Independent Person under S24 MD (6B)
Native Title Act (Commonwealth)
Western Australia

Referral 3/2004

IN THE MATTER of an application for Miscellaneous Licence Application 47/130 and objections by:

Gobawarrah Minduarra Yinhawanga People — obj NT 73/003
Native Title Claim (WC97/43) and
Innawonga People (WC98/69) — objection NT 74/004

Objectors

-and-

State of Western Australia

Government Party

-and-

Hamersley Iron Pty Ltd

Applicant

HEARD: **24 MARCH 2005**

DATE OF DECISION **2 MAY 2005**

Legislation

Native Title Act 1993 (Cth)
Aboriginal Heritage Act 1972 (WA)
Environmental Protection Act 1986 (WA)
Mining Act 1978 (WA)
Native Title Act 1993 (Cth)

Cases

Harris v Great Barrier Reef Marine Park Authority [2000] FCA 603
Mineralogy v NNTT (1997) 150ALR 467
Risk v Williamson (1998) 87FCR 202
Thalanyi Native Title Claim Group v Western Australia
Wellington International Airport Ltd v Air New Zealand [1993] INZLR 671

REPRESENTATION

Counsel	
Objectors:	Ms C L Tan
Government Party:	Mr G Ranson
Applicant:	Mr G Donaldson
Solicitors	
Objectors:	Pilbara Native Title Services
Government Party:	State Solicitors Office
Applicant:	Blake Dawson Waldron

---

1. The Applicant has applied for and the Government Party intends to grant a Miscellaneous Licence under s 91 of the *Mining Act* 1978 (WA).

2. The Miscellaneous Licence is to enable the Applicant to construct a gas pipeline from the Goldfields Gas Transmission Pipeline to the Applicant's power generation facilities in Paraburdoo. The Miscellaneous Licence is within the area of registered native title claims made by each of the Objectors.

3. The Objectors lodged objections under the *Native Title Act* (1993) (Cth) (NTA) to the Miscellaneous Licence and the matter was referred to me as an independent person.

4. In its submissions to me the Objectors have argued that I do not have jurisdiction for a number of reasons.

5. The Objectors have submitted that an independent person only has jurisdiction to make a determination if the facts come within the terms of s 24MD(6B) NTA and that it is the duty of a decision making body to make inquiry whether it has jurisdiction to decide a matter.

6. The Objectors refer to the decisions in *Mineralogy v National Native Title Tribunal* (1997) 150ALR 467 and *Risk v Williamson* (1998) 87FCR 202. In those cases it was held that when the party challenged its jurisdiction the National Native Title Tribunal (NNTT) had a duty to make due inquiry about whether it has that jurisdiction or authority. The Objectors submit that the NNTT is a statutory body carrying out a statutory function in the same way as an independent person.

7. The Applicant contends that the independent person is appointed by the State to perform a specific statutory function to enable the State to be satisfied that it has complied with s 24MD(6B).

8. The submissions of the Government Party were helpful in their examination of the purpose of the NTA and in particular the future act provisions.

9. The future act provisions in Division 3 of Part 2 of the NTA include procedural steps which, if followed, ensure that any "future act" which affects native title is "valid".

10. A failure by the State to follow the "correct" NTA procedure, or to follow any NTA procedure, in seeking to do a future act is not actionable *per se*. It is only the doing of the relevant "future act" that may give rise to a cause of action.

11. Section 24MD(6B)(f) of the NTA provides:

> "if any claimant or body corporate objects, as mentioned in paragraph (d), to the doing of the act and so requests, the Commonwealth, the State or the Territory must ensure that the objection is heard by an independent person or body;"

12. There are no statutory requirements with respect to the independent person or body. There is no formal appointment required under the NTA. The position is not one which has any powers other than those contained in the section. This can be contrasted with the NNTT which is created in Part 6 of the NTA. The independent person is not a court or a statutory tribunal. The ability for the independent person to consider the matter only arises upon referral by the State and that ability is then governed by the section.

