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Registrar

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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 1 – 18 March 2024

Mr Martin Hall and Mr Murray Meaton

Introduction

1. Pursuant to the orders of Justice Burley dated 10 January 2024, Registrar McGregor convened an experts' conference commencing on 18 March 2024 in the Perth Registry of the Federal Court of Australia.

2. The conference was attended by: Mr Murray Meaton, expert for the Applicant and Mr Martin Hall, expert for the Respondent.

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 the 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 Hall was able to adequately prepare and consider the views of Mr Meaton ahead of the Conference. Mr Meaton was only made aware on Friday 15 March 2024 that the Conference was proceeding on Monday 18 March 2024. Mr Meaton was provided Mr Hall's expert report on Friday 15 March 2024 and although he did have the opportunity to read the report felt somewhat disadvantaged in the discussion.

8. 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.

9. 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 1

Mr Hall and Mr Meaton

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 Meaton at paragraphs [257] – [301]. 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 Meaton**	
	1.(a) and (b) ***Consideration of compensation value (257(a) and pp259-263)***	1.(a) and (b)	
H1	Mr Meaton did not consider compensation value in his original report.		
	Methodology (257(b) and pp264-267)	***Methodology (257(b) and pp264-267)***The key point of disagreement is the methodology to be used in assessing compensation.	M1
H2	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 Meaton' view is that the economic loss compensation due to the YP should put them in a better financial position than if there was **never**	The pre-amble to the Native Title Act stresses that future Acts should only be validated if every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. The emphasis in the legislation is on "agreement making".	M2

	any impairment of their NT rights (i.e. more than use in perpetuity). In my opinion, this amount is more than compensation for losses suffered.	Section 51(1) of the NTA requires that compensation be on "just terms".	
H3	Negotiated agreements are not reliable measures of YP losses, because of different factual circumstances and because they likely include payments greater than what was lost by traditional owners for reasons such as avoiding delays (i.e. anxious miner) and building relationships.	Just terms lies at the heart of the processes in the Native Title Act. Both parties to an agreement want a "fair and reasonable outcome" or the agreement will not be lasting or harmonious. Since 1997, companies have negotiated agreements based on the value or quantity of production. All parties agree that this provides the only fair expression of the value of the project to all parties.	M3
H4	As at the date of the impairments (the grants of FMG mining tenements), FMG had satisfied all the requirements for those grants, including the required negotiation periods. In my opinion it would be unjust (as well as contrary to the NTA) to calculate compensation payments to the YP for the impairments to their NT rights on a basis related to other agreements (under different factual circumstances) which included payments that shared the benefits of striking mutual agreements (such as avoiding delays in mining and developing positive community relationships), when no such benefits would exist to be shared.	Mining industry agreements become the benchmark against with Traditional Owners and mining companies determine if the benefits being agreed amount to "just terms".	M4
		The WA Mining Act s123 (2)(a) requires that compensation be established by agreement in the first instance. The limitations on compensation set out in the Lonergan and Hall report relate to processes in the Warden's Court in the absence of agreement.	M5
		Yindjibarndi hold **exclusive** rights. A Mining Lease would only be granted on the condition that Yindjibarndi would agree to access to the land. They would be in a strong negotiating position that would ensure they would only agree to access with compensation at least equivalent to industry standards.	M6
	Royalty-based Compensation is contrary to NT Act: (257(c) and pp268-271)		
H5	My views are set out in pp268-271 of Hall Report, in brief:		

	• 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.	***Royalty-based Compensation is contrary to NT Act: (257(c) and pp268-271)***
		The Yindjibarndi negotiations would have proceeded to mediation if the company had not been able to deal with a "splinter" group to secure an agreement. Mediation would not have enforced compensation but would have pressured the parties to accept an agreement that reflected industry standards. The Mining Act Warden processes would not have been triggered. M7
H6	Mr Meaton and I agree that negotiated agreements can and do have a wide range of outcomes, including royalty payments. This is different from the assessment of compensation under the NTA.	The Mining Act deals with a failure to reach agreement or an infringement. The negotiations would not have gone to Warden as all parties in Western Australia recognise this default process does not produce an agreement that meets community expectations or that of any party to the negotiation., I am not aware of a single application to the Warden's Court for compensation assessment in nearly 40 years of operations under the Native Title Act. M8
	Royalty based compensation is not reasonable **- 257(d) and pp272-276:**	
H7	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.	***Royalty based compensation is not reasonable*** **- 257(d) and pp272-276:**
H8	Mr Meaton' argues that the YP rights include a right to benefit from future mining activity despite: a) the YP not having any rights over minerals,	Royalty' is likely a misnomer and a "Levy" would be a better term. The Native Title holders do not have nor do they assert any rights to minerals. They seek a very small share of the value derived from the future act as "just" compensation. These may be better referred to as M9

