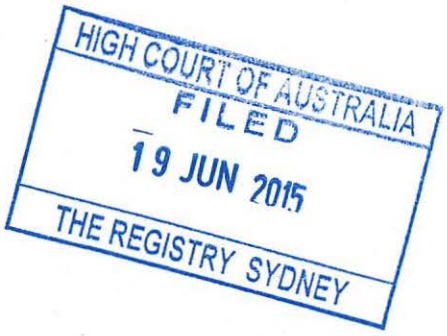
IN THE HIGH COURT OF AUSTRALIA No S99 of 2015

SYDNEY REGISTRY

BETWEEN



MOUNT BRUCE MINING PTY LIMITED

Appellant

and

WRIGHT PROSPECTING PTY LIMITED

First Respondent

10 **HANCOCK PROSPECTING PTY LTD**

Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. This appeal concerns the proper construction of the agreement between the appellant (**MBM**), Hamersley Iron Pty Ltd (**Hamersley Iron**) and the respondents (**Hanwright**) dated 5 May 1970 (**1970 Agreement**).

20 3. The appeal raises the following issues:

(1) whether the royalty imposed by clause 3.1 is payable on ore won from the areas of land which had been the subject of temporary reserves 4937H to 4946H and 4963H to 4967H, or whether it is payable only on ore won from the exercise of the

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rights MBM acquired under the 1970 Agreement in respect of those reserves (including rights deriving therefrom);

(2) whether it is impermissible to construe the definition given to an expression in an instrument by reference to the ordinary meaning of part or all of the expression defined.

Part III: Notice under s.78B of the *Judiciary Act* 1903

4. Consideration has been given to the question whether notice pursuant to s.78B of the *Judiciary Act* 1903 (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citation

5. The judgment of the Court of Appeal is not currently reported but the medium neutral citation is [2014] NSWCA 323.

6. The judgment of the primary judge is not currently reported but the medium neutral citation is [2013] NSWSC 536.

Part V: Facts

7. The case concerns claims by Hanwright for allegedly unpaid royalties under the 1970 Agreement. The claim relates to two disputed areas in the Pilbara region of Western Australia, referred to as Eastern Range and Channar. The primary judge held MBM liable to pay the claimed royalties on iron ore won from both areas. The Court of Appeal held MBM liable to pay the claimed royalties on iron ore won from Eastern Range, but not Channar. MBM appeals from the Court of Appeal's judgment in so far as it requires MBM to pay royalties on iron ore won from Eastern Range.

8. MBM refers to the Parties' Agreed Facts and Diagrams (**PAFD**) which is to be filed separately. The critical facts relevant to the construction of the 1970 Agreement are reasonably confined and are set out below.

9. MBM and Hamersley Iron are both companies whose ultimate holding company is Rio Tinto Ltd ([2013] NSWSC 536 at [5]).

10. Hanwright is a partnership formed by the respondents for the purpose of prospecting for iron ore in the Pilbara region of Western Australia (PAFD [1]).

11. On 12 December 1962, Hanwright, together with Lang Hancock and Ernest Wright, entered into an agreement with Hamersley Iron and Rio Tinto Management Services (Australia) Pty Ltd, pursuant to which Hanwright, Hancock and Wright sold to

Hamersley Iron certain rights in relation to identified temporary reserves (**1962 Agreement**) (PAFD [4]; [2013] NSWSC 536 at [14]).

12. On 11 August 1967, the State of Western Australia (**State**) and Hanwright entered into an agreement pursuant to which the State was to grant Hanwright rights of occupancy over certain temporary reserves (**1967 Hanwright State Agreement**) (PAFD [9]; [2014] NSWCA 323 at [10]). The agreement was subsequently approved by the Iron Ore (Hanwright) Agreement Act No 19 of 1967 on 23 October 1967 (PAFD [10]).

13. On 31 January 1968, Hanwright and Hamersley Iron made an agreement pursuant to which, *inter alia*, Hamersley Iron could give notice requiring identified temporary reserves held by Hanwright to be transferred to MBM (**1968 Agreement**) (PAFD [12]; [2013] NSWSC 536 at [17]).

14. On 21 March 1968, as contemplated by the 1967 Hanwright State Agreement, the State granted rights of occupancy over certain temporary reserves to Hanwright (PAFD [13]; [2014] NSWCA 323 at [10]).

15. On 8 October 1968, the State, Hanwright and MBM entered into an agreement amending the 1967 Hanwright State Agreement (**1968 Hanwright State Amendment Agreement**). This agreement was consequential upon the 1968 Agreement, and enabled MBM to take the place of Hanwright under the earlier the 1967 Hanwright State Agreement (PAFD [16]; [2013] NSWSC 536 at [18]).

16. The 1968 Hanwright State Amendment Agreement was subsequently approved by the Iron Ore (Hanwright) Agreement Act No 49 of 1968 on 12 November 1968 (PAFD [19]).

17. On 10 October 1969, pursuant to the 1968 Hanwright State Amendment Agreement, the State cancelled the temporary reserves granted to Hanwright on 21 March 1968 and granted Hanwright rights of occupancy over temporary reserves 4937H to 4967H ([2014] NSWCA 323 at [12]; PAFD [21]).

18. On 5 May 1970, Hanwright, MBM and Hamersley Iron entered into the 1970 Agreement (PAFD [26]). Under clause 2.2 of the 1970 Agreement, the parties divided temporary reserves 4937H to 4967H between themselves. MBM acquired rights in respect of temporary reserves 4937H to 4946H and 4963H to 4967H (defined in clause 2.2 as the "MBM area"). Clause 3.1 provided for MBM to pay a 2½% royalty on "Ore won by MBM from the MBM area".

19. Eastern Range is wholly within the area that was covered by temporary reserve 4967H and Channar is wholly within the area that was covered by temporary reserves 4965H and 4966H ([2014] NSWCA 323 at [14]).

Part VI: Argument

Introduction

20. The Court of Appeal held, as had the primary judge, that MBM was liable to pay royalties on iron ore won from Eastern Range on the footing that this was "Ore won by MBM from the MBM area" within the meaning of clause 3.1 of the 1970 Agreement. (The Court held that the claimed royalties were not payable on iron ore won from Channar because "MBM" was not winning the ore.)

21. The Court of Appeal construed the words "Ore won ... from the MBM area" in clause 3.1 of the 1970 Agreement as referring to ore won from the areas of land which had been the subject of temporary reserves 4937H to 4946H and 4963H to 4967H: [2014] NSWCA 323 at [40]-[53] (Macfarlan JA); [87]-[103] (Meagher JA); [104] (Barrett JA).

22. The Court's reasoning fails to apply the defined meaning of the expression "MBM area" in clause 2.2 of the agreement (read together with clauses 1.1 and 1.4), is internally inconsistent, and overlooks important features of the surrounding circumstances known to the parties. Amongst other errors, the Court impermissibly relied on the ordinary meaning of the word "area", notwithstanding that it forms part of the specially defined expression "MBM area".