13. A hearing by an independent person of an objection under s 24MD(6B) is not a forum in which relief may be sought on the basis that the party has not complied with a provision of the NTA. It is a hearing limited to considering the objection. It takes place not as an exercise in determining the legal rights of the parties but as a means of ensuring that any concerns on the part of the Native Title Claimants are considered before the act is done. The fact that, under s 24MD(6B)(g) any determination by an independent person is not binding against the Commonwealth or the State would appear to confirm that interpretation.

14. I accept and adopt the submissions of the Government Party in view of this it is not necessary to consider any of the objections as to jurisdiction but only to consider the substantive issues.

15. The Objectors submit that the reasons upon which an independent persons can uphold objections and impose conditions are not limited to the matters in s 24MD(6B)(e) and suggests that if this was the intention s 24MD(6B)(f) could have adopted wording similar to that in s 24MD(6B)(e). These matters are clearly matters relevant to the independent person's decision but the Objectors suggests they are not to be the only relevant matters. It is submitted that objection could be made to an act that affects registered Native Title interests and that objection upheld for various reasons assessed on all the circumstances of the case and

weighing up all the factors for and against the grant which affects such native title rights and interests.

16. In *Thalanyi Native Title Claim Group v Western Australia* I accepted that although s 24MD(6B)(f) does not explicitly set out the criteria upon which the determination by an independent person is to be made the logical conclusion is that it is the criteria in s 24MD(6B)(e). That is, the independent person should take into account ways of minimising the act's impact on the registered native title rights and interests, any access to the land and the way in which anything authorised by the act may be done. I am not persuaded by the Objectors' submission to vary from that previous finding. If I were to accept the submissions of the Objectors I would be required to revisit the decision of the Warden and in addition make decisions concerning State development and the financial viability of mining operations. In my view these are matters that are outside the role of the independent person. The urgency attached to this matter by the Applicant, the consequences of upholding any objection to the Applicant or the State and whether the Applicant could achieve its objectives by means of a different mining tenement are all irrelevant save to the extent that any of them might be said to have a bearing upon the level of consultation or matters the subject of consultation.

17. The Objectors submit that the application for the Miscellaneous Licence does not specify what the purposes of the licence are or restrict the possible scope of the Miscellaneous Licence. It is submitted that it can include many forms of mining infrastructure and these could all interfere substantially with the native title rights and interests of the Objectors. It is also submitted that sites may be damaged and the environment, including flora and fauna, will be affected.

18. The Objectors submit that consultation at the very least requires the provision of full information of the proposed act to facilitate the native title party being in a position to give a meaningful response and to give genuine consideration to any response. The Objectors also referred to a number of Canadian cases in which the duty to consult is discussed. In those cases letters requesting information, a few meetings and an opportunity to provide feedback have been held not to amount to proper consultation.

19. The Objectors submit that in order to have full information and to provide a meaningful response and thus in order to have a proper consultation about the matters set out in s 24MD(6B)(e) it is necessary for the Objectors to have a survey of the relevant land and see precisely where the works are proposed to be carried out. This is necessary in order to know about what native title rights and interests, in particular the need to protect sites of significance, will be affected and where impact might be minimised. It is also necessary to know about it in order to discuss any useful detail about such things as access. It is further necessary in order to have discussions about the way in which the activities authorised under the licence and any disturbance that may be caused could be minimised. This has not occurred and as a result the Objectors have not had the opportunity to give any meaningful responses about the matters. The Objectors further submit that the Applicant has failed to give necessary detailed information or offer any suggestion about how it could minimise the impact of the acts on native title rights and

interests nor about access to the land and waters nor about the way in which anything authorised by the licence may be done.

20. On the other hand the Applicant points to a number of matters demonstrating that it has consulted with the Objectors. It pointed to the level of information about the proposed pipeline and access track provided to the Objectors, meetings and correspondence providing the Objectors with an opportunity to express their view and response, meetings and correspondence attempting to obtain a substantive response by the Objectors and where a response was provided giving consideration to that response. It also points to the opportunity given to the Objectors to appoint appropriate members to consult with the Applicant and the significant funding provided by the Applicant to the Objectors to enable the Objectors to obtain professional advice in relation to the proposal and to assist them with the consultation.

