IN THE HIGH COURT OF AUSTRALIA No S102 of 2015

SYDNEY REGISTRY

BETWEEN

WRIGHT PROSPECTING PTY LIMITED

Appellant

and

MOUNT BRUCE MINING PTY LIMITED

First Respondent

10 **HANCOCK PROSPECTING PTY LTD**

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. This appeal, like the appeal in proceedings S99 of 2015 (**MBM Appeal**), concerns the proper construction of the agreement between the Appellant (**WPPL**) and the Second Respondent (**HPPL**) (together, **Hanwright**), Hamersley Iron Pty Ltd (**Hamersley**
20 **Iron**) and the First Respondent (**MBM**) dated 5 May 1970 (**1970 Agreement**).

3. It is common ground that clause 3.1 of the 1970 Agreement incorporates by reference clause 24(iii) of an agreement between Lang Hancock, Ernest Wright, Hanwright, Rio Tinto Management Services (Australia) Pty Ltd, Rio Tinto Southern Pty Ltd and Hamersley Iron entered into in December 1962 (**1962 Agreement**).

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4. The precise issue which arises for consideration by the Court on this appeal is whether the companies presently winning ore from the area known as Channar A (the Channar Joint Venturers) are "persons or corporations deriving title through or under [MBM] to [that area] of land" within the meaning of clause 24(iii).

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

5. 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: Facts

6. MBM accepts the factual matters set out in WPPL's submissions and HPPL's
10 submissions, subject to the following qualifications.

7. *First*, in the course of setting out facts, WPPL and HPPL make assertions as to the commercial effect of the bargain struck in the 1970 Agreement. WPPL states that *"the Hamersley Group*, through MBM, obtained the opportunity to develop [the MBM TR land] and to exploit it for iron ore if it so chose" (WPPL [18](b)) (emphasis added); and HPPL states that Hanwright transferred its exclusive right to explore for iron ore to MBM provided that the ore was won by, relevantly and inter alia, "a company in *the corporate group* of which MBM was a member" (HPPL [10]) (emphasis added). These passages misstate the effect of the 1970 Agreement.

8. The 1970 agreement says nothing about the Hamersley Group or any other corporate
20 group. It is an agreement by which MBM acquired specified mining rights, and in consideration for which MBM assumed an obligation to pay royalty on "Ore won by MBM from the MBM area" (clause 3.1). The reference in clause 3.1 to "the same conditions as apply to the existing Agreement between Hanwright and Hamersley" has the effect of extending the obligation to pay the royalty to circumstances where ore is won:

   a. by MBM's "successors and assigns and all persons or corporations deriving title through or under" MBM (pursuant to clause 24(iii) of the 1962 Agreement); or

   b. when MBM is "operating ... in association with or by licence to others"
30 (pursuant to clause 9 of the 1962 Agreement).

9. There is no reason why either of these conditions would be satisfied only where ore is won by a corporation in the same corporate group as MBM. Had the parties' purpose or object been to extend the royalty obligation to all circumstances where ore was won

from the MBM area by a member of the Hamersley group, then the parties easily could and no doubt would have used language which said precisely that. The fact that they did not demonstrates that it was not the purpose or intended effect of the 1970 Agreement to confer any benefit or impose any obligation on the Hamersley Group (as opposed to MBM).

10. *Secondly*, again in the course of setting out the factual background, WPPL asserts that "the manner of development of the MBM TR Land by the Hamersley Group would be a matter within the control of the Hamersley Group (subject to negotiation and agreement with the Western Australian Government), both as to the timing of the development, whether it was staged or continuous, whether for some periods some areas were left without any extant mining interest, and as to the corporate vehicle selected to undertake the development" (WPPL [31]). That characterisation ignores the binding requirements of the Hanwright State Agreements and MBM does not accept it.

11. Importantly, it was not for the Hamersley Group to decide "whether for some periods some areas were left without any extant mining interests". As explained in MBM's submissions in the MBM Appeal at [31]-[33], the rights which MBM acquired under the 1970 Agreement included the right, conferred by the Hanwright State Agreements, to convert Hanwright's temporary reserves into a mineral lease over an area not exceeding 300 square miles. Once such a lease was granted, the temporary reserves which MBM acquired under the 1970 Agreement expired automatically (see clause 5(2) of the 1968 Hanwright State Amendment Agreement[1]). Bearing in mind that the total area the subject of the temporary reserves MBM acquired from Hanwright was 400.1 square metres (Blue 4/1763 at 1772F-L, T-V), the effect of moving to a mineral lease would be to restrict MBM to winning ore only from such lesser area of land, not exceeding 300 square miles[2], as was subject to such a lease. The remaining land formerly the subject of the temporary reserves held by MBM would return to its earlier status as unreserved Crown land open for mining and for claim by any person. It was conceivable that a third party, unrelated to MBM or any other company in the Hamersley Group, might acquire rights over the temporary reserves formerly held by MBM. Indeed, this is what may have occurred when Dampier Mining Company Pty

[1] That position remained under the 1972 Mount Bruce State Agreement, clause 4(1) of which provided that the rights of occupancy to be granted to MBM under that agreement expired on the earliest of two events, one of which was the date of grant of a mineral lease to MBM.

