IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S99 of 2015

BETWEEN:

MOUNT BRUCE MINING PTY LIMITED
Appellant

and

WRIGHT PROSPECTING PTY LIMITED
First Respondent

HANCOCK PROSPECTING PTY LTD
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I:

1. The First Respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II:

2. These written submissions respond to the written submissions of Mount Bruce Mining Pty Limited ("**MBM**") dated 19 June 2015 ("**MS**") and adopt the abbreviations therein.

3. The First Respondent ("**WPPL**") agrees with the two issues identified at [3]MS. The primary issue in this appeal, as identified at [3(1)]MS, concerns the proper construction of the phrase "MBM area" in the 1970 Agreement. WPPL says that there was no error in the Court of Appeal's construction of that phrase. It is clear from the language used, the context and the object or purpose of the 1970 Agreement that the parties intended the "MBM area" in clause 3.1 of the 1970 Agreement to refer to an area of land, and which remained the MBM area (as defined) notwithstanding any subsequent shifts over time in the rights held by the Hamersley Group in respect of that land.

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4. The second issue identified at [3(2)]MS, is whether it is permissible to construe the definition of MBM area by reference to the ordinary meaning of "area". WPPL submits that there is no reason as a matter of principle or logic why the ordinary meaning of the words chosen by the parties for a defined term may not be relied upon, as part of the text of the contract, in objectively discerning the intention of the parties. WPPL says that the Court of Appeal was correct to have regard to the language of the 1970 Agreement as a whole, including the ordinary meaning of the words the parties used as a definition. In any event, the Court of Appeal's references to the ordinary meaning of "area" do not detract from the correctness of the Court of Appeal's conclusion as to the proper interpretation of MBM area in clause 3.1.

Part III:

5. WPPL certifies that it has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903 (Cth), and that no notice needs to be given.

Part IV:

6. WPPL relies upon the following facts additional to those in the factual summary in MS.

7. First, pursuant to the 1962 Agreement the parties agreed that in a range of defined circumstances a royalty would be payable by Hamersley Iron to Hanwright if ore was won from certain areas of land. One such circumstance was if ore was won from land identified by reference to the fact that at that time Hanwright held rights of occupancy in respect of the land.[1] A second was if ore was won from land identified by reference to a blue area shaded on a map annexed to the agreement ("**Third Schedule Area**") but in respect of which Hanwright held no rights as at the date of the 1962 Agreement.[2] A

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[1] Clause 1 of the 1962 Agreement provided that the Vendors (being Messrs Hancock and Wright and WPPL and HPPL) were to sell Hamersley Iron all the right, title and interest in and to the "*said Temporary Reserves*" (defined in recital (f) as the temporary reserves for iron ore listed in the Second Schedule).

[2] Pursuant to clause 9 of the 1962 Agreement, Hanwright's right to royalty payments extended to any iron ore produced by Hamersley Iron from the "*Temporary Reserve land*". Clause 10 defined "*Temporary Reserve land*" by reference to separate areas of land. The first is the "*said Temporary Reserves*", which are listed in the Second Schedule to the 1962 Agreement and are the temporary reserves referred to in clause 1. The second area of land referred to by clause 10 is that described as "*any other land as described in the Third Schedule*". The Third Schedule of the 1962 Agreement refers to "*[a]ll those pieces of land delineated and coloured blue on the plan attached hereto and comprising in all an area of approximately 1218 square miles*". Under Clause 10, the "*Temporary Reserve land*" is defined to include any areas of land within the "blue shaded area" in respect of which Hamersley Iron obtained further rights of occupancy over from the date of the 1962 Agreement up until the "*time of readiness for production*" (defined in clause 11 as the time by Hamersley Iron had made all necessary preparations to enable Hamersley Iron to commence the production of iron ore, which had occurred in

third was if ore was won from iron ore deposits disclosed by Hanwright to Hamersley Iron in the period subsequent to the entering into of the 1962 Agreement, described as the "*pre-production period*".[3] Thus, under the 1962 Agreement, as under the 1970 Agreement, Hanwright's entitlement to a royalty did not depend upon ore being won through the exercise of rights held by one or other party at the time of the agreement. Rather, it was dependent upon circumstances as defined in the agreement eventuating, reflecting the commercial bargain that the parties chose to reach. The 1962 Agreement thus does not support any presumption or inference that the parties intended, in the 1970 Agreement, to tie the entitlement to a royalty to the exercise of rights held as at the date of the agreement. It goes the other way, supporting an inference that the parties meant what they said, embodying the commercial bargain in the words used.

