

NOTICE OF FILING

Details of Filing

Document Lodged:	Reply - Form 34 - Rule 16.33
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	1/10/2026 6:34:48 PM AEST
Date Accepted for Filing:	1/10/2026 6:34:50 PM AEST
File Number:	VID198/2026
File Title:	BANJIMA NATIVE TITLE ABORIGINAL CORPORATION RNTBC v STATE OF WESTERN AUSTRALIA
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

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

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



Reply

Federal Court of Australia

No VID198 of 2026

District Registry: Victoria

Division: General

Banjima Native Title Aboriginal Corporation RNTBC

Applicant

State of Western Australia

Respondent

The Applicant says in reply to the allegations in the Defence filed 14 August 2026 (**Defence**) as follows:

The Applicant uses terms defined in the Amended Statement of Claim dated 1 October 2026 (**ASoC**) and in the Defence, in the latter case without admission. References to paragraphs are to paragraphs of the Defence save where otherwise stated. Where particulars are given, the Applicant may give further particulars before trial.

A Joinder of issue

- 1 Save insofar as the Defence consists of admissions, and save as expressly set out below, the Applicant joins issue with the State upon the Defence.

B Parties

B.1 The Applicant and Relevant Beneficiaries

- 2 As to paragraph 2, the Applicant:
 - (a) admits sub-paragraph (a);
 - (b) says that, before commencing this proceeding, it consulted with and obtained the consent of the Banjima People as defined in the Determination, in accordance with the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth);

- (c) says that it commenced this proceeding as the registered native title body corporate holding the native title rights and interests as trustee for the Banjima People;

Particulars to sub-paragraphs (b)–(c)

The Applicant refers to the minute of the resolution of the common law holders dated 16 August 2025 authorising the commencement of this proceeding, which has been provided to the State’s solicitor.

- (d) otherwise denies the paragraph.

B.2 The Respondent

- 3 As to paragraph 4(b), the Applicant repeats ASoC paragraph 4(b) and paragraph 48 below and otherwise denies the sub-paragraph.

C The Affected Area

- 4 As to paragraphs 5–6, the Applicant:
- (a) admits paragraph 6(b)(i) and but says further that the parcels of land in Schedule A to the Defence are some but not all of the parcels of land classified as “Contaminated — Remediation Required” under s 13 of the *Contaminated Sites Act 2003* (WA) (*CSA*) that are referred to as the Wittenoom Asbestos Management Area; and

Particulars

The Applicant refers to the following, which are omitted in Defence Schedule A but which form part of the Wittenoom Asbestos Management Area:

- 1 Subject M1 on Deposited Plan 404418, on certificate of title LR 3165/155, Mulga Downs, Western Australia, 6751;
 - 2 Subject M2 on Deposited Plan 404418 on certificate of title LR 3165/155, Mulga Downs, Western Australia, 6751; and
 - 3 Section of WINDELL LOCATION 126, part of Lot 126 on Plan 240332 as shown on certificate of title LR 3146/381, known as Karijini, Western Australia, 6751 (co-ordinates latitude 22.3938S, longitude 118.4591E).
- (b) repeats paragraphs 7 and 14 below; and

- (c) otherwise does not admit the paragraphs.

D Native title rights and other interests

5 As to paragraph 7:

- (a) the Applicant admits the allegation in sub-paragraph (a) that the native title rights are communal rights and otherwise does not admit the sub-paragraph;
- (b) the Applicant admits sub-paragraph (b);
- (c) as to sub-paragraph (c), the Applicant:
 - (i) admits that, by cl 5(a) of the Determination, the native title rights are subject to and exercisable in accordance with the laws of the State and the Commonwealth, including the common law, and the traditional laws and customs of the Banjima People;
 - (ii) says further that the “Other Interests” (as defined in the Determination) and their effect in relation to the native title rights are described in cls 8, 9 and Schedule 5 of the Determination;
 - (iii) says that the sub-paragraph is otherwise vague and embarrassing, including because it does not identify any allegedly valid interest or any alleged inconsistency; and
 - (iv) otherwise denies the sub-paragraph insofar as it can be understood.

6 As to paragraph 11, the Applicant:

- (a) relies on the common law and equity and, if necessary, *Racial Discrimination Act 1975* (Cth) (***RDA***) ss 9 and/or 10; and
- (b) says further that, if and insofar as the State contends that native title rights do not ground a claim in nuisance, advancing that contention is unlawful and precluded by s 9 of the *RDA*.

E Asbestos mining and the spread of asbestos tailings in Banjima Country

E.1 Wittenoom Mine and Mill and Eastern Gorge Tailings Dump

- 7 The Applicant denies paragraphs 16(b), 21(b), 29(b) and 30(a) (save insofar as it is an admission) and (c) and says that the State knows, and has since commencement of asbestos mining at Wittenoom Mine and the depositing of tailings at Eastern Gorge Tailings Dump known (or ought to have known), of the places to which blue asbestos has spread from Wittenoom Mine and Eastern Gorge Tailings Dump, even if its knowledge is not complete.