[2] In fact, as explained in paragraph [50] of MBM's submissions in the MBM Appeal, by reason of clause 2.3 of the 1970 Agreement the maximum area of land from which MBM could win ore by exploiting the rights it acquired from Hanwright was 225 square miles. This ultimately increased to 300 square miles under clause 4(2) of the 1972 Mount Bruce State Agreement.

Ltd (**Dampier**) was granted rights of occupancy over TRs 6498H and 6499H ([2013] NSWSC 536 at [42]-[43]; [2014] NSWCA 323 at [20]).

12. It follows that, as at the date of the 1970 Agreement, there was no certainty that the Hamersley Group would be able to "develop" (in the sense of mine ore from) any part of the land over which it acquired rights under that agreement, other than the 300 square mile area that formed part of the mineral lease into which its rights were ultimately converted.[3] For the same reason, it was not in any position to ensure that a corporate vehicle of its choice would obtain title to any land other than the 300 square mile area the subject of the mineral lease into which MBM's temporary reserves were converted.

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13. *Thirdly*, it is said that a finding of fact made by the trial judge, and not challenged on appeal, is that MBM's surrender of secs 18 and 19 of ML252SA and Hamersley Iron's surrender of sec 238 of ML 4SA were both "necessary" for the grant of ML265SA (WPPL [35]). That misconstrues the reasons of both the trial judge and the Court of Appeal.

14. The paragraph in the trial judge's reasons relied on, [128], simply reflects the effect of clause 15(1) of the 1987 Channar State Agreement (referred to at [2013] NSWSC 536 at [49]). By that clause, the State agreed to cause to be granted to the Channar Joint Venturers a mining lease over the land the subject of secs 18 and 19 of ML252SA and sec 238 of ML 4SA, subject to the surrender of those sections. The trial judge did not find that, had MBM been unwilling to surrender secs 18 and 19, clause 15(1) of the 1987 Channar State Agreement would not have been drafted in such a manner as to provide for a lease which excluded those sections.

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15. On appeal, Macfarlan JA, far from accepting that MBM's surrender of secs 18 and 19 was "necessary", specifically noted at [67] that there was no evidence that the Channar Joint Venturers would not have been able to obtain ML 265SA if MBM had not been willing to surrender secs 18 and 19 of ML 252SA.

16. *Fourthly*, HPPL asserts that the 1962 Agreement (which applied to a different area of the Pilbara) demonstrates that the parties treated the rights and correlative obligations created by the 1962 Agreement as referable to areas of land, and ore won from those areas (HPPL [23]). That assertion is incorrect for the reasons given in paragraphs [75]-[82] of MBM's submissions in the MBM Appeal. However, as HPPL appears to accept (HPPL [23]), this debate is not directly relevant to the present appeal.

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[3] Even this was not "certain" because, in certain circumstances, the 1967 Hanwright State Agreement (as amended) could be determined and the rights conferred by it lost: see clause 10(l).

17. *Fifthly*, HPPL asserts that the parties to the 1962 Agreement "objectively knew that they were not dealing with an uninterrupted title". The assertion is said to be based on the fact that rights of occupancy did not permit mining, and a mineral lease was required before ore could be won (HPPL [23]). Whether or not HPPL's assertion as to the parties' knowledge was true as at the time the 1962 Agreement was executed, it was not true by the time the 1970 Agreement came to be executed.

18. As noted in paragraph [11] above, the rights which MBM acquired under the 1970 Agreement included a right, conferred by the Hanwright State Agreements, to convert Hanwright's temporary reserves into a mineral lease over a lesser area not exceeding 300 square miles. Those temporary reserves were granted under and for the purposes of the Hanwright State Agreements. Further, as explained in paragraph [34] of MBM's submissions in the MBM Appeal, the rights that MBM acquired were assignable.

19. These features of the rights acquired under the 1970 Agreement were not novel. The temporary reserves which Hamersley Iron had acquired under the Iron Ore (Hamersley Range) State Agreement (**1963 Hamersley State Agreement**) had the same features (see clauses 2(a) and 9(1)(a) dealing with the conversion of temporary reserves into a mineral lease; and clause 20(1) dealing with assignment). That State Agreement concerned certain areas covered by the 1962 Agreement ([2013] NSWSC 536 at [15]).

20. It follows that, by the time of execution of the 1970 Agreement, there was an established pattern, known to the parties, whereby the grant of rights under a State Agreement in respect of a temporary reserve carried with it an entitlement under that State Agreement to convert the rights granted into a mineral lease over a lesser area; and to assign those rights. These features applied to both the temporary reserves which were contemplated by the 1962 Agreement, and the temporary reserves in fact dealt with under the 1970 Agreement. Accordingly, there was no difficulty in conceiving of the rights of occupancy acquired by MBM under the latter agreement as giving MBM "uninterrupted title" to so much of the land as ultimately became the subject of any mineral lease into which those rights were converted.

