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# Native Title Contestation in Western Australia's Pilbara Region

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### Abstract

The rights afforded to Indigenous Australians under the Native Title Act 1993 (NTA) are very limited and allow for undue coercion by corporate interests, contrary to the claims of many prominent authors in this field. Unlike the Commonwealth's first land rights law, Aboriginal Lands Rights (Northern Territory) Act 1976 (ALRA), the NTA does not offer a right of veto to Aboriginal parties; instead, they have a right to negotiate with developers, which has in practice meant very little leverage in negotiations for native title parties. And unlike ALRA, developers can deal with any Indigenous corporation, rather than land councils. These two factors have encouraged opportunistic conduct by some developers and led to vexatious litigation designed to break the resistance of native title parties, as demonstrated by the experience of Aboriginal corporations in the iron ore-rich Pilbara region of Western Australia.

### Keywords

Native title; mining companies; Aboriginal corporations; iron ore mining.

### Introduction

Some leading academics in Australia have argued that the rise of the minerals sector over the past decade, combined with legislative reforms by state and federal governments, have created unprecedented opportunities to transform the lives of Indigenous Australians. Moreover, some Indigenous academics, such as Langton and Mazel (2012: 26), say that these institutional and cultural changes have been transformative. A number of law academics with recognised expertise in this area have strongly endorsed the view that the institution of native title law, together with corporate social responsibility, has vastly improved the situation for Indigenous Australians faced with industrial resources developments often on a massive scale. For instance, Tehan and Godden (2012: 127) maintain that 'recognition of native title has had a transformative effect on relationships between Indigenous peoples and the resources sector'.

The iron ore mining operations in the Pilbara region are cited especially as a place of great potential for disadvantaged Aborigines who have for decades been marginalised by mineral developments. Langton and Mazel (2012) have highlighted the role of mining companies

operating in the Pilbara – such as Rio Tinto which now employs more than 1,500 Aborigines, along with BHP Billiton and Fortescue Metals Group – asserting that Indigenous jobs in the mining industry have been a critical part of the socio-economic transformation of Aborigines.

Academics have emphasised employment gains by Indigenous people because these numbers are more readily measurable. However, much less is known about the agreements negotiated between mining companies and Indigenous communities, such as the financial terms and income flows. Despite claims of practicing corporate social responsibility, resources companies invariably insist on and usually obtain strict confidentiality in these negotiations. In reality, little is known about the outcome of these agreements so there is in fact minimal evidence to support claims about the benefits of native title to Indigenous communities. This is contrary to practices in the 1970s, before the advent of federal native title law, when it was possible to obtain extensive details of agreements reached in the Northern Territory (Altman 1983). Thus, despite so-called improvements in legal institutions, there is less transparency today in native title negotiations than previously even though this attribute is meant to be one of the hallmarks of the neoliberal tradition.

This paper demonstrates how the procedures and institutions set up under the *Native Title Act 1993* (NTA) to deal with native title, together with state heritage laws, provides a clear benefit to developers, and that these advantages are magnified by the substantial financial resources that companies have available compared with those of native title parties. The NTA's provisions do not limit the use of aggressive and opportunistic behaviour by companies; in fact, I argue they actually encourage it. While gaining legal recognition of native title to traditional lands is complex, cumbersome and costly for native title parties, developers can generally bank on getting timely access to those same lands when they are sought for development. Furthermore, the nature of the NTA is likely to be divisive for native title groups especially when a developer chooses to provide financial support to one favoured faction within a multi-party language group. In such situations, an opportunistic company can divide and conquer a group and remain within the law, even though such actions could be considered a breach of the principle of good faith in negotiations, as required by section 31 of the NTA.

The case study discussed in this paper is a long-running dispute between the Yindjibarndi people of the Pilbara region and Fortescue Metals Group (FMG). Close scrutiny of this dispute raises questions about claims that the NTA is a more efficient and equitable framework for resolving disputes between native title parties and developers. One objective of the legislation as outlined by former Prime Minister Paul Keating in his second reading speech on the Native Title Bill in November 1993 was for individual claimants or groups to be freed from the monopoly of land councils which operate in the Northern Territory under ALRA. He declared:

We will therefore under the bill, determine representative Aboriginal and Torres Strait Islander organisations to assist claimants. They will not have a monopoly on representing native title claimants: individual claimants or groups of claimants can go elsewhere if they wish. (Keating in McKenna 1995: 3)

But the corollary of this argument, as this case study demonstrates, is that developers can also go elsewhere if they find that a native title party does not agree with their level of compensation or general approach to development.

Neoclassical theorists who have examined the NTA argue that it offers a better way of achieving market efficiency. As observed by McKenna, on the one hand, land council organisations can achieve 'economies of scale' because of their size while, on the other hand, the NTA's framework allows smaller groups to negotiate directly with miners, potentially leading to better economic outcomes. These outcomes arose because 'there will therefore be a greater chance that

Aborigines' valuation of their land will be accurately reflected in the body corporate's decision whether to negotiate a mining agreement' (McKenna 1995: 11). However, there is little evidence to support the notion that the ALRA regime, especially its land councils and local communities' rights of veto, has been responsible for poor economic outcomes. For many years the mining industry in the Northern Territory has represented a major share of that jurisdiction's economy, contributing more than 20 per cent of gross product. This level of resource sector activity is second only to that of Western Australia, and far ahead of the other five Australian states. In fact, evidence presented in this case study indicates that the absence of strong institutional support for Indigenous claimants has meant that one faction has grossly undervalued their land which has led to a substantially inferior outcome than might have been achieved.

### **Methodology and theoretical framework**

This paper focuses on a single dispute over access to land targeted for an iron ore mine worth as much as \$10 billion<sup>2</sup> in gross annual production value to highlight many problems faced by Indigenous communities in attempting to exercise their rights under relevant state and federal laws. The dispute between the Yindjibarndi Aboriginal Corporation (YAC) and FMG brings into sharp focus the governance arrangements within which Indigenous people in Australia have to work. YAC's vigorous pursuit of rights enshrined in the UN Declaration of the Rights of Indigenous Peoples, combined with FMG's aggressive approach to securing development approvals, helps to make this a highly instructive case study.

