THE NATIVE TITLE SYSTEM AS A MARKET:

FORTESCUE METALS GROUP AND THE YINDJIBARNDI

by Daniel Wells

INTRODUCTION

The ongoing dispute between the Yindjibarndi People and Fortescue Metals Group Ltd ('FMG') over an area of the Pilbara rich in both living Aboriginal heritage and high-grade iron ore features a First Nation that is fiercely intent on maintaining traditional life and, at the same time, pursuing real economic development. It also presents the myopia of a mining company publicly committed to Aboriginal advancement yet relentlessly hard-line in its approach to native title negotiations.[1] This paper attempts to make sense of the Yindjibarndi People's experience of the *Native Title Act 1993* (Cth) ('NTA') by representing the native title system as a kind of 'market'. The inequities suffered by the Yindjibarndi are, it is argued, the direct result of 'market failure', remediable only through major law reform.

LEGAL FRAMEWORK

A proposed activity that will affect lands or waters the subject of native title is a 'future act' and must be done according to the procedures set out in part 2 of the NTA in order to be valid.[2] NTA part 2 division 3 sub-division P ('Subdivision P') specifically applies to future acts concerned with mining, including 'the creation of a right to mine, whether by the grant of a mining lease or otherwise'. A 'right to mine' encompasses a right to explore, prospect, extract or quarry. Such interests are referred to as 'mining tenements'. Where Subdivision P applies, 'native title parties' have a right to negotiate ('RTN') with representatives of the government ('government party')[3] and the mining company ('grantee party') about whether a mining tenement will be granted and, if so, under what conditions.[4] 'Native title parties' are those Indigenous groups whose native title lands or waters will be affected by the grant. They may comprise registered native title claimants, as well as groups whose title has already been declared to exist. Where negotiations have been conducted in good faith but no agreement has been reached within six months of the notification day, a party may apply to the National Native Title Tribunal ('NNTT') for a 'future act determination'.[5] If the NNTT finds that the grantee party has failed to negotiate in good faith, the six month negotiation timeframe is reset.[6] The standard for good faith, however, is hardly onerous.[7]

Under NTA section 38(1) the NNTT must make one of three determinations: (a) that the act must not be done; (b) that the act may be done; or (c) that the act may be done subject to conditions. Whereas a pre-arbitral agreement may provide for payments to native title parties that are calculated by reference to the value of minerals extracted or profits made,[8] no such royalty-type payment may be included by the NNTT as a condition of a future act determination.[9] This establishes an incentive for native title parties to reach agreement and avoid arbitration.

In making its determination, the NNTT must consider the criteria set out in NTA section 39. These include the likely impacts on the native title party's interests in 'any area or site … of particular significance to the native title parties in accordance with their traditions'. They also include 'the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located, and Aboriginal peoples … who live in that area', plus 'any public interest in the doing of the act'.

THE FMG / YINDJIBARNDI DISPUTE

THE SOLOMON HUB

The Yindjibarndi hold non-exclusive native title in respect of a large tract of the Pilbara west of Port Hedland ('Determination Area').[10] They have also claimed exclusive rights over a further 2,788 square kilometres of land between Paraburdoo and Marble Bar ('Claim Area').[11] The Yindjibarndi Aboriginal Corporation ('YAC') acts on behalf of the traditional owners of both areas.

FMG's Solomon Hub mining tenements cover 4475 square kilometres of the Determination Area and over 1800 square kilometres of the Claim Area.[12] Here FMG has discovered at least 3 billion tonnes of high grade iron ore.[13] For the purposes of extracting this ore, FMG sought four mining leases. Three were approved in 2009, subject to conditions.[14] The Yindjibarndi appealed these

decisions all the way to the full Federal Court, but were unsuccessful.[15] The fourth lease was approved in 2011.[16] The first stage of the Solomon development involves a 20 megatonne-per-annum ('mtpa') operation at the 'Firetail' deposit. Stage two will be a 40 mtpa operation at the 'Valley of the Kings'.

