NATIONAL NATIVE TITLE TRIBUNAL

Robert John White and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC **[2018] NNTTA 23 (29 March 2018)**

Application No: **QF2017/0018**

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

- and -

IN THE MATTER of an inquiry into a future act determination application

Boonthamurra Native Title Aboriginal Corporation RNTBC (QCD2015/008)

(native title party)

- and -

Robert John White

(grantee party)

- and -

State of Queensland

(Government party)

FUTURE ACT DETERMINATION THAT THE ACT MAY BE DONE SUBJECT TO CONDITIONS

Tribunal:	Ms H Shurven, Member
Place:	Perth
Date:	29 March 2018

Catchwords: Native title – future act – application for determination for the grant of mining claim – s 39 criteria considered – effect of act on native title rights and interests – effect of act on way of life, culture and traditions – effect on freedom of access – effect of act on sites or areas of particular significance – interests, proposals, opinions or wishes of native title party – economic or other significance of act – public interest in doing of act – proposed conditions – determination

	that the act may be done subject to conditions
Legislation:	*Aboriginal Cultural Heritage Act 2003* (Qld)
	Environmental Protection Act 1994 (Qld)
	Mineral Resources Act 1989 (Qld)
	Mineral Resources Regulation 2013 (Qld)
	Native Title Act 1993 (Cth) ss 29, 38(1)(c), s39, 237
Cases:	*Cameron/Ernest Hoolihan, Hazel Illin, Elsie Thompson (Gugu Badhun)/State of Queensland* [2006] NNTTA 3 (‘*Cameron v Hoolihan*’)
	FMG Pilbara Pty Ltd and Another v Yindjibarndi #1 [2014] NNTTA 79 (‘*FMG Pilbara v Yindjibarndi #1*’)
	Ward v Western Australia [1996] FCA 1452; (1996) 69 FCR 208 (‘*Ward v Western Australia*’)
	Western Australia v Thomas [1999] NNTTA 99; (1999) 164 FLR 120 (‘*Western Australia v Thomas*’)
Representative of the native title party:	Zac Casagrande, Queensland South Native Title Services
Representative of the grantee party:	Robert John White
Representatives of the Government party:	Julieanne Butteriss and Julie Hookey, Department of Natural Resources, Mines and Energy
	Leilehua Helu, Crown Law

REASONS FOR DETERMINATION

Background

[1] On 23 November 2016, the State of Queensland gave notice under s 29 of the *Native Title Act 1993* (Cth) (the Act) of its intention to grant a mining claim MC300131 (the tenement) to Robert John White under the *Mineral Resources Act 1989* (Qld).

[2] The tenement is 0.1383 square kilometres in size and is located approximately 45 kilometres west of Eromanga in the Quilpie Shire Council. The tenement sits entirely within the area of the Boonthamurra People's determination of native title (QCD2015/008). The Boonthamurra People's determined native title rights and interests are held in trust by the Boonthamurra Native Title Aboriginal Corporation RNTBC (the Boonthamurra RNTBC).

[3] On 5 December 2017, Mr White lodged a future act determination application in relation to the tenement. I was appointed by President Raelene Webb QC to constitute the Tribunal for the purposes of conducting an inquiry into the future act determination application. I accepted the application and notified parties in this matter that I wished to convene a preliminary conference on 31 January 2018. I notified parties in some associated matters relating to mining claims in the Quilpie area, about the same preliminary conference, as the State had also lodged future act determination applications in relation to those tenements. My decision to run the matters simultaneously was taken in consideration of s 109 of the Act, which states the Tribunal should operate in a fair, just, economical, informal and prompt way. No party took issue with this approach.

[4] The Boonthamurra RNTBC did not challenge the power of the Tribunal to determine this matter due to any lack of good faith in negotiations with the State or Mr White. As such, I have the power, pursuant to s 38 of the Act, to conduct this inquiry and make one of the following determinations: that the act must not be done, that the act may be done, or that the act may be done subject to conditions.

[5] In making a determination, I must have regard to the criteria in s 39 of the Act and the information provided by parties. The s 39 criteria relate largely to information which is exclusively within the knowledge of the native title party concerned (see *Ward v*

Western Australia at [26]). My consideration and findings in relation to each of the s 39 criteria are outlined below.

Preliminary matters

Conduct of inquiry

[6] All parties attended the preliminary conference held on 31 January 2018. At the conference, Mr Zac Casagrande of Queensland South Native Title Services (QSNTS) highlighted that QSNTS now represented the Boonthamurra RNTBC, which was a change from their representation during the mediation process.