The methodological approach used relied heavily but not solely on interviews with many within the Yindjibarndi community on opposing sides of the dispute, along with a substantial amount of sourced documentation. The author used the federal Freedom of Information (FoI) law to obtain a series of documents. Additionally, material amassed by YAC using the Western Australian FoI law and elsewhere was made available to the author. Some of this material is in the form of confidential documents and emails that reveal a great deal about the extent to which corporate interests are able to exploit weaknesses in relevant laws. This information is complemented by publicly available documents such as records of appearances before judicial and administrative bodies which permit an appreciation of the level of contestation in this dispute.

Along with other considerations, the author carefully assessed the language used by FMG and the values embedded in the statements and presentations made by company executives in relation to this dispute. The corporate culture that emerged inside FMG is explored through scrutiny of the ways in which earlier negotiations with a community of traditional owners in the Pilbara were conducted and through examination of subsequent negotiations with YAC. The framing of debates on justice and compensation is a prominent dynamic in this case study, which in turn brings into focus the power imbalances that exist between companies and native title parties. In understanding and interpreting these dynamics, theories of justice are important. However, this case study highlights the limitations of conventional theories of justice, such as those in the Rawlsian tradition (Rawls 1971), and thus underscores the significance of theories of justice as outlined by Nancy Fraser (Fraser 2009) and Iris Marion Young (1990) that focus on concepts of recognition and oppression. Fraser in particular strongly argued that justice involves recognition of rights as well as redistribution. Fraser's theoretical framework resonates in this dispute given that a powerful corporate interest was able to frame – or indeed mis-frame – the debate about what constitutes fair and equitable outcomes. FMG was able to dismiss as 'mining welfare' YAC's legitimate demand under native title law for fair compensation. In comments that echo the influence of FMG in effectively setting the parameters of the negotiations and in defining the solutions to Indigenous disadvantage in national debates, Fraser argued that 'misframing' involves denying a voice and the ability to

press first-order claims. (Fraser 2009: 19-20) This paper argues that the dispute between the Yindjibarndi people and FMG corroborates Fraser's arguments. This assertion is borne out by the behaviour of some Yindjibarndi elders even to the point where those elders who supported FMG would defer questions about the dispute to company consultants, effectively making themselves non-persons with respect to speaking about their rights.

### **Key NTA provisions, institutions and issues**

A new administrative body, the National Native Title Tribunal (NNTT) was created by Part 6 of the NTA. The NNTT was established by the federal government on 1 January 1994, at the same time as the NTA received Royal Assent. This body is responsible for registering claims and dealing promptly and efficiently with negotiations where an agreement had not been reached after the prescribed period of six months. The Tribunal is not a court and does not decide whether native title exists or does not exist. This role is left to the Federal Court of Australia. However, the President of the Tribunal and its Members make arbitral decisions, chiefly in relation to 'future act' matters when parties have been unable to reach an agreement. The so-called future act regime set up by the NTA allows developers and native title parties to conduct negotiations even where native title claims are yet to be resolved. When an agreement cannot be reached after six months, the matter then goes to the NNTT for arbitration. Thus, the regime is designed to remove uncertainty for developers. To date, these matters have mainly involved mining proposals.

In addition to arbitration, the NNTT's Native Title Registrar has a procedural role with responsibility for making administrative decisions about the registration of claimant applications and Indigenous Land Use Agreements, which came about as a result of amendments introduced in 1998 (NNTT 2005). According to Strelein (2009: 6), a leading native title analyst, the process managed by the NNTT puts native title applicants on the back foot from the outset because it 'sets native title applicants in the position of having to "explain" their claims, to assert legitimacy and to ask for recognition from potentially hundreds of "interested" parties and often recalcitrant state governments'. The skepticism among some Aboriginal people about the role of the NTA as a facilitator of development rather than of Indigenous rights is supported by Strelein who says the provisions of the NTA were 'primarily directed to the impact on the granting of mining leases'. In its short history, the NNTT has presided over more than 3,028 future act decisions<sup>3</sup> and found in favour of the Indigenous party on just *three* occasions.

For native title parties, a pivotal element of the NTA creates the right to good faith negotiations (Section 31(1) (b)). This is deemed to be a 'special right' although it is in fact the only right given to native title parties under this regime and it can often prove to be of little value. In determining whether the negotiations have been conducted in good faith, the tribunal has asked if the parties acted 'honestly and reasonably' and has developed 'indicia' of what might be regarded as bad faith, such as the adoption of a rigid negotiating position or the failure to make counter offers (Burnside 2009: 5) In only a small number of instances, however, has the NNTT found a grantee or government party to have not acted in good faith. Burnside put the number at four out of 30 alleged instances of bad faith.

A number of cases before the Federal Court and the Tribunal involving FMG has found in favour of the company. In the case where FMG's proposed lease area overlapped part of the area of one Indigenous claimant application and also part of another Indigenous group's Determination Area (*FMG Pilbara Ltd v Cox* [2009] FCAFC 49), the Full Federal Court demonstrated, according to Burnside (2009: 11), that negotiations in good faith (s31 of the NTA) 'will be satisfied by all but the most extreme negotiation tactics'. Burnside added that an application for special leave to appeal *FMG v Cox* was refused by the High Court in October 2009. The NNTT again found in

favour of FMG in 2011 in a case involving the Yamatji Marlpa Aboriginal Corporation (YMAC), which was acting on behalf of the Njamaal People (see *Fortescue Metals Group Ltd/Western Australia/Taylor* [2011] NNTTA 66). This case acknowledged that land access lawyer Sukhpal Singh was engaged by FMG even though he had previously worked for YMAC, firstly as a senior legal officer and then as deputy principal legal officer, for almost three years to September 2008. The NNTT member Daniel O'Dea found, however, that no confidential materials were identified as being in Singh's possession, and nor had YMAC identified any information that was at risk of disclosure by Singh to the grantee party.

