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Registrar

Important Information

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No. WAD 37 of 2022

Federal Court of Australia

District Registry: Western Australia

Division: General

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC (ICN 8721)

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

Joint Report

Conference of Experts

Conference 3 – 20 March 2024

Mr Martin Hall and Mr Brian Miles

Introduction

1. Pursuant to the orders of Justice Burley dated 10 January 2024, Registrar McGregor convened an experts' conference commencing on 20 March 2024 in the Perth Registry of the Federal Court of Australia.

2. The conference was attended by: Mr Brian Miles, expert for the Applicant and Mr Martin Hall, expert for the Respondents.

3. Prior to the conference, the parties provided a series of propositions to the Court. These propositions are set out in this report. These propositions were provided to the experts prior to the conference.

4. Prior to the conference, each expert was provided with Expert Evidence Practice Note (GPN-EXPT) and at the conference, each expert was reminded of their role as an expert witness, including their duty to the Court.

5. At the conference, each expert was reminded of the purpose of the conference, namely to produce a joint report which briefly identifies what matters are agreed and where there is disagreement and why. The experts were encouraged to reach agreement on a subject, where it is possible to do so consistently with their knowledge and opinions on that subject.

6. The experts were reminded that sometimes apparent differences between experts are resolved by discussion and turn out to be an artefact of the process of drafting. Sometimes discussion enables disagreements to be clarified and the scope of the dispute to be narrowed or eliminated.

7. Experts were encouraged to approach the discussion with an open mind, with a view to assisting the Court. However, the experts were made aware they should not feel pressured to agree to any matter that is not consistent with their knowledge and opinions on that subject.

8. The Experts were reminded they are required to comply with the following guidelines when preparing this joint expert report:

(a) In the period from the commencement of the expert meeting to the signing of the joint report, the experts must not communicate with the parties, their lawyers or counsel regarding the case except with the consent of the other party or as set out in sub-paragraphs (b) and (c) below.

(b) If any expert requires guidance in relation to a matter of procedure during this period, then the expert should send their enquiry by email to Registrar McGregor at Laurelea.McGregor@fedcourt.gov.au copying her assistant, Shannon.hayes@fedcourt.gov.au, and the other expert or experts.

(c) An expert may communicate with the lawyers for a party for the purpose of getting assistance with logistical arrangements such as travel or teleconferencing but may not, in the course of that communication, discuss or disclose any substantive issue the subject of the meeting (or any aspect of it) with those legal representatives.

(d) The experts are asked to discuss and decide between themselves how a final report is to be prepared. By way of example only, following discussion of a particular topic or topics, each expert might initially prepare their own draft response and exchange them before further discussion, or the experts may divide

up responsibility for preparing a first draft response on each topic that reflects the outcome of the discussion on that topic, with the report then to be collated, reviewed, amended as required and approved by each expert before it is finalised.

(e) All draft versions of the report and draft materials exchanged are to remain confidential to the experts and must not be given or shown to the parties' lawyers or counsel in any jurisdiction either during or after the conclusion of the expert meeting.

(f) The experts should also re-read and comply with Federal Court Practice Note GPN-EXPT (Annexure A; Annexure B). A copy of the Expert Evidence Practice Note can also be accessed at:

http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt

9. The Experts were expected to have read the reports of, and considered the views of, the other expert ahead of the conference. Mr Miles was able to adequately prepare and consider the views of the other expert ahead of the Conference. Mr Hall only received a copy of Mr Miles report titled "Applicant's Expert Valuer's short response to the FMG respondents' expert valuation reports" on Tuesday 19 March 2024 and although having read the report felt there was limited time ahead of the conference on 20 March 2024 to consider the content of this report.

10. At the conclusion of the discussion, the experts were asked to confirm the substance of their discussion and the opinions expressed as set out in this report.

11. Each expert expressed the opinions set out in this report. The experts were asked to indicate this by signing the declaration at the end of the report.

CONFERENCE 3

Mr Hall and Mr Miles

Topic 1: Express areas of disagreement

1. In the report of Mr Hall of 5 March 2024 he advances criticisms of the report of Mr Miles at paragraphs [302] – [340]. You are asked to identify, discuss and set out in your joint expert report:
   (a) what you consider to be the key points of disagreement between you, cross referencing the paragraphs;
   (b) summarise your points of disagreement;
   (c) set out any points of agreement reached following your discussion; and
   (d) explain, in short form, why you consider your view to be preferable and correct.

