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5 March 2024

Subject: Yindjibarndi Ngurra Aboriginal Corporation RNTBC (ICN 8721) v The State of Western Australia | WAD 37 of 2022

Dear Mr van Brakel

1 We, Wayne Richard Lonergan and Martin John Hall, both of 64 Castlereagh Street, Sydney, are Directors of Lonergan Edwards & Associates Limited (LEA) specialising in the provision of valuation services and related advice to clients. Our curricula vitae are attached as Appendix A.

Scope

2 You have requested that we provide our opinion on certain valuation matters relating to this case, in which Yindjibarndi Ngurra Aboriginal Corporation RNTBC (YNAC or the Applicant) seeks compensation under the *Native Title Act 1993* (Cth) (NTA) from the State of Western Australia and other respondents (the latter collectively referred to as "FMG"), as set out in our instructions (which are attached as Appendix B), in particular:

(a) Question 1:

How should the entitlement in s51(1) of the NTA to compensate on just terms, or the determination of compensation required by s51(3) to compensate, the native title holders for any loss, diminution, impairment, or other effect of the grant of the FMG tenements on the native title rights and interests of the Yindjibarndi People be determined and calculated?

(b) Question 2:

If we are able to calculate the amount of the compensation or give a range for the amount of such compensation, to calculate that amount or give that range

(c) Question 3:

How should any component for non-economic or cultural loss be determined and calculated?

Authorised Representatives:
Hung Chu • Martin Hall • Grant Kepler* • Julie Planinic* • Jorge Resende • Nathan Toscan • Wayne Lonergan • Craig Edwards

* Members of Chartered Accountants Australia and New Zealand and holders of Certificate of Public Practice.
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(d) **Question 4:**

If we are able to calculate the amount of the non-economic or cultural loss compensation or give a range for the amount of such compensation, to calculate the amount or give the range

(e) **Question 5:**

When the expert report(s) from YNAC are available, review them and provide our comments, explaining whether we agree or disagree with the analysis in them and whether they affect our opinion or answers to the other questions.

3 You have further advised that our response to these questions should be provided under two alternative assumptions:

(a) the whole of the compensation application area gives non-exclusive native title rights and interests

(b) certain of the compensation application area, namely the Exclusive Area, gives exclusive native title rights and interests.

4 The fees paid to LEA for preparing this report are not contingent upon the conclusion, content or use of this report. We have prepared this report with the assistance of LEA staff under our direction and supervision. The conclusions and opinions reached are our own.

5 For the purposes of our opinion, market value is defined as the price that would be negotiated in an open and unrestricted market between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm's length within a reasonable timeframe.

Purpose

6 This report has been prepared at the request of Allen & Overy solely for the purpose of expert evidence in the proceedings referred to above.

7 Our report is not intended for general circulation or publication, nor is it to be reproduced or used for any purpose other than for that outlined in paragraph 6 above, without our or our firm's written consent in each specific instance. Our firm and we will not assume any responsibility for losses occasioned by any other party as a result of the circulation, publication, reproduction or other use of our report contrary to the provisions of this paragraph.

8 On 2 February 2024, the Court said that this report could be a joint report "*but one will have to defend the opinions, not both*" because of a concern that there should not be "*two people against one*"[1]. We have agreed that Mr Hall will give the evidence in Court in relation to this report.

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1 Transcript 2 February 2024, page 34, as attached to letter from Allen & Overy dated 20 February 2024.

Qualifications and expertise

9 Mr Hall, B.Sc (hons) is a qualified actuary (FIAA) and a fellow of FINSIA, with a range of experience including insurance, superannuation and asset-liability management (across the wide range of assets and liabilities for insurers) over the period from 1982 to 2002. Since 2002 he has been a director at LEA, conducting valuations and providing advice across a wide range of businesses, consequential losses, intellectual property and options.

10 Mr Lonergan, B.Ec., D.Sc.Ec. (hc), SF FIN, FAPI, has had over 50 years experience in corporate finance and valuations. He is an internationally distinguished practitioner who is widely recognised both within and beyond Australia as a leading expert in the field of corporate and business valuations. In addition to his extensive practical experience, he has also been a regular influential contributor to professional literature, having published the leading valuation text "The Valuation of Businesses, Shares and Other Equity" as well as "The Valuation of Mining Assets". He is a co-author of the best-selling book "Valuations for Tax Controversies" and has authored or co-authored some 115 technical papers.
Mr Lonergan's memberships of national and international accounting policy and standard setting committees include memberships, over many years, of the Companies and Securities Advisory Committee, Australian Accounting Standards Board, International Accounting Standards Sub-committees on Financial Instruments and the International Financial Reporting Interpretations Committee.

11 Both Mr Hall and Mr Lonergan have extensive experience in the economic assessment of businesses and consequential losses, including:

(a) selecting the appropriate conceptual valuation framework to apply when assessing the value of economic assets across a wide range of industries and circumstances

(b) determining the appropriate parameters within the selected framework to determine the value of a wide range of assets and consequential losses.

12 Our opinions are based wholly or substantially on specialised knowledge arising from our training, study or experience.

Sources of information

13 In preparing our report we have reviewed and/or relied upon the sources of information outlined in Appendix C.

Disclaimers

14 In respect of the information provided to us, we have not sought independent confirmation of its reliability, accuracy or completeness. This information has not been subject to an audit or independent verification (such as a "due diligence" investigation) by us and as a consequence we have no opinion on its accuracy, reliability or completeness. We have assumed that the information provided is accurate, reliable and complete and no material facts have been withheld.

15 In view of the above limitations, we reserve the right to amend our opinions should further information be made available to us subsequent to the date of this report which materially affects the opinions contained herein.

Federal Court Guidelines for Expert Witness

16 We have been provided with a copy of the Federal Court's Expert Evidence Practice Note dated 25 October 2016, entitled "*Expert Evidence Practice Notes (GPN-EXPT)*", attached as Appendix D, and confirm that our report has been prepared in conformity with this Practice Note. We acknowledge that our paramount duty is to the Court and not to the party retaining us.

General

17 Our report is set out under the following headings:

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I Executive Summary

Question 1 (framework for compensation calculation)

18 The underlying valuation concept in compensating for the economic loss arising from an event is to determine the compensation amount for the economic loss actually incurred, that is the difference between:

(a) receiving the future economic benefits that would have arisen but for the event (often referred to as the "but for" scenario); and

(b) receiving the (reduced) future economic benefits that would arise following the event (often referred to as the "actual" scenario).

19 The assessment of the difference in value between the "but for" and the "actual" scenarios should be done using market values, where market value is defined as the price that would be negotiated in an open and unrestricted market between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm's length within a reasonable timeframe. This is also known as the Spencer test[2].

20 Combining the normal conceptual framework with the requirements of the NTA, as we understand them, and applying them to the assessment of economic loss from the grant of a mining tenement, the elements can be summarised as:

(a) native title holders are entitled to compensation for their actual economic losses, as set out in NTA s51(1)

(b) because native title will not be extinguished on the grant of a mining tenement[3] and the *Mining Act 1978* (WA) (Mining Act) would compensate a freehold land owner for losses arising from the grant of a mining tenement[4], NTA s51(3) requires that the native title compensation must be calculated using "*any principles or criteria for determining compensation (whether or not on just terms)*" under the Mining Act

(c) by virtue of NTA s49(a) and s44H, there should be a single compensation amount assessed as at the date of the grant of a mining tenement

(d) the loss is assessed using the principles and criteria for compensation under the Mining Act for the anticipated economic losses to the native title rights holders arising from that grant.

21 It is not possible to directly observe traded prices to assess market values of native title rights since these rights are idiosyncratic[5]. Observed negotiations between claim groups and miners are not reliable indicators of the market value of YNAC's native title rights because:

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2 Referring to *Spencer v The Commonwealth* (1907) 5 CLR 418 (*Spencer*).

3 Hence the impairment is not the compulsory acquisition of native title rights.

4 Hence the "similar compensable interest test" is satisfied.

5 Since each claim group's rights differ and the infringements to those rights will also differ, as well as being over different land.

(a) each negotiation relates to different losses and different circumstances (different rights, different infringements, different land, different timing, etc)

(b) where agreements have occurred, there is likely to be an element of "anxiety" on the part of the miner, since delays in commencing mining operations can have large adverse economic consequences, due to the value (to the miner) of the mining rights for the area

(c) native title mining agreements are likely to include an element of "public relations" for the mining company

(d) many of these negotiations occur prior to mining, so there would have been some sharing of mining risk with the native title rights holders (e.g. if the project did not proceed, any payment based on a royalty would have no cost)

(e) the native title rights of the Yindjibarndi People do not include any rights in relation to minerals[6], hence compensation based on the value of minerals extracted cannot in any way be related to their losses incurred due to the infringements of their rights

(f) there is little or no information publicly available to assess the nature or value of the rights for the other claim groups and the impact of the relevant mining tenements on those rights (and hence to assess the losses suffered) as compared to the rights and impacts in this case.

22 Even if the other negotiations were comparable measures (which they are not because they relate to different rights, different infringements, different land, different timing, etc), the anxiety of miners to advance their project with minimal delay will[7] encourage them to agree to payments substantially in excess of the value of the actual loss suffered by a claim group. In effect, this involves the miner sharing some of the economic benefit from the delays avoided by making an agreement. However, this potential value to the miner from avoiding delays is eliminated when an agreement is **not** made (and delays are fully incurred).

23 We are instructed[8] that all the grants of mining tenements which infringed on the YNAC native title rights in this case were made either:

(a) after the good faith negotiations required under the NTA had been completed; or

(b) under sections of the NTA which do not require any negotiations.

24 In this case, the compensation should logically be only for the loss actually suffered by YNAC due to the infringement of their rights (i.e. the loss of use of the land over the relevant periods) and **not** by reference to other agreements (or negotiations) made which may include a sharing of the benefit of avoided delays in mining.[9]

25 Accordingly, in the absence of "comparable sales", it is necessary to assess the value of the economic losses suffered using other methods. Market value under the Spencer test must

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6 As noted in paragraph 5(c) of the determination in *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia (No 2)* [2017] FCA 1299 (*Warrie No. 2*).

7 Subject to the consideration that as time passes, the potential delay avoided will reduce.

8 Paragraph 3.5 of letter from Allen & Overy dated 20 March 2023.

9 Put simply, by failing to agree in a timely fashion both the claim group and the miner have missed the opportunity to share in the enhanced value from avoiding delays.

equal the present value of future economic benefits (otherwise, either the buyer or seller would not agree[10]).

26 In our opinion, the normal economic compensation framework (including the discounted cash flow (DCF) valuation approach) can be applied to the valuation of economic losses due to infringements of native title rights due to grants of mining tenements. The key elements are:

(a) properly considering the native title rights themselves, and determining the economic benefits ("cash flows") that would arise each year from those native title rights[11]

(b) determining the expected timing and extent (by period) of the interruptions to native title usage that will actually arise from the grants of mining tenements

(c) calculating the present value (at the date of the infringement) of the future losses of "cash flows" that would otherwise have been obtainable.

27 This approach, as far as it is practical to do so, directly relates the calculated compensation to the loss of future economic benefits for the native title rights holders arising from the grants of mining tenements. Applying the principles from *Spencer v The Commonwealth*[12] to setting the parameters of this calculation ensures that the result is the market value of the future economic benefits lost.

Question 2

28 We do not have any reliable information on the net market rent for the relevant land (in order to calculate the value of the temporary suppression of exclusive use native title rights), nor of the economic benefits arising each year from the non-exclusive native title rights (to value the temporary suppression of these rights).

29 Accordingly, we are not able to reliably estimate the compensation arising from the infringements to native title rights in this case.

Question 3

30 Our understanding, based on the Griffiths decision[13], is that assessing the cultural loss suffered due to compensable acts which impair native title rights involves several steps:

(a) assessment of the nature and extent of the native title rights holders' connection or relationship with the land and waters by their laws and customs

(b) assessment of the effect of the compensable acts on that connection (noting that there may have been prior or subsequent acts which also affected that connection)

(c) determining the amount of compensation which is fair and just in the circumstances.

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10 Knowledgeable, willing but not anxious participants would both be aware of expectations for future economic benefits (in essence future cash flows) and risks, hence buyers would refuse to pay more than the present value of future economic benefits and sellers would refuse to sell for less.

11 These cash flows will depend on the nature of those rights (including whether exclusive or non-exclusive) and the characteristics of the relevant land.

12 That is, what would be agreed by knowledgeable, willing but not anxious parties acting at arm's length.

13 That is, the High Court decision in *Northern Territory of Australia v Griffiths* [2019] HCA 7; (2019) 269 CLR 1 (*Griffiths*).

31 Under the NTA (due to the similar compensable interest test), the compensation to native title rights holders for their loss suffered due the grant of a mining tenement needs to be assessed using the principles and criteria for determining compensation under the Mining Act.

32 Furthermore, since the compensation (both economic and non-economic) needs to be determined using the principles and criteria under the Mining Act, it follows that compensation for the non-economic or cultural loss cannot be determined based on the value of the minerals in the ground nor by reference to any royalty on minerals. This would be illogical in any event, since there is no relationship between cultural value (which by its nature is intrinsic to the rights holders) and the minerals which can be extracted from the land.

33 We are not experts in assessing the nature and extent of any cultural loss that may have been suffered by the claim group, so any more specific comments on the process for assessing the compensation for this loss are outside our expertise.

Question 4

34 Assessing this compensation is outside our expertise.

Question 5

Meaton Report

35 The values calculated by Mr Meaton are fundamentally flawed as a basis for assessing the economic loss compensation due in this case and, in our view, are completely inappropriate for this purpose. The most significant problems with the Meaton Report are that Mr Meaton:

(a) was not asked to, and did not, assess either the economic loss incurred nor the appropriate value of compensation due in this case[14]

(b) did not set out any conceptual nor any economic basis for calculating the compensation to YNAC for the losses they actually suffered (much less any basis for doing so using the method he adopted)

(c) adopted a royalty-based compensation for the grant of mining tenements, which is contrary to the NTA

(d) used a royalty-based calculation, which is not a reasonable basis for assessing the actual losses suffered by YNAC (as it bears no relationship to the economic benefits otherwise obtainable by YNAC, which has no rights over minerals)

(e) relied on prior mining agreements regarding other native title rights (in different factual circumstances), which are not a reliable basis to estimate the value of the losses suffered by YNAC (due to lack of comparability as well as the inclusion of other elements, including sharing the benefit from avoiding delays in mining[15])

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[14] Rather he was asked to provide advice on the typical royalty rates for negotiated consent from native title claim groups for grants of mining tenements, without any consideration as to whether this approach was appropriate for calculating the compensation due in this case.

[15] We note that s223 of the NTA lists out the elements of native title rights (which are entitled to compensation under s51(1)). None of these elements include a right to negotiate with or delay other parties. In any event, it would be completely illogical to include any sharing of benefits from avoiding mining delays as part of the compensation when (as in this case) there has been no agreement reached which would avoid delays.

(f) adopted a royalty rate that is clearly excessive, even within his flawed paradigm

(g) failed to discount his value of future losses to present value.

Miles Report

36 The compensation values calculated by Mr Miles are fundamentally flawed and, in our view, completely inappropriate. The most significant errors are that Mr Miles:

(a) did not establish a proper basis for the valuation approach he adopted; in particular he purported to rely on other transactions without:

(i) having any reliable information about those transactions[16]

(ii) considering whether those transactions were actually evidence of the value of the losses incurred by YNAC (which they were not)

(b) adopted a royalty-based compensation for the grant of a mining tenement, which is contrary to the NTA

(c) used a royalty-based calculation, which is not a reasonable basis for assessing the actual loss suffered by YNAC (as it bears no relationship to the economic benefits otherwise obtainable by YNAC, which has no rights over minerals)

(d) relied on (limited) information about prior mining agreements regarding native title, which are not a reliable basis to estimate the value of loss suffered by YNAC (due to lack of comparability as well as the inclusion of other elements, including sharing the benefit from avoiding delays in mining)

(e) failed to properly consider (indeed to consider at all) the actual losses suffered by YNAC due to the infringements.

37 Mr Miles also made other errors in his calculations (such as adopting incorrect iron ore prices and failing to calculate the present values of the losses incurred). However, his fundamental errors make his calculations irrelevant to assessing compensation in this case.

16 For instance, he appears to have based his royalty parameter on a newspaper article.

II Overview

38 There are long established valuation principles and practices that are applied to assess the value of economic benefits derived from assets[17]; and to assess the loss if those assets are lost or impaired.

39 Briefly, these principles may be summarised as follows:

(a) market value is defined as the price that would be negotiated in an open and unrestricted market between a hypothetical knowledgeable, willing but not anxious buyer and a hypothetical knowledgeable, willing but not anxious seller acting at arm's length within a reasonable timeframe (known as the Spencer test)

(b) for readily traded assets, market values usually can be determined from comparable sales (since these sales give valid information as to the outcome of the hypothetical negotiation under the Spencer test)[18]

(c) for non-traded assets, it is necessary to assess by other means[19] the value of the asset to buyers and sellers (and hence the hypothetical negotiated price under the Spencer test)

(d) expressed in non technical language, assessing value involves considering: "what economic benefits are you going to get, when are you going to get them and what are the risks that the economic benefits might vary in timing and quantum"

(e) in any negotiation, including the Spencer test hypothetical negotiation, both buyer and seller would compare a proposed transaction price (cash now) against the future benefits of owning the asset:

   (i) a willing but not anxious buyer will not pay more than the present value of the future benefits from gaining the asset

   (ii) a willing but not anxious seller will not accept payment less than the present value of the future benefits from retaining the asset

(f) under the Spencer test, both parties are assumed to be knowledgeable[20] and neither has any special or unique ability to extract value from the asset (which would be special value, not market value). Accordingly, for both parties to agree on a price, that price (market value) must equal the present value of the future economic benefits from owning the asset[21]

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17 The term "assets" includes not only physical assets but also rights.

18 To be fully comparable, observed sales need to involve similar assets (and no material other assets or benefits), to be between knowledgeable, willing but not anxious parties and to occur under equivalent conditions to those applying at the valuation date, otherwise (potentially significant) adjustments may be needed.

19 Differing valuation methods, correctly applied, will produce consistent answers, so in particular applying other methods correctly to readily traded assets will produce values consistent with market values based on comparable sales (on the assumption that the comparable sales occurred in an informed and arm's length market).

20 That is, they know the current state of the asset and are aware of current market conditions and expectations about the future.

21 Otherwise the deal would be disadvantageous for one of the parties (if the price was below present value of future benefits then the seller would prefer to retain the asset; if the price was above present value of future benefits then the buyer would prefer to retain their cash and invest elsewhere).

(g) a correctly calculated asset value should result in the asset's owner being indifferent between retaining the asset and enjoying the economic benefits over time, or realising the value of those benefits (through a sale, if possible), or being compensated now for the loss of those economic benefits with a lump sum payment of that amount[22]

(h) for assets with readily observable market prices, the equivalence of current price to the present value of future benefits can be used to derive the present value discount rate (market rate of return) for those assets (for example, the market yield on a government bond relates the current price to the future cash flows from owning that bond)

(i) for assets without observable market prices[23], this equivalence can be used to assess market value by calculating the present value of the future economic benefits (future cash flows) of the asset; this is the DCF valuation method

(j) the DCF valuation method is both theoretically sound and applicable to a wide range of situations[24]

(k) the discount rates used in a DCF valuation are determined having regard to the timing and risks associated with the future economic benefits arising from that asset and the observed market rates of return for other assets (which will vary with the risks of those assets). The market relationship between risk and required return sets the framework within which the appropriate discount rate for a particular asset is determined.

40 In relation to assessing value through DCF valuations, the key principles are:

(a) an economic benefit at some future date is less valuable than the identical benefit today. This is referred to as the time value of money discount

(b) the reason for time value discounts are interest, inflation and risk

(c) generally, and especially over longer time periods, the prevailing rate of interest incorporates an allowance for inflation

(d) an investor should, theoretically at least, be able to earn (or measure value against the yardstick of) the prevailing risk free rate

(e) for assets in Australia, the risk free rate is virtually always accepted as being the Commonwealth Government Bond rate (subject to adjustment if that rate is abnormally reduced)[25] for the term corresponding to the term of the asset (hence long term bond rate for long term assets, such as shares, etc)

(f) this rate is described as being "risk free" because it is practically certain that the Commonwealth Government will honour its interest rate and capital payments on the contractually stated dates and terms

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22 Similarly a potential purchaser should also be indifferent between acquiring the asset (and enjoying its future benefits over time) or retaining the assessed market value price (and potentially buying another asset).

23 Which therefore cannot be valued using comparable sales.

24 Many other valuation methods (such as earnings multiples) are, implicitly, approximations to DCF valuations under specific assumptions.

25 For example, due to quantitative easing.

(g) strictly technically a bond owner is subject to the risk that the value of a bond prior to maturity may vary over time[26], thus it is not actually entirely free of risk

(h) but if the bond is held to maturity no capital loss need be incurred

(i) because investors can always earn as a minimum the risk free rate of interest, they will only invest in higher risk assets if they receive an additional reward for risk

(j) the lower the risk, the lower the margin over the risk free rate, and vice versa

(k) the market relationship between risk and return is used to set the appropriate risk discount rate for a particular asset.

41 There are a number of steps in carrying out a DCF valuation, each of which is linked to market information, as illustrated in the table below (which is simplified to explain the principles):

DCF element	Market evidence
Risk free rate (Rf)	Commonwealth Government Bonds are widely traded in active markets. Bond term matched to duration of investment (DCF term)
Equity market risk margin over risk free rate (Rm – Rf)[27] "market risk premium" (overall reward for risk in a diversified share portfolio)	Numerous long term studies have measured extra return from investing in the share market (Rm) over risk free return (Rf); these generally show that the margin averages some 6% p.a. in Australia.
Individual company risk	Risk is the contribution to aggregate risk in a diversified portfolio. Measured by the correlation (beta) of individual company share price movements with the overall ASX market[28]. Company risk rate = Rf + beta x (Rm – Rf)
Example: BHP (large diversified miner)	Current BHP beta is some 0.87
Specific project or asset risk discount	Rates of return for similar assets with observable market prices (with adjustment to reflect any specific risk differences).
Future cash flows	These are specific to each asset / project[29]. For instance, this might involve projecting cash flows associated with generating revenue (production volumes and prices) as well as costs and capital expenditure.

42 In basic principle, the future cash flow values in a DCF valuation are the amounts that would be reasonably expected[30] by knowledgeable buyers and sellers. In practice, they are

26 Due to changes in the interest rate applicable for the remaining period to maturity.

27 Rm = expected return from investing in the whole stock market. Rf = risk free rate.

28 For example, if an individual company's beta is 0.87, this means that for each 10% movement in the overall ASX market values, that company's shares are expected (on average) to move by 8.7% (being 0.87 x 10%).

29 Though there may be information from comparable projects, as well as detailed business planning, including technical and feasibility studies.

30 Technically the central best estimate, i.e. probability weighted mean across the range of outcomes.

determined based on the best available evidence about, and most likely outcomes for, each of the key cash flow items.

43 The valuation issues in question in this matter relate to the value of certain native title rights and interests[31].

44 Some valuation methods cannot be applied to native title areas due to:

(a) absence of reliable data (capitalised earnings methods)

(b) absence of transactions in native title rights[32] (comparable sales methods)

(c) idiosyncratic / unique nature of native title areas (rules of thumb).

45 This compensation framework (including the DCF valuation approach) can be applied to the valuation of economic losses due to infringements of native title rights. The key elements are:

(a) properly considering the native title rights themselves, and determining the economic benefits ("cash flows") that would arise each year from those native title rights[33]

(b) determining the expected timing and extent (by period) of the interruptions to native title usage that will actually arise from the grants of mining tenements

(c) calculating the present value (at the date of the infringement) of the future losses of "cash flows" that would otherwise have been obtainable.

46 This approach, as far as it is practical to do so, directly relates the calculated compensation to the future economic losses for the native title rights holders arising from the grants of mining tenements. Applying the principles from *Spencer*[34] to setting the parameters of this calculation ensures that the result is the market value of the economic benefits lost.

47 We note that, because we do not have a reliable basis for precisely measuring the economic benefits (cash flows) arising from the native title rights, we are not able to precisely quantify the compensation amounts in this case. However, lack of precision is a common problem in valuation work. This is why identifying the appropriate conceptual valuation framework is very important, as it helps ensure that results are within reasonable bounds and consistent with market values.

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31 We have referred to these native title rights and interests (as set out in s223 of the NTA) as "native title rights".

32 We note that Mr Meaton and Mr Miles have based their calculations on negotiated agreements between other miners and other claim groups, but have not considered the differences (different rights, different infringements, different land, etc) and have also failed to consider that miners were likely to be anxious to avoid the large value impact of delays on their operations. The reasons why prior negotiations are not reliable indicators of market value are discussed in more detail in paragraphs 85-89 below.

33 These cash flows will depend on the nature of those rights (including whether exclusive or non-exclusive) and the characteristics of the relevant land.