21. *Sixthly*, a number of corrections need to be made to the factual outline given by WPPL:

    a. at WPPL [24] it is said that ML252SA was for an area of 210.91 square miles, being "less than the 300 square mile maximum area for the first mineral lease to be granted over that area" that had been agreed between MBM and the State in the 1972 Mount Bruce State Agreement. In fact, the 1972 Mount Bruce State Agreement (relevantly clause 4(2)) envisaged only one mineral lease

being granted. It did not refer to or contemplate the grant of "first" or subsequent leases;

b. at WPPL [26] it is said that temporary reserve 6663H was "within the MBM TR Land". In fact, not all of temporary reserve 6663H was within the MBM TR Land as that term is defined at WPPL [16]: see Map 5;

c. at WPPL [32] it is said that Channar Mining is a wholly owned subsidiary of Hamersley Holdings. There is no finding that that was the case when the Channar Joint Venture Agreement was entered into on 16 November 1987. The only finding made by the trial judge on this matter is that Channar Mining was at least 50% owned by Hamersley Holdings (see the diagram at paragraph [53] of the trial judge's reasons).

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Part V: Applicable statutes

22. In addition to the statutory provisions identified by WPPL and HPPL, MBM will rely on the statutory provisions set out in the Schedule to these submissions.

Part VI: Argument

The Court of Appeal's reasons

23. The Court of Appeal was correct to hold that MBM was under no obligation to pay royalties under the 1970 Agreement in respect of ore won by the Channar Joint Venturers from Channar A. (Channar A comprises so much of the Channar land as was not formerly covered by secs 18 and 19 of ML 252SA: [2014] NSWCA 323 at [20], [23]).

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24. The Court of Appeal held, in effect, that:

a. the meaning of the words "deriving title through or under" must be determined not by reference to authority but by reference to the text and context of the instrument in which it is used (citing *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 342) ([2014] NSWCA 323 at [55]);

b. the reference to "deriving title through or under the Purchaser" invokes the notion of a continuity of a chain of title, consistently with the meaning attributed to the phrase "any person claiming through or under that person" in *Sahab Holdings Pty Ltd v Registrar-General (No 2)* [2012] NSWCA 42 at [28]; *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149 at [51] ([2014] NSWCA 323 at [55]-[56]);

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c. the reference to a derivation of "title" must be understood in the statutory context of the Mining Act 1904 (WA), in particular:

    i. while the grants of rights of occupation and mining leases for which that Act provided did not necessarily confer "title" to the land, the reference to "title" must be understood as embracing those interests ([2014] NSWCA 323 at [57]); and

    ii. whilst the Act did not provide for the transfer of such interests, transactions equivalent to transfers could be effected, with governmental approval, by the cancellation of interests held by the proposed transferor and the re-grant of interests to the proposed transferee. Such transactions constituted means by which "title" was "derived" by one non-governmental party from another ([2014] NSWCA 323 at [58]);

d. a chain of title in this sense exists (as MBM acknowledged) vis-à-vis so much of the Channar land as was formerly covered by secs 18 and 19 of ML 252SA, because MBM surrendered those sections to enable ML 265SA to be granted to the Channar Joint Venturers on 8 May 1988 ([2014] NSWCA 323 at [59]);

e. no such unbroken chain of "title" exists in respect of the balance of the Channar land (Channar A) as the Joint Venturers' rights in respect of this land derive from Hamersley Exploration's acquisition of rights of occupancy in 1978 and 1979 and cannot be traced back to any "title" of MBM to that land ([2014] NSWCA 232 at [60]-[61]).

25. The Court of Appeal's reasoning correctly gives the verb "deriving" in clause 24(iii) its ordinary English meaning. That meaning stated in the *Macquarie Dictionary* (3rd ed) is: (a) "to receive or obtain from a source or origin"; (b) "to trace, as from a source or origin", or (c) "come from a source; originate". Thus, "deriving title" in clause 24(iii) means obtaining title from some prior originating source of title and, as the Court of Appeal held, involves the notion of a "chain of title". In this way, the Court of Appeal adopted an entirely orthodox construction of clause 24(iii).

26. The Court of Appeal's construction is further supported by two important contextual matters.

27. *First*, the Court of Appeal's construction makes commercial sense because the Court's emphasis on the need for continuity of title ties the royalty obligation imposed on MBM to the rights that MBM acquired from Hanwright under the 1970 Agreement. There is no apparent commercial purpose in construing clause 24(iii) in such a manner

as would impose on MBM an obligation to pay a royalty in respect of ore won in the exercise of rights which arose independently of, and which do not have an unbroken connection with, the rights MBM acquired under the 1970 Agreement.