	Mr Hall	**Mr Miles**	
	1. (a) and (b) ***Lack of proper basis (302(a) and pp304-308)***	1. (a) and (b) ***Lack of proper basis (302(a) and pp304-308)***	
H1	The proper compensation for economic loss is the difference between the "but for" scenario and the "actual" scenario (after the event giving rise to the loss). The "but for" scenario for NT rights is that they are never impaired (i.e. YP continue to use their rights in perpetuity). Mr Miles failed to develop a proper basis for his valuation, including: • not having adequate information about the other NT agreements to consider comparability. • not considering that other factors (such as desire to avoid delays etc) would encourage miners to make payments exceeding loss to NT holders.	There was a lot of material available for me to consider but because of confidentiality. I referenced what I could at the time. I am now, post subpoena, able to reference them. The YP lost their opportunity to negotiate due to the way negotiations went ahead. I have calculated compensation on the basis that YP would have a proper opportunity to negotiate a mining agreement.	M1 M2
H2	***Royalty-based Compensation is contrary to NT Act: (302(b) and pp309-312)*** My views are set out in pp309-312 of Hall Report, in brief:	***Royalty-based Compensation is contrary to NT Act: (302(b) and pp309-312)*** This is a legal issue and the advice I received was that royalty based compensation could be considered.	M3

	• NT rights were impaired (but not extinguished) by grants of mining tenements under the WA Mining Act • WA Mining Act has compensation provisions for freehold owners in the same situation. • The NT Act s51(3) requires that NT compensation in these circumstances must be calculated using "*any principles or criteria for determining compensation*" under the WA Mining Act • Therefore, the compensation payable must be based on these principles or criteria, which include not allowing royalties or payments based on mineral value.	I have prepared my valuation based on the assumption that the YP have rights to the minerals in the determination area and because of being the historic owners of that land prior to European settlement. A royalty payment approach based on minerals output is most appropriate being used by many miners having agreements with Aboriginal people who have been or will be dispossessed of their land for mining. Evidence is now produced outlining many agreements that show a % royalty based on mineral output. Tony Denholder, Lawyer, reported on 2 August 2023 that in an article "Native Title Year In Review" that "…the Pilbara standard of a 0.5% royalty"	M4 M5
H3	I note that Mr Miles' assumption that the YP have rights to the minerals in the determination area is contrary to the determination in *Warrie No2*.		
	Royalty based compensation is not reasonable – 302(c) and pp313-320:	***Royalty based compensation is not reasonable - 302(c) and pp313-320:***	
H4	Compensation should be a payment for what has been lost. The YP rights do not include any rights to minerals. Accordingly, a royalty-based payment is not related to what the YP have lost.	See previous answer.	M6
H5	I note that Mr Miles' assumption that the YP have rights to the minerals in the determination area is contrary to the determination in *Warrie No2*.		
	Failure to properly assess YNAC losses - p302(d) and pp321-336	***Failure to properly assess YNAC losses - p302(d) and pp321-336***	
H6	There is no YP's native title right to minerals (per *Warrie No2)*, so I don't consider the calculation to be reasonably based on a percentage of mineral value.	The native title holders could have extracted the value of minerals and made economic gain. They could have done anything that a freehold	M7

H7	I agree that exclusive use NT holders can do anything that freehold owners can do, but this does not include mining minerals (which requires a mining tenement).	owner could have done. The loss of ability to undertake the mining should be considered in light of other Aboriginal owners in area region. I relied on the Solomon Hub Mine mining information from DMIRS and considered any necessary changes to work through the numbers and calculate a figure.	M8
H8	***Other errors p303, pp318-320 and pp337-338*** Royalty evidence in January 2024 Miles Report was inadequate for his conclusion. Subsequent access to subpoena information does not entirely fix the original report problem.	***Other errors p303, pp318-320 and pp337-338*** I believe knowledge that was available which has subsequently been proven and expanded provides an adequate basis for conclusion. Some clarification of value and output from mining as used in my valuation may need some correction.	M9
H9	1.(c) Agreement: (i) Mining agreements reached through negotiation are an example of mutual benefit where there is an agreement and payment is made which includes both payment for loss of NT rights and a sharing of the benefits to the miner of striking the deal (rather than the much slower and more acrimonious process of going to Court/NNTT to set compensation). In these circumstances the negotiated benefits include the relationship, and on-going processes in the future between the parties. (ii) We agree that if Mr Miles' approach were preferred by the Court then a review of the calculations in Mr Miles reports would need to be conducted. (iii) Negotiated mining agreements cover all aspects of loss to the native title rights holders, including both economic and non-economic losses.	1.(c) Agreement: (i) Mining agreements reached through negotiation are an example of mutual benefit where there is an agreement and payment is made which includes both payment for loss of NT rights and a sharing of the benefits to the miner of striking the deal (rather than the much slower and more acrimonious process of going to Court/NNTT to set compensation). In these circumstances the negotiated benefits include the relationship, and on-going processes in the future between the parties. (ii) We agree that if Mr Miles' approach were preferred by the Court then a review of the calculations in Mr Miles reports would need to be conducted. (iii) Negotiated mining agreements cover all aspects of loss to the native title rights holders, including both economic and non-economic losses.	M10

