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[2005] WAIP 3

Independent Person under S24 MD (6B) Native Title Act (Commonwealth) Western Australia — **Referral 1/2004**

IN THE MATTER of an application for Miscellaneous Licence Applications 08/22 and 08/03 between

Kuruma Marthudunera (Combined) Native Title Claimants	**Objector**
-and-	
State of Western Australia	**Government Party**
-and-	
Mineralogy Pty Ltd	**Applicant**

HEARD: 25 May 2005

DATE OF DECISION: 14 June 2005

Legislation
Native Title Act 1993 (Cth)
Aboriginal Heritage Act 1972 (WA)
Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002
Rights to Water and Irrigation Act 1914 (WA)

Cases
Wellington International Airport Ltd v Air New Zealand [1993] INZLR 671

REPRESENTATION

Counsel

Objector:	Mr J Ryan
Government Party:	Mr G Ranson
Applicant:	Mr A Ellis

Solicitors

Objector:	Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation
Government Party:	State Solicitors Office
Applicant:	Mr A Ellis

1. The Applicant is developing a project in the North West of the State involving the mining and processing of iron ore. The project is the subject of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA)*. The Applicant has applied for Miscellaneous Licences 08/22 and 08/23 for the purpose of extracting ground water for its operations.

2. The Objector is the registered native title claimant for the land the subject of the Miscellaneous Licence applications.

3. The Government Party proposes to grant the Miscellaneous Licences pursuant to section 91 of the Mining Act 1978 (WA). The Objector has lodged objection pursuant to s 24 MD (6B) of the *Native Title Act* 1993 (Cth).

4. The sole issue for determination by me is whether there has been sufficient consultation between the Applicant and the Objector.

5. In this matter it is accepted that there was no specific meeting between the Objector and the Applicant in relation to these particular tenements prior to a meeting on 7 October 2004. Prior to that date there had been various meetings in relation to the Applicant's project as a whole. It should be noted that the Applicant's project covered an area over which a number of Native Title claimants had lodged claims and that there were some areas where claimants were at odds with each other as to who was the valid claimant.

6. It is common ground that a full day meeting was arranged for the Applicant and the Objector's working party to specifically discuss the tenements on 7 October 2004. This was subsequently changed to a half-day meeting. This change appears to have occurred for a number of reasons including that the working group were meeting with another company on that day, the Applicant could take advantage of that meeting without contributing to the costs and it was difficult for the Applicant to arrange another suitable date within a short time frame.

7. When the meeting took place it is apparent that members of the Objector's working group sought to raise a number of unrelated issues. The Applicant's representatives were however able to give some information concerning their proposals. The Objector's working group expressed the view that they required a heritage survey over the tenement areas. The Objector was requested to put its proposals in writing and the meeting appears to have broken up without any satisfactory progress.

8. The Objector subsequently wrote to the Applicant. That letter provided in part:

9. "The working group cannot say how the activities will affect its native title rights and interests without knowing exactly where you propose to do them. We believe you could provide this information by providing a detailed work plan to the working group. Alternatively, if you do not have the detailed work plan yet, you could conduct a cultural survey over the area with members of the group. A

cultural survey could identify possible hunting grounds, heritage sites, possible burial grounds, possible Thalu sites and other information you could use to plan your work program. This way you could ensure that any impacts you cause on the group's native title rights and interests are minimised."

10. The letter also requested further information in relation to the taking of water from the aquifer and the impact this may have on surrounding flora and fauna.

11. The Applicant responded to that request and indicated that because the first activities to be undertaken following the grant of the licences would be exploration it was not possible to say with certainty what the scope of the activities would be or precisely where they would be carried out. The Applicant indicated that as the Objector only referred to possible sites it was not reasonable to expect the Objector to incur the costs of undertaking such a survey. They also referred to surveys previously carried out in the area. The Applicant indicated that the onus was on the Objector to inform the Applicant of any significant sites known to exist.

12. In referral number 3 of 2004 Gobawarrah Minduarra Yinhawanga People and Innawonga People v State of Western Australia and Hamersely Iron Pty Ltd I referred to the New Zealand Court of Appeal decision *Wellington International Airport Ltd v Air New Zealand* [1993] INZLR 671 which at 675 contains the trial judge's statement of the requirements of consultation in the context of that case. The relevant passage provides:

> "Consultation must be allowed sufficient time, and genuine effort must be made. It is to be a reality, not a charade. The concept is grasped most clearly by an approach in principle. To 'consult' is not merely to tell or present. Nor at the other extreme, is it to agree. Consultation does not necessarily involve negotiation towards an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussions....I cannot improve on the attempt at description which I made in West Coast United Council v Prebble at p. 405:
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> > 'Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.'
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> "Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh. Beyond that there are no universal requirements as to the form. Any manner of oral or written

> interchange which allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone call. In other contexts it might require years of formal meetings. Generalities are not helpful."