28. *Secondly*, as noted in paragraph [20] above, the parties to the 1970 Agreement knew that the rights the subject of that agreement had two particular features: they included a right to convert Hanwright's temporary reserves into a mineral lease over a lesser area not exceeding 300 square miles; and they were assignable. A requirement for continuity of title made perfect sense in the context of such rights. That is especially so in circumstances where the mineral leases into which Hanwright's temporary reserves were to be converted were for 21 year terms, with rights to successive
10 renewals of 21 years on the same terms and conditions (clause 8(1) of the 1967 Hanwright State Agreement).

WPPL's arguments

"Through or under"

29. WPPL submits that the words "through or under" in the context in which they are used should be given their ordinary meaning of "by means of" or "by reason of" (WPPL [39]). That submission is apparently deployed in support of the contention that there is no need to establish an unbroken chain of title of the kind which the Court of Appeal contemplated must exist. It is far from self-evident that the words "through or under"
20 bear the ordinary meaning which WPPL asserts. But that is beside the point.

30. The real difficulty with WPPL's approach is that it ignores the fact that the words are used as part of the phrase "deriving title through or under". As the Court of Appeal explained at [56], it is the reference to derivation of title which invokes the concept of continuity of title. WPPL's submission ignores the words "deriving title", or gives them a meaning that is entirely elastic in content, meaning whatever it is necessary for them to mean in order to ensure that a royalty is payable on ore won from the MBM area by any entity in the Hamersley Group (see WPPL [42], [43]). There is no warrant for disregarding the language of the 1962 Agreement (incorporated into the 1970 Agreement) in this way.

30 *Commerciality and the object and purpose of the 1970 Agreement*

31. WPPL submits that the Court of Appeal's construction would defeat the object and purpose of the 1970 Agreement and/or is uncommercial, because it would enable MBM to avoid paying a royalty through vagaries such as the timing of taking up

interests or the identity of the entity within the Hamersley Group that went on to win the ore (WPPL [42]-[43], [55]).

32. The submission depends on an assumption that it was an object of the 1970 Agreement that MBM was obliged to pay Hanwright a royalty if, independently of the rights acquired from Hanwright under the 1970 Agreement, the *Hamersley Group* mined the areas of land that Hanwright had given up (see WPPL [43]). That assumption is unfounded. For the reasons explained in paragraphs [7]-[9] above, the assumption that the 1970 Agreement was intended to create an obligation to pay a royalty if any member of the Hamersley Group won ore from the MBM area is unsupported by the careful and limited language which the parties chose to extend the basic royalty obligation of clause 3.1 ("Ore won by MBM from the MBM area") to circumstances where an entity other than MBM was winning ore from the MBM area.

33. Moreover, the contention that the Court of Appeal's construction would enable MBM to avoid payment of a royalty through vagaries such as the timing of taking up interests is misconceived. It overlooks the fact, adverted to at [11] above, that at the time they entered into the 1970 Agreement the parties knew that: (i) the maximum area of any mineral lease or leases that could be granted in respect of the rights MBM acquired under that Agreement was 300 square miles; and (ii) once MBM's rights had been converted into such a mineral lease, the rights it had previously held over the balance of the land would expire.

34. For the same reason, MBM was not in a position to ensure that another company in the Hamersley Group could go on to win ore from the balance of the MBM land. Its rights over that land having expired (except in so far as they were converted into a mineral lease covering an area less than 300 square miles), MBM had no ability to require the State to grant fresh interests in the land to it or another Hamersley Group company, as opposed to some third party who might have been interested in winning ore from that land.

Flexibility and practicality

35. WPPL submits that the language of clause 24(iii) "accommodates a degree of flexibility and practicality" in determining whether ore has or has not been won by a person in the position of a Purchaser (WPPL [44]). The submission is made in connection with criticism directed at the Court of Appeal for adopting a "narrow and rigid" construction of the words "through or under" in construing that expression so as to invoke continuity of chain of title (WPPL [47]).

36. WPPL's submission overlooks that the language adopted in clause 24(iii) is technical legal language. The references to "successors", "assigns" and corporations "deriving

title ... to any areas of land" are not imprecise expressions; they invoke definite concepts with well-established legal meanings. In context, the concept of "deriving title" clearly embraces mining titles, but that does not justify construing the concept without any regard to the requirement for continuity which a reference to a derivation of title would otherwise invoke. The Court of Appeal's construction of the words "deriving title through or under" as requiring an unbroken connection between one right or interest and another is faithful to the precise language used in clause 24(iii), whereas WPPL's construction is not. Throughout its submissions, WPPL labours to avoid referring to the words "deriving title", and in the result it gives no fixed content to the expression "deriving title through or under" (other than that it is said it must not be construed in a manner which defeats Hanwright's entitlement to a royalty – see WPPL [42]).

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37. The cases cited by WPPL in support of its submission that the words "through or under" must be interpreted flexibly or practically are cases concerned with the question of whether a person claims "through or under" a party to a commercial arbitration agreement so as to be bound by the agreement for the purposes of s 7 of the *International Arbitration Act 1974* (Cth) and the equivalent provision in the *Arbitration Act 1975* (UK) (WPPL [44]-[45], referring to *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* [2014] VSCA 166; *Tanning Research Laboratories Inc v O'Brien; Roussel-Uclaf v Searle* [1978] 1 Lloyd's Rep 225). These statutory provisions make no reference to "deriving title" or any analogous concept. As such, the cases referred to by WPPL are of very limited assistance in interpreting the phrase "deriving title through or under the Purchaser to ... areas of land" as it appears in clause 24(iii).

