NATIONAL NATIVE TITLE TRIBUNAL

Peter George Hunt and Others v Widi People of the Nebo Estate #1 and Another **[2014] NNTTA 120 (23 December 2014)**

Application Nos: QF2014/0005 and QF2014/0006

IN THE MATTER of the *Native Title Act 1993* (Cth)

- and -

IN THE MATTER of an inquiry into future act determination applications

Peter George Hunt and Robert John Davidson (grantee parties)

- and -

Widi People of the Nebo Estate #1 and Widi People of the Nebo Estate #2 (native title parties)

- and -

The State of Queensland (Government party)

DETERMINATION THAT THE ACTS MAY BE DONE

Tribunal:	Mr JR McNamara
Place:	Brisbane
Date of decision:	23 December 2014
Hearing dates:	On the papers

Catchwords: Native title – future act – applications for the grant of mining claims – native title parties neither consent nor object to future acts – s 39 criteria considered – effect on registered native title rights and interests – effect of act on sites or areas of particular significance – interests, proposals, opinions or wishes of native title parties – economic or other significance of acts – public interest in doing of acts – any other matters the Tribunal considers relevant – determination that the acts may be done.

Representative of the native title party:	Mr Perry Russell, Creevey Russell Lawyers
Representatives of the Government party:	Ms Leilehua Helu, Crown Law Ms Julieanne Butteriss, Department of Natural Resources and Mines

Legislation:

Aboriginal Cultural Heritage Act 2003 (Qld) ss 8, 9, 10, 23, 28, 160, 169

Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (Qld) (repealed)

Environmental Protection Act 1994 (Qld)

Mineral Resources Act 1989 (Qld) ss 50, 52, 53, 55, 81

Mineral Resources Regulation 2013 (Qld) ss 8

Native Title Act 1993 (Cth) ss 24MD, 29, 31, 35, 38, 39, 66B, 75, 77, 109

Queensland Heritage Act 1992 (Qld)

Cases:

Cameron/Hoolihan & Ors (Gugu Badhun)/Queensland QF05/3 [2006] NNTTA 3 (30 January 2006) (‘*Gugu Badhun’*)

Cheedy on behalf of the Yindjibarndi People v Western Australia (includes Corrigendum dated 6 July 2010) [2010] FCA 690 (‘*Cheedy v Western Australia’*)

Cheinmora v Striker Resources NL & Ors; Dann v State of Western Australia and Others [1996] FCA 1147; (1996) 142 ALR 21 ('*Cheinmora v Striker Resources NL*')

Peter George Hunt/James Butterworth & Ors (Wiri People Core Country Claim)/Queensland [2011] NNTTA 162 (‘*Peter Hunt v Wiri People’*)

St. Ives Gold Mining Company Pty Ltd and Another v Ngadju [2014] NNTTA 73 (25 July 2014) (‘*St Ives Gold Mining’)*

Watson on behalf of Nyikina & Mangala v Backreef Oil Pty Ltd [2013] FCA 1432 (‘*Watson v Backreef Oil*’)

Western Australia v Thomas and Others (1996) 133 FLR 124; [1996] NNTTA 30 (‘*Waljen*’)

Western Desert Lands Aboriginal Corporation v Western Australia and Another (2009) 232 FLR 169; [2009] NNTTA 49; (2009) 2 ARLR 214 (‘*Western Desert Lands Aboriginal Corporation v Western Australia*’)

WMC Resources v Evans (1999) 163 FLR 333 [1999] NNTTA 372 (‘*WMC Resources v Evans*’)

Xstrata Coal Queensland Pty Ltd & Others/Mark Albury & Others on behalf of Karingbal #2; Brendan Wyman & Others on behalf of Bidjara People/Queensland [2012] NNTTA 93 (‘*Xstrata Coal Queensland v Albury*’)

