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First Respondent's Written Opening

WAD 37 of 2022

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

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC (ICN 8721)
Applicant

STATE OF WESTERN AUSTRALIA and others
Respondents

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A. Background

A1 INTRODUCTION

1. These written opening submissions are provided in accordance with item 13 of the timetable attached to the orders of the Court made on 27 June 2023. They primarily address the legal issues relevant to determining the entitlement to, the quantum of, and the liability for, compensation payable to the Applicant in respect of the Claimed Compensable Acts. Unless otherwise indicated, the terms used in this document are identical in meaning to those defined in the *First Respondent's Amended Points of Response* filed on 14 July 2023 (**FR POR**).

2. These submissions also identify certain factual matters that the First Respondent contends will be relevant to the determination of compensation for the Claimed Compensable Acts. However, as evidence going to those factual matters is yet to be adduced,[1] or will be the subject of cross examination, submissions as to factual findings the Court may make will be addressed in closing submissions.[2]

3. At the outset, it is agreed by the parties that the Claimed Compensable Acts are "*future acts*" (as defined in section 233 NTA).[3] There is also no apparent dispute among the parties that some entitlement to compensation arises in respect of the Claimed Compensable Acts.[4] The primary differences between the parties which the Court will need to resolve relate to:

   (a) the provisions of Part 2, Division 3 NTA under which the Claimed Compensable Acts were validated (Agreed Issue 10(c)(i));

   (b) the provisions of the NTA under which any entitlement to compensation arises (including whether the effect of the NTA is that the entitlement arises under the *Mining Act 1978* (WA) (**MA**)) (Agreed Issues 1, 2, 3, 9 and 11);

   (c) how the compensation is to be assessed and quantified having regard to the source of the entitlement to compensation (Agreed Issues 4, 7, 8 and 12); and

   (d) who is liable to pay the compensation (Agreed Issues 10(c)(ii) and 10(d)).

4. Each of the issues identified in paragraph [3(a) – (d)] above is intrinsically linked to the others,

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[1] See, for example, items 23, 24, 25, 26, 28 and 30 of the timetable attached to the orders of the Court made on 27 June 2023.

[2] To be filed pursuant to items 36 – 39 of the timetable attached to the orders of the Court made on 27 June 2023.

[3] *Applicant's Further Amended Points of Claim* filed 5 July 2023 (**POC**) at [17]; FR POR at [198]; *FMG Respondent's Further Amended Points of Response* filed 14 July 2023 (**FMG POR**) at [13]; *Yamatji Marlpa Aboriginal Corporation's Amended Position on Points of Claim and Points of Response* filed 26 April 2023 (**YMAC POR**) at [21] and [23].

[4] POC at [16]; FR POR at [209], [211] and [245] – [246]; FMG POR at [16].

in that a particular answer by the Court to one question has consequences for, and will produce different answers to, the others. Accordingly, in the First Respondent's respectful submission, it is not helpful to deal with the issues in isolation (as may be implied by the *Agreed List of Issues* filed on 22 June 2023).

5. Further, the interrelated nature of the identified issues requires that they be dealt with in a logical order. In that respect, the First Respondent notes that these submissions occasionally (and necessarily) depart from the *Agreed List of Headings* so that the issues in dispute are most sensibly addressed for the assistance of the Court.[5] However, these submissions clearly indicate how the submissions can be read conformably with the *List of Issues*. In general terms, these submissions deal with the issues in dispute in the same order as the POC and the FR POR.

A2 THE FIRST RESPONDENT'S CASE IN SUMMARY

A2.1 The primary case

6. The First Respondent's primary case is that the Applicant's claim is misconceived because, although the Claimed Compensable Acts are "*future acts*" validated under Subdivision M of Part 2, Division 3 NTA, the effect of section 24MD(3)(b) NTA is that the entitlement for compensation does not arise under Part 2, Division 5 of the NTA but, instead, arises under the MA.

7. In particular, the First Respondent says that the MA provides compensation to the Yindjibarndi People in respect of the Claimed Compensable Acts on the basis that they are "*owners*" or "*occupiers*" (as those terms are defined in section 8 MA). Accordingly, the threshold requirement for an entitlement to compensation under Part 2, Division 5 NTA contained in section 24MD(3)(b)(ii) NTA has not been met (i.e. the requirement that the relevant State law (i.e. the MA) does **not** provide compensation to native title holders).

8. The RDA does not operate to alter the outcome of the application of section 24MD(3)(b) NTA and make that compensation, nevertheless, claimable under the NTA. Rather the RDA yields to the NTA and has no residual operation.

9. It follows that the claim for compensation in this Court should be dismissed and, instead, any application must be made to the Warden's Court under the MA.

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[5] By way of context, the *Agreed List of Headings* was prepared largely by negotiation between counsel for the Applicant and FMG Respondents without the involvement of counsel for the First Respondent (who was unavailable). As the solicitors for the First Respondent have noted in correspondence with the other parties, the *Agreed List of Headings* does not reflect the First Respondent's view of how the issues in dispute might most sensibly be addressed.

A2.2 The alternative case

10. If, contrary to the First Respondent's primary case, an entitlement to compensation ***does*** arise under Part 2, Division 5 the NTA, the First Respondent says that the entitlement arises under section 24MD(3)(b) NTA. In those circumstances:

    (a) the compensation is to be determined in accordance with section 51(3) NTA;

    (b) the effect of section 51(3) NTA is that compensation is determined in accordance with the principles and criteria contained in section 123 MA (i.e. as if the native title holders were "*owners*" or "*occupiers*" for the purposes of that section);

    (c) the principles or criteria contained in the MA are binding on the Court and must be applied when determining compensation under section 51(3) NTA, however, to extent that any particular MA principle or criteria is unclear in its operation to native title holders, the principles for the assessment of compensation in *Northern Territory v Griffiths*[6] (**Griffiths**) are sufficiently congruent to be relevant by way of analogy;

    (d) the Applicant's claim is a significant departure from the *Griffiths* principles in relation to both economic and non-economic loss;

    (e) section 53(1) of the NTA is not relevant in this proceeding as it is only engaged in the limited circumstances provided by that section. There has not been a "*paragraph 51(xxxi) acquisition of property*" in this proceeding. However, even if there had been, section 53(1) NTA is only engaged where the compensation determined under section 51(3) NTA (by reference to the principles and criteria contained in the MA) does not provide "*paragraph 51(xxxi) just terms*". As section 123 MA provides native title holders with parity of treatment, it provides "*paragraph 51(xxxi) just terms*" in any event; and

    (f) any compensation is payable by the FMG Respondents by operation of section 125A MA.

B. Statutory scheme for compensation under NTA for "*future acts*"

B1 THE RELEVANT PROVISIONS OF PART 2, DIVISION 3 NTA

This section deals with Agreed Issues 1 and 10(c)(i).

B1.1 Introduction

11. It is common ground that the grant of each of the Claimed Compensable Acts is a "*future act*" within the meaning of section 233 NTA.[7] However, there is a dispute between the parties as to

[6] [2019] HCA 7; (2019) CLR 1.
[7] POC at [17]; FR POR at [198]; FMG POR at [13]; and YMAC POR at [21] and [23].

which Subdivision of Part 2, Division 3 NTA applies to validate some of the Claimed Compensable Acts.

12. In summary, the First Respondent says that Subdivision M applies to all of the Claimed Compensable Acts.[8] The FMG Respondents agree that Subdivision M applies to most of the Claimed Compensable Acts[9], but contend that Subdivision H applies to certain miscellaneous licences (which they have labelled the "*Water Management Miscellaneous Licences*").[10] The Applicant's primary contention is that Subdivision M applies to each of the Claimed Compensable Acts.[11] In the alternative, they assert that if Subdivision M does not apply then either Subdivision H or Subdivision I applies.[12] The Applicant has not identified the particular Claimed Compensable Acts which are said to fall within this category.

13. In the First Respondent's respectful submission the question of which Subdivision of Part 2, Division 3 NTA applies to each Claimed Compensable Act is the first issue that needs to be determined by the Court as it has consequences for: (a) where any entitlement to compensation arises; (b) the provisions (if any) of Part 2, Division 5 NTA which apply; and (c) the party liable to pay any compensation. It cannot, for example, be addressed only (and lastly) in the context of determining the party liable for the payment of any compensation.[13]

B1.2 Scheme of Part 2, Division 3 NTA

14. In general terms, "*future acts*" (as defined in section 233 NTA) are governed by Part 2, Division 3 NTA. Section 24AA NTA provides an overview of Division 3 and, importantly, provides that a "*future act*" will be valid to the extent that it is covered by the list of acts contained in section 24AA(4). Section 24AB explains how the various validating provisions of Division 3 (and, indirectly, the Subdivisions) apply to a given future act. Relevantly, section 24AB(2) NTA provides that "*to the extent that a future act is covered by a particular section in the list in paragraphs 24AA(4)(a) to (k), it is not covered by a section that is lower in the list*".

15. The Subdivisions in Part 2, Division 3 NTA are thus to be considered sequentially. To the extent that an earlier Subdivision applies, a later one will not. Therefore, in considering which Subdivision applies to each of the Claimed Compensable Acts, it is necessary to start at the

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[8] FR POR at [199].
[9] FMG POR at [13(c) – (d)] and [17(c)].
[10] FMG POR at [13(e)] and [17(b)] (consisting of miscellaneous licences L 47/302, L 47/361, L 47/362, L 47/363, L 47/367, L 47/396, L 47/472, L 47/697, L 47/801, L 47/813, L 47/814, L 47/914, and L 47/919).
[11] POC at [17] – [20] and [27] – [31].
[12] POC at [31A].
[13] Cf POC at [31A]; See also *Agreed List of Headings* p.2.

beginning of the list in paragraphs 24AA(4)(a) to (k) NTA and to consider whether, and to what extent, each validating provision applies before considering the application of a later validating provision.