Particulars

The Applicant refers to:

- 1 the particulars subjoined to ASOC paragraphs 13–15, including the 2006 GHD Report and the 2013 GHD Report;
 - 2 Report by GHD for the Department of Planning, Lands and Heritage entitled “Wittenoom and Yampire Asbestos Management Areas — Decision Making Framework for Remediation Options Selection” (12 December 2025) (**2025 GHD Report**);
 - 3 ASOC paragraphs 111–112 and 115 and the particulars subjoined to them;
 - 4 ASOC Schedule A and Schedule B and the particulars subjoined to them;
 - 5 paragraphs 3–7, 12, 13, 20, 29, 32–41 of the Applicant’s Response to Request for Further and Better Particulars of the Statement of Claim served on 3 July 2026.
- 8 As to paragraph 17:
- (a) the Applicant admits sub-paragraphs (a)–(c);
 - (b) says that the works were commissioned, funded, directed and supervised by the State (via the Western Australian Building Management Authority) and were undertaken upon Crown land;
 - (c) does not know and does not admit sub-paragraph (d);

- (d) says further that, if one or more of the openings of Wittenoom Mine was re-opened after 1996, the Respondent knew or ought to have known of that and did not thereafter appropriately re-seal the opening(s) in a manner that prevents movement of blue asbestos.
- 9 The Applicant admits paragraphs 30(b) and 32(a) and says further that, save for TR70/5616, the tenements or forms of tenure have ceased.
- 10 The Applicant admits paragraph 31(a)–(c), save that it does not admit that all asbestos tailings had been deposited by the time of the grants.
- 11 As to paragraph 33:
 - (a) the Applicant denies sub-paragraph (a) and says that the alleged construction is contrary to the text, context and purpose of s 111 of the *Mining Act 1904* (WA) as in force at the dates identified in ASoC paragraph 33;
 - (b) the Applicant denies sub-paragraph (b) and says that the alleged construction is contrary to the text, context and purpose of that provision, which expressly applies to a mining lease, mining tenement or other holding held under the authority of the *Mining Act 1904* (WA);
 - (c) as to sub-paragraph (c):
 - (i) the Applicant does not admit sub-paragraph (c)(i), which is vague and embarrassing and does not admit of any specific response;
 - (ii) the Applicant denies the allegation in sub-paragraph (c)(ii) that the tailings have ceased to retain separateness from the realty and have become part of the land and says that this has not occurred; and

Particulars

The Applicant refers to the following matters:

- 1 the asbestos tailings were and remain distinguishable from the land;
- 2 the asbestos tailings can be, and are being, moved, removed and dispersed separately from the land; and

- 3 the State's own reports by GHD consistently identify blue asbestos and material containing blue asbestos released in the environment, and asbestos tailings, as separate and distinct from the land, for example 2025 GHD Report at pp 4, 36, 73–75 refers to “tailings stockpiles”, “former mine waste areas”, “residual tailings at the mine area”, “Colonial mine tailings”, “Eastern gorge tailings” and “Yampire Gorge Tailings”.

(iii) the Applicant otherwise denies the sub-paragraph.

12 As to paragraph 34, the Applicant:

- (a) denies sub-paragraphs (d) and (l) and says that the alleged construction is contrary to the text, context and purpose of the *Mining Act 1904* (WA) and the *Mining Regulations 1925* (WA) as in force at the relevant dates;
- (b) admits sub-paragraph (p) and says further that reg 222 of the *Mining Regulations 1925* (WA) relevantly made it an offence for the holder of any mining tenement to allow any of the detritus, dirt, sludge, refuse, garbage or mine water from his tenement:
 - (i) to become a nuisance or an inconvenience to the holder of any other mining tenement or to the public; or
 - (ii) in any way to injure or obstruct any land used for agricultural, pastoral, fruit-growing, forestry or other useful purposes; and
- (c) otherwise does not admit the paragraph.

13 The Applicant denies paragraph 35 and says that:

- (a) Schedule B to the Defence is vague and embarrassing;
- (b) further and in any event, none of the matters in Schedule B to the Defence (insofar as it can be understood) is a step (or a determination to take a step) to remove, contain or otherwise remediate the blue asbestos released into the environment by the extraction and/or processing of ore at Wittenoom Mine and Wittenoom Mill or the asbestos tailings deposited at the Eastern Gorge Tailings Dump, save for the ineffective attempt to seal mine openings in 1996 (alleged in item B.32 and paragraph 17).

E.2 Colonial Mine and Mill, Colonial Upstream Tailings Dump and Colonial Downstream Tailings Dump

- 14 The Applicant denies paragraphs 40(b), 46(b), 54(b) and 55(a) (save insofar as it is an admission) and (c) and says that the State knows, and has since commencement of asbestos mining at Colonial Mine and the depositing of tailings at the Colonial Upstream Tailings Dump and the Colonial Tailings Dumps known (or ought to have known), of the places to which blue asbestos has spread from Colonial Mine and the Colonial Tailings Dumps, even if its knowledge is not complete.

Particulars

The Applicant repeats the particulars subjoined to paragraph 7 above.

