial Mining Tenements.
10.6	[61], [73], [74], [75], [78], [80], [81]	As for App Order [10.2] in respect of the Yampire Mining Tenements (see, for the corresponding issues raised by the State, Defence [61(b)] and [73], save that there was no tailings lease in respect of the Yampire Tailings Dump).
10.7	[67(f)]	As for App Order [10.3] in respect of the Yampire Mining Tenements, where the State says that Reserve 30082 was created and then vested under various legislation, and that its boundaries were changed, rather than the grant of other mining tenements.

App Order Ref	Defence (or Other) Ref	Reason why early discovery required
10.8	[83]	As for App Order [10.3] in respect of the Wittenoom Racecourse, where the State says that Reserve 23864 was created and then vested under various legislation, and its boundaries were changed, rather than the grant of other mining tenements.
10.9	[89]	As for App Order [10.3] in respect of the Wittenoom Airport, where the State says that Reserve 23278 was created and then vested under various legislation, and its boundaries were changed, rather than the grant of other mining tenements.
10.10	[89(c)]–[89(e)]	Request for the lease and documents evidencing the arrangements the State expressly pleads in Defence [89(c)]–[89(e)] and required for the reasons given for [10.3].
10.11	[116(c)]	Request for the advice of the Public Health Department in 1978 that the State expressly pleads in Defence [116(c)], in support of the apparent suggestion (see Defence [116(b)] and [116(d)]) that it was only from around 1978 that the State knew that exposure to low levels of blue asbestos was harmful to health, including because it could cause mesothelioma.
10.12	[142], [144]	Relevant to the reasons and decision-making behind the classification of the land in the Wittenoom Asbestos Management Area under the <i>Contaminated Sites Act 2003</i> (WA), and to the State's decision-making around whether and how remediation was required, which the Defence places in issue.
10.13	[152(a)(ii)], [152(b)]	This advice is directly relevant to the state of knowledge of the State in 2016, what was communicated by the Core Working Group of the Wittenoom Steering Committee, the remediation strategies available and considered feasible and the potential end point of any remediation project.
10.14(a)	Schedule B items B.3 and B.13, and Schedule B generally	Relevant to the State's consideration of and alleged steps to remediate asbestos in Wittenoom, which is placed in issue by Schedule B (read with Defence [35], [60], [82], [88], [94] and [117]–[118]). Items B.3 and B.13 identify that the State has, since September 1978, established an Interdepartmental Committee or Wittenoom Standing Committee (IDC) of senior officials who have considered how the State should address the Asbestos Sources. Documents from the early discovery appear to be documents provided to the IDC, records of its deliberations and documents it has created: see, eg, ASOC [116] particular 9A, Schedule B [B.54]–[B.55] particulars 7, 14, 34, 35, 36, Schedule B [B.57] particular 7, Schedule B [B.58]–[B.59] particulars 3, 5, 8.

App Order Ref	Defence (or Other) Ref	Reason why early discovery required
10.14(b)	Schedule B	Each item of the table identifies the specific allegation in Defence Schedule B that is the basis for the request, the State having positively raised all of those matters by Schedule B of the Defence (read with Defence [35], [60], [82], [88], [94] and [117]–[118]). A number of the requests are for documents mentioned or alluded to in Schedule B. Relevant to the State’s allegations, in Schedule B, that it has taken the steps there set out in respect of the Asbestos Sources.

NOTICE OF FILING

Details of Filing

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Sia Lagos

Registrar

Important Information

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

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