	b) despite s223 of the NTA not including any right to negotiate (or delay) in the compensable NT rights, and c) despite the grants of mining tenements occurring **after** completion of the good faith negotiations required under the NTA (or under sections of the NTA which do no require negotiations).	Good Neighbour agreements that ensure a harmonious and sustainable working relationship between the parties over what can be a multi-generation project. The underlying philosophy of the Native Title Act is mutual agreements that provide benefits to both parties. Governments worldwide expect that resource companies will negotiate agreements with First Nation people in a free, informed, and prior consent way (FIPC). M10
H9	In my opinion, Mr Meaton' position is illogical and a royalty-based payment cannot be a measure of what has been lost by the YP. His reference to the benefits of a negotiated agreement is irrelevant to the current situation, and in fact highlights why assessing compensation based on negotiated agreements (which include these benefits and therefore encourage miners to pay more than what is lost by the claim groups) is not appropriate here.	
	Prior Negotiations not reliable measures of loss p257(e) and pp277-282	***Prior Negotiations not reliable measures of loss p257(e) and pp277-282***
H10	• Different agreements – different factual circumstances and likely involve the mining companies wanting to get on with the process (anxious miners), as well as establishing "harmonious relationships" with the community (e.g. avoiding problems and delays in the heritage process, etc), so that the amount payable is not about the loss suffered by the native title holders – it's about what is the miner prepared to pay to move forward.	Disagree with Hall that Pilbara iron ore agreements are not a relevant benchmark. Yes, they reflect a broad range of conditions which is why I used the average of a large sample of 39 agreements negotiated between 2004 and 2022. I further restricted my choice of the royalty rate to "large" projects comparable in size to the Solomon Valley. All agreements are for iron ore mined from open cuts and exported from the Pilbara. The quality of ore between mines varies a little but this is M11
H11	• Right to negotiate is not a compensable right under s223 of NTA, and the NTA preamble refers to NT holders getting "*compensation on just terms, and with a special right to*	

	negotiate its form" – no indication that negotiation is intended to be a source of additional compensation per se, rather it is a chance to strike a mutually beneficial agreement	accounted for in the sale price and hence the revenue on which the compensation is assessed.
H12	• It is illogical to base compensation for YP on agreements made in different circumstances, particular when the grants of FMG mining tenements were made after the good faith negotiations required under the NTA had already been completed (so no avoidance of delay would apply).	Disagree with Hall that the industry compensation levels have been influenced by an "anxious" mining company seeking to avoid delays. The reality is that the right to negotiate process is a surrender of rights as stressed in the Griffiths case and is not given up by a willing seller. The Traditional Owners are regularly advised that if the negotiations are not successful, the company can seek NT Tribunal approval without any requirement for compensation. The Traditional Owners are every bit as anxious as the mining companies. M12
H13	Put simply, there is mutual benefit from negotiated settlements between miners and claim groups, which may include avoidance of delay and the benefits of "harmonious and sustainable working relationship between the parties" as noted by Mr Meaton. However, these potential benefits are lost when no agreement is actually made and it makes no sense to set compensation payments as though these benefits existed and should be shared between the parties.	
	Royalty Rate excessive, even in flawed Meaton paradigm p257(f) and pp283-295	
H14	• No evidence from agreements with exclusive use NT	***Royalty Rate excessive, even in flawed Meaton paradigm p257(f) and pp283-295***
H15	• In the context of Meaton's paradigm, the difference between exclusive and non-exclusive are minimal in terms of difference to the Miner (same mining project cash flows), hence amount they would logically pay (to avoid delays and get better relationships) would not change significantly	Meaton says Timber Creek provides a benchmark for comparing the value of exclusive and non-exclusive rights. The 50% payment for non-exclusive was covered in the appeals and finalised in the High Court. M13

