

**BEFORE THE INDEPENDENT PERSON  
OBJECTION UNDER SECTION 24 MD (6B)  
NATIVE TITLE ACT 1993 (CTH)**

**IN THE MATER OF APPLICATIONS FOR MISCELLANEOUS LICENCES  
L45/249, L45/250 AND L45/251**

**BETWEEN**

MOLY METALS AUSTRALIA PTY LTD (ACN 108 503 331)

**APPLICANT**

**BETWEEN**

KARIYARRA NATIVE TITLE CLAIMANTS (WC 99/3)

**OBJECTOR**

**AND**

THE STATE OF WESTERN AUSTRALIA

**GOVERNMENT PARTY**

**DECISION**

1. The Applicant has applied for three Miscellaneous Licences under the *Mining Act (WA)* for the purpose of bringing electricity or gas from Port Hedland to the site of its Spinifex Ridge Molybdenum Project. The Miscellaneous Licences fall within the Objector's Native Title claim area. The Department of Mines and Petroleum issued notification to the Objector pursuant to Section 24MD (6B)(c) of the *Native Title Act*. The Objector lodged objections to the grant of the Miscellaneous Licences and the objections were referred to me as an Independent Person.
2. The Miscellaneous Licence applications are contiguous and portion of two of them intersect with Miscellaneous Licence L45/200. I considered an objection to the grant that the Miscellaneous Licence in Moly Metals Australia Pty Ltd, Kariyarra Native Title Claimants and State of Western

Australia, IND 2 of 2011 delivered on 19 August 2011 ("Moly Metals (No1)"). The Applicants have sought these additional licences to accommodate the possibility of securing a different gas supply and connecting to a different gas pipeline.

3. The Objector argues that the Independent Person does not have jurisdiction to conduct this hearing, that the fairness of the hearing is compromised and that if the Miscellaneous Licences are to be granted then a condition should be imposed requiring the Applicant to consult with the Objector.

#### **JURISDICTION**

4. The area subject to Applications L45/249 and L45/251 have been covered at all relative times by an exemption under Section 19 of the *Mining Act*. Accordingly if the Applications are to be granted they will be granted pursuant to Section 19 of the *Mining Act* rather than Section 91 of that *Act*.
5. The Objector argues that the act of granting the Miscellaneous Licences would not meet the freehold test set out at Section 24MB(1) of the *Native Title Act (Cth)* because Section 19 does not apply to private land and accordingly the Minister could not grant Miscellaneous Licences pursuant to Section 19 if the Objectors held ordinary title to the land. The Objector points out that where an application is pursuant to Section 91 it has the advantage of a hearing before the Mining Warden which is absent where the Minister makes a grant pursuant to Section 19. The Objector submits that the grant of these Miscellaneous Licences would be invalid to the extent that it affected Native Title and therefore unlawful under the *Native Title Act*.

6. The Government Party however suggests that an Independent Person requested to hear an objection has no role in determining whether or not he or she has "jurisdiction" to consider any particular objection. The sole question of jurisdiction is whether the Government Party has requested the Independent Person to consider the objection.
7. The Government Party contends that sub-division M applies in any event to the grant of Miscellaneous Licences because the relevant future act is the grant of the Miscellaneous Licences. There is no relevance whether the Minister under Section 19 or the Mining Warden under Section 91 is authorised to grant the Licences. If the Objector held ordinary title to the land in question, Sections 27 and 29(1) of the *Mining Act* would apply which provide for the grant of Miscellaneous Licences over land subject to freehold title. It is submitted that it would be an unwieldy result and one which cannot have been intended by the legislature if the particular factual circumstances surrounding every proposed future grant were required to be analysed by an Independent Person before deciding that he or she may proceed to consider the substantive aspects of an objection.
8. The Applicant supports the Government Party's submissions. In addition the Applicant notes that Section 19(7) of the *Mining Act* expressly provides that the *Mining Act* applies to a Mining Tenement granted pursuant to Section 19 as if it were granted under Part IV of the *Mining Act* (including Section 91 of the *Mining Act*). Section 226 of the *Native Title Act* looks to the licence granted, including its inherent rights and obligations, rather than the power by which the licence is granted.

