



OFFICIAL

Perth: 1/7 Tully Rd, East Perth WA 6004
08 9331 0100
Kalgoorlie: 159-161 Dugan St, Kalgoorlie WA 6430
08 9092 6500
Freecall: 1800 413 942
Postal: PO Box 3007, East Perth WA 6892
ABN: 54 635 417 042

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Dear Rachel,

Re: Attachment to NTSG 2023-2024 Funding Application – Marlinyu Ghoorlie Proceeding

NTS Goldfields Ltd (NTSG) provides the following funding request as an additional proposal which should be considered in conjunction with NTSG's 2023-2024 Funding Application dated (16 June 2023).

1. Background

The Marlinyu Ghoorlie native title application (WAD 647/2017) (the **Application**) lies within the southwestern portion of NTSG's area of service provision. The Application was listed for a separate question hearing on 5 October 2022. The separate question is:

"Who are the holders of native title rights and interest in accordance with s 223 of the Native Title Act 1993 (Cth) in relation to the land and waters covered by the Marlinyu Ghoorlie native title determination application (WAD 647 or 2017)?"

A significant number of Indigenous persons have approached NTSG seeking assistance to protect or pursue recognition of their asserted traditional rights and interests in relation to the Application area. s42

[REDACTED]

To date NTSG has considered applications for assistance on a merits basis and has been utilising carry over funds NIAA provided for this purpose. Responding to the numerous applications for assistance has been resource intensive and, given the complexities of the disputes, challenging.

As NTSG has dealt with the applications for assistance on a merit basis, some parties have been provided with comprehensive assistance, other parties have been provided with limited assistance, others still with assistance via a staged approach to consideration and allocation of that assistance and some parties have been refused assistance altogether. s42

[REDACTED]

2. The Court seeks to deal with the Application area to finality


Prior to the hearing of the separate question, a preservation evidence hearing occurred in February 2023. During that hearing, his Honour Justice Bromberg made the following comments in relation to the participation of a respondent party in the separate question hearing:

HIS HONOUR: Insofar as it might help, it would certainly be the Court's preference for the claims made by everyone in relation to the claim area, that's the Marlinyu Ghoorlie claim area, it would certainly be the Court's preference that all claims be determined and all claims be determined in the forthcoming hearing through the separate question that I have ordered. As a matter of fairness and as a matter of efficiency, it seems to me that that is the most just approach. I'm not in a position to do anything about your client's need for funding, but insofar as those observations assist in making it clear to those who might provide funding, the Court's view about the most efficient way forward –then I'm happy for those observations to be relied upon.¹

Bromberg J goes on to state:

HIS HONOUR: I only say what I say because as a matter of fairness and also as a matter of efficiency, it would certainly be better if the Court can deal to finality with all claims.²

NTSG recognises that parties (including any Indigenous party) and their lawyers have obligations under s37M of the *Federal Court of Australia Act 1976* (Cth) to act consistently with the overarching purpose of facilitating the just resolution of disputes. This includes resolving disputes as quickly, inexpensively, and efficiently as possible. s42



s42



The history of native title in this area of the Goldfields of Western Australia is long, complex and fraught with disputes. Numerous claimant applications have been made by various differing parties in relation to the area presently covered by the Marlinyu Ghoorlie application. Despite these many applications, none have progressed to a determination.

¹ Transcript of Proceedings, *Brian Champion and Ors on behalf of the Marlinyu Ghoorlie Claim Group v State of Western Australia*, (Federal Court of Australia, WAD 647/2017, Bromberg J, 21 February 2023), P-216, 41

² Ibid, P217, 16

Consequently, parties who seek recognition of their asserted rights and interests, must continue to repetitively engage in making new claims or acting as respondents to those claims in the absence of any final resolution about who holds native title. We suggest that this reflects the complex nature of people's connections to this area and the extent of dispute between parties about those connections. NTSG acknowledges that significant resources have already been expended in attempting to resolve native title in this area since the inception of the *Native Title Act 1993* (Cth).

3. Proposal for an alternative approach to funding

In light of the above, NTSG proposes that substantive funds are provided by NIAA to allow the various Indigenous parties seeking native title recognition to make and prosecute those claims (s42 [REDACTED]). The overall objective of this approach would be to provide adequate funds to enable all parties to have the opportunity to make out their cases for recognition of native title. If all parties are in a position to make and prosecute those claims, it should enable parties to seek recognition of their asserted rights and interests and allow the Court to deal to finality with those claims.