34 That is, what would be agreed by knowledgeable, willing but not anxious parties acting at arm's length.

48 We note that no attempt has been made by the Applicant to provide any assessment of the economic benefits arising from the **use** of the YNAC native title rights[35].

49 As discussed in paragraphs 85-89 and 161-169, in our opinion, prior negotiations and agreements by mining companies are not reliable indicators for the value of the loss suffered by the native title rights holders in this case, because of a lack of comparability (these negotiations and agreements relate to different factual circumstances[36]) as well as the inclusion of other elements, for instance the anxiety of miners to avoid delays will encourage them to agree to payments whose value exceeds the value of the loss suffered by the native title rights holders. In effect, the miners would be sharing the benefit of avoiding delays with the claim group.

50 From a valuation perspective, including a component relating to sharing the benefit of avoided delays in the court ordered compensation payable after the miner and claim group have failed to reach an agreement which would avoid delays is illogical. This is because these potential benefits have been lost forever.

Methodology for calculating native title economic loss

Conceptual valuation framework

51 The underlying valuation concept in compensating for the economic loss arising from an event is to determine the compensation amount payable at the date of the triggering event equal to:

(a) the economic value[37] but for the event (often referred to as the “but for” scenario)

less

(b) the (reduced) economic value following the event (often referred to as the “actual” scenario).

52 The compensation amount (value of the loss) at the date of the event is then increased to allow for the passage of time from event date to judgment date (typically with simple interest at Court rates, in accordance with Court practice).

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[35] We note (as discussed in our response to Question 5) that neither Mr Meaton nor Mr Miles considers the actual rights held by the Yindjibarndi People, their economic benefits (i.e. “cash flows”) from using those rights over time (but for the infringements) nor the impacts of the grants of mining tenements on those economic benefits. Instead, they both (incorrectly) base their assessments of value on an (erroneous) assumption of equivalence between the economic losses suffered and the agreements struck by other claim groups and (often anxious) miners, when in fact such agreements involved different losses (different rights, different infringements, different land, etc) and may include other elements, including a sharing of the benefits (to the miner) of avoided delays in the mining operations.

[36] Different rights, different infringements, different land, different timing, etc.

[37] Noting that economic value derives from the future economic benefits that will arise (either from a transaction or from usage over time).

53 For native title rights, we have used the descriptive term "cash flows" to describe the economic benefits generated by using native title rights in each period, although we recognise that the economic benefits would not actually be in cash[38].

Legislation and court precedent

54 The NTA and Court decisions, in particular *Griffiths*, create a context for the valuation of the economic losses incurred by native title rights holders.

55 Combining the normal conceptual framework with the requirements of the NTA, as we understand them, and applying them to the assessment of economic loss from the grant of a mining tenement, the elements can be summarised as:

(a) native title rights holders are entitled to compensation for their actual losses, as set out in NTA s51(1)

(b) because native title will not be extinguished on the grant of a mining tenement[39] and the Mining Act would compensate a freehold land owner for losses arising from the grant of a mining tenement[40], NTA s51(3) requires that the native title compensation must be calculated using the "*principles or criteria for determining compensation (whether or not on just terms)*" under the Mining Act (on the assumption that the Mining Act does not provide compensation to the native title rights holders on its own terms[41])

(c) by virtue of NTA s49(a) and s44H, there should be a single compensation amount assessed as at the date of the grant of the mining tenement

(d) the loss is assessed using the principles and criteria for compensation under the Mining Act for the anticipated losses to the native title rights holders arising from that grant.

Mining Act

56 The key principles and criteria for determining compensation under the Mining Act include:

(a) being compensated for (along with other, less common, sources of loss)[42]:

(i) "*being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land*"

(ii) "*damage to the land or any part of the land*"[43]

(b) **not** being compensated for:[44]

(i) "*permitting entry to any land for mining purposes*"

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38 For instance, obtaining food for personal consumption, which would not produce any cash flows (though this would reduce cash outgoings).

39 NTA s24MD(3)(a) for mining leases, etc and s24HA(4) for miscellaneous leases.

40 Hence the "similar compensable interest test" is satisfied.

41 Noting that if this were the case, then the principles and criteria of the Mining Act would necessarily apply to that compensation and furthermore, as noted in s49 of the NTA, compensation under the NTA needs to take account of any other compensation payable (otherwise the loss would be compensated twice).

42 Mining Act, s123(4).

43 Noting, however, that the mining company is obligated to rehabilitate the land after the mining operations, reducing the permanent damage to the land.

44 Mining Act, s123(1).

(ii) "*the value of any mineral which is or may be in, on or under the surface of any land*".

57 It would normally be the case that the miner will be required to rehabilitate the surface of the land [redacted]. In practice, from an economic perspective the rehabilitation process may even result in the land being in a better condition (e.g. due to the existence of road access[45], etc).

58 In circumstances where there is no permanent economic damage to the land, the economic loss compensation for native title rights holders would be equal to the present value of their expected net economic losses arising from their loss of use of the area over the period of the interruption due to the mining (i.e. their loss of cash flow).

Extent and timing of interruption to economic usage

59 The extent and timing of the expected interruptions to native title economic usage should be predictable (e.g. from FMG's expectations of the period over which each tenement will be mined and then rehabilitated).

60 It would be normal for there to be a considerable time lag between the grant of a mining tenement and the commencement of material mining operations. These temporal interruption differences should be allowed for in the compensation calculations.

61 In addition, only part of the tenement areas would be subject to mining operations at any particular time, with progressive rehabilitation as mining is completed in parts of the tenement.

62 At worst, the interruption to native title economic usage caused by a mining tenement will stop when mining operations have ceased and rehabilitation has been completed.

Quantifying loss of economic value

63 The economic value of an infringement of native title rights were summarised in *Griffiths*[46] as being:

"the sum which a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to obtain the latter's assent to the infringement, or, to put it another way, what the Claim Group could fairly and justly have demanded for their assent to the infringement"

64 Since this adapted Spencer test has to be applied using the principles and criteria for compensation under the Mining Act, the value (of assent to the infringement) needs to be assessed without reference to the value of any minerals on or in the ground[47].

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45 Roads improve access for all economic purposes, including the economic usage value arising from native title usage. Other improvements could occur, for example, reinstated flora might be more drought resistant or have other improved genetic qualities.

46 *Griffiths* at [84].

47 Noting in any case that the YNAC native title rights under *Warrie (No 2)* specifically exclude any rights to minerals.

65 Put simply, the value being determined is the present value of the economic losses arising from the infringement to the native title rights. Quantifying this requires assessing the difference between the "but for" and the "actual" (after the infringement) economic value from usage of the native title rights.

66 Since the losses in this case are temporary suppressions of native title (i.e. each occurs over a specific period of time), the natural valuation approach is to value the loss suffered directly through a DCF valuation of the impact on net economic benefits ("cash flows") received over time. This requires determining the cash flows lost each period and also the appropriate risk discount rates to value the lost cash flows. In the context of a market valuation (and in line with *Spencer*'s framework), these parameters should be those that would be agreed between hypothetical knowledgeable, willing but not anxious buyers and hypothetical knowledgeable, willing but not anxious sellers. Thus the expected cash flow impacts should reflect the available knowledge and market expectations at the valuation date, and the risk discount rate should be consistent with expected rates of return as at the valuation date for cash flows with similar risk characteristics.

Assessing loss of cash flows

67 The expected reductions in the native title rights holders' cash flows arising from the interruptions each year needs to be assessed and quantified.

68 Unlike commercial usage of land, economic usage of native title rights would rarely result in recorded outcomes, and even less often in observable or measurable cash flows. Nevertheless, we have used the descriptive term "cash flow" to represent the net economic benefit from the usage of native title rights, for consistency with normal asset valuation terminology.

69 In addition, the cash flows will depend on the scope of the native title rights for the holders (the rights of some groups may be more or less extensive than the rights of other groups).

70 The economic usage of the claim area by the native title rights holders under the "but for" and "actual" scenarios should be a matter of fact, however we do not have any direct readily observable information on this economic usage (under either scenario)[48].

71 In the absence of direct information about native title usage, we have considered alternative methods of assessing the economic benefits associated with utilising the native title rights (for the non-exclusive rights and, where appropriate, the exclusive rights).

72 The non-exclusive native title rights in this case[49] are personal (rights to camp, fish, forage, hunt, etc) or ceremonial (conducting rituals and protecting significant sites, etc) and do not include any right to conduct commercial activities nor to prevent others from accessing or using the land. In our opinion they share the characteristics of the (broadly similar) non-exclusive rights in *Griffiths*, which were described as follows[50]:

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48 We note that neither the Meaton Report nor the Miles Report (both discussed further in response to Question 5) addresses the economic usage of the native title rights for the claim area at all.

49 Listed in paragraph 92(d) below.

50 Page 3 of *Griffiths* (Headnote; similar comments are made at [69] and [106]).

"the native title rights here were essentially usufructuary, ceremonial and non-exclusive, and were devoid of rights of admission, exclusion and commercial exploitation".

73 In our opinion, the activities permitted by the Yindjibarndi People's non-exclusive native title rights would generate little if any economic benefit[51]. Furthermore, because these non-exclusive rights do not include any ability to exclude others from the land nor prevent others from carrying out any activities there, even if the permitted activities could generate any material economic benefits, the non-exclusive native title rights holders could not prevent others from also conducting those activities on the land and thus competing to extract any such economic benefit. In our opinion, it is therefore appropriate to conclude that the economic benefit ("cash flow") that could be obtained each year from utilising the non-exclusive native title rights would be very low (much lower than the economic benefits of exclusive native title rights, which, inter alia, allow commercial use and can prevent others from using the land)[52].

74 The exclusive use native title rights (where it is appropriate to consider them) have greater economic benefits, but these rights must also be exercised in accordance with the traditional laws and customs of the Yindjibarndi People. This places additional constraints (which would not apply to freehold land) on the economic benefits that can be obtained from these rights. For example, exclusive use native title rights cannot be sold nor mortgaged and can only be used for (or leased out for) usages that are consistent with Yindjibarndi traditional laws and customs[53].

75 Because there is no available direct evidence on the economic benefits (net of associated costs, such as costs of collection including labour etc) arising from exclusive use native title rights, it is appropriate to assess the cash flows lost for these rights on the following basis:

(a) as instructed[54], we have treated exclusive use native title rights as having economic value equivalent to freehold over the relevant land

(b) accordingly, since pastoral use is the highest and best use of the land for a freehold owner[55], it will also be the highest and best use for exclusive use native title rights

(c) the lease for land which would be negotiated on a Spencer test basis[56] between a freehold owner and a pastoral user would be at a market rent for pastoral use (noting that market rents will be higher than the pastoral lease fees[57]). This market rent, net of costs of ownership[58] (i.e. the net market rent) is therefore the most appropriate measure

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51 Noting that economic benefit from activities is measured net of the costs (including labour, etc) required to generate the outputs.

52 This is discussed further in paragraphs 123-127 below.

53 This might for instance allow certain pastoral uses, but not allow intensive development.

54 Paragraph 4.2 of the letter from Allen & Overy dated 20 February 2024.

55 The report of Mr Preston dated 31 October 2023 (the Preston Report) notes in section 8.02.03 that he considers that the highest and best use of the relevant land is "as rural or pastoral use".

56 That is, on an arm's length basis between knowledgeable willing but not anxious buyers and knowledgeable willing but not anxious sellers.

57 Pastoral lease payments to the government are generally concessional, as shown by pastoral leases trading at substantial values (implying a substantial premium of market rent for land over lease fees).

58 Such as rates, etc.

of cash flow each year to the freehold land owner[59], i.e. the economic benefit deriving from ownership (which will also be the economic benefit for the exclusive use native title rights holder, due to the instructed equivalence assumption).

76 This case involves temporary suppression of native title rights, rather than the compulsory acquisition (extinguishment) considered in *Griffiths*, so that a relativity to the freehold land market value can be used to cross-check the economic value of the infringement for exclusive use native title[60].

Present value discount rate

77 The appropriate discount rate to convert the loss of future economic benefits into their present value amount at the date of the event needs to be consistent with the valuation framework and the risks associated with the lost economic benefits.

78 Applying the normal conceptual framework and assessing losses as the expected reductions in native title cash flows, it is appropriate to separately consider non-exclusive and exclusive native title rights, because their economic benefits and the risks to those benefits are significantly different.

79 As noted in paragraphs 72-73 above[61], non-exclusive native title rights will have very low economic benefits generated each year. These economic benefits arise from traditional usage which has continued for a very long time. Accordingly, it is reasonable to expect that, while there will be fluctuations from year to year (due to essentially unpredictable effects such as weather, fire, etc), over the long term the annual amount of these economic benefits will be stable in real terms[62]. This long term stability and the fact that the fluctuations are uncorrelated with market changes[63] means that the appropriate risk premium (that is, margin over the risk free rate) in the discount rate will also be relatively low[64]. However, a margin is needed for the additional risks associated with the reduced flexibility (e.g. inability to sell or borrow) of non-exclusive native title rights compared to other low risk assets (such as government bonds)[65].

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59 Noting that the return from a pastoral operation on the land would include the benefit from the usage of additional assets (such as livestock, fencing, equipment, etc) as well as the expertise of the operator.

60 For non-exclusive native title rights, the economic benefits ("cash flows") will be much lower than for freehold rights, so that the relative value will be much lower for this reason, as well as the temporary suppression rather than extinguishment.

61 And discussed in more detail in paragraphs 123-127 below.

62 The amount will increase in nominal dollars as inflation changes the dollar value associated with goods and services.

63 The effects of non-market (or diversifiable) risks on expected returns and discount rates is discussed further in paragraphs 189-190.

64 We note as a matter of completeness that a low risk premium, i.e. a low discount rate, produces a higher assessed loss than a higher risk premium for the same expected future benefits. We note that we have considered s238 of the NTA (non-extinguishment principle), which effectively makes native title rights "subservient" to other rights. However, we consider that this subservience does not adversely affect the economic value of the rights (nor the risks for those rights), since the impacts of any infringements to native title rights (arising from such subservience) will result in fair (market value) compensation, if and when these impacts occur.

65 This illiquidity risk premium is discussed further in paragraphs 128-130.

80 For exclusive use native title it is appropriate to use the annual net market rent for pastoral use[66] as the proxy for the cash flow each year. These amounts need to be discounted at a rate that reflects the risks for exclusive use native title rights. Properly calculated, these risks would include all those associated with the net market rental income stream, plus the additional risks associated with the reduced flexibility (e.g. inability to borrow) of exclusive use native title rights compared to freehold ownership.

81 An additional risk margin is appropriate because native title rights (whether exclusive or non-exclusive) can only be utilised over time and never sold nor mortgaged. An inability to sell changes the choices available to an owner of an asset, compared to owning otherwise similar assets that can be sold, reducing its value. The appropriate rate of return (and discount rate) should reflect this characteristic. This results in a higher risk discount rate for native title rights than would apply to otherwise similar assets (e.g. freehold land for exclusive use rights). This higher risk rate can be considered as a risk margin for reduced flexibility or illiquidity[67].

82 However, we note that *Griffiths* (discussed in more detail in paragraphs 144-155 below) equated the value of the extinguishment of exclusive use native title with the value of freehold land. Having regard to this precedent, we have been instructed to assume equivalence between the economic values of exclusive use native title rights and freehold rights[68]. Under this instructed assumption, it is not appropriate to include an additional risk margin for reduced flexibility in the risk discount rate for exclusive use native title rights[69].

Date of loss and interest

83 In accordance with normal valuation principles and NTA s49(a) and s44H, the value of the loss suffered should be assessed at the date of the act (such as the grant of a mining tenement) giving rise to the infringement.

84 Consistent with normal Court practice, and reaffirmed in *Griffiths*, the value of the loss suffered (evaluated at the date of the act) should be increased by simple interest at Court rates from the date of the act to the payment date.

Prior negotiations are not reliable indicators

85 We are aware that negotiations (and agreements) have occurred between mining companies and native title rights holders over compensation for infringement of native title rights, including in relation to the FMG mining tenements (which are the source of this claim).

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66 As discussed in paragraph 75(c) above, market rents will be higher than pastoral lease fees.

67 In theory, there would also be a risk margin for undiversified specific risk, since native title rights (being non-tradable assets) will always remain part of the owners' assets and hence the ability of the owners to diversify specific risks associated with those assets is likely to be limited. In practice such an adjustment would be very difficult to calculate and we have not made any allowance beyond the illiquidity premium applied for non-exclusive rights.

68 Paragraph 4.2 of the letter from Allen & Overy dated 20 February 2024.

69 But for this instruction, we would have allowed for the additional risk margin associated with this reduced flexibility for exclusive use native title (as we have for non-exclusive native title) and therefore calculated a lower present value of losses suffered.

86 In our opinion, such negotiations and agreements are not reliable indicators of market value for the loss suffered by YNAC because:

(a) each negotiation relates to different losses and different circumstances (different rights, different infringements, different land, different timing, etc)

(b) there is likely to be an element of "anxiety" on the part of the miner, since delays in commencing mining operations can have large adverse economic consequences for the miner (but not the native title rights holders), due to the value (to the miner) of the mining rights for the area

(c) native title mining agreements are likely to include an element of "public relations" for the mining company

(d) many of these negotiations occurred prior to mining, so there would have been some sharing of mining risk with the native title rights holders (e.g. if the project did not proceed, any payment based on a royalty would have no cost)

(e) the native title rights of the Yindjibarndi People do not include any rights in relation to minerals[70], hence compensation based on the value of minerals extracted cannot in any way be related to their losses incurred due to the infringements of their rights

(f) there is little or no information publicly available to assess the nature of the rights and the impact of the mining operations on those rights (and hence the losses suffered) for the other claim groups as compared to the rights and infringements in this case.

87 The anxiety of miners to advance their project with minimal delay will[71] encourage them to agree to payments substantially in excess of the value of the actual loss suffered by a claim group. In effect, this involves sharing some of the value benefit from the delays avoided by making the agreement. However, this potential value to the miner from avoiding delays is eliminated when an agreement is **not** made (and delays are fully incurred). In this circumstance, the compensation should logically be only for the loss actually suffered by the claim group due to the infringement of their rights (i.e. the loss of use of the land over the relevant periods) and **not** by reference to agreements (or negotiations) made which are likely to have included a sharing of the benefit of avoided delays in mining.[72]

88 Because of these factors the results of the actual negotiations and agreements have included elements (related for instance to the value of minerals on or in the ground, which is specifically excluded from being compensable under the Mining Act) that do not properly form part of the compensable value of the native title rights[73].

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70 As noted in paragraph 93(b) below.

71 Subject to the consideration that as time passes, the potential delay avoided will reduce.

72 Put simply, by failing to agree in a timely fashion both the claim group and the miner have missed the opportunity to share in the enhanced value from avoiding delays.

73 In this context, we note that s223 of the NTA lists out the elements of native title rights (which are entitled to compensation under s51(1)). None of these elements include a right to negotiate with or delay other parties. Accordingly, while it might be possible (at certain points in time) for the rights holders to obtain additional benefits from the eagerness or anxiety of mining companies in negotiations, we understand that these additional benefits are not part of the compensable rights under the NTA.

89 It follows that these prior negotiations are not a reliable basis for determining the compensation for infringement of native title rights suffered by YNAC.

Summary

90 The steps to calculate compensation for the impairment of native title rights due to the grant of a mining tenement are therefore:

(a) identify the expected timing and extent by period of interruptions to native title rights economic usage due to mining operations[74]

(b) ascertain the expected impact of the interruptions on the native title rights holders' "cash flow" each year[75]

(c) discount the expected "cash flow" impacts (economic losses) back to the date of the event giving rise to the impairment, using an appropriate discount rate

(e) add interest at Court rates[76] from the date of the event up to the date of compensation payment.

91 This approach, as far as it is practical to do so, directly relates the calculated compensation to the loss of future economic benefits for the native title rights holders arising from the grants of mining tenements. Applying the principles from *Spencer*[77] to setting the parameters of this calculation ensures that the result is the market value of the economic benefits lost.

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74 Having regard to remediation as well as staged process of mining operations.

75 Having regard to the nature of the native title rights, including whether exclusive or non-exclusive. Further noting that as discussed in paragraph 53, we have used "cash flows" to describe the economic benefit (net of costs) arising each year from utilising the native title rights, even though the benefit may not actually be in cash.

76 In accordance with Court practice.

77 That is, what would be agreed by knowledgeable, willing but not anxious parties, acting at arm's length.

III Background

92 In *Warrie (No 2)*, it was decided that:

(a) native title exists in the Determination Area and is held by the Yindjibarndi People

(b) YNAC shall hold the determined native title in trust for the native title rights holders

(c) the native title rights and interests of the Yindjibarndi People in the Exclusive Area confer "*the right to possession, occupation, use and enjoyment of that area to the exclusion of all others*"

(d) in other parts of the Determination Area their native title rights are (including the right to conduct activities to give effect to them):

"(a) A right to access (including to enter, to travel over and remain);

(b) A right to engage in ritual and ceremony (including to carry out and participate in initiation practices);

(c) A right to camp and to build shelters (including boughsheds, mias and humpies) and to live temporarily thereon as part of camping or for the purpose of building a shelter;

(d) A right to fish from the waters;

(e) A right to collect and forage for bush medicine;

(f) A right to hunt and forage for and take fauna;

(g) A right to forage for and take flora;

(h) A right to take and use resources;

(i) A right to take water for drinking and domestic use;

(j) A right to cook on the land including light a fire for this purpose;

(k) A right to protect and care for sites and objects of significance in the Determination Area (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others)."

93 Both the exclusive use rights and the non-exclusive use rights are subject to qualifications, including that they:

(a) are subject to and exercisable in accordance with:

(i) the laws of the State and the Commonwealth, including the common law, and

(ii) the traditional laws and customs of the Yindjibarndi People

(b) do not confer any rights in relation to minerals as defined in the *Mining Act 1904* (WA) (repealed) and in the *Mining Act 1978* (WA).

IV Question 1

How should the entitlement in s 51(1) of the NTA to compensate on just terms, or the determination of compensation required by s 51(3) to compensate, the native title holders for any loss, diminution, impairment, or other effect of the grant of the FMG tenements on the native title rights and interests of the Yindjibarndi People be determined and calculated?

Overview

94 In answering this question it is appropriate to divide the issue into three components:

(a) what is the appropriate conceptual framework for determining the appropriate compensation for impairment to native title rights?

(b) what is the legislative framework required by the NTA and Court precedents?

(c) how should that framework be applied in practice to calculate the compensation?

95 In discussing the appropriate framework, we have considered both the conceptual valuation framework for calculating the value of losses incurred and also our understanding of the valuation framework provided by the NTA and relevant Court decisions.

96 In both cases, we have limited our consideration to the economic losses, since you have separately asked (in Question 3 of the letter of instruction) about the assessment of any component for non-economic or cultural loss.

97 [redacted]

Conceptual valuation framework

98 The underlying valuation concept in compensating for the economic loss arising from an event is to determine the compensation amount for the economic loss actually incurred, that is the difference between:

(a) receiving the future economic benefits[78] that would have arisen but for the event (often referred to as the “but for” scenario); and

(b) receiving the (reduced) future economic benefits that would arise following the event (often referred to as the “actual” scenario).

99 As the assessment of the loss suffered is determined as at the date of the event generating the loss, the compensation for the loss needs to be increased to allow for the passage of time from event date to date of compensation payment. This is typically done by allowing for simple interest at Court rates, in accordance with Court practice.

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[78] Noting that future economic benefits in most cases other than native title rights cases include the potential to sell that asset to another party.

100 Since the economic value of an asset[79] to its owner is the present value of the future economic benefits that will arise from ownership, the appropriate compensation can also be described as the amount equal to the reduction in the economic value of the asset to the owner due to the event.

101 Where the event affected an asset with a readily observable market value, the compensation amount can usually be calculated directly as the reduction in the observable market value due to the event.

102 In the more usual situation where the affected asset does not have a readily observable market value, it is necessary to determine the difference in the value of the asset (i.e. present value of the future economic benefits from the asset) before and after the effects of the event.

103 This difference in value can be determined even for assets which cannot be traded, such as native title rights, using the market value framework by assuming hypothetical negotiations equivalent to those normally preceding a transaction.

Market value

104 Market value is defined as the price that would be negotiated in an open and unrestricted market between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm's length within a reasonable timeframe (the Spencer test).

105 Where it is not possible to directly observe traded prices to assess market values, it is necessary to assess value using other methods.

106 As discussed in paragraph 39, market value under the Spencer test must equal the present value of future economic benefits.

107 Expressed in non-technical language, assessing the value of an asset involves considering:

(a) what net economic benefits will that party receive from ownership and use of this asset?

(b) when will it get them?

(c) what are the risks that the net economic benefits might vary in timing or amount?

108 Clearly, more net benefits are better than less, sooner is better than later and more certain is better than less certain.

109 We note that one of the potential economic benefits from ownership of most assets is a future sale[80]. Where an asset cannot be sold this reduces the choices available to the owner (e.g. to respond to changing circumstances over time) and thus reduces the attractiveness of the asset both to the owner and to potential buyers. The required rate of return to invest in the asset

79 "Asset" is used here in the broadest sense of something, including rights and other intangibles, that will provide economic benefits to the person or people benefiting from it.