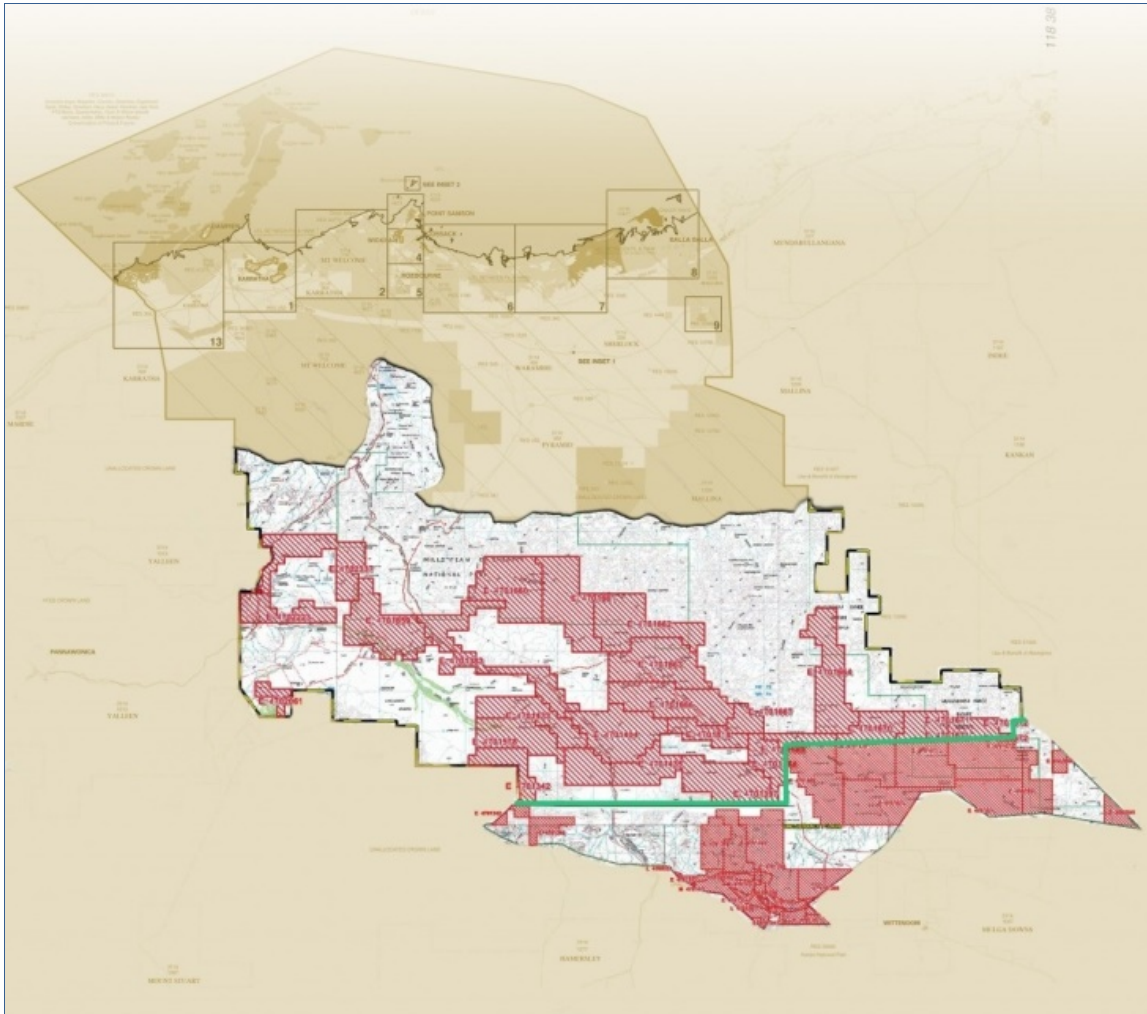
The deficiencies in s. 31 led the former Federal Labor government to propose amendments in the form of the Native Title Amendment Bill 2012 which proposed a reverse onus of proof on good faith negotiations, and an increase in the minimum negotiation period to eight months. The Bill, however, was held up in a Committee inquiry at the time of the 2013 election and was never passed into law.

### **The Yindjibarndi people**

After inhabiting the high country of the Pilbara region of Western Australia for tens of thousands of years, most Yindjibarndi people now live in the town of Roebourne and surrounding outstations. Roebourne, located just 39km from the affluent mining town of Karratha, has been symbolic of Indigenous exploitation, disadvantage and despair in Australia for decades. During the first century of white settlement in the region it was used as a hub to subjugate the Indigenous population and such oppression has continued into recent times. The September 1983 death of 16-year-old Yindjibarndi boy John Peter Pat at the hands of local police led to a Royal Commission into Aboriginal deaths in custody. Today, one of the major pieces of new infrastructure in Roebourne is a prison opened in March 1984 which has been continually expanded since then. Located just 5km from the town centre, its operational capacity of 161 inmates is regularly exceeded. This prison for the Pilbara and Kimberly regions has 'a high percentage of Aboriginal prisoners' (Department of Corrective Services 2013). In fact, the prison population is more than 80 per cent Indigenous.

Despite the overwhelming poverty and disadvantage experienced by the Yindjibarndi people, they formed their own corporation under Federal law in 1994, just three months after the NTA received Royal Assent. Under the native title law, the Yindjibarndi Aboriginal Corporation is known as a prescribed body corporate, which means that it holds native title rights and acts on behalf of the Yindjibarndi people when dealing with native title matters.<sup>4</sup> YAC's incorporation coincided with discussions among the Ngarluma and Yindjibarndi people that were aimed at lodging a native title claim and were led by the former Premier of Western Australia, Peter Dowding, in the town of Roebourne.

On December 20, 1994, the NNTT formally registered the Ngarluma-Yindjibarndi land claim. Registration of a claim is a significant milestone for native title groups because claims must meet 12 conditions specified in the NTA. As a result, registration carries with it implicit rights and is considered to be just as important as obtaining a determination because it can provide the basis for negotiations with developers. Almost a decade later, on 3 July 2003, Justice Nicholson granted a determination of Native Title to these two peoples in the form of non-exclusive possession and designated YAC as the prescribed body corporate for its successful claim (*Daniel v Western Australia* [2003] FCA 666 18). Just one week after Nicholson issued his native title determination, YAC submitted a new claim to the NNTT in an area adjoining the Determination Area. This became known as the Yindjibarndi #1 Native Title claim for which YAC is technically known as the agent to the claim Applicant.



**Map 1: The Ngarluma Determination Area in brown; the Yindjibarndi Determination Area is below it in white (overlaid with mineral exploration and development leases in red); and the adjoining Yindjibarndi #1 Native Title Claim area is below the green line.**

Source: Yindjibarndi Aboriginal Corporation

### **The FMG way**

Shortly after the July 2003 decision in which Nicholson found in favour of the Yindjibarndi people, FMG began staking out 'landholdings' in the Pilbara that reached into land claimed by YAC and subsequently registered with the NNTT in 2005. From 2003 onwards, FMG began lodging applications for exploration rights in both the Yindjibarndi Determination Area and the claim area. Specifically, between 16 October 2003 and 13 February 2006, FMG lodged 19 applications for exploration licences in the Determination Area and a further 18 in the area of the Yindjibarndi #1 Native Title Claim (Irving 2012: 2). The company made these applications even though it was focused on developing its first iron ore mines in another part of the Pilbara region.