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The prerequisites said to have been imposed by the Court of Appeal

38. WPPL says that the Court of Appeal imposed a series of unjustified prerequisites for derivation of title within the meaning of clause 24(iii) (WPPL [49]).

39. *First*, it is said that at [58] Macfarlan JA stated that the surrender of title by a previous holder of an interest in that land constituted the means by which title was derived for the purposes of the 1970 Agreement. WPPL criticises his Honour for excluding other means of derivation of title from the ambit of clause 24(iii) (WPPL [49]). That criticism misconstrues his Honour's reasons.

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40. Macfarlan JA did not say at [58] that such a surrender of title was *the means* by which title was derived for the purposes of the 1970 Agreement, or that a transaction was always required; he said that "such transactions constitute *means* by which 'title' was derived" for the purposes of the 1970 Agreement (emphasis added). Nothing in the

manner in which his Honour expressed himself excluded other forms of derivation of title.

41. *Secondly*, it is said that at [60] his Honour adopted a narrow or rigid reading of clause 24(iii) by requiring an unbroken chain of title to exist in respect of Channar A (WPPL [50]). For the reasons explained in paragraphs [25] and [35]-[36] above, such a requirement was justified having regard to the language of derivation of title employed in that clause.

42. *Thirdly*, it is said that at [63] Macfarlan JA imposed a requirement that there be some transaction between two persons which leads to one acquiring the rights of the other
10 (WPPL [51]). That misconstrues his Honour's reasons.

43. In paragraph [63] Macfarlan JA referred to the facts that no relevant mining rights covered the Channar A area from 1974 to 1978, and that it was not suggested on appeal that Hamersley Exploration's acquisition of temporary reserves from 1978 was causally related to the cancellation of MBM's temporary reserves in 1974. His Honour added: "In other words, the evidence does not indicate that there was any transaction between MBM and Hamersley Exploration that led to the latter acquiring its rights".

44. His Honour was not saying that there must be a transaction between MBM and Hamersley Exploration to satisfy the expression "deriving title through or under"; rather, his Honour was simply drawing attention to the fact that there was no basis for
20 suggesting that rights subsequently held by Hamersley Exploration from 1978 derived from the rights of MBM that expired in 1974.

45. *Fourthly*, WPPL says that at [67] and [69] Macfarlan JA imposed a requirement that the Channar Joint Venturers' "rights" be derived from MBM. This is said to be contrary to the language of clause 24(iii), which speaks of deriving title through or under an entity and not deriving title through or under *rights* held by an entity (WPPL [52]-[53]). This is a distinction without a difference. Given that neither a temporary reserve nor a mineral lease under the *Mining Act* 1904 confers an interest in land[4], the only thing to which the Channar Joint Venturers could acquire title was the rights MBM had in respect of the land the subject of the relevant temporary reserve or
30 mineral lease.

[4] This proposition is developed in MBM's submissions in the MBM Appeal, paragraph [29].

Work done by the words "deriving title through or under the Purchaser"

46. WPPL appears to suggest that any acquisition or transaction giving rise to a continuous chain of title would fall within the expression "successors and assigns" in clause 24(iii), and thus leave the words "and all persons or corporations deriving title through or under the Purchaser" with no work to do (WPPL [54]). That is not so.

47. As Macfarlan JA explained at [58], the concept of deriving "title" through or under MBM would extend to a transaction pursuant to which interests held by one entity were cancelled and new interests over the same land granted to another entity. Such a transaction would not involve a succession or assignment of rights.

10 48. Further, another instance in which title might be derived through or under MBM would be where MBM leased or sub-leased its rights to another person. Again, such a transaction would not involve a succession or assignment or rights. (A sublease of this kind occurred when the Channar Joint Venturers granted a sublease of ML 265SA for a term ending on 31 December 2012 to Channar Investment Nominee Pty Ltd: [2013] NSWSC 536 at [52]).

The so-called factual question

49. Under the heading "Issue 2 – the factual question", WPPL identifies three matters which are said to support the conclusion that the Channar Joint Venturers derived their title to Channar A through or under MBM.

20 50. *First*, reliance is placed on the fact that under clause 15(1) of the 1987 Channar State Agreement the surrender by MBM of secs 18 and 19 of ML 252SA was a necessary condition of the grant to the Channar Joint Venturers of a single mining lease (ML 265SA) (WPPL [57]). However, as Macfarlan JA pointed out at [67], that does not mean that the Joint Venturers derived title to Channar A from MBM: they did not do so because at the time ML 265SA was granted, MBM did not have any rights over Channar A to pass on to the Joint Venturers. Only by ignoring altogether any requirement for continuity of title could MBM's surrender of secs 18 and 19 possibly bring the case within the scope of the phrase "deriving title through or under the Purchaser" in clause 24(iii).

