

**INDEPENDENT PERSON UNDER S24 MD (6B)
NATIVE TITLE ACT 1993 (COMMONWEALTH)
WESTERN AUSTRALIA**

IND 2/2024

**IN THE MATTER OF AN OBJECTION TO THE GRANT OF MISCELLANEOUS
LICENCE L45/571**

BETWEEN

BRADFORD JOHN YOUNG

Applicant

and

KARIYARRA ABORIGINAL CORPORATION

Objector

and

STATE OF WESTERN AUSTRALIA

Government Party

DECISION

Introduction

- 1 The Applicant is the holder of Mining Lease 45/1228 on which it proposes to develop what is described as the Flash Butt Sand and Aggregate Project. The Applicant is also the holder of Miscellaneous Licence 45/311 which currently gives access from the Mining Lease to Buttweld Road. Buttweld Road is a local road and as such the Applicant is restricted to using trucks with a single trailer. The Applicant has made application for Miscellaneous Licence L45/571 for the purpose of a road, pipeline and powerline, primarily to construct an alternative access road to Great Northern Highway. This would permit the use of road trains with double or triple trailers.
- 2 The Application for the Miscellaneous Licence relates to an area of 51.80 hectares of which 48.6097 hectares is located within the boundaries of land in respect of which the Objector holds Native Title Rights and Interests.
- 3 The Objector has lodged an objection to the grant of the Miscellaneous Licence.

- 4 The Objector has objected to the grant of the Miscellaneous Licence on the basis that there has been no meaningful consultation, but if there has been proper consultation, on what might broadly be described as the impact of the grant on the registered Native Title Rights and Interests.
- 5 The Government Party has requested I determine the objection in accordance with s24 MD (6B) of the *Native Title Act 1993* (Commonwealth).

Is consultation required?

- 6 In *Moly Metals Australia Pty Ltd v Kariyarra Native Title Claimants and the State of Western Australia* IND2/2011 the objector in that case argued that in the absence of consultation the objection should be upheld. I concluded that there was no specific requirement that consultation occur before a matter can be referred or that a failure to consult must lead to an objection being upheld. I again adopt my reasoning in that decision and accordingly I need not make any determination as to whether or not there has been consultation.
- 7 My role in determining this objection is to determine the impact that the grant of the Miscellaneous Licence would have on the Objector's Native Title rights and interests, or access to land and consider ways in which, if granted, those impacts can be minimised. I must then uphold the objection, dismiss the objection or impose conditions on the grant of the Miscellaneous Licence.

What are the Objector's Native Title Rights and Interests?

- 8 The Objector has non-exclusive Rights and Interests described in the Native Title Register as:

“Non-exclusive Rights and Interests

- (5) Subject to paragraphs 6, 7, 8, 9 and 12 the nature and extent of the Native Title Rights and Interests in relation to the non-exclusive area is that they confer the following non-exclusive rights on the Native Title holders:
- (a) the right to live on, being to enter and remain on, and to camp and erect temporary shelters and other structures for that purpose, and to travel over and visit, the non-exclusive area;

- (b) the right to hunt on, fish from, take and use traditional resources of the non-exclusive area;
- (c) the right to take and use water;
- (d) the right to engage in cultural activities, including:
 - (i) visiting, caring for and maintaining places and objects of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity; and
 - (ii) conducting ceremonies, burials and rituals;
- (e) the right to be accompanied onto the non-exclusive area by those people who, though not Native Title holders and who (for the avoidance of doubt) cannot themselves exercise any Native Title rights, are:
 - (i) the spouses, parents or children of the Native Title holders; or
 - (ii) people required by traditional law and custom for the performance of ceremonies or cultural activities; and
- (f) a right to speak for and make decisions about the use of the non-exclusive area by members of the Aboriginal Society to which the Native Title holders belong.”

How are those Rights and Interests currently exercised?

- 9 In order to assess the potential impact of the grant of the Miscellaneous Licence it is necessary to determine how these rights are currently exercised.
- 10 The Objector filed affidavits from traditional owners Mr Albert Lockyer and Mr Alfred Barker. The effect of Mr Lockyer’s affidavit is that there is an old lore site which was used for initiation ceremonies some distance from the Miscellaneous Licence. However the whole area between that site and 9-Mile Creek was used during the initiation ceremonies as hunting grounds. The area is visited when weather conditions permit and families swim when the water runs through the creeks. A map was annexed to Mr Lockyer’s affidavit with some markings but there is no

explanation of the markings in Mr Lockyer's affidavit. Mr Barker's evidence was that he was initiated at a site some distance from the Miscellaneous Licence marked on a map annexed to his affidavit with a circle. It would seem that this is likely the old lore site referred to by Mr Lockyer. Mr Barker has also highlighted an area around what is described as the 9-Mile Creek on the map annexed to his affidavit which crosses the Miscellaneous Licence. This area was used as a cultural hunting ground during men's initiation but there is no evidence as to when it was last used. The lore site is described as being "dormant at the moment". Mr Barker indicates that that area is used regularly to cook kangaroo tail.