23. MBM contends that, properly construed, the words "Ore won ... from the MBM area" mean "Ore won from the exercise of the rights acquired from Hanwright in relation to temporary reserves 4937H to 4946H and 4963H to 4967H, or rights deriving therefrom". This follows from the fact that the definition of "MBM area" in clause 2.2 refers to Hanwright's present and future rights in relation to temporary reserves 4937H to 4946H and 4963H to 4967H, being the rights which MBM acquired under that clause. That in turn is demonstrated by an accurate, contextual reading of clauses 1.1, 1.4 and 2.2 of the 1970 Agreement.

The approach to construction

24. It was common ground in the Court of Appeal that the principles to be applied in construing a commercial contract are those restated recently by the plurality in *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]: see [2014] NSWCA 323 at [36]. As Macfarlan JA noted at [37]-[38], the case did not involve any disputed references by any of the parties to surrounding circumstances so as to require the Court of Appeal to consider whether it is necessary to find ambiguity before recourse can be had to surrounding circumstances in aid of the construction of a contract.

25. Subject to the dispute concerning the relevance and applicability of Lord Hoffman's comments in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [17] (considered in paragraph [65] below), there is no relevant controversy as to the principles of construction to be applied.

Preliminary matters

26. Before analysing the terms of the 1970 Agreement, it is helpful to identify two aspects of the background against which that agreement came to be executed.

The nature of the rights dealt with under the 1970 Agreement

27. *First*, it is necessary to understand the nature of the rights in respect of temporary reserves 4937H to 4946H and 4963H to 4967H which MBM acquired under clause 2.2 of the 1970 Agreement.

28. The label "temporary reserve" has its origin in s.276 of the *Mining Act* 1904 (WA).[1] Section 276 provided relevantly that the Minister may temporarily reserve any Crown land from occupation and may, subject to s.277, authorise any person to temporarily occupy any such reserve on such terms as the Minister may think fit.

29. Rights granted pursuant to s.276 comprise legal choses in action, rather than interests in land. That proposition is established by the decision of the Western Australian Court of Appeal in *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29 at [73] (per McLure P, Newnes JA and Le Miere J agreeing). It is consistent with a line of authority in this Court treating rights to enter on land to prospect for minerals as personalty rather than realty: *Gander v Murray* (1907) 5 CLR 575 at 579-580 (Griffith CJ) and 588-590 (Isaacs J); *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 189-190 (Windeyer J). This Court has reached a similar conclusion in relation to mining tenements granted under the *Mining Act* 1904: *Adamson v Hayes* (1973) 130 CLR 276 at 289 (Barwick CJ) and 312 (Stephen J); *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576 at [28]-[36].

30. Further, a right granted pursuant to s.276 was in effect a right to prospect; it did not confer a right to work and get minerals: *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29 at [61] (per McLure P, Newnes JA and Le Miere J agreeing). In order to undertake mining on the land, a mineral lease under s.48 of the *Mining Act* 1904 was required.

[1] That Act, which was in force in 1970, has since been repealed: see s 3(1) of the *Mining Act* 1978 (WA), which came into operation on 1 January 1982.

31. The rights which Hanwright held at the time of the making of the 1970 Agreement went beyond the mere rights of occupation which s.276 authorised the Minister to confer. That is because Hanwright's rights under s.276 were supplemented by additional entitlements conferred under the 1967 and 1968 State Agreements. Most significantly, those entitlements included the right to convert Hanwright's temporary reserves into a mineral lease over a lesser area not exceeding 300 square miles and to assign Hanwright's rights.

32. Thus, under clause 2(a) of the 1967 Hanwright State Agreement, Hanwright was to be given rights of occupancy under s.276 as well as the right to successive renewals of such rights of occupancy (each renewal being for a period of 12 months at the same rental and on the same terms), the last of which would expire on the earliest of a number of events, one of which was the date of Hanwright applying for a mineral lease under clause 8(1)(a). Clause 8(1)(a) provided relevantly that after application was made by Hanwright for a mineral lease of any part or parts (not exceeding 300 square miles) of the mining areas the subject of that State Agreement, the State would grant Hanwright a mineral lease or leases of the land so applied for in the form set out in a schedule and for a term of 21 years, with rights to successive renewals of 21 years on the same terms and conditions.

33. Clause 5(1) of the 1968 Hanwright State Amendment Agreement provided that, upon MBM giving notice that it wished to take the place of Hanwright under the 1967 Hanwright State Agreement (as amended), MBM would be obliged to perform and observe all covenants and obligations of Hanwright under that agreement and it would be construed and take effect as if MBM were a party to it in place of Hanwright. Clause 5(2) further provided that, upon MBM giving such notice, Hanwright would surrender its rights of occupancy granted under clause 2 of the 1967 Hanwright State Agreement and MBM would be granted rights of occupancy under s.276 with successive renewals (each renewal being for a period of 12 months at the same rental and on the same terms), the last of which would expire on the earliest of a number of events, one of which was the date of grant of a mineral lease under clause 8(1) of the 1967 Hanwright State Agreement.

34. In addition, clause 14(1) of the 1967 Hanwright State Agreement provided that Hanwright could assign any or all of its rights and obligations under that agreement or appoint another person to exercise any or all of its powers, functions and authorities under it.[2] Under the 1968 Hanwright State Amendment Agreement, MBM had the

[2] Hanwright was entitled to do this as of right if the other person was an associated company, and otherwise with the written consent of the relevant Minister, and subject to the assignee executing a deed of covenant in favour of the State of Western Australia to perform all of the obligations arising under the State Agreement.

ability to do this if it gave notice of its intention to take Hanwright's place under the 1967 Hanwright State Agreement (as amended).

35. The Court of Appeal failed to appreciate these aspects of the rights acquired by MBM under clause 2.2 of the 1970 Agreement. At [42], Macfarlan JA stated that the reference in clause 1.1 of the 1970 Agreement to Temporary Reserves "must be a loose, although not uncommon, reference to rights of occupancy granted under s.276 of the *Mining Act* in respect of Crown Land reserved by the Minister under that section". At [46], his Honour stated that by clause 2.2 of the 1970 Agreement the parties divided "rights of occupation of the Temporary Reserves". Similarly, at [88] Meagher JA stated that the subject matter of the parties' dealings were "rights to occupy land and prospect for ore" and said further: "Generally, rights of temporary occupation were granted for mineral exploration purposes pursuant to an agreement between the State and the grantee". Those references state incompletely the subject matter of the 1970 Agreement. The Agreement was concerned not with mere "rights of occupation" but with rights of occupation enhanced by the entitlements Hanwright received under the State Agreements – in particular, the entitlement to move from its rights of occupation under s.276 to a mining lease for a 21 year term (with successive renewals of 21 years on the same terms and conditions) in respect of a lesser area of 300 square miles but on condition that all other rights relating to the balance of the area would expire; and the entitlement to assign its rights.

The 1962 Agreement and the 1968 Agreement

36. The *second* aspect of the context in which the 1970 Agreement was executed is the existence of two earlier agreements – the 1962 Agreement and the 1968 Agreement – dealing with temporary reserves held by Hanwright. Both agreements are expressly or impliedly referred to in the 1970 Agreement (the 1962 Agreement in clause 3.1[3] and the 1968 Agreement in clauses 1.2 and 12) and their terms therefore form part of the surrounding circumstances known to the parties at the time of execution of the 1970 Agreement: cf *Verve Energy* at [35].