8. The entitlement to royalty under the 1962 Agreement related to geographically defined areas of land that were distinguished from rights of occupancy or rights to mine. Thus, the 1962 Agreement in the preamble (clauses (f) and (g)) drew a clear distinction between Temporary Reserves, and the land comprised therein, defined as the "*Temporary Reserve land*". Further, the freestanding nature of that definition is clear from clause 10, which, for the purpose of the royalty entitlement, defined "*Temporary Reserve land*" as including all of the land shaded blue in the attached map provided that "*at any time prior to the time of readiness for production*" Hamersley Iron obtained title in respect of such land. It is readily apparent that there was, in the 1962 Agreement, no suggestion that continuity of title to any of the Temporary Reserve land was required as a precondition to the entitlement to a royalty in respect of iron ore won from that land. As a matter of fact, the Mount Tom Price mine, over which royalties have been paid by Hamersley Iron to Hanwright since 1966, is located in the blue shaded area of the map attached to the 1962 Agreement (being the Third Schedule Area) in respect of which Hanwright did not at any time hold rights of occupancy.[4]

1966).

[3] Clauses 12 and 13 of the 1962 Agreement placed obligations on Hanwright during the "*pre-production period*" to disclose to Hamersley Iron the location of any iron ore deposits known to Hanwright in the area. The "*pre-production*" period is defined in clause 12 as the period from the date of the agreement up to the "*time of readiness for production*" (being 1966). Clause 14 of the 1962 Agreement then provided that should a notification by Hanwright under clause 12 result in a temporary reserve (or similar title) being granted during the "*pre-production*" period, Hanwright was entitled to the same royalty payment under clause 9.

[4] See T352 at lines 9-14 (14 March 2013): in August 1963, Hamersley Iron was granted rights of occupancy over TRs 2702H and 2703H, which covered most of the area of land within the Third Schedule Area. Hamersley Iron

9. Secondly, in relation to [13]MS, clause 3 of Part I of the 1968 Agreement provided for a royalty to be payable to Hanwright in respect of ore won from "*Block 4053 H*". Block 4053H is referred to in the Preamble as an "*area on the attached map*" and clearly intended to refer to a defined area of land (cf [88]MS). Similarly, clause 5 of Part II of the 1968 Agreement provided for a royalty to be payable in respect of ore won from the *"Mount Bruce Reserves"*. The phrase "*Mount Bruce Reserves*" was identified in clause 1 of Part I as "*blocks*" and was clearly intended by the parties to refer to defined areas of land (cf [83]-[87]MS). Further, the option for Hamersley Iron under the 1968 Agreement (which concerned all the areas of land outside Block 4053H, being Paraburdoo) related to *"blocks"* which as already noted were areas of land indicated on "*the attached map*" referred to in the Preamble.[5]

10. These previous agreements are part of the background to and context for the 1970 Agreement, namely that the parties had previously struck commercial bargains for the payment of a royalty from ore won from defined areas of land irrespective of whether rights were held over those defined areas on a continuous basis or ore was won from the exercise of rights. Where additional preconditions were intended to be added, they were added in express, clear language (as for example in respect of the Third Schedule Area in clause 10 of the 1962 Agreement). There is no reason to suppose that a different approach was intended to be taken in the 1970 Agreement.

11. Third, as at May 1970, the parties were aware that there could be interruptions in the continuity of title of Hanwright, Hamersley Iron or MBM, that the geographic areas over which rights were held could be altered on request to the Minister for Mines of Western Australia, and that there could be no certainty as to the terms of any future State Agreements, including any future State Agreements amending earlier State Agreements, because the terms of a State Agreement were matters for negotiation with

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was then granted ML4SA in June 1966, and the sections of ML4SA included an area known as Mount Tom Price (falling within the Third Schedule Area and not within the areas which had been covered by Hanwright's rights of occupancy): see T352 at 3-14 (14 March 2013). For the location of Mount Tom Price see: map in Hamersley Holdings Limited Prospectus for 1970. For the Third Schedule Area see: map attached to 1963 Hamersley Range State Agreement. In 1966, Hamersley Iron started paying royalty on ore produced from Mount Tom Price to Hanwright and was paying this royalty in 1970 (and continues to pay today): see T352 (14 March 2013).

[5] See following clauses of 1968 Agreement: clause 1 of Part I; and clause 5 of Part II D.

the State of Western Australia and were, in any event, subject to variation. More particularly, the facts known to the parties as at May 1970 included:

a. gaps in title (with no rights held by Hanwright or Hamersley Iron) in respect of the land in the MBM area had occurred through the process of surrender or cancellation of rights of occupancy and further grants made subsequently;[6]

b. gaps in title (with no rights held by Hanwright or Hamersley Iron) over land adjacent to the MBM area previously held by Hanwright and subsequently held by Hamersley Iron had occurred through the process of surrender or cancellation of rights of occupancy and grant of a mineral lease;[7]

10 c. the rights of occupancy in relation to particular areas held by Hanwright had been cancelled and new rights of occupancy granted, including in respect of altered geographic areas, either by reference to the same or different block numbers;[8]

d. requests to the Minister for Mines of Western Australia could be made for the alteration of boundaries of temporary reserves over which rights of occupancy were held and those requests (including requests made by Hanwright at the suggestion of Hamersley Iron) had been acceded to;[9] and

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[6] For example, there was a gap between 31 December 1968 and 14 January 1970, during which HPPL and WPPL held no rights of occupancy over the areas of land formerly covered by TRs 4594H – 4627H (which covered part of the MBM area) as is apparent from (i) letter dated 5 November 1968 from Hancock and Wright to the Minister for Mines in relation to the surrender of rights of occupancy; (ii) surrender document over rights of occupancy dated 12 November 1968; and (iii) Executive Council minute paper for the grant of rights of occupancy in relation to TRs 4937H-4967H dated 14 January 1970.