- 15 As to paragraph 41:
- (a) the Applicant admits paragraphs (a)–(c);
 - (b) says that the works were commissioned, funded, directed and supervised by the State (via the Western Australian Building Management Authority) and were undertaken upon Crown land;
 - (c) does not know and does not admit sub-paragraph (d);
 - (d) says further that, if one or more of the openings of Colonial Mine was re-opened after 1996, the State knew or ought to have known of that and did not thereafter appropriately re-seal the opening(s) in a manner that prevents movement of blue asbestos.
- 16 The Applicant admits paragraph 55(b) and says further that, save for TR 70/5656, the tenements or forms of tenure have ceased.
- 17 The Applicant admits paragraph 56(a)–(c) , save that it does not admit that all asbestos tailings had been deposited by the time of the grant.
- 18 As to paragraph 58:
- (a) the Applicant admits sub-paragraph (a);

- (b) the Applicant denies sub-paragraph (b) and says that the alleged construction is contrary to the text, context and purpose of s 111 of the *Mining Act 1904* (WA) as in force at the dates identified in ASoC paragraph 58;
- (c) the Applicant denies sub-paragraph (c) and says that the alleged construction is contrary to the text, context and purpose of that provision, which expressly applies to a mining lease, mining tenement or other holding held under the authority of the *Mining Act 1904* (WA);
- (d) as to sub-paragraph (d):
 - (i) the Applicant does not admit sub-paragraph (d)(i), which is vague and embarrassing and does not admit of any specific response;
 - (ii) the Applicant otherwise denies sub-paragraph (d); and
- (e) the Applicant denies sub-paragraph (e) and says that the asbestos tailings have not ceased to retain separateness from the realty and have not become part of the land.

Particulars

The Applicant repeats the particulars subjoined to paragraph 11(c)(ii) above.

19 As to paragraph 59, the Applicant:

- (a) denies sub-paragraphs (d) and (l) and repeats paragraph 12(a) above;
- (b) admits sub-paragraph (p) and repeats paragraph 12(b) above; and
- (c) otherwise does not admit the paragraph.

20 The Applicant denies paragraph 60 and says that:

- (a) paragraph 13(a) above is repeated;
- (b) further and in any event, none of the matters in Schedule B to the Defence (insofar as it can be understood) is a step (or a determination to take a step) to remove, contain or otherwise remediate the blue asbestos released into the environment by the extraction and/or processing of ore at Colonial Mine and Colonial Mill, or the asbestos tailings deposited at the Colonial Upstream Tailings Dump and the

Colonial Downstream Tailings Dump, save for the ineffective attempt to seal mine openings in 1996 (alleged in item B.32 and paragraph 41) and the burial of the Colonial Mill in 2003 (alleged in item B.34).

E.3 Yampire Mine and Yampire Tailings Dump

- 21 The Applicant denies paragraphs 65(b), 70(b), 76(b) and 77(a) (save insofar as it is an admission) and (c) and says that the State knows, and has since commencement of asbestos mining at Yampire Mine and the depositing of tailings at the Yampire Tailings Dump known (or ought to have known), of the places to which blue asbestos has spread from Yampire Mine and the Yampire Tailings Dump, even if its knowledge is not complete.

Particulars

The Applicant repeats the particulars subjoined to paragraph 7 above.

- 22 As to paragraph 66:
- (a) the Applicant admits paragraphs (a)–(c);
 - (b) says that the works were commissioned, funded, directed and supervised by the State (via the Western Australian Building Management Authority) and were undertaken upon Crown land;
 - (c) does not know and does not admit sub-paragraph (d);
 - (d) says further that, if one or more of the openings of Yampire Mine was re-opened after 1996, the State knew or ought to have known of that and did not thereafter appropriately re-seal the opening(s) in a manner that prevents movement of blue asbestos.
- 23 The Applicant denies paragraph 67(b) and says that Yampire Mine and Yampire Mill and associated structures and roads are or were improvements.
- 24 As to paragraph 80:

- (a) the Applicant denies sub-paragraph (a) and says that the alleged construction is contrary to the text, context and purpose of s 111 of the *Mining Act 1904* (WA) as in force at the date identified in ASoC paragraph 80;
- (b) the Applicant denies sub-paragraph (b) and says that the asbestos tailings have not ceased to retain separateness from the realty and have not become part of the land; and

Particulars

The Applicant repeats the particulars subjoined to paragraph 11(c)(ii) above.

25 As to paragraph 81, the Applicant:

- (a) denies sub-paragraph (d) and repeats paragraph 12(a) above;
- (b) admits sub-paragraph (p) and repeats paragraph 12(b) above; and
- (c) otherwise does not admit the paragraph.

26 The Applicant denies paragraph 82 and says that:

- (a) paragraph 13(a) above is repeated;
- (b) further and in any event, none of the matters in Schedule B to the Defence (insofar as it can be understood) is a step (or a determination to take a step) to remove, contain or otherwise remediate the blue asbestos released into the environment by the extraction and/or processing of ore at Yampire Mine and Mill and the asbestos tailings deposited at the Yampire Tailings Dump, save for the ineffective attempt to seal mine openings in 1996 (alleged in item B.32 and paragraph 66).

E.4 Wittenoom Racecourse

27 The Applicant admits paragraphs 83(h) and 85(a) and says that, for the avoidance of doubt, the partial burial did not effectively cover, contain, seal or otherwise remediate the asbestos tailings used to construct Wittenoom Racecourse.

28 The Applicant denies paragraph 84 and says that the State knows, and has since commencement of construction of the Wittenoom Racecourse known (or ought to have

known), of the places to which blue asbestos has spread from Wittenoom Racecourse, even if its knowledge is not complete.