37. The 1962 and 1968 Agreements both contain clauses which, like clause 3.1 of the 1970 Agreement, provide for Hanwright to be paid a 2½% royalty on ore won from an area of land the subject of a temporary reserve transferred to MBM or Hamersley Iron (as the case may be): see clause 9 of the 1962 Agreement and clauses 3 of Pt I and A5 of Pt II of the 1968 Agreement. The language of the earlier agreements is not to be substituted for the language of the 1970 Agreement, but it is relevant to note that the

[3] It was common ground below that the reference to "the existing Agreement between Hanwright and Hamersley" referred to in clause 3.1 is a reference to the 1962 Agreement: [2013] NSWSC 536 at [21]; see also [2014] NSWCA 323 at [7].

manner in which the royalty clauses operated in those agreements is consistent with MBM's construction of the 1970 Agreement.

38. The operation of the 1962 Agreement and the 1968 Agreement is analysed at paragraphs [74] to [88] below, after consideration of the text of the 1970 Agreement and other matters of context. At this point, it is sufficient to note that two key points emerge from the analysis. *First*, when the clauses refer to ore being won from a particular area of land, they are referring to ore being won from the exercise of rights in relation to that area of land and not to ore being won simply from a particular geographic area. *Secondly*, the rights in question comprise not just rights in relation to the land which exist at the time of the relevant agreement, but extend to future rights which may be derived from rights existing at the time of that agreement.

Construction of the 1970 Agreement

39. The 1970 Agreement replaces the 1968 Agreement. The earlier agreement gave Hamersley Iron an entitlement to have Hanwright's temporary reserves transferred to MBM, which was to be operated as a joint venture company in which Hanwright held a 25% interest (see clause A2 of Pt II). The 1970 Agreement instead divides the rights to the temporary reserves between Hanwright and MBM (clause 2.2), and no provision is made for Hanwright to have any interest in MBM.

40. Clause 1.1 of the 1970 Agreement, which forms part of the Preamble, states that Hanwright "hold Temporary Reserves ... *in respect of areas* indicated on the attached map (Appendix A) as the following numbered blocks ..." (emphasis added). That formulation makes it plain that Temporary Reserves are to be understood as comprising rights in relation to areas of land rather than the land alone.

41. Clause 1.1 continues: "these blocks (hereinafter referred to as 'Mount Bruce Temporary Reserves') are subject to the exercise of an option by Mount Bruce Mining Pty Ltd". The reference to an option is a reference to MBM's right, conferred by the 1968 Hanwright State Amendment Agreement, to take the place of Hanwright under the 1967 Hanwright State Agreement (as amended). That right entitled MBM to the enhanced rights Hanwright obtained over the relevant blocks under the 1967 and 1968 State Agreements. It follows that where clause 1.1 refers to "these blocks", and defines the "Mount Bruce Temporary Reserves" by reference to such blocks, the point of reference is not land conceived of as a geographic area; it is *rights* in respect of geographic areas of land.

42. This reading is reinforced by clause 1.4. Clause 1.4 of the 1970 Agreement provides that "[A]ll references to blocks or reserves include all present and future rights of Hanwright in relation to the above blocks and reserves ..." The clause makes it plain

that words which might otherwise signify a geographic area ("blocks" and "reserves") are to be understood as also referring to rights in relation to such an area and not the area alone; and that this includes derivative rights as well as existing rights.

43. Turning to clause 2.2, all members of the Court of Appeal accepted that this clause effects a division of rights in relation to an identified geographic area: [2014] NSWCA 323 at [46] (Macfarlan JA) and [100] (Meagher JA). That reading is clearly correct. The clause states that "Hanwright agrees that its Mount Bruce Temporary Reserves should be divided...". The word "its" must refer to what Hanwright owns, namely, the enhanced rights conferred by the 1967 and 1968 State Agreements. As noted above, the defined term "Mount Bruce Temporary Reserves" itself refers to rights in relation to land and not to land alone. Finally, the fact that the subject matter of clause 2.2 is rights in relation to land, not land alone, is confirmed by the fact that the phrase "the entire rights" is used twice – first to signify that which is "restored" to Hanwright, and secondly to signify that which is "acquired" by MBM.

44. Next, and critically, it is necessary to turn to the defined term "MBM area" in clause 2.2. The term is defined to mean "temporary reserves 4937H to 4946H inclusive and 4963H to 4967H inclusive". By force of the interpretative provision in clause 1.4, the word "reserves" in clause 2.2 must be read as encompassing all Hanwright's present and future *rights* in relation to the land the subject of the said reserves. It follows that "MBM area" refers to the rights (including derivative rights) which MBM acquires in respect of temporary reserves 4937H to 4946H inclusive and 4963H to 4967H inclusive.

45. That reading of the defined term "MBM area" is confirmed by the last words of clause 2.2: "MBM acquires the entire rights thereto". This refers back to the specified temporary reserves, and the emphatic word "entire" is there to stress that the rights being acquired are not merely those conferred by the *Mining Act* 1904, but the wider range of present and future rights described in clause 1.4. Thus, those words reinforce the proposition that under clause 2.2 MBM acquires rights in relation to land and not land alone; and that accordingly the phrase "MBM area" must refer to the rights acquired and not solely the land to which they relate.

46. This reading flows through to clause 3.1. When that clause speaks of "Ore won ... from the MBM area", it can only be referring to ore won from the exercise of the rights MBM acquired under clause 2.2. Those rights include derivative rights (for example, rights conferred under a mineral lease into which MBM's rights in respect of temporary reserves 4937H to 4946H and 4963H to 4967H might be converted); but they cannot include rights other than those which MBM acquired under clause 2.2 (including rights derived therefrom).

Further considerations

47. There are further considerations which support the construction of clause 3.1 for which MBM contends.

48. *First*, MBM's construction gives clause 3.1 a sensible commercial operation. It ensures that the royalty obligation under clause 3.1 remains tied to what MBM acquired from Hanwright under clause 2.2 of the 1970 Agreement – relevantly, the rights Hanwright held under the 1967 and 1968 State Agreements in respect of temporary reserves 4937H to 4964H and 4963H to 4967H. The royalty was granted in consideration for the transfer of those rights, so it makes eminent commercial sense for the royalty to be payable for the exploitation of those rights, including rights deriving therefrom.

49. *Secondly*, the parties knew at the time of executing the 1970 Agreement that the rights MBM was to acquire from Hanwright would not enable it to win ore from the entirety of the land to which those rights related. That is because, to win any ore at all, a mineral lease was required; and under the State Agreements the maximum area of such a lease was 300 square miles. The area the subject of the temporary reserves which MBM acquired under clause 2.2 comprised 400.1 square miles (Blue 4/1763 at 1772F-L, T-V). Even if the 1970 Agreement had never been entered into and Hanwright retained the entirety of the Mount Bruce Temporary Reserves for itself (an area comprising 689.1 square miles: Blue 4/1763 at 1772F-V), it still could not have won ore from all parts of the land the subject of those reserves because of the 300 square mile limitation.

50. The parties were acutely conscious of the 300 square mile limitation, since they provided in clause 2.3 for the total area of any mineral lease to which the Mount Bruce Temporary Reserves were reduced under clause 8(1)(a) of the 1967 Hanwright State Agreement to be divided between MBM and Hanwright in the proportion 75%/25%. Pursuant to that division, the maximum area of land from which MBM could win ore by exploiting the rights it acquired from Hanwright was 225 square miles.