The ethos and operational modus of FMG and its founder Andrew Forrest are an important part of any study of this company. In the space of five years, Forrest transformed a small listed company with a handful of prospects into a major iron ore exporter. A key part of the company's success has relied on a very strict approach to costs and efficiency, while at the same time investing significant resources in acquiring tenements throughout the Pilbara region that

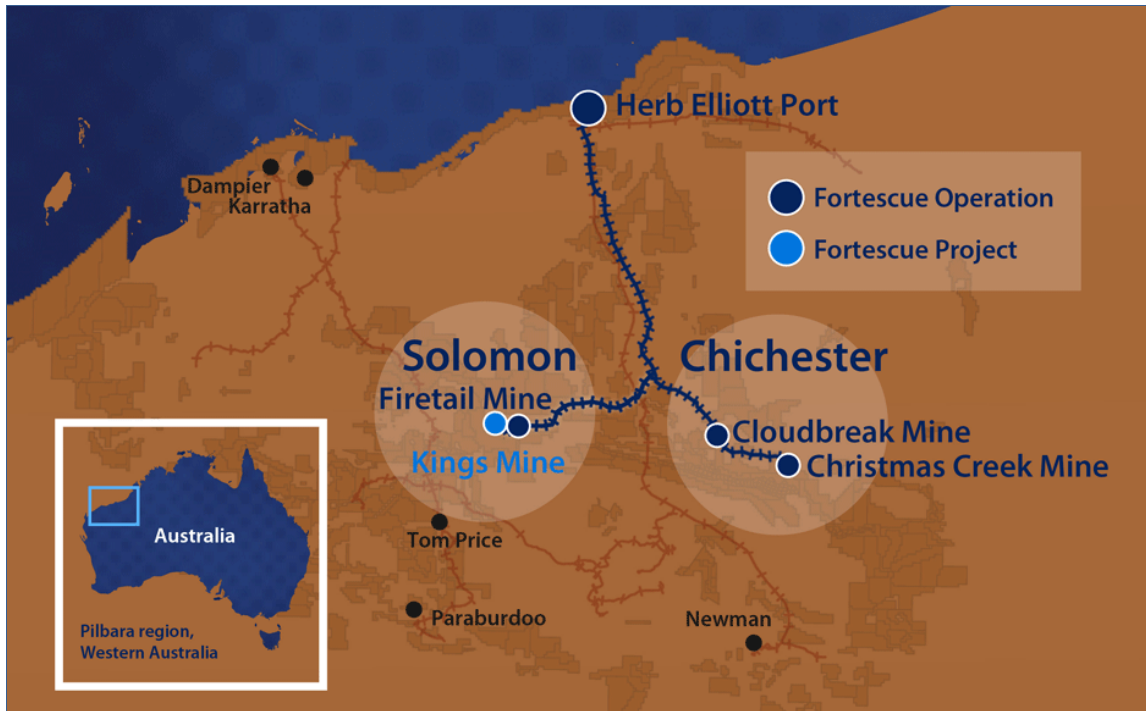
overlap native title land and claim areas. FMG has taken a different approach to land access agreements with traditional owners to that of established iron ore producers Rio Tinto and BHP Billiton in that it has emphasised jobs and training for Indigenous Australians and used highly loaded language to dismiss financial compensation such as labelling it 'mining welfare'. When Traditional Owners have rejected FMG's offers of low compensation, the company has responded with an aggressive campaign of litigation aimed at breaking this resistance and thus securing approval in a timely and cost-effective manner.

In July 2003, Andrew Forrest acquired a stake in a small iron ore miner, Allied Mining and Processing, which held mineral exploration leases in the Pilbara, and then changed the name to Fortescue Metals Group, reflecting the heritage of the region associated with his great-great uncle, the former Western Australia Premier John Forrest. Andrew Forrest acquired his controlling stake in the company for just 8c a share and, after converting all of his options, his total cash investment of \$8 million was, by January 2005, worth \$400 million (Burrell 2013: 109). FMG then embarked on a fast-track strategy of securing for its new mines all necessary approvals under state and federal law within the space of a few years.

An insight into FMG's attitude to political processes was shown in the way it lauded the ability of the Chinese government to expedite projects. In a 2008 shareholder presentation company executives said that while 'Australia is well-managed for a free democratic society, China is even better able to handle a crisis ....' (FMG 2008). The presentation pointed out that the new airport in Beijing went from approval to completion in three years, whereas the new Terminal 5 at Heathrow airport in London involved four years of public consultation followed by six years of construction (FMG 2008). FMG wanted to adopt a similar approach to the approvals required for its new Pilbara mines because it had set itself an extremely ambitious target of achieving first production by 2008.

FMG's applications for exploration leases throughout the Pilbara were part of a plan to acquire a vast number of potential mine sites. By 2006, it had already accumulated 32,000 square kilometres of tenements, more than *double* the combined tenements of Rio Tinto and BHP Billiton, two companies that had been operating in the Pilbara since the 1960s. The company had even acquired exploration rights that extended out to sea for about 20 kilometres along 500 kilometres of the Pilbara coastline. FMG at times referred to these exploration tenements as 'landholdings' in its shareholder presentations, even though it had no ownership of this land. In a February 2006 presentation to the Global Iron Ore and Steel Forecast Conference the company twice referred to itself as an extensive 'landholder' in the Pilbara (FMG 2006). Over the next five years, this calculated approach delivered the company an additional 50,000 square kilometres of approved or pending exploration tenements, taking the total to 85,000 square kilometres by 2013 (FMG 2013).

FMG's first mines were Cloudbreak and Christmas Creek, located in the Pilbara's Chichester Ranges about 260km south of Port Hedland. Both mines straddled the upper reaches of the Fortescue River (see Map 2). The myriad of approvals required to open this mine included negotiations with the elders of four communities who held native title claims within the mining lease: the Nyiyaparli; the Palyku; the Martu Idja Banyjima; and, the Puutu Kunti Kurrama and Pinikura and Eastern Guruma (Priest 2006: 44). The company had to negotiate with native title groups in order to obtain heritage clearances under the state's heritage laws and to reduce the risk that a successful native title claim could be used to secure compensation at a later date.