Particulars

The Applicant repeats the particulars subjoined to paragraph 7 above.

29 The Applicant denies paragraph 88 and says that:

- (a) paragraph 13(a) above is repeated;
- (b) further and in any event, none of the matters in Schedule B to the Defence (insofar as it can be understood) is a step, or an adequate step, to remove, contain or otherwise remediate the blue asbestos released into the environment from the asbestos tailings at Wittenoom Racecourse, save for the partial burial alleged at paragraphs 83(h) and 85(a), which was ineffective.

E.5 Wittenoom Airport

30 The Applicant denies paragraph 90 and says that the State knows, and has since commencement of construction of Wittenoom Airport known (or ought to have known), of the places to which blue asbestos has spread from Wittenoom Airport, even if its knowledge is not exhaustive.

Particulars

The Applicant repeats the particulars subjoined to paragraph 7 above.

31 The Applicant denies paragraph 94 and says that:

- (a) paragraph 13(a) above is repeated;
- (b) further and in any event, none of the matters in Schedule B to the Defence (insofar as it can be understood) is a step, or an adequate step, to remove, contain or otherwise remediate the blue asbestos released into the environment from the asbestos tailings at Wittenoom Airport (and, for the avoidance of doubt, the removal of fuel storage tanks in June 1996 pleaded at item B.32 is not such a step).

E.6 The spread of blue asbestos from the Asbestos Sources

- 32 In the premises of paragraph 7 above, the Applicant denies paragraphs 96(b) and 97(b).
- 33 In the premises of paragraph 14 above, the Applicant denies paragraphs 98(b) and 99(b).
- 34 In the premises of paragraph 21 above, the Applicant denies paragraphs 100(b) and 101(b).
- 35 In the premises of paragraph 27 above, the Applicant denies paragraphs 102(b) and 103(b).
- 36 In the premises of paragraph 30 above, the Applicant denies paragraphs 104(b) and 105(b).

F The nature of blue asbestos

- 37 As to paragraph 109:
- (a) the Applicant says that sub-paragraph (a) is vague and embarrassing and does not admit it;
 - (b) as to sub-paragraph (b):
 - (i) the Applicant admits that blue asbestos and material containing blue asbestos were used in Wittenoom;
 - (ii) says further that the State:
 - (A) itself extensively used asbestos tailings to construct and/or maintain, or permitted asbestos tailings to remain on or in, the Other State Places, as set out in ASoC paragraph 94A; and

Particulars

The Applicant refers to the particulars subjoined to ASoC paragraph 94A.

- (B) permitted such use by others; and
- (iii) otherwise does not admit the sub-paragraph;

- (c) the Applicant admits the allegation in sub-paragraph (c) that blue asbestos occurs naturally in the Determination Area, on the basis that this is a reference to mineral ores under or on the ground (that have not been mined, extracted or processed);
- (d) as to sub-paragraph (d), the Applicant:
 - (i) says that it claims an order and/or mandatory injunction requiring the State to abate the nuisance in ASoC paragraph 141(b);
 - (ii) says that the particulars of the required abatement subjoined to ASOC paragraph 141(b) state that the blue asbestos or material containing blue asbestos in the Asbestos Sources, the Affected Area and the other parts of the Determination Area to which blue asbestos or material containing blue asbestos spreads (including cultural heritage areas) should be removed, contained or otherwise remediated or that those places should otherwise be made safe;
 - (iii) says that there have at all material times been, and are, reasonable steps that can be taken to remove, contain or remediate the blue asbestos and material containing blue asbestos (or the substantial majority of it) from the Asbestos Sources, in the Affected Area or which spreads into the Determination Area (including cultural heritage areas) or by which those places can be made safe;
 - (iv) denies, if alleged, that abatement of the nuisance would require the complete removal of all blue asbestos and material containing blue asbestos from the Affected Area or the Determination Area;
 - (v) says that sub-paragraph (d) does not respond to the case advanced by the Applicant and its relevance is not understood; and
 - (vi) otherwise does not admit the sub-paragraph.

Particulars to sub-paragraph (d)

The Applicant refers to the particulars subjoined to ASoC paragraph 117.

- (e) otherwise does not admit the paragraph; and

- (f) says further that the matters pleaded in paragraph 109, even if established, do not support a denial of the allegation in ASoC paragraph 109.

G No removal, containment or other remediation by the State

38 As to paragraph 117, the Applicant:

- (a) in the premises of paragraphs 13, 20, 26, 29 and 31 above, denies the paragraph;
- (b) repeats paragraph 13(a) above; and
- (c) says further that none of the matters in Schedule B to the Defence (insofar as it can be understood) is a step (save as expressly set out in paragraphs 13, 20, 26, 29 and 31 above), or in any case an adequate step, to remove, contain or otherwise remediate the blue asbestos or material containing blue asbestos (i) at the Asbestos Sources or (ii) that has spread from the Asbestos Sources to the Affected Area and which may spread into other parts of the Determination Area.

