



16 March 2018

Aboriginal Land Commissioner
Office of the Aboriginal Land Commissioner
GPO Box 9932
Darwin NT 0801

Attention: The Honourable John Mansfield AM QC

Dear Land Commissioner

REVIEW OF DETRIMENT ISSUES – MCARTHUR RIVER REGION LAND CLAIM NO. 184

This letter sets out information for your consideration additional to the information set out in my previous letter dated 25 January 2018.

Background

The terms of reference for this review generally require a review of detriment in relation to various Aboriginal land claims recommended for grant but not yet finalised, including The McArthur River Region Land Claim No. 184 (**McArthur River Region Land Claim**).

In addition to matters of detriment, you confirm in your letter dated 15 December 2017, that the terms of reference also require you to more fully address certain issues including the fact that, "Commissioner Olney did not make a final determination regarding whether any part of the loading facility was land within the claim area but noted that counsel for MIM submitted uncontradicted evidence that the area of land was not unalienated Crown land and was not available for claim pursuant to s 50(1)(a) of the Land Rights Act".

The submissions in this letter first address the specific issue regarding Commissioner Olney's findings before going on to address matters of detriment on behalf of Glencore Group.

Bing Bong Loading Facility excision

The issues specific to the Bing Bong loading facility arise in relation to the swing basin and associated deep water channel which are part of the loading facility. The question whether these facilities could be subject of a land grant is to be determined by first examining whether they fit within the Description of the Land Claimed in the McArthur River Region Land Claim, and if so, then considering whether they are on land which is available for claim under s 50(1)(a) *Aboriginal Land Rights (Northern Territory) Act (Cth) (1976)(ALRA)*¹.

In summary Glencore Group's position is that, notwithstanding Commissioner Olney's observation that the, " ... question of whether any part of the loading facility is land within the claim area involves legal

¹ Being land which is either unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held, by or on behalf of, Aboriginals.

issues which are not within the scope of this inquiry to finally resolve"² he did not leave things open ended in relation to the swing basin and the channel. When the Land Claim Report is considered in its entirety it is unambiguous that there is only a small area of land within the swing basin and the channel, and this area is not land available for claim because it is not on unalienated Crown land. The only evidence before Commissioner Olney is that the swing basin and the channel are within NT Portion 4319, Perpetual Pastoral Lease 1051 (**McArthur River Pastoral Lease**) which is land excluded from grant under the terms of the recommendation made in the Land Claim Report.

Claim Area

There are two areas claimed in the McArthur River land claim which are the subject of the Land Claim Report. They are referred to in paragraph 14 of the Land Claim Report, and relevant to the Bing Bong loading facilities, these areas include the intertidal zone in the Bing Bong Creek region which is described as: "All the land in the Northern Territory of Australia between the high water mark and the low water mark from the northern-most point of the western boundary of the Northern Territory Portion (NTP) 4319, otherwise known as McArthur River Pastoral lease to where the eastern bank of the McArthur River meets the seacoast."

The claim area as described prevails over the area identified in the map at schedule 1 of the McArthur River Region Land Claim Application - a note in the application states that, "The map depictions of the claimed areas are approximate only and are subject to the descriptions of the claimed areas set out above".

The Bing Bong loading facility is constructed on mineral lease 1126 (ML1126). The loading facility was constructed between 1993 and 1995. The swing basin was excavated and flooded in 1995³. As a result, the loading facility was constructed prior to making of the McArthur River Region Land Claim Application which was received by the Aboriginal Land Commissioner on 4 June 1997⁴.

The swing basin and the channel are permanently inundated, irrespective of the rise and fall of the tide. Commissioner Olney determined that the high water mark and the low water mark coincide at the vertical wall of the swing basin⁵, and the only area where there is an intertidal zone in the swing basin and channel is that part of the swing basin with a sloping bank creating an area, ".. albeit not large, of intertidal zone .."⁶.

This small area of intertidal zone is the only area of intertidal zone in the swing basin and the channel. Its precise location and area has not been determined. Calculation of the area would involve determination of the mean tidal movement in the area where the swing basin bank slopes⁷.