51. In those circumstances, it makes no business sense for clause 3.1 to be construed in such a way as would entitle Hanwright to the payment of a royalty on ore won from any part of the land that was formerly subject to temporary reserves 4963H to 4967H, regardless of whether the ore was won by exploiting the rights MBM acquired from Hanwright or rights deriving therefrom. The effect of such a construction would be to compensate Hanwright for something greater than the commercial opportunity which it gave up by transferring its rights to MBM. On that construction, Hanwright would get something – a very substantial royalty – for nothing. It is most unlikely that

parties to a commercial contract such as the 1970 Agreement intended such an outcome.

52. *Thirdly*, the parties to the 1970 Agreement made a conscious choice not to define "MBM area" solely by reference to a physical area shown on a map. Had that been intended, it would have been a simple matter to include such a definition in clause 1.1 (which identifies the areas over which Hanwright held temporary reserves by reference to numbered blocks shown on a map).

53. *Fourthly*, MBM's construction is supported by the use in clause 3.1 of the term "royalty" to describe the payment which MBM is obliged to make. In *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* (1993) 176 CLR 480 at 497, Mason CJ, Brennan, Deane and Gaudron JJ stated:

> In the context of mineral royalties, patent and copyright royalties and royalties in respect of rights to cut and remove timber, it is of the essence of a royalty that the payments should be made in respect of the exercise of a right granted and should be calculated in respect of the quantity or value of things taken, produced or copies or the occasions on which the right is exercised.

54. The concept of a royalty as a payment made in respect of the exercise of a right granted is well-established. In *Australian Tape Manufacturers* the plurality referred to earlier decisions of the Court describing a "royalty" in similar terms: *Stanton v Federal Commissioner of Taxation* (1955) 92 CLR 630 at 642 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ) and *Federal Commissioner of Taxation v Sherritt Gordon Mines Ltd* (1977) 137 CLR 612 at 626 (Mason J). In an even earlier decision, *McCauley v Federal Commissioner of Taxation* (1944) 69 CLR 235, both Latham CJ (at 246) and McTiernan J (at 248) referred to the ordinary meaning of "royalty" as a payment made in consideration of a right granted.

55. It should be inferred that when the parties used the term "royalty" in clause 3.1 of the 1970 Agreement, without defining its meaning, they intended it to have the ordinary well-established meaning identified above.

The reasoning of the Court of Appeal in relation to the construction of the 1970 Agreement

56. In light of the foregoing, four central errors are apparent in the Court of Appeal's approach to the construction of the 1970 Agreement.

57. *First*, the Court misconstrued clause 1.1 of the 1970 Agreement. Macfarlan JA stated at [42] that because the "blocks" referred to in clause 1.1 are areas of land, the Mount Bruce Temporary Reserves must also be that. This overlooks the fact that the blocks referred to are said in clause 1.1 to be "Temporary Reserves ... in respect of areas"

indicated on a map. As explained above, this indicates that the "blocks" refer to rights in respect of areas of land and not the land alone. That is confirmed by the reference in the balance of that clause to the "blocks" being subject to the exercise of an option by MBM. This meaning is also compelled by the interpretive provision in clause 1.4 that applies to all references to blocks or reserves. Further, Macfarlan JA's reasoning is internally inconsistent because in an earlier part of [42] his Honour recognised, correctly, that "[t]he reference to Temporary Reserves must be a loose, although not uncommon, reference to rights of occupancy granted under s 276 of the *Mining Act* ..." (As noted in paragraph [31] above, the rights in question go further than mere rights of occupancy, but that is not relevant for present purposes.)

58. For similar reasons, Meagher JA erred in the first sentence of [96] where he stated that in clause 1.1 "blocks" where first used describes areas of land which are the reserves the subject of rights granted to Hanwright. In context, and having regard to clause 1.4, "blocks" must include Hanwright's rights in relation to the reserves which the relevant block numbers identify.

59. *Secondly*, the Court of Appeal failed to give effect to clause 1.4. Macfarlan JA stated at [43] that clause 1.4 does not detract from his view that "blocks" in clause 1.1 refers to areas of land because clause 1.4 "expands the meaning of that expression to include rights but does not change its primary signification of the relevant areas of land". This reasoning is difficult to follow. Clause 1.4 does not permit references to "blocks" in the 1970 Agreement to be read as having a "primary signification" of areas of land, whatever precisely that might mean. Rather, the clause requires *all* references to "blocks" to be read as including the present and future rights of Hanwright in relation to the blocks and reserves mentioned in clause 1.1 (i.e. block numbers 4937H to 4967H). Nor does the clause provide a warrant for reading "blocks" as a reference to areas of land in some parts of the agreement, and rights in relation to land in others.

60. Meagher JA took a different approach. In the penultimate sentence of [96] his Honour said that, read in accordance with its terms, clause 1.4 creates "some uncertainty" as to whether the reference to Mount Bruce Temporary Reserves is to be understood as including the exploration rights to which the relevant land areas or reserves are subject. However, his Honour stated in the last sentence of [96] that that uncertainty does not affect the meaning to be given to the MBM area in clause 2.2. It is not clear on what basis his Honour could have drawn that conclusion. Clause 1.4 is plainly an interpretative provision, and therefore must be applied to the word "reserves" as it appears in clause 2.2 in the manner indicated in paragraph [44] above.

61. At [97], Meagher JA stated that in clause 1.4 the context makes it clear that "blocks and reserves" refers to the land areas identified by the relevant block numbers and does not include the rights to which those blocks or reserves are subject. That is

contrary to the express words of clause 1.4 and cannot be correct. His Honour's explanation – that the blocks and reserves are described as including the ore bodies located therein – does not support his reading down of the clause. The reference to ore bodies simply means that the present and future rights in relation to the blocks and reserves mentioned in clause 1.1 include rights to any extension of the ore bodies located therein.

62. Meagher JA appears to suggest at [98]-[99] that the purpose of clause 1.4 was to accommodate the possibility that the boundaries of the temporary reserves held by Hanwright might change or that those reserves might be replaced by new rights in the future. That may be one purpose of the clause, but it clearly had other purposes, including ensuring that all references to blocks or reserves captured all of the present and future rights that might arise under the State Agreement. Moreover, the purpose his Honour identified could not absolve the court of the obligation to give full effect to the words of the clause, which require all references to blocks and reserves to be read as including all present and future *rights* of Hanwright in relation to the blocks and reserves mentioned in the agreement (i.e. block numbers 4937H to 4967H).

63. *Thirdly*, the Court of Appeal misconstrued "MBM area" in clause 2.2 and clause 3.1 as meaning solely areas of land rather than including rights in respect of those areas. Macfarlan JA appeared to base his conclusion on the circumstance that "MBM area" included a reference to the relevant areas of land: see the penultimate sentence of [46]. In other parts of his Honour's reasons, he recognised that "MBM area" also *includes* a reference to rights (see the third-last sentence of [46]) and acknowledged that the reference to the Mount Bruce Temporary Reserves in clause 2.2 is a reference to the reserved land *including* "rights in respect thereof" ([45]). If both the "MBM area", and the Mount Bruce Temporary Reserves (part of which comprise the MBM area), *include* a reference to rights, it follows that the "MBM area" cannot be read as a reference to land alone. Yet that is how his Honour construed that expression.