**Map 2: FMG's east and west Pilbara development zones. The Solomon mines are located in the Yindjibarndi # 1 Claim Area.**

Source: FMG 2014 shareholder presentation

One of the four groups, the Niyaparli, was preparing a claim for 36,684 square kilometres of land overlapping the FMG tenements. The claim was registered with the NNTT on 1 September 2005 (NNTT 2005). Two months earlier, FMG had secured an agreement with the Niyaparli people by using a tactic that might be described as divisive. The four groups were represented by the Pilbara Native Title Service (PNTS), which was the Pilbara-based subsidiary of the Yamatji Marlpa Aboriginal Corporation (YMAC), a registered native title body corporate that represented traditional owners in negotiations with mining interests. Partly as a result of the difficult and drawn-out negotiations with FMG, the relationship between the four groups and PNTS broke down. FMG saw this as an opportunity to broker a deal with some of the Niyaparli elders. Forrest had a relationship with one of the six elders, the 74-year-old Andrew Stock, who had worked on the Forrest family's Mindaroo station in the Pilbara, where Stock had taught Forrest and his brothers to ride horses (Priest 2006: 44). The financial compensation in the agreement amounted to unindexed cash payments of just 2.5 cents a tonne. By comparison, compensation paid by major Pilbara iron ore producers BHP and Rio Tinto has been in the order of 0.5 per cent per tonne, or 50 cents per tonne when compared to a benchmark iron ore price of \$100 per tonne.

The August 2005 agreement signed by Stock and five other Niyaparli native title claimants removed significant cultural heritage and environmental provisions that had been agreed between FMG and the Niyaparli in earlier negotiations, and it was signed without the elders having legal representation present. The broader Niyaparli claimant group disavowed the agreement two weeks later, and Stock said he had not known what he was agreeing to. Stock was quoted in the media the day after signing saying: 'I didn't know what was going on. I feel like they made me sign—they kept calling me uncle'. (Priest 2006: 44) He added that the company had given him and the five others two brand new Toyota Land Cruiser 4WD vehicles (with a current value of around \$100,000 each). After going through a protracted legal claim to



gain native title, the Niyiyaparli forfeited their rights as a result of this agreement with Stock and his associate.

The approach taken by FMG in these negotiations with the Niyiyaparli people and subsequent ones with YAC was outlined in a series of emails sent by staff and advisers in 2006 as the company was racing towards first production from its Cloudbreak mine. The emails were obtained by YAC in late 2011 and then posted on its website in August 2012. YAC first referred to them in a press release dated 29 August 2012 (YAC 2012). The authenticity of the emails has never been challenged by FMG or any other party, according to YAC Chief Executive Michael Woodley. However, YAC's senior executives agreed to shut down their website in July 2013 in order to move beyond the dispute and when it re-appeared the emails and other documents relating to the dispute with FMG had been removed.

The emails highlight FMG's adoption of 'aggressive strategies' to divide native title claim groups and undermine their confidence in their legal representative, PNTS. Instead, the company wanted these groups to seek new legal representation funded by FMG. The emails discussed 'efforts to get PNTS out of the heritage picture' and of 'executing a multifaceted strategy to counter PNTS's ability to impede [FMG's] achievement of outcomes with the blackfellas'. At the heart was a strategy to put PNTS under immense pressure and undermine its ability to organise itself due to a 'barrage' of 'expedited' litigation prosecuted at a 'gruelling pace'. The strategy outlined here with regard to FMG's negotiations with the Niyiyaparli people bears remarkable similarities to FMG's conduct in subsequent dealings with the Yindjibarndi people.

Significantly, the strategy included defamation actions against PNTS, a common feature of FMG's approach with native title advisers and the media. YAC later dismissed PNTS because it became unhappy with its conceding to FMG demands such as expedited applications. As an FMG executive explained:

Therefore, while we are still exposed to PNTS in the short term, I think it would be highly advantageous to maintain the defamation writs against PNTS and its operatives. This is consistent with the way I have presented the battle lines and we should respond to their correspondence accordingly. (Unpublished correspondence held by the author)

A September 2005 email from a Perth lawyer to various FMG executives outlined the strategy of dealing with Niyiyaparli elders Gordon Yuline and David Stock (unpublished correspondence dated 1 September; held by author). The lawyer said that Yuline and Stock 'were unhappy with the current state of affairs and wished to pursue a compromise with FMG'. The lawyer added, however, that another FMG-funded lawyer who was advising the two was not being sufficiently aggressive in trying to win hearts and minds in the Niyiyaparli community. 'I do not think that [the lawyer] is actively considering any of our "aggressive" strategies. I think we need to take the time to explain the benefits of those strategies to [the lawyer] – to the extent we believe it will assist us'.

It was around this time that FMG was preparing to serve a writ on PNTS for 'unlawful interference'. When asked whether FMG should 'push the button' on legal action, a very senior FMG executive responded by saying: 'I am deeply in favour of both expedition and serving the writ next tuesday [sic]. Give [the lawyer] one chance on Monday and then go immediately. Are we ready to go now or do we need that time anyway?' (unpublished email dated 31 August 2005; held by author).

The Perth lawyer explained in an August 2005 email to FMG's 'litigation coordinator' how the company could use the provisions of the NTA to secure the agreement it wanted with the

Niyaparli people (unpublished correspondence dated 31 August; held by author). This included replacing the members of the Applicant to the claim nominated by the Niyaparli community with FMG-favoured Applicant members, which is exactly the tactic used in the later dispute with YAC. Replacing the members of the Applicant could be achieved by going to the Federal Court and using a section of the NTA which was intended for use by claim communities. Using the term 'one' as the pronoun for the company, the lawyer explained: 'To replace Applicants, one applies to the Federal Court for an order that one or more of the applicants be replaced: see s66B of the NTA'. Although FMG wanted a fast resolution of the issues with the Niyaparli, the lawyer outlined an aggressive and ambitious litigation strategy that, while being more time consuming, would have the benefit of wearing down the PNTS. He wrote that he favoured seeking admission to the Supreme Court Expedited List to obtain an accelerated hearing date because this action would 'keep up with the *grueling pace* [emphasis added] of Supreme Court expedited trial. Such pressure will impact PNTS ability to organise themselves over coming weeks. It will be interesting to see whether they have the resources to actually run the case' (unpublished correspondence dated 31 August 2005; held by author).