The result of Commissioner Olney's findings is that the small area of intertidal zone within the swing basin, where the bank of the swing basin slopes, is the only part of the swing basin and the channel where there is an intertidal zone which could fit the description of the land claimed in paragraph (b)(i) of the

² McArthur River Region Land Claim No. 184 (Report No. 62) (the Land Claim Report) at page 69 [143].

³ See evidence in this regard in statement Kevin Hendry, MIM exhibit 3, including paragraphs 14-16.

⁴ That construction predated the land claim is recognised in paragraph 28 of the Land Claim Report.

⁵ Land Claim Report pages 11 & 69 [28 & 142].

⁶ Land Claim Report page 69 [142]. Also, the fact that, "It as conceded that there may well have been a "very narrow area of inter-tidal zone" within the wharf facility where a wall was sloping rather than vertical" citing transcript p. 1542.3 is referred to in submissions by Counsel for MIM – exhibit MIM 14.

⁷ Commissioner Olney made a finding that the intertidal zone is the area of land between the mean high water mark and the mean low water mark –Land Claim Report page 42 [80 a)].

McArthur River Region Land Claim but, this area is not available for claim because it is within the McArthur River Pastoral Lease .

Before turning to that question, it should also be noted that Commissioner Olney determined that the area seawards of the low water mark, described in paragraph (b)(iv) of the McArthur River Region Land Claim Application, "is not land in the Northern Territory and thus not available to be claimed"⁸. This finding was based on the Full Federal Court judgment in *Risk v Northern Territory* 105 FCR 109 which was at the time subject to appeal⁹. That decision was upheld by the High Court in *Risk v The Northern Territory* [2002] HCA 23 therefore Commissioner Olney's finding still holds good.

Jurisdictional Issues – Swing Basin Intertidal Zone

The intertidal area within the swing basin and the channel is not available for claim because it is located within McArthur River Pastoral Lease. McArthur River Pastoral Lease is not unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held, by or on behalf of, Aboriginals.

At the time the claim was lodged and at all times since it has been owned by Mount Isa Mines Limited (MIM). MIM is now a subsidiary in the Glencore Group, headed by Glencore PLC. A recent title search recording the current ownership is attached, and historical details concerning ownership are contained in the statement of evidence of David Daniell, the Manager of McArthur River Station on behalf of Colinta Holdings Pty Ltd¹⁰. Colinta Holdings Pty Ltd remains the manager of McArthur River Station and it is also a subsidiary in the Glencore Group.

As McArthur River Pastoral Lease was owned by MIM when the McArthur River Region Land Claim Application was made it is not land available for claim. Accordingly Commissioner Olney found that the McArthur River Pastoral Lease is not land which may be subject of a traditional land claim¹¹.

Commissioner Olney determined, based on the uncontradicted evidence of Mr Hendry¹², "that the swing basin or channel were excavated into the shore and foreshore which must inevitably lead to the conclusion that the whole of that area, which includes the narrow area of the intertidal zone along the sloping wall, is landward of the high watermark as it existed when PPL1051 was granted"¹³. He also found that to the extent the leasehold boundary extends seaward of the mainland, the intertidal zone in the relevant area is included in the land covered by the pastoral lease¹⁴. The effect of these findings is that the intertidal zone in the swing basin was not on unalienated Crown land when McArthur River Pastoral Lease was first granted.

Commissioner Olney's observation that, "The question of whether any part of the loading facility is land within the claim area involves legal issues which are not within the scope of this inquiry to finally

⁸ Land Claim Report pages 5-6 [13].

⁹ The fact that status remains unclear pending decision of the High Court is mentioned Land Claim Report in page 44 [82c)]. The subsequent High Court decision supports Commissioner Olney's finding.

¹⁰ Exhibit MIM 7.

¹¹ Land Claim Report page 42 [80b)].

¹² Mr Hendry was General Manager of McArthur River Mining Pty Ltd. H evidence is contained in written statement exhibit MIM3 & he also gave evidence at Borroloola on 9 August 2000 – page 66 [134] Land Claim Report.

¹³ Land Claim Report page 69 [143].

