



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

Royalty Calculation

26 September 2024

Mr Murray Meaton and Mr Campbell Jaski

Filed on behalf of (name & role of party)	The Applicant and FMG Respondents (being FMG Pilbara Pty Ltd, Pilbara Energy (Generation) Pty Ltd, Pilbara Energy Company Pty Ltd, Pilbara Gas Pipeline Pty Ltd and Pilbara Infrastructure Pty Ltd)		
Prepared by (name of person/lawyer)	Simon Blackshield of Blackshield Lawyers and Mark Van Brakel of A&O Shearman		
Law firm (if applicable)	Blackshield Lawyers and A&O Shearman		
Tel	(08) 9288 4515/ (08) 6315 5900	Fax	(08) 6315 5999
Email	simon@blackshield.net / mark.vanbrakel@aoshearman.com		
Address for service (include state and postcode)	Level 28, AMP Tower, 140 St Georges Terrace PERTH WA 6000/ Level 12, Exchange Tower, 2 The Esplanade PERTH WA 6000		

[Form approved 01/08/2011]

Introduction

1. The Court has requested further calculations to be undertaken regarding the assessment of compensatory damages assuming that a royalty-based quantification approach is taken, as claimed by the Applicant.
2. Mr Murray Meaton, the expert witness retained on behalf of the Applicant, and Mr Campbell Jaski, the expert witness retained on behalf of the FMG Respondents, have conferred in relation to this.
3. Mr Meaton has quantified this compensation using a royalty-based approach. Mr Jaski does not agree with the royalty-based quantification approach. He has instead quantified the economic loss component of this compensation using a framework based on the legislative requirements, judicial guidance from the Timber Creek Decision and Brown Decision, and his own experience (as set out in Mr Jaski's expert witness report and joint reports).
4. While Mr Jaski does not agree with the royalty-based quantification approach, he has calculated the compensation assuming a royalty-based approach is appropriate.
5. The experts have calculated the present value (as at 1 January 2024) of the assumed historical and future royalty-based payments (including pre-judgement interest), at the royalty rates of both 1% and 0.55% of the FOB value of all historical and future iron ore sales from the FMG Tenements within the Yinjibarndi native title determination area.
6. The experts have reviewed and agreed on the appropriate source documents to be used to calculate the historical and future royalty (for example the historical and forecast production and shipping data).
7. The experts have also reviewed and agreed upon the appropriate inputs required to calculate the royalty (for example the appropriate discount rates and interest rates).
8. However, the experts do not agree on the appropriate methodology that should be adopted with respect to the appropriate date at which the compensation assessment should be made.
9. In essence, for the reasons set out in this report, Mr Meaton considers that:
 - a. historical royalty-based payments should not be discounted
 - b. future royalty-based payments should be discounted back to the present date (1 January 2024)
 - c. pre-judgement interest should be applied to the historical royalty-based payments from the date of production through to the present day (1 January 2024).
10. In essence, for the reasons set out in this report, Mr Jaski considers that:
 - a. historical royalty-based payments should be discounted back to the grant date of the tenement
 - b. future royalty-based payments should also be discounted back to the grant date of the tenement

- c. pre-judgement interest should be applied to the discounted historical and future royalty-based payments from the grant date of the tenement through to the present day (1 January 2024).
11. The experts have reviewed each other's calculations and have agreed that the relevant outputs appropriately reflect the intended assessment of compensation, assuming a royalty-based quantification approach.
12. The experts have previously been provided with Expert Evidence Practice Note (GPN-EXPT). The experts acknowledge their duty to the Court and confirm that they have read, understood and complied with GPN-EXPT.
13. Each expert expressed the opinions set out in this report and have confirmed this by signing the declaration at the end of the report.

Areas of Agreement

14. Mr Jaski and Mr Meaton have agreed on the following calculation data sources and inputs.

Sales

15. Historical dry metric tonnes (DMT) volume shipped from the Yindjibarndi native title determination area sourced from the "SHP Ore Shipped" tab from the workbook titled "240418 Sol ore production and forecast data summary May 12 onwards.xlsx".
16. Forecast DMT volume shipped has been sourced from the "SHP Ore forecast tab" from the workbook titled "240418 Sol ore production and forecast data summary May 12 onwards.xlsx".

