IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S102 of 2015

BETWEEN:

WRIGHT PROSPECTING PTY LIMITED
Appellant

and

MOUNT BRUCE MINING PTY LIMITED
First Respondent

HANCOCK PROSPECTNG PTY LTD
Second Respondent

10 **APPELLANT'S REPLY**

Part I:

1. The appellant (**WPPL**) certifies that these submissions in reply are in a form suitable for publication on the internet.

Part II:

2. There are several key factual assertions in the written submissions of Mount Bruce Mining Pty Ltd (**MBM**) dated 10 July 2015 (**MS Reply**) that WPPL says are not correct. First, MBM repeatedly asserts (see eg [11], [18], [33], [67] MS Reply) that the parties to the 1970 Agreement knew, as at May 1970, that the maximum area MBM could obtain a mineral lease over was 300 square miles. This is not correct, nor could it
20 be given that:

   a. the parties were aware that it was necessary for MBM to renegotiate the 1967 Hanwright State Agreement[1] in order to implement the arrangements in the 1970 Agreement and there could be no certainty as to what would be agreed;

   b. the State had varied previous State Agreements to increase or vary the area over which each of Hanwright (in the 1968 Hanwright State Agreement) and Hamersley Iron (in the 1968 Hamersley Range State Agreement) had interests

[1] See clauses 4 and 10 of the 1970 Agreement (Joint Appeal Book 3/1273 at 1276-1277, 1282).

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including to agree to grant a second mineral lease to Hamersley Iron in the 1968 Hamersley State Agreement and to agree (subject to notice being given) to grant a third mineral lease to MBM, a company in which at that time Hamersley Holdings held a majority interest, in the 1968 Hanwright State Agreement; and

c. the parties would have been well aware that over time the State of Western Australia may well grant further mining leases or rights of exploration, or expand or vary the area of existing mineral leases to extend the life of a mine. All State Agreements prior to 1970 had included provision for variation.

3. Second, it is not correct that the parties to the 1970 Agreement intended that the rights that MBM would be granted by the State of Western Australia, and be capable of exercising in the future, were Hanwright's rights under the 1967 Hanwright State Agreement as they existed as at May 1970: see [11] MS Reply. As set out above, the premise of the 1970 Agreement was that the 1967 Hanwright State Agreement would have to be further amended and there was no certainty as to the form of any renegotiated, or new, State Agreement.[2]

4. Third, contrary to MBM's claim at [20] MS Reply there was no established pattern as to the entitlement to exploration or mining interests over time being tied to the area of the first lease granted under a State Agreement. State Agreements had by 1970 only been agreed as regards iron ore for some 7 or 8 years, and it was manifest in the State Agreements themselves that they were intended to operate over decades.[3] Still less was there any pattern that could support the conception of "uninterrupted title" relied upon by MBM. All that was clear was that the grant of mining and exploration interests by the Government of Western Australia was generally the subject of negotiation and agreement, with the potential for variation in the future.

5. Fourth, at [67]-[68] MS Reply, MBM confuses title to mine iron ore, being a mineral lease, with contractual rights, which cannot confer an entitlement to mine. This confusion belies the artificiality of MBM's construct of "continuity of title" and

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[2] See, for example, clause 5(1) of the 1967 Hanwright State Agreement, which provided for the Joint Venturers to submit a proposal for the location of a port, which was inconsistent with the 1970 Agreement and the parties were aware would not be carried out (Joint Appeal Book 2/894 at 905).

[3] See, for example, clause 10 and 13 of the 1963 Hamersley State Agreement (Joint Appeal Book 2/785 at 807-815, 821-824), and clause 9 of the 1967 Hanwright State Agreement (2/894 at 915-928).

illustrates the difficulties with MBM's submission that the parties to the 1970 Agreement would have intended the expression "deriving title through or under [MBM]" necessarily to have connoted continuity of title as between the rights of occupancy in existence as at the time of the 1970 Agreement and the winning of ore. Until title to mine is in fact granted in the form of a mineral lease, it makes no sense to speak of continuity of title to win ore. This further underscores the contextual distance between the language of "through or under" in the 1970 Agreement, and legislation governing the Torrens system which was under consideration in the case of *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149.

6. Fifth, cf [25] MS Reply, there is nothing in the ordinary English meaning of deriving that connotes a chain of title. Further, at [27] MS Reply MBM asserts that there is commercial sense in requiring an unbroken chain of title between the subject of the 1970 Agreement and the exploitation of ore. This is mere assertion. There is no commercial justification advanced for requiring such a link.

7. At [12] MS Reply MBM relies upon there being no certainty as at May 1970 that the Hamersley Group would be able to mine iron ore from any part of the MBM Area. That may well be so, but it does not alter the essence of the agreement that was reached in 1970 which was that if ore was won from that area by or (relevantly) through or under MBM, a royalty was to be paid to Hanwright.