[7] The various grantee parties communicated their desire for the matters to be resolved as quickly as possible. They stated there was now an urgent commercial imperative in the tenements being granted, as negotiations had been undertaken off and on over several years since notification of the intended grants. It was generally understood that the exploration season for this area commenced around April each year.

[8] To provide procedural clarity for all parties, I explained the process for future act determination application inquiries and how it differs from the mediation process. I confirmed that further discussions between parties with a view to reaching agreement could run in parallel with the determination process. I also confirmed the Tribunal would be able to provide assistance with those further discussions if required. I noted parties could advise the Tribunal if agreement was reached before the future act determination was handed down. I also highlighted, however, that any such further discussions between parties with a view to reaching agreement, would not unnecessarily delay the inquiry process, and it was my intention to hand down the determination in this and the associated matters by the end of March.

[9] As such, I directed parties to attend an oral hearing on 1 March 2018 and to provide any written information or evidence in support of what they intended to say. Specifically, parties were asked to consider and provide information relating to the factors outlined in s 39 of the Act in relation to the proposed tenement. Given the wide geographical location of parties, the hearing was conducted by telephone conference.

Submissions and evidentiary material

[10] The State submitted contentions and a list of documents in support. Mr Casagrande circulated a draft Ancillary Agreement for Small Mining Operations to the Tribunal and parties, however, no contentions were lodged on behalf of the Boonthamurra People prior to the hearing. In addition to the material provided in his application, Mr White provided a copy of the mining claim application for MC300131 and photographs of the tenement area.

[11] At the hearing, parties were given the chance to verbally provide information to the Tribunal for this inquiry. Parties again discussed the progress of an agreement, and provided some limited information in relation to the s 39 criteria. I will refer to the information that was provided in my consideration below. That day, I set further directions requiring:

(a) Mr Casagrande to provide draft conditions that the Boonthamurra People would seek to have applied to the grant of the tenements if the Tribunal determined the act may be done, and any commentary in support of imposing them with reference to the s 39 criteria, by Friday 9 March 2018;

(b) The State and grantee parties (or their representatives) to provide any response to the conditions by Friday 16 March 2018.

[12] No proposed conditions were received from Mr Casagrande by 9 March 2018. On 13 March 2018, the Tribunal emailed parties to propose certain conditions based on submissions made by parties at the 1 March 2018 hearing, which I would consider imposing if I determined the act may be done (see Appendix 1). Mr Casagrande was asked to provide any comments or other proposals in relation to the conditions by 16 March 2018. All other parties were invited to provide comments on the proposed conditions by 23 March 2018.

[13] On 14 March 2018, Mr Casagrande wrote only to the Tribunal attaching a copy of the Cultural Heritage Terms contained in the Boonthamurra's draft Ancillary Agreement for Small Mining Operations. He stated, 'We hope that the Tribunal will consider these terms as part of any determination'. These proposed conditions were a full schedule extracted from the draft Ancillary Agreement, and related to issues such as

cultural heritage inspection and monitoring. The Tribunal wrote to Mr Casagrande on 15 March 2018 to confirm he was seeking the content of that full schedule be considered as conditions to be imposed in the determination, and if so, whether the proposed conditions could be passed on to the other parties. This was confirmed on 19 March 2018, and the next day the Tribunal circulated the conditions provided by Mr Casagrande to parties for comment by 23 March 2018, noting I would consider these in place of those conditions previously proposed by the Tribunal, pending party comments.

[14] The State replied via email, noting it had no substantial issues with Mr Casagrande's proposed conditions, and the matters covered by the conditions largely related to issues between the Boonthamurra People and the grantee parties. Some grantee parties, including Mr White, responded to Mr Casagrande's email with serious concerns about those proposed conditions, once again noting the commercial imperative of granting the proposed tenements expeditiously. They submitted these proposed conditions did not provide certainty for all parties, and would require parties to further negotiate following the grant of the tenements. All responses were received by 22 March 2018.

[15] As I noted in *FMG Pilbara v Yindjibarndi #1* at [176], citing Nicholson J in *Evans v Western Australia* at [214], the Tribunal must provide 'certainty to parties' when imposing conditions:

> I regard it as inherent in s 38 the arbitral body not leave the outstanding issues between the parties unresolved. For conditions to permit of such issues being unresolved would not be in conformity with the legislation providing the power to make conditions.