### **FMG-Yindjibarndi negotiations**

In 2007, as the negotiations between the two parties were reaching a crucial stage, YAC appointed 37-year-old Michael Woodley as its new Chief Executive. Woodley is a highly articulate individual, despite having left school at sixth grade, and he has consistently taken a rights-based approach to the dispute. He personifies the community's experience with the mining industry over the past 40 years. His mother Susie was one of many young Aboriginal women in the region who became a teenage mother as a result of a brief liaison with a white mine worker. Michael Woodley has never known his father and was raised by his grandfather Woodley King who, along with other elders, educated him in traditional law. Despite gaining employment in the mining industry, Michael Woodley subsequently chose to work in cultural preservation through the Juluwarlu Aboriginal Corporation that he founded in 1999 with his wife Lorraine Coppin, before becoming Chief Executive of YAC.

At this time, part of FMG's preparations for mining on Yindjibarndi country involved obtaining clearances under State law for Indigenous heritage. The Western Australian *Aboriginal Heritage Act 1972* has two key sections that are designed to facilitate development that impacts on, or destroys, Aboriginal heritage. However, in order to do this, developers need to obtain the involvement and consent of Aboriginal parties. To this end, in 2007 YAC agreed to undertake heritage surveys in accordance with the Yindjibarndi Heritage Agreement. It began identifying areas that should be protected from development. In June that year FMG negotiated a 'Contract for Services in Relation to Exploration' with YAC, the agent for the Yindjibarndi Applicant to the #1 Native Title Claim. However, the relationship broke down when FMG mine clearance work destroyed an identified heritage site. YAC then refused to submit to FMG's expedited approach to heritage clearances.

In early 2008, while the dispute over heritage surveys was ongoing, FMG commenced formal negotiations for a land access agreement covering Yindjibarndi country. In terms of financial wherewithal, the disparity between the two entities could not have been greater. In the 2007-08 financial year, YAC reported income of \$115,705, whereas FMG earned gross income of \$201 million and reported a trading profit of \$72 million.

In a meeting attended by Chairman Andrew Forrest on 10 March 2008, FMG again pursued what it called a 'Whole of Claim Land Access Agreement' which involved YAC granting 'any and all tenure desired by FMG' for an unspecified project (Irving 2011: 13). In some ways, FMG's claims about its extensive landholdings in the Pilbara indicated that it was trading in real estate as much as iron ore. YAC responded to the ambitious claim by paraphrasing the UN Declaration

on the Rights of Indigenous Peoples. It said that in return for the free, prior and informed consent of the Yindjibarndi People, FMG should pay YAC an 'un-capped' 5 per cent royalty, equivalent to the royalty paid to the state government. At this meeting, Forrest declared native title did not equate to property rights and therefore native title parties were not entitled to compensation (Irving 2011: 9). This line of argument has been used inconsistently by senior FMG executives in their background briefings to third parties. However, some years later in July 2012, FMG applied to the Federal Court to be joined as a respondent party to the Yindjibarndi #1 Native Title Claim, on the grounds that it faced a compensation liability if the claim succeeded (*NC (deceased) v State of Western Australia* [2012] FCA 773).

At a negotiation session in Roebourne on 10-12 June 2008 (that is, subsequent to the March 2008 meeting), FMG was represented by land access manager Blair McGlew while YAC was represented by its directors and elders, along with a large number of YAC members. At this meeting FMG again proposed a 'Whole of Claim Land Access Agreement' with YAC; in return YAC would receive an upfront signature payment of \$250,000, plus \$2 million in training and a further \$3 million as a capped, un-indexed royalty (YAC 2008). YAC repeated its request for a royalty of 5 per cent. FMG's representatives claimed the request amounted to extortion. A video recording of this meeting made by YAC shows that FMG's chief negotiator Blair McGlew responded to the request with: '[t]hat number is extortionally [sic] high, it's way beyond, it is probably 10 times higher than any other number'. Later in the day McGlew explained how such a royalty was completely inconsistent with the approach taken by FMG in its intent to drive down costs to the bare minimum:

FMG wants to be the lowest cost iron ore producer—that's our goal, that's our number one goal out there. And we recognise that we don't pay quite the same money as some other companies, so we have put our energy and focus into other areas, and that is employment support and business support. (McGlew in YAC 2008)

When asked to respond to this statement in a 2011 interview, Andrew Forrest said McGlew's comments did not apply to Indigenous settlements. Rather, Forrest thought that:

... he was referring to the mining costs and operating and shipping costs Kerry [O'Brien, the interviewer]. It's, I mean we're not the lowest cost when it comes to Aboriginal involvement and we are one of the most expensive ... We do want always our overall cost to be as competitive as possible, it is how we can survive as an independent Australian company. The line I would like to draw in that is when it comes to Aboriginal contribution in [sic] Indigenous involvement we've always gone way, way beyond the call of duty. (Forrest, in Four Corners 2011)

However, at the June 2008 meeting, McGlew made clear that, if YAC did not accept the terms offered by FMG, the company would use considerable legal leverage to get its way. And he justified this approach by saying the company was in a rush to develop, declaring: 'Fortescue will always use legal avenues to get our mining leases and roads and whatever else. I'm not going to hide that. We will do that every time, because we are in a hurry, in a rush' (McGlew in YAC 2008).

Subsequently, in late 2008, YAC reduced its ask to a 2.5 per cent royalty, in line with the percentage paid to mining heiress Gina Rinehart in her private company's arrangement with Rio Tinto. And finally, as iron ore prices climbed above more than \$150 a tonne, YAC's request fell back to the industry standard for Pilbara iron ore of 0.5 per cent of the production value (Irving 2011: 15) A consistent comment by FMG's negotiators in response to these requests was that 'Aboriginal people can't handle that kind of money' (Irving 2012: 15). Interestingly, at no point

did the company offer to pay money into a trust fund so that savings could be prudently managed and made available for future generations.