YINDJIBARNDI HERITAGE

In all of the FMG future act inquiries, Michael Woodley, Chief Executive of the YAC and senior Yindjibarndi lawman, provided the NNTT with extensive affidavit evidence of his people's relationship with the affected country. The Tribunal noted:

> Mr Woodley gives eloquent testimony to the sincerity and depth of the attachment of the Yindjibarndi People to the country, including the area of the proposed lease. He explains, in a comprehensive fashion, the foundation of the Yindjibarndi People's ownership of Yindjibarndi country, telling some of the stories which led to the creation of the country and recounting the laws which are imposed upon the Yindjibarndi in the maintenance of their religious obligations to the creation spirits (*Marrga*) the sun god (*Minkala*) and their ancestors.[17]

Woodley explains that FMG's proposed leases will directly interfere with areas where the Yindjibarndi visit each year to 'sing the country' to keep it alive, and collect *Gandi* (sacred stones) that the Yindjibarndi use in their ceremonies; areas where the Yindjibarndi collect ochre and perform *Thalu* ceremonies; and pristine freshwater rivers, creeks, springs and permanent pools, where the Yindjibarndi must perform the *Wuthurru* ritual.[18]

NNTT'S RELIANCE ON THE *ABORIGINAL HERITAGE ACT 1972* (WA) ('AHA')

Despite this evidence, in every case the NNTT determined that FMG may be granted their lease. These determinations are subject to four conditions, the most important of which requires FMG to give the YAC a copy of any application that FMG makes under AHA section 18 for permission to excavate, destroy, damage or alter an identified Yindjibarndi heritage site.

Section 17 of the AHA makes it an offence to excavate, destroy, damage, conceal or alter any Aboriginal site or object. However, under AHA section 18 the landowner or the holder of a mining tenement may apply to the Minister of Indigenous Affairs for permission to use the land in such a way as would otherwise constitute a breach of section 17. In reaching a decision, the Minister must have regard to the recommendations of the Aboriginal Cultural Material Committee ('Committee') and the Registrar of Aboriginal Sites, but is not bound to follow them.[19] The Minister must also have regard to the 'general interest of the community'.[20] Applicants aggrieved by a Minister's decision may request a review by the State Administrative Tribunal.[21] In contrast, beyond making submissions to the Committee or looking for common law administrative error in the Minister's decision,[22] affected Aboriginal people have no equivalent avenue for appeal.

The Committee considered 131 applications made under section 18 over the 2011/12 financial year and, of these, the Minister assented to 125.[23] There are also credible reports, based on documents obtained from the Department of Indigenous Affairs ('DIA'),[24] that FMG has consistently failed to report identified Yindjibarndi heritage sites.[25] What is more, on 28 September 2011 the WA Auditor General, Colin Murphy, reported that at no stage has the DIA effectively monitored or enforced compliance with the AHA.[26] This all adds to the risk that Yindjibarndi heritage is being destroyed without the consent of either the State Government or the owners of that heritage.

THE NATIVE TITLE MARKET

How best, then, to understand the relationship between these events and the underpinning legal framework? Commentators like David Ritter[27] and Ciaran O'Faircheallaigh[28] have increasingly sought to apply a market analysis to the operation of the native title system. In doing so they stand on the shoulders of academic giants such as Marcia Langton[29] and Jon Altman,[30] who have tracked the marketisation of Indigenous people's relationships with the state and other actors over many years.

Within the native title system as it presently operates, the greatest source of market power for Indigenous peoples is the RTN, which Altman has characterised as a form of property right.[31] The RTN has a commercial value that fluctuates in correlation to the degree to which the grantee party is willing to pay for both the expeditiousness of a mining project and the goodwill of local Indigenous peoples: 'If native title holders can control the timing of mining company access to land and the conditions of that access, they possess leverage that can potentially be applied to secure a share of the wealth created by mining.'[32] Theoretically, the native title party holds the levers of supply, while the grantee controls demand. The value of the RTN is where the two vectors meet.