9. I accept the primary submission of the Government Party that it is not my role to determine whether any preconditions necessary for the referral of an objection have been complied with. This is consistent with my finding in *Moly Metals (No1)* that whether or not there had been consultation as required by Section 24 MD(6B) was a matter for enforcement by those Courts which have jurisdiction with respect to the *Native Title Act*. An Independent Person has no ongoing power or jurisdiction but is enlivened only upon the receipt of a referral in accordance with sub-section (6B)(f). The sole function of the Independent Person is then to hear the objection that has been referred.
10. As the role of the Independent Person only arises upon receipt of the referral that is all that it is appropriate for an Independent Person to consider in determining whether he or she has "jurisdiction". Any error in the referral such as a failure to meet any preconditions prior to referral or if the referral is not one to which the section applies must be a matter for a Court. It is not necessary or appropriate for me to consider whether or not the grant of the Miscellaneous Licences satisfies the freehold test. The matter has been referred to me and I will hear the objection.

### **FAIRNESS**

11. The Objector also argues that because of the conduct of the Government Party, this hearing is unfair and that as the process is fundamentally compromised I should step aside or determine that the Licences not be granted.
12. In *Moly Metals (No.1)* it was held that the Miscellaneous Licences in that matter could be granted subject to the condition that any development be done in accordance with an affidavit of Mr Johan Hendrick Zandburg. When the Miscellaneous Licences were granted the Objector contends

that the Government Party decided unilaterally not to apply all aspects of the affidavit. The Objector therefore submits that if in this case it was determined that the Licences should be granted subject to conditions it is likely that the Government Party would not comply with the conditions.

13. The Government Party submits that any conditions imposed by an Independent Person must be conditions about the doing of the act that relate to the registered Native Title rights and interest. Further it submits any conditions proposed must be sufficiently certain. The Government Party submits that it has given effect to all the matters in the affidavit which relate to these matters.
14. The Applicant submits that the Objector's complaint does not reflect upon the ability of an Independent Person to conduct a fair hearing. It submits that any complaint about noncompliance with the previous decision should be ventilated in a court and that it is not a dispute within the function of the Independent Person.
15. I do not accept the Objector's submissions. Even if the Government Party had completely ignored a previous decision that does not affect in any way the right of the Objector to a fair hearing before the Independent Person. Any complaint relating to noncompliance needs to be pursued in an appropriate Court. If, as was suggested by the Objector, the *Native Title Act* does not provide a remedy for noncompliance then this is a matter for Parliament and not a reason for the Independent Person either not to hear the objection or to uphold the objection regardless of the merits.

The Applicant as much as the Objector is entitled to a hearing and for a decision to be made on the basis of the material presented and after all parties have had the opportunity to be heard.

### **CONSULTATION**

16. The Objector also submits that there has been no consultation by the Applicant with the Objector, that it is unlikely that the Government Party will insist on any consultation prior to the granting of licences and that a grant in those circumstances would be unlawful. The Objector therefore proposed that if it was determined that any of the licences be granted then the determination be subject to the condition that the Applicant and the Government Party comply with Section 24MD (6B)(e) of the *Native Title Act* or otherwise that the Applicant be required to consult with the Objector in good faith.
17. The Government Party submits that Section 24MB (6B)(e) requires the proponents of an act to consult with any objectors but that it is not a precondition to the hearing of the objection. As such a lack of consultation cannot form a ground of objection. It submits that the Independent Person has no power to enquire into or make determinations about questions of compliance including the requirement to consult and that questions of compliance are matters for the Federal Court.
18. The Applicant contends that it has consulted as far as it has been able but it has been the Objector who has failed to respond. In any event the Applicant submits that whether or not there has been consultation is not determinative of the objection.

19. I concluded in Moly Metals (No1) that whether or not there had been consultation was not a matter which determined whether or not the Independent Person could hear the matter.
20. The degree of consultation may affect the information available to the Independent Person when determining the impact of the proposed grant of the Miscellaneous Licences on any Native Title rights and interests, ways of minimising that impact and any issues relating to access to the land or the way in which things authorised under the grant of the Miscellaneous Licence may be done.
21. In this case the Objector has chosen not to file any affidavits identifying their Native Title rights and interests or detailing how the grant of the Miscellaneous Licences might impact upon such rights and interests. In the absence of any such evidence it is not possible to assess what if any will be the impact of any grant of these applications. A condition requiring consultation as a condition of any licence is not appropriate. It is not a condition which of itself goes to minimising any impact of the grant. It would be a condition that would be difficult to enforce and could well lead to further dispute. If there has not been consultation then a remedy already exists before the Federal Court.

### **DECISION**

22. For these reasons the objections are dismissed.

Dated the 14th Day of June 2012



Steven Heath

**Independent Person**