

# NATIONAL NATIVE TITLE TRIBUNAL

*William Webb & Ors on behalf of South West Boojarah #2 v Hesketh Quarry's Pty Ltd & Anor* [2018] NNTTA 17 (26 March 2018)

**Application No:** WF2017/0022

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

- and -

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

**William Webb & Ors on behalf of South West Boojarah #2 (WC2006/004)**  
**(native title party)**

- and -

**Hesketh Quarry's Pty Ltd**  
**(grantee party)**

- and -

**State of Western Australia**  
**(Government party)**

## **FUTURE ACT DETERMINATION THAT THE ACT MAY BE DONE**

**Tribunal:** Mr J R McNamara

**Place:** Brisbane

**Date:** 26 March 2018

**Catchwords:** Native title – future act – application for determination in relation to proposed grant of mining lease – uncontested application – parties unable to formalise s 31(1)(b) agreement – s 39 criteria considered – act may be done

**Legislation:** [\*Native Title Act 1993 \(Cth\) ss 31, 36\(2\), 37\(a\), 38, 39\(1\), 39\(2\), 39\(4\)\*](#)

[\*Aboriginal Heritage Act 1972 \(Cth\) s 18\*](#)

**Cases:** *McGlade v Native Title Registrar* [\[2017\] FCAFC 10](#); (2017) 340 ALR 419 ('McGlade')

*Re Koara People* [\[1996\] NNTTA 31](#); (1996) 132 FLR 73;

*Western Australia v Thomas* [\[1996\] NNTTA 30](#); (1996) 133 FLR 124;

**Representative of the native title party:** Mr Peter Nettleton, South West Land & Sea Council

**Representative of the grantee party:** Mr Chris Barker, Hesketh Quarry's Pty Ltd

**Representatives of the Government party:** Mr Domhnall McCloskey, State Solicitors Office  
Ms Faye Mitchell, Department of Mines, Industry Regulation & Safety

## REASONS FOR DETERMINATION

- [1] This determination that the State of Western Australia may grant mining lease M70/1350 (the lease) to Hesketh Quarry's Pty Ltd (Hesketh) is made in the absence of an agreement of the kind mentioned in s 31(1)(b) of the *Native Title Act 1993* (Cth) (the Act). The agreement referred to in s 31(1)(b) is the agreement of the native title party to the doing of the proposed act, with or without conditions. Had there been an agreement of that kind, the Tribunal would be barred from making a determination by s 37(a) of the Act.
- [2] Mining lease M70/1350 is 33.69 hectares in size and is located approximately 15 kilometres north of Manjimup. The lease is located wholly within the native title claim of South West Boojarah #2 (WC2006/004) and there are no other native title parties for the relevant area. Hesketh intend to reopen a now defunct quarry already present in the lease area in order to supply black basalt hard rock for road base and construction purposes to government and other consumers in the South West of Western Australia.
- [3] The State gave notice of its intention to grant the leases on 1 June 2016, triggering the right to negotiate process.
- [4] A future act determination application in relation to the leases was made by the native title party on 11 December 2017. On 12 December 2017 President Raelene Webb QC appointed me to constitute the Tribunal for the purposes of conducting the inquiry and making the determination.
- [5] I held a preliminary conference on 29 January 2018 where the conduct of the inquiry was discussed. The native title party and the grantee party advised that they have reached agreement in relation to the grant of the lease. However, it has not been possible for the parties to fully execute an agreement of the kind mentioned in s 31(1)(b) because two of the registered applicants have failed to sign the agreement.
- [6] Section 36(2) of the Act prohibits the Tribunal from making a determination where there has been a failure to negotiate in good faith by the grantee party or the Government party. The parties also agree that there has been negotiation in good faith.
- [7] Following the preliminary conference I made directions that the parties lodge a Joint Submission addressing the criteria within s 39 of the Act, together with supporting

evidence. The parties lodged their Joint Submission on 19 February 2018. On 20 March 2018 Hesketh provided two separate emails to the Tribunal and the other parties providing copies of the following:

- an ethnographic survey of the lease prepared by Brad Goode & Associates, Consulting Anthropologists and Archaeologists, prepared in October 2016;
- an environmental survey prepared by Plantecology Consulting, prepared in December 2015;
- an email from the Material Manager, South West Region, Department of Main Roads regarding the availability, suitability and supply constraints of road base material, and supporting Hesketh's application for the grant of the lease; and
- a statement from Hesketh's representative outlining the economic significance of the quarry project and the public interest in favour of it.

[8] At paragraph 3 of the Joint Submission the parties stated:

“The Native Title Party and the Grantee Party have reached an agreement regarding the grant of the Mining Lease. However, it has not been possible to fully execute an agreement under section 31 of the NTA (i.e. a State deed between all parties) in respect of the Mining Lease because two of the registered applicants comprising the Native Title Party have not signed the agreement and State Deed. Ms Margaret Culbong declined to sign the agreement and State Deed and Mr Bertram Williams has not responded to requests to sign the agreement and State Deed.”

[9] I am informed by the legal representative of the native title party that Ms Culbong refuses to have any interaction with the South West Land & Sea Council and refuses to sign anything whatsoever on behalf of the native title party. The native title party's legal representative advised me that he is reliably informed that Mr Williams has significant health issues that affect his legal capacity to sign the agreement.

[10] In relation to the grant of the lease, I must determine either that the act must not be done, that the act may be done, or that the act may be done subject to conditions (see s 38 of the Act). Despite being informed the native title party consents to a determination that the act may be done, I cannot overlook the Act's requirement that I

assess the evidence provided by parties in terms of the criteria in s 39 (see *Western Australia v Thomas* at 165–166).

[11] Due to Ms Culbong’s refusal to sign any documents relating to South West Boojarah #2, I cannot be certain there is agreement amongst the registered applicants of the sort contemplated by the decision of the Federal Court in *McGlade* that would allow me to avail myself of the provisions of s 39(4) of the Act. Therefore I must consider each of the criteria in s 39 of the Act despite the parties’ submissions that they have reached agreement and consent to the Tribunal having no further regard to the criteria within s 39(1)(a) to (f).

[12] I outline my consideration of relevant material in respect of each criterion below, noting that I consider some criteria together. The Act does not direct that greater weight be given to some criteria over others. The weight to be given to each criterion will depend on the evidence. I must also take all reasonable steps to make a determination as soon as practicable (see ss 36 and 37 of the Act).

### **Assessing the s 39 criteria**

#### ***Section 39(1)(a)(i) and 39(2) – enjoyment of registered native title rights and interests of South West Boojarah #2***

#### ***Section 39(1)(a)(ii) – way of life, culture and traditions of South West Boojarah #2***

#### ***Section 39(1)(a)(iii) – development of social, cultural and economic structures of South West Boojarah #2***

#### ***Section 39(1)(a)(iv) – freedom of access and freedom to carry our rites and ceremonies of South West Boojarah #2***

[13] The parties submitted the interests set out in these criteria have been addressed to their mutual satisfaction. The parties state at paragraph 4(a) of the Joint Submissions that the grant of the Lease will have no significant adverse impacts on:

- (a) South West Boojarah #2’s exercise of their registered native title rights and interests;
- (b) South West Boojarah #2’s way of life, culture and traditions;

- (c) the development of South West Boojarah #2's social, cultural and economic structures;
- (d) South West Boojarah #2's freedom of access 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

[14] The Tribunal has received no contradictory evidence from South West Boojarah #2 that would cause the Tribunal to doubt the joint submissions of the parties.

[15] In the absence of contradictory evidence from South West Boojarah #2, Ms Culbong or Mr Williams, I am satisfied the grant of the proposed leases will not have a significant adverse effect on the matters in paragraphs 39(1)(a)(i) - (iv).