	1.(d)	1.(d)	
H10	Compensation should be the amount of money that restores the injured party (the YP) to their situation "but for" the impairment occurring. Compensation should be valued at the loss suffered by YP, due to the loss of use of their rights and not at an amount above this. There is no loss of rights to minerals as YP have no rights over minerals.	Under section 123 of the Mining Act, the owner of the land is entitled to compensation for all loss and damage suffered or likely to be suffered through mining. Compensation may include deprivation of possession, damages for the land, severance, social disruption, loss or restriction to access.	M11
H11	"But for" any impairments, the YP would have continued to make use of their NT rights in perpetuity. The economic value of using the land under exclusive use NT is the same as freehold, since both parties could use the land surface for any purpose. Therefore, the economic value unimpaired ("but for" the impairment) of exclusive use native title is the same as freehold land, and the economic loss compensation should be the same as for freehold land suffering the same impairment. Non-exclusive native title will be less, because the economic benefits arising from using non-exclusive native title are much less, so the compensation for loss of use of these rights must be correspondingly less.	In my experience compensation claims under s123 are invariably resolved by agreement. I consider the subject of YNAC lands are unique in that their ownership predating European settlement of Australia. "Compensation Heads of Claim" – Miles report paragraph 85 pag 39. The Yindjibarndi People lost control of their rights and country when mining consent was granted by the Minister on or about 2010. A long contested Native Title Claim was finally determined in 2017 and Yindjibarndi people were confirmed as the traditional owners and there on the rightful owners from the start of mineral production in 2012/2013.	M12 M13 M14
H12	This is consistent with s51A of NTA which caps Native Title rights at the value of freehold and therefore temporary suppression (which is lower loss than extinguishment) must be valued at less than the freehold value. Non-exclusive native title values would be lower again compared to freehold, because its use would generate less benefits.	It is understood that "striking a deal is a fast way to" reach an outcome (Mr Hall). The rightful owners were not able to come to an agreement at an earlier period and were 'left out' completely ultimately.	M15 M16
H13	There is a right to negotiate, but: a) the State granted the FMG mining tenements **after** the required period of good faith negotiation was completed (so no delay avoidance element is appropriate in compensation)	YP's rights, in my opinion, do include the minerals as previously explained being historic owners for thousands of years. The failure to not originally come to a compensation agreement with the miner was frustrating for the miner but resolution of issues raised	M17 M18

	b) the right to negotiate is not a right for the other party to agree to what is asked c) the right to negotiate is not a separately compensable element of NT rights (it is not listed in s223 of NTA) d) other agreements are not reliable measures of the loss to the YP, since they relate to different factual circumstances and they include payments in excess of losses suffered by claim groups, which have the effect of sharing with that claim group the benefits to the miner of avoiding delays and building better relationships with the claim group. e) None of the reasons why miners might agree to pay more than losses suffered by claim groups (such as anxiety to avoid delays and desire to build better relationships with claim groups) are applicable to assessing compensation by the Court after the good faith negotiation period has completed (since no delay avoided and no relationships developed).	by YP as Native Title Owners were shown in evidence as not being addressed.
H13	Striking a deal is a fast way to reach an outcome for the parties and particularly to ensure the mining process can commence as quickly as possible (which is highly valuable to the miner, who is therefore anxious to complete a deal). Under these circumstances, there can be mutually beneficial deals where the miners get certainty and a more rapid start (as well as better relations with the community, avoiding issues and delays with heritage processes, etc). These benefits to the miners can be shared with the claim groups, resulting in payments exceeding the value of using their NT rights in perpetuity (and hence exceeding their losses suffered). But these agreements are not measures of the loss suffered by YP.	
H14	Furthermore, a royalty-based compensation is not appropriate because:	

a) it is contrary to the principles and criteria of the Mining Act, which must be applied when assessing compensation since there is a "*similar compensable interest*" b) YP rights do not include minerals, hence the YP losses suffered are not related to the value of minerals (per *Warrie No2*), under their country c) it would produce an unreasonable outcome of economic loss compensation exceeding the unimpaired value of the YP rights.	