[7] For example, there was a gap between 31 December 1969 and 3 June 1970, during which Hamersley Iron held no rights of occupancy over the land formerly covered by TR 4968H (the Paraburdoo area, adjacent to the MBM area and the subject of the 1968 Agreement) prior to the grant of ML4SA. This is apparent from the grant of rights of occupancy over TR 4968H until 31 December 1969 and tenement register for TR 4968H & the commencement of ML246SA on 3 June 1970 as set out on certified copy of lease instrument for ML246SA. See: (i) letter from Under Secretary for Mines to Hamersley Iron dated 10 October 1969 approving Hamersley Iron's rights of occupancy over TR 4968H to 31 December 1969; (ii) letter from Hamersley Iron to Department of Industrial Development dated 28 May 1970 applying for a mining lease; and (iii) certified copy of lease for ML246SA stating that the grant had been confirmed in Executive Council on 12 August 1970 to commence on 3 June 1970 (as the grant was expressed to be retrospective).

[8] For example, the State of WA granted rights of occupancy over TRs 4594H to 4627H to WPPL and HPPL on 21 March 1968. TRs 4598H to 4601H covered similar but not identical areas of land as TRs 4053H, 4054H and 4056H: see: (i) letter stamped 8 May 1967; (ii) certified copy of tenement register for TR 4598H; (iii) certified copy of tenement register for TR 4599H; (iv) certified copy of tenement register for TR 4600H; (v) certified copy of tenement register for TR 4601H; and (vi) letter dated 25 March 1968 from the Under Secretary for Mines to Hancock and Wright.

[9] For example, following the grant of rights of occupancy over TRs 4594H-4627H to WPPL and HPPL

e. the maximum area allocated for a potential mining lease under a State Agreement could be varied by agreement. State Agreements could be and had been varied following negotiation with the State of Western Australia. The 1967 Hanwright State Agreement included a clause expressly permitting variation. It was amended by the Iron Ore (Hanwright) State Agreement 1968 (ratified by the *Iron Ore (Hanwright) Agreement Act Amendment Act 1968 (WA)*) the effect of which was potentially to expand the Hamersley Group's entitlement to obtain a mining lease in the Pilbara well beyond the 300 square miles allocated under the 1963 Hamersley Range State Agreement.[10] Also, in November 1968 the Iron Ore (Hamersley Range) State Agreement 1963 (which was ratified by the *Iron Ore (Hamersley Range) Agreement Act* 1963 (WA)) was amended by the *Iron Ore (Hamersley Range) Agreement Act* 1968 (WA) enabling Hamersley Iron to obtain a second mining lease in the Pilbara, again, significantly expanding the geographic area over which the State of Western Australia agreed that the Hamersley Group could obtain a mining lease.[11]

12. Fourth, the parties were aware that a further amendment to the 1967 Hanwright State Agreement was required, or a new State agreement had to be entered into, to give effect to the 1970 Agreement, because under the 1970 Agreement MBM would not be taking the place of Hanwright under that agreement as had been the position under clause 5(1) of the 1967 Hanwright State Agreement (as amended by the Iron Ore (Hanwright) State Agreement 1968). Thus, it was clear and known to the parties as at May 1970 that if the commercial bargain effected by the 1970 Agreement was to be implemented, a new agreement with the State of Western Australia had to be negotiated and there was no certainty as to what would be agreed.[12] These changes could include an entitlement to be granted "leases"; and not merely a single lease; see clause 8(1) of the Schedule to the *Iron Ore (Hanwright Agreement Act)* 1967 (WA).

Hamersely Iron wrote to Hanwright and requested Hanwright to apply to the State for further areas as a "logical extension": see letter dated 2 April 1968 from Mr Madigan to Mr Wright. Hanwright requested an extension of its rights of occupancy in a letter dated 23 May 1968 to the Minister for Mines.

[10] clause 5(1) of the 1968 Amended Hanwright State Agreement.

[11] clause 6(2)(a) of the 1968 Amended Hamersley Range State Agreement.

[12] See: letter dated 5 May 1970 from Hamersley Iron to Hanwright; and (ii) letter dated 23 April 1971 from Hamersley Iron to Minister for Industrial Development.