B1.3 Subdivision H of Part 2, Division 3 NTA

16. The FMG Respondents assert that Subdivision H applies to the grant of the Water Management Miscellaneous Licences. [14] Section 24HA(2) NTA (which appears in Subdivision H) applies, *inter alia*, to "*future acts*" consisting of the "*grant of a lease, licence, permit or authority under legislation that…that relates to the management or regulation of… surface or subterranean water or… living aquatic resources or… airspace*".

17. Where section 24HA NTA applies to a "*future act*", the following consequences arise: (a) the act is valid and subject to the "*non-extinguishment principle*"[15]; (b) where the act is attributable to the State, compensation is payable by the State[16]; and (c) prior to the act being done any registered native title claimants or registered native title bodies corporate must be notified and given an opportunity to comment.[17]

18. The FMG Respondents' contention in respect of the Water Management Miscellaneous Licences appears to be that, because one or more of the purposes for which each licence was granted includes "*taking water*" or "*a search for groundwater*", then Subdivision H, and only Subdivision H, applies to each licence.[18] That contention should not be accepted. In particular, each of the relevant Water Management Miscellaneous Licences was granted not only for the purposes of "*taking water*" or "*a search for groundwater*" but also for a range of other unrelated purposes which clearly do not fall within the scope of Subdivision H.[19]

19. In the First Respondent's submission, following the Full Federal Court's decision in *BHP Billiton Nickel West Pty Ltd v KN*[20] (**Tjiwarl FC**) the proper approach for assessing whether section 24HA(2) NTA applies to a licence is, first, to identify the particular provisions under which the licence is granted and, second, to assess whether those provisions (as opposed to the Act or

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[14] For ease of reference, the First Respondent has adopted the definition used by FMG for the miscellaneous licences identified at paragraph [13(e)] of the FMG POR (i.e. the "*Water Management Miscellaneous Licences*"). However, for the reasons expressed below, given the purposes of these licences the First Respondent submits that it is somewhat misleading to refer to them by this nomenclature.
[15] Section 24HA(3) and (4) NTA.
[16] Section 24HA(6) NTA.
[17] Section 24HA(7) NTA.
[18] FMG POR at [13(e)], [16(a) – (f)] and [17(b)].
[19] As to which see paragraph [20] below. See also FR POR at [76], [80], [84], [88], [92], [96], [100], [104], [108], [112], [116], [128] and [132].
[20] [2018] FCAFC 8; (2018) 258 FCR 521.

regulations as a whole) relate to the management or regulation of subterranean water. The Full Court in *Tjiwarl FC* held that section 91(1) MA (which allows the grant of a miscellaneous licence "*for any one or more of the purposes prescribed*") and regulations 42B(i) and (ia) *Mining Regulations 1981* (WA) (**Mining Regulations**) (the prescribed purposes of "*taking water*" and "*a search for groundwater*") were provisions that related to the management or regulation of subterranean water.[21]

20. In the present proceeding, whilst the prescribed purposes of the Water Management Miscellaneous Licences relevantly include "*taking water*" (reg 42B(i)) and/or "*a search for groundwater*" (reg 42B(ia)) (i.e. like those licences considered in *Tjiwarl FC*), they also include one or more of the following other prescribed purposes: "*a road*" (reg 42B(a)); "*an aerial rope way*" (reg 42B(c)); "*a pipeline*" (reg 42B(d)); "*a power line*" (reg 42B(e)); "*a conveyor system*" (re 42B(f)); "*a tunnel*" (reg 42B(g)); "*an aerodrome*" (reg 42B(k)); "*a communications facility*" (ref 42B(n)); "*a minesite accommodation facility*" (reg 42B(q)); "*a power generation and transmission facility*" (reg 42B(u)); "*a storage or transportation facility for minerals or mineral concentrate*" (reg 42B(v); and/or "*a workshop and storage facility*" (reg 42B(x)).

21. It follows that, in granting the Water Management Miscellaneous Licences, the relevant "*legislation*" for the purposes of s 24HA(2) NTA comprises section 91(1) MA, regulations 42B(i) and 42B(ia) *Mining Regulations* and those other paragraphs of regulation 42B which correspond to the additional purposes of the licences. Hence, applying *Tjiwarl FC*, it may be said that whilst some of the provisions which authorise the grant of the Water Management Miscellaneous Licences are "*legislation that ... relates to the management or regulation of ... surface or subterranean water*" within the meaning of s 24HA(2), some are not.

22. On its face, section 24HA(2) NTA does not deal with the situation where the provisions that authorise the grant of the relevant licence also include purposes that are not listed within the subparagraphs of section 24HA(2)(b). Rather, section 24HA(2) NTA is drafted as if the relevant legislation either does, or does not, satisfy section 24HA(2). The miscellaneous licences considered in *Tjiwarl FC*, for example, were granted **solely** for purposes to which section 24HA(2) NTA applied.

23. However, taking into account the "*discernible legislative intent*" in Part 2, Division 3 NTA that "*persons with determined or possible native title interests in the land are to have carefully graded rights to be notified beforehand and are also to have carefully graded rights to have attention given by the decision-maker to their views about the doing of the act*"[22] it would, in the First

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[21] *Tjiwarl FC* at [62].
[22] *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603; (2000) 98 FCR 60 at [27].

Respondent's submission, be contrary to the scheme of Division 3 for a "*future act*" to be treated as wholly covered by a particular Subdivision where, like here, some of the rights conferred by or under the act are plainly not covered by that Subdivision and are, instead, covered by a later Subdivision under which the native title holders are entitled to substantially greater procedural rights.

24. For example, the practical effect of the FMG Respondents' contention being accepted would be that any applicant for a miscellaneous licence under the provisions of the MA could obtain a wide suite of rights under that licence (such as the right to construct aerodromes, accommodation facilities, power generation facilities, workshops, roads, mineral storage, tunnels and/or bridges) but, through the mere inclusion of "*taking water*" among that wide suite of rights, avoid the application of the more onerous procedural requirements provided for by Subdivisions M or P which would otherwise be required in relation to those rights. That cannot have been the intention of Parliament when enacting the NTA. It follows that Subdivision H has no application to the Water Management Miscellaneous Licences.

B1.4 Subdivision I of Part 2, Division 3 NTA

25. The Applicant asserts, in the alternative to Subdivision M, that Subdivision I of Part 2, Division 3 NTA may apply to the renewals or extensions of term of some of the Claimed Compensable Acts.[23] The Applicant has not identified these renewals or extensions of term but the First Respondent assumes that the Applicant is referring to those listed at paragraphs [136], [141], [147], [153], [158], [163], [168] and [172] of the FR POR.

26. Whilst the Applicant has not explained the basis upon which it contends that Subdivision I applies, the First Respondent submits that it cannot apply to any of the Claimed Compensable Acts or any renewals or extensions of term thereof. In particular, none of the Claimed Compensable Acts (or their renewals or extensions of term) are *pre-existing rights based acts* as that term is defined in section 24IB NTA. Further, any renewal or extension of term of a Claimed Compensable Act is not a *permissible lease etc. renewal* for the purpose of section 24IBC as the original grant of the Claimed Compensable Act: (a) did not occur before 23 December 1996; (b) was not, itself, a *permissible lease etc. renewal* or a *pre-existing rights based act*; and/or (c) was not created by an act covered by section 24GB, 24GC, 24GE or section 24HA (see section 24IC(1)(b)).

B1.5 Subdivision M of Part 2, Division 3 NTA

27. Accordingly, as none of Subdivisions A – L of Part 2, Division 3 NTA apply to any of the Claimed Compensable Acts, and as each of the Claimed Compensable Acts:

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[23] POC at [31A].

(a) relates to an "*onshore place*" within the meaning of section 240(a) NTA;

(b) could be done in relation to the land in the Application Area if the Yindjibarndi People instead held ordinary title to it; and

(c) the AHA is a law of the State that makes provision of the kind referred to in section 24MB(1)(c) NTA,

the First Respondent submits that, in accordance with section 24MB NTA, Subdivision M of Part 2, Division 3 NTA applies to each of the Claimed Compensable Acts and, by reason of section 24MD(1) NTA, each of the Claimed Compensable Acts is valid.[24]

28. Further, as none of the Claimed Compensable Acts was a compulsory acquisition covered by sections 24MD(2) or (2A) NTA, pursuant to section 24MD(3)(a) NTA, the "*non-extinguishment principle*" (as defined in section 238 NTA) applies to each of the Claimed Compensable Acts.[25]

C. How is compensation to be determined?

C1 INTRODUCTION

29. If the Court is satisfied the Claimed Compensable Acts are all "*future acts*" to which Subdivision M of Part 2, Division 3 applies, two interrelated issues arise next for determination. The first is: under which provisions of the NTA (if any) does the entitlement to compensation for the Claimed Compensable Acts arise? The second is: having regard to the source of any entitlement to compensation, how is that compensation to be assessed and quantified, including what (if any) sections of Part 2, Division 5 NTA apply?

30. This section addresses these issues in the following order[26]:

(a) does the entitlement to compensation for the Claimed Compensable Acts arise under Part 2 Division 5 of the NTA or under the MA by operation of section 24MD(3)(b) NTA?: see Part C2.1 below. The First Respondent's **primary** argument is that the entitlement to compensation arises under the MA;

(b) if the effect of section 24MD(3)(b) NTA is that entitlement to compensation arises under Part 2, Division 5 of the NTA, how is that compensation to be determined?: see Part C2.2 below. The First Respondent's **alternative** argument is that, pursuant to section 51(3) NTA the compensation is to be determined in accordance with the principles and criteria contained in the MA;

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[24] FR POR at [199]-[200].
[25] FR POR at [201].
[26] The order being is governed primarily by the *Agreed List of Headings.*

(c) if the entitlement to compensation arises under the MA, do section 10 RDA and section 45 NTA nevertheless operate to make that compensation claimable under the NTA?: see Part C3 below. The First Respondent says that the RDA does not have this effect; and

(d) in circumstances where the entitlement to compensation does arise under Part 2, Division 5 NTA, does section 53(1) NTA provide an entitlement to compensation, or further compensation, on "*paragraph 51(xxxi) just terms*"?: see Part C4 below. The First Respondent says section 53(1) has no application in these circumstances.