¹⁴ Land Claim Report page 10 [27].

resolve"¹⁵ needs to be viewed in the context of his other findings, particularly in the immediately prior paragraph 142 and then later in paragraph 143. In paragraph 142 Commissioner Olney found that:

- It is clear that the swing basin and the wharf were constructed landward of the original coastal boundary of McArthur River Pastoral Lease.
- That there is no intertidal zone where the wall of the wharf is vertical.
- There is a small rise and fall of tide, creating an area, albeit not large, of intertidal zone where the swing basin has a sloping bank.

Commissioner Olney then considered submissions made by Counsel for MIM to the effect that the boundary of McArthur River Pastoral Lease was not altered by construction of the swing basin¹⁶ and determined that any questions in that regard are legal issues beyond the scope of his inquiry to determine.

The only conclusion that can be drawn from Commissioner Olney's findings is that the swing basin and the wharf are within McArthur River Pastoral Lease unless the boundary of the pastoral lease has moved. Commissioner Olney decided that any questions on that point are not within the scope of his inquiry to resolve. This means that the swing basin and the wharf are within McArthur River Pastoral Lease.

Commissioner Olney's Recommendation

The recommendation made by Commissioner Olney to the Minister to make a land grant resulting from the McArthur River Region Land Claim is consistent with and follows from the findings made by Commissioner Olney, in relation to the swing basin and the channel, as articulated previously.

Relevantly, the area recommended for grant extends to that, "...land between the mean high water and the mean low water mark along the coast of the mainland of Australia extending from the northern-most point of the western boundary of Northern Territory Portion 4319 to the eastern bank of the Robinson River but excluding any land which is subject of Perpetual Pastoral Lease 1051..."¹⁷.

This area is limited to land between the mean high water mark and the mean low water mark, and excludes land within McArthur River Pastoral Lease. It is clear from the findings by Commissioner Olney that the only land between the mean low water mark and the mean high water mark in the swing basin and the channel is the narrow area of intertidal zone where there is a sloping bank of the swing basin, and this area is within McArthur River Pastoral Lease.

All land within McArthur River Pastoral Lease was found not to be land available for claim under s 50(1)(a) ALRA¹⁸. Commissioner Olney's recommendation that any land which is subject of McArthur River Pastoral Lease be excluded from the grant effectively excludes the swing basin and the wharf from grant because Commissioner Olney determined that they are within the original boundary of McArthur River Pastoral Lease, and that it was beyond the scope of his inquiry to determine whether the boundary of McArthur River Pastoral Lease had moved due to the construction of the swing basin.

Advice to the Minister

¹⁵ Land Claim Report page 69 [143].

¹⁶ There does not appear to have been any submission made by claimants that the boundary of PPL 1051 had been altered by the construction of the swing basin.

¹⁷ Land Claim Report at page 43 [81].

¹⁸ Land Claim Report at page 42 [80 b)].

Glencore Group submits that your advice to the Minister pursuant to s 50(1)(d) ALRA clarifying the position in relation to the findings and recommendations made by Commissioner Olney in the Land Claim Report concerning the Bing Bong loading facilities should address the following points:

- That there is no intertidal zone in the swing basin and the associated channel, other than the small intertidal area where the bank of the swing basin is sloping.
- That the permanently inundated areas in the swing basin and the channel are not 'land' available for claim under s 50(1)(a) ALRA, and nor are they part of the intertidal zone described in the McArthur River Region Land Claim Application, paragraph (b)(i).
- That the small intertidal area within the swing basin and within the boundary of the McArthur River Pastoral Lease is not unalienated Crown land available for claim in accordance with s 50(1)(a) ALRA.
- Each of the previous points are consistent with the recommendations and findings by Commissioner Olney's in the Land Claim Report.

Detriment

The detriment to MIM, as owner of the McArthur River Mine and the McArthur River Pastoral Lease, is potentially substantial and significant. With regard to the Bing Bong loading facility Commissioner Olney determined (page 71 [144] of the Land Claim Report):

In the event that any part of the port facility becomes Aboriginal land any restriction upon the use of the facility that may affect the Joint Venturers' capacity to conduct operations at the port facility could lead to the suspension or cessation of operations at the McArthur River mine if such restriction impeded or prevented the continued transportation of mineral concentrate from the port facility. Similarly, the capacity to use the port facility for other purposes could be similarly impeded.