8. As to [21(a)] MS Reply, whilst the 1972 Mount Bruce State Agreement may not have referred in terms to a "first" lease, it included a clause providing for variations, the parties were well aware at May 1970 that State Agreements had been varied in the past to grant a second mineral lease, and, as is now known, variations to mineral leases or new mineral leases were in fact granted in respect of the MBM Area in 1982 further to the 1982 Hamersley State Amendment Agreement and in 1987 further to the 1987 Channar State Agreement.

9. WPPL accepts that [21(b)] and [21(c)] MS Reply correctly reflect the trial judge's findings.

10. As set out above, the assertion at [28] MS Reply that the parties were aware of the terms of the 1967 Hanwright State Agreement does not support MBM's construction of the expression "deriving title through or under [MBM]" in the 1970 Agreement. Indeed, the likely longevity of any mineral lease or leases granted over the MBM Area supports

WPPL's construction, given the likelihood that over those many decades, and bearing in mind the infrastructure commitments identified in that State Agreement,[4] variations to the area of a mineral lease, or new mineral leases, may well have been granted over that area: see written submissions of WPPL dated 9 July 2015 in appeal No S99 of 2015 at [14].

11. As to [30] MS Reply, WPPL does not ignore the words "deriving title". Rather WPPL seeks to construe those words in the context of the 1970 Agreement having regard to the nature of a mineral lease, and bearing in mind that there are important differences between a mineral lease and title to land. Here, the entitlement to mine is ML265SA and the surrender by MBM of ss 18 and 19 of ML252SA was a precondition to the grant of that title. WPPL says that that is a derivation of title through or under MBM.

12. As to [47] MS Reply, MBM's submission reflects confusion between assignments of exploration and mining interests or of rights under State Agreements (which MBM [20] MS Reply] relies upon as being permitted by State Agreements) and the means by which the Government of Western Australia may have given effect to such assignments, which may involve a cancellation and subsequent grant of an interest or right, foreseeably with a gap in time between the cancellation and subsequent grant. WPPL's submission, however, is not dependent upon all such transactions being properly characterised as "assignments". Rather, WPPL says that the intention of the parties in cl 24(iii) was that the expression "deriving title through or under [MBM]" was not intended to be limited to situations involving a transaction akin to that pursuant to which interests in land are assigned.

13. As to MBM's submission at [14] and [51] MS Reply, the reality is that clause 15(1) of the 1987 Channar State Agreement provided that it was a precondition to the grant of ML265SA that MBM surrender ss 18 and 19 of ML252SA. There is, therefore, no need to speculate as to how the parties, the Channar Joint Venturers, and the State of Western Australia might, in other circumstances, have chosen to act. In any event, Hamersley Iron had warranted in the Channar Mining Joint Venture Agreement that the whole of the Mining Area, that is the area within the proposed area of the mining lease over which activities were to be conducted by the Channar Joint Venturers, contained reserves of 200 million tonnes of mineable iron ore and Hamersley Iron was aware that

[4] For example see clause 9(1) of the 1967 Hanwright State Agreement (Joint Appeal Book 2/894 at 915-918).

approximately 90% of the iron ore for the Channar Joint venture lay within the area covered by ss 18 and 19 of ML252SA.[5] Indeed, HI told the Minister for Minerals and Energy that "the majority of the ore on which the project is based occurs within ss 18 and 19 of ML252SA".[6] In a practical sense, therefore, the evidence shows that ML265SA would not have been granted without MBM surrendering ss18 and 19 ML252SA.

14. MBM at [54] and [55] MS Reply misunderstands WPPL's submission. WPPL says that the exploration and mining of the MBM area by members of the Hamersley Group extended in incremental stages from ML252SA held by MBM as part of one composite mining development project of the Hamersley Group. There is an obvious distinction between that situation and that of an unrelated third party relied upon by MBM.

15. At [65(b)] MS Reply MBM says that the broader purpose of the 1970 Agreement was to ensure that "a royalty is paid if ore is won by reason of the exploitation of the rights MBM acquired under the 1970 Agreement". If this is so (and WPPL does not accept that it is), then the concept of exploitation should not be narrowly construed, and in particular invokes no notion of continuity of title. Properly understood, the winning of ore with ML265SA as a whole occurred by reason of the ongoing exploitation of that which was transferred to MBM and given up by Hanwright in the 1970 Agreement.

Dated 24 July 2015

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[5] Channar Mining Joint Venture Agreement, Preamble E (Joint Appeal Book 5/2055 at 2060) and Sixth Schedule (Joint Appeal Book 5/2255) and letter from HI to Minister for Minerals and Energy dated 5 October 1984 (Joint Appeal Book 4/1949).

[6] Letter from HI to Minister for Minerals and Energy dated 5 October 1984 (Joint Appeal Book 4/1949).