REASONS FOR DECISION

Background

[1] On 26 March 2014, the State of Queensland ('the Government party') gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant Mining Claim 72291 to Robert John Davidson (MC72291) and Mining Claim 72330 to Peter George Hunt (MC72330). For the purpose of s 29(4)(a), 16 April 2014 was specified as the notification day. Robert John Davidson and Peter George Hunt are the grantee parties in this determination. The notice states that the proposed mining claims would authorise the grantee parties to mine, and carry out associated activities subject to the *Mineral Resources Act 1989* (Qld) ('MRA') for a term not exceeding ten (10) years with the possibility of renewal for a further term not exceeding ten (10) years. The notice shows MC72291 to be over an area of 8000 square metres, located approximately 37km North West of Nebo and MC72330 to be over an area of 9202 square metres, located approximately 35km North West of Nebo, both in the Isaac Regional Council local government area.

[2] Mining claims are regulated by Chapter 3 of the MRA. The holder of a mining claim may, pursuant to s 50 of the MRA, prospect for any mineral to which the mining claim applies and hand mine in accordance with the conditions of the mining claim. Limited use of machinery is permitted for the purposes of prospecting or hand mining, and moderate use of explosives may be permitted (s 50(1)(b) and (c)). A mining claim may be granted in respect of any specified mineral other than coal (s 52).

[3] Generally, the prescribed area of land over which a mining claim may be granted is limited to one hectare (s 53(3)), and a person cannot at any time be holder of or have an interest, direct or indirect, in more than two mining claims (s 55(1)).

[4] MC72291 overlaps the Widi People of the Nebo Estate #1 claim (QC2006/014, registered from 27 August 2009) by 52.2 percent and the Widi People of the Nebo Estate #2 claim (QC2013/006, registered from 14 March 2014) by 47.8 per cent. MC72330 overlaps the Widi People of the Nebo Estate #2 claim by 100 per cent. These groups are the native title parties in this determination.

Tribunal proceedings

[5] On 15 and 20 August 2014 the Government party referred the mining claims for Tribunal mediation, pursuant to s 31(3) of the Act. I was appointed as the Member to conduct the mediation and on 4 September 2014 a mediation conference of the parties was held. It was discussed at the mediation that one of the native title parties, (previously called the Wiri People Core Country claim, now Widi People of the Nebo Estate #1) had recently been through s 66B proceedings to change the named persons comprising the Applicant and that both native title parties now have the same named persons comprising the Applicant. The representative for the native title parties explained his instructions that the native title parties neither consent nor object to the grant of the mining claims and that the Applicants do not meet regularly, are spread-out and do not have resources to fund meetings. In the mediation, parties discussed the previous Tribunal matter of *Peter Hunt v Wiri People*, which, essentially, involved the same parties as for the matters at hand, in similar circumstances. Parties discussed the prospect of dealing with the matters at hand in the same manner as in that determination.

[6] As no further progress could be made through mediation, due to the difficulty associated with the native title parties negotiating with the grantee parties, the mediation assistance was terminated on 10 September 2014.

[7] On 17 October 2014, a date more than six months after the notification day, as required by s 35 (1)(a) of the Act, the Government party lodged future act determination applications in relation to the mining claims (see ss 35 and 75 of the Act).

[8] Section 31(4) of the Act provides that the Tribunal must not use or disclose information it has obtained during mediation other than for specified purposes, without the prior consent of the person who provided the information. Where a future act determination application follows mediation assistance for the same tenement/s and involves the same parties, it is usual Tribunal practice to have a different Member and Case Manager appointed, to ensure s 31(4) is complied with. Given the circumstances in these matters being that parties were not able to engage in substantive negotiation in the mediation, all parties confirmed with the Tribunal in

writing that they agreed that information provided in the mediation be used for the inquiry and that the same Member be appointed.

[9] I was appointed as Member for the purpose of the inquiry into the mining claims on 22 October 2014. On 30 October 2014 I accepted the future act determination applications pursuant to s 77 of the Act.