***Section 39(1)(a)(v) – effect on areas or sites of particular significance to South West Boojarah #2***

[16] The parties state at paragraph 4(a) of the Joint Submissions that the grant of the Lease will have no significant adverse impacts on any area or site on the land and waters concerned of particular significance to South West Boojarah #2.

[17] An ethnographic survey of the lease area was carried out on 8 September 2016 by Brad Goode & Associates, who are consulting anthropologists and archaeologists. Representatives from South West Boojarah #2, along with representatives from two other native title claim groups that border the lease area, attended the survey. The two other native title claim groups that border the lease area are Gnaala Karla Booja (WC1998/058) and Wagyl Kaip (WC1998/070). The survey included a review of the Department of Aboriginal Affairs' Register of Sites, which identified one 'other heritage place' existing on the area of the lease (Site ID 17979, Donnelly River & Associated Wetlands, Mythological, No Gender Restrictions). It appears from the ethnographic survey report that no other sites or areas were identified by the participants during the survey.

[18] Hesketh will need to upgrade the existing bridge over Donnelly River to accommodate the trucks travelling to and from quarry in the lease area. This will include widening the bridge and installing stronger bridge foundations, which would likely interfere with the Donnelly River 'other heritage place'. While there is no evidence as to

whether the Donnelly River ‘other heritage place’ is a site of particular significance, Hesketh and South West Boojarah #2 have agreed to the employment of heritage monitors to monitor such work and all land clearing in the lease area, and it appears from the ethnographic survey report that the survey participants were informed of, and agreed to, the need for Hesketh to make an application under s 18 of the *Aboriginal Heritage Act* in order to complete the bridge works. It appears the survey participants provided agreement to the s 18 application on the basis the bridge works would be monitored by members of the three native title groups.

[19] It is clear to me from Hesketh’s conduct of the heritage survey and agreement to employ heritage monitors that Hesketh is aware of the operation and effect of the State’s regulatory regime in relation to aboriginal heritage. In the circumstances, while there is likely to be an impact on the Donnelly River ‘other heritage place’, there is no evidence of likely interference with sites of particular significance to South Boojarah #2 people. I am satisfied the grant of the proposed leases will not have a significant adverse effect on the matters in paragraphs 39(1)(a)(v).

***Section 39(1)(b) – interests, proposals, opinions or wishes of South West Boojarah #2***

[20] At paragraph 4(b) of the Joint Submissions the parties state the interests, proposals, opinions and wishes of South West Boojarah #2 in relation to the management, use or control of the relevant land and waters have been considered and taken into account by Hesketh, and there is no other evidence before me to suggest South West Boojarah #2 oppose the grant of the lease. I have received no contradictory evidence from either Ms Culbong or Mr Williams that would cause me to doubt the assertions made by the parties in the Joint Submissions.

***Section 39(1)(c) – economic or other significance***

[21] At paragraph 4(c) of the Joint Submissions the parties state the grant of the lease is of economic significance to Australia, the State of Western Australia, the area in which the lease is located and the Aboriginal people who live in that area. I have no evidence before me to contradict this statement.