Tenement allocation assumptions

17. Historical DMT has been allocated to each relevant tenement using the same proportionate allocation that has been determined according to the production data sourced from "F.02.001 - Affidavit of John Sharman.pdf".
18. Forecast DMT has been allocated to each relevant tenement using the same proportionate allocation for the historical DMT of iron ore shipped, adjusted to account for the relevant split between the Yindjibarndi and Eastern Guruma determination areas.

Pricing assumptions

19. The historical pricing relies on the source file "Prices and Product Type - FY13 to FY23.xlsx" provided by the FMG Respondents, which contains the historical prices and product types for the period FY13-FY23.
20. The forecast pricing relies on the Office of the Chief Economist's iron ore FOB sales forecast dated March 2024, discounted to reflect the discounted price that FMG historically received for its iron ore products compared to the standard product reference used by the Office of the Chief Economist.

Royalty rate

21. According to Mr Meaton, the appropriate royalty rate should be 1% of the FOB sales value of iron ore extracted from the Determination Area. According to Mr Miles, the appropriate royalty rate should be 0.55% of the FOB sales value of iron ore extracted from the Determination Area. Mr Jaski does not accept that a royalty rate of 1% or 0.55% FOB is the appropriate royalty rate, even if, contrary to Mr Jaski's views, any royalty rate were in any way relevant in the determination of compensation.
22. For the purposes of this report, the experts have each calculated the implied value of a royalty-based payment, using their preferred methodology, at the rate of both 1% and 0.55% of the FOB sales value of historical and future iron ore extracted from the Determination Area.

Future discounting

23. The discount rate to apply to any future royalty-based payments is 12.24%. This rate reflects FMG's weighted average cost of capital (WACC) at 30 June 2023, of 9.50% plus a premium of 2.74% to reflect the additional risk associated with the future production from the Solomon Hub compared to the total production risk across all operations.
24. However, the experts disagree in relation to the appropriate assessment date for compensation. As a result, Mr Meaton discounts the future royalty-based payments back to the present day (1 January 2024) and Mr Jaski discounts the future royalty-based payments back to the tenement grant date. The expert's opinions are set out below under areas of disagreement.

Historical discounting

25. Mr Meaton does not discount the historical royalty-based payments under his methodology. However, Mr Jaski does discount the historical royalty-based payments (back to the tenement grant date) under his methodology. The expert's opinions are set out below under areas of disagreement.
26. The experts do agree that if the Court determines that it is appropriate to assess compensation as at the date of tenement grant then discounting of the historical royalty-based payments back to the grant date of each tenement is appropriate at a discount rate of 6.76%. This rate represents the risk free 10-year government bond as at 30 June 2023 of 4.02% plus a premium of 2.74% to account for the lower risk of historical payments while recognising that those payments were not risk free.

Interest

27. The experts agree that simple interest should be applied to historical royalty-based payments up to 31 December 2023 (having regard to the Timber Creek Decision).
28. The experts have each adopted the pre-judgment interest rates sourced from the Federal Court website. However, as discussed below in the areas of disagreement:
 - a. Mr Meaton applies the pre-judgement interest to the undiscounted value of the historical royalty-based payment from each respective year of production through to 31 December 2023

- b. Mr Jaski applies the pre-judgement interest to the discounted value of the historical royalty-based payment from each respective tenement grant date through to 31 December 2023.