To the extent that your answers to Topic 1 do not address Topics 2, 3 or 4, you are asked to proceed to discuss and then provide, in summary form, your views in respect of each.

Topic 2: Compensation Methodology

2. What is the appropriate method to determine the amount of the entitlement of the Yindjibarndi People (**YP**) to compensation for economic loss arising from the loss, diminution, impairment or other effect (together **Impairment**) on YP's native title rights and interests caused by the grant(s) of the FMG tenements, including whether the method used may rely on or refer to:
   a) agreements made between mining companies and other native title holders/registered claimants or other mining companies as to other mining projects;
   b) the value of any mineral in or under the surface of the land the subject of YP's native title rights and interests;
   c) the value of any minerals produced or any rent, royalty or other amount assessed in respect of the mining of any such mineral;
   d) the amount that would be payable if the grant(s) of the FMG tenements were instead a compulsory acquisition of a freehold estate in the land the subject of YP's native title rights and interests;
   e) the principles for the assessment of economic loss as determined by the High Court in *Northern Territory of Australia v Griffiths* [2019] HCA 7; (2019) 269 CLR 1; and/or
   f) any other relevant factor.

Mr Hall	**Mr Miles**
2(a) No, for the following reasons:	2(a)

H15

	i. agreements relate to different circumstances, ii. agreements include other aspects other than loss to claim groups (avoidance of delay and developing good relationships) iii. royalty structure is not allowed under the NTA iv. royalty structure doesn't make sense, as YP don't have rights and interests in the minerals (per *Warrie No2*).	Yes, there is much evidence in the Pilbara and elsewhere in Australia where miners want to get on with a project by agreement with aggrieved owners and this is a standard practice – the agreement and the circumstances can be variable but royalty compensation is most common.	M19
H16	2(b) No, for the following reasons: i. not permitted under the NTA, which incorporates the Mining Act by references to Mining Act principles and criteria for compensation. ii. YP native title rights and interests don't include rights over minerals (per *Warrie No2)* so no relationship between loss of native title rights and the mineral value.	2(b) Yes, for the following reasons: i. The agreements are based on royalties and therefore this is appropriate. ii. YP have rights and interests in relation to the minerals and therefore compensation is related to this.	M20
H17	2(c) No, for the following reasons: i. not permitted under the NTA, which incorporates the Mining Act by references to Mining Act principles and criteria for compensation ii. YP native title rights and interests don't include rights over minerals (per *Warrie No2)* so no relationship between loss of native title rights and the mineral value.	2(c) Yes, for the following reasons: i. The agreements are based on royalties and therefore this is appropriate ii. YP have rights and interests in relation to the minerals and therefore compensation is related to this.	M21
H18 H19	2(d) Yes, the amount payable on compulsory acquisition on freehold is relevant as an uppermost limit of the economic loss. This is for two reasons: i. If there was no impairment and there was use in perpetuity of native title rights over the land - for exclusive use rights there	2(d) No, the amount payable on compulsory acquisition on freehold is not relevant as I discuss on pages 16 and 17 [46(d)] of my report dated 16 January 2024.	M22

	would be the same cash flow as freehold in perpetuity, and hence the same market value and thus freehold land value is a relevant benchmark. Non-exclusive rights usage will be lower than that of exclusive use (and freehold land) and so therefore the freehold value would be the upper limit. ii. Freehold land value is a benchmark and a cap under s51A of NTA for extinguishment of native title and therefore in this case where there is a temporary suppression, the actual loss must be a lesser amount (since suppression is lower loss than extinguishment).	
H20 H21	2(e) The principles in *Griffith* decision are relevant as this is the only HC ruling on NT compensation. In particular, it established the Spencer test assessment for the value of the NT loss suffered as the compensation amount. The proper application of the Spencer test to value the loss suffered would involve comparing the "but for" scenario against the actual outcome. Since there are no direct measures of the loss suffered by YP, the best approach would be to calculate the present value of the lost benefits for each year the native title rights cannot be used.	2(e) The principles in *Griffith* decision are relevant to NT compensation but I consider the circumstances of YP compensation to be different and require different considerations in assessing compensation. M23
H22	2(f) Nothing further to add.	2(f) Nothing further to add. M24