H Loss and damage

39 As to paragraph 139, the Applicant:

- (a) denies sub-paragraph (a), repeats paragraph 11 of its Response to Request for Further and Better Particulars of the Statement of Claim served on 3 July 2026 and says further that:
 - (i) loss of amenity is recoverable for private nuisance, public nuisance and nuisance on the case and includes (in the circumstances of this case) cultural loss; and
 - (ii) the contention that cultural loss is not recoverable is wrong in law;

Particulars to sub-paragraph (a)

The Applicant refers to the following:

- 1 the content of the native title rights, as set out in ASoC paragraphs 8 and 9 and the particulars subjoined thereto;

- 2 the effect of the State's wrongdoing, as set out in ASoC paragraphs 125 and 126 and the particulars subjoined thereto;
- 3 the Relevant Beneficiaries have suffered annoyance, inconvenience, discomfort and vexation due to the interference with the native title rights, including their inability to fulfil their responsibilities under their traditional law and customs to care for the Determination Area, to conduct activities of a spiritual, ceremonial and cultural nature, and to maintain their connection with the Country under their traditional laws and customs.

Separate particulars of loss and damage, including economic loss and loss of amenity (including cultural loss), will be provided prior to or at trial.

(b) as to sub-paragraph (b):

- (i) admits that loss in private nuisance must be of a reasonably foreseeable kind or type;
- (ii) says that foreseeability is to be assessed as at the accrual of each cause of action;
- (iii) says further, and in any event, that loss from interference with rights related to property caused by the spread of blue asbestos or material containing blue asbestos from the Asbestos Sources is, and has at all relevant times been, loss of a reasonably foreseeable kind or type; and
- (iv) otherwise denies the sub-paragraph; and

Particulars to sub-paragraph (b)

The Applicant refers to the offence created by reg 222 of the *Mining Regulations 1925* (WA).

(c) otherwise denies the paragraph.

I *Contaminated Sites Act 2003* (WA)

40 As to paragraph 142, the applicant:

- (a) admits the Chief Executive Officer classified the parcels of land set out in Part 1 of Schedule A to the Defence as a known or suspected contaminated site with a classification of “Contaminated — Remediation Required”;
- (b) says the Chief Executive Officer made the classification on 28 January 2008;
- (c) says that the Chief Executive Officer also so classified additional sites referred to as the Wittenoom Asbestos Management Area and repeats paragraph 4(a) above.

41 As to paragraph 143, the Applicant:

- (a) admits that powers of entry and other rights, obligations and powers by reason and force of the declarations as to Wittenoom and surrounding areas being contaminated sites pursuant to the *CSA* are “Other Interests” in the Determination;
- (b) admits that this applies in respect of the parcels of land in Part 1 of Schedule A to the Defence;
- (c) otherwise denies the paragraph.

42 The Applicant admits paragraphs 144–145.

43 As to paragraphs 146–147, 158 and 159(a)–(c), the Applicant:

- (a) says that s 9(4) of the *CSA* provides that: “Nothing in this Act affects any right a person has at law to prevent, control or abate contamination or to obtain damages”;
- (b) says that Part 3 of the *CSA* confers a power upon the Contaminated Sites Committee (which the *CSA* constitutes) to require certain persons, including the State, to remediate sites classified under the *CSA* as “contaminated — remediation required”;
- (c) says that, by virtue of s 9, the provisions of Part 3, and the *CSA* otherwise, do not affect the Applicant’s rights or remedies as asserted in these proceedings, including the availability of a mandatory injunction, but, instead, exist in parallel to and without affecting such rights or remedies, and denies paragraphs 158 and 159(b)–(c) insofar as they allege otherwise;

- (d) says that, by virtue of *CSA* s 9 (and the object stated in s 8), the allegations that the grant of mandatory injunctive relief would undermine or distort the achievement of the objects or scheme of the *CSA* (as alleged in paragraph 159(c)(i)) and would give rise to undesirable uncertainty as to the administration of the *CSA* (as alleged in paragraph 159(c)(ii)) are incorrect and untenable;
- (e) says, further or alternatively, that, if the *CSA* (or its implementation) purport to remove the power of this Court to issue a mandatory injunction (as alleged in paragraph 158) or otherwise to limit or affect the power of this Court to issue a mandatory injunction (as alleged in paragraphs 159(b)–(c)), then:
 - (i) the *CSA* is a State law that purports to govern the exercise of federal jurisdiction, is beyond the State’s legislative competence and is to that extent invalid; and/or
 - (ii) the *CSA* is inconsistent with at least ss 5(2), 22 and 23 of the *Federal Court of Australia Act 1976* (Cth) and is to that extent invalid, that is, ineffective, by virtue of s 109 of the *Commonwealth Constitution*;
- (f) otherwise denies those paragraphs.

Particulars

The Applicant refers to ss 8 and 9 of the *CSA* and will rely on the *CSA* for its full force and effect.