64. Meagher JA emphasised that clause 2.2 draws a distinction between land and rights, and stated that the rights in question are rights in respect of particular areas of land described as the "MBM area" and the "Hanwright area" respectively: at [100]. Macfarlan JA seems to adopt a similar approach in the third and fourth sentences of [46]. That approach ignores the fact that both "MBM area" and "Hanwright area" are defined by reference to particular numbered "temporary reserves", and clause 1.4 makes it clear that a reference to those numbered reserves includes all present and future rights of Hanwright in respect to those numbered reserves. Further, at [100] Meagher JA said that the reference to "entire rights" in clause 2.2 was to be understood in accordance with clause 1.4. This indicates that, to the extent that his Honour applied clause 1.4 in construing clause 2.2, he applied it to the wrong part of

that clause; i.e. the references to "entire rights" instead of the references to "temporary reserves", the meaning of which is governed by clause 1.4.

65. *Fourthly*, relying on Lord Hoffman's comments in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [17], both Macfarlan JA (at [47]) and Meagher JA (at [103]) had recourse to the ordinary signification of the word "area" to interpret the phrase "MBM area" in the 1970 Agreement. That approach is contrary to authority.

66. In *Owners of "Shin Kobe Maru" v Empire Shipping Co Ltd* (1994) 181 CLR 404 at 419, this Court unanimously held that the use of the word "proprietary" in the defined expression "proprietary maritime claim" in the *Admiralty Act* 1988 (Cth) did not colour the meaning to be given to the definition which followed it on the ground that "[i]t would be quite circular to construe the words of a definition by reference to the term defined". In reaching that view, the Court referred to *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503. In *Wacal*, Gibbs J rejected a submission that the word "instalment" in the expression "instalment contract" in the *Property Law Act* 1974 (Qld) coloured the meaning to be given to the definition, stating "it is impermissible to construe a definition by reference to the term defined" (at 507).

67. Although both cases involved the interpretation of defined terms in statutes rather than in contracts, no sensible distinction can be drawn between the construction of statutes and other instruments in this respect. In the Court of Appeal, Macfarlan JA (at [39]) cited a case concerning statutory construction in support of his approach, namely, *Streller v Albury City Council* [2013] NSWCA 348; (2013) Aust Torts Reports 82-146 at [43]. In *Chartbrook* at [94], Lord Walker of Gestingthorpe relied on cases dealing with statutory definitions in holding that weight should be given to the natural meaning of the terms defined in the contract at issue in that case.

68. If, contrary to the foregoing, it were permissible to have regard to the ordinary signification of "area" in interpreting the defined term "MBM area", that ordinary signification plainly cannot be given decisive weight. In *Chartbrook* at [17] Lord Hoffman himself suggested nothing more than that the language of the defined expression "may help to elucidate" ambiguities in the definition or other parts of the agreement. In the present case, the range of considerations to which MBM has referred above overcomes any force that could otherwise be given to the ordinary meaning of the word "area" and precludes the term "MBM area" from being construed as a reference to a geographic area alone. In this respect, "MBM area" is hardly an inapposite label for such area of land as remains subject, from time to time, to the rights acquired by MBM under the 1970 Agreement (including rights derived therefrom).

69. In addition to these central errors, there were other errors in the Court of Appeal's reasoning.

70. Macfarlan JA stated at [53] that commercial commonsense did not assist MBM because on MBM's construction it could avoid paying royalties by ensuring any mining it did on the land was done pursuant to fresh grants of rights. However, this overlooks the fact that, for that to occur, MBM would need to have lost or surrendered the rights it acquired from Hanwright, giving rise to the risk of the land being taken over by third parties. That risk was very real, not remote or fanciful. As it happened, an unrelated third party may have acquired rights over part of the land formerly subject to temporary reserves 4965H to 4967H in 1977, after MBM had ceased to hold rights of any kind in relation to that land (PAFD [41]; [2013] NSWSC 536 at [42]-[43])[4]. Moreover, Macfarlan JA failed to address the circumstance, identified above, that the construction his Honour adopted would compensate Hanwright for more than the commercial opportunity it gave up in transferring its rights to MBM.

71. Macfarlan JA relied at [47] on the fact that it is a more natural use of English to speak of ore "won ... from" an area of land than of ore "won ... from" a right such as a right of occupation or mining lease. A similar point was made by Meagher JA in the last sentence of [101]. The force of that consideration falls away if the defined meaning is read into the clause, and the expression "Ore won ... from the MBM area" is understood as referring to ore won *from the exercise of* MBM's rights over the areas the subject of temporary reserves 4937H to 4946H and 4963H to 4967H. It is a perfectly natural use of English to speak of ore being won from the exercise of a right to mine.

72. Both Macfarlan JA (at [50]) and Meagher JA at [101] also relied on clauses 6, 6.12 and 9 (which refer to "ore from" or "mined from" the "Hanwright area") and clause 12 (which refers to the commencement of "mining of the MBM area") to suggest that the defined terms must denote only the physical areas from which ore is won. However, those clauses are entirely neutral. If, as MBM contends, the "MBM area" (and, it would follow, the "Hanwright area") refers to present and future rights in respect of identified temporary reserves, there is no obstacle to reading the words "ore from" or "mined from" the Hanwright area in clauses 6, 6.12 and 9 as referring to ore mined *from the exercise of Hanwright's rights over* the areas the subject of temporary reserves 4947H to 4962H. Similarly, there is no obstacle to reading the words "mining of the MBM area" in clause 12 as referring to mining *from the exercise of MBM's rights over* the areas the subject of temporary reserves 4937H to 4946H and 4963H to 4967H.

[4] Neither the primary judge, nor the Court of Appeal, found it necessary to resolve whether or to what extent this had in fact occurred.

73. At [48] Macfarlan JA appeared to accept that the natural meaning of "royalty" connotes payments in respect of the exercise of rights, but considered that the other factors he had referred to indicated the word was used in a broader, less technical sense in the 1970 Agreement. In light of the criticisms made elsewhere of the other factors on which Macfarlan JA relied, there is no basis for holding that "royalty" in the 1970 Agreement is used in anything other than its ordinary sense.

The 1962 Agreement and the 1968 Agreement

74. As foreshadowed above, on MBM's construction, clause 3.1 has an operation that is consistent with the operation of clause 9 of the 1962 Agreement and clauses 3 of Pt I and A5 of Pt II of the 1968 Agreement. That surrounding circumstance lends further support to MBM's construction given the commonality in the subject matter and phraseology of the three sets of clauses.

75. In this respect as well, the Court of Appeal erred, particularly in respect of the 1962 Agreement. Macfarlan JA at [51] stated that the 1962 Agreement does not assist MBM because recital (g), in referring both to rights and to the land itself, reveals a consciousness of the distinct concepts of rights and parcels of land. Meagher JA also stated at [102] that recital (g) draws a distinction between rights in or in respect of the Temporary Reserves and the land comprising those reserves, with only the latter being defined as the "Temporary Reserve land". As explained below, those propositions are not correct.

