

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

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Dear Sir

Independent Person 2 of 2011

**Application by Moly Metals Australia Pty Ltd for Miscellaneous Licences
45/200 and 45/205: Objections by Kariyarra Registered Native Title
Claimants**

Please find my enclosed my decision in this matter.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Steven Heath', with a stylized flourish at the end.

Steven Heath
Independent Person

19 August 2011

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

IND2/11

**IN THE MATTER OF APPLICATIONS FOR MISCELLANEOUS
LICENCES L45/200 AND L45/205**

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 is engaged in developing the Spinifex Ridge Molybdenum Project and has applied for the grant of Miscellaneous Licences L45/200 and L45/205.
2. The Licences are sought for the purpose of bringing power from a power station in Port Hedland by powerlines or constructing a gas pipeline from Port Hedland to allow power generation at the project.
3. Each of the proposed Miscellaneous Licences cross the claim area of the Objector who has lodged objections. The matters have been referred to me pursuant to the provisions of Section 24MD (6B) of the *Native Title Act*.

4. Although the section provides for the objection's to be heard by an independent person or body it provides no guidance as to the basis upon which an objection should be determined.
5. The Applicant has submitted that consistent with the decision in *Gobawarra Minduarra Yinhawanga People Native Title Claim and Innawonga People v State of Western Australia and Hamersley Iron Pty Ltd Referral 3/2004 Delivered 2 May 2005* ("Gobawarra") the objection should be determined by assessing the extent to which the Objector enjoys their registered Native Title rights and interests and taking into account the criteria in Section 24MD (6B)(e). That is I should take into account ways of minimising the act's impact on the registered Native Title rights and interests, the access to the land and the way in which anything authorised by the act may be done.
6. The Objector however contends that the hearing must enable the independent person to obtain sufficient information to make the determination required at paragraph 24 MD(6B)(g) that either the objection is upheld or the act may be done subject to conditions. The Objector argues if the hearing is limited to the criteria in paragraph 24 MD(6B)(e) then the Independent Person would not be able to consider whether to uphold the objection because the consultation process in that paragraph is essentially a process to facilitate the doing of the act.
7. I am not persuaded by the Objector's argument. The independent person may still uphold the objection if having considered ways of minimising the acts impact on the registered Native Title rights and interests, access to the land and the way in which anything authorised by the act may be done that the act should not proceed because the impact is too great.

8. Although Section 24MD (6B)(e) provides that the person who requested or applied for the doing of the act must consult any claimants and bodies corporate who object there has been no consultation in this case.
9. The Applicant forwarded a letter containing documents described as a "consultation package". It sent a follow up letter approximately one month later. Following that the Objector responded inviting the Applicant to a working group meeting but indicating that they would be unavailable for approximately three months. The Applicant responded that it believed it had satisfied any obligation to consult but was happy to meet with the working group in the month nominated. The Objector did not respond to this letter and accordingly there has been no consultation as to any of the matters set out in paragraph (e).
10. The Objector submits that in the absence of consultation the objection should be upheld. Some previous decisions have been determined on the basis of whether or not there has been consultation. However in *Kuruma Marthudunera (Combined) Native Title Claimants v State of Western Australia and Mineralogy Pty Ltd* Delivered 28 May 2008 I indicated that this should be revisited.
11. The Government Party submits that it is not my role to determine whether or not there has been consultation and that the remedy for any breach of paragraph (e) is with the Federal Court.

12. The obligation to consult is imposed in this case on the Applicant but it is the Government Party who must ensure that the objection is heard by an independent person or body. There is 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.
13. Consultation can assist the independent person in determining whether an objection should be upheld and in particular whether or not there are conditions which should be imposed which might minimise the impact of the act where the objection is not upheld.
14. Where Applicants and Objectors do not consult, they each risk an unfavourable decision, not because they have failed to consult but because the independent person will not have evidence which would assist their argument. Save in this context I accept the Government Party's submission that the issue of consultation is not determinative and any action to compel consultation lies elsewhere.
15. In this case I am left to determine the matter on the basis of affidavits which are limited to presenting the diametrically opposed positions of the Applicant and the Objector without the benefit of any alternate proposals or conditions that have had the benefit of input or comment by both sides.
16. In addition to submitting that the objection should be upheld because of a lack of consultation, the Objector has submitted in the alternative that the objection should be upheld because the proposed licences would affect the Objector's Native Title rights and interests including a site of very high cultural and historical significance. This site is identified as

the 12 Mile Law Ground being Registered Site 27412 on the Western Australian Register of Aboriginal Sites.