80 For instance, a party may assess value based on an expectation that it will hold the asset for a period then sell it. Under this scenario, it will receive ownership benefits during the holding period, then the sale proceeds and no subsequent benefits.

needs to increase (i.e. the price paid needs to decrease) to compensate for this disadvantage relative to an otherwise similar asset which is readily traded.

110 However, we have been instructed that, for consistency with *Griffiths*, we should assume that exclusive native title rights have economic value equivalent to the freehold value of the relevant land (and on this instructed basis no illiquidity adjustment is appropriate for exclusive use native title rights).

111 The valuation of an asset by considering its future benefits, their timing and the discounting of those benefits to allow for risk and timing into a value today is called calculating the present value of the asset[81]. As noted in paragraph 41 above, each of the elements in a present value (DCF) valuation is based on information about the asset (such as its expected cash flows and its risks) and market information about the expected returns required to reflect the risks to its cash flows.

112 We note that market value does not include special value. The market value purchaser is (by definition) "knowledgeable, willing, but not anxious" and thus would not overpay (nor would a knowledgeable and willing seller "over ask", i.e. refuse to sell except at an unreasonably high price).

Loss calculation framework

113 In the (fairly common) circumstance where there are not readily observable market values, the usual framework for assessing the value of (and hence compensation for) economic losses arising from an event is to:

(a) calculate the difference in expected cash flows between the situation that would have applied but for the event ("but for" scenario) and the actual situation applying because of the event (the "actual" scenario). The differences in expected future cash flows each period are the economic losses suffered

(b) calculate the compensation at the date of the event as the present value of these future losses, discounted at a rate which reflects the risk associated with these forgone cash flows and the years in which they occur.

114 This framework directly ties the calculation of compensation to the expected net effects of the event on future cash flows (the future economic losses) and also ties the present value (compensation amount) to the amount, timing and risk associated with those future losses.

115 This compensation framework (including the DCF valuation method) can be applied to the valuation of economic losses due to infringements of native title rights. The key elements are:

(a) properly considering the native title rights themselves, and determining the economic benefits ("cash flows") that would arise each year from those native title rights[82]

(b) determining the expected timing and extent (by period) of the interruptions to native title rights usage that will actually arise from the grants of mining tenements

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81 And is also referred to as the DCF valuation method.

82 These cash flows will depend on the nature of those rights (including whether exclusive or non-exclusive) and the characteristics of the relevant land.

(c) calculating the present value (at the date of the infringement) of the future losses of "cash flows" that would otherwise have been obtainable.

116 This approach, as far as it is practical to do so, directly relates the calculated compensation to the loss of future economic benefits for the native title rights holders arising from the grants of mining tenements. Applying the principles from *Spencer*[83] to setting the parameters of this calculation ensures that the result is the market value of the economic benefits lost.

Differences for native title rights

117 We are instructed to consider two alternatives in relation to calculating compensation for the infringements to native title rights, namely:

(a) the whole of the compensation application area gives non-exclusive native title rights and interests

(b) certain of the compensation application area, namely the Exclusive Area, gives exclusive native title rights and interests.

118 In the case of native title rights, when applying the usual conceptual valuation framework to the economic loss suffered due to an event which impairs rights (such as the grant of a mining tenement), there are a number of differences from the usual circumstances which need to be considered:

(a) no financial outlay was made to acquire the native title rights (thus, for example, there is no identifiable cost base as indicia of value)

(b) the native title rights are specific to the (collective) holders of those rights

(c) the rights are not divisible

(d) the rights cannot be traded to (or used by) others

(e) the utilisation of native title rights may not generate measurable / observable cash flows (as commercial usage would), so the term "cash flows" should be understood to include the economic benefits generated by using native title rights in each period, whether or not they would actually produce cash[84]

(f) the cash flow each year will depend on the scope of the native title rights for the holders (the rights of some groups may be more or less extensive than the rights of other groups). It is therefore necessary to consider the specific rights in each case, especially for non-exclusive native title rights[85]

(g) the loss of economic benefits (reductions in cash flows) suffered need to be measured based on the expected impact of the impairment event on future usage by the native title rights holders themselves (the difference between their "actual" and "but for" cash flows for each period).

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83 That is, what would be agreed by knowledgeable, willing but not anxious parties acting at arm's length.

84 An example of usage which would not generate any positive cash flows would be obtaining food for personal consumption. However, there would be a saving in outgoings.

85 This is discussed in more detail in paragraphs 178-182.

119 However, we do not have any direct evidence about the economic usage of the native title rights for the claim area in this case[86]. In these circumstances the best approach is to adopt a proxy, being the lost economic benefits on a highest and best use basis of the rights held[87].

120 Where exclusive rights are included, we note that the relevant rights as set out in *Warrie (No 2)* are "*the right to possession, occupation, use and enjoyment of that area to the exclusion of all others*", subject to "*the traditional laws and customs of the Yindjibarndi People*".

121 These rights are essentially the same as the exclusive use native title rights in *Griffiths*[88], although in this case there is temporary suppression of the rights, rather than compulsory acquisition (extinguishment).

122 In our opinion, it is appropriate to assess the cash flows lost for exclusive use native title rights on the following basis:

(a) as instructed[89], we have treated exclusive use native title rights as having economic value equivalent to freehold over the relevant land

(b) accordingly, since pastoral use is the highest and best use of the land for a freehold owner[90], it will also be the highest and best use for exclusive use native title rights

(c) the lease for this land which would be negotiated on a Spencer test basis[91] between a freehold owner and a pastoral user would be at a market rent for pastoral use (noting that market rents will be higher than the pastoral lease fees[92]). This market rent, net of costs of ownership[93] (i.e. the net market rent) is therefore the most appropriate measure of cash flow each year to the freehold land owner[94], i.e. the economic benefit deriving from ownership (which will also be the benefit for the exclusive use native title rights holder, due to the instructed equivalence assumption).

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86 We note that neither the Meaton Report nor the Miles Report (both discussed further in response to Question 5) addresses the economic usage of the native title rights for the claim area at all.

87 Noting that the uses possible (and hence their cash flows) will differ between exclusive and non-exclusive native title rights.

88 Which were stated as "*rights and interests in accordance with traditional laws and customs to the possession, occupation, use and enjoyment of the Timber Creek area to the exclusion of all others*", paragraph 71 of *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900.

89 Paragraph 4.2 of the letter from Allen & Overy dated 20 February 2024.

90 The Preston Report notes in section 8.02.03 that he considers that the highest and best use of the relevant land is "as rural or pastoral use".

91 That is, on an arm's length basis between knowledgeable willing but not anxious buyers and knowledgeable willing but not anxious sellers.

92 Pastoral lease payments to the government are generally concessional, as shown by pastoral leases trading at substantial values (implying a substantial premium of market rent for land over lease fees).

93 Such as rates, etc.

94 Noting that the return from a pastoral operation on the land would include the benefit from the usage of additional assets (such as livestock, fencing, equipment, etc) as well as the expertise of the operator, and therefore exceeds the economic benefit from ownership itself.

Low value for non-exclusive economic usage

123 The non-exclusive rights in this case (as decided in *Warrie (No 2)* and set out in paragraph 92(d)) are broadly similar to the non-exclusive rights considered in *Griffiths*, which were described as "*essentially usufructuary, ceremonial and non-exclusive, and were devoid of rights of admission, exclusion and commercial exploitation*"[95].

124 As we understand it, the non-exclusive native title rights in this case:

(a) do not prevent other parties entering the land and conducting a wide range of activities (such as pastoral use)

(b) do not themselves include the right to undertake commercial activities on the land, but rather only a limited range of activities, with little if any economic benefit[96] (since they are either personal, such as rights to camp, hunt, forage, etc, or ceremonial such as rights to conduct rituals and protect significant sites).

125 Furthermore, because the non-exclusive native title rights holders cannot prevent any others from undertaking activities on the land (including similar activities), even if their rights could generate a material economic benefit, other parties could also conduct similar activities in competition, limiting the potential benefit to the non-exclusive native title rights holders.

126 It is therefore reasonable to expect that the usage of non-exclusive native title rights will generate little if any economic benefit and hence there will be low "cash flow" for a non-exclusive native title rights holder.

127 Given this situation, cash flow for non-exclusive native title rights, being the economic benefit generated from utilising these rights net of the cost of inputs (including cost of labour, etc) would be much lower than the economic benefits from exclusive use native title rights (which allow a much wider range of activities, including commercial activities, and also can prevent others from using the land). In our opinion it is reasonable to expect that the cash flow for non-exclusive native title rights would be very low and therefore also a low or nominal proportion of the cash flow for exclusive use native title rights.

Risk differences for native title rights

128 Native title rights cannot be traded nor mortgaged, which reduces the financial flexibility for an owner, compared to tradable assets having the same expected future net cash flows each year.

129 This lack of financial flexibility gives rise to additional risk for the holders (owners), which can be thought of as an illiquidity risk[97].

130 Accordingly, the risk discount rate appropriate for valuing the suppression of native title rights (i.e. the loss of future cash flows over the suppression period) should have a margin to reflect this additional risk, which is known as the illiquidity risk margin. However, in accordance with our instructed assumption of equivalence between the economic values of

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95 Page 3 of *Griffiths* (Headnote; similar comments are made at [69] and [106]).

96 Noting that economic benefits are measured net of the costs of collection (including labour, etc).

97 As discussed in paragraph 81.

freehold land and exclusive use native title rights[98], no additional margin should be included in the valuation of the loss suffered for exclusive use native title rights.

NTA valuation framework

131 The NTA sets out some key principles for determining the compensation payable for an act that impairs native title rights, many of which are essentially consistent with the usual conceptual framework set out above. In particular:

(a) s51(1) of the NTA provides that, subject to s51(3), the entitlement to compensation is an entitlement on just terms to compensate the native title rights holders for any loss, diminution, impairment or other effect[99] of the act on their native title rights and interests. That is, compensation must equal the economic losses suffered

(b) s51(3) of the NTA provides that (where the impairment is not the compulsory acquisition of native title rights) if the similar compensable interest test is satisfied (that is[100], there is other legislation which would provide compensation to freehold land owners for the act), then the compensation must be calculated by applying any principles and criteria for determining compensation under that legislation (whether or not on just terms)

(c) s44H of the NTA provides that there is no compensation to native title rights holders for any activities under a lease (or licence, permit or authority) which infringes on native title rights, but rather that the compensation for granting the lease can include allowance for the effects of the activities that will occur under that lease. It naturally follows from this (and the requirement under s49(a) of the NTA that compensation is only payable once for acts that are essentially the same) that the compensation value should be set as at the grant of the lease for the future effects arising from the grant

(d) s51A of the NTA provides that the compensation for compulsory acquisition (extinguishment) of native title rights cannot exceed the freehold market value for that land[101].

This section also appears to us to have been interpreted by the courts (e.g. in *Griffiths*) as setting freehold land value as the cap on the compensation for the economic losses incurred[102].

132 In the case of the grant of mining tenements to FMG, the relevant legislation is the Mining Act, which provides for compensation to freehold land owners when a mining tenement is granted, so that the similar compensable interest test is met.

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98 Paragraph 4.2 of the letter from Allen & Overy dated 20 February 2024.

99 In this report we use the term “impairment” generically to cover “loss, diminution, impairment or other effect”.

100 As set out in s240 of the NTA.

101 Section 51A(2) of the NTA provides that s51A has effect subject to s53 (which deals with the need for “just terms” compensation).

102 With non-economic or cultural losses being assessed separately.

Mining Act

133 As noted above, s240 of the NTA provides that where compensation would be payable under another law to the owner of freehold land for the act (such as the grant of a mining tenement) infringing on native title rights, then the "*similar compensable interest test*" is satisfied. The Mining Act provides for compensation to the owner of freehold land for losses arising from the grant of a mining tenement. Hence it is necessary to apply the principles and criteria for determining compensation under the Mining Act (whether on just terms or not) when determining the compensation due under the NTA (other than for extinguishment of native title rights).

134 In this context, we note that in most cases the grant of a mining tenement does not extinguish native title rights, but rather suppresses them (to at least some extent) for the areas affected during the period of the interruption i.e. it is not all of the land for all of the time. This is analogous to the situation for a freehold land owner, who retains their legal title to the land, but is restricted in its use of the land during the interruption period arising from a mining tenement.

135 The Mining Act s123(4) sets out several sources of compensable loss:

"the amount payable under subsection (2) to which an owner or occupier may be found to be entitled may include compensation for

(a) being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land; and

(b) damage to the land or any part of the land; and

(c) severance of the land or any part of the land from other land of, or used by, that person; and

(d) any loss or restriction of a right of way or other easement or right; and

(e) the loss of, or damage to, improvements; and

(f) social disruption; and

(g) in the case of private land that is land under cultivation, any substantial loss of earnings, delay, loss of time, reasonable legal or other costs of negotiation, disruption to agricultural activities, disturbance of the balance of the agricultural holding, the failure on the part of a person concerned in the mining to observe the same laws or requirements in relation to that land as regards the spread of weeds, pests, disease, fire or erosion, or as to soil conservation practices, as are observed by the owner or occupier of that land; and

(h) any reasonable expense properly arising from the need to reduce or control the damage resulting or arising from the mining."

136 Section 123(5) of the Mining Act adds compensation for damage done to nearby land and s123(6) adds compensation for damage to the surface of the land (in or near the mining lease) due to mining operations[103].

137 It is appropriate to note that that s123(1) of the Mining Act explicitly **excludes** compensation:

(a) for permitting entry to any land for mining purposes

(b) in respect of the value of any mineral in, on or under the surface of any land

(c) by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral.

138 It would normally be the case that the miner will be required to rehabilitate the surface of the land to a condition equivalent to its state prior to the mining[104]. In practice, from an economic perspective the rehabilitation process may even result in the land being in a better condition (e.g. due to the existence of road access, etc)[105]. In circumstances where there is no permanent economic damage to the land, the main compensable loss for most freehold land owners would be under s123(4)(a), namely for the loss of use of the land over the period of the interruption.

139 However, some changes may have a more permanent effect on native title economic usage. For example, a mine pit may permanently alter the landscape, which might materially affect native title economic usage for a longer time period.

140 Applying the Mining Act's principles and criteria for determining compensation to the situation of native title rights impaired by the grant of a mining tenement, the same considerations as for freehold land would apply, so that the economic loss compensation would be equal to the present value of the economic losses to the native title rights holders arising from their loss of use of the areas affected during the periods when the interruption occurred, plus the value (if any) of any subsequent economic losses arising from any permanent impairment to the land (despite rehabilitation)[106].

141 Clearly, losing the use of land for a finite, and reasonably limited period of time, has less impact (and hence has lower compensation) than a permanent loss.

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103 Which might include subsidence or similar effects.

104 So that there is no permanent damage to the surface, though its shape may change, e.g. where there was previously a hill the land may now be flat. Furthermore, it is reasonable to expect that fauna, lizards, insects etc will follow the flora.

105 Roads improve access for all economic purposes, including the economic usage value arising from native title rights. Other improvements could occur, for example, reinstated flora might be more drought resistant or have other improved genetic qualities. We are not aware of any offset to the compensation under the Mining Act to reflect potential betterment of the land during the mining period. Although, under any reasonable view of fairness an offset would be appropriate in some cases, we have not quantified the possibility of an adjustment for betterment in this case.

106 In our opinion, given the rehabilitation requirements on miners, it is highly unlikely there will be any material economic losses arising from permanent impairment to the land, so we have not considered this further.

142 The expected economic losses suffered due to deprivation of native title rights for a period of time would be a factual matter, both as to expected value each year and as to expected period of time. This is discussed further in paragraphs 172-182.

143 The economic loss suffered for temporary suppression of non-exclusive use native title rights is a lot less than for temporary suppression of exclusive use native title rights.[107]

Griffiths decision

144 In addition to the NTA itself, there have been some decisions on the compensation for the loss of native title rights. *Griffiths* considered this issue in the context of complete loss of native title rights (for both exclusive and non-exclusive rights).

145 In *Griffiths*, the High Court approved[108] a bifurcated approach to the assessment of just compensation:

(a) determine the economic value of the native title rights and interests that had been extinguished

(b) estimate the additional, non-economic or cultural loss occasioned by the consequent diminution of the claim group's connection to country.

146 As noted above, you have separately asked (in Question 3 of the letter of instruction) about the assessment of the non-economic or cultural loss associated with the loss of (or impairment to) native title rights. Accordingly, in response to Questions 1 and 2, our scope is limited to the assessment of the economic value component.

147 The economic value of an infringement of native title rights was summarised in *Griffiths*[109] as being:

(a) the sum which a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to obtain the latter's assent to that infringement; or, to put it another way

(b) what the claim group could fairly and justly have demanded for their assent to that infringement[110].

148 *Griffiths* described this as being an adapted Spencer test, which is the normal valuation framework for assessing the market value of an asset (as noted in paragraph 5 above). *Griffiths* notes[111] that this framework is applicable, even in circumstances where the actual

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107 In simple terms, what the non-exclusive native title rights holders are deprived of is much less.

108 *Griffiths* at [84].

109 Ibid.

110 In the context of an economic loss assessment it is difficult to see how this could reasonably be materially different from paragraph 147(a). The wording adopted in *Griffiths* implies that the High Court saw these expressions as alternative ways of expressing the same thing.

111 *Griffiths* at [85].

claim group would not have been at all interested in selling their native title rights and interests[112].

149 In context, the alternative formulation above (based on the claim group's fair and just price of assent) in respect of economic losses suffered must be assessed **excluding** the amount associated with the fair and just compensation for the claim group's non-economic or cultural loss (such as loss of connection to country), since that is a separate and additional component of compensation under the bifurcated approach.

150 Under the *Griffiths* framework the economic compensation amount that a claim group could fairly and justly demand for their assent to an infringement is the present value of the economic losses that they will suffer due to the infringement. In line with the economic loss framework, this present value of loss suffered is also the amount that a notional willing but not anxious buyer would be prepared to pay for assent to the infringement.

151 We would note that it is not appropriate to include the value of minerals in or on the ground for two reasons:

(a) the value of minerals cannot be included in determining compensation under the principles and criteria of the Mining Act

(b) the native title rights do not include any right to minerals, so they cannot be part of the loss suffered.

152 In *Griffiths*[113], s51A of the NTA is interpreted as equating the economic value of full exclusive native title to the economic value of a freehold interest in that land. This equivalence is not a necessary outworking of the normal conceptual framework[114]. However, this decision by the High Court has to inform valuation work when assessing compensation for complete extinguishment of exclusive native title rights. We have been instructed[115] that, for conformity with *Griffiths*, we should assume that for the purpose of calculating economic loss under the NTA, exclusive use native title rights are equivalent to freehold land ownership[116].

153 Furthermore, *Griffiths* also sets the compensation for extinguishment of non-exclusive native title rights (on the facts of that case) at 50% of freehold market value. We note that the findings of the Court[117] state that 50% of freehold was a cap on the value of non-exclusive native title rights in this case, since the judgement states:

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112 Noting that such rights by their nature are not in fact saleable. An agreed value does not mean that a sale has to actually occur.

113 For instance, at [51] and [90].

114 As discussed further in paragraph 207.

115 Paragraph 4.2 of the letter from Allen & Overy dated 20 February 2024.

116 This ensures, for instance, that the value associated with a temporary suppression of excusive use native title rights will converge on the freehold market value as the period of suppression lengthens towards a perpetuity. It also naturally follows that the temporary suppression of exclusive use native title rights will give rise to the same compensation as for the corresponding temporary suppression / deprival of freehold rights (both absolutely and as a percentage of freehold market value).

117 *Griffiths* at page 3 (Headnote; similar comments are made at [69] and [106]).

> *"the native title rights here were essentially usufructuary, ceremonial and non-exclusive, and were devoid of rights of admission, exclusion and commercial exploitation. Expressed as a percentage of freehold value, the value of those non-exclusive native title rights and interests could have been no more than 50 per cent. Since no party contended otherwise, a figure of 50 per cent of the freehold value could be accepted".*

154 *Griffiths* only considered extinguishment of native title rights (exclusive and non-exclusive). In other situations, such as temporary suppression of native title rights due to the grant of a mining tenement, we have proceeded on the basis that the normal conceptual framework (i.e. present value of expected economic losses to the native title rights holders) would apply, subject to our instruction as to the equivalence of exclusive use native title rights and freehold land ownership for NTA loss assessment purposes. We note that the appropriate value for non-exclusive use native title rights under the normal conceptual framework would generally be very low.

155 Accordingly, the economic loss arising from temporary suppression of native title rights should be calculated using the normal conceptual framework for economic loss (subject to the cap of freehold value under s51A of the NTA[118]).

Summary of framework

156 Combining the normal conceptual framework with the requirements of the NTA, as we understand them, and applying them to the assessment of economic loss from the grant of a mining tenement, the elements can be summarised as:

(a) native title rights holders are entitled to compensation for their actual economic losses, as set out in NTA s51(1)

(b) because native title rights will not be extinguished on the grant of a mining tenement and the Mining Act would compensate a freehold land owner for losses arising from the grant of a mining tenement[119], NTA s51(3) requires that the native title rights compensation must be calculated using "*any principles or criteria for determining compensation (whether or not on just terms)*" under the Mining Act

(c) by virtue of NTA s49(a) and s44H, there should be a single compensation amount assessed as at the date of the grant of a mining tenement

(d) the loss is assessed using the principles and criteria for compensation under the Mining Act for the anticipated economic losses of the native title rights holders arising from that grant.

157 The net effect is that the native title rights holders should receive compensation for their expected economic losses arising from the grant of a mining tenement over their native title rights area.

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118 Since the compensation for temporary suppression must logically be less than the compensation for permanent extinguishment (which is capped at freehold market value).

119 Hence the "similar compensable interest test" is satisfied.

158 In accordance with our instructions, the assessed economic loss compensation for exclusive use native title rights holders will be the same as the compensation for freehold land owners (for a loss of use to the same degree over the same period)[120].

159 The economic loss compensation for non-exclusive native title rights holders will differ due to the differences in their expected losses (arising from the lower economic value of their usage rights).

160 However, because we do not have direct evidence for the actual usage of native title rights, it is necessary to estimate their cash flows using proxies. For exclusive use native title rights (where appropriate to include), our proxy is annual net market rental value for pastoral use, which is the same annual cash flow as freehold land in remote locations such as the claim area[121]. For non-exclusive native title rights, the cash flows are much lower (being a low or nominal proportion of net market rent), in line with the lower economic potential of these restricted rights.

Prior negotiations not reliable indicators

161 As noted earlier in our report (paragraphs 85-89 above), we are aware that negotiations (and agreements) have occurred between mining companies and native title rights holders over compensation for infringement of native title rights, including in relation to the mining tenements which are the source of this claim.

162 In our opinion, such negotiations and agreements are not reliable indicators of market value for the loss suffered by YNAC because:

(a) each negotiation relates to different losses and circumstances (different rights, different infringements, different land, different timing, etc)

(b) there is likely to be an element of "anxiety" on the part of the miner, since delays in commencing mining operations can have large adverse economic consequences, due to the value (to the miner) of the mining rights for the area

(c) native title mining agreements are likely to include an element of "public relations" for the mining company

(d) many of these negotiations occurred prior to mining, so there would have been some sharing of mining risk with the native title rights holders (e.g. if the project did not proceed, any payment based on a royalty would have no cost)

(e) the native title rights of the Yindjibarndi People do not include any rights in relation to minerals[122], hence compensation based on the value of minerals extracted cannot in any way be related to their losses incurred due to the infringements of their rights

(f) there is little or no information publicly available to assess the nature or value of the rights for the other claim groups and the impact of the relevant mining tenements on

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120 The compensation for temporary suppression of exclusive native title rights will be less than the compensation for full permanent loss (which would be freehold land market value), but the proportion of freehold land market value will be the same for exclusive native title rights holders as for freehold land owners suffering the same loss of usage.

121 As discussed in paragraph 75(c), market rents will be higher than the pastoral lease fees charged by the government, which is evidenced by pastoral leases trading for substantial values.

122 As noted in paragraph 93(b).

those rights (and hence to assess the losses suffered) as compared to the rights and impacts in this case.

163 The anxiety of miners to advance their project with minimal delay will[123] encourage them to agree to payments substantially in excess of the value of the actual loss suffered by a claim group. In effect, this involves sharing some of the economic benefit from the delays avoided by making the agreement. However, this potential value to the miner from avoiding delays is eliminated when an agreement is **not** made (and delays are fully incurred). In this circumstance, the compensation should logically be only for the loss actually suffered by the claim group due to the infringement of their rights (i.e. the loss of use of the land over the relevant periods) and **not** by reference to agreements (or negotiations) made which included a sharing of the benefit of avoided delays in mining.[124]

164 Because of these factors, the results of the actual negotiations and agreements have included elements (related for instance to the value of minerals on or in the ground, which is specifically excluded from being compensable under the Mining Act) that do not properly form part of the compensable value of the native title rights[125].