13. Fifth, whatever was agreed in a State Agreement, the parties would have been well aware that over time the State of Western Australia may well grant further mining leases or rights of occupancy, or expand existing interests to extend the life of a mine or further utilise the very significant infrastructure that the existing State Agreements required be built by mining companies in connection with any mining development, or to satisfy the very significant contractual commitments that mining companies were required to undertake under the existing State Agreements.[13]

14. Sixth, it was known by the parties that MBM was not the only member of the Hamersley Group that participated or would participate in the Group's iron ore operations in the Pilbara and that there was every possibility that exploration or mining interests might be taken up by different entities within the Hamersley Group including (as set out above) after a gap in title, or to continue exploration or development undertaken by another entity within the Hamersley Group. The facts known to both parties as at May 1970, included:

    a. a history of involvement of different subsidiaries of Rio Tinto Pty Limited. That formed the background to the 1962 Agreement as set out in the recitals at (a) to (h) of the 1962 Agreement;[14]

    b. Hamersley Iron was incorporated in October 1962 becoming the operating company for the "Hamersley project" in Western Australia,[15] and was the operating company at the Mount Tom Price mine;

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[13] See, for example: (i) clause 10 of the *Iron Ore (Hamersley Range) Agreement Act* No 24 of 1963 (WA), which required Hamersley Iron to construct a railway, make roads and construct a wharf within 3 years at a cost of not less than 30,000,000 pounds; (ii) clause 7 of the *Iron Ore (Hamersley Range) Agreement* No 48 of 1968 (WA), which required Hamersley Iron to carry out further harbour and port development, lay out and develop a townsite, construct roads and construct other works within 7 years at a cost of not less than 50,000,000 dollars; and (iii) clause 9 of the *Iron Ore (Hanwright) Agreement* No 19 of 1967 (WA), which required the joint venturers to construct a railway, make roads and construct a wharf within 5 years at a total cost of not less than 70,000,000 dollars.

[14] In 1959, Hanwright had granted Rio Tinto Management Services (Australia) Pty Limited (**RTMS**) an option to acquire various TRs from Hanwright: see 1959 Agreement. Later in 1961, RTMS transferred its interest in the option under the 1959 Agreement to a related company, Rio Tinto Southern Pty Ltd. In 1962, pursuant to clause 1 of the 1962 Agreement, Hanwright then sold all its right and interest over various TRs to Hamersley Iron: see 1962 Agreement; see also TJ[11]-[17].

[15] Conzinc Riotinto of Australia Annual Report 1962.

c. a draft of 1970 Agreement made no reference to MBM,[16] and it was only on the eve of the parties entering into the 1970 Agreement that a decision was made to substitute MBM for Hamersley Iron in the 1970 Agreement, at the instigation of the Hamersley Group for their own commercial purposes.[17] It was thus entirely foreseeable that Hamersley Group commercial imperatives may well dictate that yet another corporate entity who would ultimately win ore from the areas the subject of the 1970 Agreement; and

d. Mr Madigan, Mr Mawby and Sir Val Duncan were all directors of Hamersley Iron, MBM and Hamersley Holdings.[18]

10 **Part V:**

15. WPPL accepts the applicable statutes as set out by MBM in the Schedule to MS.

Part VI:

Issue 1: construction of clause 3.1

16. This appeal concerns the construction of one of the conditions for the payment of royalty to Hanwright pursuant to clause 3.1 of the 1970 Agreement, namely, what area must the ore be won from for a royalty to be payable.

17. WPPL says that the phrase "MBM area" in clause 3.1 of the 1970 Agreement was intended to refer to an area of land as delineated by the boundaries of temporary reserves listed in clause 2.2 (being the **MBM TR Land**). That is the natural and
20 ordinary understanding of the language used. That area of land was clearly defined at the time the agreement was entered into, including by reference to a map which the parties included as an annexure to the agreement, and was readily ascertainable at all times thereafter. Both the trial judge (TJ[89]-[110]) and the Court of Appeal (CAJ[40]–[53] and [87]–[103]) adopted this construction. Both Eastern Range and Channar A (as referred to by the Court of Appeal) fell within the MBM TR Land, with Eastern Range

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[16] Letter dated 6 April 1970 from Mr Bradfield (as the legal officer of Hamersley Iron, on behalf of Hamersley Iron) to Mr Hancock enclosing a copy of a draft of the 1970 Agreement.

[17] Telex dated 5 May 1970 from Mr Madigan to Kaiser Oakland.

[18] See "Common Directors and Secretaries of Rio Group" table in WPPL Chronology in appeal No. S102 of 2015.

within TR 4967H and Channar A within TRs 4965H to 4967H. WPPL says that as a consequence the first condition for the payment of the royalty is satisfied for both Eastern Range and Channar A.

18. WPPL agrees with [24]MS that the principles to be applied in construing a commercial contract are set out in *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640 at [35].