The 1962 Agreement

76. The 1962 Agreement provides for the sale by Hanwright to Hamersley Iron of certain temporary reserves[5] in consideration for, *inter alia*, the payment of a 2½% royalty on iron ore produced by Hamersley Iron from the "Temporary Reserve land" and sold or otherwise disposed of by it. The relevant provisions of the agreement demonstrate that "Temporary Reserve land" is not a reference solely to a geographic area, but is a composite reference to rights in relation to such an area as well as derivative rights.

77. Thus, recital (f) defines Temporary Reserves as "certain rights and privileges in or in respect of the Temporary Reserves for iron ore listed in the Second Schedule". This makes it plain that the expression "Temporary Reserves" refers to rights in relation to land and not the land itself.

78. Recital (g) states:

[5] The temporary reserves the subject of the 1962 Agreement are unrelated to those the subject of the 1970 Agreement: [2014] NSWCA 353 at [6].

"It is intended that the Vendors shall sell and the Purchasers shall purchase all the right, title and interest of the Vendors and each of them in and to and in respect of the said Temporary Reserves and the land comprised therein (hereinafter called "the Temporary Reserve land") and/or rights to prospect or mine granted thereby or flowing therefrom."

79. The expression "the Temporary Reserve land" is evidently a reference to rights in relation to the Temporary Reserves referred to in recital (f) *and* the land the subject of those Temporary Reserves. The words "thereby" and "therefrom" confirm this by referring back to the defined term "the Temporary Reserve land"; and it is only possible for rights to prospect or mine to be granted *by* or flow *from* the "Temporary Reserve land" if that phrase includes rights in relation to land.

80. Clause 1, by which the Vendors sell all their rights, title and interest in and to and in respect of the Temporary Reserves and the land comprised therein and all rights to prospect or mine granted thereby or flowing therefrom, repeats the language of recital (g) and must be read in the same way. The clause confirms that the 1962 Agreement is concerned with rights in relation to land, or rights to prospect or mine granted by such rights or flowing from such rights.

81. Reading clause 9 with recitals (f) and (g) and clause 1, when the clause refers to "ore produced ... from the Temporary Reserve land", it must be referring to "ore produced from the exercise of rights in relation to the land the subject of the Temporary Reserves listed in the Second Schedule, or rights to prospect or mine granted by such rights or flowing from such rights". That is simply to apply the definition of "the Temporary Reserve land" in recital (g) to clause 9.

82. The conclusion that the royalty imposed by clause 9 must be paid in consequence of the exercise of rights in relation to land, including derivative rights, is confirmed by clause 24(iii) which specifies that the Purchaser shall include its successors and assigns and/or persons or corporations "deriving title" through or under the Purchaser to any areas of land in respect of which an obligation to pay the royalty has arisen or may arise under, relevantly, clause 9.[6]

The 1968 Agreement

83. As noted above, the 1968 Agreement gave Hamersley Iron an entitlement to require the transfer to MBM of certain "blocks" referred to in the Preamble to the agreement, being Block 4053H and other identified blocks, the latter of which are defined as the

[6] The same is confirmed by clause 19 of the 1962 Agreement which imposes certain obligations on the Purchaser in the event of its "selling or otherwise assigning its title" to any areas of land in respect of which an obligation to pay any amount has arisen or may rise under, relevantly, clause 9.

"Mount Bruce Temporary Reserves" (clause 1 of Pt 1 and clause D5 of Pt II). Ore won from these blocks was to be subject to the payment of a royalty of 2½% (clause 3 of Pt I and clause A5 of Pt II). Again, a reading of relevant provisions of the agreement demonstrates that the references to Block 4053H and to the "Mount Bruce Reserves" in the clauses imposing the royalty include rights in relation to the blocks or reserves concerned rather than being solely to a geographic area.

84. The Preamble states that Hanwright represents that they "hold Temporary Reserves ... in respect of areas indicated in the attached map (Appendix A) as the following numbered blocks". This language is mirrored in the preamble to the 1970 Agreement. As submitted at [40] above, the formulation "Temporary Reserves ... in respect of areas" makes it plain that Temporary Reserves are to be understood as comprising rights in relation to areas of land rather than the land alone.

85. The same point emerges from the next sentence of the Preamble, in which Hanwright "represent that they have the right to these reserves as provided by their Government Agreement". The "Government Agreement" refers to the 1967 and 1968 State Agreements which have been referred to above and the "right" in question is the enhanced rights conferred by those agreements. These are assignable, personal rights of temporary occupation, convertible into mining leases limited to a 300 square mile area.

86. The interpretive clause at the top of page 2 of the 1968 Agreement corresponds to clause 1.4 of the 1970 Agreement. It confirms that the 1968 Agreement is concerned with rights in relation to land by stating that "[a]ll references to blocks or reserves include all present and future rights of Hanwright in relation to the above blocks and reserves..." Thus, words which might otherwise signify a geographic area ("blocks" and "reserves") are to be understood as referring to rights in relation to such an area and not the area alone. The clause is also important because it indicates that the rights in question comprise derivative rights as well as existing rights.

87. Accordingly, when in clause 1 of Part I provision is made for the transfer of Block 4053H to Hamersley Iron, what is transferred is Hanwright's rights in relation to Block 4053H. Similarly, when reference is made in clause D5 of Part II to an entitlement to require the transfer to MBM of the blocks mentioned in the preamble other than Block 4053H, what is required to be transferred is Hanwright's rights in relation to those blocks. This follows from both the application of the interpretive provision just mentioned, and the fact that Hanwright could not transfer the blocks themselves because it did not have anything other than rights of personalty in relation to them.

88. The clauses imposing a royalty must be read in the same light. When clause 3 of Part I imposes a 2½% royalty on "Ore won ... from Block 4053H", it is referring to ore won from the *exercise of present or future rights* in relation to Block 4053H. Similarly, when clause A5 of Pt II imposes a 2½% royalty on "Ore won ... from the Mount Bruce Reserves", it is referring to ore won from the *exercise of the present or future rights* which are to be transferred under clause D5. Applying the interpretative provision mentioned above, these "blocks" and "reserves" are not solely areas of land, but include present and future rights in relation to areas of land.

Conclusion

89. If MBM's construction is accepted, it follows that MBM was not required to pay any royalty to Hanwright in relation to either Eastern Range or Channar. So far as concerns Eastern Range, which falls wholly within the area that was covered by temporary reserve 4967H, there were no temporary reserves or mineral leases over that land from 17 October 1974 until 26 August 1977, temporary reserve 4967H having been cancelled when ML 252SA was granted to MBM ([2013] NSWSC 536 at [29]-[30]; PAFD [40]). It follows that when MBM acquired a temporary reserve over part of the area which formerly comprised temporary reserve 4967H on 26 August 1977 ([2013] NSWSC 536 at [31]; PAFD [42], [44]), its rights were not rights it had acquired from Hanwright under the 1970 Agreement or rights deriving therefrom.