165 To illustrate the potential miner's "anxiety" over delays, assume a situation where the mining operation will invest $1 million immediately in infrastructure and other mining plant and equipment to obtain $1.5 million of present value of cash flows at a discount rate of 10% per annum[126]. The net value of the mining operation is therefore some $0.5 million (being the net of $1.5 million present value less $1 million cost). But if the start will be delayed a year, even if everything else is unchanged, the value today would reduce to some $0.455 million (since the net value will be reduced by discounting for one year, hence $0.5 million net of the discount rate) due to the additional discounting on the cash flows. Accordingly, it is reasonable to expect that if this loss is avoided, mining companies will be prepared to be generous (relative to the loss actually suffered by the rights holders) to avoid having native title rights negotiations becoming the delaying factor in commencing the project.[127]

166 If the price of iron ore changes, this will alter the revenue generated, but will not alter most of the costs. Accordingly, the value of the mining operation could shift substantially due to prices. In the earlier example, if the value of mining operations increased from $1.5 million to $1.8 million due to the present value of the increased price expectations over the mining period, then the value net of required infrastructure cost would increase to some $0.8 million.

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[123] Subject to the consideration that as time passes, the potential delay avoided will reduce.

[124] Put simply, by failing to agree in a timely fashion both the claim group and the miner have missed the opportunity to share in the enhanced value from avoiding delays.

[125] In this context, we note that s223 of the NTA lists out the elements of native title rights (which are entitled to compensation under s51(1)). None of these elements include a right to negotiate with or delay other parties. Accordingly, while it might be possible (at certain points in time) for the rights holders to obtain additional benefits from the eagerness or anxiety of mining companies in negotiations, we understand that these additional benefits are not part of the compensable rights under the NTA. In any event, they are not relevant in this case.

[126] For illustration purposes only. The actual discount rate appropriate to a mining operation will vary due to a variety of factors.

[127] But obviously, if this delay is not avoided, then the economic benefit is lost by the miner and there is none of this benefit to share with the claim group.

In this circumstance the impact of delays would be even larger (increasing the anxiety for the mining company to complete a native title rights deal to avoid a delay).

167 Accordingly, the results of these actual negotiations and agreements are each specific to different factual considerations (both with respect to the miner and to the claim group) and are time sensitive. The agreements also include elements that do not properly form part of the compensable value of the native title rights. It follows that these results are not a reliable basis for determining the compensation for infringement of native title rights. Furthermore, to the extent that any such agreements involve a royalty on the value of minerals extracted, this is expressly barred under the principles and criteria for compensation under the Mining Act[128].

168 Put simply, agreements struck by miners for whom every day of delay in commencing mining could cost them large sums (due to, if delays are incurred or avoided, the change in the present value of the minerals extracted) are not indicative of the economic value of the native title rights to that land.

169 In this context, we note that s223 of the NTA lists the elements of native title rights (which are entitled to compensation under s51(1)). None of these elements include a right to negotiate with or delay other parties. Accordingly, while it might be possible (at certain points in time) for the rights holders to obtain additional benefits from the eagerness or anxiety of mining companies in negotiations, we understand that these outcomes are not part of the compensable rights under the NTA.

Application of the framework to assess compensation

170 The compensation calculation for the economic loss arising from the grant of mining leases therefore involves several steps:

(a) assess the expected extent and timing of interruption to native title economic usage

(b) quantify actual loss of cash flow by period

(c) calculate the present value of these economic losses

(d) apply the Mining Act principle of compensating for the value lost

(e) apply a cap of the freehold land value[129]

(f) add interest at Court rates from date of loss to payment date.

171 We consider each of these below.

[128] In particular, s123(1) of the Mining Act.

[129] Applying the *Griffiths* decision setting 50% of freehold land value for the extinguishment of non-exclusive native title rights, logically the compensation for temporary suppression of non-exclusive native title rights should be below 50% of freehold value. In our opinion, the value of the actual economic loss arising from suppression of non-exclusive native title rights will be much lower than this.

Extent and timing of interruption to economic usage

172 The grant of a mining tenement does not result in the whole of the relevant land immediately being subject to activities which would prevent native title economic usage. Instead there is likely to be a significant delay between the grant of a mining tenement and the commencement of substantial operations that would interfere with any type of use. Furthermore, large parts of each tenement might remain undisturbed for a long period of time, while mining occurs elsewhere. It is common for some parts of the tenement area to never actually be disturbed. Finally, the ability to resume native title rights may be restored for certain areas (e.g. due to remediation work, etc) in respect of parts of the tenement, even though mining continues elsewhere.

173 This is analogous to the situation of a freehold land owner which can still use (e.g. farm on) part of the land covered by a mining tenement. The particular area of land impacted would change over time. In such a case, the land owner is only entitled to compensation for the lost use areas for the period of time that usage is actually lost, not for the whole tenement area for the whole of the time. The same considerations apply to determining compensation for native title rights losses.

174 In relation to the YNAC compensation application area, we are advised[130] that the expected life of the Solomon Hub mine is some 33 years from commencement of operations, meaning that mine life will end in approximately 2045.

175 The tenements granted within the YNAC compensation area include exploration licence and prospecting licence areas, where we are instructed[131] that FMG did not conduct mining operations nor related activities, but rather explored the area including by conducting drilling which did not involve enduring ground disturbance. The Affidavit of Mr Stuart Badock dated 10 July 2023 provides evidence of the activities conducted by FMG on its exploration and prospecting licenses within the YNAC native title rights area. Such relatively minor and short duration activities would cause significantly less disruption to native title economic usage of these areas.

176 FMG is required to undertake progressive rehabilitation beginning within 12 months of the commencement of ground-disturbing activities and ending at least five years following mine completion[132].

Quantify loss of cash flow by period

177 To quantify the loss we need to ascertain the expected impact of the impairment on the native title rights holders' cash flow each year, noting that:

(a) the extent of impairment may vary over time (e.g. little or no impact during a period of preparation prior to active mining; gradual expansion of mined area over time, increasing the affected area; progressive rehabilitation as mining finishes in parts of the lease area, reducing the affected area)

[130] Paragraph 4.9 of letter from Allen & Overy dated 20 March 2023.

[131] Paragraph 3.8 of letter from Allen & Overy dated 20 March 2023.

[132] Paragraph 4.10 of letter from Allen & Overy dated 20 March 2023.

(b) quantifying the rights holders' cash flow from native title rights is likely to be difficult. Unlike commercial usage of land, economic usage of native title rights rarely, if ever, would result in observable or measurable cash flows

(c) the cash flow from non-exclusive native title rights will be much smaller than from exclusive use native title rights, since the activities permitted under the non-exclusive native title rights will generate little if any economic benefit and the rights holders cannot prevent others from using the land.

178 The assessment of economic loss arising from the loss of native title rights would also need to consider the nature of the rights, in particular whether the rights were exclusive or non-exclusive.

179 As set out in *Warrie (No 2)*, the native title rights of the Yindjibarndi People in the relevant area include:

(a) in the Exclusive Area "*the right to possession, occupation, use and enjoyment of that area to the exclusion of all others*"[133]

(b) in other parts of the Determination Area their native title rights are (including the right to conduct activities to give effect to them):

"(a) A right to access (including to enter, to travel over and remain);

(b) A right to engage in ritual and ceremony (including to carry out and participate in initiation practices);

(c) A right to camp and to build shelters (including boughsheds, mias and humpies) and to live temporarily thereon as part of camping or for the purpose of building a shelter;

(d) A right to fish from the waters;

(e) A right to collect and forage for bush medicine;

(f) A right to hunt and forage for and take fauna;

(g) A right to forage for and take flora;

(h) A right to take and use resources;

(i) A right to take water for drinking and domestic use;

(j) A right to cook on the land including light a fire for this purpose;

(k) A right to protect and care for sites and objects of significance in the Determination Area (including a right to impart traditional knowledge

[133] We note, however, that under one of our instructed valuation scenarios we are to value the loss suffered on the basis that all of the claim area is only subject to non-exclusive native title rights.

concerning the area, while on the area, and otherwise, to succeeding generations and others).”

180 Both the exclusive use rights and the non-exclusive use rights are subject to qualifications, including that they:

(a) are subject to and exercisable in accordance with:

(i) the laws of the State and the Commonwealth, including the common law, and

(ii) the traditional laws and customs of the Yindjibarndi People

(b) do not confer any rights in relation to minerals as defined in the *Mining Act 1904* (WA) (repealed) and in the *Mining Act 1978* (WA).

181 We expect that it would be a matter of fact, which could be determined by evidence, as to the extent to which (in both impact and time) the grant of the mining tenements has impacted (or is expected to impact) the exercise of the economic (i.e. non-cultural) aspects of these native title rights (i.e. the impact on their annual cash flow).

182 The activities permitted under non-exclusive native title rights are either personal (such as the rights to camp, hunt, forage, etc) or ceremonial (such as the rights to conduct rituals and protect significant sites, etc) and hence would likely produce little or no economic benefit (especially net of the costs of collection, such as labour, etc) and hence would have limited “cash flow”.

183 From an economic perspective, the fact that the non-exclusive rights in this case do not include any rights of commercial exploitation and do not prevent others from accessing the land (and conducting activities, including commercial activities) indicate that these rights would have very limited cash flows.

184 In order to consider the appropriate cash flows (and discount rates) it is relevant to consider the differences between freehold land ownership, exclusive native title rights and non-exclusive native title rights, as illustrated in the table below:

	Freehold land	**Exclusive native title**	**Non-exclusive native title**
Right to undertake commercial activities, including pastoral use	Yes	Yes	No
Right to deny access to others	Yes	Yes	No
Right to conduct limited non-commercial activities	Yes	Yes	Yes
Annual Economic Income rises with inflation	Yes	Yes	Yes
Real growth in Annual Economic Income	Yes	Yes	No[1]
Risks	Commercial risks associated with land ownership	Similar to freehold[2]	Limited risks due to limited activities but subject to illiquidity risk

Note:
1 Ceremonial and traditional usage with no real change over time.
2 Illiquidity risk excluded in accordance with our instructions.

185 For exclusive use native title rights, it is appropriate to assess cash flow[134] using the annual net market rent for pastoral use (i.e. net of ownership costs, such as rates, etc), as the closest available proxy for the annual usage of these rights (as discussed in paragraph 75).

186 For non-exclusive native title rights, it is appropriate to assess cash flow[135] at a low or nominal percentage of annual net market rent for pastoral use, since (from an economic perspective) these rights will have very low value.

187 The impact on the "but for" cash flow (and hence the loss suffered by YNAC) will vary with the extent and timing of the disruption caused by operations on that tenement (for instance, exploration or prospecting licenses will have much less intrusive operations, as noted in paragraph 175).

Allowance for risk

188 Most people are risk-averse, that is, they generally prefer a certain amount over an uncertain amount with the same expected result (for instance getting $50 for certain over 50% chance of getting $100 and 50% chance of getting $0). Because they put less value on the expected results of risky assets, the price they will pay for them is less (and hence the expected returns are higher). This is the fundamental reason that risky assets (such as shares) have higher expected returns than assets with certain cash flows (such as government bonds).

189 For traded assets (such as shares and bonds), it is possible to combine assets into well-diversified portfolios, so that the effects of many risks are greatly diminished because those risks only affect a small part of the overall portfolio. The risks that have diminishing effects on increasingly diversified portfolios (and ultimately an immaterial effect on a market portfolio) are called diversifiable risks.

190 For portfolio investors, the effective risk associated with a particular asset is its contribution to the overall risk of their portfolio, which for practical purposes will be its non-diversifiable risk (since diversifiable risk can be averaged out across the portfolio). These investors will therefore pay prices for assets that put effectively no weight (i.e. no cost) on the diversifiable risks of those assets. Accordingly, it is reasonable to expect that the market price of traded assets (and hence their expected returns) will only reflect their non-diversifiable (market) risk. The capital asset pricing model (CAPM), which is widely used in valuation practice for assessing the appropriate discount rate in a variety of situations, uses this framework.

Calculate present value

191 Because the loss in economic benefits occurs over a number of years, it is necessary to discount[136] the expected cash flow impacts (economic losses) back to the date of the event giving rise to the impairment, using an appropriate discount rate.

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[134] Conceptually, the economic benefits arising from the use of **exclusive** native title rights, i.e. benefits net of associated costs (including costs of collection, etc).

[135] Conceptually, the (limited) economic benefits arising from the use of **non-exclusive** native title rights, i.e. benefits net of associated costs (including costs of collection, such as labour, etc).

[136] That is, reduce subsequent years' losses back to a common measurement date.

192 The appropriate present value discount rate needs to be consistent with the valuation framework.[137] Applying the normal conceptual framework and assessing losses as the actual reductions in native title rights cash flow, then the appropriate discount rate would vary between the non-exclusive and exclusive native title rights.

193 The economic usage under non-exclusive native title rights relates to long term traditional usage of the claim area[138], which will generate very low cash flows. But these future cash flows are not expected to change materially over time (though they would fluctuate due to the effects of weather, fires and other non-market risks) and hence have low non-diversifiable risk. The appropriate discount rate for calculating the present value of the cash flow for these rights is relatively low (close to the risk-free rate plus an illiquidity risk premium).

194 However, given the specific risks of traditional usage (weather, fire, etc), the inability to sell or mortgage the rights and mean reversion expectations for interest rates, it would be appropriate to have a minimum discount rate at each grant date (to prevent understated discount rates in period where bond rates are unusually low[139]).

195 For exclusive use native title rights, it would be appropriate to assess cash flow using the annual net market rent for pastoral use[140], as the closest available proxy. The discount rate needs to reflect the risks for exclusive use native title rights, which would include the risks for the net market rent each year (under pastoral use).

Differences between commercial and native title discount rates

196 It is worth noting that the capital value of commercial use land differs from traditional use under non-exclusive native title rights[141]:

Use	Discount rate	Growth rate
Commercial use	Use annual yield[(1)] plus annual growth rate, so generally higher than the discount rate for traditional use under non-exclusive native title rights	Can achieve real growth (land is limited, but population keeps growing) Possible technological benefits (e.g. better pastures, more drought resistant grains, etc.)
Traditional use under non-exclusive native title rights	Low discount rate (limited non-diversifiable risk) but with illiquidity risk premium	No real growth (continuity of traditional practices)

Note:
1 Annual net market rent divided by asset's capital value.

137 The concept of compound interest is widely understood. That is, $100 lost today is a loss of $100. But $100 lost in a year's time is equivalent to only $91 today, assuming a 10% interest rate (i.e. $91 plus 10% interest of $9 (ignoring rounding for the sake of simplicity) equals $100). Discounting is merely the application of compound interest, but in reverse. That is, a future loss is less of a detriment due to the impact of interest (and inflation).

138 Unlike exclusive use native title rights, which include value associated with non-traditional usage, including pastoral use.

139 For instance, due to government or Reserve Bank of Australia (RBA) intervention in bond markets (such as quantitative easing).

140 As discussed in paragraph 75(c).

141 For exclusive native title rights, a wider range of usage is possible and in accordance with our instructions we assume no material differences in economic value from the usage of freehold land title.

Practical valuation conclusion for discount rates

197 In theory, the appropriate risk discount rate for the economic usage of native title rights should reflect the specific risks of this usage. However, in our opinion, it is not practical to precisely ascertain the parameters to make the appropriate adjustment to the discount rate for risk[142].

198 Accordingly, in the circumstances it is appropriate to use a different risk discount rate corresponding to the risks in each case:

(a) for exclusive use native title rights, the same risk discount rate as for freehold land ownership (in accordance with our equivalence instruction)

(b) for non-exclusive native title rights, the activities relate to traditional usage which has continued unchanged for a long period of time and therefore has a high degree of stability over time (and the annual variations are not market related but rather due to weather, fire, etc), so that the risk discount rate should be low, such as the risk-free rate plus an allowance of illiquidity risk premium (subject to an overall minimum rate).[143]

Exclusive use native title rights

199 Since the cash flow for exclusive use native title rights is the annual net market rent for pastoral use (market rent less ownership costs, such as rates, etc), the discount rate needs to reflect the risks associated with these future amounts. The appropriate risk discount rate is the rate of return appropriate on this asset, which can be calculated as the sum of:

(a) net market rental yield (net market rent / market value of freehold), plus

(b) expected growth rate per annum.

Non-exclusive use native title rights

200 The cash flow for non-exclusive use native title rights derives from the traditional activities permitted by these rights. Because these underlying traditional activities are long standing customs, it is reasonable to expect that there will be minimal change over time[144], with increase in monetary value only due to inflation. Given the relatively low market risk for these activities, the appropriate starting point for discount rates is the long-term Commonwealth Government Bond rate (broadly the risk-free rate, which implicitly includes an allowance for expected inflation), plus a margin for illiquidity risk premium.

Date of loss and interest

201 In accordance with normal valuation principles, the amount of the loss suffered should be assessed at the date of the act (such as the grant of a mining tenement) giving rise to the infringement (even though the impact may not be felt on cash flows for some time). This is consistent with s44H of the NTA, which provides that native title rights holders are not entitled to compensation for activities under a valid lease that adversely affects native title

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[142] Doing so would require considering the specific risks of this economic usage, the asset base of the claim group (to assess dilution of these risks) and also the claim group's risk aversion preferences, etc.

[143] Refer to paragraphs 193-194.

[144] There will be fluctuations each year due to unpredictable effects of weather, fire etc. but these are non-market (diversifiable) risks.

rights, but that the compensation for the granting of that lease may take into account the impact of the activities under the lease.

202 Consistent with normal Court practice, and reaffirmed in *Griffiths*, the value of the loss suffered (evaluated at the date of the act) should be increased by simple interest at Court rates from the date of the act to the payment date.

Application of cap and cross-check for reasonableness

203 It is appropriate to perform a cross-check for reasonableness of the calculated present value of economic losses suffered by the native title rights holders against the contemporaneous freehold market value of the land. The relativity should reflect:

(a) in the case of exclusive use, the instructed equivalence to freehold land title

(b) in the case of non-exclusive native title rights, the differences in economic value between native title rights and commercial usage (both initially and over time)

(c) the extent of disruption to usage, both as to proportion of land affected and timing of impacts

(d) differences in risk and hence appropriate discount rate for commercial usage of freehold land and non-exclusive native title rights activities.

204 We note that, consistent with normal economic principles[145], the economic loss compensation amount at the date of the infringement (before allowing for interest to payment date) cannot exceed freehold land value at the infringement date by virtue of s51A of the NTA.

205 Logically the appropriate compensation amount for temporary suppression, which only involves the loss of part of the future usage, must be lower than for extinguishment which is a total loss of future usage. Even for exclusive use native title rights, the cash flow associated with each year of suppression will only represent a small proportion of the freehold land value (starting at the annual net market rental value[146], and decreasing, in present value terms, for each subsequent year of suppression by a percentage which reflects the difference between the discount rate and the growth rate[147]).

206 For non-exclusive native title rights, the annual cash flows are very much lower than for freehold land ownership (because non-exclusive rights do not have access to nor control the most valuable economic uses of the land, such as pastoral use). Thus, its economic value is only a very small percentage of the annual net market rent. Accordingly, the compensation value for temporary suppression of non-exclusive native title rights is a much lower proportion of freehold land value.

Conclusion re application of framework

207 It should be noted that the present value of exclusive use native title rights under this process will equal the loss as if it were freehold land (converging towards full freehold land market value for loss in perpetuity), in accordance with our equivalence instructions.

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145 In particular, that compensation should not be paid in excess of the value of what was actually lost.

146 That is, current net market rent divided by market value.

147 The annual cash flow increases at the growth rate, but its present value decreases at the discount rate.

208 For non-exclusive native title rights, the value under this process will be very significantly less than 50% of freehold land market value.

209 The main reason for this is that non-exclusive native title economic usage will generally have a very low value each year, as discussed in paragraphs 182-186. The primary reason for this low value is that the activities enabled by non-exclusive native title rights will generate little or no economic benefit. In addition, because the rights are non-exclusive, the holders cannot prevent others from undertaking activities on the land.

210 Applying this assessment framework at first looks complex because many of the key inputs are not directly observable. However, the exact numbers depend on three simple concepts:

(a) amount of annual benefit (cash flow) from using the land

(b) annual increase thereof, and

(c) the applicable discount rate (because a future loss has less adverse impact than a loss today).

211 The theoretically precise assessment of native title usage value would require adequate evidence of the native title usage and the corresponding economic value of this usage. The non-exclusive rights set out in *Warrie (No 2)* (listed in paragraph 179) which would have any economic value[148] appear to relate to personal usage of the land for subsistence (gathering food and water, erecting shelters, etc).

212 It is also important to note that the economic value generated is the value of outputs less the value of inputs – for example it is necessary to deduct the value of the labour used from the value of the output produced in assessing the economic value of utilising any native title rights. Accordingly, the economic value of non-exclusive native title rights, net of the cost of inputs (e.g. labour required to hunt and forage), is very low for remote land.

213 The costs of conducting a rigorous study to determine the precise actual net economic value, and hence to directly calculate the cash flow of non-exclusive native title rights, would likely be excessive relative to the underlying values. However, using proxy measurement techniques is common and accepted practice in many valuation tasks.

214 The precise discount rate to determine the present value of the economic losses due to temporary suppression of native title rights is not directly observable. However, as set out in paragraphs 197-200 above, the appropriate discount rate on a proxy basis should reflect the risks associated with the cash flow and hence should differ between exclusive and non-exclusive native title rights:

(a) non-exclusive native title rights would be close to the risk-free rate[149] plus an illiquidity risk margin

(b) exclusive native title rights would be equivalent to the pastoral land discount rate (broadly, net market rental yield plus growth rate).

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[148] That is, excluding rights clearly related to cultural activities, such as rights (b) and (k) listed in paragraph 179(b).

[149] Possibly subject to adjustment when observed bond rates were suppressed by abnormal factors (such as quantitative easing).

Simplified mathematical examples

215 Some simplified mathematical examples demonstrate how this works.

Exclusive use native title

216 Assume land that has freehold market value of $100,000 and is leased to a pastoralist to produce an annual cash flow (market rent for pastoral use, net of ownership costs such as rates, etc) for the next year of $1,500 (being 1.5% yield on market value), treated as end of year benefit for simplicity.

217 The cash flow is expected to rise at 3.5% per annum thereafter[150], so to $1,552.50 in the second year. Accordingly, the (nominal) freehold market value will also increase at 3.5% per annum, in line with the increased rent.

218 Since the current market value of freehold land must equal the present value of the future cash flows[151], under these steady growth parameters the market value can be expressed as follows:

Market value

$$V = u/(r - g)$$

Where:

V	=	Freehold market value
u	=	First year cash flow (net market rent)
r	=	Discount rate
g	=	Growth rate

219 It follows that in this example the appropriate discount rate for freehold land must be 5% per annum (since otherwise the market value and cash flows would not be consistent). The present value of cash flows in each future year are decreased at this discount rate, often expressed as a present value (PV) factor, e.g. 0.9524 (=1/1.05) for one year ahead, 0.9070 (=1/1.05^2) for two years ahead etc.

220 In the case of temporary suppression the underlying land value continues to increase during the period of suppression. But the whole of the annual cash flows over the period of suppression are lost. Valuing the loss due to suppression therefore involves valuing these lost cash flows, discounted at the appropriate rate. The present value of each cash flow will change by a factor which depends on the difference between the rate of growth (g) and the discount rate (r), so that if there is a gap of 1.5%, then the present value of each year's cash flow will be roughly 1.5% less than the present value of the prior year's cash flow[152].

[150] Commercial use value for land should normally increase slightly more than inflation (change in nominal prices), since land is a limited resource, but less than gross domestic product overall, since the proportion of wealth associated with land has decreased over time. Hence 2.5% inflation plus 1% real growth for aggregate 3.5% growth per annum.

[151] For freehold land, this would include the possibility of sale at market value at some point, but the value is the same as assuming receiving the cash flows in perpetuity (since market value on future sale would equal the value then of the subsequent cash flows from rent or selling).

[152] Technically the factor is (1 + g)/(1 + r), but this is close to 1 – (r – g).

221 In this example, we assume nil loss of use in first year[153], then 100% loss of use in years 2 through 11, then nil loss thereafter as the property is returned.

222 The present value of the lost cash flows under these parameters would be some $13,210 or 13.21% of the starting market value.

223 The value impact of temporary suppression of exclusive native title rights in this example is shown in the table below:

Year	Land value $	Cash flow(1) $	PV factor(2) @ 5% p.a.	Loss of usage %	PV lost cash flows(3) $
0	100,000		1.0000		
1	103,500	1,500.00	0.9524	0	-
2	107,123	1,552.50	0.9070	100	(1,408.16)
3	110,872	1,606.84	0.8638	100	(1,388.05)
4	114,752	1,663.08	0.8227	100	(1,368.22)
5	118,769	1,721.28	0.7835	100	(1,348.67)
6	122,926	1,781.53	0.7462	100	(1,329.40)
7	127,228	1,843.88	0.7107	100	(1,310.41)
8	131,681	1,908.42	0.6768	100	(1,291.69)
9	136,290	1,975.21	0.6446	100	(1,273.24)
10	141,060	2,044.35	0.6139	100	(1,255.05)
11	145,997	2,115.90	0.5847	100	(1,237.12)
12	151,107	2,189.95	0.5568	0	-
				Present value	(13,210.02)
				% initial land value	(13.21%)

Note:
1 Net rent starting at $1500, increasing by 3.5% growth per annum (compounding basis).
2 5% discount rate p.a. as set out in paragraph 218.
3 Cash flow times loss of usage times PV factor.