WPPL construction

19. The purpose and object of the 1970 Agreement, and the language used, support WPPL's construction. The 1970 Agreement was an agreement whereby Hanwright relinquished its rights of occupancy over large areas of land in the Pilbara in exchange for a royalty over any ore won by MBM (as expanded by clause 24(iii) of the 1962 Agreement) from the area as relinquished. That is the commercial bargain that was reached. There is nothing in the object, purpose or text to suggest that the parties intended such entitlement to be conditional upon ore being won from the exercise of any defined rights, or upon there being continuity of title to the area from which the ore is won. As was apparent from the analysis of the 1962 Agreement set out above, the parties were well able to define the conditions for payment of a royalty, and had in the past, as in this agreement, done so in clear terms.

20. There are two aspects to the relevant purpose and object. First, by this agreement, MBM effectively removed Hanwright from the defined area and derived a valuable commercial opportunity to develop the entire area if it so chose, and by whichever corporate vehicle it chose, over time. The commercial opportunity which MBM, and through it the Hamersley Group, obtained was not limited by reference to the rights which Hanwright held at the time of the 1970 Agreement, nor was it limited by reference to continuity of title.

21. The second aspect is that, as would be the expectation of commercial parties seeking to make arrangements to regulate their rights over what could well be many decades, the 1970 Agreement provided certainty as to the area of land over which the royalty attached. The valuable right to receive a royalty, which was manifestly a central element of the 1970 Agreement, would not thus be susceptible to modification by matters within the control of the Hamersley Group, and over which Hanwright would have no control once the agreement was made.

22. Moreover, the language of the 1970 Agreement is clear. The key clauses are clauses 3.1, 2.2 and 1.1.

23. Clause 3.1 provides that Hanwright is entitled to a royalty on "*ore won ... from the MBM area*". The definition of "*MBM area*" is located in clause 2.2. In clause 2.2, the parties agreed to a division along geographic lines of the *"Mount Bruce Temporary Reserves"*. The "*Mount Bruce Temporary Reserves*" are in turn defined in clause 1.1. Clause 1.1 states that: *"Hanwright hold temporary reserves in respect of areas indicated on the attached map (Appendix A) as the following numbered blocks: 4937H to 4967H inclusive"* (emphasis added). The map attached to the 1970 Agreement as appendix A shows the areas identified by reference to numbered blocks, as indicated in clause 1.1. Clause 1.1 then goes on to identify that it is *"these blocks"* which are *"(hereinafter referred to as "Mount Bruce Temporary Reserves")"*. It is the "*blocks*", which in turn refer to the areas indicated on the attached map, that were defined by the parties as constituting the "*Mount Bruce Temporary Reserves*" (clause 1.1).

24. In clause 2.2 the parties divided up the "*Mount Bruce Temporary Reserves*", namely the "*blocks*" as defined in clause 1.1, into two geographic areas: the "*MBM area*" and the "*Hanwright area*" (clause 2.2). In defining these two areas the parties took care to identify the boundaries of those areas by reference to geographic areas then temporarily reserved, and which were reflected in the blocks as clearly delineated on the map attached to the 1970 Agreement to which clause 1.1 referred. The MBM area is then defined as "*in respect to temporary reserves 4937H to 4946H inclusive and 4963H to 4967H*" (emphasis added). Of critical significance, in clause 2.2 the parties agreed that, as regards the MBM area, "*M.B.M. acquires the rights thereto*" (emphasis added) and made identical provision as regards the Hanwright area. The inescapable conclusion from this language is that the parties drew a clear distinction between the areas of land, which were the subject of the definition of MBM area and Hanwright area, and the "*rights thereto*", which were being allocated pursuant to clause 2.2. The language used by the parties in clause 2.2 is only consistent with MBM area being an area of land, to which rights may pertain.

25. The definition of MBM area was then expanded by clause 1.4 to include certain present and future rights. However, to say that the MBM area will include rights as well as the areas of land is not to say that the areas of land themselves cease to be within the definition of the MBM area (irrespective of whether or not they are subject to any

particular rights at any particular time: cf [44]MS). MS seek to use the expansion effected by clause 1.4 to contract the ambit of the definition of MBM Area. That is not the effect of the language used by the parties, nor is it consistent with the structure of the 1970 Agreement within which clause 1.4 serves as a means of ensuring that additional rights which may arise in respect of the MBM Area are also allocated pursuant to clause 2.2.