30 51. Further, as explained in paragraphs [13]-[15] above, the assumption that the surrender by MBM of secs 18 and 19 of ML 252SA was a necessary condition of the grant of a single mining lease to the Channar Joint Venturers is contestable. There was no evidence that, had MBM been unwilling to surrender those sections, clause 15(1) of

the 1987 Channar State Agreement would not have been drafted in such a manner as to provide for a lease which excluded secs 18 and 19.

52. *Secondly*, reliance is placed on the circumstances that the Channar Joint Venture Agreement required the availability of 200 Mt of iron ore, which necessitated the inclusion of secs 18 and 19 of ML 252SA within the mining area of ML 265SA and thus the surrender of those interests by MBM; and that MBM's surrender of secs 18 and 19 of ML252SA was by arrangement between it and the Channar Joint Venturers (WPPL [57](a) and (b)). This does not bring the case within the terms of clause 24(iii) for the simple reason that Channar A is not part of the former secs 18 and 19 of ML
10 252SA. It follows that, as Macfarlan JA held at [69], an arrangement whereby MBM surrendered those sections and the Channar Joint Venturers acquired ML 265SA (which did include Channar A) did not result in the latter deriving title to Channar A through or under the former.

53. WPPL criticises Macfarlan JA's reasoning at [69] on the basis that it is "tainted" by what is said to be his Honour's unduly narrow construction of clause 24(iii) and his failure to have regard to text and context (WPPL [61]). Plainly that criticism only has validity if one otherwise accepts WPPL's contentions as to the construction of clause 24(iii).

54. *Thirdly*, reliance is placed on what is said to be a "historical continuity" between the
20 exploration of the Channar area done by MBM following its acquisition of rights from Hanwright under the 1970 Agreement, and the opportunities which that exploration created for later applications by Hamersley Exploration and Hamersley Iron and the ultimate surrenders that led to the grant of ML 265SA (WPPL [59]). As to the factual position, the undisputed evidence at trial was that there had been no drilling exploration of any part of Channar A between 1 January 1968 and 17 October 1974 (when ML 252SA was granted) (Affidavit of John David Glen Phillips affirmed 12 March 2013, Blue1/54 at [8]). Further, the only reports recording the results of exploration of any kind of the Channar area (i.e., Channar A and Channar B) were six reports listed at [7] of Mr Phillips' affidavit (Blue 1/61, 1/77, 1/95, 1/104, 1/476,
30 1/481). The only significant deposit noted in these reports in the vicinity of Channar A was deposit 53S 0E, and even that deposit was considered too small to initiate a mining project (Blue 1/77 at 89 and 1/104 at 115). But in any event, as Macfarlan JA said at [70], even if (which he did not accept) there were such a historical continuity, it does not demonstrate that the Channar Joint Venturers derived their title to Channar A from MBM: since there were no mining rights subsisting over the subject land when Hamersley Exploration acquired its rights in 1978 and 1979, that company is properly regarded as having acquired its rights from the government and not from MBM.

55. Further, a criterion of "historical continuity" of the kind for which WPPL contends would lead to irrational outcomes. To the extent that MBM's exploration of the Channar area created opportunities for later applications, those opportunities were not opportunities available to companies in the Hamersley Group alone. The possibility that Dampier held rights of occupancy over parts of Channar A for a year from 25 February 1977 (adverted to by Macfarlan JA at [19]) demonstrates that other unrelated companies may also have benefitted from the opportunities created by MBM's exploration of the area. The 1970 Agreement could not sensibly be construed as imposing an obligation to pay a royalty had Dampier proceeded to win ore from the
10 Channar land; yet that is the effect that applying a test of "historical continuity" would entail.

56. WPPL's criticisms of Macfarlan JA's reasoning at [70] (WPPL [62]) do not undermine it. Specifically:

a. the observation that his Honour misstates the terms of clause 24(iii), which require derivation of title "through or under" but not "from" MBM, goes nowhere. His Honour's reasoning at [70] is no less sound because he did not track precisely the language of clause 24(iii);

b. the assertion that his Honour erred in finding that derivation of title for the purpose of cause 24(iii) requires that there be an acquisition of "rights" by the
20 Channar Joint Venturers is misconceived for the reasons given in paragraph [45] above; and

c. the assertion that Macfarlan JA adopted an inappropriately narrow and rigid approach to construction without reference to text and context is again valid only if one otherwise accepts WPPL's contentions as to the construction of clause 24(iii).

HPPL's arguments

57. HPPL argues that the Channar Joint Venturers are persons or corporations "deriving title through or under" MBM in respect of Channar A based on a sequence of events involving (a) the cancellation of MBM's rights of occupancy over the land that is now
30 Channar A in 1974 and (b) Hamersley Exploration obtaining rights of occupancy over that land in 1978 and 1979. The connection between these two events is said to be the fact that the cancellation of MBM's rights of occupancy "was a necessary condition to the grant of the relevant rights of occupancy" to Hamersley Exploration (HPPL [43], [46]). The argument is flawed.