44 The Applicant admits paragraph 148 and repeats paragraph 43 above.

J Section 264 of the *Land Administration Act 1997*(WA)

45 The Applicant denies paragraphs 149 and 150 and says further that:

- (a) paragraph 149 is not a fair, accurate or complete description of the allegations in the ASoC, in particular paragraphs 127–138 thereof;
- (b) s 264 of the *Land Administration Act 1997* (WA) (*LAA*) does not on its proper construction apply in respect of or preclude any injunction or declaration;

- (c) further and in any event, s 264 of the *LAA* does not on its proper construction apply in respect of or preclude any liability asserted or relief claimed because it does not apply in respect of:
 - (i) liability, causes of action, damage, injury, loss, causes and/or other matters that arose, commenced or first arose prior to the commencement of the *LAA*; and/or
 - (ii) damage, injury or loss to property rights (including the interference with the use or enjoyment of land, or an interest in land), which is not loss suffered by a person within the meaning of s 264;
- (d) further or alternatively, s 264 of the *LAA* does not apply in respect of or preclude any liability asserted or relief claimed because that provision:
 - (i) is a State law that, insofar as it purports to apply:
 - (A) would give special privileges to the State not accorded to a subject; and
 - (B) would govern the exercise of federal jurisdiction;
 - (ii) could apply in federal jurisdiction only by force of s 79 of the *Judiciary Act 1903* (Cth) (***Judiciary Act***); and
 - (iii) is not picked up by s 79 of the *Judiciary Act* because s 64 of the *Judiciary Act* provides relevantly that, in a suit to which a State is a party, the rights of the parties shall as nearly as possible be the same as in a suit between subject and subject, and thereby provides otherwise for the purposes of s 79; and
- (e) further or alternatively, s 264 of the *LAA* does not apply in respect of or preclude any liability asserted or relief claimed because that provision:
 - (i) if it applies of its own force in the exercise of federal jurisdiction, is a State law that would give special privileges to the State not accorded to a subject; and

- (ii) is to that extent inconsistent with s 64 of the *Judiciary Act* and invalid to the extent of the inconsistency pursuant to s 109 of the *Commonwealth Constitution*;
- (f) further or alternatively, if s 264 of the *LAA* applies, the loss and damage alleged in ASoC paragraph 139 was caused by, or its cause is a direct consequence of, the acts and/or activities undertaken by the State as set out in ASoC paragraph 118 and Schedule A and Schedule B thereto, which the Applicant repeats, and Section S below, and the Applicant refers to:
 - (i) s 5 of the *Interpretation Act 1984* (WA), which provides relevantly that the word “act” includes an omission and extends to a series of acts or omissions or a series of acts and omissions; and
 - (ii) s 10(c) of the *Interpretation Act 1984* (WA), which provides relevantly that the singular includes the plural.

K Section 132 of the *Conservation and Land Management Act 1984* (WA)

46 The Applicant denies paragraph 151 and says further that:

- (a) section 132(1) of the *Conservation and Land Management Act 1984* (WA) (***CALM Act***) excludes the civil liability of a person (and not the State) for anything done in good faith in or in connection with the performance or purported performance of functions under the CALM Act;
- (b) section 132(2) excludes the civil liability of the State for anything done in good faith in or in connection with the performance or purported performance of functions under the CALM Act in relation to preventing, managing or controlling fire on land to which the CLAM Act applies and certain other land;
- (c) neither provision, nor any other part of s 132 of the CALM Act, is relevant to any of the allegations in the ASoC.

L Section 5X of the *Civil Liability Act 2002* (WA)

47 As to paragraph 152, the Applicant:

- (a) admits that the traditional owners (being the Banjima People) are the most important land user group to consider in managing the land going forward and that the end use of the area needs to be determined in association with them (as alleged in sub-paragraph (a)(ii)(H));
- (b) otherwise does not know and does not admit sub-paragraphs (a) and (b);
- (c) denies (as appears to be alleged by heading M.5 and sub-paragraph (c)) that s 5X of the *Civil Liability Act 2002* (WA) (*CLA*) has any application to the decision alleged in sub-paragraph (a), including because:
 - (i) s 5X (and Part 1C generally) of the *CLA* do not, by virtue of s 5V(1) and/or s 5X, apply to claims in private nuisance, public nuisance and nuisance on the case, which are the claims the Applicant makes;
 - (ii) further or alternatively, s 5X (and Part 1C generally) of the *CLA* do not by virtue of s 5V(3)–(3a) apply unless the harm giving rise to a claim for damages arises out of an incident happening on or after 1 December 2003, and in this case the relevant incident happened (alternatively some relevant incidents happened) before 1 December 2003;
 - (iii) further or alternatively, s 5X of the *CLA* does not apply to claims for an injunction and a declaration;
 - (iv) further or alternatively, s 5X of the *CLA* does not apply because that provision:
 - (A) is a State law that, insofar as it purports to apply:
 - (A) would give special privileges to the State not accorded to a subject; and
 - (B) would govern the exercise of federal jurisdiction;
 - (B) could apply in federal jurisdiction only by force of s 79 of the *Judiciary Act*; and

- (C) is not picked up by s 79 of the *Judiciary Act* because s 64 of the *Judiciary Act* provides otherwise for the purposes of s 79; and
- (v) further or alternatively, s 5X of the *CLA* does not apply because that provision:
 - (A) if it applies of its own force in the exercise of federal jurisdiction, is a State law that would give special privileges to the State not accorded to a subject; and
 - (B) is to that extent inconsistent with s 64 of the *Judiciary Act* and invalid to the extent of the inconsistency pursuant to s 109 of the *Commonwealth Constitution*.
- (d) in the premises of sub-paragraph (b) above, does not admit sub-paragraph (c);
- (e) says, further and in any event, that any decision as alleged in sub-paragraphs (a) and (b) (which is not admitted) was not one that was reasonably open to be made.