26. The language used by the parties in clause 3.1 also strongly favours a construction of MBM area as an area of land. In clause 3.1, the parties provided that ore won by MBM from the MBM area would be subject to a royalty. That language indicates that MBM area was an area of land, and not rights. Moreover, given that in 1970 none of the rights that the parties held in respect of the land conferred a right to mine (and clause 1.4 only expanded the definition of MBM area to include present and future rights *of Hanwright* in relation to the blocks and reserves), clause 3.1 makes no sense if MBM area is construed to mean the rights held in respect of the land at the time of the 1970 Agreement (or indeed those rights expanded by clause 1.4 also to include rights subsequently held by Hanwright). Further, in the 1962 Agreement, where the language of "wining ore from" was used, it was always in relation to ore won from land (or specific deposits of iron ore) and not from rights (cll 9, 14, 15 of the 1962 Agreement). There is nothing in clause 1.4 or in the 1970 Agreement that supports the proposition, which underlies MBM's submission, that ore can *only* be won from the MBM area if it is won from rights existing at the time of the 1970 Agreement or derived therefrom. Nor is there any support in the 1970 Agreement for the proposition at [46]MS that "*'Ore won from the MBM area' ... can only be referring to ore won from the exercise of the rights MBM acquired under clause 2.2*". The ordinary and natural reading of the language used by the parties is that the royalty is payable for ore won from the area of land as defined.

27. MBM asserts at [41]MS that the reference to blocks in clause 1.1 is not to land as a geographic area, but is instead to "*rights in respect of geographic areas of land*". That is not the language used by the parties, nor is it consistent with the language used in clause 2.2. MBM thus seeks to rewrite clause 1.1 to fit the construction for which it advocates. Moreover, as noted above, the terms of the 1962 Agreement shows that the parties were well aware of the distinction between rights and physical areas of land and had the parties intended to define the Mount Bruce Temporary Reserves (and the MBM and

Hanwright areas) as rights rather than geographic areas of land, they could and would have done so.

28. MBM at [45]MS impermissibly elides that which was allocated under the 1970 Agreement, being rights in respect to geographically defined areas, with that which was the subject of the defined terms "MBM area" and "Hanwright area", being the geographic areas by reference to which the rights were divided. Contrary to MBM's submission, the fact that MBM acquired rights under clause 2.2 does not suggest (nor, as MBM submits, require) that the MBM area must refer to the rights acquired and not to the land to which the rights relate. The parties divided rights by reference to geographical divisions, and those geographical divisions were effected by reference to two defined areas of land. The parties made their intention in this regard clear by agreeing that MBM acquired *"the entire rights [to the MBM area]"*. As set out above, that language is only consistent with the MBM area being a geographic area of land.

29. Moreover, even if MBM were correct that the MBM area encompasses both an area of land and an exercise of rights, then WPPL says that the exercise of rights to mine in relation to Channar A derives from rights included in the definition MBM adopts because (for the reasons advanced in WPPL's submissions in *No S102 of 2015*) ML265SA (containing Channar A) derives from ML252SA (namely sections 18 and 19), which in turn derives from the MBM TRs.

30. Finally, the terms "*MBM area*" and "*Hanwright area*" are used in other clauses in the 1970 Agreement (ie. clauses 6, 6.12, 9 and 12) and their use in those clauses strongly suggests that the "*MBM area*" refers to a physical area of land.

31. WPPL's construction is supported by the background and context to the 1970 Agreement. The terms and operation of the 1962 Agreement show that the parties were well aware of the distinction between land and rights thereto and, where appropriate, used language making that distinction explicit. Further, the 1962 Agreement shows that the parties did not necessarily tie the entitlement to a royalty with the exercise of any rights which were extant at the time the agreement was entered into (cf [48]MS), but instead, as one would expect of commercial parties, recognised that there may be a range of circumstances in which it would be in their commercial interests to agree that a royalty should be paid in respect of iron ore won from the land.

32. Further, the knowledge of the parties as to the matters set out in paragraphs 11 to 14 above made it highly unlikely that the parties intended that MBM (and through it the Hamersley Group) was to be given unilateral control over the future ambit of the royalty bearing area, as would be the case if, as MBM submits, the ambit of that area depended upon continuity of title existing at all times from the time when the 1970 Agreement was entered into. On MBM's construction, by surrendering title to an area of land (even for a matter of weeks or months and there may have been commercial reasons for them to do so), MBM could effectively defeat Hanwright's entitlement to a royalty. Further, on MBM's construction, if MBM chose (again for its own commercial or other reasons) to develop the land allocated under the 1970 Agreement, in stages over time, Hanwright's entitlement to a royalty would be defeated. It is improbable that commercial entities, knowing as they did that the 1970 Agreement would regulate their respective rights over decades, would have intended the agreement to operate in that way. By contrast, by adopting the terms MBM area and Hanwright area as effecting geographic dividing lines the parties gave certainty to the royalty entitlement in clause 3.1.

33. Contrary to MBM's submission at [48]MS, there is no sound commercial reason to tie the royalty entitlement to any extant rights which Hanwright or MBM had under State Agreements as at May 1970. The parties both knew these agreements could be varied and in the past had been varied, and they both knew that the 1970 Agreement, to be implemented, required further variation of the existing 1967 Hanwright State Agreement. There was no certainty as to what that amendment would involve, nor as to what further amendments would be made over the life of the 1970 Agreement, nor as to what future policy the Western Australian Government would seek to implement through State Agreements or otherwise as regards iron ore mining in the Pilbara.