90. So far as concerns Channar, which falls wholly within the area that was covered by temporary reserves 4965H and 4966H, there were no temporary reserves or mineral leases over the disputed area from 17 October 1974 until 26 August 1977 (save for the possibility that temporary reserves were granted over part of that area to a BHP subsidiary, Dampier Mining Pty Ltd), temporary reserves 4965H and 4966H having been cancelled when ML 252SA was granted to MBM ([2013] NSWSC 536 at [41]; PAFD [40]). It follows that when Hamersley Exploration Pty Limited acquired temporary reserves over part of the area which formerly comprised temporary reserves 4965H and 4966H on 21 April 1978 and 2 May 1979 ([2013] NSWSC 536 at [44]-[45]; [2014] NSWCA 323 at [21]; PAFD [43], [46], [48]), its rights were not rights that derived from the rights MBM had acquired from Hanwright under the 1970 Agreement.

Part VII: Applicable statutes

91. The applicable statutes on which MBM will rely are set out in the Schedule to these submissions.

Part VIII: Orders

92. In the event that the appeal is successful, MBM seeks the following orders:

(1) The appeal be allowed.

(2) Orders 1 to 4 and 7 of the Court below be set aside and in lieu thereof:

(A) The first respondent's claim against the appellant is dismissed.

(B) The second respondent's Cross Claim against the appellant is dismissed.

(C) The respondents pay the appellant's costs of the proceedings before Hammerschlag J, plus interest pursuant to s 101(4) of the *Civil Procedure Act 2005* (NSW) on the amounts assessed in respect of such costs from the dates on which such costs were paid.

(D) The respondents pay the appellant's costs of the proceedings in the New South Wales Court of Appeal, plus interest pursuant to s 101(4) of the *Civil Procedure Act 2005* (NSW) on the amounts assessed in respect of such costs from the dates on which such costs were paid.

(3) The appellant is entitled to repayment by the first respondent of the sum of $89,397,091.73, plus interest from 27 June 2013.

(4) The appellant is entitled to repayment by the second respondent of the sum of $89,397,091.73, plus interest from 27 June 2013.

(5) The respondents pay the appellant's costs of the appeal.

Part IX: Time estimate

93. MBM estimates that it will require three hours to present its oral argument.

Dated: 19 June 2015

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ANNEXURE TO APPELLANT'S SUBMISSIONS

PART VII: LEGISLATION

A. *Mining Act 1904* (WA)

The following sections of the Mining Act were in force in 1970. The Mining Act 1904 has since been repealed: see s 3(1) of the Mining Act 1978 (WA) which came into operation on 1 January 1982.

Section 48

48. The Governor may, subject to this Act and the regulations, grant to any person, not being an Asiatic or African alien, a lease of any Crown land, not exempted by the next following section, for any or all of the undermentioned purposes, that is to say –

(1) for mining, and for all purposes necessary to effectually carry on mining operations therein or thereon for any mineral other than gold;

(2) for cutting and constructing thereon water races, drains, dams, reservoirs, tramways and roads to be used in connection with such mining;

(3) for erecting thereon any buildings and machinery to be used in connection with such mining;

(4) for boring or sinking for, pumping, or raising water;

(5) for residence thereon in connection with any or all such purposes.

Section 276

276. The Minister and, pending a recommendation to the Minister, a warden, may temporarily reserve any Crown land from occupation, and the Minister may at any time cancel such reservation: Provided that if such reservation is not confirmed by the Governor within twelve months, the land shall cease to be reserved.

The Minister may, with the approval of the Governor, authorise any person to temporarily occupy any such reserve on such terms as he may think fit, but subject to the provisions of section two hundred and seventy-seven.

Section 277

277. (1) In this section –

"deep alluvial gold" means alluvial gold below a depth of thirty feet from the natural surface of the ground.

(2) A right of occupancy granted under the preceding section for the purpose of prospecting for gold, other than for deep alluvial gold, shall not exceed three hundred acres in area.

(3) A right of occupancy may be granted for a fixed period in excess of one year, but in that event the Minister shall cause the terms and conditions relating thereto to be laid on the Table of each House of Parliament within fourteen days of the granting.

(4) A right of occupancy granted for any fixed period may be renewed from time to time for any term not exceeding twelve months on each occasion of renewal, but if any such renewal is granted then the provisions of subsection (3) of this section shall apply, and the terms and conditions of such renewal shall be tabled in each House of Parliament accordingly.

(5) The provisions of section thirty-six of the Interpretation Act, 1918, relating to the disallowance of regulations by either House shall apply to all intents and purposes as if the terms and conditions of the right of occupancy as tabled under this section were regulations tabled under that section.

B. *Iron Ore (Hanwright) Agreement Act* (WA) (No 19 of 1967)

This Act was amended by an Amendment Act set out below in "C".

Clause 2(a) of the Schedule

2. The State shall –

(a) upon application by the Joint Venturers at any time prior to the 31st day of December, 1967 (and surrender of the then existing rights of occupancy already granted in respect of any portions of the mining areas) cause to be granted to the Joint Venturers and to the Joint Venturers alone rights of occupancy for the purposes of this Agreement (including the sole right to search and prospect for iron ore) over the whole of mining areas under section 276 of the Mining Act at a rental at the rate of eight dollars ($8) per square mile per annum payable quarterly in advance for the period expiring on the 31st December, 1968 and shall then and thereafter subject to the continuance of this Agreement cause to be granted to the Joint Venturers as may be necessary successive renewals of such last mentioned rights of occupancy (each renewal for a period of twelve (12) months at the same rental and on the same terms) the last of which renewals notwithstanding its currency shall expire:

(i) On the date of application for a mineral lease to the Joint Venturers under clause 8(1)(a) hereof;

(ii) at the expiration of one month from the commencement date;

(iii) on the determination of this Agreement pursuant to its terms; or

(iv) on the day of the receipt by the State of a notice from the Joint Venturers to the effect that the Joint Venturers abandon and cancel this Agreement.

whichever shall first happen...

Clause 8(1) of the Schedule

8. (1) As soon as conveniently may be after the commencement date the State shall –

(a) after application is made by the Joint Venturers for a mineral lease of any part or parts (not exceeding in total area three hundred (300) square miles and in the shape of a rectangular parallelogram or rectangular parallelograms) of the mining areas in conformity with the Joint Venturers' detailed proposals under clause 5(2)(a)(A) hereof as finally approved or determined cause any necessary survey to be made of the land so applied for (the cost of which survey to the State will be recouped or repaid to the State by the Joint Venturers on demand after completion of the survey) and shall cause to be granted to the Joint Venturers a mineral lease or mineral leases of the land so applied for (notwithstanding the survey in respect thereof has not been completed but subject to such corrections to accord with the survey when completed) for iron ore in the form of the Schedule hereto for a term which subject to the payment of rents and royalties hereinafter mentioned and to the performance and observance by the Joint Venturers of their obligations under the mineral lease or mineral leases and otherwise under this Agreement shall be for a period of twenty-one (21) years commencing from the commencement date with rights to successive renewals of twenty-one (21) years upon the same terms and conditions but subject to earlier determination upon the cessation or determination of this Agreement PROVIDED HOWEVER that the Joint Venturers may from time to time (without abatement of any rent then paid or payable in advance) surrender to the State all or any portion or portions (of reasonable size and shape) of the mineral lease or mineral leases;

(b) in accordance with the Joint Venturers' proposals as finally approved or determined under clause 6 hereof and as require the State to accept obligations and on written application by the Joint Venturers grant to the Joint Venturers a lease or leases under the Mining Act or if mutually agreed a lease or leases under the Land Act (notwithstanding any of the provisions of those Acts) of such area of land for the Joint Venturers' railway as the Joint Venturers shall

require and the Minister may approve at a peppercorn rental and for such term or period and on such terms and conditions (including renewal rights) as shall be reasonable having regard to the requirements of the Joint Venturers hereunder and to the provisions of this Agreement. The Mining Act shall be deemed to be so amended varied and modified as to enable such lease or leases to be granted.