Ritter's phrase 'native title market' is pejorative, expressing his cynicism about the underlying motivations of the new 'culture of agreement-making' and the deeper effects of the commoditisation of land and heritage,[33] whereas O'Faircheallaigh starts from a more positive normative

position, focusing on the economic benefits that ought to flow to Indigenous peoples with greater engagement in the real economy.[34] However, these two commentaries harmonize on one key point: that to whatever degree native title groups do engage with resources markets, the current terms of that engagement are profoundly inequitable.

MARKET FAILURE

Until recently,[35] the NNTT never once declined to permit the grant of a mining lease. In 2006 O'Faircheallaigh and Tony Corbett analysed all of the NNTT's arbitrated future act determinations from its first ten years and published an article criticising the 'politics' of the Tribunal as inherently predisposed to subordinating the interests of Aboriginal people to those of mining companies.[36] In 2009 the NNTT responded with a paper by Deputy President Christopher Sumner and Legal Officer Lisa Wright.[37] Sumner and Wright reveal obvious mistakes in Corbett and O'Faircheallaigh's legal analysis. They state that too often 'there is no material on point or the material provided is insufficient to allow inferences favourable to the native title party to be drawn'.[38] They further argue that, to the extent that the future act regime is biased toward mining interests, this bias is located in the NTA itself, not in the institution of the Tribunal.[39]

According to classical economy theory, optimal market performance relies on maintaining relative equality between the bargaining positions of market participants: *ceteris paribus*.[40] But markets do not form in a vacuum: they are legally configured by governments to deliver an intended range of social outcomes. Looking at the native title system as a market, it is clear that the current legal-institutional environment has put native title parties in a weaker bargaining position vis-à-vis grantee parties. Ultimately, regardless of the precise origin of this bias, there is a well-founded perception amongst market participants that, when the RTN periods expire and matters go to arbitration, the NNTT will inevitably determine that mining leases may be granted. There is also general recognition that the AHA fails to adequately protect Aboriginal heritage in WA.[41] The result is market failure: access to native title land is undervalued, heritage is threatened, and the development of the capacity of Indigenous peoples to engage with resources markets in a self-determinative fashion is retarded. It cannot be sensibly suggested that, in shaping the NTA, successive federal governments intended these results.

MARKET REFORM THROUGH LAW REFORM

According to the YAC, the Solomon project 'has had and will continue to have devastating effects on the Yindjibarndi People and their capacity to care for country'.[42] The YAC's stated objectives in negotiating with FMG were to protect country and reach an agreement that will deliver 'substantial economic benefits for Yindjibarndi People'.[43] To that end, the YAC sought a royalty of 2 per cent of FMG's 'freight on board' revenue per annum. However, the CEO of FMG has stated that the Solomon mines will 'sit in the bottom quartile on the cost curve, which will position Fortescue as a low-cost producer globally and strengthen our international competitiveness'.[44] A company which seeks to position itself as a low-cost producer will be less inclined to reach agreements with native title parties that provide for royalty payments when it knows that, when the NNTT assumes its arbitral role, payments as a percentage of profits will be taken off the table and permission to proceed will almost certainly be granted. Arguably, a company so inclined will also be tempted to under-report Aboriginal heritage sites.

Market functionality will only be achieved when the Commonwealth Government amends the NTA. Changes to section 31 which would require parties to 'negotiate in good faith *using all reasonable efforts*', and would elaborate the contents of that requirement, are a positive development.[45] So too is the proposed extension of the RTN period under section 35 from six to eight months.[46] But these amendments only play at the edges.