224 We note that the relatively low ratio of the loss value from 10 years' deprival to the starting freehold market value is due to the relatively small gap between the discount rate (5%) and the growth rate (3.5%), which means that the present value of the usage associated with any particular year is a small proportion of the total (for instance the PV loss associated with year 2 usage is only worth some 1.4% of the starting land value, as shown in the table above, reducing to some 1.2% of the starting land value for year 11 usage).

225 Adding interest for the (say) 15 years from event date (time 0 in this example) to compensation payment date at a simple interest Court rate of (say) 6% per annum would add $13,210.02 x .06 x 15 = $11,889.02. In this case the judgement amount would be $25,099.04 in total.

153 For instance, this might apply if the mining lease is granted but there is no interruption in land use during the first year.

Non-exclusive native title rights

226 Basically the same process applies for assessing the economic loss for non-exclusive native title rights, except that the appropriate parameters for cash flow (use value) is very low per year (much lower than freehold), growth over time (no real growth) and discount rate (usually lower) would differ.

227 Non-exclusive native title rights differ greatly from exclusive native title rights. In particular:

(a) non-exclusive native title rights have much lower cash flow per year. As discussed in paragraph 127 above it is reasonable to adopt a low percentage of annual net rent, and in this example we have used 5%[154], so cash flow is therefore $75 (5% of $1,500) in the first year. This low rate is appropriate because non-exclusive native title rights do not have access to nor control the most valuable economic uses of the land (such as pastoral use)

(b) non-exclusive native title rights are based on largely unchanged traditional practices, so it is appropriate to project this to increase at inflation rate only, hence growth of 2.5% per annum

(c) the present value discount rate should be the risk-free rate (which incorporates inflation expectations) plus the additional risk margin (for illiquidity). For this illustration we have used 5% per annum (being the sum of 4% risk-free rate and 1% illiquidity premium)

(d) the same percentage infringement as for the exclusive native title rights example (starting at nil, increasing to 100% then decreasing to nil again).

228 The present value of the lost use values of non-exclusive native title rights in this example would be some $627, as shown in the table below:

Year	Cash flow(1) $	PV factor(2) @ 5% p.a.	Loss of usage %	PV lost cash flows(3) $
0		1.0000		
1	75.00	0.9524	0	-
2	76.88	0.9070	100	(69.73)
3	78.80	0.8638	100	(68.07)
4	80.77	0.8227	100	(66.45)
5	82.79	0.7835	100	(64.86)
6	84.86	0.7462	100	(63.32)
7	86.98	0.7107	100	(61.81)
8	89.15	0.6768	100	(60.34)
9	91.38	0.6446	100	(58.90)
10	93.66	0.6139	100	(57.50)
11	96.01	0.5847	100	(56.13)
12	98.41	0.5568	0	-
			Present value	(627.12)(4)

154 We note that this is a proxy for the economic benefits from using non-exclusive native title rights, i.e. the benefits net of associated costs (including costs of collection, such as labour costs, etc).

Note:
1 Net benefit starting at $75, increasing by 2.5% inflation per annum (compounding basis).
2 5% discount rate p.a. as set out in paragraph 227(c).
3 Cash flow times loss of usage times PV factor.
4 The non-exclusive title rights economic loss is about 5% of the present value exclusive native title rights loss set out in paragraph 223 (5% x $13,210). The actual value is slightly below this because of the lower growth rate.

229 We note that the impact of the interruption for the non-exclusive native title rights in this example is much less than for the exclusive native title rights example, due to the much lower cash flow each year.

230 Adding interest for the (say) 15 years from event date (time 0 in this example) to compensation payment date at a simple interest Court rate of (say) 6% per annum would add $627.12 x .06 x 15 = $564.41. In this case the judgement amount would be $1,191.53 in total.

Conclusion

231 The underlying valuation concept in compensating for the economic loss arising from an event is to determine the compensation amount for the economic loss actually incurred, that is the difference between:

(a) receiving the future economic benefits that would have arisen but for the event (often referred to as the “but for” scenario); and

(b) receiving the (reduced) future economic benefits that would arise following the event (often referred to as the “actual” scenario).

232 The assessment of the difference in value between the “but for” and the “actual” scenarios should be done using market values[155], where market value is defined as the price that would be negotiated in an open and unrestricted market between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm’s length within a reasonable timeframe (the Spencer test).

233 Combining the normal conceptual framework with the requirements of the NTA, as we understand them, and applying them to the assessment of economic loss from the grant of a mining tenement, the elements can be summarised as:

(a) native title rights holders are entitled to compensation for their actual economic losses, as set out in NTA s51(1)

(b) because native title rights will not be extinguished on the grant of a mining tenement and the Mining Act would compensate a freehold land owner for losses arising from the grant of a mining tenement[156], NTA s51(3) requires that the native title rights compensation must be calculated using “*any principles or criteria for determining compensation (whether or not on just terms)*” under the Mining Act

155 Both for consistency with the framework under *Griffiths*, and because it provides a consistent, objective framework for valuation.

156 Hence the “similar compensable interest test” is satisfied.

(c) by virtue of NTA s49(a) and s44H, there should be a single compensation amount assessed as at the date of the grant of a mining tenement

(d) the loss is assessed using the principles and criteria for compensation under the Mining Act for the anticipated economic losses to the native title rights holders arising from that grant.

234 It is not possible to directly observe traded prices to assess market values of native title rights since these rights are idiosyncratic[157]. Observed negotiations between claim groups and miners are not reliable indicators of the market value of YNAC's native title rights because:

(a) each negotiation relates to different losses and different circumstances (different rights, different infringements, different land, different timing, etc)

(b) there is likely to be an element of "anxiety" on the part of the miner, since delays in commencing mining operations can have large adverse economic consequences, due to the value (to the miner) of the mining rights for the area

(c) native title mining agreements are likely to include an element of "public relations" for the mining company

(d) many of these negotiations occurred prior to mining, so there would have been some sharing of mining risk with the native title rights holders (e.g. if the project did not proceed, any payment based on a royalty would have no cost)

(e) the native title rights of the Yindjibarndi People do not include any rights in relation to minerals[158], hence compensation based on the value of minerals extracted cannot in any way be related to their losses incurred due to the infringements of their rights

(f) there is little or no information publicly available to assess the nature or value of the rights for the other claim groups and the impact of the relevant mining tenements on those rights (and hence to assess the losses suffered) as compared to the rights and impacts in this case.

235 Even if the other negotiations were comparable measures (which they are not because they relate to different rights, different infringements, different land areas, different timing, etc), the anxiety of miners to advance their project with minimal delay will[159] encourage them to agree to payments substantially in excess of the value of the actual loss suffered by a claim group. In effect, this involves the miner sharing some of the economic benefit from the delays avoided by making an agreement. However, this potential value to the miner from avoiding delays is eliminated when an agreement is **not** made (and delays are fully incurred).

236 We are instructed[160] that all the grants of mining tenements which infringed on the YNAC native title rights in this case were made either:

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157 Since each claim group's rights differ and the infringements to those rights will also differ, as well as being over different land.

158 As noted in paragraph 93(b).

159 Subject to the consideration that as times passes, the potential delay avoided will reduce.

160 Paragraph 3.5 of letter from Allen & Overy dated 20 March 2023.

(a) after the good faith negotiations required under the NTA had been completed; or

(b) under sections of the NTA which do not require any negotiations.

237 In this circumstance, the compensation should logically be only for the loss actually suffered by YNAC due to the infringement of its rights (i.e. the loss of use of the land over the relevant periods) and **not** by reference to other agreements (or negotiations) made which may include a sharing of the benefit of avoided delays in mining.[161]

238 Accordingly, since it not possible to directly observe market values for native title rights, it is necessary to assess the value of the economic losses suffered using other methods. As discussed in paragraph 39, market value under the Spencer test equals the present value of future economic benefits.

239 In our opinion, the normal economic compensation framework (including the DCF valuation method) can be applied to the valuation of economic losses due to infringements of native title rights. The key elements are:

(a) properly considering the native title rights themselves, and determining the economic benefits ("cash flows") that would arise each year from those native title rights[162]

(b) determining the expected timing and extent (by period) of the interruptions to native title rights that will arise from the grants of mining tenements

(c) calculating the present value (at the date of the infringement) of the future losses of "cash flows" that would otherwise have been obtainable.

240 This approach, as far as it is practical to do so, directly relates the calculated compensation to the loss of future economic benefits for the native title rights holders arising from the grants of mining tenements. Applying the principles from *Spencer*[163] to setting the parameters of this calculation ensures that the result is the market value of the economic benefits lost.

[161] Put simply, by failing to agree in a timely fashion both the claim group and the miner have missed the opportunity to share in the enhanced value from avoiding delays.

[162] These cash flows will depend on the nature of those rights (including whether exclusive or non-exclusive) and the characteristics of the relevant land.

[163] That is, what would be agreed by knowledgeable, willing but not anxious parties acting at arm's length.

V Question 2

If you are able to calculate the amount of the compensation mentioned in question (1) or give a range for the amount of such compensation, based on your answer to question (1), please calculate that amount or give that range.

Overview

241 Compensation for economic loss due to an event should equal the present value of the future net economic benefits forgone due to that event[164].

242 In the case of the Yindjibarndi People's non-exclusive native title rights, the future economic benefits forgone due to the grant of mining tenements are low because:

(a) the activities enabled by their non-exclusive native title rights are limited

(b) none of the activities enabled by these rights are likely to generate substantial economic benefits (noting that economic benefits are net of costs incurred, including the opportunity cost of labour and other inputs required)

(c) these rights are similar to the non-exclusive native title rights in *Griffiths*, which were described by the High Court as:

"the native title rights here were essentially usufructuary, ceremonial and non-exclusive, and were devoid of rights of admission, exclusion and commercial exploitation"

(d) non-exclusive native title rights do not enable the holders to prevent anyone else from undertaking activities on the land, including both relatively high value activities such as pastoral use and also lower value activities similar to those permitted by the non-exclusive rights. Accordingly, others[165] could extract any significant economic benefits possible from the land.

243 The economic loss compensation for impacts on non-exclusive native title rights needs to reflect the low economic benefits forgone.

244 In respect of exclusive use native title rights, we are instructed (following *Griffiths*) to value the impacts on these rights as though these rights had economic value equivalent to freehold land title.

245 This is equivalent to assuming that the economic benefits (and the risks to those benefits) that can be obtained from freehold land on a highest and best use basis are the same as the economic benefits and risks arising for utilising exclusive use native title rights.

246 However, we do not have any reliable information on the net market rent for the relevant land (in order to calculate the value of the temporary suppression of exclusive use native title

[164] The difference between the present value of the future economic benefits "but for" the event and the present value of the future economic benefits following the event.

[165] Including a pastoral lease holder, if applicable.

rights), nor of the economic benefits arising each year from the non-exclusive native title rights (to value the temporary suppression of these rights).

247 Accordingly, we are not able to reliably estimate the compensation arising from the infringements to native title rights in this case.

248 The percentage of freehold land value associated with the suppression of non-exclusive native title rights would be a very low proportion of the values for exclusive use native title rights, since the economic value of these rights is much lower.

249 If the mining tenement was an exploration or prospecting licence (rather than a mining lease or miscellaneous licence) which had a much lower impact on other land usage, including native title rights, then the appropriate proportion of land value would be much lower again (noting this adjustment for lower impact would apply in respect of both exclusive and non-exclusive native title rights).

VI Question 3

How should any component for non-economic or cultural loss be determined and calculated?

Overview

250 Our understanding, based on *Griffiths*, is that assessing the cultural loss suffered due to compensable acts which impair native title rights involves several steps:

(a) assessment of the nature and extent of the native title rights holders' connection or relationship with the land and waters by their laws and customs

(b) assessment of the effect of the compensable acts on that connection (noting that there may have been prior or subsequent acts which also affected that connection)

(c) determining the amount of compensation which is fair and just in the circumstances.

251 Under the NTA (due to the "similar compensable interest" test), the compensation to native title rights holders for their losses suffered due the grant of a mining tenement needs to be assessed using the principles and criteria for determining compensation under the Mining Act. The circumstances of *Griffiths* did not require consideration of the Mining Act. Accordingly, different considerations should apply (e.g. any cultural loss would need to be claimed under elements of the Mining Act).

252 Furthermore, since the compensation (both economic and non-economic) needs to be determined using the principles and criteria under the Mining Act, it follows that compensation for the non-economic or cultural loss cannot be determined based on the value of the minerals in the ground nor by reference to any royalty on minerals. This would be illogical in any event, since there is no relationship between cultural value (which by its nature is intrinsic to the rights holders) and the minerals which can be extracted from the land.

253 We are not experts in assessing the nature and extent of any cultural loss that may have been suffered by the claim group, so any more specific comments on the process for assessing the compensation for this loss are outside our expertise.

VII Question 4

If you are able to calculate the amount of the compensation mentioned in question (3) or give a range for the amount of such compensation, based on your answer to question (3), please calculate the amount or give the range.

Overview

254 Assessing this compensation is outside our expertise.

VIII Question 5

When the expert report(s) from YNAC are available, please review them and provide your comments, explaining whether you agree or disagree with the analysis in them and whether they affect your opinion or answer to questions (1)-(4).

Overview

255 We have reviewed the reports of Mr Murray Meaton, dated March 2023 (the Meaton Report) and of Mr Brian Miles, dated 16 January 2024 (the Miles Report). Both reports contain several serious errors, some of which are common to both reports.

256 We have reviewed each report separately, even though they have some common errors, to assist the Court in assessing each report and because the Applicant may elect not to rely on one or other of these reports.

Meaton Report

257 There are several serious problems with using the calculations in the Meaton Report to assess the value of compensation payable for the economic losses arising from the infringements to the YNAC native title rights by the grants of mining tenements, the most significant being:

(a) Mr Meaton was apparently[166] not asked to assess the value of compensation payable (i.e. the losses suffered by YNAC due to the infringements on their native title rights), but rather to provide advice on typical royalty rates paid to other claim groups[167] for consent to mining activities

(b) Mr Meaton provided no conceptual nor economic basis for calculating the compensation for YNAC's losses (much less any basis for using the method he adopted)

(c) a royalty-based compensation for the grant of a mining tenement is contrary to the NTA

(d) royalty on minerals is not a reasonable basis of compensation for the economic loss suffered (as it bears no relationship to the economic benefits otherwise obtainable by YNAC, which has no rights over minerals)

(e) prior negotiations are not reliable indicators of the loss suffered by YNAC

(f) even within the Meaton Report's flawed paradigm, the royalty rate adopted is clearly excessive

(g) the value of future losses are not discounted to present value.

258 There are also several other areas where the Meaton Report is deficient, outlined in paragraph 300.

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[166] The Meaton Report does not include a copy of the instructions received, so the questions asked have to be inferred from what is stated in the report itself.

[167] In other areas, with other rights and other infringements and at different times.

Not asked to assess value of compensation

259 Mr Meaton was asked to "*provide advice on the royalty rates that other mining producers pay as a matter of course to Indigenous groups in the Pilbara and elsewhere to obtain their consent to mining activities on land where those Indigenous groups either possess or assert that they possess, native title rights and interests*"[168].

260 Thus Mr Meaton was apparently not asked the actual economic valuation question at issue, namely what is the value of the compensation payable for the economic losses suffered by the Yindjibarndi People due to the infringements on their native title rights from the grants of the FMG mining tenements.

261 Rather, the question put to Mr Meaton appears to effectively presuppose that some sort of royalty-based payment is appropriate both as a measure of loss and as a measure of compensation for the losses suffered by YNAC. In fact, as noted in our report, such a basis for compensation is inconsistent with the NTA, as well as being fundamentally unreasonable (since the YNAC native title rights explicitly exclude any rights to minerals).

262 Mr Meaton's entire report would therefore only be relevant if it were established (which it does not appear it can reasonably be) that a royalty-based payment approach would be appropriate for compensation in this case.

263 Despite this fundamental problem with the Meaton Report, we have nevertheless analysed the other problems in the report, as if Mr Meaton had been asked to assess compensation for the actual losses suffered by YNAC. This is relevant if the Applicant proposes to rely on the Meaton Report to value the compensation due in this case.

No proper basis for using adopted method to calculate compensation

264 The Meaton Report calculates an amount supposedly based on negotiated agreements between miners and other claim groups, without establishing a proper economic basis for using that approach to assess the market value of the compensation due in this case.

265 To use other transactions to set the market value for an asset, a valuer needs to establish that those transactions are truly comparable, and hence are indicators of the value of the asset under consideration. In particular, that those transactions:

(a) have sufficient available information[169] to assess their relevance and appropriateness

(b) involved comparable assets (and the nature of any differences, to make appropriate adjustments)

(c) did not involve other material assets or benefits for the parties (or be able to separately value those other assets or benefits and adjust prices accordingly)

(d) involved parties (on both sides) that were knowledgeable, willing but not anxious

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[168] Paragraph 2 on page 3 of the Meaton Report. Appendix A of the Meaton Report has basically similar language about his instructions. We note that the meaning of the phrase "*as a matter of course*" in this context is not explained.

[169] This information normally needs to be public. In a contested valuation, purporting to rely on private or confidential information creates difficulties, unless this information is made available to all the valuers and to the Court.

(e) occurred under circumstances that were equivalent to those applying at the valuation date (or make appropriate adjustments for the differences)

(f) produced a result which is reasonable, given the nature of the asset[170].

266 Mr Meaton failed to establish any of these conditions for relying on other agreements to determine the value of the economic loss incurred and hence the appropriate economic loss compensation for the infringements to the native title rights of the Yindjibarndi People. In particular:

(a) he asserted knowledge of various agreements but provided no information in his report to allow another expert (or the Court) to assess the details of his process and appropriateness (or otherwise) of the adjustments (if any) he made to allow for the differences between these cases and YNAC's losses

(b) he failed to consider the nature and extent of the economic loss actually suffered by YNAC, which requires considering their native title rights (and the land over which the rights apply) and the infringements to those rights caused by the grants of the mining tenements

(c) he failed to consider the losses suffered by the other claim groups (i.e. the nature of their rights and the infringements to those rights) in different circumstances and to what extent they differed from the losses suffered by YNAC

(d) he failed to consider the extent to which the negotiated agreements would provide additional benefits to the miners, due to avoided delays (which can be very substantial and have large value impact), which were quite separate from the actual losses suffered by each of the other claim groups[171]

(e) he failed to consider the extent to which miners would be anxious to settle due to the effect of delay on the value of their mining projects and therefore the negotiated deals would not meet the Spencer test (which requires that both buyers and sellers be "not anxious")

(f) he failed to consider the reasonableness of his outcomes, in that his approach would assign a value related to the value of minerals contained, even though the YNAC native title rights did not include any right to minerals so their losses cannot in any economically rational sense be related to the value of those minerals. His approach would also assign no value to infringements affecting land which did not have any minerals extracted, without any consideration of the economic benefits that YNAC might otherwise have obtained from their rights over that land. These are inherently unreasonable outcomes.

267 Accordingly, Mr Meaton adopted a calculation method which has no proper basis as an assessment of the economic losses actually incurred nor of the appropriate (market) value of compensation due in this case.

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170 In this case, the losses suffered, so that reasonableness should have regard to the nature of the rights held, the degree and timing of the infringements to those rights, etc.

171 Noting that s223 of the NTA lists out the elements of native title rights (which are entitled to compensation under s51(1)). None of these elements include a right to negotiate with or delay other parties.

Royalty-based compensation for a mining tenement is contrary to NTA

268 Because native title rights will not be extinguished on the grant of a mining tenement and the Mining Act would compensate a freehold land owner for losses arising from the grant of a mining tenement (so there is a "*similar compensable interest*"), s51(3) of the NTA requires that the native title rights compensation must be calculated using the "*principles or criteria for determining compensation*" under the Mining Act.

269 The key principles and criteria for determining compensation under the Mining Act include:

(a) being compensated for (along with other, less common, sources of loss)[172]:

(i) "*being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land*"

(ii) "*damage to the land or any part of the land*"

(b) **not** being compensated for:[173]

(i) "*permitting entry to any land for mining purposes*"

(ii) "*the value of any mineral which is or may be in, on or under the surface of any land*".

270 Indeed, s123(1) of the Mining Act specifically excludes compensation for the grant of a mining lease "*assessed by reference to any rent, royalty or other amount in respect of the mining of the mineral*".

271 Accordingly, the use of a royalty rate (i.e. a payment based on the value of minerals associated with the land) to determine compensation for impairment of native title rights is contrary to the NTA.

Royalty on minerals is not a reasonable basis of compensation for loss suffered

272 Even leaving aside the explicit requirements of the NTA, compensation on the basis of a royalty over minerals under the native title rights area is not a reasonable basis of compensation, because such compensation would not relate in any way to the actual economic loss suffered by the claim group, which is the loss of their ability to derive economic benefits from their rights.

273 The fundamental objective of compensation for a loss is to provide the party suffering the loss with a payment which is equal in value to what has been lost, in this case the reduction in the native title rights holders' ability to exercise their native title rights.

274 As set out in *Warrie (No.2)*, the native title rights of the Yindjibarndi People in the relevant area specifically exclude any right to minerals.

275 The value of exercising their native title rights is therefore necessarily completely unconnected with the value of the minerals that could be mined from the area.

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[172] Mining Act, s123(4).

[173] Mining Act, s123(1).

276 Accordingly, determining compensation based on the value of minerals mined is not appropriate because it does not match the loss suffered, even if it were permitted under the NTA, as it bears no relationship to the economic benefits otherwise obtainable by YNAC, which has no rights over minerals.

Prior negotiations are not reliable indicators

277 In our opinion, even if it were appropriate to consider them at all, prior negotiations and agreements between other miners and other claim groups (in different factual circumstances) are not reliable indicators of the market value for the losses suffered by YNAC (due to infringements of native title rights) because:

(a) those other outcomes were specific to their differing factual circumstances (both for the miners and for the claim groups[174])

(b) there is likely to be an element of "anxiety" on the part of the miner, since delays in commencing mining operations can have large adverse economic consequences on the miner (but not the native title rights holder), due to the value (to the miner) of the mining rights for the area

(c) native title mining agreements are likely to include an element of "public relations" for the mining company.

278 Even if the other negotiations were comparable measures (which they are not because they relate to different rights, different infringements, different land areas, different timing, etc), the anxiety of miners to advance their project with minimal delay will[175] encourage them to agree to payments substantially in excess of the value of the actual loss suffered by a claim group. In effect, this involves the miner sharing some of the time value benefit from the delays avoided by making an agreement. However, this potential value to the miner from avoiding delays is eliminated when an agreement is **not** made (and delays are fully incurred).

279 We are instructed[176] that all the grants of mining tenements which infringed on the YNAC native title rights in this case were made either:

(a) after the good faith negotiations required under the NTA had been completed; or

(b) under sections of the NTA which do not require any negotiations.

280 In this circumstance, the compensation should logically be only for the loss actually suffered by YNAC due to the infringement of their rights (i.e. the loss of use of the land over the relevant periods) and **not** by reference to other agreements (or negotiations) made which may include a sharing of the benefit of avoided delays in mining.[177]

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[174] We note, for instance, that the Meaton Report contains no discussion of the rights and interests held by the other claim groups nor any comparison of the effects of losing those rights relative to YNAC's loss, other than an assertion that only YNAC had any exclusive use native title rights.

[175] Subject to the consideration that as time passes, the potential delay avoided will reduce.

[176] Paragraph 3.5 of letter from Allen & Overy dated 20 March 2023.

[177] Put simply, by failing to agree in a timely fashion both the claim group and the miner have missed the opportunity to share in the enhanced value from avoiding delays.

281 Accordingly, the results of these actual negotiations and agreements (in different factual circumstances) have included elements (related for instance to the value of minerals) that do not properly form part of the compensable value of the native title rights[178], because they:

(a) in no way reflect what was actually lost; and

(b) are specifically excluded from being compensable under the Mining Act.

282 It follows that these results are not a reliable basis for determining the compensation for the infringement of YNAC's native title rights.

Royalty rate adopted is excessive

283 Even if (counterfactually) it were appropriate to determine NTA compensation based on a royalty rate, the rate adopted by Mr Meaton is clearly excessive.

284 There are two reasons why Mr Meaton's royalty rate is excessive:

(a) the rate observed in native title mining agreements is not a reliable indicator of the loss suffered by the claim groups (as discussed above)

(b) Mr Meaton incorrectly further inflated his adopted royalty rate beyond his asserted "observed" rate.

285 Mr Meaton stated that he reviewed certain negotiations between mining companies and native title rights holders (and claimants). He did not provide sufficient information about these negotiations (such as details of each deal and the criteria used as to which deals were included or excluded) to enable an independent review of his assertions about these negotiations, which limits our ability to respond to this part of his report.