Topic 3: Highest and Best Use of the Land

3. What in your opinion is the highest and best use of the land the subject of YP's native title rights and interests (as at the respective date of the grant(s) of the FMG tenements), including by reference to whether this highest and best use is for: (1) pastoral purposes; or (2) as land used by native title holders; (3) or mining purposes. Comment on the relevance of the highest and best use of the land the subject of YP's native title rights and interests to YP's entitlement to compensation for the Impairment on YP's native title rights and interests caused by the grant(s) of the FMG tenements.

Mr Hall	Mr Miles
3. H23 Highest and best use of the land: i. Using the land for pastoral uses, continuing use of native title and using the land for mining purposes (such as buildings and tailings dams) are all uses of the land (surface) ii. Mr Preston (land valuer) has assessed highest and best use of the land as pastoral – I have no basis for disputing this. iii. Use by native title holders would vary with their rights. Exclusive use rights would enable use for any purpose available to freehold user (NB excludes mining minerals, since no mineral rights), so would be pastoral or similar. Non-exclusive rights usage would have lower value. iv. Mining itself is the use of a mining tenement and not use of the land (mining tenements include the right to access the land for mining purposes). Other mining-related purposes, such as housing mining infrastructure, offices, etc would be valid uses of the land itself. v. Compensation to YP is for loss of use of NT rights, so use for pastoral purposes (or to house mining infrastructure, etc) if exclusive (or lesser use if non-exclusive rights) would be relevant to assessing the loss to the YP and hence the value of the compensation.	3. M25 Highest and best use of the land is as set out in my report at 46(a) page 14 and 15 of my report dated 16 January 2024. M26 Compensation of highest and best use for YP is in effect impairment on their native rights and interests on a valuation of royalties based on production. M27 The valuation of Mr Preston (Land Valuer) has assessed as the higher and best use as "pastoral" which I believe is contrary to existing use which is mining and produces economic value output for the period of long term mining programmes. Likely completion of mining is around 2045. M28 As previously emphasised, YP's rights, in my opinion, include the minerals.

vi. The YP's rights do not include rights to minerals (per *Warrie No2)*, but rather use of the surface of the land (similar to freehold, if exclusive rights, and quite restricted if non-exclusive) and that's therefore how compensation should be calculated. H24 Difference in interpretation of the question: this is about use of the land. H25 If the question was about the use of the land **and** associated mining tenements, then clearly mining value is highest, but the value on this basis would have no relevance to the value of YP's rights (as they do not include minerals) and hence no relevance to compensation payable for impairment to those rights. In addition, compensation based on mineral value is barred under the NTA (which must use the WA Mining Act principles or criteria for determining compensation).	

Topic 4: Quantum

4. Having regard to topics 2 and 3, in your opinion what is the quantum of the compensation payable for economic loss for the Impairment of YP's native title rights and interests caused by the grant(s) of the FMG tenements.

Mr Hall	**Mr Miles**
H26 I have not formed an opinion as to quantum but in my view it would not exceed the freehold land value (before adding interest). Exclusive use rights would be entitled to the same compensation as freehold owners suffering the same loss of use and non-exclusive use rights would be entitled to significantly less than freehold owners in the same situation.	I have estimated the value in my reports, this was based on government production records however, my interpretation may need to have some refinement to reflect a more accurate figure. M29

Declarations of Experts

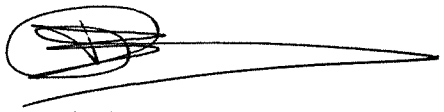
I, Martin Hall, in expressing the opinions attributed to me in this report have had regard to the basis material and the statements made at the conference of experts and have made all the inquiries which I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld.

Signed:

Dated 20 March 2024

I, Brian Miles, in expressing the opinions attributed to me in this report have had regard to the basis material and the statements made at the conference of experts and have made all the inquiries which I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld.

Signed:



Dated 20 March 2024