17. The Objector's submissions have set out the rights and interests of the Objector's Native Title Claim which are contained in the Schedule to this decision. The exercise and enjoyment of those rights were detailed in the affidavit of Donnie Wilson. It is clear that the grant of the Miscellaneous Licences will impact on those rights but Mr Wilson's affidavit suggests that for the most part the impact is confined to some restriction of access and some disturbance to the land and flora, particularly during construction.
18. The affidavit of Mr Johan Hendrick Zandburg filed on behalf of the Applicant details that the licences would allow the Applicant to establish either a subsurface gas pipeline or a power transmission line.
19. Any pipeline will be constructed within a 30 metre corridor reduced to 20 metres after construction within which grass and bushes are allowed to grow to a controlled height. There will be no new permanent fencing unless required by other bodies or if slam shut or valve stations are required (which is considered unlikely). Any proposed power line would not appear to provide any lasting restrictions on access to the land. Whilst I accept Mr Wilson's concerns as to the visual impacts the rights can to the most part continue to be enjoyed.
20. It is clear that any encroachment upon the 12 Mile Law Ground would be very significant. This appears to be recognised by the Applicant and it has expressed its intent to avoid this ground. The affidavit of Mr Zandburg details other steps to minimize the impact of the proposed

pipeline including the use of an environmental team and heritage team to walk in front of any digger.

21. In addition the Applicant has indicated that any bores would only be established for the purpose of water testing a pipe line and that after completion of the test the Applicant will cap the hole or fill the entire bore hole depending on any views expressed by the land owner or the relevant traditional owners. This would in part address the concerns expressed by Mr Wilson with respect to water rights.
22. I am satisfied that the impact of the proposed Licences on the registered Native Title rights is not so great as to uphold the objections. The objections should be dismissed but there should be conditions upon the grant of each of the Miscellaneous Licences that they do not encroach upon the area of the 12 Mile Law Ground being Registered Site 27412 on the Western Australian Register of Aboriginal Sites and that any other development on the Leases be done in accordance with the affidavit of Mr Zandberg.

Dated the 19th Day of August 2011

A handwritten signature in black ink, appearing to read 'Steven Heath', with a long horizontal line extending to the right.

Steven Heath

Independent Person

SCHEDULE

- a. the right to ingress and exit, occupy, possess, use, enjoy and live upon the land of their ancestors upholding custom and Aboriginal law;
- b. the right to manage and maintain the fauna and flora together with the land and waters according to traditions and complying with Aboriginal law and culture which has been passed down from generation to generation to sustain existence in the environment upon their traditional lands;
- c. the right to forage for food, medicine and for such other items used for customary practices including fauna and flora on and under the land and waters, and the right to protect them from degradation;
- d. the right to participate at meeting for social and cultural gatherings within the group or with other groups to enforce customary laws and practices and hold traditional ceremonies, arrange marriages, organise ceremonies, mediate and carry out punishments, barter for food tools materials, equipment, utensils access to water, hunting and burial grounds on the land;
- e. the right to lay away the dead upon their land and the right to bring the dead of the claim group for traditional ceremonies;
- f. the right to camp, hunt, fish, gather traditional foods, and building materials, utensils, tools, equipment and weapons;

- g. the right to use, manage, maintain and care for the water resources on the land;
- h. the right to extract and collect flints, clay, salt, soil, sand, gravel, stones, ochres and such other substances in, on or under the land for use of trade as it was done by their ancestors in title;
- i. the right to use such resources and material (animate and inanimate) growing, living and occurring in on or under the land and waters together with the right to receive a portion of any such resources taken by others, as was done by their ancestors in title, for use or barter;
- j. the right to manage and protect their sites, their secret societies and lodges or fraternities to ensure that rituals of religious significance, mystery and solemnity relating to the Dreamtime can continue which gives authority to the survival instruction or activities that have evolved over centuries and allow for the gathering of people to come together to carry out ceremonies and activities required under customary law and culture;
- k. the right to freely move upon their land to teach their young about their country, culture and traditions, how to look after the fauna and flora for both sustenance and to protect the land, waters, the environment and the natural habitat;
- l. the right to construct camps, dwellings and other structures.