[10] On 30 October 2014, Directions were made for the conduct of the inquiry, which provided for the Government party to provide a statement of contentions and evidence addressing the relevant criteria in s 39 of the Act. The Directions provided that 'the native title parties and the grantee parties are at liberty to provide to the Tribunal, the Government party and to each other any material they wish the Tribunal to take into account in making its determination.' The Directions also provided, 'Unless any of the parties otherwise submit, the Tribunal will, on receipt of any submissions and documentation from the native title parties and grantee parties then make a determination under section 38 on the basis of the materials before the Tribunal.'

[11] The Government party submitted contentions and evidence on 14 November 2014. None of the native title or grantee parties submitted any contentions or evidence by the due date of 24 November 2014. On 26 November 2014 the Tribunal emailed all parties noting this and stating, 'Unless advised otherwise, the Tribunal will assume that these parties do not wish to provide any material and will now proceed to determine these matters on the papers, based on the material before it.' The email also said that if any party took issue with this approach or wanted to provide contentions or evidence they should contact the Case Manager. None of the native title or grantee parties responded to this email or otherwise contacted the Tribunal.

[12] The Tribunal's Geospatial Services team created a map of the mining claims and surrounding area ('Tribunal map'). This map was circulated to parties by email on 18 November 2014 with a statement that the Tribunal intended to rely on it in making its determination and inviting comments on its use. None of the parties raised any opposition to the Tribunal relying on the map.

Legislation relevant to mining claims

[13] The grant of mining claims in Queensland is governed by the MRA and the *Mineral Resources Regulation 2003* (Qld) ('MRR'). Chapter 3 of the MRA deals specifically with mining claims.

[14] The general conditions for mining claims are set out in s 81 of the MRA. So far as is relevant, each mining claim is subject to the holder:

- using the land comprising the tenement bona fide for the purpose for which the mining claim was granted and in accordance with the MRA and conditions of the claim and for no other purpose;
- complying with the mandatory provisions of the small scale mining code to the extent it applies to the holder and ensuring any other person carrying out an authorised activity for the mining claim also complies;
- furnishing at such times, and in such manner as required by the mining registrar, reports, returns, documents, statements and other materials;
- maintaining the surface of the tenement in a tidy state;
- carrying out improvement restoration for the mining claim;
- conducting prospecting and mining by such method or in such manner as is provided for in, or applies in respect of, the mining claim;
- not erecting any permanent or other structure and prior to the termination of the claim for whatever cause, removing any building or structure erected and all mining equipment and plant;
- not, without the prior approval of the mining registrar, obstructing or interfering with any right of access had by any person in respect of the land;
- paying prescribed rentals and royalties, local authority rates and charges and depositing any security required by the mining registrar;
- maintaining during the term of the claim, the marking out of the land including any survey pegs;
- complying with the MRA and other mining legislation; and

- complying with such other conditions imposed by the mining registrar, including such conditions as determined by the Land Court pursuant to Chapter 3 of the MRA.

[15] In addition, s 81(1)(o) provides that the grant of a mining claim is subject to such other conditions as may be prescribed. Section 8 of the MRR has the effect of prescribing the following conditions:

- that the holder must not use prohibited machinery in the area of the mining claim (this excludes, among other activities, using machinery to: transport mineral bearing ore or wash; transport equipment, material or water being used for mining operation; building storage facilities for water used for mining and rehabilitating the land). Prohibited machinery means any of the following: backhoe, bobcat, bucket excavator, bulldozer, clamshell, continuous miner, dragline, end-loader, excavator, grader, loader, ripper, scarifier, scoop, scoop mobile, scraper, tractor or traxcavator (MRR s 8(5));

- the holder or another person acting under the authority of a mining tenement must use, if practicable, only existing roads or tracks on the land;

- the holder, or another person acting under the authority of a mining tenement must take reasonable steps to ensure no reproductive material of a declared plant is moved onto, within or from the land;

- the holder, or another person acting under the authority of a mining tenement must not allow an animal in their custody to be on the land unless the area is fenced or the animal is restrained; and

- if the mining claim is occupied land, that the holder shall not discharge a firearm on the land unless the holder has the written consent of the owner and such consent has been lodged with the mining registrar.