What is really required is a fundamental reconfiguration of parties' respective bargaining positions. At minimum, Parliament should adopt provisions in a Bill introduced on 21 March 2011 by Senator Rachel Siewart that would enable the NNTT to impose profit-sharing conditions in an arbitrated future act determination.[47] Better yet, the Commonwealth should consider an amendment to section 36, repeatedly recommended by the AIATSIS Native Title Research Unit, that provides:

> The arbitral body must not make the determination unless the negotiation party that made the application under the section 35 for the determination satisfies the arbitral body that negotiations between the parties have reached the point where no further progress towards agreement is likely.[48]

These amendments mirror proposals made in 2009 by the Aboriginal and Torres Strait Islander Social Justice Commissioner.[49]

Some mining companies operating in the Pilbara demonstrate a conciliatory approach to negotiating with native title groups. They may decide that their long-term financial interests are best served by obtaining a 'social

licence' from local Aboriginal communities.[50] But not every company makes this calculation. As the Yindjibarndi will attest, when players such as FMG calculate that their best interests lie in going to arbitration, the native title market functions to undermine rather than support Indigenous aspirations toward economic participation, wealth creation and self-determination.

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1 This paper does not canvass all aspects of the dispute. For example, no room is made for the intriguing story of the Wirlumurra Yindjibarndi Aboriginal Corporation. See *NC (deceased) v Western Australia* (No 2) [2013]. See Gerry Georgatos, 'Hit the Road Twiggy', *National Indigenous Times* (Canberra) 28 November 2012, 1.

2 NTA s 233.

3 Here the Minister for Mines in the State Government of Western Australia ('WA'), whose powers to grant mining tenements are delegable to officers of the Department of Mines and Petroleum.

4 NTA s 31.

5 NTA s 35.

6 NTA s 36(2).

7 See *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141, [29]–[30]; *FMG Pilbara Pty Ltd / Cheedy / Western Australia* [2009] NNTTA 38, [67].

8 NTA s 33(1).

9 NTA s 38(2).

10 See *Daniel v Western Australia* [2005] FCA 536; *Moses v Western Australia* [2007] FCAFC 78.

11 NNTT File No. WC03/3, Federal Court File No. WAD6005/03.

12 YAC, 'The Facts about FMG's Proposed 'Solomon Hub' in Yindjibarndi Country', Factsheet, 4 August 2011, <http://yindjibarndi.org.au/yindjibarndi/wp-content/uploads/2011/08/FMG-Solomon-Mining-Lease-Fact-Sheet-04-08-11-v31.pdf>.

13 FMG, 'Solomon Fact Sheet' (October 2012) <http://www.fmgl.com.au/UserDir/FMGResources/Download/en/FACT%20SHEET_Solomon_Oct%202012%20LOW%20RES32.pdf>.

14 *FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia* [2009] NNTTA 91; *FMG Pilbara Pty Ltd / Wintawari Guruma Aboriginal Corporation / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia* [2009] NNTTA 99.

15 *Cheedy v Western Australia* [2011] FCAFC 100.

16 *FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia* [2011] NNTA 107.

17 *FMG / Cheedy / WA*, NNTTA 91, above n 14, [48].

18 See, eg, *FMG / Wintawari / Cheedy / WA,* NNTTA 99, above n 14, [26].

19 AHA s 11A.

20 AHA s 18(3).

21 AHA s 18(5).

22 See *Re Minister for Indigenous Affairs; Ex parte Woodley (No 2)* [2009] WASC 296.

23 Western Australia, Department of Indigenous Affairs, *2011/12 Annual Report* (2012) 31.

24 See YAC, 'FMG 'Declassified' then Destroyed Yindjibarndi Heritage Sites' (Press Release, 10 September 2012).

25 See Paul Cleary, 'Miner Tried to Fudge Study: Anthropologist', *The Australian* (Canberra) 17 October 2012, 6.

26 Auditor General, Western Australia, *Ensuring Compliance with Conditions on Mining*, Report No 8 (28 September 2011) 22.

27 See, eg, *The Native Title Market* (University of Western Australia Press, 2009); *Contesting Native Title* (Allen & Unwin, 2009) ch 5 ('Mining Rules and the Sheep's Back') 99–121.