I agree the conditions proposed by the Boonthamurra People would not provide certainty for all parties, for the purposes of this inquiry. As such, and given the grantee parties' objections, I indicated to all parties on 22 March 2018 that I did not intend to attach those condition to any determination. I indicated I would instead consider the six conditions I previously proposed in the email to all parties on 13 March 2018, as outlined in Appendix 1 to this decision. Parties were given until 27 March 2018 to provide any final comment for my consideration in relation to these conditions.

[16] The focus of these six conditions was to continue to facilitate positive ongoing relationships regarding the rights and interests of the Boonthamurra People and the respective grantee parties. I also noted to all parties that, separately to the arbitration

process, they were at liberty to come to their own arrangements regarding survey costs and other matters relating to the operation of relevant tenements. I reinforced that any such discussions would not delay the future act determinations, which I intended to issue on or by the end of March 2018, as previously advised to all parties.

[17] No further comments were provided by any of the grantee parties. The State responded on 26 March 2018 that it repeated and relied on its previous written submissions and sought that the determination be made without the conditions outlined in Appendix 1. I address the matter of conditions further below at [34]–[37].

Relevance of the Queensland regulatory regime

[18] The State submits its mining, environmental and cultural heritage regimes 'provide layers of cultural heritage and environmental protection in relation to mining activities'. It states the Tribunal has previously accepted that Queensland's 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' (citing *Cameron v Hoolihan* at [38]). I agree the Tribunal has often considered the ameliorating effect of Queensland's regulatory regime, though note each matter must be determined on its own facts and evidence. I consider the impact of the State's regime as relevant in drawing my conclusions below.

Findings on the Section 39 criteria

Sections 39(1)(a)(i)–(iv) – effect of the act on the enjoyment of registered native title rights and interests; effect on way of life, culture and traditions; development of social, cultural and economic structures; and freedom to access the land and freedom to carry on rites and ceremonies and other activities of cultural significance

[19] The State contends the grant of the mining claim is not likely to affect: the registered native title rights and interests (s 39(1)(a)(i)); the way of life, culture and traditions (s 39(1)(a)(ii)); or the development of social, cultural and economic structures of the Boonthamurra People (s 39(1)(a)(iii)), because of the following factors:

> (a) the statutory restrictions under the MRA [*Mineral Resources Act* 1989 (Qld)] that will apply to the tenements;

(b) the statutory restrictions under the EPA [*Environmental Protection Act* 1994 (Qld)] that will apply to the tenements and the activities undertaken pursuant to them;

(c) the operation of the ACHA [*Aboriginal Cultural Heritage Act* 2003 (Qld)] to protect cultural heritage;

(d) there are no known Aboriginal communities situated on the area subject to the applications for the tenements or in close proximity to it;

(e) the area subject to the tenements is a small area of land within the Boonthamurra determination, and the nature of the proposed mining activities is small scale;

(f) parts of the area subject to the applications for the tenements has been subject to prior exploration and mining activities which may have already effected the Native Title Party's rights and interests, such that any further potential for impact by tenements on the enjoyment of native title rights and interest will be minimal; and

(g) the operation of the non-extinguishment principle in s 24MD(3)(a) to the granting of the tenements.

[20] The State also notes the Boonthamurra People provided no evidence to suggest their freedom to access the land and carry on rites, ceremonies or other culturally significance activities would be affected by the grant of the mining claim (s 39(1)(a)(iv)).

[21] In his future act determination application, Mr White stated in relation to the effect of the act:

- 'It is not intended that The Boonthamurra People be restricted from accessing the site other than due to safety and induction requirements that may apply under law'; and
- 'The project is small scale in an extremely isolated area so it is not anticipated that there will be any impact on the way of life, culture and traditions of the Boonthamurra People'.

[22] At the oral hearing, Mr Casagrande stated there is 'at least a possibility or a chance of culturally significant discoveries' in the area of the tenements, but the Boonthamurra People will not know for certain unless a cultural heritage survey is undertaken. He stated the Boonthamurra People do not suggest there are people on country who need to access the area of the proposed tenements every day or every month.