[16] The environmental management of mining is regulated by the *Environmental Protection Act 1994* (Qld) ('EPA'). The holder of a mining claim is required, pursuant to Chapter 5 of the EPA, to have an environmental authority in relation to the proposed mining activities. Such authority requires a holder, inter alia, to comply with each of the relevant standard environmental conditions contained in the *Code of Environmental Compliance for Mining Claims and Prospecting Permits* ('the Code'). The Code deals with the following types of matters: financial assurance, land

disturbance, air quality, noise emissions, erosion and sediment control, topsoil and overburden management, hazardous contaminants, nature conservation, waste management, service/maintenance and storage areas, monitoring/reporting and emergency response procedures and rehabilitation.

[17] Condition 14 of the Code prohibits the holder of a mining claim environmental authority from carrying 'out activities within 100m of a Historical, Archaeological or Ethnographic Site.' Note 21 under this condition, advises the holder of a mining claim:

> With regard to cultural heritage issues refer to the *Cultural Record (Landscapes Queensland and Queensland Estate) Act* 1987 and the *Queensland Heritage Act* 1992. Prior to carrying out any activities on the mining claim, the holder of the environmental authority should consult with the administering authority if a site has the potential to be designated as a historical, archaeological or ethnographic site.

[18] I note that the *Aboriginal Cultural Heritage Act 2003* (Qld) ('ACHA') repealed the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld) (s 160 ACHA). Section 169 of the ACHA has the effect that a reference to the *Cultural Record (Landscapes Queensland and Queensland Estate) Act* in a document may, if the context permits, be taken to be a reference to the ACHA. My opinion is that Note 21 to Condition 14 of the Code is such a document.

[19] The ACHA imposes a duty of care on the holder of a mining claim in relation to Aboriginal cultural heritage. Section 8 of the ACHA defines 'Aboriginal cultural heritage' as anything that is:

- a significant Aboriginal area in Queensland; or
- a significant Aboriginal object; or
- evidence, of archaeological or historic significance, of Aboriginal occupation of an area of Queensland.

The term 'significant Aboriginal area' is defined in s 9 to mean an area of particular significance to Aboriginal people because of either or both, aboriginal tradition and the history, including the contemporary history, of an Aboriginal party for the area. The term 'significant Aboriginal object' is defined in s 10 in the same manner.

[20] Subsection 23(1) of the ACHA requires a person who carries out an activity to take all reasonable and practical measures to ensure that the activity does not harm Aboriginal cultural heritage. This is referred to as the cultural heritage duty of care.

[21] Subsection 23(2) of the ACHA provides a non-exhaustive list of matters that a Court may have regard to when determining if a person has discharged their duty of care. One of the matters listed is the extent to which the person consulted with Aboriginal parties about the carrying out of the activity, and results of the consultation (s 23(2)(c)). In addition, s 28 provides that the Minister may, by gazette notice, notify cultural heritage duty of care guidelines which identify reasonable and practical measures for ensuring activities are managed to avoid or minimise harm to Aboriginal cultural heritage. Such guidelines were gazetted on 16 April 2004. The guidelines provide the holder of a mining claim with detailed information on how to properly discharge their duty of care**.**

[22] These provisions were considered by the Tribunal in *Gugu Badhun* and the following conclusion was reached:

> [37] Summing up, the above brief and non-exhaustive overview of the current state of mining, environmental and cultural heritage law impacting on relatively low impact mining activities, highlights that Queensland possess(es) a comprehensive and well integrated regime that aims to an appropriate level of environmental and cultural protection ....
>
> [38] The material before the Tribunal demonstrates that the legislative regime cumulatively provides a protective framework which ameliorates the likely or potential effect of the future act on the native title rights and interests of the native title party.

I adopt these findings for the purpose of this inquiry.