	• extent of difference in value of rights to NT holder (unimpaired or perpetuity value) is small relative to mining value • unreasonable to expect that claim groups would agree to much smaller rates because their claims not yet determined • therefore doubling the royalty percentage makes no sense.	There is no better method of assessing the difference between exclusive and non-exclusive.	M14
		From a mining company perspective the value of a project is not affected by the nature of the native title rights held. From a TO perspective, the strength of the rights held is vital to how they feel and act about country. Industry agreements reflect the highest compensation in Aboriginal Land Rights areas (SA and the NT) followed by Aboriginal Reserves and then exclusive rights.	M15
H16	Mr Meaton' proposition that claim groups would expect more because exclusive is unreasonable when actual value of the NT rights (in perpetuity) is minimal relative to the mining value and hence the major driver is enhancement of mining value by striking an agreement and sharing of this enhancement between the parties. The enhancement is unchanged whether exclusive or non-exclusive, so change in royalty rate is unreasonable.		
H17	In relation to the higher royalty rates that Mr Meaton advises are generally agreed in SA and NT, I note that in these jurisdictions the native title rights holders can delay projects for much longer (Mr Meaton advises up to 5 years), hence I consider it unsurprising that miners would agree to much higher royalties to avoid longer potential delays in these circumstances.		
	Future Losses and other calculations p257(g) and pp296-300		
H18	Even if a royalty-based formula were adopted by the Court, the amounts calculated by Mr Meaton are not appropriate (unreliable amounts, unreliable prices, not discounted to grant date).	***Future Losses and other calculations p257(g) and pp296-300***	

		Meaton agrees that the forecast of future compensation was limited by a lack of any data from FMG. It should be recalculated using better data from FMG desirably including both production data and price forecasts. M16
	1.(c) Agreement: H19 1. YP rights determination says their native title rights do not include rights to minerals H20 2. 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/NTT to set compensation). In these circumstances the negotiated benefits include the relationship, and on-going processes in the future between the parties. H21 3. Negotiated mining agreements cover all aspects of loss to the native title rights holders, including both economic and non-economic losses.	1.(c) Agreement: 1. YP rights determination says their native title rights do not include rights to minerals M17 2. 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/NTT to set compensation). In these circumstances the negotiated benefits include the relationship, and on-going processes in the future between the parties. M18 3. Negotiated mining agreements cover all aspects of loss to the native title rights holders, including both economic and non-economic losses. M19
1.(d)	1.(d)	

H22	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.	I believe I was asked to focus on royalties because there has only been this form of compensation paid for mining projects. I believe this is the correct approach because the NT holders have the right to negotiate an agreement and they will negotiate a mutual beneficial agreement.	M20
		It is not a "but for" scenario – it's not about the damages caused – it's about the mutual benefits for each party.	M21
H23	"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.	I disagree that the compensation payable should be the amount lost. I say it should be a fair payment for future acts work being conducted on their country.	M22
		The rights should be part of the valuation but in addition the benefit of the loss to the other party.	M23
H24	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.	FMG reached an agreement with a separate group – Wirlu Murra group. This was not based on land values and had a similar structure to other industry agreements.	M24
		A miner is keen to strike a deal to create a faster outcome and get onto mining.	M25
H25	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's mutually beneficial to the parties to have an agreement to ensure continued productive engagement between the parties.	M26
		The Mining Act restriction on compensation capped at freehold land value only applies to a Warden Court process in the absence of an agreement. Companies and Traditional Owners are aware of the limitations under this default process and hence I am not aware of a single case in Western Australia that has been submitted to the Warden for assessment of compensation. Both parties understand the default process would not produce an outcome conducive to a harmonious agreement and that it would be expensive in other ways through constant disruption to heritage processes.	M27
H26	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)		

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).

H27 It is agreed between us that 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 a 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.

H28 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 under their country c) it would produce an unreasonable outcome of economic loss compensation exceeding the unimpaired value of the YP rights.	
H29	Mr Meaton' position appears to be that the YP rights are worth more than their unimpaired value (i.e. use in perpetuity), because, but for the grant of the FMG mining tenements, the YP would have had the opportunity to get more money from a negotiated settlement in respect of a hypothetical future grant of mining tenements. This is an illogical loop – under his approach compensation after a failure to agree following the completion of the required period of good faith negotiation would be assessed (based on outcomes from other negotiations under different factual circumstances) as though both parties were sharing the benefits of a negotiated outcome (and hence payments in excess of losses suffered by YP), even though the miner is actually receiving none of those benefits (no delays avoided, no community relationship, etc).	