Areas of disagreement

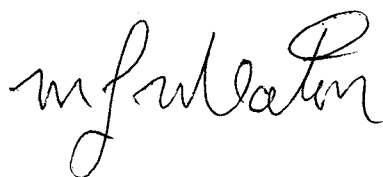
29.	Mr Meaton and Mr Jaski have adopted different dates at which to assess compensation. As a result, each expert has approached the discounting and the application of pre-judgement interest in a different manner.		
30.	The experts set out their reasoning for adopting their respective assessment dates and why it is to be preferred.		
31.	The experts agree that if the Court finds that the correct date of assessment is the present day, then Mr Meaton’s discounting convention and application of pre-judgement interest is correct. Conversely, if the Court finds that the correct date of assessment is the date of the compensable acts (the tenement grant date) then Mr Jaski’s discounting convention and application of pre-judgement interest is correct.		
	Mr Meaton	Mr Jaski	
M32.	Mr Jaski’s methodology assumes compensation is payable on the grant of the Mining Leases based on the estimated value of the land.	Mr Meaton’s methodology calculates compensation as at the present date, being 1 January 2024.	J32.
M33.	Mr Meaton argues that the grant of a Mining Lease does not extinguish native title rights and the compensable activity occurs when the mining activity takes place. The Timber Creek decision is not relevant as the applicant sought compensation for extinguishment on the date at which this occurred – the land resumption date.	In Mr Jaski's view, the appropriate date at which to assess compensation is the date at which the Yinjibarndi People’s native title rights and interests to the land were taken to have been impaired by the compensable acts (that is, the granting of the FMG Tenements).	J33.
M34.	Compensation is thus payable at the time of mining activity and a small royalty based on the value of mine revenue is the industry standard approach to compensation.	In Mr Jaski’s opinion, the tenement grant date is the preferred date to assess compensation because in Mr Jaski’s experience, it is consistent with the general principles for assessing compensatory damages (that is, at the date of breach) and it is also consistent with the Timber Creek Decision [56], which held that:	J34.
M35.	As the date of mining activity is the compensable date, Mr Meaton does not consider that payments should be discounted but simple interest added from the period of mine revenue to the present date being 1 January 2024.	<i>The date on which the value is to be assessed was not in dispute before this Court. Following a relevant holding from the trial judge [82], the matter was conducted on the basis that the economic value of the Claim Group’s native title in the application area fell to be determined according to the rights and interests actually held by the Claim Group as at the date that their native title to the land was taken to have been</i>	J35.
M36.	Mr Meaton does not consider the Timber Creek decision to be relevant as it involved		

	the extinguishment of native title rights on resumption of the land.	<i>extinguished by the compensable acts...</i>	
M37.	Mr Meaton and Mr Jaski agree on the discount rate used for future payments to bring them back to January 2024 values. Mr Meaton does not consider that simple interest is payable on future compensation as it is discounted back to present values and payable in 2024.	<p>Assuming that the appropriate date to assess compensation is at the date of the compensable acts, then it follows that it is also necessary to discount historical and future royalty-based payments back to the tenement grant date.</p> <p>The discount rate adopted for the historical royalty-based payments should be lower than the discount rate adopted for the future royalty-based payments on account of the lower risk associated with the largely known environment associated with the historical royalty-based payment period compared to the largely unknown environment associated with the future royalty-based payment period.</p> <p>Assuming that the appropriate date to assess compensation is at the date of the compensable acts and the historical and future royalty-based payments have been appropriately discounted back to the tenement grant date, then it also follows that it is appropriate to apply pre-judgement interest to the compensation amount from the tenement grant date though to the present day, being 1 January 2024. This is because the compensation amount is expressed in present value terms as at the tenement grant date.</p>	<p>J36.</p> <p>J37.</p> <p>J38.</p>

Declarations of Experts

The experts confirm that in expressing our opinions in this report, we have had regard to the basis, material and the statements made throughout the conference of experts and have made all the inquiries which we believe are desirable and appropriate and that no matters of significance which we regard as relevant have, to our knowledge, been withheld.

Signed:

A handwritten signature in black ink, appearing to read 'murray meaton', written in a cursive style.

Mr Murray Meaton
Dated 30 September 2024

Signed:

A handwritten signature in black ink, appearing to read 'Campbell Jaski', written in a cursive style.

Mr Campbell Jaski
Dated 30 September 2024

NOTICE OF FILING

Details of Filing

Document Lodged:	Expert Report
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	1/10/2024 4:52:15 PM AWST
Date Accepted for Filing:	1/10/2024 4:52:20 PM AWST
File Number:	WAD37/2022
File Title:	YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC ICN 8721 AND STATE OF WESTERN AUSTRALIA & ORS
Registry:	WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.