Incorrect further overstatement

286 As noted above, royalty-based compensation for losses due to infringements of native title rights is a fundamentally flawed concept, because its very basis of calculation is not related to the losses suffered (since YNAC has no rights over minerals). Furthermore, the value of the losses suffered by YNAC cannot be reliably measured from prior negotiations between other miners and other claim groups, because these agreements relate to different losses[179] and because these agreements were likely to have been with miners anxious to avoid the loss of value arising from delays to mine operations.

287 Even within this fundamentally flawed approach, Mr Meaton adopted a clearly excessive royalty rate.

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[178] In this context, we note that s223 of the NTA lists out the elements of native title rights (which are entitled to compensation under s51(1)). None of these elements include a right to negotiate with or delay other parties. Accordingly, while it might be possible (at certain points in time) for the rights holders to obtain additional benefits from the eagerness or anxiety of mining companies in negotiations, we understand that these additional benefits are not part of the compensable rights under the NTA.

[179] Different rights, different infringements, different land, different timing, etc.

288 Mr Meaton's summary of these agreements is that the average royalty rate (on free on board (FOB) iron ore price[180]) was some 0.5% for large projects (which would include the FMG operations) and some 0.55% for all projects (since small and medium size projects have higher average royalty rates).

289 Mr Meaton then made an (unwarranted) adjustment of doubling the royalty rate from 0.5% to 1.0%, on the basis that YNAC differ from the typical rights holders, since they have exclusive use rights over parts of the mining area and already have a Court determination of their rights, whereas he asserted[181] that the negotiations he reviewed all involved claimants which only had non-exclusive native title rights claims.

290 Our instructions[182] indicate that there is a dispute between the parties as to whether the compensation claim should have regard to the determination of exclusive use in respect of part of the claim area.

291 Even if the exclusive use area should be reflected in the compensation claim at all, Mr Meaton's erroneous adjustment is wrongly calculated. It appears to derive from his incorrect extrapolation of the instructed assumption "*that the value of exclusive native title rights and interests equates to the value of an unencumbered freehold estate whereas the value of non-exclusive native title rights and interests equates to 50% of the value of an unencumbered freehold estate, as happened in the Griffiths case*".

292 This fundamentally misunderstands the impact (or more properly, the non-impact) of the value of the underlying freehold land on the royalty rates agreed. It is quite unreasonable to assert (as is implied by Mr Meaton's approach) that the mining companies agreed to pay higher or lower royalty rates because the underlying land was more or less valuable (in fact the land values would often be so small relative to the value of the mining operation as to be insignificant). Accordingly, whether the native title rights holders had interests worth 50% or 100% of the freehold land value would have no impact on agreed royalty rates.

293 This lack of relationship between agreement terms and underlying land value is another product of the observed native title rights agreements not being primarily based on the loss suffered by the claim groups, but rather being substantially driven by other factors, such as the miner's anxiety to avoid delays.

294 As to the issue of royalties being agreed with claim groups that did not yet have their native title rights determined by the Court, in our opinion, this difference is also unlikely to cause any material difference in negotiated outcomes since:

(a) miners are likely to be driven primarily by avoiding delays to mining and the distinction between claimed and decided rights would not affect the period of delay for the miner caused by the native title process, and hence would not alter the value to the miner of striking a deal that reduces or avoids delays

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180 We note that FOB iron ore prices have a further element of illogicality, since they implicitly include the costs of transport from the actual mine to the port, which can be quite material and vary with mine location and infrastructure. Value at mine gate would remove this extra layer of illogicality.

181 As noted above, insufficient information was provided in the Meaton Report to verify this assertion.

182 As set out in paragraph 2.3 of letter from Allen & Overy dated 20 March 2023.

(b) claim groups would generally have high confidence that their position will eventually be upheld and accordingly it would be unreasonable to expect (as Mr Meaton implicitly assumed) that these claim groups have adopted substantially lower bargaining positions before determination than they would have adopted after successful determination.

295 Even combining the effects (if any) of part of the claim area being subject to exclusive use rights and of having determined rights (rather than claims), it is not reasonable to expect that these differences would lead to any material effect on negotiated royalty rates. It follows that Mr Meaton has no proper basis for his increase from an inappropriate (and fundamentally flawed) 0.5% to an even more inappropriate 1.0% royalty rate, and the proposed 1.0% rate is clearly excessive.

Future losses are not discounted to present value

296 Mr Meaton calculated future royalties under his flawed approach and stated in paragraph 5 of his report that the compensation for the loss relating to future production is "*estimated at $107 million*".

297 However, his compensation calculation is just the total of his (incorrect) projected royalty amounts (as shown in his Table 4 on page 9 of the Meaton Report).

298 This is fundamentally flawed (even if his underlying amounts were properly assessed, which they were not, as noted above), since the proper compensation for the loss of an uncertain future amount should be discounted to reflect both the time until receipt (since money receivable years from now is less valuable than cash now) and also the risks associated with the future amounts (which under Mr Meaton's flawed paradigm would include risks relating to production volumes from the relevant areas and iron ore prices).

299 Mr Meaton's failure to discount the value of future losses results in further overstatement in his calculated value.

Other deficiencies in the Meaton Report

300 In addition to the fundamental flaws and clear errors outlined above, there are several other deficiencies in the Meaton Report:

(a) Mr Meaton relied on a Wood Mackenzie Asset Report from June 2019 to estimate production amounts, but does not appear to have engaged Wood Mackenzie (or any other mining expert) to provide their expertise directly

(b) Mr Meaton relied on iron price forecasts and AUD:USD forecasts from the Office of the Chief Economist, without any consideration of these forecasts nor of any alternative information

(c) Mr Meaton assumed a constant 20% discount to allow for the differences between future FMG realised prices and 62% Fe index prices, without consideration of the factors underlying this discount and how they have varied over time (and are likely to vary in the future)

(d) Mr Meaton assumed that the iron ore extracted from the YNAC area is:

(i) pro-rata with surface area of claim to total mining surface area (without any consideration of variations in mining depth, etc)

(ii) average quality for overall FMG production (without any consideration of variations in grade, etc)

(e) Mr Meaton stated that he had details of over 100 mining agreements of which he selected 39 as the basis for his analysis of royalty agreements. He did not provide any information about the selection process (e.g. why he included manganese mines), nor enough information to allow a proper review of his calculations or other assertions about these agreements

(f) Mr Meaton entirely failed to consider the actual economic losses suffered by YNAC, in that he did not consider at all:

(i) the economic benefits (cash flows) arising from usage of the native title rights for the affected areas over time

(ii) the expected impact on those cash flows due to the grants of the various tenements (extent and timing of impacts, which will vary by tenement).

Conclusion

301 The values calculated by Mr Meaton are fundamentally flawed as a basis for assessing either the economic loss incurred or the compensation due in this case and, in our view, are completely inappropriate for this purpose. The most significant problems with the Meaton Report are that Mr Meaton:

(a) was not asked to, and did not, assess the value of the economic loss incurred nor the appropriate value of compensation due in this case[183]

(b) did not set out any conceptual nor any economic basis for calculating the compensation to YNAC for the losses it suffered (much less any basis for doing so using the method he adopted)

(c) adopted a royalty-based compensation for the grant of a mining tenement, which is contrary to the NTA

(d) used a royalty-based calculation, which is not a reasonable basis for assessing the actual loss suffered by YNAC (as it bears no relationship to the economic benefits otherwise obtainable by YNAC, which has no rights over minerals)

(e) relied on prior mining agreements regarding other native title rights (in different factual circumstances), which are not a reliable basis for assessing the value of the loss suffered by YNAC (due to lack of comparability as well as the inclusion of other elements, including sharing the benefit from avoiding delays in mining[184])

(f) adopted a royalty rate which is clearly excessive, even within his flawed paradigm

(g) failed to discount his value of future losses to present value.

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[183] Rather he was asked to provide advice on the typical royalty rates for negotiated consent from native title rights claim groups for grants of mining tenements, without any consideration as to whether this approach was appropriate for calculating the compensation due in this case.

[184] We note that s223 of the NTA lists out the elements of native title rights (which are entitled to compensation under s51(1)). None of these elements include a right to negotiate with or delay other parties. In any event, it would be completely illogical to include any sharing of benefits from avoiding mining delays as part of the compensation when there has been no agreement reached which would avoid delays.

Miles Report

302 There are several serious errors in the Miles Report, the most significant being:

(a) Mr Miles did not establish a proper basis for the valuation approach he adopted; in particular he purported to rely on other transactions without:

(i) having any reliable information about those transactions[185]

(ii) considering whether those transactions were actually evidence of the value of the losses incurred by YNAC (which they were not)

(b) royalty-based compensation for the grant of a mining tenement is contrary to the NTA

(c) royalty on minerals is not a reasonable basis of compensation for the economic loss suffered by YNAC (as it bears no relationship to the economic benefits otherwise obtainable by YNAC, which has no rights over minerals)

(d) failure to properly assess the losses suffered by YNAC due to the infringements in this case.

303 There are also several other areas where the Miles Report is deficient (even under his flawed paradigm), for instance:

(a) he lacks a proper evidentiary basis for his royalty parameter

(b) his calculations are unreliable.[186]

No proper basis for valuation approach adopted

304 Mr Miles was requested (among other things) to provide his opinion on "*what would be a reasonable and appropriate method (or methods if more than one) for assessing the economic loss component of the compensation payable to the Yindjibarndi People … for the infringement of the Yindjibarndi People's native title rights and interests caused by the grant of the FMG tenements*"[187].

305 However, in his report Mr Miles failed to develop a reasonable or appropriate method for assessing either the economic loss incurred or the appropriate compensation. In particular, he adopted a valuation approach supposedly based on negotiated agreements between other miners and other claim groups (in different factual circumstances) without establishing a proper economic basis for that approach.

306 To use transactions to set the market value for an asset, a valuer needs to establish that those transactions are truly comparable, and hence are indicators of the value of the asset under consideration. In particular, that those transactions:

(a) have sufficient available information to assess their relevance and appropriateness

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[185] For instance, he appears to have based his royalty parameter on a newspaper article.

[186] Due to errors such as his use of constant volume (despite actual variation), adopting annual price parameters not matching actual prices, not discounting to date of infringement, etc.

[187] Paragraph 25(a) of the instruction letter to Mr Miles, Page 61 of Miles Report.

(b) involved comparable assets (and the nature of any differences, to make appropriate adjustments)

(c) did not involve other material assets or benefits for the parties (or be able to separately value those other assets or benefits and adjust prices accordingly)

(d) involved parties (on both sides) that were knowledgeable, willing but not anxious

(e) occurred under circumstances that were equivalent to those applying at the valuation date (or make appropriate adjustments for the differences)

(f) produced a result which is reasonable, given the nature of the asset[188].

307 Mr Miles failed to establish (or even mention in his report) any of these conditions for relying on agreements between other claim groups and other miners (in different factual circumstances) to determine the value of the economic loss incurred and the appropriate economic loss compensation for the infringements to the native title rights of the Yindjibarndi People. In particular:

(a) he apparently based his assessment primarily on a newspaper article about native title mining agreements without any actual knowledge of the transactions involved

(b) he failed to consider the nature and extent of economic loss suffered by YNAC, which requires considering their native title rights (and the land over which their rights apply) and the infringements to those rights caused by the grants of the mining tenements

(c) he failed to consider the losses suffered by the other claim groups (i.e. the nature of their rights and the infringements to those rights) and to what extent these other groups' losses differed from YNAC's losses (which are what he had been asked to value)

(d) he failed to consider the extent to which these other negotiated agreements provided additional benefits to the miners, due to avoided delays (which can be very substantial and have high value impact), which were quite separate from the actual losses suffered by each of the other claim groups[189]

(e) he failed to consider the extent to which the miners would be anxious to settle due to the effect of delay on the value of their mining projects and therefore the negotiated deals would not meet the Spencer test (which requires that both parties be "not anxious")

(f) he failed to consider the reasonableness of his outcomes, in that his approach would assign a value related to the value of minerals contained, even though the YNAC native title rights did not include any right to minerals so their losses cannot in any economically rational sense be related to those minerals. His approach would also assign no value to infringements affecting land which did not have any minerals extracted, without any consideration of the economic benefits that YNAC might otherwise have obtained from their rights over that land. These are inherently unreasonable outcomes, which should have made Mr Miles reconsider his approach.

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188 In this case, the losses suffered, so that reasonableness should have regard to the nature of the rights held, the degree and timing of the infringements to those rights, etc.

189 Noting that s223 of the NTA lists out the elements of native title rights (which are entitled to compensation under s51(1)). None of these elements include a right to negotiate with or delay other parties.

308 Accordingly, Mr Miles adopted a valuation approach which has no proper basis.

Royalty-based compensation for a mining tenement is contrary to NTA

309 Because native title rights will not be extinguished on the grant of a mining tenement and the Mining Act would compensate a freehold land owner for losses arising from the grant of a mining tenement (so there is a "*similar compensable interest*"), s51(3) of the NTA requires that the native title rights compensation must be calculated using the "*principles or criteria for determining compensation*" under the Mining Act.

310 The key principles and criteria for determining compensation under the Mining Act include:

(a) being compensated for (along with other, less common, sources of loss)[190]:

(i) "*being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land*"

(ii) "*damage to the land or any part of the land*"

(b) **not** being compensated for:[191]

(i) "*permitting entry to any land for mining purposes*"

(ii) "*the value of any mineral which is or may be in, on or under the surface of any land*".

311 Indeed, s123(1) of the Mining Act specifically excludes compensation for the grant of a mining lease "*assessed by reference to any rent, royalty or other amount in respect of the mining of the mineral*".

312 Accordingly, the use of a royalty rate (i.e. a payment based on the value of minerals associated with the land) to determine compensation for impairment of native title rights is contrary to the NTA.

Royalty on minerals is not a reasonable basis of compensation for loss suffered

313 Even leaving aside the explicit requirements of the NTA, compensation on the basis of a royalty over minerals under the native title rights area is not a reasonable basis of compensation, because such compensation would not relate in any way to the actual economic loss suffered by the claimants, which is the loss of their ability to derive economic benefits from their rights.

314 The fundamental objective of compensation for a loss is to provide the party suffering the loss with a payment which is equal in value to what has been actually lost, in this case the reduction in the native title rights holders' ability to exercise their rights.

315 As set out in *Warrie (No.2)*, the native title rights of the Yindjibarndi People in the relevant area specifically exclude any right to minerals.

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[190] Mining Act, s123(4).

[191] Mining Act, s123(1).

316 The value of exercising their native title rights is therefore necessarily completely unconnected with the value of the minerals that could be mined from the area.

317 Accordingly, determining compensation based on the value of minerals mined is not appropriate because it does not match the loss suffered, even if it were permitted under the NTA, as it bears no relationship to the economic benefits otherwise obtainable by YNAC, which has no rights over minerals.

Mr Miles' "Royalty Evidence"

318 Mr Miles set out in pages 34 to 36 of the Miles Report some material which he labelled as "Royalty Evidence". For reasons set out above, a royalty-based compensation is neither permitted under the NTA nor reasonable as a basis for assessing the economic losses suffered by YNAC (which has no rights to minerals), so that any royalty information is fundamentally irrelevant to assessing the appropriate compensation in this case. Nevertheless for completeness, we have considered the information put forward by Mr Miles.

319 We note that the information set out by Mr Miles:

(a) is of uncertain reliability, since Mr Miles noted[192] that he had "*not been able to sight any of the royalty agreements and I have had to rely on reputable media reports/interviews and references made in other public documents which are cited in this report*"

(b) is mostly unrelated to this case or indeed to any native title rights case, in that his first five examples relate to agreements between a miner which owned rights over the relevant minerals and another miner which wanted to obtain those rights. This is fundamentally different from a situation where one party (such as YNAC) has no rights over the minerals involved

(c) includes only two native title rights examples, which are:

(i) not reliable as measures of compensation for losses suffered by YNAC (different rights, different infringements, different land, different timing, etc as well as being likely to include effects of miner anxiety, as previously discussed)

(ii) for rates well below the royalty rate proposed by Mr Miles in this case

(d) includes comments by Mr Miles for which he put forward no basis[193], in particular[194]: "*Overall a higher royalty I believe would be appropriate for the subject lands which are more highly impacted in land destroyed and with respect to, heritage and cultural aspects*".

320 In our opinion, none of Mr Miles' so-called "royalty evidence" is useful to assessing the compensation payable to YNAC for the infringements to their native title rights.

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192 Paragraph 81 on Page 36 of Miles Report.

193 There is no analysis of the rights and infringements in each case to support Mr Miles' assertions, nor did Mr Miles set out his expertise to opine on heritage and cultural aspects.

194 Comparison column on Page 35 of Miles Report.

Failure to properly consider the loss suffered

321 Mr Miles did not consider the loss actually suffered due to the infringement of the YNAC native title rights. Rather, he made assertions[195] which are either incorrect or unsupported by evidence, namely:

(a) that the highest and best use of the Determination Area is as the traditional country of the Yindjibarndi People[196]

(b) that the best available measure of the value of the native title rights and interests is what other native title rights holders have agreed to accept in other negotiations concerning the impact of mining

(c) that the most appropriate method for valuation of the economic loss component of compensation payable to the Yindjibarndi People is the utilisation of an annual royalty.

322 All of these incorrect assertions appear to flow from a basic failure to consider the economic value of the native title rights to the Yindjibarndi People that were actually lost.

Highest and best use

323 Mr Miles defined "highest and best use" as "*the use of an asset that maximises its potential and that is physically possible, legally permissible and financially feasible*"[197].

324 The proper assessment of the highest and best use of an asset (including land) to maximise its potential should consider the values that would be generated over time from the possible uses and adopt the use that produces the greatest present value from that use over time. Mr Miles did not conduct any assessment in his report of the value generated from the **use** of the land "*as the traditional country of the Yindjibarndi People*"[198].

325 A manifestly unreasonable outcome from Mr Miles' valuation method is that it attaches no value to the infringement of rights over land from which no minerals will be extracted, irrespective of the extent or nature of the economic benefits arising from actually using the native title rights over that land.

326 Fundamentally, Mr Miles did not actually consider in his report the use of the YNAC native title rights (and hence the economic loss arising from infringements to this use). Instead, he adopted (without proper basis, as discussed above) a valuation approach supposedly based on the negotiated agreements between other claim groups and other miners (in different factual circumstances). He also appears to have "retrofitted" an ill-defined highest and best use basis[199] in order to apply his chosen (and fundamentally flawed) calculation approach.

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[195] Pages 14-15 of the Miles Report.

[196] Mr Miles did not define what this usage would involve.

[197] Miles Report, Definitions, page 51.

[198] Instead, he ignored use of the land entirely and only considered payments under other agreements relating to different rights, different infringements and different land.

[199] Mr Miles' only apparent assessment of the use of the land "*as the traditional country of the Yindjibarndi People*" involves consideration of the terms on which different claim groups agreed to different infringements of their different rights at different times and under different circumstances.

327 Accordingly, his opinion that the highest and best use of the Determination Area is as the traditional country of the Yindjibarndi People is without any foundation in his report.

Using prior agreements with mining companies as a measure of value

328 As noted above, Mr Miles did not establish any proper basis for the use of negotiated agreements (made in different circumstances) as indicators of the market value for the losses incurred by YNAC. Even if it were appropriate to consider them at all, prior negotiations and agreements between mining companies and native title rights holders over compensation for infringements are not reliable indicators of the value of the loss suffered by YNAC[200] because:

(a) each negotiation relates to different losses and different circumstances (different rights, different infringements, different land, different timing, etc)

(b) there is likely to be an element of "anxiety" on the part of the miner, since delays in commencing mining operations can have large adverse economic consequences, due to the value (to the miner) of the mining rights for the area

(c) native title mining agreements are likely to include an element of "public relations" for the mining company

(d) many of these negotiations occurred prior to mining, so there would have been some sharing of mining risk with the native title rights holders (e.g. if the project did not proceed, any payment based on a royalty would have no cost)

(e) the native title rights of the Yindjibarndi People do not include any rights in relation to minerals[201], hence compensation based on the value of minerals extracted cannot in any way be related to their losses incurred due to the infringements of their native title rights

(f) there is no information referred to by Mr Miles to assess the nature of the rights and the impact of the mining operations on those rights (and hence the losses suffered) for the other claim groups as compared to the rights and infringements in this case.

329 Even if the other negotiations were comparable measures (which they are not because they relate to different rights, different infringements, different land, different timing, etc), the anxiety of miners to advance their project with minimal delay will[202] encourage them to agree to payments substantially in excess of the value of the actual loss suffered by a claim group. In effect, this involves the miner sharing some of the time value benefit from the delays avoided by making an agreement. However, this potential value to the miner from avoiding delays is eliminated when an agreement is **not** made (and delays are fully incurred).

330 We are instructed[203] that all the grants of mining tenements which infringed on the YNAC native title rights in this case were made either:

(a) after the good faith negotiations required under the NTA had been completed; or

(b) under sections of the NTA which do not require any negotiations.

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200 As discussed in paragraphs 85-89 above.

201 As noted in paragraph 93(b). Nor are we aware of any native title rights that include mineral rights.

202 Subject to the consideration that as time passes, the potential delay avoided will reduce.

203 Paragraph 3.5 of letter from Allen & Overy dated 20 March 2023.

331 In this circumstance, the compensation should logically be only for the loss actually suffered by YNAC due to the infringement of their rights (i.e. the loss of use of the land over the relevant periods) and **not** by reference to other agreements (or negotiations) made which may include a sharing of the benefit of avoided delays in mining.[204]

332 Because of these factors, the results of the actual negotiations and agreements have included elements (related for instance to the value of minerals on or in the ground, which is specifically excluded from being compensable under the Mining Act) that do not properly form part of the compensable value for the loss of the economic benefits that flow from the native title rights[205].

333 It follows that these results are not a reliable basis for determining the compensation for the infringements of their native title rights suffered by YNAC.

334 Furthermore, from both an economic perspective and a fairness and reasonableness perspective, payments that might reasonably be made to share with a native title rights claim group the benefits of an earlier start to mining are no longer fair and reasonable payments when the project has already suffered the adverse impact of the full delays arising from an agreement **not** being reached.

335 Put simply, the pool of extra value available (to both parties) diminishes the more a project is delayed. We emphasise that any such sharing of acceleration benefits in no way implies that these payments are equal to the loss of native title rights economic benefits suffered by the claim groups – rather that a large part of each negotiated agreement may be an extra payment (above and beyond the amount due as compensation for the infringement of native title rights) as an incentive for early agreement[206].

Equating total compensation with economic loss

336 Even if (counterfactually) Mr Miles' approach were valid, he made a further clear error in stating that the value of economic loss equals his estimated royalty rate. Since the royalty payments in the other cases represent settlements for all losses (economic and cultural), setting the YNAC economic loss to the full estimated royalty implies that all the other claim groups had no non-economic or cultural losses associated with the infringements of their rights.

Other errors

337 Even if his approach were valid (which it is not), the Miles Report lacks a proper basis for his royalty parameters. Mr Miles appears to have relied on a newspaper article for his estimate of typical royalty payments under native title rights agreements. This is not a reasonable method

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204 Put simply, by failing to agree in a timely fashion both the claim group and the miner have missed the opportunity to share in the enhanced value from avoiding delays.

205 In this context, we note that s223 of the NTA lists out the elements of native title rights (which are entitled to compensation under s51(1)). None of these elements include a right to negotiate with or delay other parties. Accordingly, while it might be possible (at certain points in time) for the rights holders to obtain additional benefits from the eagerness or anxiety of mining companies in negotiations, we understand that these additional benefits are not part of the compensable rights under the NTA.

206 The difference in the dollar value of payments to different claim groups arising based on the value of minerals (if any) in their determination areas cannot reasonably be explained by differences in the value of each claim group's economic losses nor is it plausible that their non-economic or cultural losses would vary pro-rata to mineral value.

for setting such a significant parameter. In particular, it means that the Miles Report lacks any information about the comparability of the relevant rights or the mining infringements on those rights in the various native title mining agreements to the situation for the YNAC rights and the FMG mining impacts on those rights.

338 Mr Miles' calculations of royalty amounts (even within his flawed paradigm and unsupported 0.55% rate) are unreliable because:

(a) he adopted a constant iron ore volume per annum, whereas actual volumes fluctuated

(b) he adopted value per tonne for each year which differs from observed averages in the data he used (e.g. for 2014 he adopted $110, whereas the actual unit values for the various volumes reported for that year (as set out in the Miles Report) were $61.46, $75.53, $56.79 and $71.95[207])

(c) his methodology implicitly assumes no quality differences between ore mined from the Determination Area versus other mining by FMG

(d) he increased his calculated royalty amounts by 2.5% per annum compounded to 2022, rather than calculating the expected present value at the date of infringement.