- [22] The supporting email from the Department of Main Roads advises there are currently two hard rock quarries located in the South West of Western Australia, which supply the majority of aggregate that the Department of Main Roads use in sealing roads but this does not meet the full demand for such hard rock supplies in the South West of Western Australia as access to requisite areas to maintain supplies is becoming more difficult, increasing the time and cost of providing such material to the department of Main Roads and local industry.
- [23] The information provided by Hesketh from the Department of Main Roads indicates the project on the lease area will increase supplies of hard rock materials, increasing supply and competition in the industry, while potentially reducing the cost to the Department of Main Roads and other consumers of the hard rock products. In their email to the Tribunal, Hesketh argues that their close proximity to the source of demand will result in reduced transport costs which will reduce the cost to the Department of Main Roads in sealing and maintaining roads in Western Australia, meaning a reduction of expenditure of public funds on these necessary activities.
- [24] Hesketh's email to the Tribunal also advises it expects to employ up to 10 local people directly at the quarry, and will indirectly engage local contractors and tradespeople for the construction and maintenance of the project, including for accommodation, fuel, surveys and environmental consultation. Hesketh also advises it will employ Aboriginal people from South West Boojarah #2, Gnaala Karla Booja and Wagyl Kaip as heritage monitors in its works.
- [25] In its email to the Tribunal, Hesketh advises it has also agreed to pay a royalty to South West Boojarah #2 for its quarry work, providing income to South West Boojarah #2 in addition to the royalty and other payments Hesketh will be required to pay to the State.
- [26] I am satisfied the proposed project to be developed on the lease subject to this inquiry will have economic and other significance for the local Aboriginal community, as well as the State of Western Australia.

***Section 39(1)(e) – public interest***

- [27] Section 39(1)(e) is a broader provision than s 39(1)(c) and requires me to take into account both the public interest in the protection of native title rights and interests and



also evidence of the public interest in the act being done (*Re Koara People* at 98). The parties argue grant of the lease is in the public interest, and there is no material before me to suggest the grant of the lease would be contrary to the public interest.

- [28] In its email to the Tribunal, Hesketh advises that currently hard rock products have to be transported from the existing two quarries over large distances to consumers (both government and private), typically at least 200km and often much longer, which increases truck movements in the South West of Western Australia due to the limited sources of road building materials. Hesketh asserts that by re-establishing a quarry in the area of the lease, it will considerably reduce the amount of truck traffic on roads in the local area, making the roads safer for other users and reduce maintenance costs.
- [29] Hesketh has also undertaken an environmental survey in the lease area and a Black Cockatoo nesting habitat was identified in a corner of the lease. Hesketh advised the Tribunal in its email that it has quarantined that area as an environmental buffer in order to preserve the Black Cockatoo nesting habitat.
- [30] Hesketh advised the Tribunal in its email that it has estimated the rehabilitation costs for the quarry and will set aside funds in order to meet those rehabilitation costs. Hesketh went on to give specifics as to the likely rehabilitation costs and how it will set aside the necessary funds. Given the quarry is within the bounds of a State Forest area, I take this to mean Hesketh is aware of its environmental obligations and is demonstrating a commitment to meeting those obligations.
- [31] In weighing up the public interest, I have considered whether the grant of the lease would be to the detriment of any native title rights or interests and the environment. I accept there is likely to be economic and social benefit to the public in the grant of the lease. There is no evidence before me to suggest detriment to South West Boorah #2's native title rights or interests and Hesketh will comply with its environmental obligations.

***Section 39(1)(f) – any other relevant matter***

- [32] Implicit in the parties' joint submission is that there are no other matters parties wish to draw to my attention as being relevant to the determination. The Tribunal has not received any other evidence that would contradict this assertion by the parties.

***Section 39(2) – Existing non-native title interests etc.***

[33] I am also required to take into account the nature and extent of existing non-native title rights and interests and existing uses by persons other than the native title parties. M70/1350 appears to wholly overlap the following areas:

- (a) wholly overlap a State Forest Reserve (Parcel ID SF9);
- (b) wholly overlap a Water Reserve (Parcel ID WR20); and
- (c) wholly overlap exploration permit E70/4825.

[34] However, in light of the Joint Submissions of the parties, I do not consider the overlap of the listed areas has any relevance to the determination the parties seek.

**Conclusion**

[35] After taking into account the effect of the proposed grant of the lease on the matters set out in s 39(1) and (2), I conclude the act may be done.

**Determination**

[36] The determination of the Tribunal is that the act, being the grant of mining lease M70/1350 to Hesketh Quarry's Pty Ltd, may be done.

**J R McNamara**  
**Member**  
**26 March 2018**