C2 ENTITLEMENT TO COMPENSATION PURSUANT TO SECTION 24MD(3)(B) NTA

This section deals with Agreed Issues 1, 2, 3 and 4.

C2.1 Primary case: no entitlement to compensation under section 24MD(3)(b) NTA

31. If the Court is satisfied that the Claimed Compensable Acts are acts to which Subdivision M of Part 2, Division 3 NTA applies, section 24MD(3)(b) NTA relevantly provides that an entitlement to compensation under Part 2, Division 5 NTA will arise where:

(a) the "*similar compensable interest test*" (as defined in section 240 NTA) is satisfied in relation to the act (section 24MD(3)(b)(i)); and

(b) the law mentioned in section 240 NTA does not provide for compensation to the native title holders for the act (section 24MD(3)(b)(ii)).

32. Section 24MD(3)(b) NTA thus has two limbs, each constituting a threshold requirement which must be satisfied for a native title holder to be entitled to compensation in accordance with Part 2, Division 5 NTA.

C2.1.1 First Limb: "*Similar compensable interest test*" satisfied (section 24MD(3)(b)(i))

33. The "*similar compensable interest test*" is defined in section 240 NTA. That section provides, *inter alia*, that the test will satisfied in relation to an act if: (a) the act relates to an "*onshore place*" (section 240(a) NTA); and (b) compensation would, apart from the NTA, be payable if the native title holders instead held ordinary title to the land and waters the subject of the act (section 240(a) NTA).

34. In this proceeding it is agreed that:

(a) the Claimed Compensable Acts all relate to an "*onshore place*";

(b) if the Applicant held ordinary title to the land the subject of each Claimed Compensable Act, then they would:

(i) be an "*owner*" or "*occupier*" of the land the subject of each Claimed Compensable Act within the meaning of those terms as defined in section 8 MA; and

(ii) as such, be entitled to compensation under section 123 MA for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining on that land (whether lawfully carried out or not); and

(c) the entitlement to compensation referred to in paragraph [34(b)] above constitutes compensation "*for the act*" within the meaning of section 240(b) NTA.[27]

35. The parties therefore agree that the "*similar compensable interest test*" (as defined in section 240 NTA) is satisfied in relation to each Claimed Compensable Act within the meaning of section 24MD(3)(b)(i) NTA.

C2.1.2 Second limb: Does the MA provide compensation to the Applicant (section 24MD(3)(b)(ii))?

36. There is, however, a dispute as to whether the threshold condition in section 24MD(3)(b)(ii) is satisfied. The Applicant says that it is.[28] The First Respondent says that it is not.[29]

37. The dispute between the Applicant and the First Respondent is, in effect, whether the MA (being the "*law mentioned in section 240*") provides compensation to the Yindjibarndi People.[30] This disagreement is significant as, in the event that the condition in section 24MD(3)(b)(ii) NTA is **not** met, any entitlement to compensation for each Claimed Compensable Act arises under the MA and not the NTA.

38. Contrary to the Applicant's contentions[31], the MA provides for any applicable compensation to be paid to the Yindjibarndi People on the basis that they are "*owners*" or "*occupiers*" of the land the subject of each of the Claimed Compensable Acts, within the meaning of those terms as defined in section 8 MA.[32]

39. Part VII MA has, at all material times, provided compensation for "*owners*" and "*occupiers*" of land associated with the grant of mining tenements or mining. Pursuant to section 123(2) MA[33] the compensation for "*owners*" and "*occupiers*" of "*any land where mining takes place*" is, according to their respective interests and subject to sections 124 and 125 MA:

> *... for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining, whether or not lawfully carried out in accordance with this*

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[27] POC at [18] – [19]; FR POR at [202] – [207]; FMG POR at [16(e)], [18] – [19]; and YMAC POR at [23].
[28] POC at [20].
[29] FR POR at [208] – [211].
[30] Noting that the threshold condition in section 24MD(3)(b)(ii) NTA is expressed in the negative.
[31] POC at [20].
[32] See FR POR at [208] – [211].
[33] Section 123(2) MA has appeared in its present form since 31 January 1986.

> *Act, and a person mining thereon is liable to pay compensation in accordance with this Act for any such loss or damage, or likely loss or damage, resulting from any act or omission on his part or on the part of his agents, sub-contractors or employees or otherwise occasioned with his authority.*

40. "*Owners*" and "*occupiers*" of land are defined in section 8 MA as:

> *"**occupier**" in relation to any land includes any person in actual occupation of the land under any lawful title granted by or derived from the owner of the land;*
>
> *"**owner**" in relation to any land means -*
> *(a) the registered proprietor thereof or in relation to land not being land under the Transfer of Land Act 1893 the owner in fee simple or the person entitled to the equity of redemption thereof;*
> *(b) the lessee or licensee from the Crown in respect thereof;*
> *(c) the person who for the time being, has the lawful control and management thereof whether on trust or otherwise; or*
> *(d) the person who is entitled to receive the rent thereof.*

41. The MA assumes that the "*occupier*" may or may not be the same person as the "*owner*".[34]

42. In *Western Australia v Ward*[35] (**Ward HC**), the joint majority of the High Court considered that whilst native title holders did not generally fall within paragraphs (a), (b) or (d) of the definition of "*owner*" in section 8 MA, they may fall within paragraph (c) of the definition in circumstances where they hold a right to possession, occupation, use and enjoyment of the land to the exclusion of all others.[36]

43. As for whether non-exclusive native title holders may be "*occupiers*", the joint majority in *Ward HC* considered that they did not fall within the definition of persons "*in actual occupation of the land under any lawful title granted by or derived from the owner of the land*" because their rights were not "*granted by or derived from*" the owner of the land. However, the joint majority noted that "*occupier*" was defined in section 8 MA in an inclusive way (as contrasted with the use of the term "means" in the definition of "owner") with the result that "*it may be that the Act does not limit what otherwise might be meant by the term 'occupier'*", but ultimately determined that they did not need to decide this point.[37] Similarly, although Callinan J dissented in relation to many of the holdings in *Ward HC*, in referring to the definitions of "*owner*" and "*occupier*" in the MA, his Honour said that:

> *In my opinion, each of these definitions is capable of applying to native title rights and interests. It can be seen that the definition of ''occupier'' is expressed inclusively*

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[34] See, for example, sections 8(3) and 31(2) MA.
[35] [2002] HCA 28; (2002) 213 CLR 1.
[36] *Ward HC* at [317].
[37] *Ward HC* at [318]. This holding was refrred to without demur by the joint majority in *Griffiths* at [75] – [76]. See also *Western Desert Lands Aboriginal Corporation/Western Australia/Kitchener Resources / Scimitar Resources* [2008] NNTTA 22; (2008) 218 FLR 362 at [39] – [44]; *FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia* [2009] NNTTA 91 at [83].

and does not exclude occupation according to its ordinary meaning of being in possession by having a physical presence on land.[38]

44. On the basis of the above, the First Respondent submits that the Yindjibarndi People are:

(a) to the extent that the relevant Claimed Compensable Act is located within the Exclusive Area, the "*owners*" of the land the subject of those Claimed Compensable Acts granted over the Exclusive Area after (but not before) the Yindjibarndi Determination[39] (being M 47/1513, M 47/1570, L 47/801, L 47/813, L 47/814, L47/914 and L47/919); and

(b) "*occupiers*" of land the subject of all other Claimed Compensable Acts, regardless of when those acts were granted (this is on the basis that, both before and after the making of the Yindjibarndi Determination[40], the Yindjibarndi People have a right to access (including to enter, to travel over and remain) in relation to the Determination Area).[41]

45. Accordingly, as the MA provides compensation to the Applicant for each Claimed Compensable Act, the First Respondent says that the condition in section 24MD(3)(b)(ii) NTA is **not** met and the entitlement to compensation for each Claimed Compensable Act arises under the MA and not the NTA.[42] It follows that the present application in this Court must be dismissed and any application for compensation must necessarily be made to the Warden's Court under the MA and against the FMG Respondents.

C2.2 Alternative Case: where there is an entitlement to compensation under section 24MD(3)(b) NTA

46. If, contrary to the First Respondent's primary case, the Court determines that the MA does **not** provide compensation to the Yindjibarndi People as *"owners' or "occupiers"*, the effect of section 24MD(3)(b) NTA is that compensation for the Claimed Compensable Acts is to be determined in accordance with Part 2, Division 5 NTA. A question would then arise as to which provision of Part 2, Division 5 NTA applies in those circumstances. The First Respondent contends that it is section 51(3) NTA for the reasons set out below.[43]

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[38] *Ward HC* at [854].

[39] There is a question in this proceeding as to whether section 47B NTA operates in relation to a compensation application brought under the NTA: see Part E1.2.1 below. This issue has no relevance to an application for compensation under the MA. There is also a question in this proceeding as to the date on which the Yindjibarndi People were said to have obtained the right of exclusive possession. see Part E1.2.2 below. In the event that the First Respondent is wrong with respect to its contentions regarding the point in time at which section 47B NTA is engaged, the tenements to which paragraph [44(a)] would apply include all those Claimed Compensable Acts that are located in the Exclusive Area, regardless of the date of grant.

[40] See *Warrie v State of Western Australia (No.2)* [2017] FCA 1299; (2017) 366 ALR 467

[41] See FR POR at [209] – [210].

[42] See FR POR at [211] and [229].

[43] See FR POR at [212] and [245] – [248].

C2.2.1 What provision of Part 2, Division 5 NTA applies to determine compensation that arises under section 24MD(3)(b) NTA?

47. Section 48 NTA provides, *inter alia*, that where compensation is payable under Part 2, Division 3 NTA, it is payable only in accordance with Part 2, Division 5 NTA. The core provision[44] of Part 2, Division 5 NTA is section 51(1) which provides that, subject to section 51(3), 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*".