Government party contentions and evidence

[23] As noted above, the Government party was the only party to provide any material for the inquiry into the matters at hand. The Government party provided:

- statement of contentions;
- copy of the s 29 notice for the mining claims;
- Tribunal overlap analysis reports;
- extracts from the Tribunal register of native title claims;
- mining tenure public enquiry reports;

- current and historic (where relevant) land title searches for the tenure underlying the mining claims (Lot 1000 on NPW566 and Lot 174 on USL 44425);
- maps of: the mining claims; historic mining and exploration surrounding the mining claims; and of the claim areas of the native title parties;
- affidavit of Julieanne Maree Butteriss about, in addition to other matters, historic and current mining activity in the areas of the mining claims and annexing several documents, including mining tenure public enquiry reports for mining tenements adjoining and in the vicinity of the mining claims;
- affidavit of Kylie Joy Dunlop about undertaking the s 29 notice process and annexing the s 29 notice;
- affidavit of Kevin John Pokarier about determining the area of MC72291 in the context of a discrepancy in data as to the underlying tenure of the claim and stating his belief that the correct underlying tenure is Lot 1000 on NPW566 and annexing supporting documents;
- results of cultural heritage register and database searches from the Department of Aboriginal Torres Strait Islander and Multicultural Affairs ('DATSIMA');
- copy of the Code of Environmental Compliance for Mining Claims and Prospecting Permits; and
- copy of the Duty of Care Guidelines under the ACHA, gazetted on 16 April 2004.

[24] The Government party contends that the mining claims cover areas that have been subject to significant historic mining activities (para 3.1 Government party statement of contentions ('GVP contentions')). Research undertaken by the Government party indicates that there are an estimated 55 historic and current mining tenements adjoining and in the vicinity of MC72330 (para 3.6 GVP contentions). These comprise 41 historic grants, 11 current grants and 1 pending application (para 3.6 GVP contentions). This number does not take into account tenements granted prior to the creation of the MERLIN (Mineral Energy Local Information Network) system in 1991 (para 3.6 GVP contentions). In her affidavit, Ms Julieanne Butteriss talks about a mining claim abutting MC72291 to the left and a mining lease abutting to the right (at para 17 (b) and (c)). In relation to MC72330 she says, 'The area of this proposed

mining claim has been intensively mined in the past during the goldmining era of the early 1880s' (para 17 (e)). The affidavit includes a table detailing all of the historic and current tenements in the area of MC72330 and annexes public reports for each.

[25] The Government party contends it is not aware of any Aboriginal community on or within the vicinity of the mining claims (para 3.7 GVP contentions). It also says that searches of the Aboriginal Cultural Heritage Database and the Aboriginal Cultural Heritage Register did not identify any Aboriginal cultural heritage sites on the mining claims (para 3.8 GVP contentions). However, the Government party notes it is not possible to conclusively guarantee that there are no cultural heritage sites on the areas (para 3.8 GVP contentions). In her affidavit, Julieanne Butteriss deposes that correspondence from DATSIMA, when providing database and register search results, said it was probable that the absence of recorded Aboriginal cultural heritage places reflect a lack of previous cultural heritage surveys of the areas (para 19).

[26] A large amount of material was provided by the Government party. Most of this material is helpful in terms of providing background and information about previous activity on the mining claim areas. Little of the material goes to substantially address the s 39 criteria, with the likely reason being that these matters are usually within the knowledge of the native title party. All of the Government party material has been considered in making this determination, however not all of it will be referred to in this decision, as some of it carries little weight or is of little relevance to the criteria being considered.

Statutory interpretation in relation to future act determinations

[27] I rely on the principles enunciated in the following Tribunal future act determinations:

- *Waljen;*
- *WMC Resources v Evans;*
- *Western Desert Lands Aboriginal Corporation v Western Australia; and*
- *Cheedy v Western Australia.*

[28] Section 38 of the Act sets out the types of determinations that can be made and which relevantly are:

38 Kinds of arbitral body determinations

(1) Except where section 37 applies, the arbitral body must make one of the following determinations:

(a) a determination that the act must not be done;

(b) a determination that the act may be done;

(c) a determination that the act may be done subject to conditions to be complied with by any of the parties.