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 Meaton**
2(a) No, for the following reasons: 1. agreements relate to different circumstances, 2. agreements include other aspects other than loss to claim groups (avoidance of delay and developing good relationships)	2(a) Yes, because they establish an industry standard and create equitable and sustainable agreements. Agreement making reflects the focus and emphasis of the Native Title Act and more than 100 have been negotiated for mining projects around Australia. However, these

H30

M28

	3. royalty structure is not allowed under the NTA 4. royalty structure doesn't make sense, as YP don't have rights and interests in the minerals.	agreements represent compensation covering all aspects (including both economic loss and non-economic loss)
H31	2(b) No, for the following reasons: 1. not permitted under the NTA, which incorporates the Mining Act by references to Mining Act principles and criteria for compensation 2. YP native title rights and interests don't include rights over minerals so no relationship between loss of native title rights and the mineral value.	2(b) Yes, because the value of the asset is only realised with access to the country and the support of the Traditional Owners. To be more precise, it is not based on value in the ground but on a share of revenue for minerals extracted and sold. There is no revenue share if mining does not proceed.
H32	2(c) No, for the following reasons: 1. not permitted under the NTA, which incorporates the Mining Act by references to Mining Act principles and criteria for compensation 2. YP native title rights and interests don't include rights over minerals so no relationship between loss of native title rights and the mineral value.	2(c) Yes, because the value of the asset can only be realised with the support of the Traditional Owners The TO's do not assert that they hold rights to minerals. They assert they have a right to very small share in the revenue generated by the future Act.
	2(d)	2(d)

M29

M30

H33	Yes, the amount payable on compulsory acquisition on freehold is relevant as an uppermost limit of the economic loss.	No, this is not relevant as this is not freehold land and compulsory acquisition only applies to government land resumption for public purposes. Further the land is returned after a very long time in a degraded state. This restriction fails on three points – it is not freehold land, there is no compulsory acquisition, and compulsory acquisition only applies when governments resume land for public purposes.	M31
H34	This is for two reasons: 1. If there was no impairment and there was use in perpetuity of native title rights over the land - for exclusive use rights there 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. 2. 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).		
	2(e)	2(e)	
H35	The principles in *Griffith* decision are relevant as this is the only HC ruling on NT compensation.	The principles in *Griffiths* are not relevant as it did not relate to mining projects and involved extinguishment of rights. Griffiths provides a relationship for exclusive and non- exclusive and thinking about how to determine non-economic values. The considerations and valuations were about extinguishment and residential land and these have no relevance to mining projects in a premium mining district.	M32
H36	In particular, it established the Spencer test assessment for the value of the NT loss suffered as the compensation amount.		
H37	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(f) Nothing further to add.	2(f) Nothing further to add.

H38 M33

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 Meaton**
3. Highest and best use of the land: 1. 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) 2. Mr Preston (land valuer) has assessed highest and best use of the land as pastoral – I have no basis for disputing this.	3. Highest and best use of the land is based on what the land can be used for in the generation of economic value. The tenement has no value without access to the land. Yindjibarndi have exclusive rights to control access and the tenure could not be sold without access agreement. The mineral rights are an intrinsic part of the value of the land. This is not

H39 M34

	3. 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. 4. 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. 5. 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. 6. The YP's rights are do not include rights to minerals, 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.	pastoral land and all relationship to that is arbitrary. Yindjibarndi rights are not specifically restricted to surface rights.
H40	Difference in interpretation of the question: this is about use of the land	
H41	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 Meaton**	
H42	I have not formed an opinion as to quantum but in my view it would not exceed the freehold land value. 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.	1% of the value of iron ore produced from mining lease tenements with exclusive native title rights and 0.5% of the value for production from non-exclusive tenements. To be calculated using FMG records of actual production and sale. Mr Meaton notes that these amounts would be compensation for both economic and non-economic losses.	M35 M36

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 19 March 2024

I, Murray Meaton, 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 19 March 2024