48. Part 2, Division 5 NTA does not contain provisions setting out the principles or criteria to be applied in the assessment of compensation on "*just terms*" under section 51(1) NTA. Rather, it directs the court assessing the compensation to any principles or criteria set out in the law of the polity to whom the compensable act is attributable (i.e. the Commonwealth, a State or a Territory). The extent to which those principles or criteria are binding on the court depends on the applicable provision of Part, Division 5 NTA.[45]

49. Further, whilst section 51(1) NTA generally provides compensation is to be on "*just terms*", it is subject to the exception contained in section 51(3) NTA. The exception in section 51(3) NTA arises where, in the case of something other than a compulsory acquisition, the State or Territory law would provide compensation to ordinary titleholders in similar circumstances (i.e. where the "*similar compensable interest test"* contained in section 240 NTA is satisfied).[46]

50. In those circumstances, section 51(3) provides that the Court **must** apply the principles or criteria set out in the relevant State or Territory law to determine compensation. Native title holders, therefore, are to receive the same compensation as the holders of equivalent non-native title interests under the State or Territory law, "*whether or not on just terms*". As the Explanatory Memorandum to the *Native Title Bill 1993* (Cth) explained:

> [i]*f the…act involves the grant of an interest which can be granted over ordinary title land, such as a mining interest, subclause (3) provides that compensation is to assessed under the same regime as that for the holders of ordinary title. This is the exception to the entitlement to just terms compensation.*[47]

51. In the present proceeding, the First Respondent submits that if an entitlement to compensation arises under the NTA in relation to any of the Claimed Compensable Acts by operation of section

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[44] *Griffiths* at [41].
[45] Contrast, for example, the difference between section 51(3) NTA (where the Court "*must*" take into account the relevant principles and criteria) with section 51(2)(4) NTA (where it "*may*" take those things into account).
[46] It is common ground in this proceeding that the "*similar compensable interest test"* contained in section 240 NTA is satisfied: see paragraphs [34] – [35] above.
[47] *Native Title Bill 1993* (Cth)*:* Explanatory Memorandum – Part B at p.29.

24MD(3)(b) NTA, section 51(3) NTA applies to determine that compensation, on the basis that: (a) the grant of the Claimed Compensable Acts was not a compulsory acquisition of native title[48] (section 51(3)(a)); and (b) the "*similar compensable interest test*" is satisfied in relation to each of the Claimed Compensable Acts (section 51(3)(b)) (as to which see Part C2.1.1 above).[49]

52. The effect of section 51(3) NTA is that, subject to sub-sections (5) to (8), any entitlement to compensation in respect of the Claimed Compensable Acts is to be determined in accordance with the principles or criteria for the assessment of compensation set out in the MA, **whether or not** that would provide compensation to the Yindjibarndi People on just terms.

53. For the purposes of determining compensation under section 51(3) NTA (i.e. in accordance with the principles or criteria set out in the MA), the Yindjibarndi People are afforded equal treatment to the holders of equivalent non-native title interests in the land under the MA.[50]

54. In the First Respondent's submission, the Applicant's POC, whilst acknowledging that section 51(3) NTA applies to the making of a determination of compensation in respect of the Claimed Compensable Acts[51], wholly fails to address the principles and criteria for the assessment of compensation set out in the MA. Rather, the POC appears to erroneously assume that the relevant principle or criteria is simply "*just terms*" and does not address how compensation is to be determined under the principles and criteria contained in the MA in accordance with section 51(3) NTA.[52]

55. Whilst it is not clear from the Applicant's POC, it appears that this approach stems from an (incorrect) assumption that either: (a) the application of section 51(3) NTA requires "*just terms*" (such that the applicable principles and criteria for the assessment are, therefore, "*just terms*" instead of the principles and criteria for the assessment of compensation set out in the MA); or (b) if section 51(3) does not require "*just terms*", section 53(1) of NTA does (such that the applicable principles and criteria are "*just terms*").[53] For the reasons expressed at Parts C2.2.2 and C4 below, this is not the effect or operation of section 51(3) or section 53(1) NTA.

56. Further, contrary to the contentions made by the Applicant[54], there is no requirement that the principles or criteria of the MA which are to be applied to determine the entitlement to

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[48] In asserting that section 24MD(3) NTA applies to the Claimed Compensable Acts (see POC at [16]) it is implicit that the Applicant agrees that none of the Claimed Compensable Acts was a compulsory acquisition covered by sections 24MD(2) or (2A) NTA.
[49] See FR POR at [245] – [248].
[50] See, for example, *Griffiths* at [75] – [76].
[51] POC at [41].
[52] See, for example, POC at [46].
[53] See, for example, POC at [43] – [46].
[54] POC at [42] – [42A].

compensation under section 51(3) NTA must not be "*inconsistent with the NTA*". It is the NTA itself which mandates the adoption of the principles and criteria contained in the MA, such that using those principles is clearly consistent with the scheme of Part 2, Division 5 NTA. The only "*consistency*" required is that the Yindjibarndi People are afforded equal treatment to the holders of equivalent non-native title interests under the MA.

C2.2.2 Principles or criteria where section 51(3) NTA applies

57. The provisions of the MA detailed below provide the principles or criteria to be applied to determine compensation for the grant of the Claimed Compensable Acts under section 51(3) NTA:

(a) the native title holders' entitlement to compensation under section 123(2) MA arises in respect of loss and damage suffered, or likely to be suffered, by them as a result of, or arising from, "*mining*"[55] pursuant to a Claimed Compensable Act;

(b) section 123(2) MA is expressed to be subject to sections 123, 124 and 125 which, among other things:

(i) limit the types of claims for compensation that may be made (section 123(1));

(ii) in the case of pastoral and grazing lessees, and lessees of Crown land for the use and benefit of Aboriginal inhabitants, limit the entitlement to compensation to certain heads of damage (sections 123(7) and 125);

(iii) provide for certain matters to be considered by a Warden's Court when determining compensation (sections 124(1) and (3)) including:

(A) any work that the person liable for the compensation has carried out or undertakes to carry out to make good injury to the surface of the land (section 124(1)(a)); and

(B) the amount of any compensation that the owner and occupier or either of them have or has already received in respect of the loss or damage for which compensation is being assessed (section 124(1)(b)); and

(iv) confer power on the Warden's Court to make an order requiring the miner to restore, so far as is reasonably practicable, the surface of any land that was damaged (section 124(2)); and

[55] Defined in section 8 MA to include fossicking, prospecting and exploring for minerals and mining operations, which definition is expanded by section 123(2a) MA to include a reference to marking out in connection with an application for a mining tenement.

(c) section 123(4) provides that, subject to sections 123(1) and (7), and taking into account the matters referred to in sections 124 and 125, the amount of compensation payable under section 123(2) may include compensation for:

(i) being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land;

(ii) damage to the land or any part of the land;

(iii) severance of the land or any part of the land from other land of, or used by, that person;

(iv) any loss or restriction of a right of way or other easement or right;

(v) the loss of, or damage to, improvements;

(vi) social disruption;

(vii) in the case of private land that is land under cultivation, particular losses to those agricultural activities; and

(viii) any reasonable expenses properly arising from the need to reduce or control the damage resulting or arising from the mining.

58. In accordance with the principles and criteria above, the First Respondent submits[56] that for the purpose of assessing the compensation payable for the Claimed Compensable Acts under section 51(3) NTA:

(a) the Applicant must demonstrate a causal link between the loss and damage suffered, or likely to be suffered, and the activity of mining on the Claimed Compensable Act. Accordingly, there is no entitlement to, or liability for, compensation arising in respect of the circumstances prior to, or in which, the grant of the Claimed Compensable Act was made; and

(b) contrary to the case being put by the Applicant, there is no entitlement to, or liability for, compensation arising:

(i) in consideration of permitting entry on to any land for mining purposes (section 123(1)(a)) MA), including whether that entry occurred without the prior permission of the "*owner*" or "*occupier*";

(ii) in respect of the value of any mineral which is or may be in, on or under the surface of any land (section 123(1)(b) MA); or

[56] See FR POR at [303A]. See also FR POR at Part F1.2.

(iii) by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral (section 123(1)(c) MA).

59. It is clear that the principles and criteria for the assessment of compensation under the MA are, pursuant to section 51(3) NTA, determinative and binding upon the Court when assessing compensation by force of that sub-section.[57] Accordingly, the determination of compensation under section 51(3) NTA cannot, for example, be substituted with compensation on "*just terms*"[58] or be made solely by reference to the components for economic loss and cultural loss as if determined in accordance with the general entitlement to compensation in section 51(1) NTA.

60. In *Western Australia v Thomas*[59], the NNTT relevantly made three observations regarding the operation of section 123(4) MA in the context of compensation to native title holders. First, it considered that the items listed in section 123(4) MA, although extensive, were illustrative of the items for which compensation may be payable and were not an exhaustive list.[60] Second, the words of section 123(2) and (4) MA did not, expressly or by necessary implication, exclude consideration of any special or unique aspects of the links which native title holders have to an area of land.[61] Third, because the NTA effectively adopted the principles and criteria of the MA for the determination of compensation under 51(3) NTA, it was strongly arguable that the words should not be read narrowly but should be applied to the actual circumstances of native title holders. Put another way, if the general intention of the legislative scheme of the NTA (which incorporates the relevant provisions of the MA) is to treat native title holders equally with the holders of ordinary title, then that equality should be actual equality, and not merely formal equality.[62]

61. Relying on those principles, the NNTT determined that:

> *..the plain meaning of the words of s 123 of the* [MA]*, whether read in the context of that Act or within the context of the* [NTA]*, leads to the conclusion that native title holders are to be put in a position of substantive equality with the owners of land when their entitlement to compensation is being assessed. It follows that, if owners of ordinary title are entitled to compensation for "all loss and damage" suffered or likely to be suffered by them resulting or arising from the actual mining, then native title holders are entitled to no less, even if the nature of their loss or damage is different from that of a non-Aboriginal landowner.*[63]

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[57] Section 51(3) NTA provides that the "*court, person or body making the determination of compensation* ***must***" apply them. This can be contrasted with sections 51(2) and 51(4) NTA which provides that the court "*may*" take account of relevant principles and criteria.
[58] Which appears to be the position taken by the Applicant (see paragraph [55] above).
[59] [1996] NNTTA 30; (1996) 133 FLR 124.
[60] *Western Australia v Thomas* at p.191.
[61] *Western Australia v Thomas* at p.191.
[62] *Western Australia v Thomas* at p.191.
[63] *Western Australia v Thomas* at p.193.