Particulars

The Applicant refers to the following:

- 1 the particulars to ASoC paragraph 117, which include that, in November 2015:
 - (A) the State's own engineering consultants GHD had advised that encapsulation of the tailings dumps was feasible; and
 - (B) the Department of Lands had endorsed that advice in writing and had requested that Phase 2 of the project commence;
- 2 insofar as any decision was taken in November 2016, it appears that it was a decision to carry out the encapsulation strategy subject to certain investigations, certain costings and obtaining the consent of the Banjima people;
- 3 the considerations alleged in sub-paragraphs 152(a)(i) and (a)(ii)(A) and (B) are considerations of cost, and of the deterrence of human presence, and are not considerations directed to the abatement of the nuisance or to the restoration of land or access to it;

- 4 the consideration alleged in sub-paragraph 152(a)(ii)(B), that State funding could be more effectively spent targeting measures that reduced or stopped people entering the area, amounts to the substitution of the restriction of access for remediation;
- 5 the consideration alleged in sub-paragraph 152(a)(ii)(F), that asbestos is naturally occurring and therefore continually deposited in the Wittenoom area, is of no relevance or concern and does not rationally bear on the need to remediate the Asbestos Sources;
- 6 the considerations alleged in sub-paragraphs 152(b)(iii) and (iv), of uncertainty as to whether the asbestos tailings still represented a continual asbestos source to downstream areas, and the absence of quantification of mass movement of blue asbestos downstream, were the consequence of the State's own failure to undertake or commission that quantification, notwithstanding that it had been on notice of downstream movement from no later than 1978, as admitted in paragraph 115(a)(i); and
- 7 insofar as any decision was made, it was made without consultation with the Applicant or with the Banjima people, notwithstanding the consideration alleged in sub-paragraph 152(a)(ii)(H).

M *Crown Suits Act 1898* (WA)

48 The Applicant denies paragraph 153 and, insofar as any claims in the present proceeding accrued during the currency of the *Crown Suits Act 1898* (WA) (**1898 Act**), further:

- (a) repeats paragraph 52 below;
- (b) says that the *1898 Act* was repealed by *Crown Suits Act 1947* (WA) s 2 with the effect that the *1898 Act* no longer has any application to any cause of action, irrespective of when it accrued;
- (c) alternatively, says that ss 22, 33 and 37 of the *1898 Act* do not apply to any claims in the present proceeding because those provisions:
 - (i) are a State law that, insofar as it purports to apply:
 - (A) would give special privileges to the State not accorded to a subject; and
 - (B) would govern the exercise of federal jurisdiction;

- (ii) could apply in federal jurisdiction only by force of s 79 of the *Judiciary Act*; and
- (iii) are not picked up by s 79 of the *Judiciary Act* because s 64 of the *Judiciary Act* provides otherwise for the purposes of s 79; and
- (d) alternatively, says that ss 22, 33 and 37 of the *1898 Act* do not apply to any claims in the present proceeding because those provisions:
 - (i) if they apply of their own force in the exercise of federal jurisdiction, are a State law that would give special privileges to the State not accorded to a subject; and
 - (ii) are to that extent inconsistent with s 64 of the *Judiciary Act* and invalid, that is, ineffective, pursuant to s 109 of the *Commonwealth Constitution*.

N *Crown Suits Act 1947(WA)*

49 The Applicant denies paragraph 154 and, insofar as any claims in the present proceeding accrued between 1 November 1947 and 15 November 2005, further:

- (a) repeats paragraph 52 below;
- (b) says that, for the purposes of s 6 of the *Crown Suits Act 1947 (WA)* (***1947 Act***) when it was in force:
 - (i) the claims in the present proceeding are based on a continuing act, neglect or default of the State which has not ceased;
 - (ii) the claims have not accrued for the purposes of that the *1947 Act* by virtue of s 6(1); and
 - (iii) in the premises, insofar as s 6 applies, its requirements have been satisfied;
- (c) alternatively, says that s 6 of the *1947 Act* does not apply to any claims in the present proceeding because that provision:
 - (i) is a State law that, insofar as it purports to apply:

- (A) would give special privileges to the State not accorded to a subject; and
- (B) would govern the exercise of federal jurisdiction;
- (ii) could apply in federal jurisdiction only by force of s 79 of the *Judiciary Act*; and
- (iii) is not picked up by s 79 of the *Judiciary Act* because s 64 of the *Judiciary Act* provides otherwise for the purposes of s 79; and
- (d) alternatively, says that s 6 of the *1947 Act* does not apply to any claims in the present proceeding because that provision:
 - (i) if it applies of its own force in the exercise of federal jurisdiction, is a State law that would give special privileges to the State not accorded to a subject; and
 - (ii) is to that extent inconsistent with s 64 of the *Judiciary Act* and invalid, that is, ineffective, pursuant to s 109 of the *Commonwealth Constitution*.

O *Limitation Act 1935 (WA)*

50 The Applicant denies paragraph 155 and, insofar as any claims in the present proceeding accrued before 15 November 2005, further:

- (a) repeats paragraph 52 below; and
- (b) alternatively, says that the *Limitation Act 1935 (WA)* (***1935 Act***) does not, on its proper construction, affect the State and/or have any application to any claims in the present proceeding, by virtue of ss 48 and/or 49 (in the latter case taken with s 6 of the *1947 Act*);
- (c) alternatively, says that the claims for a mandatory injunction and declaratory relief are claims for equitable relief in respect of a continuing and/or threatened wrong, which ss 38(1)(c)(vi) and 38(1)(c)(vii) of the *1935 Act* do not bar and/or where application of the limitation period by analogy would be unconscionable; and

- (d) alternatively, insofar as any Relevant Beneficiary was under 18 years of age or otherwise under a disability when any cause of action accrued, relies upon the corresponding extension of time to commence an action under s 40 of the *1935 Act*.