Determinations may cover other matters

...

Profit sharing conditions not to be determined

(2) The arbitral body must not determine a condition under paragraph (1)(c) that has the effect that native title parties are to be entitled to payments worked out by reference to:

(a) the amount of profits made; or

(b) any income derived; or

(c) any things produced;

by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

[29] Central to the scheme by which the Tribunal makes a determination about whether the future act may be done, with or without conditions, or must not be done, are the requirements of s 39 of the Act. Subsections (1) and (2) of that section provide:

39 Criteria for making arbitral body determinations

(1) In making its determination, the arbitral body must take into account the following:

(a) the effect of the act on:

(i) the enjoyment by the native title parties of their registered native title rights and interests; and

(ii) the way of life, culture and traditions of any of those parties; and

(iii) the development of the social, cultural and economic structures of any of those parties; and

(iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and

(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;

(b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;

(c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;

> (d) any public interest in the doing of the act;
>
> (e) any other matter that the arbitral body considers relevant.
>
> *Existing non-native title interests etc.*
>
> (2) In determining the effect of the act as mentioned in paragraph (1)(a), the arbitral body must take into account the nature and extent of:
>
> (a) existing non-native title rights and interests in relation to the land or waters concerned; and
>
> (b) existing use of the land or waters concerned by persons other than the native title parties.

[30] The Tribunal's task involves weighing the various criteria in s 39 by giving proper consideration to them on the basis of evidence. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue exploration and mining, and the interests of the Aboriginal or Torres Strait Islander people concerned. The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. The Tribunal is required to take into account diverse and sometimes conflicting interests in coming to its determination. The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence (see *Waljen* at 165–166; *Western Desert Lands Aboriginal Corporation v Western Australia* at 37). The Tribunal undertakes the task set by s 39 by considering 'each of the criteria … individually' in light of the evidence and the submissions made by each party to the inquiry in relation to that criterion, and then engages in a 'weighing process' before making its determination: *Watson v Backreef Oil* at [27]-[28] per Siopis J.

[31] The Tribunal is not bound by the rules of evidence (s 109(3) NTA) and adopts a commonsense approach to evidence.

Findings on the Section 39 criteria

[32] The Tribunal looks to evidence of the native title party rights and interests which the native title party states will be affected, plus evidence of those effects – for example, current use and potential impact.

[33] As has been noted previously, no evidence was received from the native title parties in these matters, as they neither consented nor objected to the grant of the mining claims.

[34] The Tribunal has, on a number of occasions, made determinations without evidence from the native title party involved and, in doing so, has confirmed and adopted the authority in *Western Australia v Thomas* (at 162).

[35] In *Gugu Badhun*, Deputy President Sosso noted the mandatory nature of s 39, holding the Tribunal has the power to make a determination in the absence of evidence from the native title party and that there is no obligation to go beyond the evidence submitted by the parties in an endeavour to perform the statutory obligation imposed by s 39 (at [17]). This approach has been followed in later Tribunal decisions, such as *St Ives Gold Mining* (see from [22]).

[36] In the matters at hand the Tribunal has only received material from the Government party and has no evidence before it for many of the s 39 criteria. Section 39 is mandatory in nature: 'In making its determination, the arbitral body *must* take into account the following…' [emphasis added]. The effect of this is that I am required to consider each of the criteria, irrespective of the fact I have no evidence before me for many of them.

[37] In *Griffin Coal v Nyungar People*, the native title party instructed its representatives not to submit contentions or evidence in regard to the s 35 determination after the good faith negotiations challenge failed. The Tribunal confirmed (at [8]):

> The Tribunal's present view, subject to receipt of submissions to the contrary in a future matter, is that despite the cost and inconvenience to the other parties and Tribunal, the Act imposes an obligation to consider and take into account the criteria in s 39 for the purposes of making one of the required determinations. The mandatory nature of ss 38 and 39 means that even where a native title party says before compliance by the Government party and grantee party that it will not be making contentions or providing evidence, the Tribunal is obliged to conduct an inquiry which requires the other parties to address the issues dealt with in s 39. In such circumstances there is no means whereby the Tribunal can in a summary manner proceed to make a determination.