FMG's penultimate offer was limited to a cash settlement – not even indexed for inflation – of \$4 million a year over the life of the mine. It added \$6.5 million a year in unspecified jobs and training benefits, even though such outlays could be construed as tax deductible business expenses. And, significantly, FMG offered the inducement of a \$500,000 signature fee to secure the agreement. Negotiations remained stalemated until FMG used the global financial crisis in late 2008 as a catalyst for making an even lower cash offer to YAC, even though it was telling its shareholders that a strong recovery in China was underway. It offered a signature payment of \$245,000 and an annual payment of \$2.1 million.

These fixed dollar amounts are very modest compared to industry practice in the Pilbara region. Based on Rio Tinto and BHP Billiton settlements and FMG's planned production levels<sup>5</sup>, the Yindjibarndi people might have benefitted from an income stream of at least \$30 million a year, with a substantial share of these payments paid into a trust fund which would fund business development and scholarships, while leaving a share for future generations. The FMG offer therefore amounted to about one tenth of potential arrangements.

FMG put the same offer back on the table in December 2009, and again in January 2010, before then asking YAC to arrange a community meeting so that it could be satisfied that all Yindjibarndi people were aware of this offer. In February 2010, FMG negotiator Blair McGlew raised the prospect of organising his own community meeting, and then circulated throughout Roebourne the 'Yindjibarndi-Fortescue Information Paper'. This paper said YAC was asking 'way too much' and FMG would go to NNTT to secure its mining licences. FMG's assertion that the company was not required to pay compensation were repeated with the statement that: '[u]nder the law, no financial compensation is payable to Yindjibarndi if the leases are granted in this way'.

On 6 July 2010, McGlew convened a meeting in Roebourne of Yindjibarndi people to discuss job opportunities and work on heritage surveys in the Solomon area. According to attendees, FMG lawyer Alexa Morcombe and McGlew focused instead on the negotiations and the prospect of YAC securing a favourable outcome. The conveners told the attendees that there was no way that YAC could win in court and that they should accept the FMG offer. YAC's chances were 'all over rover', was how Yindjibarndi elder Bigali Hanlon interpreted their comments (personal interview, 11 April 2011). Hanlon added: 'FMG told people at that meeting on Tuesday that they have lost their court case, and you can't do anything. That gave people the understanding that their only hope was to do heritage surveys' (Hanlon 2011). Another attendee added: 'We didn't understand what was going on in the Tuesday meeting. I was there. I thought they were offering jobs for people. Put you names down here, write down everyone who might be interested in work. Now I see that we were being tricked' (Irving 2011: 17)

As with the earlier Nyiyaparli negotiations, FMG's strategy also involved applying a barrage of litigation and administrative procedures against YAC, which subsequently included a Supreme Court action to have YAC wound up, and a Federal Court Action to have the members of the Applicant for the native title claim replaced. These demands drove YAC's sole legal counsel George Irving to exhaustion and reinforced a perception in the community that there was no point in resisting the company. The extent of legal contestation from 2009 onwards between YAC and FMG and the FMG-funded WMYAC is shown in Table 1.

**Table 1: Legal and administrative proceedings between YAC and FMG/WMYAC for the Solomon Hub**

<i>Date</i>	<i>Matter</i>	<i>Case reference</i>
<b>2009</b>		
24 April	Determination of NIGF re mining lease M47/1413	[2009] NNTTA 38
23 June	Granting of mining leases M471409/1411	[2009] NNTTA 63
13 August	Granting of M47/1411	[2009] NNTTA 91
<b>2010</b>		
14 May	Mining Warden upholds YAC objections	[2010] WAMW 15
2 July	FCA dismisses YAC appeal against 3 leases	[2010] FCA 690
26 October	FCA dismisses FMG's application for costs	[2010] FCA 1154
25 November	FCA dismisses YAC applic. to stay grant of leases	[2010] FCA 1305
29 November	NNTT upholds objection to grant of E47/1818 to FMG	[2010] NNTTA 194
<b>2011</b>		
1 April	FCA orders YAC to pay FMG costs on stay applic.	[2011] FCA 305
17 June	NNTT affirms NIGF over M47/1431 and awards lease	[2011] NNTTA 107
12 August	Full Federal Court dismisses YAC appeals against 3 leases	[2011] FCAFC 100
18 August	Mining Warden dismisses YAC objection to four misc. leases and M47/1453	[2011] WAMW 13
29 November	Injunction against YAC holding its AGM	[2011] WASC 354
<b>2012</b>		
7 February	NNTT dismisses YAC objection to grant of E47/1319	[2012] NNTTA 11
17 February	State Administrative Tribunal dismisses YAC objection to deletion of conditions on leases	[2012] WASAT31
2 July	FCA allows FMG to be joined as a party to Yindjibarndi native title claim	[2012] FCA 773
<b>2013</b>		
12 February	FCA affirms YAC application to replace members of the Applicant	[2013] FCA 70
Pending	Application in Supreme Court of WA to appoint a receiver/manager to YAC	

### The splinter group emerges

Following unsuccessful attempts by FMG to again secure YAC involvement in heritage clearances, the Wirlu-murra Yindjibarndi Aboriginal Corporation (WMYAC) was registered with the Federal government's Office of the Registrar of Indigenous Corporations on 23 November 2010. Its stated purpose was to provide 'health and community services' to the Yindjibarndi people. Fifteen days later, it became clear that the real aim of WMYAC was to replace YAC and the members of the Applicant to the native title claim. A Notice of Meeting in the *Pilbara News* (8 December 2010) informed Yindjibarndi members of a meeting to be held at the '50 Cent Hall' in Roebourne on 21 December with the aim of securing a vote to discontinue all legal resistance to FMG. The meeting was proposed by three of seven members of the Applicant for the Yindjibarndi #1 Native Title Claim, Aileen Sandy, Mavis Pat and Sylvia Allen (*Pilbara News* 2010). The agenda proposed that:

- YAC discontinue two Federal Court appeals.
- All objections made under the Mining Act 1978 (WA) on behalf of the Yindjibarndi #1 Native Title Claim members against FMG's Solomon Hub project land tenure be withdrawn.
- All objections made under the NTA on behalf of the Yindjibarndi #1 Native Title Claim members against FMG's Solomon Hub project land tenure be withdrawn.
- The Yindjibarndi #1 Claim applicants give consent to any mining tenement applications by FMG Pilbara Pty Ltd or other FMG entities which affect land within the Yindjibarndi

#1 Native Title Claim and which are the subject of application under s. 35 of the Native Title Act 1993 (Cth).