28 See, eg, ''Unreasonable and Extraordinary Restraints: Native Title, Markets and Australia's Resources Boom' (2007) 11(3) *Australian Indigenous Law Review* 28; 'Native Title and Mining Negotiations: A Seat at the Table, but No Guarantee of Success' (2007) 6(26) *Indigenous Law Bulletin* 18; 'Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economy or 'Business as Usual'? (2006) 41(1) *Australian Journal of Political Science* 1.

29 See especially Marcia Langton, 'Introduction' in Marcia Langton and Judy Longbottom (eds) *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (Routlege, 2012) 1–20; Marcia Langton, 'The Resource Curse: New Outback Principalities and the Paradox of Plenty' (2010) 28 *Griffith Review* 47; Marcia Langton, Odette Mazel and Lisa Palmer, 'The 'Spirit' of the Thing: The Boundaries of Aboriginal Economic Relations at Australian Common Law' (2006) 17(3) *Australian Journal of Anthropology* 307.

30 See especially Jon Altman, 'In the Name of the Market?' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalize, Exit Aboriginal Australia* (Arena, 2007) 307–24; Jon Altman, 'Reforming Financial Aspects of the *Native Title Act 1993*: An Economics Perspective' (Discussion Paper No 105, Centre for Aboriginal Economic Policy Research, 1996); Jon Altman, 'Land Rights and Aboriginal Economic Development: Lessons from the Northern Territory' (1995) 2(3) *Agenda* 291.

31 Jon Altman, 'Native Title and the Petroleum Industry: Recent Developments, Options, Risks and Strategic Choices' (Discussion Paper No 125, Centre for Aboriginal Economic Policy Research, 1996) 2.

32 Ciaran O'Faircheallaigh, ''Unreasonable and Extraordinary Restraints: Native Title, Markets and Australia's Resources Boom' (2007) 11(3) *Australian Indigenous Law Review* 28, 29.

33 David Ritter, *The Native Title Market* (University of Western Australia Press, 2009) 76.

34 O'Faircheallaigh, above n 49, 28.

35 See *Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49; *Seven Star Investments Group Pty Ltd / Western Australia / Freddie* [2011] NNTTA 53; *Weld Range Metals Limited / Western Australia / Simpson* [2011] NNTTA 172.

36 Tony Corbett and Ciaran O'Faircheallaigh, 'Unmasking Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions (2006) 33(1) *University of Western Australia Law Review* 153.

37 Christopher J Sumner and Lisa Wright, 'The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries' (2009) 34(2) *University of Western Australian Law Review* 191.

38 Ibid 210. See also Christopher J Sumner, 'Getting the Most out of the Future Act Process' (Paper presented at the AIATSIS 2007 Native Title Conference, Cairns, 7 June 2007) 30–1.

39 Sumner and Wright, above n 53, 194.

40 See Chris Bajada et al, *Economic Principles* (3rd ed, McGraw Hill, 2012) 52.

41 See Blaze Kwaymullina, Ambelin Kwaymullina and Sally Morgan, 'Reform and Resistance: An Indigenous Perspective on Proposed Changes to the *Aboriginal Heritage Act 1972* (WA)' (2012) 8(1) *Indigenous Law Bulletin* 7

42 YAC, above n 12.

43 Ibid.

44 FMG, *2012 Annual Report* (10 October 2012) 6.

45 See Native Title Amendment Bill 2012 (Cth) (Exposure Draft) <http://www.ag.gov.au/ Indigenouslawandnativetitle/NativeTitle/Pages/Nativetitlereform.aspx> (emphasis added).

46 Ibid.

47 Native Title Amendment (Reform) Bill 2011 (Cth) sch 1 item 10.

48 AITSIS Native Title Research Unit, 'Comments on Exposure Draft: Proposed Amendments to the *Native Title Act 1993* (19 October 2012) 13.

49 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (Australian Human Rights Commission, 23 December 2009) 106–107.

50 See Marcia Langton, 'The Quiet Revolution: Indigenous People and the Resources Boom' (Part 1 of the 2012 Boyer Lectures, 18 November 2012).