The NNTT ultimately concluded that the assessment of compensation by reference to the criteria in section 123 of the MA: (a) may take into account any special or unique aspects of links of the native title parties to that land; and (b) was not limited to the freehold value of the land which is the subject of the proposed act.[64]

62. The joint majority in *Ward HC* similarly observed that "*it is also significant that the compensation payable under the* [MA] *includes compensation for the loss of the land and for 'social disruption', which may be particularly apposite in respect of any compensation for native title holders*".[65]

63. In the First Respondent's submission, it would seem clear that the principles and criteria contained in sections 123(2) and (4) MA encompass compensation for the special or unique ways in which loss or damage may be suffered by native title holders (i.e. they compensate native title holders for any loss or damage that may by suffered in respect of both aspects of the statutory definition of native title in section 223 NTA (i.e. the physical or material and the cultural or spiritual)).[66]

64. On that basis, to the extent that any particular MA principles or criteria are unclear in their operation to native title holders, the First Respondent submits that the *Griffiths* principles for the assessment of compensation are sufficiently congruent that it may (depending on the facts) be appropriate to apply, by way of analogy, the *Griffiths* principles for the assessment of:

(a) economic loss, for example, to determine the compensation referred to in section 123(4)(a) MA (i.e. by assessing the economic value of affected native title rights in relation to the area of land in respect of which the native title holders have been deprived of the possession or use, or any particular use, by reference to the equivalent freehold value of that area of land and the legal content of the affected native title rights); and

(b) non-economic loss in the form of cultural loss, for example, to determine the compensation referred to in section 123(4)(b) and (f) MA (i.e. in respect of both damage to the land and social disruption, by assessing the effect of mining on the cultural value of the land by reference to native title holders' sense of loss of connection to country),

subject to any adaptation of those principles of assessment as are necessary to determine compensation in accordance with the MA principles or criteria. The principles with respect to the calculation of economic loss and cultural loss are discussed further below in Parts E2 – E4 below.

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[64] *Western Australia v Thomas* at p.195.
[65] *Ward (HC)* at [316].
[66] As to which see, for example, *Griffiths* at [23] and [44].

C3 ENTITLEMENT TO COMPENSATION: SECTION 10 RDA AND SECTION 45 NTA

This section deals with Agreed Issue 11.

C3.1 No entitlement to compensation under the NTA by operation of section 10 RDA and section 45 NTA

65. As discussed at Part C2.1 above, if the Court determines that the MA provides compensation to the Yindjibarndi People as *"owners"* or *"occupiers"*, the Applicant contends[67] that, nevertheless, section 10 RDA and section 45 NTA are engaged such that compensation for the Claimed Compensable Acts is "*to be determined in accordance with section 50* [NTA] *as if the entitlement to compensation arose under* [the NTA]".[68]

66. In other words, the Applicant asserts that, despite the effect of section 24MD(3) NTA being that compensation for the Claimed Compensable Acts is to be determined under the MA and not the NTA, the RDA nevertheless intervenes to make that compensation claimable under the NTA. This is neither the correct, nor logical, interpretation of the interaction and effect of the RDA and the NTA.

67. The RDA does not operate in this way in relation to the matters covered by the NTA. As explained by the High Court in *Western Australia v The Commonwealth*:[69]

> *... even if the Native Title Act contains provisions inconsistent with the Racial Discrimination Act, both Acts emanate from the same legislature and must be construed so as to avoid absurdity and to give to each of the provisions a scope for operation. The general provisions of the Racial Discrimination Act must yield to the specific provisions of the Native Title Act in order to allow those provisions a scope for operation…*

68. In circumstances where Subdivision M applies to an act, if the State law satisfies the "*similar compensable interest test*" and also provides for compensation to native title holders, the effect of section 24MD(3)(b) NTA is that compensation is payable under the State law and not the NTA. This is entirely consistent with the scheme of the NTA which requires parity between native title holders and the holders of ordinary title, including in relation to compensation. Parliament's concern was to ensure that, whether under the NTA or under State law, native title holders receive the same entitlement to compensation as non-native title holders.

69. In those circumstances the RDA does not have any residual operation that would have the effect of substituting the entitlement to compensation under State law and making that compensation

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[67] POC at [21] – [23].
[68] Section 45(1) NTA.
[69] [1995] HCA 47; (1995) 183 CLR 373 at p.484.

claimable under the NTA. Thus, in *Ward (HC)* the joint majority considered that if the native title holders were "*owners*" or "*occupiers*" within the meaning of section 8 MA they would have been entitled to compensation under the MA as such and noted "[t]*his consequence would flow apart from the RDA, which would not be engaged*".[70]

70. In the alternative, the First Respondent submits that the RDA is generally only engaged to confer a right to compensation on native title holders where a State law confers a right to compensation on the holders of equivalent non-native title interests but fails to confer that right on native title holders.[71] In this instance, however, there is no disparity of treatment between native title rights and interests and the equivalent non-native title rights and interests under section 123 MA, and section 10 RDA and section 45 NTA are thus not engaged in any event.

71. In particular, if native title holders meet the criteria that give rise to an entitlement under the MA (i.e. they are an "*owner*" or "*occupier*" of land where mining takes place and they suffer, or are likely to suffer, loss or damage resulting or arising from the mining), they will be entitled "*according to their respective interests*" to compensation under Part VII MA in the same manner as any other "*owner*" or "*occupier*" as the case may be.

72. Further, compensation is not to be assessed as if their native title was instead "*private land*", including so as to include an allowance for such compensation as might become payable to the owner of private land under the various provisions of the MA. Rather the categorisation of land as "*Crown land*", "*reserve land*" or "*private land*" under the MA does not alter the entitlement of an "*owner*" or "*occupier*" to compensation under section 123(2) MA (which entitlement arises in respect of "*any land*" where mining takes place and is not limited to "*private land*" as defined in section 8 MA).

73. To the extent that section 123 MA includes a reference to "*private land*", those subsections are limited to either: (a) providing for additional heads of compensation that arise in the case of "*private land*" under cultivation[72]; or (b) ensuring that, in circumstances where an "*owner*" and an "*occupier*" of any "*private land*" are both entitled to compensation for loss or damage sustained by each of them as a result of mining, the compensation is severally apportioned (as opposed to jointly).[73]

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[70] *Ward HC* at [319]. See also *James v Western Australia* [2010] FCAFC 77; (2010) 184 FCR 582 at [54] and *Griffiths* at [74] – [76].
[71] See FR POR at [214] and [225]; *Griffiths* at [75] – [76].
[72] Section 123(4) MA.
[73] Section 123(5) and (6) MA.

74. Additionally, the effect of section 10 RDA is only to provide parity with the holders of equivalent non-native title rights and interests. This means, for example, that:

(a) in relation to non-exclusive native title, the effect of section 10 RDA is not to provide parity of treatment with the holders of freehold title: it is to provide parity of treatment with the holders of equivalent, non-exclusive, non-native title rights and interests[74]; and

(b) section 10 RDA has no work to do in respect of section 38 MA as there is no disparity of treatment under the MA between the Yindjibarndi People's native title rights and interests and the holders of equivalent non-native title rights and interests. Section 38 MA applies to a very small number of landholders, namely those holders of a Crown grant issued prior to the commencement of the *Land Act 1898* (WA) where the grant included a right of the owner of the land to retain any minerals (excluding gold, silver and precious metals) in or upon the land. After the commencement of the *Land Act 1898* (WA), all Crown grants were required to contain a reservation to the State in respect of all minerals, such that the owners of freehold land since that time have had no rights to the minerals in or upon their land. Similarly, the Yindjibarndi People's native title rights and interests expressly do not include any rights in relation to minerals as defined in the *Mining Act 1904* (WA) (repealed) or the MA[75].

C3.2 Alternatively: where there is an entitlement to compensation under the NTA by operation of section 10 RDA and section 45 NTA

75. If, contrary to the First Respondent's submissions above, the Court determines that an entitlement to compensation for the Claimed Compensable Acts arises under the NTA by operation of section 10 RDA and section 45 NTA, the First Respondent contends that, for the reasons expressed at paragraph [51] above, section 51(3) NTA applies in those circumstances (and compensation is assessed in the manner set out in Part C2.2).

C4 ENTITLEMENT TO COMPENSATION PURSUANT TO SECTION 53(1) NTA

This section deals with Agreed Issue 9.

C4.1 No entitlement to compensation under section 53(1) NTA

76. Section 53(1) NTA provides for an additional entitlement to compensation where the doing of a future act or the application of any provision of the NTA would result in a "*paragraph 51(xxxi)*

[74] *Griffiths* at [67] – [76].
[75] Yindjibarndi Determination at [5(c)].

acquisition of property" other than on "*paragraph 51(xxxi) just terms*".[76] As noted by the High Court in *Griffiths,* section 53(1) is a "*shipwrecks clause*" designed to ensure the constitutional validity of the compensation provisions in Part 3, Division 5 NTA.[77]

77. Regardless of where the entitlement to compensation arises under the NTA, the Applicant asserts that section 53(1) NTA applies to provide an entitlement to compensation, or further compensation, on "*paragraph 51(xxxi) just terms*".[78]

78. In the First Respondent's submission, section 53(1) NTA does not have a general or independent operation. Rather, section 53(1) NTA arises for consideration only in circumstances where: (a) the MA does not provide compensation to the Yindjibarndi People; (b) there was a "*paragraph 51(xxxi) acquisition of property*"; and (c) the determination of compensation under section 51(3) NTA (i.e. by the application of the principles and criteria under the MA) was other than on "*paragraph 51(xxxi) just terms*". In other words, any claim for *"compensation in addition to any otherwise provided by this Act"* under section 53(1) NTA should first require an assessment of compensation that is otherwise payable under the NTA. Only then is the Court in a position to consider whether or not section 53 NTA is engaged.