- The Yindjibarndi #1 Native Title Claim applicants immediately proceed to finalise a land access agreement with Fortescue Metals Group Ltd, FMG Pilbara Pty Ltd and other FMG entities in terms approved by the majority of the claim group membership.

This meeting broke down amid acrimony but in March 2011 WMYAC called another meeting to replace the members of the Applicant, which was attended by FMG Chairman Andrew Forrest. This tactic would have succeeded had YAC not taken the initiative and matched this effort by calling its own s.66 (b) meeting a year later, in March 2012. YAC then joined WMYAC's application to the Federal Court and became known as the 'Replacement Applicant'. In a separate avenue of legal pressure on YAC, FMG funded and initiated an action in the Supreme Court of Western Australia to have an administrator appointed to YAC. FMG provided substantial funding to WMYAC for both the Federal and Supreme Court challenges. For the 2011-12 financial year, WMYAC reported gross revenue of \$8.5 million and net assets of \$3.6 million (WMYAC 2013) The main source of revenue was described in the notes to the accounts as 'services' income which included \$1.6 million from FMG in addition to \$2.98 million from other services, and \$1.79 million as survey income. WMYAC's single biggest outlay was on consulting expenses, which totaled \$2.1 million, with about half of this spent on legal expenses.

On 12 February 2013 the Federal Court's Justice McKerracher issued his judgment on replacing the Applicant. He declined to first consider the resolutions passed at the March 2011 meeting staged by WMYAC/FMG because he declared that this meeting would be made redundant by YAC's s66b March 2012 meeting (FCA 70, 9-10). McKerracher dismissed the validity of the WMYAC meeting with a deft touch. He said that had the opposition to YAC's authorisation meeting been successful, then of course he would have considered the 2011 meeting. But given this was not the case, then 'the 2011 meeting arguments fall away' (*NC (deceased) v State of Western Australia (No 2)* [2013] FCA 70 [13]). The preparation undertaken by YAC for the March 2012 meeting and the procedure at the meeting was described by McKerracher as 'particularly thorough'. He noted that the evidence given about the preparation for the meeting and the procedure at the meeting went unchallenged. He concluded:

The 2012 meeting was entirely professional, balanced and careful. There is no technical reason why the Replacement Applicant should not succeed in their application and the potential disharmony between the two groups is something which is unlikely to be resolved simply by refusing the application. For all those reasons, I am satisfied that the Replacement Applicant should succeed in its application. (FCA 70: [106])

After five years of fighting on numerous legal fronts in various courts and tribunals the decision proved to be a huge moral victory for YAC. Chief Executive Michael Woodley argued that the Federal Court had provided the Yindjibarndi people with the 'safety net' that it needed. The decision meant that the people would 'not be denied our place within this nation's legislative laws because a mining company thinks it knows best' (Woodley 2013). The victory owed a great deal to the tenacious approach taken by Michael Woodley and George Irving. Despite this win, FMG has continued to give substantial funding to WMYAC and has maintained a Supreme Court Action to have a receiver appointed to YAC. It now appears that about 40 per cent of Yindjibarndi people side with WMYAC so it may only be a matter of time before FMG prevails and replaces YAC with WYAC. However, under YAC's constitution, directors can only be installed with unanimous support.

## Conclusion

After six years of costly resistance and wrangling through the courts and the tribunal, FMG began mining on land claimed by the Yindjibarndi people under the *Native Title Act 1993* and registered with the National Native Title Tribunal but without paying compensation to the Yindjibarndi Aboriginal Corporation. The Solomon Hub's Firetail mine has produced almost 20 million tonnes of iron ore since opening in May 2013 (FMG 2014), earning the company around \$2 billion in revenue alone. The Kings Deposit, which commenced operations in March 2014, will boost annual production by another 40 million tonnes and earn around \$3.5 billion a year at current prices. Its production is a crucial part of the company's goal of reaching 155 million tonnes per annum. Both mines sit squarely within the Yindjibarndi #1 Native Title Claim and yet FMG has been able to access this land without paying a cent of compensation.<sup>6</sup>

This dispute bears many of the hallmarks identified by Australian and international scholars and UN officials, most notably former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya, about the injustices experienced by Indigenous or marginalised peoples generally, and especially when mineral riches are involved (Anaya 2011). Beyond the legalities of the dispute, it seems patently unfair that the people whose land is contributing to the nation's single biggest source of export revenue (Bingham and Perkins 2012) remain mired in poverty. Because of the high living costs associated with regions where the mining industry is dominant, including for basics such as food and shelter, Indigenous people in the Pilbara face even greater economic disadvantages than those experienced by other Indigenous Australians and low income groups. Even more unjust is the fact that corporate interests are able to use the justice system to achieve this end.

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<sup>1</sup> This research was carried out while the author was a doctoral candidate at the Centre for Aboriginal Economic Policy Research at the Australian National University, Canberra. Conferral of his PhD is scheduled for late December 2014.

<sup>2</sup> All figures are in Australian dollars. This estimate is based on the 10-year average price of \$90 per tonne, using figures from The Steel Index (see <https://www.thesteelindex.com/>).

<sup>3</sup> Figure obtained from NNTT's website using 'search the register & applications' function, which yields this number of determinations each with their own unique Tribunal file number.

<sup>4</sup> *Daniel v Western Australia* [2005] FCA 536 (2 May 2005) at 18 states that: 'The Yindjibarndi Aboriginal Corporation is to hold the native title rights and interests of the Yindjibarndi People in trust for the Yindjibarndi People'.

<sup>5</sup> FMG planned to mine 60 million tonnes of iron ore a year from the Solomon Hub, which, at an average forward price of \$100 a tonne, would amount to \$6 billion of revenue a year. If production rose to 100 million tonnes – which potential FMG had flagged in shareholder presentations – revenue would lift to \$10 billion a year, and a higher iron ore price assumption would take this amount even higher.

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<sup>6</sup> While the Solomon mine is wholly within the claim area, one of the leases for the Kings mine overlaps 74.35 per cent of the area, and a second overlaps 4.98 per cent. FMG has said the mine is solely within the Eastern Gurama determination area because it has an Indigenous Land Use Agreement with this group, but it often fails to mention the Yindjibarndi interest perhaps because it has no such agreement.

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