58. As Macfarlan JA noted at [63], it was not suggested that Hamersley Exploration's acquisition of temporary reserves in respect of Channar A from 1978 was causally related to the cancellation of MBM's rights in 1974, other than in the sense that the cancellation rendered the land free of any mining rights, leaving it open to the Minister to grant rights to Hamersley Exploration some years later. A connection of that kind – which demonstrates nothing more than a "but for" relationship between two events – cannot amount to Hamersley Exploration deriving title through or under MBM for the purposes of clause 24(iii). The precise language of clause 24(iii) ("deriving title through or under") indicates that something more is required.

10 59. If, as the Court of Appeal held (and MBM contends), continuity of title is required in order for the terms of clause 24(iii) to be satisfied, plainly it did not exist here in circumstances where: (a) no one held any rights in respect of Channar A between 17 October 1974 and 21 April 1978 ([2014] NSWSCA 536 at [19]-[21]); and (b) it is possible that an unrelated third party, Dampier, held rights of occupancy over that land for a year from 25 February 1977 ([2013] NSWSC 323 at [42]; [2014] NSWCA 536 at [20]).

60. HPPL offers five reasons why the connection it identifies suffices. None of these reasons supports HPPL's argument.

61. *First*, it is said that the expression "deriving title through or under" does not require a
20 transaction (HPPL [47]). So much may be accepted. However, it does not follow that a simple "but for" relationship between two events suffices to engage the terms of clause 24(iii).

62. *Secondly*, it is said that clause 24(iii) is intended to capture changes in the company winning ore from the MBM area, other than those changes the subject of clauses 9 and 19 of the 1962 Agreement; and that therefore it must extend to the case of a different company in the Hamersley Group applying for the subsequent tenement "in place of MBM" (HPPL [48]). This is flawed.

63. Hamersley Exploration did not acquire any tenement "in place of MBM". As noted in paragraph [59] above, so much of MBM's former temporary reserves as comprise
30 Channar A were unoccupied by anyone between 17 October 1974 and 21 April 1978, and may have been occupied by an unrelated third party for a year from 25 February 1977.

64. Moreover, as explained in paragraphs [7]-[9] and [31]-[34] above, there is no basis in either the text of clause 24(iii) or the context for construing the words "persons or

corporations deriving title through or under" MBM as extending to any company in the Hamersley Group.

65. *Thirdly*, it is suggested that clause 24(iii) is directed (at least) to a company in the Hamersley Group other than MBM winning ore from the MBM area (HPPL [49]). Neither of the reasons HPPL gives for this conclusion supports it.

a. The suggestion that it was necessary to avoid the inconvenience of potentially committing the group to a corporate structure that became outmoded does not advance HPPL's argument. Had the Hamersley Group wished to change its corporate structure, it would have needed to procure an assignment or re-grant of MBM's rights to some other company in the group. Such an assignment or re-grant would satisfy the concept of continuity of title as it was explained by Macfarlan JA at [58] (where his Honour spoke of the possibility of transfers of interests under the Mining Act being effected by the cancellation of interests held by the proposed transferor and the re-grant of interests to the proposed transferee).

b. The suggestion that the incorporation of clause 24(iii) into clause 3.1 of the 1970 Agreement has an "anti-avoidance" function is an inaccurate characterisation of these provisions. The purpose of the provisions is simply to expand MBM's obligations under clause 3.1 of the 1970 Agreement in accordance with their terms. To the extent that some other or broader purpose or object is apparent, it is the purpose (identified at paragraph [27] above) of ensuring that a royalty is paid if ore is won by reason of the exploitation of the rights MBM acquired under the 1970 Agreement. Giving effect to such a purpose does not require clause 3.1 to be read as imposing an obligation to pay a royalty simply because an entity in the Hamersley Group happens to win ore from the MBM area.

66. *Fourthly*, it is said that the concept of continuity of title is inapt in the context of the Mining Act (HPPL [50]). Again, the reasons proffered for this conclusion do not support it.

67. The fact that ore could not be won from the rights of occupancy held by MBM does not mean "there was no necessary continuity of tenements granted under the Mining Act" as HPPL suggests (HPPL [50]). As explained in paragraph [20] above, it was a fact known to the parties at the time of the 1970 Agreement that the rights of occupancy granted under the relevant State Agreements included an entitlement to convert those rights into a mineral lease over a lesser 300 square mile area. The

expression "deriving title through or under the Purchaser" in clause 24(iii) is apt to apply to rights derived through a conversion of this kind.