Sections 39(1)(a)(i) and (2)– enjoyment of registered native title rights and interests

[38] The Government party contends it is not aware of any information indicating that the grant of the mining claims would be likely to affect the enjoyment by the native title parties of their native title rights and interests (para 6.1 GVP contentions).

[39] No evidence has been provided of the enjoyment of native title rights and interests on the mining claim areas. The only information provided by the native title parties' representative is that they neither consent nor object to the grant of the mining claims.

[40] Section 39(2) directs that, in considering s 39(1)(a), the arbitral body must take into account the nature and extent of existing non-native title rights and interests in relation to the land or waters concerned and the existing use of the land or waters concerned by persons other than the native title parties. The Government party has provided evidence of previous mining activity on the mining claim areas, especially in relation to MC72330 (para 3.6 GVP contentions and affidavit of Julieanne Maree Butteriss and annexures). The Tribunal map shows significant current mining activity in the vicinity of the mining claims. It is likely that this current mining activity is impacting the enjoyment of native title rights and interests in this area.

[41] The Government party contends the grant of the mining claims is not likely to affect the enjoyment by the native title parties of their native title rights and interests or adversely affect their way of life or the development of their cultural and economic structures because of the following factors (para 6.2 GVP contentions):

- the statutory restrictions under the MRA;
- the statutory restrictions under the EPA;
- the operation of the ACHA;
- there are no known Aboriginal communities situated on the mining claims or in close proximity to them;
- the limited area of the mining claims compared to the areas contained within the external boundaries of the native title parties' claims;
- prior extensive exploration and mining activities which may have already affected the enjoyment of native title rights and interests; and

- the area of the mining claims having been heavily mined in the past.

[42] I have taken into account the follow factors in my evaluation of this criterion:

- the history of previous tenement grants and mining activity over the subject areas;
- the operation of the non-extinguishment principle in s 24MD(3)(a) to the granting of the mining claims;
- the small scale nature of the proposed mining operations;
- the absence of any evidence of how members of the native title parties enjoy their registered native title rights and interests; and
- the statement by the representative for the native title parties' that they do not oppose the grants.

[43] Given these factors, I find the grant of the mining claims is unlikely to affect the enjoyment by the native title parties of their registered native title rights and interests.

Section 39(1)(a)(ii) – effect on way of life, culture and traditions

[44] See [41] above in relation to Government party contentions on this criterion.

[45] There is no evidence before me on this criterion so I am unable to find that the way of life, culture and traditions of the native title parties will be affected by the grant of the mining claims.

Section 39(1)(a)(iii) – effect on the development of social, cultural and economic structures of the native title party

[46] See [41] above in relation to Government party contentions on this criterion.

[47] Without any evidence before me I am unable to make a finding that the development of the social, cultural or economic structures of the native title party will be adversely affected by the grant of the mining claims.

Section 39(1)(a)(iv) – freedom to access the land and freedom to carry on rites and ceremonies and other activities of cultural significance

[48] The Government party contends there is no evidence to indicate or suggest that the freedom of access of the native title parties or their freedom to carry out rites,

ceremonies or other culturally significant activities on the land will be affected by the grant of the mining claims (para 6.3 GVP contentions).

[49] In evaluating this criterion I have taken into account the following factors:

- the absence of any evidence that members of the native title parties have accessed the mining claim areas recently, or if they have, any evidence of the regularity of such visits, the numbers visiting and the nature of the visits;
- the absence of any evidence of rites or ceremonies being carried out on the areas of the mining claims;
- that the mining claims comprise small areas of land and the small scale of the mining activities; and
- that s 81 of the MRA makes it a condition that the holder of a mining claim not, without the prior approval of the mining registrar, obstruct or interfere with any right of access had by any person in respect of the land.