13. As I indicated in that matter I believe this is a good summary of what is required in relation to the consultation under s 24MD (6B) of the *Native Title Act* (1993) (Cth).

14. What constitutes adequate consultation and what is required to enable adequate consultation to occur may differ from case to case.

15. The Objector submitted that any information and consultation with respect to the general project as opposed to the specific tenements was not relevant. In my view that is not necessarily correct. Whilst in most cases one would anticipate the need for consultation with respect to the specific tenements, consultation with respect to the entire project or an associated project will often be relevant to providing Native Title claimants with information and enable some consultation to occur.

16. A heritage survey will not always be required but in many cases, when dealing with an Aboriginal Community, a survey over the relevant piece of land explaining on country what is proposed to take place will be needed. There is however an obligation on an objector to identify their interests. The knowledge of what is claimed and what is significant in a particular area is within the knowledge of the Objector not the Applicant.

17. In this case I am not satisfied that the previous heritage surveys conducted by the Applicant covered the area of the current tenements. The evidence in this regard was somewhat vague and the maps annexed to the affidavits of the Applicant and the Objector, being black and white photocopies, are generally unhelpful. The documents provided by the Department of Industry and Resources at the time this matter was referred to me and the plan forming part of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* would suggest that L08/23 is largely within the project area as defined in that agreement but that L08/22 is not. Unfortunately the heritage survey previously conducted by the Applicant is not in evidence and whilst a map from that report is in evidence there is nothing to indicate whether the report covered the entire area of the map, the project area as defined in the agreement or the mining tenements as shown on that map.

18. I note that in paragraph 34 of the affidavit of Vimal Kumar Sharma he refers to the "Iron Ore Mine and Downstream Processing, Cape Preston, Western Australia – Supplementary Environmental Review" prepared by Halpern Glick Maunsell Pty Ltd, dated February 2003. At paragraph 2.1.4 that report reads:

> "Austeel commissioned Mr Rory O'Connor to conduct an ethnographic survey and Mr Gary Quartermaine to conduct an

> archaeological survey on the existence of aboriginal heritage sites within Austeel's mining tenements in the Fortescue River/Cape Preston area in order to prevent the unintentional disturbance of sites during project construction and operation."

19. This would suggest that the surveys only concerned the mining tenements and therefore would not have involved the areas the subject of these tenements which were applied for after the date of the surveys.

20. If granted these Miscellaneous Licences will be subject to other legislation which will require separate State processes, such as those in the *Rights to Water and Irrigation Act* 1914 (WA), to occur which require that environmental impacts are assessed and will include the assessment of any impact on Aboriginal interests. The Aboriginal Heritage Act will also apply to protect Aboriginal Heritage sites. These other Acts do not replace the Applicant's obligation to consult however they are relevant in their restrictions on the Applicant's activities. The difference in the obligations is well illustrated in paragraph 33 of Mr Sharma's affidavit where he quotes from part 14.3 of a report entitled 'Iron Ore Mine and Downstream Processing, Cape Preston, Western Australia – Public Environmental Review'. The Report states:

> "Should the project, as it is currently defined, impact on any sites of significance which cannot be disturbed, and for which approval to disturb cannot be obtained under the Aboriginal Heritage Act, the project will be modified to ensure the protection of the sites. Approval under section 18 of the Aboriginal Heritage Act 1972 will be sought to disturb any sites"

21. This would indicate an intention to seek statutory approval to disturb Aboriginal sites and to modify the project proposal only where that consent cannot be obtained. The obligation for consultation under s24 MD requires consultation to investigate ways of minimising and avoiding any such disturbance such that the need to seek such statutory approval is avoided.

22. The Applicant has correctly submitted that the proposal is of a nature that inherently has little impact. The development of a well head requires a small physical area and electricity supplies, pipelines and roads will impact on a relatively small portion of the licensed area. However this does not relieve the Applicant from the requirements to consult in order to minimise the impact of the act even if that act would be expected to have a small impact. Whilst a well head may require only a small physical area if that area were to coincide with site of particular significance it would clearly have a large impact.

23. I appreciate the difficulties for the Applicant where the tenements sought are to enable exploration for water and it would be impossible at this point to specify the exact areas where activity will take place or to specify where there will be temporary or permanent disturbance of the land. This in turn makes it equally difficult for the Objector to respond to the proposal.

24. In my view this was a case where there was a requirement for greater consultation. There was not satisfactory consultation at the end of the meeting on 7 October 2004. There was a need for both the Objector and the Applicant to meet again to discuss specific areas where the Applicant's activities were likely to occur and for the Objector to point out areas of significance. Some of this may have been possible with the use of maps or it may have required the parties to visit the actual site. Whilst the Objector has not pointed to specific sites on this occasion it has identified potential problems, sought additional information and shown a willingness to assist in provided further information in response to information provided by the Applicant. The Applicant on the other hand appears to have relied upon the statutory obligations under the other State schemes rather than addressing its obligation under s24MD (6B).

25. In my view the objection should be upheld.