34. Further, contrary to MBM's submission at [50]MS, clause 2.3 of the 1970 Agreement does not indicate any consciousness of the parties as to the likely future geographical ambit of the mining *lease or leases* referred to therein. It merely reflects an agreement as to the proportion of the area of the *lease or leases* to which each of MBM and Hanwright would be entitled. It also reflects an awareness of the parties that Hamersley Iron had some influence with the Minister of Mines of Western Australia to the extent that it is agreed in clause 2.3 that Hamersley Iron will use its best endeavours to ensure that Hanwright is also granted tenure as regards additional areas.

Court of Appeal

35. The Court of Appeal found that the MBM area meant an area of land. Macfarlan JA (with whom Meagher and Barrett JJA agreed, with Meagher JA adding additional observations) concluded that as the *"blocks"* are areas of land the *"Mount Bruce Temporary Reserves"* must also be areas of land: CAJ[42]. His Honour considered that the expression *"Mount Bruce Temporary Reserves"* was intended by the parties to refer to areas of land which could be identified by being marked on the attached map (CAJ[42]) and the outer boundaries of the temporary reserves marked out the relevant areas of land. Macfarlan JA considered the effect of clause 1.4 and found the expression "*Mount Bruce Temporary Reserves*" remained primarily defined by clause 1.1 such that, although its meaning was expanded to include rights, its primary signification remained areas of land: CAJ[43]-[44]. Macfarlan JA found that his "*conclusion*", as set out in CAJ[45], was confirmed by the language of clause 2.2 in its reference to *"the entire rights thereto"*. The parties were conscious of the distinction between rights and areas of land and chose, in clause 3.1, to refer to an area of land and not to rights. Macfarlan JA concluded that clause 3 royalties were payable if ore was won from those areas by MBM: CAJ[46].

36. At [35]MS, MBM is critical of the Court of Appeal for failing to appreciate aspects of the rights pursuant to the 1967 Hanwright State Agreement and the 1968 Hanwright State Amendment Agreement. The fact that Hanwright as at May 1970 held contractual rights (pursuant to the State agreements) in addition to the rights of occupation over the temporary reserves conferred by the rights themselves,[19] does not alter fact that in the 1970 Agreement, the parties chose to divide the rights (whether contractual or otherwise) as they stood by reference to geographic dividing lines, and to reach a commercial bargain as to the future royalty entitlement of Hanwright to be given as consideration for that division, again by reference to those geographic dividing lines. Contrary to MBM's submission at [48] & [53]MS, there is nothing in the text or context of the 1970 Agreement to suggest that Hanwright's entitlement to a royalty should be limited by reference to the contractual rights which Hanwright held as at May 1970. Moreover, contrary to [70]MS, the construction adopted by Macfarlan JA did not

[19] See, for example "Conditions of Right of Occupancy of Temporary Reserve for Iron Ore" attached to the register for TR 4937H (approved by the Minister on 10 October 1969 and confirmed in Executive Council on 23 January 1970).

compensate Hanwright for more than it gave up. As at May 1970, the possibility of variation of State Agreements over time, and the inherent likelihood that a successful mine would be permitted to expand over time, would have suggested to reasonable commercial parties that the commercial opportunity to develop the MBM area into the future would not have been constrained as submitted by MBM.

37. Importantly, the Court of Appeal also found that considerations of commerciality did not assist MBM's construction. Macfarlan JA observed, correctly, that the parties may well have considered that Hanwright's right to royalty would be more secure if the phrase the MBM area was understood as an area of land rather than the exercise of rights which was entirely dependent upon a decision of MBM: CAJ[53].

38. At [70]MS, MBM is critical of Macfarlan JA's observation that, on MBM's construction, it could avoid paying royalties by ensuring any mining it did on the land was done pursuant to fresh grants. However, even if, as MBM submits, there was a risk to MBM in not ensuring that it had continuous rights of occupancy over the whole of the area, the decision whether or not to take that risk (and there is no basis to infer that this was regarded by the parties as at May 1970 as a very real risk: cf MS[70]) was one for MBM and over which Hanwright had no control.

Trial judge

39. The trial judge also found that MBM area referred to an area of land and found that the division was drawn in the 1970 Agreement by reference to physical areas shown on the map attached to the 1970 Agreement, not with respect to any intellectual construct based on the continuity of incorporeal rights: TJ[101]. As did the Court of Appeal, the trial judge found that it was commercially rational and sensible that a royalty be paid on ore won from any part of the area the entire rights to which were held by Hanwright: cf [48]MS.