(c) in accordance with the Joint Venturers' proposals as finally approved or determined under clause 6 hereof and as require the State to accept obligations:-

(i) grant to the Joint Venturers for such terms or periods and on such terms and conditions (including renewal rights) as subject to the proposals (as finally approved or determined as aforesaid) shall be reasonable having regard to the requirements of the Joint Venturers hereunder and to the overall development of the port and access to and use by others of lands the subject of any grant to the Joint Venturers and of services and facilities provided by the Joint Venturers at peppercorn rental — special leases of Crown lands within the port area the townsites and the railway; and at rentals as prescribed by law or are otherwise reasonable — leases rights mining tenements easements reserves and licenses in on or under Crown lands

under the Mining Act the Jetties Act, 1926 or under the provisions of the Land Act modified as in subclause (2) of this clause provided (as the case may require) as the Joint Venturers reasonably require for their works and operations hereunder including the construction or provision of the railway wharf roads airstrip water supplies and stone and soil for construction purposes; and

(ii) provide any services or facilities (including any expanded services or facilities which from time to time are considered necessary by the Minister) subject to the Joint Venturers bearing and paying the capital cost involved if reasonably attributable to or resulting from the Joint Venturers' project and operations hereunder and reasonable charges for maintenance and operation except operation charges in respect of education hospital and police services and except where and to the extent that the State otherwise agrees –

subject to such terms and conditions as may be finally approved or determined as aforesaid PROVIDED THAT from and after the fifteenth anniversary of the export date or the twentieth anniversary of the date hereof whichever shall first

occur (provided that the said twentieth anniversary shall be extended one (1) year for each year this Agreement has been continued in force and effect under clause 5(4) hereof) the Joint Venturers will in addition to the rentals already referred to in this paragraph pay to the State during the currency of this Agreement after such anniversary as aforesaid a rental (which if the Joint Venturers so request shall be allocated in respect of such one or more of the special leases or other leases granted to the Joint Venturers hereunder and remaining current) equal to twenty-five (25) cents per ton on all ore in respect of which royalty is payable under clause 9(2)(j) hereof in any financial year such additional rental to be paid within three (3) months after shipment sale or use as the case may be of the ore SO NEVERTHELESS that the additional rental to be paid under this proviso shall be not less than three hundred thousand dollars ($300,000) in respect of any such year and the Joint Venturers will within three (3) months after expiration of that year pay to the State as further rental the difference between three hundred thousand dollars ($300,000) and the additional rental actually paid in respect of that year but any amount so paid in respect of any financial year in excess of the rental payable for that year at the rate of twenty-five (25) cents per ton as aforesaid shall be offset by the Joint Venturers against any amount payable by them to the State above the minimum amounts payable to the State under this paragraph in respect of the two (2) financial years immediately following the financial year in respect of which the said minimum sum was paid; and

(d) on application by the Joint Venturers cause to be granted to them such machinery and tailings leases (including leases for the dumping of overburden) and such other leases licences reserves and tenements under the Mining Act or under the provisions of the Land Act modified as in subclause (2) of this clause provided as the Joint Venturers may reasonably require and request for their purposes under this Agreement on or near the mineral lease...

Clause 14 of the Schedule

14. (1) Subject to the provisions of this clause the Joint Venturers may at any time –

(a) assign mortgage charge sublet or dispose of to an associated company as of right and to any other company or person with the consent in writing of the Minister the whole or any part of the rights of the Joint Venturers hereunder (including their rights to or as the holder of any lease license easement grant or other title) and of the obligations of the Joint Venturers hereunder; and

(b) appoint as of right an associated company or with the consent in writing of the Minister any other company or person to exercise all or any of the powers

functions and authorities which are or may be conferred on the Joint Venturers hereunder;

subject however to the assignee or (as the case may be) the appointee executing in favour of the State a deed of covenant in a form to be approved by the Minister to comply with observe and perform the provisions hereof on the part of the Joint Venturers to be complied with observed or performed in regard to the matter or matters so assigned or (as the case may be) the subject of the appointment.

(2) Notwithstanding anything contained in or anything done under or pursuant to subclause (1) of this clause the Joint Venturers shall at all times during the currency of this Agreement be and remain liable for the due and punctual performance and observance of all the covenants and agreements on their part contained herein and in any lease license easement grant or other title the subject of an assignment under the said subclause (1).

C. *Iron Ore (Hanwright) Agreement Act Amendment Act* (WA) (No 49 of 1968)

This Act was not amended.

Clause 5 of the Schedule

5. (1) The Company may by notice in writing to the State and the Joint Venturers given at any time before the 31st day of December 1970 or such extended date if any as the Minister may approve inform the State and the Joint Venturers that the Company desires to take the place of the Joint Venturers under the Principal Agreement and upon the giving of that notice the Company covenants and agrees with the State to perform and observe all the Joint Venturers' covenants and obligations contained in the Principal Agreement and the Principal Agreement shall thenceforth be read and construed and take effect as if the Company were a party thereto in place of the Joint Venturers and –

(a) the words "any covenant or agreement on the part of the Joint Venturers hereunder will be deemed to be a joint and several covenant or agreement as the case may be" shall be deleted from clause 1 of the Principal Agreement;

(b) the words "either of" and the words "unless within three months from the date of such liquidation the other Joint Venturer acquires absolutely the share estate and interest of the Joint Venturer (in liquidation) in or under this Agreement and in or under the mineral lease and any other lease license easement or right granted hereunder or pursuant hereto" shall be deleted from paragraph (1) of clause 10 of the Principal Agreement;

(c) subject as aforesaid all references in the Principal Agreement to "the Joint Venturers" shall become references to "the Company";

(d) all plural verbs and pronouns in the Principal Agreement relating to the Joint Venturers shall become singular; and

(e) the provisions of clauses 5(2) and 6 to 10 (both inclusive) hereof shall then come into operation.

(2) Upon the giving of the notice referred to in sub-clause (1) of this clause the Joint Venturers shall forthwith surrender the then remaining rights of occupancy granted to the Joint Venturers under clause 2 of the Principal Agreement and simultaneously therewith the State shall cause to be granted to the Company and to the Company alone rights of occupancy for the purposes of this Agreement (including the sole right to search and prospect for iron ore) over the whole of the mining areas under Section 276 of the Mining Act at a rental at the rate of eight dollars ($8) per square mile per annum payable quarterly in advance for the period expiring on 31st December next after the grant thereof and shall then and thereafter subject to the continuance of this Agreement cause to be granted to the Company as may be necessary, successive renewals of such last mentioned rights of occupancy (each renewal for a period of twelve (12) months at the same rental and on the same terms) the last of which renewals shall notwithstanding its currency expire –

(a) on the date of grant of a mineral lease under clause 8(1) of the Principal Agreement;

(b) on the expiration of five (5) years from the date hereof; or

(c) on the determination of this Agreement pursuant to its terms;

whichever shall first happen.