C4.1.1 Not a "*paragraph 51(xxxi) acquisition of property*"

79. In the First Respondent's respectful submission the Applicant has not clearly explained in its POC the basis upon which it asserts that there was a relevant "*paragraph 51(xxxi) acquisition of property*". However, the First Respondent says that the grant of the Claimed Compensable Acts did not result in a "*paragraph 51(xxxi) acquisition of property*", including because the grant of each of the Claimed Compensable Acts is a "*future act*" to which the non-extinguishment principle applies.[79]

C4.1.2 Acquisition was on "*paragraph 51(xxxi) just terms*"

80. If, which is denied, the grant of the Claimed Compensable Acts amounted to "*paragraph 51(xxxi) acquisition of property*", the First Respondent says that any such acquisition was on "*paragraph 51(xxxi) just terms*", such that section 53(1) NTA is not engaged.[80]

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[76] The references to "*paragraph 51(xxxi) just terms*" and "*paragraph 51(xxxi) acquisition of property*" in section 53(1) NTA are to be construed by reference to paragraph 51(xxxi) of the Constitution: see section 253 NTA.
[77] *Griffiths* at [49].
[78] POC at [26].
[79] FR POR at [216].
[80] FR POR at [218] and [306].

81. As noted above, the term "*paragraph 51(xxxi) just terms*" is to be construed by reference to paragraph 51(xxxi) of the Constitution. In the constitutional context, unlike "*compensation*" which connotes full money equivalence, the expression "*just terms*" evokes the notion of "*fair dealing*" and the measure of "*just terms*" involves a consideration of what is fair, equitable and just as between the community and the owner of the thing taken.[81] It gives rise to an inquiry which focuses upon whether the law amounts to a true attempt to provide fair and just standards of compensation to the owner of the property, as between the owner and the government.[82]

82. What in practice comprises "*just terms*" will depend upon the circumstances of each case and there is no precise formula that must be adopted to ensure that an acquisition is on just terms. Rather, it is for the Parliament to determine the appropriate compensation in respect of an acquisition.[83] It has a wide degree of legislative judgement and discretion in doing so.[84]

83. The Applicant's POC fails to identify, or explain, how the application of section 51(3) NTA in respect of the Claimed Compensable Acts (i.e. a determination of compensation which applies the principles and criteria contained in the MA) is not on "*paragraph 51(xxxi) just terms*" such that section 53(1) is engaged. Rather, the POC merely seems to assume that this is the case.[85]

84. In the First Respondent's submission, any determination of compensation for the Claimed Compensable Acts under section 51(3) NTA (i.e. by the application of the principles and criteria under the MA) is on "*paragraph 51(xxxi) just terms*". In particular, as discussed at paragraphs [60] – [63] above, native title holders, like the holders of ordinary title, are entitled to compensation under section 123 MA for "*all loss and damage*" suffered or likely to be suffered by them, even where the nature of their loss or damage may be different from that of an ordinary title holder. The clear implication from the reasons of the joint majority in *Griffiths* is that it was satisfied that parity of treatment between native title holders and the holders of equivalent non-native title rights amounted to "*just terms*".[86]

C4.1.3 "Top up" nature of section 53(1) NTA

85. In the event that the Court determines against the First Respondent's submission that section 53(1) NTA applies, the First Respondent says that it acts to "*top up*" the difference in compensation

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[81] *Nelungaloo Pty Ltd v Commonwealth* [1947] HCA 58; (1948) 75 CLR 495 at p.569
[82] *Grace Bros Pty Ltd v Commonwealth* [1946] HCA 11; (1946) 72 CLR 269 at pp.280 and 290 – 291. See also *Nelungaloo v The Commonwealth* [1952] HCA 11; (1952) 85 CLR 545 at p.600.
[83] See *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1 at pp.289 – 90 and the cases there cited. See also *Smith v ANL Limited* [2000] HCA 58; (2000) 204 CLR 493 at [48].
[84] *Grace Bros Pty Ltd v Commonwealth* [1946] HCA 11; (1946) 72 CLR 269 at pp.285, 291 and 295.
[85] See, for example, POC at [43] – [46].
[86] See, for example, *Griffiths* at [73] – [76].

between that determined under section 51(3) NTA and what would be required to provide "*paragraph 51(xxxi) just terms*". In other words, section 53(1) NTA does not replace section 51(3) NTA, it merely supplements the determination of compensation made under section 51(3).[87] Understanding the "*top up*" nature of section 53(1) NTA is particularly relevant where, as here, the party liable for the compensation determined under section 51(3) NTA may be different to the party who is liable to "*top up*" that amount under section 53(1).[88]

C5 CONSTRUCTION AND OPERATION OF SECTION 49 NTA

This section deals with Agreed Issue 6.

86. To the extent that YMAC's POR brings into question the proper construction and operation of section 49 NTA[89], the First Respondent says that this is a hypothetical issue which does not arise on the pleadings of the other parties. This is because the Applicant has informed the First Respondent that "*it is not presently aware of any acts that have occurred within the application area and for which it may have an entitlement to compensation, other than those acts which are the subject of the present application*".[90] In those circumstances the First Respondent says that YMAC should not be permitted to raise the construction of section 49 NTA as an issue for resolution in this proceeding.

D. Compensation payable by State or FMG Respondents?

D1 UNDER THE MA

87. The First Respondent's primary case is that, as compensation is payable under the MA (and not the NTA), it follows that any application for compensation must be made to the Warden's Court under the MA and against the FMG Respondents because, under the MA, it is the person mining on the land who is liable to pay compensation.

D2 UNDER THE NTA

This section deals with Agreed Issues 10(a), 10(b), 10(c)(ii) and 10(d).

D2.1 Liability to pay by operation of section 24MD(3)(b) NTA

88. In the alternative, which is denied by the First Respondent, if an entitlement to compensation

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[87] Accordingly, and contrary to POC at [45], where section 53(1) of the NTA applies, section 51(2) does not: (a) provide the principles and criteria for the "*top up*" under section 53(1); or (b) replace the application of section 51(3). In this respect the "*compulsory acquisition*" referred to in section 51(2) NTA has a different meaning from a "*paragraph 51(xxxi) acquisition of property*".

[88] As to which see paragraph [99] below.

[89] YMAC POR at [20(b)(ii)-(iii)].

[90] FR POR at [195(a)].

under the NTA arises in relation to any of the Claimed Compensable Acts by operation of section 24MD(3)(b) NTA, section 24MD(4)(b) NTA provides that compensation is payable by the First Respondent unless "*a law of the State … provides that a person other than the Crown in any capacity is liable to pay the compensation*", in which case that person is liable to pay.

89. Section 125A MA is a law of the State of the kind referred to in section 24MD(4)(b)(i) NTA.[91]

90. Section 125A was introduced into the MA by section 16 of the *Acts Amendment (Land Administration, Mining and Petroleum) Act 1998* (WA). It provides that "*if compensation is payable to native title holders for or in respect of the grant*[92] *of a mining tenement"* the person liable to pay compensation is, *inter alia*, either: (a) the holder of the mining tenement at the time a determination of compensation is made; or (b) if, at the time a determination of compensation is made, the mining tenement has been surrendered, forfeited or has expired, the holder of the mining tenement immediately before its surrender, forfeiture or expiry.

91. As all of the Claimed Compensable Acts were granted after the introduction of section 125A MA on 11 January 1999, the person liable to pay compensation in respect of each of the Claimed Compensable Acts is the person described in section 125A MA (being the relevant FMG Respondent).[93]

D2.1.1 Is s.125A invalid by reason of section 109 of the Constitution?

92. The FMG Respondents assert that section 125A MA is invalid by force of section 109 of the Constitution on the basis that it does not differentiate between compensation for the grant of mining tenements falling within Subdivision M and those falling within other Subdivisions of the NTA (such as Subdivision H) which do not have a provision in similar terms to section 24MD(4)(b)(i) NTA.[94] In other words, as section 125A MA does not specifically refer to itself as being a law of the kind referred to in section 24MD(4)(b)(i) NTA, the FMG Respondents assert that it applies to compensation for the grant of all mining tenements, whether within Subdivision M or not.

93. For the avoidance of doubt, the First Respondent does not assert that section 125A MA has any effect in respect of compensation for mining tenements that do not fall under Subdivision M of Part 2, Division 3 NTA.[95] Rather, in circumstances where the NTA only permits the introduction

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[91] FR POR at [232].
[92] Section 125A(3) MA provides that "*grant includes extension or renewal*."
[93] See FR POR at [233]. See also FR POR at [237(b)(ii)] for the FMG Respondent liable in respect of each of the Claimed Compensable Acts.
[94] FMG POR at [29(g)(i),(ii) and (iii)].
[95] See, for example FR POR at [238A(b)-(c)].

of a provision such as section 125A MA in respect of "*future acts*" to which Subdivision M apply, section 125A MA must be read to only apply to "*future acts*" under Subdivision M.

94. Further, or in any event, even if section 125A MA could be construed as having an operation beyond "*future acts*" covered by Subdivision M of Part 2, Division 3 NTA, it is incorrect to suggest that the effect of section 109 of the Constitution would be to invalidate the whole of section 125A MA.

95. Rather, section 109 provides that "*when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid*" (emphasis added). Accordingly, under section 109, only those parts of a law of the State which are inconsistent with a law of the Commonwealth will be considered invalid, provided that the separation of the inconsistent parts of the State law will not produce results the State Parliament never intended to enact. As Dixon J explained in *Wenn v Attorney-General (Vict)*[96]:

> [W]*hile s 109 invalidates State legislation only so far as it is inconsistent, the question whether one provision of a State Act can have any operation apart from some other provision contained in the Act must depend upon the intention of the State legislation, ascertained by interpreting the statute. ... No doubt s 109 means a separation to be made of the inconsistent parts from the consistent parts of a State law. But it does not intend the separation to be made where division is only possible at the cost of producing provisions which the State Parliament never intended to enact.*

96. Accordingly, if the Court finds that section 125A MA purports to apply to compensation for the grant of mining tenements not subject to Subdivision M of Part 2, Division 3 NTA, the effect of section 109 of the Constitution would be to limit the operation of section 125A MA to compensation for mining tenements subject to Subdivision M, rather than invalidate section 125A in its entirety. It is also clear that limiting the operation of section 125A MA to "*future acts*" to which Subdivision M applies would not have an effect that the State Parliament "*never intended to enact*"[97].