NTSG does note that, whilst provision of substantial funding to enable all parties to bring claims before the Court is preferable, it will not guarantee that all parties will elect to file claims rather than remain as respondents - nor can respondent parties be compelled to bring claims. It should be noted that a respondent cannot secure a determination of native title in their capacity as a respondent party³. In such a case, it is possible that the Court will not be able to deal with the claims to native title in the area to finality, if the respondents are able to advance their case and are successful in doing so, as no relief could flow.

The current proceedings and listing of the separate question have had the effect of 'flushing out' parties who are asserting traditional rights and interests in the application area. NTSG's proposal includes a request for funds that would provide for each of these various parties to both make and prosecute a claim via the separate question hearing. The funds sought for this purpose are based on estimates of costs provided by various practitioners throughout the "applications for assistance" process related to these proceedings and from reviewing costs NTSG itself has incurred when facilitating native title applications.

4. Particulars of the funding proposal

The total additional funds requested for this purpose are **\$ 2,850,000.00**. This includes funds for authorisation meetings (or claim meetings to amend claims), legal fees, travel assistance, anthropologist fees, administrative costs and disbursements. The funds sought are as follows:

Party	Activities	Funds Required
Karratjibin	<ul style="list-style-type: none"> - Anthropological research report completed (supplementary work) - Participation in separate question hearing (lay and expert evidence filed for separate question hearing, submissions lodged for trial or separate 	\$400,000

³ *Commonwealth v Clifton* (2007) 164 FCR 355, [57]-[58]

		question hearing, closing submissions completed) - Claim or amendment to claim authorised by claim group	
s42			\$400,000
s42			\$500,000
s42			\$500,000
s42			\$50,000
s42			\$500,000
s42			\$500,000 (\$100,000 for making of claim) (\$400,000 for separate question hearing and other work)

Released under the FOI Act by the
National Indigenous Australians Agency (NIAA)

	- s42	
Total Funds		\$2,850,000

NTSG is open to discussing this proposal further with NIAA if additional information is required.

Yours sincerely,

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NTS Goldfields Ltd

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35. **Native Title Services Goldfields (NTSG):** NTSG's application contains in effect, a contested litigation component as the timing with Court orders in the Marlinyu Ghoorlie case management has coincided recently. In arriving at a recommended amount for NTSG, the assessment and recommendation at Attachment C sees a \$s22 recommendation for NTSG's operations and PBC support and a further amount of \$2.2 million for Marlinyu Ghoorlie case management. NTSG's application for Marlinyu Ghoorlie (bid: \$2.85m) has been assessed by the Native Title Funding Team and a recommendation of \$2.2 million is made here. In arriving at the recommended amount, we have acknowledged that NTSG has committed unspent funds out of 2022-23 toward the matter and have reviewed the Court orders which have been set out going forward through the next financial year. The recommendation has taken account of the history and complexity of Kalgoorlie and surrounds, high level of disputation, lasting trauma from the 2007 Wongatha dismissal and taking into account the Federal Court's current approach to hopefully resolving the matter. This will involve separate question proceedings to make determinations of who might hold native title across overlapping asserted interests. Put crudely, the approach being taken has the potential to 'flush out' claims and counter claims. By supporting 'the day in court' approach and providing funding across a number of parties, NTSG believes this presents the best chance to ensure people are heard and questions of fairness better addressed. We are supportive of the approach, although acknowledge inherent risks that NTSG has outlined in its Marlinyu Ghoorlie specific addendum to the application. It will be important in conveying the funding amount to NTSG for 2023-24 that the Marlinyu Ghoorlie case management strategy has a dedicated amount attached to it so as to provide clarity to the multiple legal and research practitioners representing the various asserted interests.

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EC23-001009	National Indigenous Australians Agency	
Indigenous Advancement Strategy (IAS) – Grant Proposals for Decision		
Merits of the grant		
Grant funding recommendation:		Partially Recommended
s22	s22	<u>Delegate Decision</u>
		Fund
		Signature
	Of particular emphasis, has been the finalisation of the Marlinyu Ghoorlie claim. With the finalisation of the South West Settlement, the Marlinyu Ghoorlie claim has particularly grown in complexity as it overlaps a residual boundary of the settlement area in addition to having several different Respondent groups laying claim over the area. NTSG has currently prioritised the proceeding and is seeking to define a strategy to resolve the claim. s22	s47F
s22	Comment:	



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