- 11 On the basis of that evidence I conclude that the Native Title Rights and Interests currently exercised are to swim in the creeks when water is flowing, to visit the area when weather permits and to hunt and cook kangaroos. The area remains of cultural significance because these were hunting grounds associated with the dormant lore site.

What impact would the grant of the Miscellaneous Licence have on the Native Title Rights and Interests?

- 12 Mr Lockyer's concerns as to the manner in which the Miscellaneous Licence would impact the Native Title Rights is that these areas will be at risk of damage and destruction and that the grant of the tenement would prevent the Native Title holders from accessing their country and continuing their tradition. He expressed concern that any change to the landscape would disrupt native flora and fauna and that road construction operations and land disturbance on significant traditional sites would occur including the risk of polluting rivers and waterways that are used for traditional purposes. Similarly, Mr Barker has expressed concern that construction of the road would cause damage to native vegetation, pollution to waterways, dust, noise, visual pollution, destroying and disturbing harmonious cultural interests and rights of the Native Title holders to conduct traditional practices at their leisure and convenience.
- 13 Neither pointed to any evidence in support of their concerns. In particular they did not address the area of the proposed Miscellaneous Licence.
- 14 There is nothing in the evidence of the Objector that suggest that the Miscellaneous Licence would directly impact the exercise of the Native Title Rights by destroying

a significant site or preventing access to the area. Their relevant concerns appears to be that the construction of the proposed infrastructure may impact the environment.

- 15 The submissions relating to Land Banking are not relevant, are not supported by any evidence and as such I need not address them further.
- 16 The Applicant points out that the Objector's Native Title Rights are non-exclusive and that there are already others who may exercise rights over the areas of and around the Miscellaneous Licence. The Applicant provided a series of maps with overlays of the area where Native Title does not exist and where it is subject to Stock Route Reserve 9701. These would indicate that almost all of the northern section of both the Miscellaneous Licence and the area identified by Mr Barker as used for hunting grounds in association with initiation are areas where Native Title does not exist or is subject to the Stock Route Reserve. The Applicant in addition points to an Aboriginal Cultural Heritage Survey conducted on the area of the Miscellaneous Licence in 2019 which found that there were no ethnographical heritage sites or archaeological heritage material observed on the proposed access road.
- 17 The Applicant submits that the Objector's evidence does not sufficiently identify what activities occur in the area of the Miscellaneous Licence. It says that any infrastructure constructed on the Miscellaneous Licence will be subject to the conditions imposed by the Government Party. These will include the requirements of the *Environmental Protection Act*, *Environmental Protection (Clearing of Native Vegetation) Regulations*, the *Aboriginal Heritage Act*, the *Wildlife Conservation Act*, the *Rights in Water and Irrigation Act*, the *Waterways Conservation Act*, and many other State and Commonwealth provisions.
- 18 The Applicant also indicates that the Miscellaneous Licence lies entirely within Exploration Licence 45/5339 held by the Applicant and which permits the Applicant to undertake the activities permitted for a tenement of that nature under the *Mining Act*. The Applicant points to the industrial nature of the area, located relatively close to South Hedland, the Port Hedland airport, the Town of Port Hedland Quarry, facilities for motor vehicle racing, an explosives manufacturing plant and a reserve for the manufacture and storage of explosives and security risk substances.

- 19 The purpose of the Miscellaneous Licence as specified in the application to the Department of Energy, Mines, Industry Regulation and Safety, (DEMIRS) and further elaborated in the affidavit of Mr Newland on behalf of the Applicant, is the construction of a gravel road, with the possibility of it being bituminised, together with a water pipe for use in dust suppression and a powerline to provide power for the pumping of water. It is not intended to fence the road.
- 20 I am not satisfied that the grant of the Miscellaneous Licence would have any direct impact on the Native Title Rights identified by the Objector. It would not prevent access to the area or prevent the hunting and swimming currently said to be enjoyed, nor prevent the area around it being used for hunting as part of initiation ceremonies if the old lore site was again used. It is to be remembered that the Native Title Rights are non-exclusive and so their exercise is already subject to other permitted access to the area.
- 21 The Objectors raise concerns about the impact that the construction of the infrastructure might have on the environment which might then impact some of their rights. That is speculative and not supported by any evidence. The grant of the Miscellaneous Licence would be subject to the numerous conditions required by DEMIRS and other regulatory bodies and there was no evidence that those conditions would not be adequate to ensure the protection of the environment.
- 22 The Objector did not address how the current exploration licence or other activities in the area impact upon their ability to exercise their Native Title Rights particularly given that the Exploration Licence and the granted Mining Licence would seem to cover a much larger area.
- 23 I find that the grant of the Miscellaneous Licence will have no impact on the Native Title Rights and Interests.

Should any Conditions be imposed on the grant of the Miscellaneous Licence?

- 24 There would not appear to be any conditions in addition to those which will already apply that would lessen the impact on the Native Title Rights and Interests or access to the land.

Conclusion

25 Given these findings the objection will be dismissed.

A handwritten signature in blue ink, appearing to read 'Steven Heath', followed by a long, sweeping horizontal line that extends to the right.

Steven Heath
Independent Person

18 February 2025