D2.2 Liability to pay under Subdivision H or I of Part 2, Division 3 NTA

97. The First Respondent says that no entitlement to compensation under the NTA arises in relation to any of the Claimed Compensable Acts by operation of section 24HA(5) NTA. However, if the Court finds that it does, the First Respondent concedes that, by operation of section 24HA(6)(b) NTA, the person liable to pay that compensation is the State and section 24MD(4)(b) NTA and/or section 125A MA have no application in those circumstances.[98]

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[96] [1948] HCA 13; (1948) 77 CLR 84 at p.122
[97] See *Wenn v Attorney-General (Vict)* at p.122.
[98] FR POR at [238A(b)].

98. Similarly, the First Respondent says that no entitlement to compensation under the NTA arises in in relation to the renewal or extension of term of any of the Claimed Compensable Acts by operation of section 24ID(1)(d) NTA. However, if the Court finds that it does, the First Respondent concedes that, by operation of section 24ID(2)(b) NTA, the person liable to pay that compensation is the State and section 24MD(4)(b) NTA and/or section 125A MA have no application in those circumstances.[99]

D2.3 Liability to pay by operation of s.53(1)

99. The First Respondent says that section 53(1) NTA has no operation in this case. However, if the Court finds that it does, the First Respondent says that it acts as a "*top up*" provision.[100] Accordingly, the State is only liable under section 53(1) NTA for the difference (i.e. the "*top up*") between any determination of compensation under section 51(3) and what would be required to provide the native title holders with "*paragraph 51(xxxi) just terms*" under section 53(1). The FMG Respondents would remain liable for the compensation under section 51(3) NTA.

E. Claimed effects etc. on the native title rights and interests

E1 NATIVE TITLE RIGHTS AND INTERESTS

This section deals with Agreed Issues 5 and 7.

E1.1 The effect on the native title by the Claimed Compensable Acts

100. The nature and extent of the native title rights and interests held by the Yindjibarndi People in the Yindjibarndi Determination Area are described in paragraphs 3 and 4 of the Yindjibarndi Determination and comprise exclusive native title rights and interests[101] and certain non-exclusive native title rights and interests.[102] Those native title rights and interests are subject to the qualifications contained in paragraph 5 of the Yindjibarndi Determination[103] and have the relationship with the "*Other Interests*"[104] set out in paragraph 9 of the Yindjibarndi

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[99] FR POR at [238A(c)].
[100] See paragraph [78] and [85] above.
[101] Being the right to possession, occupation, use and enjoyment of that area to the exclusion of all others.
[102] Being those native title rights and interests replicated at paragraph [7(a) – (k)] of the POC.
[103] Including, in particular, that the native title rights and interests do not confer: (a) exclusive rights in relation to water in any watercourse, wetland or underground water source as defined in the *Rights in Water and Irrigation Act 1914* (WA); or (b) any rights in relation to minerals, petroleum, geothermal energy resources or geothermal energy.
[104] Defined in paragraph 11 of the Yindjibarndi Determination.

Determination. Some of the Claimed Compensable Acts are listed as "*Other Interests*" in the Yindjibarndi Determination.[105]

101. In the First Respondent's submission, it is a novel feature of this proceeding that the Applicant has not identified in its application or by its POC the particular "*loss and damage suffered or likely to be suffered by them*" (to use the language of section 123 MA) which has resulted from the Claimed Compensable Acts.

102. Rather the Applicant focusses on how the Yindjibarndi People were treated by the FMG Respondents in the exercise of their statutory rights under Part 2, Division 3 of the NTA and has alleged, in substance, a failure of negotiation between it and the FMG Respondents and sought compensation equivalent to that which it asserts it might have obtained had the negotiations resulted in an agreement.[106] These issues have been the subject of a long-running and highly publicised dispute between the Yindjibarndi People and the FMG Respondents.[107]

103. To the extent that compensation for the Claimed Compensable Acts falls to be determined under Part 2, Division 5 of the NTA (which is denied), the First Respondent submits that these matters are not compensable under section 51(3) (having regard to the principles and criteria of the MA), or alternatively, are only compensable to the extent that they constitute elements of section 123 MA. In its focus upon the failed negotiations and the conduct of the FMG Respondents, the Applicant has failed to plead, or failed to plead adequately, the effects of the Claimed Compensable Acts upon its native title rights and interests and/or the loss and damage suffered by it in terms referable to section 123 MA.

104. In this respect, it is clear that the Applicant's native title rights and interests have not been surrendered, acquired or extinguished by the Claimed Compensable Acts. Instead, as discussed at paragraph [28] above, on the assumption that Subdivision M of Part 2, Division 3 NTA applied to validate the Claimed Compensable Acts, pursuant to section 24MD(3)(a) NTA, the "*non-extinguishment principle*" (as defined in section 238 NTA) applies to each of the Claimed Compensable Acts.

105. By operation of the "*non-extinguishment principle*", native title rights and interests continue to exist in their entirety in relation to the whole of the area affected by the Claimed Compensable Acts, however, the rights granted under the Claimed Compensable Acts and the doing of activities

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[105] See FR POR at [16], [22], [27], [33], [39], [45], [51], [73], [81], [85], [89], [93], [101], [105], [139], [144], [150], [155], [160], [165] and [170].
[106] POC at [35], [36] and [46].
[107] See, for example, FR POR at [297].

pursuant to those rights temporarily prevail over the native title rights and interests to the extent that the two are inconsistent.[108] Inconsistency is a question of fact and the Applicant bears the onus of demonstrating the relevant effect which it relies upon for compensation. The reasoning of the High Court in *Western Australia v Brown*[109] illustrates that there may in many circumstances be little or no inconsistency between the existence and exercise of native title rights and interests and those of the holder of a tenement under the MA. Upon the cessation of the MA rights or their exercise, the native title rights remain, unaffected.[110]

106. It follows that it is not necessarily the case that the Yindjibarndi People's native title rights and interests have been wholly or substantially suppressed by the grant of any Claimed Compensable Act or that such an effect relates to the entirety of the area the subject of any particular Claimed Compensable Act (or all of them). Rather, it is only where the evidence suggests that all incidents of the native title rights and interests are entirely incapable of continued existence or exercise that the native title rights and interests will have been wholly suppressed. Further, that complete suppression is only to the extent, for the duration of, and in respect of the area in which the inconsistent activities are being conducted pursuant to the Claimed Compensable Acts by the FMG Respondents.

107. The Court will, therefore, need to identify with precision the effects of the Claimed Compensable Acts on the native title rights and interests in order to quantify the determination of compensation under Part 2, Division 5 of the NTA. All of the relevant facts are yet to be revealed or tested in the proceeding.

E1.2 Operation and effect of section 47B NTA

108. In the Yindjibarndi Determination, the Court determined that section 47B NTA applied to certain land and waters within the area of the Yindjibarndi Claim.[111] Two issues have arisen in relation to the application of section 47B NTA. The first concerns whether section 47B can operate in relation to a compensation application, as distinct from a native title determination application.[112] The second relates to the point in time when exclusive native title existed in the Exclusive Area.[113]

109. The criteria for section 47B of the NTA to apply are, *inter alia*, that: (a) there is a claimant application in relation to an area; (b) when the application is made, the area is, effectively, vacant

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[108] See, for example, *Jango v Northern Territory* [2006] FCA 318; (2006) 152 FCR 150 at [78].
[109] [2014] HCA 8; 253 CLR 507.
[110] *Western Australia v Brown* at [57] and [63] – [64].
[111] Yindjibarndi Determination at paragraph 7, Schedule 4.
[112] FMG POR at [5(f) – (g)].
[113] FR POR at [12].

Crown land; and (c) when the application is made, one or more members of the native title claim group occupy the area.[114]

110. Where section 47B NTA applies, section 47B(2) provides generally that "[f]*or all purposes under this Act in relation to the application*" any extinguishment of the native title rights and interests in relation to the area that are claimed in the application by the creation of any prior interest in relation to the area must be disregarded. It was on this basis that a right of exclusive possession was determined to exist in an area identified as the Exclusive Area within the Yindjibarndi Determination.[115] Absent the application of section 47B NTA, the native title rights and interests would have been non-exclusive in nature only.[116]

111. Section 47B(3) provides that if the determination on the application is that the native title claim group holds the native title rights and interests claimed: (a) the determination does not affect the validity of the creation of any prior interest, or any interest in the Crown or any statutory authority in any public works on the land or waters concerned; and (b) the "*non-extinguishment principle*" as defined in section 238 NTA applies to the creation of any prior interest in relation to the area.

E1.2.1 First issue: Can section 47B operate in relation to a compensation application

112. In respect of the first issue, the First Respondent notes that the decision of Mansfield J in *Griffiths v Northern Territory*[117] is of relevance. In that case, although section 47B applied in the determination proceedings with the effect that the claim group was entitled to a determination that they hold exclusive native title rights and interests in an area from the date of the determination, Mansfield J ignored the effect of this determination when assessing compensation, thus treating the native title as having been extinguished.[118] Mansfield J arrived at this conclusion as a result of an analysis of the text of section 47B itself, as well as its context.[119]

113. If section 47B NTA does not operate in relation to the compensation application the subject of these proceedings, the Applicant's claim for compensation falls to be assessed on the basis that any native title rights of exclusive possession had been extinguished throughout the *whole* of the Application Area before the grant of the Claimed Compensable Acts. In other words, compensation must be assessed on the basis of the effect of the Claimed Compensable Acts on the Applicant's non-exclusive native title rights and interests only.

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[114] Section 47B(1) NTA.
[115] Yindjibarndi Determination at [7] and [11] (definition of Exclusive Area); Part 2 Schedule 1; and Schedule 3.
[116] FMG POR at [5(b) – (e)].
[117] [2014] FCA 256
[118] *Griffiths v Northern Territory* [2014] FCA 256 at [67].
[119] *Griffiths v Northern Territory* [2014] FCA 256 at [68] – [77].