Conclusion

339 The compensation values calculated by Mr Miles are fundamentally flawed and, in our view, completely inappropriate. The most significant errors are that Mr Miles:

(a) did not establish a proper basis for the valuation approach adopted; in particular he purported to rely on other transactions without:

(i) having any reliable information about those transactions[208]

(ii) considering whether those transactions were actually evidence of the value of the losses incurred by YNAC (which they were not)

(b) adopted a royalty-based compensation for the grant of a mining tenement, which is contrary to the NTA

(c) used a royalty-based calculation, which is not a reasonable basis for assessing the actual loss suffered by YNAC (as it bears no relationship to the economic benefits otherwise obtainable by YNAC, which has no rights over minerals)

(d) relied on (limited) information about prior mining agreements regarding native title rights, which are not a reliable basis to estimate the value of loss suffered by YNAC (due to lack of comparability as well as the inclusion of other elements, including sharing the benefit from avoiding delays in mining)

(e) failed to properly consider (indeed to consider at all) the actual losses suffered by YNAC due to the infringements.

340 Mr Miles also made other errors in his calculations (such as adopting incorrect iron ore prices and failing to calculate the present values of the losses incurred). However, his fundamental errors make his calculations irrelevant to assessing compensation in this case.

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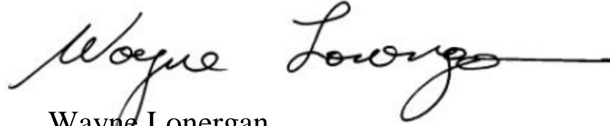
[207] Valuation Calculations table on page 43 of the Miles Report.

[208] For instance, he appears to have based his royalty parameter on a newspaper article.

IX Other matters

341 We have made all the enquiries that we believe are desirable and appropriate and no matters of significance that we regard as relevant have, to our knowledge, been withheld from the Court.

Yours faithfully



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Qualifications and Membership of Professional Bodies

Bachelor of Science in Mathematics | BSc (Hons)
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Fellow of the Financial Services Institute of Australia | F Fin

Professional Background

Since November 2002 Martin Hall has been a Director at Lonergan Edwards & Associates Limited, a firm that specialises in valuations, consequential loss assessments and associated finance advice. Martin has performed numerous valuations of both private and public unlisted companies covering a wide range of industries, as well as consequential loss assessments and transfer pricing assessments.

Martin has previously worked as a Senior Manager for Ernst & Young, in both Australia and the USA, with responsibility for a range of projects.

Martin Hall has also had over 15 years of other experience primarily in the life assurance and general insurance industry, as well as superannuation consulting.

Martin Hall specialises in the valuation of employee and other options, listed and unlisted shares and financial instruments.

Papers

- Required Rate of Return for Life Insurers, 2nd AFIR Colloquium, Brighton | 1991
- Capital Gains Tax Reserves, Quarterly Journal of Institute of Actuaries of Australia
- Employee Share Options, Still a Valuable Incentive Device, Company Director | April 2005

Appendix A

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Qualifications and Membership of Professional Bodies

Adjunct Professor in the Faculty of Economics and Business, School of Business, The University of Sydney
Bachelor of Economics | B.Ec
Doctor of Science in Economics University of Sydney | D.Sc.Ec (hc)
Life Member of FINSIA | SF Fin
Fellow of the Australian Institute of Company Directors | FAICD
Fellow of the Australian Property Institute | FAPI
Associate Member of the Institute of Arbitrators & Mediators | AIAMA

Professional Background

Wayne Lonergan is a founding director of Lonergan Edwards & Associates, a specialist corporate valuation firm based in Sydney CBD. Prior to its establishment in December 2000, Wayne was a Corporate Finance Partner at Coopers & Lybrand (now PricewaterhouseCoopers) for 23 years, and has had over 46 years experience in Corporate Finance and Valuations.

Wayne has been responsible for numerous assignments for both public and private companies as well as various government departments with particular emphasis on valuations and consequential loss assessments.

Wayne Lonergan is an internationally distinguished practitioner who is widely recognised both within and beyond Australia as a leading expert in the field of corporate and business valuations. In addition to his extensive practical experience of more than 46 years, he has also been a regular influential contributor to professional literature in the area of his expertise, having published the leading valuation text “The Valuation of Businesses, Shares and Other Equity”, his second text “The Valuation of Mining Assets”, co-authored the best-selling book “Valuations for Tax Controversies” as well as over 100 technical papers.

Wayne’s memberships of several national and international accounting policy and standard setting committees are further evidence of the high value placed on his professional advice and expertise. Of particular note are Wayne’s memberships, over many years, of the Companies and Securities Advisory Committee, Australian Accounting Standards Board, International Accounting Standards Sub-committees on Financial Instruments and the International Financial Reporting Interpretations Committee.

He has also held numerous and senior roles in the Securities Institute of Australia including three years as National President and Chairman of numerous sub-committees on capital market related matters. In recognition of Wayne’s outstanding technical contributions and tireless efforts and involvement in the industry, Wayne was awarded the honorary degree of Doctor of Science in Economics from The University of Sydney in May 2008.

Appendix A

Other activities

Companies & Securities Advisory Committee

- Member (Statutory Appointment) | 1989-1998
- Chairman, Accounting Sub-Committee | 1990-1994
- Chairman, Prospectus Law Reform Sub-Committee | 1991-1994
- Member, Steering Committee advising the Attorney General on the introduction of National Securities Legislation in Australia | 1987-1989
- Member, Working Party advising the Attorney General on legislation re director related transactions | 1992

Australian Accounting Standards Board

- Member | 1992-1999

Australian Taxation Office

- Member of Audit Committee | 2006 - 2009

International

- Member, Asian Securities Analysts Federation Executive Committee | 1997-2000
- International Accounting Standards Sub-Committee on Financial Instruments | 1997-2000
- IASB, International Joint Working Group Financial Instruments Sub-Committee | 1997-2000
- The Institute of Chartered Accountants in New Zealand Lecture Tour on Share Valuations | 1993
- Member, AIMR Sub-committee on Financial Instruments | 2001
- Member, International Financial Reporting Interpretations Committee | 2002-2004
- Institute of Valuers & Appraisers Singapore IVAS-IVSC BV Conference 22 Masterclass | 2022

Other positions

- Advisory Director of the Property Services Group (NSW) State Government | 1990
- Member, Consultative Group on Corporate Law Simplification (Federal Attorney General’s Appointment) | 1993-1997
- Member, Mineral Valuations Committee | 1997-2005

The Securities Institute of Australia (now FINSIA)

- President of National Council | 1997-2000
- President of New South Wales Council | 1993-1997
- Vice President of New South Wales Council | 1991-1993
- Vice President of National Council | 1993-1997
- Chairman, Investigating Accounting for Identifiable Intangible Assets | 1989
- Chairman, National Training Committee | 1989-1995
- Chairman, Corporate Practices and Conduct Sub-Committee | 1990
- Chairman, Improved Financial Reporting Sub-Committee | 1990
- Chairman, Derivatives Sub-Committee | 1993-1995
- Chairman, Prospectus Sub-Committee | 1991-1995
- Chairman, Valmin Code Sub-Committee | 1994-1995 &1997-2001
- Member, Insider Trading Committee | 1987 & 1989
- Member, Fast Track Prospectus Committee | 1985

- Member, NSW State Council | 1989-2001
- Member, National Council | 1992-2001
- Member, Accounting Standards Sub-Committee | 1990-2001
- Member, Timing and Frequency of Financial Reporting Sub-Committee | 1991-1994
- Member, Company Reporting Sub-Committee | 2000-2005

The Institute of Chartered Accountants in Australia

- Member, Audit Expectation Gap Sub-Committee | 1992-1993

Academic Appointments

- Tutor in accounting | 1967-1968 | The University of Sydney
- Member, Master Academic Committee | 1998-2001 | Securities Institute of Australia
- Adjunct Professor in the Faculty of Economics and Business, School of Business | 2002 - present | The University of Sydney

Current Publications

- Co-authored with Dr Hung Chu "Valuations for Tax Controversies" | Wolters Kluwer | 2017
- Author "The Valuation of Mining Assets" | Sydney University Press | 2006
- Author "The Valuation of Businesses, Shares & Other Equity" | Allen & Unwin | 2003 | 4th Edition
- Author "Valuation of Property and Tax and Revenue Issues" | The Law Book Company Limited 2000 and 2006

Abacus - A Journal of Accounting, Finance and Business Studies

- Notes of the University of Sydney Pacioli Society, "An Australian Practitioner's Perspective" | Vol. 39 No. 1 | February 2003
- "The Importance of Goodwill" | Vol 45 No. 3 | 2009

ASX Perspective

- "Accounting Illusions - or Differences of Opinion?" | 4th Quarter 2000

AUSIMM

- "Gold Forwards - Is The Party Over?" | May 1996
- "Derivatives and the Gold Industry" | September 1997
- "Traps in Mineral Valuations - Proceed with Care" | May / June 2002

Australian Accountant, The

- "Financial Reporting v Management Reporting" | July 1996
- "ED 72: The Way Forward" | December 1996

Australian Accounting Review

- "Establishing the Fair Value of Consideration Given in an Acquisition" | July 2004
- "Commentary: Discount rates in Disarray: Evidence on Flawed Goodwill Impairment Testing" | December 2009

Australian Family Lawyer

- "Hiding Behind a Clayton's Precedent", co-authored with Julie Planinic | Volume 15, No. 4 | 2002
- "Reducing the Cost of Expert's Reports" | Volume 16, No. 4 | 2003
- "The Numerous Fallacies of ROI" | Volume 18, No. 1 | 2005

- "Rules of Thumb and their Acronym" | Volume 19, No. 1 | 2006
- "Demystifying the Key Man Value Concept", co-authored with Dr Hung Chu | Volume 20 No. 1 | Summer 2007 / 2008

Australian Financial Review, The

- "Balance hard to find in water trade", co-authored with Dr Hung Chu | 8 July 2008

Australian Investor Relations Association

- "Valuations and the Impact of Changes in Accounting Standards | July 2006

Australian Journal of Mining

- "The Native Title Financial Time Bomb" | July 1997
- "Gold forward sales and the valuation of gold mining development projects", co-authored with Dr Hung Chu | March / April 2012

Australian Legal Practice

- "Valuation of Professional Partnerships" | July 1991

Australian and New Zealand Property Journal

- "Measuring the Real Risk of Mezzanine Property Finance", co-authored with Dr Hung Chu | September 2006
- "Valuation of Partly Completed Development Projects under the GST Margin Scheme", co-authored with Dr Hung Chu | June 2007
- "A Conceptual Framework for Determining a Fair and Reasonable Water Infrastructure Access Charge", co-authored with Dr Hung Chu | December 2008
- "The Use of Comparable Sales Approach in the Valuation of Early Stage Mineral Bearing Properties", co-authored with Dr Hung Chu | December 2011
- "The Valuation of a Fractional Interest in a Residential Property", co-authored with Dr Hung Chu | November 2016

Australian Tax Review

- "A Rethink of Goodwill", co-authored with Dr Hung Chu | February 2010
- "The Accommodation Bond Conundrum and the Taxation Treatment of Residential Aged Care Facilities", co-authored with Dr Hung Chu | February 2012

BLEC Books

- "Expert Reports" | February 1990
- "Corporate Law Reform Under the New Scheme" | February 1991
- "Related Party Disclosures: ASRB 1017 Revised - Which Standard to Apply to 30 June Accounts?" | May 1991
- "Prospectus Law Reform" | May 1992
- "Corporate Law Reform - Accounting Standards and Financial Reports" | 1993

Charter

- "Ed 72: The Other Side of the Story" | December 1996
- "The True and Fair Value of Liabilities" | September 1998
- "Marking to Market" | July 2000

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Chartered Accountant

- "Foreign Currency Translations - Some Fundamental Issues Overlooked" | December 1989
- "AASB 1010 and Recoverable Amount Test: Let's Get Serious" | March 1992
- "AASB 1010 and Recoverable Amount Test: A Controversial View" | September 1992

Commercial Law Quarterly

- "The Problem with DORCs (Depreciated Optimised Replacement Costs)", co-authored with Dr Hung Chu | June / August 2009

Company Director

- "Identifiable Intangible Assets" | November 1989
- "Derivatives - Tomorrow's FX Fiasco?" | March 1993
- "Accounting Concepts Statements - What they Mean to You" | April 1993
- "Property Valuations - Big Traps and Big Losses" | May 1993
- "Accounting for Financial Instruments" | June 1993
- "Standard Setting in Perspective" | November 1993
- "Super Voting Shares - Good for Chiefs, Bad for Indians" | February 1994
- "Gaps in Expectations of Accountants" | April 1994
- "The Implications of IFRS for Non-Accountants" | August 2005
- "Goodwill Hunting" | November 2005

CPA Australia 2016 Australian Mining & Energy Conference

- Presentation, "The Value of Mining Assets" | November 2016

Fiji Accountant, The

- "Accounting for Impairment" | November / December 2006

inFinance

- "Fact or Fiction in Mark-to-Market Accounting" | August 2009

Journal of Applied Research in Accounting and Finance

- "AIFRS – A Practitioner's Viewpoint" | 2007
- "Pre and Post Tax Discount Rates and Cash Flows - A Technical Note" | 2009

JASSA / The FINSIA Journal of Applied Finance

- Awarded Securities Institute of Australia prize for most original article published (article on share valuations), 1992 (article on mastheads) | 1996 (article on goodwill) and 2003 (article on accounting standards)
- "Where They Go Wrong: Traps in Share Valuations" | December 1987
- "Independent Expert's Reports" | September 1989
- "The Evaluation of the NCSC Requirements for Experts Reports" | April 1990
- "Intangible Assets: Handle With Care" | June 1990
- "Getting the Truth to Shareholders" | March 1991
- "Experts Need to be Just That" | June 1991
- "Valuing Mastheads - Fact or Fiction?" | June 1992
- "The Asset Valuation Fiasco" | March 1993
- "Derivatives - Friend or Foe?", co-authored with Andrew Thirsk | September 1993

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- “Goodwill and Bad Ideas” | December 1995
- “Fool’s Gold” | April 1996
- “Demutualisation - Prizes and Pitfalls” | Autumn 1997
- “Tomorrow’s Gold, Today’s Profit” | Spring 1997
- “Own it, or owe it?” | Spring 1998
- “Dig a Million, Lose a Million: the truth about FX losses” | Winter 1999
- “Giving Substance to Intangibles”, co-authored with Donald Stokes and Peter Wells | Summer 2000
- “The Disappearing Returns” | Autumn 2001
- “Traps in Mining Valuations” | Autumn 2002
- “Expensing Stock Options: The Way Ahead” | Autumn 2003
- “The Emasculation of Accounting Standard Setting in Australia” | Spring 2003
- “International Accounting Standards Under Pressure”, co-authored with Dr Hung Chu | Winter 2004
- “Foreign Exchange Rates in Australian Mining Company Valuations” | Summer 2004
- “Accounting for Impairment” | Spring 2005
- “The DORC Valuation Model of Regulated Infrastructure Assets” co-authored by Prof. David Johnstone | Winter 2006
- “Private Equity - The Emperor’s New Clothes” | Winter 2007
- “The Valuation Of In-situ Plant and Machinery” | Issue 4 2009
- “Pitfalls in Adjusting Merger Ratios for cash payout” | Issue 3 2013
- “The Value of Total Assets”, co-authored with Dr Hung Chu | Issue 1 2015
- “Problems with using EBITDA-based valuations in capital-intensive industries”, co-authored with Dr Hung Chu | Issue 2 2016

Law Society Journal

- “Takeover & Scheme Documents in Mining Industry Takeovers” | November 1996
- “The True Value of Liabilities in Family Law Cases” | March 1998
- “Shares Issued in Takeover - What Value?” | April 1999
- “Changing Nature of Discount for Minorities” | July 1999
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- “Will Your Service Trust Pass Muster?” | December 2003
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Appendix A

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- "Why discounting works in quarry valuations" | June 2010

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- Lonergan, Stokes and Wells, "The Changing Value Relevance of Net Assets and Earnings" | 2000

Securities Institute of Australia (now FINSIA)

- Author and Lecturer, Diploma Course, "Problem Areas in Valuations" | 1990-1996
- Author and Lecturer, Graduate Diploma Course of Lectures, Mergers & Acquisitions 1990-2007 on "Valuing Target Companies" and "Accounting, Tax and Other Issues in Takeovers"
- Author and Lecturer, Master of Applied Finance and Investment Course, "Valuation of Intangible Assets" | 1999-2007
- Author and Lecturer, Graduate Diploma Course of Lectures, Mergers & Acquisitions on "Valuation Issues in Mergers & Acquisitions" and "Private Treaty Acquisitions and Sales" | 2002
- Lecturer, Master of Applied Finance and Investment Course, Subject: Corporate Financial Management, Topic: Mergers & Acquisitions | 2004-2007
- "The Great Debate" | March 2007

Tax Specialist, The

- "The valuation of cash holdings and its tax implications", co-authored with Dr Hung Chu | August 2012
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Valuer & Land Economist

- "Accounting Requirements and Plant and Machinery Valuations" | February 1995

Appendix B

Letters of instruction

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14 December 2022

Dear Mr Lonergan

WAD 37 of 2022 - Yindjibarndi Ngurra Aboriginal Corporation RNTBC (ICN8721) v The State of Western Australia - Preliminary questions

1. **INTRODUCTION**

1.1 Thank you for agreeing to act as an independent expert on behalf of Fortescue Metals Group and its wholly-owned subsidiaries (together, **FMG**).

1.2 In this letter, we set out some material background to the matter. We also set out questions which we would like you to consider, based on your expertise and the background we provide below.

2. **BACKGROUND**

2.1 In Federal Court of Australia action WAD 37 of 2022, the applicant, Yindjibarndi Ngurra Aboriginal Corporation RNTBC (**YAC**) seeks against the first respondent, the State of Western Australia (**State**), and other respondents (together, **FMG**) compensation under the Native Title Act 1993 (**NTA**) as to the grants of certain mining tenements by the State to FMG (**FMG tenements**).

2.2 YAC's amended points of claim of 5 December 2022 (**PoC**) sets out the basis on which YAC makes its claim for compensation.

2.3 Division 5 of Part 2 of the NTA deals with the determination of compensation for acts affecting native title etc.

2.4 Section 51(1) of the NTA provides that, subject to s 51(3), the entitlement to compensation is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

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2.5 Section 51(2) deals with how compensation may be determined if the act is the compulsory acquisition of native title rights and interests.

2.6 Section 51(3) provides that if the act is not the compulsory acquisition of native title rights and interests and the ***similar compensable interest test*** is satisfied as to the act the Court must (subject to irrelevant exceptions) apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in s 240 of the NTA.

2.7 Section 240 of the NTA provides that the ***similar compensable interest test*** is satisfied as to an act if the native title concerned relates to an onshore place and the compensation would, apart from the NTA, be payable under any law for the act on the assumption that the native title holders instead held ***ordinary title*** to any land or waters concerned and to adjoining land. Section 253 of the NTA provides relevantly that ordinary title means a freehold estate in fee simple in the land.

2.8 Section 123(2) of the *Mining Act 1978* (WA) provides relevantly that the owner and occupier of any land where mining takes place are entitled according to their respective interests to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining. But, s 123(1) of the *Mining Act 1978* provides relevantly that no compensation is payable "in any case" "in respect of the value of any mineral which is or may be in, on or under the surface of any land" (s 123(1)(b)) or "by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral" (s 123(1)(c)). Section 123(4) of the *Mining Act 1978* sets out that the amount payable under s 123(2) may include compensation for a number of itemised matters.

2.9 YAC accepts that s 51(3) of the NTA applies to its compensation claim: PoC [41]. Section 123 of the *Mining Act 1978* is in this context the law mentioned in s 240 of the NTA.

2.10 Section 51A(1) of the NTA relevantly provides that the total compensation payable under Division 5 of Part 2 of the NTA for an act that extinguishes all native title in relation to particular land must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land. Section 51A(2) of the NTA provides that s 51A has effect subject to s 53 (which deals with the need for "just terms" compensation).

2.11 Section 53 of the NTA, in effect, provides relevantly that if the doing of any future act would result in an acquisition of property within paragraph 51(xxxi) of the *Constitution* other than on "just terms" within the meaning of paragraph 51(xxxi), there is an entitlement to such compensation in addition to any otherwise provided for by the NTA from the State.

2.12 In the PoC [5]-[7], YAC details the nature of the native title rights and interests the subject of the claim for compensation. In the PoC [8], YAC specifies the FMG tenements being the grants the subject of the claim for compensation. In the PoC [16]-[26], the basis of the entitlement to the claimed compensation is set out. In PoC [33]-[38], assertions and claims are made about the impact of the grant of the FMG tenements on native title rights and interests.

2.13 In PoC [46(a)] and [46(b)], reference is made to ***Northern Territory of Australia v Griffiths*** [2019] HCA 7; (2019) 269 CLR 1, the leading High Court of Australia case on compensation under the NTA.

2.14 YAC is due to provide its expert reports by 15 March 2023. We will provide these expert reports to you.

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3. **QUESTIONS**

3.1 Given the above background, based on your expertise and the native title rights and interests the subject of YAC's compensation claim under the NTA, please consider, and answer the following questions.

(1) How should the entitlement in s 51(1) of the NTA to compensate on just terms, or the determination of compensation required by s 51(3) to compensate, the native title holders for any loss, diminution, impairment, or other effect of the grant of the FMG tenements on the native title rights and interests of the Yindjibarndi People be determined and calculated?

(2) If you are able to calculate the amount of the compensation mentioned in question (1) or give a range for the amount of such compensation, based on your answer to question (1), please calculate that amount or give that range.

(3) How should any component for non-economic or cultural loss be determined and calculated?

(4) If you are able to calculate the amount of the compensation mentioned in question (3) or give a range for the amount of such compensation, based on your answer to question (3), please calculate the amount or give the range.

(5) When the expert report(s) from YAC are available, please review them and provide your comments, explaining whether you agree or disagree with the analysis in them and whether they affect your opinion or answer to questions (1)-(4).We look forward to working with you.

Yours faithfully

Mark van Brakel
Partner

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20 March 2023

Dear Mr Lonergan and Mr Hall

WAD 37 of 2022 - Yindjibarndi Ngurra Aboriginal Corporation RNTBC (ICN 8721) v The State of Western Australia - Further information

1. INTRODUCTION

1.1 We refer to the above matter (**Compensation Claim**).

1.2 In this letter, we set out some further information, in order to assist your analysis of the questions identified in our letter of 14 December 2022.

2. COMPENSATION APPLICATION AREA

2.1 In *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v Western Australia (No 2)* (2017) 366 ALR 467; [2017] FCA 1299 (***Warrie (No 2)***), the Federal Court of Australia held that the Yindjibarndi People hold native title over the area identified in the Determination annexed to its judgment (**compensation application area**).[1]

2.2 The Federal Court held that native title exists in the compensation application area of 246,102 hectares and, as to part of that area, there is an exclusive area of 77,711 hectares, where the native title rights and interests confer the right to possession, occupation, use and enjoyment to the exclusion of all others (**Exclusive Area**).[2] However, the Exclusive Area was determined by the application of ss 47A and 47B of the *Native Title Act 1993* (**NTA**).

2.3 Although the applicant (YNAC) in the Compensation Claim appears to contend otherwise, the 2nd to 6th respondents (**FMG Respondents**) in the Compensation Claim contend that ss 47A and 47B of the NTA does not apply when a determination of compensation is made under Part 2, Division 5 of the NTA. For present purposes, please answer the questions identified in our letter of 14 December 2022

[1] *Warrie (No 2)*, Determination, paragraph 1.
[2] *Warrie (No 2)*, Determination, paragraphs 4, 7, 11, Schedule 1 and Schedule 3.

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on the assumption that the whole of the compensation application area gives non-exclusive native title rights and interests; and, separately, on the assumption that certain of the compensation application area, namely the Exclusive Area, gives exclusive native title rights and interests.

2.4 In all parts of the compensation application area, the Yindjibarndi People hold the following rights:[3]

(a) A right to access (including to enter, to travel over and remain);

(b) A right to engage in ritual and ceremony (including to carry out and participate in initiation practices);

(c) A right to camp and to build shelters (including boughsheds, mias and humpies) and to live temporarily thereon as part of camping or for the purpose of building a shelter;

(d) A right to fish from the waters;

(e) A right to collect and forage for bush medicine;

(f) A right to hunt and forage for and take fauna;

(g) A right to forage for and take flora;

(h) A right to take and use resources;

(i) A right to take water for drinking and domestic use;

(j) A right to cook on the land including light a fire for this purpose;

(k) A right to protect and care for sites and objects of significance in the Determination Area (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others).

3. **FMG TENEMENTS**

3.1 In the Compensation Claim, YNAC seeks compensation under the NTA from the State of Western Australia (**State**) and the FMG Respondents as to the grants of certain mining tenements (**FMG tenements**) by the State to the FMG Respondents which overlap with the compensation application area.

3.2 The FMG tenements consist of:

(a) mining leases, which were granted between November 2010 and March 2020;

(b) exploration licences, which were granted between July 2007 and February 2017;

(c) prospecting licences, which were granted on 11 August 2021; and

(d) miscellaneous licences, which were granted between November 2006 and January 2010.

3.3 A full list of the FMG tenements, including the date on which each FMG tenement was granted and expires and the extent to which those tenements overlap with each other and/or the compensation application area, is in Schedule 1.