[50] Taking these factors into account, I find that the grant of the mining claims is unlikely to have any impact, or at least any significant impact, on the freedom of the native title parties to access the land and to carry on rites and ceremonies and other activities of cultural significance.

Section 39(1)(a)(v) – effect on areas or sites of particular significance

[51] The issue to be determined in relation to s 39(1)(a)(v) is whether the grant of the proposed licence will affect sites or areas of particular (that is, of special or more than ordinary) significance to the native title party in accordance with their traditions: *Cheinmora v Striker Resources NL* at [34]-[35]. The focus of the inquiry is on the effect of the future act on relevant sites or areas within the land or waters concerned. However, in some circumstances, the effect of the future act on sites or areas of particular significance located elsewhere may be relevant if they are linked in some way to sites or areas on the land or waters concerned: *Xstrata Coal Queensland v Albury* at [103].

[52] The Government party contends that a search of the Aboriginal Cultural Heritage Database and the Aboriginal Cultural Heritage Register undertaken by it has not

identified any Aboriginal cultural heritage sites within the area of the mining claims (para 6.4 GVP contentions). The Government party is not aware of any area or sites of particular, as opposed to ordinary, significance to the native title parties that would be affected by the mining claims and contends the native title parties bear the onus of establishing these matters (para 6.4 GVP contentions).

[53] The Government party contends that the grant of the mining claims is not likely to interfere with areas or sites of particular significance to the native title parties because of the obligations on the grantee parties pursuant to the MRA, the EPA and the ACHA regulating the activities that may be undertaken (para 6.5 GVP contentions).

[54] There is no direct or indirect evidence before me that establishes the existence of areas or sites of particular significance on the area of the mining claims. Further, I find that the operation of the regulatory regime in Queensland means it is unlikely that areas or sites of particular significance will be affected, should any be located on the mining claims.

Section 39(1)(b) – effect on interests, proposals, opinions and wishes

[55] The native title party representative has said that the native title party neither consents nor objects to the grant of the mining claims.

Section 39(1)(c) – economic and other significance

[56] There is no material before the Tribunal in relation to this criterion and the Government party has not addressed it in their contentions.

[57] In *Peter Hunt v Wiri People*, which had circumstances very similar to the matters at hand, the Tribunal said (at [54]-[56]):

> [54] …It is doubtful if the grant of the mining claim would generate either considerable wealth to the grantee party or significant economic benefits either to the local community or the broader Queensland economy.
>
> [55] It is the case nonetheless, that there is an economic and social benefit in facilitating small mining, especially in remote areas of Queensland. The fact that the grant of this tenement will not create significant economic or social benefits for the broader community is not of itself determinative. It is the case that cumulatively the grant of such tenements assist in facilitating a small mining industry, which looked at in the broader scheme of things, is of advantage to the State of Queensland and in particular, to certain

> small communities in remote parts of Queensland that are largely dependent on mining activities.
>
> [56] I therefore find that if the mining claim is granted, there may be some associated economic and social benefits for the local economy…the grant of the tenement when looked at in the broader perspective of maintaining a small mining industry is likely to have a positive economic impact.

I agree with this reasoning and follow it for the purpose of this inquiry.

Section 39(1)(e) – public interest

[58] The Government party, by proposing to grant the mining claims, inferentially must view this as being in the public interest. No other view has been offered by the native title parties except that they neither object nor consent to the grants.

[59] In these circumstances I am satisfied the doing of the future acts is in the public interest.

Section 39(1)(f) – any other matter the Tribunal considers relevant

[60] There are no further matters or material before the Tribunal relevant to the determination.

Determination

[61] The determination of the Tribunal is that the acts, being the grant of mining claim 72291 to Robert John Davidson and mining claim 72330 to Peter George Hunt may be done.

James McNamara
Member
23 December 2014