21. In the Applicant's submissions it is necessary to distinguish the concept of consultation with the "right to negotiate" conferred by other parts of the NTA. The Applicant referred to the comments of the Full Court of the Federal Court in *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603 where the Full Court contrasted the opportunity to comment under s 24HA with consultation under s 24HA(6B):

> "This right to be consulted may well entitle those with native title interests to be given information by the decision-maker where that is necessary to enable the persons with native title rights to respond to the decision-maker with their own advice and information in a way that will permit the stated object of consultation to be achieved. This right to be consulted is a more extensive right than the opportunity conferred by s 24HA(7) to comment ..."

22. In its closing submission the Government Party referred me to the National Native Title Tribunal Members' Guide to Mediation and Agreement-Making Under the Native Title Act:

> "the right to be consulted is a lesser form of right than the right to negotiate, although the practical difference between consultation and negotiation remains to be ascertained. It does not include any formal negotiating right, access to Tribunal mediation or arbitration or the requirement for good faith in negotiations."

23. The Objectors referred me to the New Zealand Court of Appeals 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:

> "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:

> '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.'

"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."

24. I think this is a good summary of what is required in relation to the consultation under s 24MD(6B).

25. The Objectors point out that an essential component of meaningful consultation is to have full information in order to be a position to provide a meaningful response. What is required depends on the facts of each case. It is submitted that in most cases under s 24MD(6B) when one is dealing with an Aboriginal community, it means at least conducting a survey over the relevant piece of land and explaining 'on country' what is proposed to take place and where. The traditional country of a native title group is usually very large and it is difficult for claimants to be able to understand where the works are proposed to be carried out and what may be the sites or features at the area that will be affected. Heritage surveys on country enable the claim group to be able to respond about activities and the concerns they have and to suggest alternatives or mitigatory actions.

26. The Objectors have suggested that any discussion between the Applicant and the groups representing the Objectors may not have been appropriate groups and therefore there was not proper consultation.

27. The Objectors each have a "working group" with whom the Objectors submit the Applicant should have consulted. The role of the working group is to deal with issues relating to consultations about activities and is the group to speak to about the affect of native title rights and interests, protection of those interests and all issues where people speak for the land and what is culturally appropriate in the land. The Objectors distinguish its working groups from its negotiation team. The role of the negotiation team is to negotiate a claim wide commercial agreement

with the Applicant. The Objectors submit that the negotiation team was not authorised to consult about the effects of the Miscellaneous Licence or to carry out heritage surveys in relation to that or be consulted about cultural matters.

28. Section 24MD(6B) provides that there must be consultation with "any claimant ...who objects". "Claimant" in this context means registered native title claimant being the person or persons whose name or names appear in the register as the applicant. In relation to each of the Gobawarrah Minduarra Yinhawanga (GMY) and the Innawonga claims the names of a number of persons so appear. It is accepted that it would be impractical to require an applicant to consult with an entire claimant group. This is so given the large membership and distribution of claimant groups. The obvious and most practical solution is to consult with a representative person or subgroup of persons, such subgroup having authority to speak on behalf of the whole claimant group. The Applicant submits that the onus should be on the Objectors to inform the Applicant if there is a particular process of decision-making which must be followed in relation to consultations. It is further submitted that in the present case the registered native title claimant are legally represented. In those circumstances it is suggested that it is sufficient for the Applicant to advise the Objectors' legal representatives that they wish to consult with the appropriate persons and then be able to rely on a presumption that those legal representatives will make the appropriate representatives reasonably available.

29. In the Applicant's submissions all meetings referred to in the evidence included members of the GMY and Innawonga native title claim groups and their representatives the Pilbara Native Title Service (PNTS) Those people were authorised by the Objectors to meet and discuss matters pertaining to their claim and the application with the Applicant. How those individual exercise their authority was no business of the Applicant.

30. The negotiation team model was negotiated with the Applicant by the PNTS on behalf of among others the Objectors. The negotiation team was appointed at a working group meeting of the Objectors on 8 May 2004. Mr Wilkie's evidence was that he understood that the negotiation team was authorised to consult on behalf of the Objectors. This evidence was not contradicted in the working group or negotiation team meetings in which the matter was raised. These meetings included the working group meeting of 8 May and the negotiation team meeting of 2 September. The Applicant pointed to the fact that the Objectors put a proposal to the Applicant that would have resulted in the withdrawal of the objection had it been accepted by the Applicant.