68. The fact that the 1970 Agreement did not require the rights of occupancy surrendered by Hanwright to be immediately followed by a grant of fresh rights of occupancy to MBM (HPPL [51]) does not undermine the existence of continuity in title between the two sets of rights. The necessary continuity is supplied by:

   a. the terms of the 1970 Agreement, clause 2.2 of which transferred to MBM Hanwright's rights of occupancy over various temporary reserves, including temporary reserves 4965H and 4966H which cover the Channar land;

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   b. the fact that the Iron Ore (Wittenoom) State Agreement and the Iron Ore (Mount Bruce) State Agreement were executed on the same day (10 March 1972) and approved by separate Acts of Parliament each assented to on the same day (16 June 1972) (PAFD [30], [31], [33], [34]). These State Agreements provided respectively for the surrender of Hanwright's temporary reserves and the grant to MBM, on application, of temporary reserves over the same areas as those surrendered by Hanwright ([2013] NSWSC 323 at [26]-[27]). It is plain that the intended effect of these arrangements was that Hanwright's rights in respect of, relevantly, temporary reserves 4965H and 4966H, would be replaced with fresh rights granted in favour of MBM. The date on which those rights were or would be granted to MBM is immaterial.

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69. *Fifthly*, reliance appears to be placed on the suggestion that control of the exploration and mining of the areas the subject of the 1970 Agreement, and hence the ability to obtain a benefit from those areas, vested exclusively in MBM and the Hamersley Group. For the reasons explained at paragraphs [10]-[12] above, that suggestion is misconceived.

70. HPPL also refers to *BP Refinery (Westernport) Pty Limited v Shire of Hastings* (1977) 180 CLR 266 at 286 (HPPL [56]). The facts of that case are remote from the present. The question there was whether a term could be implied into a rating agreement between a company operating an oil refinery and a local council, to the effect that a preferential rate agreed with the company would also apply to any related entity to which that company assigned rights to operate the oil refinery. In the present case, there is no need for the implication of any term since clause 24(iii), which is incorporated into the 1970 Agreement, expressly provides for the circumstances (including assignment) in which the obligation to pay a royalty is engaged as a result of companies other than MBM winning ore from the MBM area.

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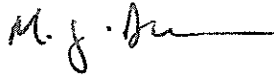
Part VIII: Time estimate

71. MBM estimates that it will require two hours to present its oral argument.

Dated: 10 July 2015



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ANNEXURE TO FIRST RESPONDENT'S SUBMISSIONS

PART V: LEGISLATION

A. *Iron Ore (Hamersley Range) Agreement Act* (WA) (No 24 of 1963)

Clause 2(a) of the Schedule

2. The State shall –

10 (a) upon application by the Company within one (1) month after the execution hereof by the parties hereto (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 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 four pounds (£4) per square mile per annum payable quarterly in advance for the period expiring on the 31st December, 1963 and shall then and thereafter subject to the continuance of this Agreement cause to be granted to the Company as may be
20 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 by the Company under clause 9(1) hereof;

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

30 (ii) on the determination of this Agreement; or

(iv) on the day of the receipt by the State of a notice from the Company to the effect that the Company abandons and cancels this Agreement,

whichever shall first happen;

Clause 9(1)(a) of the Schedule

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

(a) after application is made by the Company 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 parallelogram or parallelograms) of the mining areas in conformity with the Company's detailed proposals under clause 5(1)(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 Company on demand after completion of the survey) and shall cause to be granted to the Company a mineral lease thereof 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 Company of its obligations under the mineral lease 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 Company may from time to time (without abatement of any rent then paid or payable in advance) surrender to the State any portion or portions (of reasonable size and shape) of the mineral lease;

Clause 20(1) of the Schedule

20. (1) Subject to the provisions of this clause the Company 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 Company hereunder (including its rights to or as the holder of any lease license easement grant or other title) and of the obligations of the Company 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 Company 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 Company 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.

B. *Iron Ore (Mount Bruce) Agreement Act* (WA) (No 37 of 1972)

Clause 4(1) of the Schedule

4. (1) The State shall forthwith (subject to the surrender of the rights of occupancy as
10 referred to in sub-clause (2) of clause 2 of the Agreement firstly referred to in the First Schedule hereto) 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 a rate of eight dollars ($8) per square mile per annum payable quarterly in advance for the period expiring on the 31st day of December, 1972, 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
20 its currency expire –

(i) on the date of grant of a mineral lease to the Company under subclause (2) of this clause; or

(ii) on the determination of this Agreement pursuant to its terms whichever shall first happen.

Clause 4(2) of the Schedule

30 (2) The Company may at any time after the grant to it of the said rights of occupancy and before the end of year 2 apply 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 or as near thereto as is practicable) of the mining areas and thereupon the State shall 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 Company on demand after completion of the survey) and shall cause to be granted to the Company a mineral lease of the land so applied for (notwithstanding the survey in respect thereof has not been completed but subject to such corrections as may be necessary to accord with the survey when completed) for
40 iron ore in the form of the Second Schedule hereto for a term which subject to the

payment of rents and royalties hereinafter mentioned and to the performance and observance by the Company of its obligations under the mineral lease and otherwise under this Agreement shall be for a period of twenty-one (21) years commencing from the date of application by the Company therefor 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 Company may from time to time (without abatement of any rent then paid or payable in advance) surrender to the State any portion or portions (of reasonable size and shape) of the mineral lease.