[23] As stated in *Ward v Western Australia* at [26], 'where facts are peculiarly within the knowledge of a party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn when the administrative tribunal

applies its common sense approach to evidence'. Therefore, on the limited evidence before me, and considering Mr White's statements and the State's cultural heritage and environmental protection legislative regime, I cannot conclude the act will impact the Boonthamurra People's enjoyment of registered native title rights and interests; way of life, culture and traditions; development of social, cultural and economic structures; or freedom to access the land and freedom 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

[24] The State undertook a search of the Aboriginal Cultural Heritage Database and the Aboriginal Cultural Heritage Register and did not identify any Aboriginal cultural heritage sites within the area of the tenement. It submits the grant of the tenement is anyway unlikely to interfere with any areas of significance that may exist because of the grantee party's obligations under the MRA, EPA and ACHA.

[25] Mr White states in his application for this determination:

> The area has previously been extensively mined by shallow open cut methods during the 1970's. To the untrained eye there are no observable items of cultural significance. However it is proposed that an inspection of the site by a member of the Boonthamurra people be carried out prior to the commencement of mining activities to identify any items of significance so that mining activities would not adversely impact them.

[26] As noted above, at the oral hearing, Mr Casagrande stated there is 'at least a possibility or a chance of culturally significant discoveries' in the area of the tenement, but the Boonthamurra People will not know for certain unless a cultural heritage survey is undertaken. The Boonthamurra People have provided no further information as to the existence of sites or areas of particular significance. As such, I am unable to find the grant of the tenement would be likely to affect areas or sites of particular significance to the Boonthamurra People.

Section 39(1)(b) – effect on interests, proposals, opinions or wishes of the Boonthamurra People in relation to the management, use or control of land or waters

[27] Apart from reference in the oral hearing to cultural issues, no contentions or evidence were provided in regards to the interests, proposals, opinions or wishes of the Boonthamurra People in relation to the management, use or control of land or waters

concerned. As also outlined, Mr Casagrande provided a copy of Cultural Heritage Terms contained in the Boonthamurra's draft Ancillary Agreement for Small Mining Operations, with the request they be considered 'as part of any determination'. These conditions related to issues such as cultural heritage inspection and monitoring. However, there was nothing else provided in support of the s 39(1)(b) criteria. As such, I am unable to draw a conclusion that the proposed grant would have any effects on the Boonthamurra People's interests, proposals, opinions or wishes.

Section 39(1)(c) and (e) – economic and other significance; and public interest

[28] The State submit the grant of the tenement would provide economic and social benefits to the State and local communities, and the region in which the mine operates, as well as economic stimulus to local towns and businesses within the area of the proposed mining claims.

[29] The State also contends the proposed act is in the public interest. Citing previous Tribunal decisions and information, the State contends that as a matter of public knowledge, the grant of exploration permits is important to maintaining a healthy and feasible mining industry in Queensland.

[30] The Tribunal has often accepted that economic benefits flow from the grant of particular exploration permits and mining leases, and that the public interest may be served by a vibrant mining industry. In the absence of any evidence to the contrary, I accept the grant of this tenement is likely to provide economic and social benefits to the local communities, region and State, and will be in the public interest.

Sections 39(1)(f) and 39(2) – any other matter the arbitral body considers relevant; and existing non-native title rights and interests and use of the land

[31] The State outlines that the tenement is overlapped with leases for pastoral purposes, and surrounded by historical and current mining activities. It states a significant part of the area covered by the proposed tenement has been mined in the past, as depicted in the maps annexed to its submissions.

[32] All other parties indicated they were aware of the tenure and the historical and current activity in the area of the proposed grant. No further contentions or evidence were

provided by any party to suggest the nature and extent of any effect this has had on the Boonthamurra People's native title rights and interests. Based on the material before me, I am unable to draw meaningful conclusions on the effect of previous tenure of the area and conclude there are no further relevant matters to be considered.

Section 39(4) – Issues relevant to the inquiry on which the negotiation parties agree

[33] There are no further substantive matters to which parties agreed that are relevant to this inquiry, which have not already been outlined in this decision.

Conditions on the future act

[34] In its email of 26 March 2018, the State sought that the determination be made without the conditions outlined in Appendix 1 on the basis the conditions:

- 'are addressed by Queensland's mining, environmental and cultural heritage regime, which provides layers of cultural heritage and environmental protection through statutory obligations and conditions to ensure protection of the Native Title Party's cultural heritage and native title rights and interests'; and

- 'would be difficult to administer, noting that under s 41 of the NTA [*Native Title Act*], these conditions are not conditions of the mining tenement but create additional contractual obligations on the grantee parties'.