Issue 2: reference to the defined term MBM area as an aid to construction

40. At [65]-[67]MS, MBM submits that the Court of Appeal erred for drawing on Lord Hoffmann's observation in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [17] that words used as labels *"are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition"*: see also Lord Walker at [94]. Although both Macfarlan JA and Meagher JA referred to the ordinary meaning of "area" as an area of land rather than rights with respect to that area,

it is apparent from their reasons that the ordinary meaning of "area" was not central to their conclusion on the construction of "MBM area": see CAJ[47] (Macfarlan JA) and CAJ[103] (Meagher JA). MBM says that this reliance on the ordinary meaning of "area" was contrary to authority and cite *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 419 and *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 507. These cases both concerned the interpretation of defined terms in statutes, whereas the issue in this case is one of contractual interpretation. Whilst it is well recognised that the processes of statutory and contractual construction involve similar approaches as a matter of principle: see for example *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at [67] – [70]), there is clear authority in this Court that, in construing a contract, the court can and should have regard to the language of the contract as a whole to determine the parties' intention: see *Australian Broadcasting Commission v Australian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.

41. WPPL submits that the Court of Appeal did not err in drawing on the observations of Lord Hoffmann in *Chartbrook.* WPPL submits that the language used by the parties in the contract, including the label that the parties to the contract have chosen to refer to a defined term, is part of the context that can and, in an appropriate case should, be considered on construction. Similar observations have been made by the NSW Court of Appeal: *Barangaroo Delivery Authority v Lend Lease (Millers Point) Pty Ltd* [2014] NSWCA 279 (see Leeming JA at [10]-[11]; Beazley P agreeing at [1]; Tobias JA agreeing at [104]); *Segelov v Ernst & Young Services Pty Ltd* [2015] NSWCA 156 (see Gleeson JA at [83]-[87]; Meagher JA agreeing at [1]; Leeming JA agreeing at [156]).

42. The ordinary meaning of "area" connotes a physical area and therefore an area of land. The fact that the parties chose to use this label, particularly in the context in which in the 1962 Agreement a distinction was deliberately drawn between rights and land, reinforces WPPL's construction that the parties intended that the phrase MBM area to mean an area of land and not a combination of an area of land and exercise of rights from that area.

MBM construction

43. The construction MBM advances requires words (denoted in square brackets below) to be inserted into the definition in clause 3.1 of the 1970 Agreement as follows:

"ore won by MBM from the [present and future rights of Hanwright in relation to temporary reserves 4937H to 4946H and 4963H to 4967H, including rights to any extensions or adjustments and ore will be won from the rights when it is won by MBM exercising the rights, or rights deriving therefrom]".

44. To arrive at this construction, it is necessary, in effect, to interpose an intellectual construct based on the continuity or derivation of incorporeal rights into the language used in the 1970 Agreement. There is no reason to suppose that the parties intended this, rather than that their words bore their natural and ordinary meaning. At [49]MS, MBM seeks to support its submission by asserting that as at 1970 the parties were aware that the rights MBM acquired from Hanwright would not enable it to win ore from the entirety of the land covered by those rights. MBM points to no evidence in support of this assertion, and there is none. This submission cannot properly be based upon entitlements conferred under State Agreements existing as at May 1970 given that these were subject to variation, and the parties knew that these agreements had been varied in the past and had to be varied to give effect to the 1970 Agreement in any event.

45. Further, there is nothing in the language, nor in the commercial objects and purposes, of the 1970 Agreement to support MBM's submission that that its construction gives clause 3.1 "sensible commercial operation": [48]MS. The consequence of the MBM area meaning incorporeal rights is, as set out above, that MBM would be given unilateral control over the area to which the royalty attaches (as identified by the Court of Appeal and trial judge) subject only to the need to negotiate with the Western Australian government.

46. The reliance by MBM on the term "*royalty*" at [53]-[54]MS, and its meaning by reference to judicial authority, is of no assistance. The sense in which the parties used the term "*royalty*" in clause 3.1 the 1970 Agreement is to be determined in the context of the 1970 Agreement and not from judicial authority.

47. Finally, at [89]-[90]MS, MBM submits that if MBM is successful on the appeal, that WPPL is not entitled to any royalty in relation to Eastern Range or Channar. WPPL accepts that if MBM is successful in this appeal MBM has no obligation to pay royalty in relation to the Eastern Range. However, in relation to Channar A, the submission made by MBM (and the orders sought by MBM) overlooks the finding of the trial judge that if WPPL have failed on its argument in relation to the MBM area, it would have succeeded in relation to its ore body extension claim pursuant to clause 1.4 of the 1970

Agreement: TJ[169]. It is not necessary for this Court to consider this finding by the trial judge as it has not been challenged by MBM.

48. The consequence is that if MBM's argument on the meaning of MBM area is accepted, the MBM area consists of ss 18 and 19 of ML252SA and any extensions of ore bodies as found by the trial judge at TJ[154]-[168]. In these circumstances, if MBM succeeds on its appeal (and WPPL succeeds on its appeal) WPPL submits that it is entitled to a royalty in relation to ore won from the extensions of ore bodies and the matter should be remitted to the trial judge for determination.

Part VII:

49. Not applicable.

Part VIII:

50. The First Respondent estimates it will need 2 hours to present its oral argument.

Dated 10 July 2015

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