E1.2.2 Second Issue: point in time in which exclusive possession arose

114. The second issue only arises if section 47B NTA is found to operate in relation to a compensation application. The Applicant contends that the effect of section 47B is the Yindjibarndi People's right to possession, occupation, use and enjoyment of the Exclusive Area to the exclusion of all others has *always* existed and has not ever been subject to prior extinguishment.[120]

115. In contrast, the First Respondent submits that the reviving effect of section 47B is engaged at the point in time at which the determination of native title is made. In respect of those Claimed Compensable Acts that were done *before* the Yindjibarndi Determination was made, compensation would be assessed on the basis of their effect on the Applicant's non-exclusive native title rights and interests (including in respect of those Claimed Compensable Acts that fall within the Exclusive Area). In respect of the effects of the Claimed Compensable Acts arising *after* the Yindjibarndi Determination was made, compensation would be assessed in the Exclusive Area on the basis of their effect on the Applicant's exclusive native title rights and interests.

116. In support of its argument, the Applicant places reliance on an observation made by Rares J in *Warrie v Western Australia (No.2)*[121] that "*by force of ss 11(1), 47A(2) and 47B(2), no extinguishment of native title rights and interests ever occurred…*" In the First Respondent's respectful submission, this aspect of his Honour's reasons for decision was wrong at law.[122]

117. The Applicant contends that because there was no appeal from the decision in *Warrie (No.2)*, the First Respondent is now estopped from contending that the reviving effect of section 47B NTA is engaged at the point in time at which the determination of native title is made. In the First Respondent's respectful submission, Rares J's observation is *dicta* in that it is an observation relating to a matter which would not have changed the content of the Yindjibarndi Determination. It was not a matter which would sensibly have founded an appeal (directed at only at challenging the reasons, but not the result).

E2 THE QUANTUM OF COMPENSATION: INTRODUCTION

E2.1 Need to identify the quantum claimed

118. A noted in its POR, the First Respondent says that the Applicant should state for the Court and the parties the quantum of its claim. This has not yet occurred. In the First Respondent's submission, to fail to identify such matters at this stage of the proceeding is not consistent with

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[120] POC at [6].
[121] [2017] FCA 1299; 366 ALR 467 at [6]
[122] See *Northern Territory v Griffiths* [2017] FCAFC 106; (2017) 256 FCR 478 at [229], [231] and [233] and, in particular, references therein to exclusive native title rights being restored / recognised from the date of the determination.

the overarching purpose set out in section 37M of the *Federal Court of Australia Act 1976* (Cth) and with the obligations of parties set out in section 37N of that Act.

E2.2 Relevance of economic and cultural loss principles

119. As discussed at Part C2.2 above, in the event that compensation for the Claimed Compensable Acts arises under Part 2, Division 5 NTA, that compensation is to assessed by the Court in accordance with section 51(3) NTA by application of the principles and criteria contained in the MA.

120. Accordingly, the principles for the assessment of compensation identified by the High Court in *Griffiths* in the context of its consideration of section 51(1) NTA "*just terms*" (i.e. a bifurcated assessment of economic and cultural loss) are not directly applicable in this proceeding. Whilst the concepts of economic and cultural loss may be of use when interpreting the principles and criteria contained section 123 MA, they do not supplant those principles and criteria.

121. In the First Respondent's respectful submission, the Applicant's POC erroneously assumes that compensation is to be determined simply on "*just terms*" and that the relevant principles to be applied are those of economic and cultural loss, without any consideration of the principles and criteria contained in the MA. In that respect, the Applicant's claim is misconceived and it is, accordingly, mistaken to discuss compensation for economic loss or cultural loss divorced from the requirements of section 51(3) NTA and principles and criteria contained section 123 MA. That being said, the First Respondent accepts that there is a degree of congruence between section 123 MA and the *Griffiths* principles such that the latter may be of assistance, at least by analogy.

E3 ECONOMIC LOSS

This section deals with Agreed Issues 4, 7 and 8.

E3.1 Compensation for economic loss

122. To the extent that economic loss may be relevant to a determination of compensation in accordance with section 51(3) NTA (for example, by way of analogy), the relevant principles for the assessment of compensation for economic loss are those set out at Part F1.4 of the FR POR. The First Respondent submits that economic loss is not to be assessed in the manner set out in paragraphs [35] and [46] of the POC. Rather, those paragraphs represent a significant departure from the principles contained in *Griffiths* with respect to economic loss.

123. In summary, compensation for economic loss requires an objective assessment of the value of the native title rights having regard to their legal content, divorced from any consideration of the

market value of any statutory rights that may attach to those rights. Contrary to the contentions made by the Applicant[123], compensation for economic loss is not to be assessed by reference to: (a) the circumstances in which the Claimed Compensable Acts were done; (b) the amount that the Yindjibarndi People would have been prepared to accept in exchange for their consent to the grant of the Claimed Compensable Acts for the purpose of Part 2, Division 3 NTA; or (c) the value of any statutory rights and procedures contained in Part 2, Division 3 NTA that may have applied.

124. In this respect, the claim being made by the Applicant is factually very different from the claim made in *Griffiths*. It does not, for example, focus on the effect of particular acts on the native title rights or on the country. Instead the claim focuses on how the Yindjibarndi People were treated by the FMG Respondents in the exercise of their statutory rights under Part 2, Division 3 NTA, with compensation claimed on the basis of what the Yindjibarndi People could reasonably have expected to achieve had that process resulted in an agreement.[124]

125. Leaving to one side the correctness of the Applicant's claim in this respect, to the extent that the comparative terms of any other native title agreements are publicly available (for example via extracts from the Register of Indigenous Land Use Agreements), it would appear that those agreements are not readily referrable to the present circumstances.

126. Further, the First Respondent denies that it has paid, or is required to pay, any compensation (or any compensation of the kind described in paragraph [46(aaaa)] of the POC) to obtain the consent of registered native title claimants or registered native title bodies corporate to the grant of mining tenements for the purpose of Part 2, Division 3 NTA. Accordingly, there are no agreements of the kind referred to in paragraph [46(aaaa)] of the POC that have been entered into by the First Respondent.

E3.2 Limit on compensation: section 51A

127. On the current state of the law, section 51A NTA: (a) equates the economic value of **exclusive** native title in relation to the land with the economic value of a freehold interest in the land; and (b) in the case of extinguishment of all subsisting native title in relation to the land, applies an upper limit on compensation for economic loss at that amount.

128. The effect of section 51A NTA is that compensation for economic loss is to be measured by reference to the freehold value of the land and on the basis that the freehold value of the land caps the maximum compensation payable for economic loss in all cases. It follows that compensation

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[123] POC at [35], [36] and [46].
[124] See POC at [35], [36] and [46]. See also *Expert Report of Murray Meeton* filed 22 March 2023 at [2(b)].

for economic loss for an act that does not involve extinguishment of all subsisting native title in relation to the land is to be determined for an amount below the upper limit.

129. None of the Claimed Compensable Acts extinguished the native title rights and interests. On that basis, the First Respondent says that consideration of the upper limit in section 51A NTA is not engaged in relation to any of the Claimed Compensable Acts.[125]

E4 CULTURAL LOSS

This section deals with Agreed Issues 4 and 7.

130. To the extent that cultural loss has relevance to a determination of compensation in accordance with section 51(3) NTA (for example by way of analogy), the relevant principles for the assessment of compensation for cultural loss are those set out at Part F1.5 of the FR POR. The First Respondent submits that cultural loss is not to be assessed in the manner set out in paragraphs [36] and [46(b) – (c)] of the POC. Rather, those paragraphs represent a significant departure from the principles contained in *Griffiths* with respect to cultural loss.

131. In summary, compensation for cultural loss arises only in respect of the effect of a compensable act on spiritual connection with the land which is demonstrated by evidence of a group-felt sense of loss of spiritual connection with the land, assessed by reference to the traditional laws and customs that give rise to that connection.[126] It is not, as contended by the Applicant[127]: (a) an award in the nature of a solatium for mental distress caused by mining, the grant of the Claimed Compensable Acts or the circumstances in which those grants were made; or (b) payable for a breach of traditional law and custom or in respect of a split in the native title holding group, unless it is also demonstrated that those matters give rise to a sense of loss of spiritual connection with the land.

132. Further, to the extent that the Applicant asserts that cultural loss has arisen by the alleged destruction of sites[128], the Applicant has not described: (a) the nature and significance of the sites; (b) the nature and extent of the loss (having regard to the content of traditional law and custom); and/or (c) the consequences of any destruction on the Yindjibarndi People's spiritual attachment to the country. It is not enough, in the First Respondent's submission, to point to the mere destruction of a site to found a claim for cultural loss.

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[125] See FR POR at [274] – [276].
[126] *Griffiths* at [84], [214] and [218].
[127] POC at [34A], [35], [36] and [46(b) – (c)].
[128] POC at [34A] and [46(c)].

E5 INTEREST

This section deals with Agreed Issue 12.

133. The Applicant's claim for interest is limited to a bare claim for compound interest on the economic loss portion of their compensation.[129] In the First Respondent's respectful submission, the Applicant has failed to: (a) set out the basis upon which they claim the entitlement to compound interest; (b) provide the compounding interest rate which is claimed and the intervals at which that interest is to be compounded; and/or (c) describe the circumstances and manner in which interest is to be calculated if not on a compound basis. Accordingly, the Applicant's POC is deficient in this respect and, in particular, does not comply with rule 16.02(1)(f) of the *Federal Court Rules 2011* (Cth).

134. The First Respondent denies that any of the matters pleaded by the Applicant in the POC give rise to an entitlement to compound interest. The joint judges in *Griffiths* observed there is no "*recognised juridical basis for the award of compound interest on compensation for the lawful extinguishment of land title*."[130] Whilst their Honours observed that it is possible that an award for compound interest might arise on different facts, that would be on the basis of an analogy with an award of damages at common law for loss of use of money.[131]

Dated: 24 July 2023

Griff Ranson SC

[129] POC at [46(d)].
[130] *Griffiths* at [132].
[131] *Griffiths* at [133].