31. I am satisfied that in this case there was consultation between the Applicant and appropriate representatives of the Objectors. This is particularly so given the presence of the PNTS in arranging the meetings. At no time where the proposed pipeline was discussed did any member of the Objectors or the PNTS indicate that such discussion or consultation should not occur. Indeed the contrary was the case and an offer was made to the Applicant to settle the matter.

32. In this case I am satisfied that the Applicant provided the Objectors with sufficient information to enable the Objectors to consider its proposal. As the Government

Party has pointed out this act is not a future act if the claim is not established. The knowledge of what is claimed and what is significant in a particular area is within the knowledge of the Objectors not the Applicant. A survey would have enabled further and better consultation and there was a dispute between the evidence of the Applicant and the Objectors as to whether there had been any request or any proper request for such a survey. However it is not in dispute that the Objectors were aware of the application for the Miscellaneous Licence and lodged objections under the Mining Act. There were meetings in May and June with the Objectors Working Groups. A scope of works for a survey was, putting aside the conflict about any earlier request, with Mr Stevens in July 2004. Thereafter there was no action on part of the Objectors to progress the survey. This was notwithstanding that there were offers exchanged with proposals for a negotiated settlement and the withdrawal for the Mining Act objections.

33. There is significant conflict in the evidence as to whether there were requests for a survey and whether the Applicant had placed higher priority on other surveys. Some of these differences may simply be differences of interpretation. It is important that the survey, whilst perhaps satisfying the Applicant's requirements for the purpose of the *Aboriginal Heritage Act* 1972 (WA), was of importance to the Objectors if they wished to have that information for the purpose of consultation. At no time did the Objectors request the survey proceed or ask that the consultation be delayed until the survey be conducted. The Objectors were not entitled to leave responsibility for the conduct of the survey as the sole province of the Applicant.

34. The conduct of the survey was necessarily in the control of the Objectors. The Applicant had provided information on the area in which the pipeline was to be constructed. Until the survey identified areas of significance there could be no further consultation as to ways to minimise any impact. The Objectors are not entitled to say that there has not been consultation when the Objectors have by their inaction prevented the exchange of the information relevant to that consultation.

35. In none of the consultations nor in any of the affidavits filed nor in the hearing before me did any evidence emerge of particular rights that might need to be exercised in the area or of any sites of significance. There was some evidence from Mr Injie about access but it appeared that these issues related to other areas rather than the area of the Miscellaneous Licence. Mr Tommy and Mr Injie both indicated that a heritage survey was necessary to ensure that any significant sites were avoided but it would appear that the Objectors have made no effort to identify any sites. The conduct of a heritage survey is a matter that is required in any event by the *Aboriginal Heritage Act* and therefore occurs regardless of this objection or the consultation.

36. In terms of minimising the act's impact on the native title rights and interests the Applicants have indicated that they have applied for a wider corridor than will be necessary so that it is possible to vary the route of the pipeline to avoid any sites identified in a heritage survey. It has also indicated that once the route is finalised the area of the Miscellaneous Licence will be reduced. It has also indicated that

the pipeline will be sunk and the area above it revegetated. Apart from warning signs and the access road the impact on the environment will then be minimised.

37. The Miscellaneous Licence is subject to other legislation. I have already referred to the *Aboriginal Heritage Act*. In addition the *Environmental Protection Act* 1986 (WA) will require the Applicant to apply for a clearing permit. These other Acts do not replace the Applicant's obligation to consult however they are relevant in their restrictions on the Applicant's activities.

38. Given these additional restraints upon the act I am satisfied that as far as possible the Applicant has endeavoured to minimise the act's impact on the Objectors' rights and interest in relation to the land and the access to the land and the way in which things authorised by the act might be done. There is nothing in the Objectors' submissions to me which identify any of the Objectors' rights and interests which might be better protected.

39. I therefore dismiss the objections.