P *Limitation Act 2005* (WA)

51 The Applicant denies paragraph 156 and, insofar as any claims in the present proceeding accrued on or after 15 November 2005 and before 24 February 2020, further:

- (a) repeats paragraph 52 below;
- (b) alternatively, says that the *Limitation Act 2005* (WA) (***2005 Act***) does not, on its proper construction, apply to a nuisance that came into existence prior to the commencement of that Act on 15 November 2005 and continues to subsist, by virtue of s 4;
- (c) alternatively, says that the claims for a mandatory injunction and declaratory relief are claims for equitable relief in respect of a continuing and/or threatened wrong, which s 13 of the *2005 Act* does not bar and/or where application of the limitation period by analogy would be unconscionable; and
- (d) alternatively, says that causes of action that accrued within six years before the commencement of this proceeding, and which have accrued since its commencement, are not barred by s 13 of the *2005 Act*;
- (e) alternatively, insofar as any Relevant Beneficiary was under 18 years of age or suffered a mental disability when any cause of action accrued, relies upon any available extension of time to commence an action under ss 30–31 and 35 and/or hereby seeks an extension of time under ss 41–42 of the *2005 Act*.

Q Continuing nuisance

52 The Applicant denies paragraph 157, which is vague and embarrassing, and says further that, insofar as the paragraph can be understood:

- (a) the allegation is bad in law;

- (b) private nuisance, public nuisance and nuisance on the case are continuing causes of action that accrue from day to day for so long as the private nuisance, public nuisance or nuisance on the case is not abated;
- (c) further and in any event, blue asbestos or material containing blue asbestos is constantly being released into the environment and spreading from the Asbestos Sites and from further areas to which it has spread or spreads, as set out in ASoC paragraphs 95–105B, thereby causing further and more extensive interferences with the Applicant’s and the Relevant Beneficiaries’ native title rights.

R Mandatory injunctive relief

53 As to paragraphs 158 and 159:

- (a) the Applicant pleads to paragraphs 158 and sub-paragraphs 159(a)–(c) in paragraph 43 above, which is repeated;
- (b) as to sub-paragraph 159(d), the Applicant repeats paragraph 37(d) above and otherwise does not admit the paragraph;
- (c) the Applicant denies sub-paragraph 159(e) and says that specific relief is capable of being appropriately framed; and
- (d) the Applicant otherwise denies the paragraphs.

S Aggravated and exemplary damages

54 As to paragraph 160, further to and for the purposes of the aggravated and exemplary damages claimed in ASoC paragraph 141(e) and the particulars subjoined thereto, the Applicant will rely on the State’s conduct of the proceeding generally.

Particulars

The Applicant refers to the following matters:

- 1 the State’s allegation in Defence paragraph 11 that the Banjima people’s exercise of their native title rights in the Determination Area, and accordingly their traditional and cultural use of that land, is not an ordinary use of the land; and

- 2 the Applicant on 31 August 2026 requested the State to withdraw this allegation and the State on 9 September 2026 refused to do so.

T Schedule B to the Defence

55 As to Schedule B to the Defence, the Applicant:

- (a) says that Schedule B is vague and embarrassing and materially incomplete;
- (b) insofar as Schedule B can be understood, admits items B.3, B.4, B.5, B.8, B.10, B.11, B.12, B.13, B.14, B.15, B.18, B.19, B.20, B.21, B.22, B.23, B.24, B.26, B.27, B.28, B.29, B.30, B.32, B.34, B.35, B.37, B.38, B.39, B.40, B.42, B.44, B.45, B.46, B.47, B.48, B.49 and B.50, but does not admit that these are complete and fair descriptions;
- (c) as to items B.1, B.2, B.7, B.9, B.16, B.17, B.25 and B.36, admits that the surveys, samplings, studies, monitoring, reports and advices were commissioned, undertaken and/or received, but does not admit the conclusions there pleaded or otherwise that these are complete and fair descriptions;
- (d) says further that Schedule B discloses that, in the forty-eight years since 1978, the steps taken by the State:
 - (i) have consisted of the monitoring of blue asbestos levels, the commissioning of studies, the erection of signage, the publication of pamphlets, the closure of services, the acquisition and demolition of buildings, the removal of the resident population and the physical exclusion of persons from the area of Wittenoom; and
 - (ii) have not at any time included any adequate removal, containment or other remediation of the Asbestos Sites.

Date: 1 October 2026



.....

Gordon Legal

Solicitors for the Applicant

This reply was prepared by:

R Finklestein

B F Quinn

J Gordon

D O F Heaton

B Paull

Counsel for the Applicant

Certificate of lawyer for Applicant

I, Peter Gordon, certify to the Court that, in relation to the reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

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



.....

Peter Gordon
Senior Partner
Gordon Legal
Solicitor for the Applicant