[3] *Warrie (No 2)*, Determination, paragraph 3.

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3.4 We also have provided you with a document titled "FMG Respondents' mining tenements and infrastructure", which was filed on 13 February 2023. The maps attached to that document and marked A1 through A4 identify the location of the FMG tenements.

3.5 Of the FMG tenements:

(a) each of the FMG tenements which are mining leases, plus exploration licences E47/1319, E47/1398 and E47/1399, were granted by the State following a determination by the National Native Title Tribunal under s 38(1)(c) of the NTA after a six-month period of good faith negotiations (which were unsuccessful) pursuant to s 31(1)(b) of the NTA;

(b) the balance of the exploration licences and each of the prospecting licences were granted by the State after the State gave notice, under s 29(7) of the NTA, that those grants attracted the "expedited procedure" under s 32 of the NTA;

(c) miscellaneous licences L 1SA, L47/859 and L47/901 were granted by the State after the State gave notice under s 24MD(6B)(c) of the NTA, and were therefore rendered valid by s 24MD(6B)(b) of the NTA; and

(d) the balance of the miscellaneous licences were granted by the State after the State gave notice under s 24HA(7) of the NTA.

3.6 After compliance with the NTA (as described above), each of the FMG tenements was granted under the *Mining Act 1978* (WA) where the FMG Respondents complied with the requirements of the *Mining Act 1978* (including dealing with any objections to the grant of the FMG tenements).

3.7 As mentioned, the whole of the compensation application area is 246,102 hectares. The FMG Respondents' mining leases and miscellaneous licences overlap with the compensation application area by 16,482.45 hectares. As is evident from the maps referred to at paragraph 3.4 above, the total area of the FMG Respondents' mining leases and miscellaneous licences that form part of the Solomon Hub mine is a larger area extending outside the compensation application area. The 16,482.45 hectare area within the compensation application area comprises 12,042 hectares covered by mining leases and 11,141.9 hectares covered by miscellaneous licences. The area in common between the mining leases and miscellaneous licences within the claim area is 6,702.05 hectares.

3.8 The area within the compensation application area covered by the FMG Respondents' exploration licences and prospecting licences is 44,180 hectares, of which 4,435.31 ha overlaps with the miscellaneous licences. However, as to the area of these exploration licences and prospecting licences within the compensation application area, the exploration and prospecting activities conducted did not involve mining operations or related activities. Instead, the FMG Respondents explored the area, including by conducting drilling (at intervals) which did not involve enduring ground disturbance.

3.9 The Solomon Hub mine is where mining operations and related activities are conducted. The Solomon Hub mine is operated in the FMG tenements identified in Schedule 1, as **Solomon Tenements**.

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4. MINING AND INFRASTRUCTURE

Commencement of Mining

4.1 We have provided aerial photography of the Solomon Hub mine area dated 2007, 2010 and 2022 for your reference.

4.2 Exploration activities as to the Solomon Hub mine commenced in 2003. In 2011, final Ministerial approval was granted for the Solomon Hub mine. Construction at the Solomon Hub commenced in approximately June 2011.[4]

4.3 From an approvals perspective, the development of the Solomon Hub has taken place in two overarching phases. The first phase, beginning in 2011 and ending in 2016, is set out in a Public Environmental Review (**PER**) prepared by Fortescue Metals Group Ltd (**FMGL**) in November 2010. This phase consisted of the development of mining, support and access infrastructure for operations at the Firetail and Kings mining pits, and the development the Solomon rail line to link these two mines to the FMG Respondents' existing north-south rail line.[5] This development, as set out in the proposals forming part of the PER, is shown in Schedule 2.

4.4 Mining commenced at the Solomon Hub mine in October 2012, with the first shipment of ore departing the Solomon Hub in December 2012.[6]

4.5 The second phase, beginning in 2016 and ongoing, is set out in a PER prepared by FMGL in December 2015. This phase consists of the expansion of existing mining areas and related infrastructure, including the Trinity mine pit, and the establishment of new mining areas including outside the compensation application area.[7] This development, as set out in the proposals forming part of the PER, is shown in Schedule 3.

Current infrastructure

4.6 As noted above, we have provided you with a document titled "FMG Respondents' mining tenements and infrastructure", which identifies the infrastructure that has been constructed on each of the FMG tenements. The map attached to that document and marked "Map B" identifies that infrastructure.

4.7 By way of general summary, the key infrastructure at the Solomon Hub mine consists of the following:

(a) **Mine pits**: The Solomon Hub consists of several mine pits, being the Kings, Trinity, Firetail North, Firetail South, and Queens mine pits. The Queens mine pit sits outside the compensation application area.

(b) **Ore processing facilities**: Ore from the mine pits is transported via conveyor to one of two crushing hubs for primary crushing, and then to one of two ore processing facilities (**OPFs**) for further grinding and refining.

(c) **Stockpiles and stockyards**: Ore from the OPFs is transported via conveyor to an area where the product is stored, before being loaded onto trains to be shipped to Port Hedland.

(d) **Waste and tailings**: Waste rock is disposed of in one of two designated waste dumps. Tailings are stored in the Tailings Storage Facility.

4 FMG 2011 Annual Report, p 40.
5 Solomon Project Public Environmental Review, Fortescue Metals Group, November 2010, pp iv to vii and Chapter 4.
6 FMG 2013 Annual Report, p 8.
7 Public Environmental Review, Solomon Iron Ore Project – Sustaining Production, Fortescue Metals Group, December 2015, p i.

(e) **Transport and service infrastructure**: The Solomon Hub contains a variety of transport infrastructure, including haul roads, access roads, conveyor belts, and a rail corridor. It also contains service infrastructure such as water pipelines and powerline infrastructure.

4.8 As of 10 March 2023, the FMG Respondents' operations within the Solomon Hub mine have disturbed 5,180.66 hectares of land within the compensation application area.[8] We are instructed that FMGL will formally report on the area disturbed by its (and the FMG Respondents') operations at the end of March 2023, and will notify any changes to the above figure.

End of life and rehabilitation

4.9 We are instructed that the expected life of the Solomon Hub mine is approximately 33 years from the commencement of operations, meaning that mine life will end in approximately 2045.

4.10 Pursuant to Ministerial Statement 862, issued on 21 April 2011 under the *Environmental Protection Act 1986* (WA) (**EPA**) (s 45(8)(a)), FMGL is required to undertake progressive rehabilitation beginning within 12 months of the commencement of ground-disturbing activities and ending at least 5 years following mine completion, using native plant species of local provenance.[9]

4.11 Similarly, pursuant to Ministerial Statement 1062, issued on 3 October 2017 under the EPA (s 45B), FMGL is required to prepare a series of Mine Closure Plans in order to ensure that the Solomon Hub is rehabilitated and decommissioned in an ecologically sustainable manner.

5. **YINDJIBARNDI PEOPLE**

5.1 In *Warrie (No 2)*, the Court defined "Yindjibarndi People" as "Aboriginal persons who recognised themselves as, and are recognised by other Yindjibarndi People as, members of the Yindjibarndi language group."[10]

5.2 We are not aware of the precise number of people that fall within this definition. We do not have data that accurately describes the number of native title holders that fall within the group recognised as the Yindjibarndi People.

5.3 However, we provide the following information that might assist.

(a) The Yindjibarndi Aboriginal Corporation RNTBC (**YAC**) reported on 25 October 2022 that it had 473 members: YAC's General Report 2021. YNAC reported on 2 February 2023 that it had 9 members, who are also members of YAC: YNAC's General Report 2022. YAC is the registered native title body corporate that holds on trust the Yindjibarndi People's native title rights and interests in the area determined in *Moses v Western Australia* (2007) 160 FCR 148; 241 ALR 268; [2007] FCAFC 78. YNAC is the registered native title body corporate that holds on trust the Yindjibarndi People's native title rights and interests in the area determined in *Warrie (No 2)*.

(b) It has been said by an anthropologist assisting YNAC in the Compensation Claim that, for the most part, the members of the Yindjibarndi community live in the town of Roebourne.[11]

(c) ABS data from 2021 shows that the population of Roebourne at that time was 975, of which 73.5% (717 people) were Indigenous.[12]

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8 Email from Tanika Matic to Simon Bourke and Mark van Brakel, 10 March 2023 at 4:45pm.
9 Ministerial Statement 862, published 20 April 2011, conditions 9-1(2) and 9-2.
10 Determination, Schedule 6.
11 Report of Dr Kingsley Palmer dated August 2022, [118].
12 Australian Bureau of Statistics: https://abs.gov.au/census/find-census-data/quickstats/2021/SAL51305

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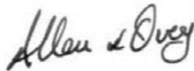
(d) It appears that not all of the Indigenous population of Roebourne are Yindjibarndi, as members of the Ngarluma, Nyangumarta, Banjima and Nyamal groups also reside in Roebourne.[13] We are not aware of any breakdown of the numbers of the different groups.

Yours faithfully



Mark van Brakel
Partner

[13] Australian Bureau of Statistics: https://abs.gov.au/census/find-census-data/quickstats/2021/SAL51305

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SCHEDULE 1

Tenement	Type	Grant Date	Expiry Date	Compensation application area Overlap	Solomon Tenement
M47/1409	Mining Lease	26 Nov 2010	25 Nov 2031	73.9% (5069.75 ha)	Yes
M47/1411	Mining Lease	26 Nov 2010	25 Nov 2031	5.07% (177.93 ha)	Yes
M47/1413	Mining Lease	26 Nov 2010	25 Nov 2031	100% (1044.5 ha)	Yes
M47/1431	Mining Lease	8 July 2011	7 July 2032	100% (2961.5 ha)	Yes
M47/1453	Mining Lease	17 Jan 2013	16 Jan 2034	100% (727 ha)	Yes
M47/1473	Mining Lease	29 Aug 2014	28 Aug 2035	100% (472 ha)	Yes
M47/1475	Mining Lease	29 Aug 2014	28 Aug 2035	100% (525.27 ha)	Yes
M47/1513	Mining Lease	3 Dec 2018	31 March 2020	100% (700.55 ha)	No
M47/1570	Mining Lease	31 March 2020	30 March 2041	100% (1033 ha)	Yes
L 1SA	Miscellaneous Licence	29 Nov 2006	N/A	5.28% (2310.12 ha)	Yes
L 47/302	Miscellaneous Licence	5 June 2009	7 Jan 2013	100% (247 ha)	No
L 47/361	Miscellaneous Licence	11 Oct 2011	10 Oct 2032	100% (4447 ha)	No
L 47/362	Miscellaneous Licence	3 May 2011	2 May 2032	100% (3494 ha)	Yes
L 47/363	Miscellaneous Licence	3 May 2011	2 May 2032	100% (721 ha)	No
L 47/367	Miscellaneous Licence	2 March 2012	1 March 2033	100% (1229 ha)	No
L 47/396	Miscellaneous Licence	23 May 2012	7 Jan 2013	100% (216 ha)	No
L 47/472	Miscellaneous Licence	18 July 2014	17 July 2035	100% (965 ha)	No
L 47/697	Miscellaneous Licence	2 Dec 2013	1 Dec 2034	98.9% (94.95 ha)	No
L 47/801	Miscellaneous Licence	24 May 2019	23 May 2040	87.54% (570.41 ha)	No

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Tenement	Type	Grant Date	Expiry Date	Compensation application area Overlap	Solomon Tenement
L 47/813	Miscellaneous Licence	6 April 2018	5 April 2039	74.23% (428.79 ha)	No
L 47/814	Miscellaneous Licence	6 April 2018	5 April 2039	94.07% (875.84 ha)	No
L 47/859	Miscellaneous Licence	6 Feb 2019	5 Feb 2040	100% (6 ha)	Yes
L 47/901	Miscellaneous Licence	26 June 2019	25 June 2040	100% (11 ha)	Yes
L 47/914	Miscellaneous Licence	15 Nov 2019	14 Nov 2040	71.01% (209.42 ha)	No
L 47/919	Miscellaneous Licence	10 Jan 2020	9 Jan 2041	94.07% (875.84 ha)	No
E 47/1319	Exploration Licence	16 March 2012	15 March 2023	100% (7196.45 ha)	No
E 47/1333	Exploration Licence	28 July 2007	27 July 2023	9.83% (1134.77 ha)	No
E 47/1334	Exploration Licence	2 June 2007	1 June 2023	37.42% (1632.31 ha)	No
E 47/1398	Exploration Licence	8 July 2011	7 July 2023	99.5% (21390.06 ha)	No
E 47/1399	Exploration Licence	8 July 2011	7 July 2023	31.49% (6204.13 ha)	Yes
E 47/1447	Exploration Licence	2 June 2007	1 June 2023	100% (8215.22 ha)	No
E 47/3205	Exploration Licence	21 Sept 2016	20 Sept 2026	100% (664.2 ha)	No
E 47/3464	Exploration Licence	24 Feb 2017	23 Feb 2027	42.33% (903.25 ha)	No
P 47/1945	Prospecting Licence	11 Aug 2021	10 Aug 2025	37.13% (1.67 ha)	No
P 47/1946	Prospecting Licence	11 Aug 2021	10 Aug 2025	98.51% (163.39 ha)	No
P 47/1947	Prospecting Licence	11 Aug 2021	10 Aug 2025	97.38% (145.25 ha)	No

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SCHEDULE 2

Fortescue Metals Group Ltd, Solomon Project Public Environmental Review, Figure 2

Fortescue Metals Group
Solomon Project
Public Environmental Review

Firetail and Kings Mine Overview

Job Number 61-25230
Revision 2
Date 02 NOV 2010

Figure 2

GHD House, 239 Adelaide Terrace Perth WA 6004

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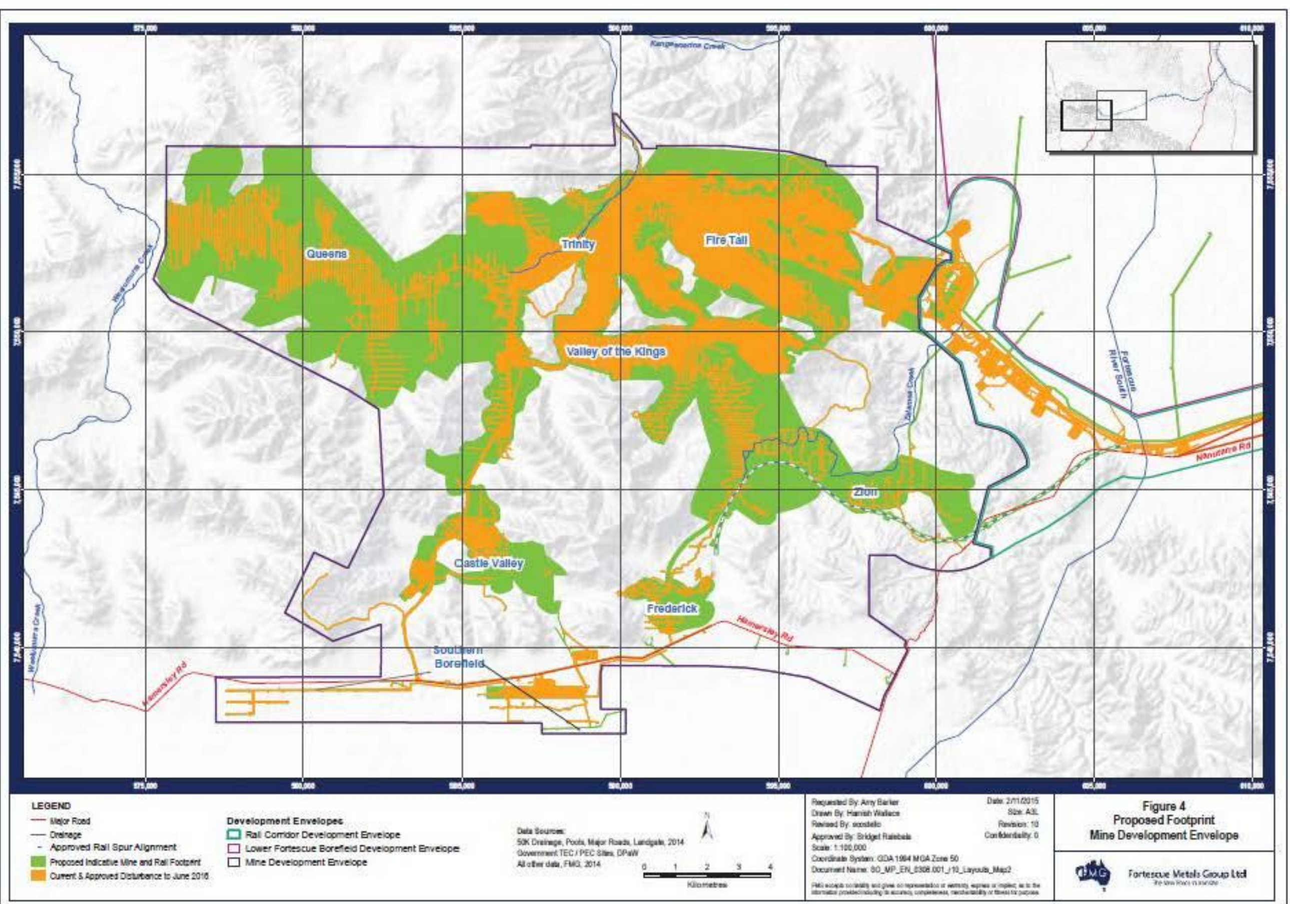
SCHEDULE 3

Fortescue Metals Group Ltd, Solomon Iron ore Project – Sustaining Production Public Environmental Review, Figure 4



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20 February 2024

Dear Mr Lonergan and Mr Hall

WAD 37 of 2022 - Yindjibarndi Ngurra Aboriginal Corporation RNTBC (ICN 8721) v The State of Western Australia - Further assumptions

1. INTRODUCTION

1.1 We refer to the above matter (**Compensation Claim**), and to our earlier letters of 14 December 2022 and 20 March 2023.

1.2 In this letter, we set out some further information in order to assist your analysis of the questions identified in our letter of 14 December 2022.

2. NATURE OF REPORT

2.1 Based on comments made by the presiding judge at the hearing on 2 February 2024, we intend to submit a joint report as authored by both of you, but that Mr Hall alone will be the witness "to defend the opinions" (see attached transcript of 2 Feb 2024, p 34).

3. EXPLORATION ACTIVITIES

3.1 As stated in our letter dated 20 March 2023 at paragraph 3.8, FMG has conducted exploration and prospecting activities on its exploration licences and prospecting licences, including by drilling (at intervals) which did not involve enduring ground disturbance.

3.2 The scope of FMG's exploration activities is further explained in the affidavit of Stuart James Badock sworn 10 July 2023 (**Badock Affidavit**), which we have attached.

4. NATURE OF EXCLUSIVE NATIVE TITLE RIGHTS

4.1 In *Northern Territory v Griffiths* (2019) 269 CLR 1, Kiefel CJ, Bell, Keane, Nettle and Gordon JJ held that:

(a) the underlying premise of the *Native Title Act 1993* (Cth) (**NTA**) is to equate native title with freehold for the purpose with dealing with native title, and that s 51A of the NTA provides a cap that should reflect the compensation payable if native title amounted to freehold (at [51]);

(b) under the general law, the compensation for the compulsory acquisition of land comprises the freehold value of the land, as well as compensation for severance, injurious affection, disturbance, special value, solatium or other non-economic loss (at [51]); and

(c) if the native title holders had full exclusive native title in the subject land, the economic value of their native title as required to be determined by the NTA would have the land's freehold value (at [90]).

4.2 On the basis of the above, we ask you to assume for the purposes of your expert report that full exclusive native title has an economic value equivalent to the freehold value of the relevant land.

Yours faithfully

Mark van Brakel
Partner

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Sources of information

1 In preparing this report, we have reviewed and/or relied upon the following sources of information:

(a) letter of instruction from Allen & Overy dated 14 December 2022

(b) letter from Allen & Overy dated 20 March 2023

(c) letter from Allen & Overy dated 20 February 2024

(d) *Spencer v The Commonwealth* [1907] 5 CLR 418

(e) *Native Title Act 1993* (Cth)

(f) *Mining Act 1978* (WA)

(g) High Court decision in *Northern Territory of Australia v Griffiths* [2019] HCA 7; (2019) 269 CLR 1

(h) the determination in *Warrie (formerly TJ) on behalf of the Yindjibarndi People v State of Western Australia (No. 2)* [2017] FCA 1299; (2017) 366 ALR 467

(i) report of Mr Preston dated 31 October 2023

(j) the Affidavit of Mr Stuart James Badock dated 10 July 2023.

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Federal Court Expert Evidence Practice Note *(GPN-EXPT)*

EXPERT EVIDENCE PRACTICE NOTE (GPN-EXPT)

General Practice Note

1. INTRODUCTION

1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* ("**Code**") (see Annexure A) and the *Concurrent Expert Evidence Guidelines* ("**Concurrent Evidence Guidelines**") (see Annexure B), applies to any proceeding involving the use of expert evidence and must be read together with:

(a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework ("**NCF**") of the Federal Court and key principles of case management procedure;

(b) the Federal Court of Australia Act 1976 (Cth) ("**Federal Court Act**");

(c) the *Evidence Act 1995* (Cth) ("**Evidence Act**"), including Part 3.3 of the Evidence Act;

(d) Part 23 of the *Federal Court Rules 2011* (Cth) ("**Federal Court Rules**"); and

(e) where applicable, the Survey Evidence Practice Note (GPN-SURV).

1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.

2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).

2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:

(a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and

(b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

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being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.

2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.

3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness[1] should, at the earliest opportunity, be provided with:

(a) a copy of this practice note, including the Code (see Annexure A); and

(b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.

3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

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[1] Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

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4. ROLE AND DUTIES OF THE EXPERT WITNESS

4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.

4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.

4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).

5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:

(a) acknowledge in the report that:

(i) the expert has read and complied with this practice note and agrees to be bound by it; and

(ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;

(b) identify in the report the questions that the expert was asked to address;

(c) sign the report and attach or exhibit to it copies of:

(i) documents that record any instructions given to the expert; and

(ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

(a) whether a party should adduce evidence from more than one expert in any single discipline;

(b) whether a common expert is appropriate for all or any part of the evidence;

(c) the nature and extent of expert reports, including any in reply;

(d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;

(e) the issues that it is proposed each expert will address;

(f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);

(g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and

(h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

(a) who should prepare any joint-report;

(b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties o r the experts should assist in preparing such a list;

(c) the agenda for the conference of experts; and

(d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference (“**conference report**”).

Conference of Experts

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

(a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts’ opinions be confidential to the parties while the mediation is occurring;

(b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;

(c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts’ evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.

7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).

7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.

7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.

8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.

9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

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Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT[2]

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:
   (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
   (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
   (a) the name and address of the expert;
   (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
   (c) the qualifications of the expert to prepare the report;
   (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
   (e) the reasons for and any literature or other materials utilised in support of such opinion;
   (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
   (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
   (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
   (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

[2] Approved by the Council of Chief Justices' Rules Harmonisation Committee

knowledge of the expert, been withheld from the Court;

(j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

(k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and

(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:

(a) confer with any other expert witness;

(b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and

(c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

7. Each expert witness shall:

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

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ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique[3] will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.

3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.

4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.

5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

[3] Also known as the "hot tub" or as "expert panels".

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.

7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:

   (a) the agenda;

   (b) the order and manner in which questions will be asked; and

   (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.

8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.

9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.

11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.

13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.

14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

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(a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;

(b) the experts will be grouped and called to give evidence together in their respective fields of expertise;

(c) the experts will take the oath or affirmation together, as appropriate;

(d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;

(e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;

(f) the judge will guide the process by which evidence is given, including, where appropriate:

(i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;

(ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;

(iii) inviting legal representatives to identify the topics upon which they will cross-examine;

(iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and

(v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.

15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.

16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.

Appendix E

Glossary

Term	Meaning
CAPM	Capital asset pricing model
DCF	Discounted cash flow
Exclusive Area	The part of the compensation application area where the Applicant has exclusive native title rights and interests
FMG	Fortescue Metals Group Ltd and its subsidiaries
FOB	Free on board
GDP	Gross domestic product
Griffiths decision	*Northern Territory of Australia v Griffiths* [2019] HCA 7; (2019) 269 CLR 1
LEA	Lonergan Edwards & Associates Limited
Meaton Report	Report of Mr Murray Meaton dated March 2023
Miles Report	Report of Mr Brian Miles dated 16 January 2024
Mining Act	*Mining Act 1978* (WA)
NTA	*Native Title Act 1993* (Cth)
Preston Report	Report of Mr Preston dated 31 October 2023
PV	Present value
RBA	Reserve Bank of Australia
Rf	Risk free rate
Rm	Expected market return
Spencer test	The definition of market value as set out in *Spencer v The Commonwealth* (1907) 5 CLR 418
Warrie (No 2)	*Warrie (formerly TJ) on behalf of the Yindjibarndi People v State of Western Australia (No.2)* [2017] FCA 1299; (2017) 366 ALR 467
YNAC / the Applicant	Yindjibarndi Ngurra Aboriginal Corporation RNTBC

NOTICE OF FILING

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Registry:	WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA

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.