[35] The State submitted some helpful technical considerations in relation to the wording of the proposed conditions. They also suggested the proposed conditions are unnecessary as the proposed tenements are 'clearly identified as small scale opal mining' and the Tribunal has previously found Queensland's legislative regime 'cumulatively provides a protective framework which ameliorates the likely or potential effect of the future act on the native title rights and interest of the native title party'.

[36] I have taken into account the technical considerations raised by the State, and the proposed conditions have been reworded accordingly at Appendix 2. I do not consider the conditions outlined at Appendix 2 would be difficult to administer.

[37] Section 38(1)(c) of the Act provides me with a wide discretion to impose conditions. The purpose of the Tribunal's power to impose conditions under s 38(1)(c) is to

address the effects of a proposed act on the s 39 criteria, including the effect on native title rights and interests (*FMG Pilbara v Yindjibarndi #1* at [175]; see also *Western Australia v Thomas* at [106]). While limited evidence has been provided in this matter in relation to the s 39 criteria, I am satisfied the imposition of the conditions outlined in Appendix 2 is justified on the basis the Boonthamurra People have consistently asserted the importance of cultural heritage in the area, there is a long history of positive negotiations between parties, and the grantee parties have demonstrated at various stages general agreement in respecting cultural heritage. I note the conditions relate to the communication and notification of the grantee parties' activities to the Boonthamurra People, taking into account the State's regulatory regime. The conditions are not arduous and I consider them appropriate to facilitate a positive ongoing relationship regarding the rights and interests of the Boonthamurra People and the respective grantee parties.

Conclusion

[38] Having considered the evidence and information before me, I conclude the future act may be done subject to conditions.

Determination

[39] The determination of the Tribunal is that the act, namely the grant of mining claim MC300131 to Robert John White, may be done subject to the conditions outlined in Appendix 2 of this decision.

Helen Shurven
Member
29 March 2018

Appendix 1: Proposed Conditions

1. If the grantee party submits a work program as required by s 81(c) of the *Mineral Resources Act 1989* (Qld), the grantee party must provide the native title party with a copy, excluding sensitive commercial data, within 21 days.

2. If the grantee party makes an application for an environmental authority under s 121 of the *Environmental Protection Act 1994* (Qld), the grantee party must provide the native title party with a copy within 21 days.

3. If the grantee party notifies the administering authority of a Notifiable Activity listed in Schedule 4 of the *Environmental Protection Act 1994* (Qld), the grantee party must provide the native title party with a copy of the notice within 21 days.

4. When, prior to the cancellation or expiry of the mining claim, the grantee party submits a Final Rehabilitation Report and a compliance statement to the administering authority, the grantee party must provide the native title party with copies within 21 days.

5. Correspondence to the native title party must be sent to:

    a) the address for service listed on the National Native Title Register; and

    b) any other representative named by the native title party from time to time.

6. These conditions apply to any assignee of the grantee party (other than a mortgagee, chargee or other security holder not in possession of the mining claim).

Appendix 2: Final Conditions

1. The grantee party must provide the native title party with a copy of any work program the grantee party has submitted, or submits, in compliance with s 81(c) of the *Mineral Resources Act 1989* (Qld) in relation to the mining claim. The work program must be provided to the native title party within 60 days of the date of this determination or within 60 days of the date of the submission of the work program, whichever is later. The grantee party may exclude sensitive commercial data from the copy of the work program provided.

2. The grantee party must provide a copy of any application the grantee party has made, or makes, for an environmental authority under s 121 of the *Environmental Protection Act 1994* (Qld). The application must be provided to the native title party within 60 days of the date of this determination, or within 60 days of the date of that application, whichever is later.

3. If the grantee party notifies the administering authority of a Notifiable Activity (as set out under Schedule 3 and defined under Schedule 4 of the *Environmental Protection Act 1994* (Qld)) in relation to the mining claim, the grantee party must provide the native title party with a copy of the notice within 30 days of that notification.

4. When, prior to the cancellation or expiry of the mining claim, the grantee party submits a Final Rehabilitation Report and a compliance statement to the administering authority, the grantee party must provide the native title party with copies within 30 days of that submission.

5. Correspondence to the native title party must be sent to:

    a) the address for service listed on the National Native Title Register; and

    b) any other representative named by the native title party from time to time.

6. These conditions apply to any assignee of the grantee party (other than a mortgagee, chargee or other security holder not in possession of the mining claim).