With regard to pastoral uses (including the McArthur River Pastoral Lease), Commissioner Olney determined that (page 52 [100] of the Land Claim Report):

In the event that the intertidal zone becomes Aboriginal land, the adjoining pastoralists would suffer detriment to the extent that the continuation of the practice of allowing cattle to graze unrestricted beyond the mean high water mark would be dependent upon the necessary permission being obtained ... Similar considerations would apply in relation to gaining access from pastoral land to the McArthur River. Additionally, MIM staff and others would be unable to access the coastal foreshore for recreational purposes without the consent of the Land Council.

Bing Bong Loading Facility tenure restrictions

My letter to you dated 25 January 2018 sets out details of the current expected life of the McArthur River Mine following completion of the Phase 3 Development Project, and based on the projected 4 main stages of the Overburden Management Project.

The life of mine which Commissioner Olney considered for the purposes of his inquiry, running up to 2016¹⁹, has been extended significantly. Based on projections of the Overburden Management Project production of mineral concentrates from the mine is expected to continue until 2047.

¹⁹ Land Claim Report p 68-69 [140]

The *McArthur River Project Amendment (Ratification of Mining Authorities) Act* (NT), enacted in 2007, ratified an extension of Mineral Lease 1126 (the Bing Bong loading facility) until 4 January 2043. Extension beyond that date will be necessary to continue shipment of mineral concentrates from the Bing Bong loading facility for the currently projected life of mine.

Detailed submissions on detriment issues in relation to ML1126 were made in previous submissions by MIM - see MIM13 [paragraphs 4.1.2 – 4.1.5]. As set out in those submissions, MIM will suffer detriment if it cannot expand the mineral lease area or the scope of activities permitted under ML1126 in order to accommodate changes in requirements that occur during the life of mine [paragraph 4.1.4] or, if MIM's belief that it has a right to renew ML1126 for the purposes of s 3(4) ALRA is subject to challenge [paragraph 4.1.5]. These issues remain a source of potential serious detriment to MIM given the currently projected life of mine.

Third party access to the Bing Bong Loading Facility

Pursuant to clause 10(2) of the *McArthur River Project Agreement* dated 25 November 1992 (the Project Agreement) (contained in Schedule 1 of the *Macarthur River Project Agreement Ratification Act* (NT)) MIM is entitled to licence or permit the use of the facility or parts of the Bing Bong loading facility by other persons and to charge users such fees as are necessary to recover MIM's costs of the loading facility.

Licences or permits granted under clause 10(2) of the Project Agreement are not estates or interests in land for the purposes of s 70(2) ALRA. They are purely contractual. As a result, the holder of a clause 10(2) licence or interest may not be able to rely on rights under sections 70(2)&(4) ALRA to enter onto or cross any part of ML 1126 that becomes Aboriginal land for the purpose of enjoying the rights under such a licence or interest. They would require a permit which might be withheld or be subject to onerous conditions.

The actual or possible inability to access Aboriginal land within ML1126 for this purpose will cause detriment to the holder of the licence or interest through restrictions on its activities, and to MIM by reason that it may not be able to exercise its contractual right to grant licences or interests over Aboriginal land as it would wish; may have to make operational changes as a result; and may lose the benefit of recovering costs of the loading facility.

As mentioned in my letter dated 25 January 2018 a third party agreement was made under clause 10(2) of the Project Agreement with Western Desert Iron Ore Pty Ltd, in relation to the Roper Bar Iron Ore Project for construction and operation of wharf and barge loading facilities on the western side of the Bing Bong loading facility swing basin. Relevant tenure in relation to those operations is now held by Brtimar (Aust) Pty Ltd.

The McArthur River Basin is highly prospective for mineral resources and there are reasonable prospects that other third party users will seek access to use the Bing Bong loading facility in future. The ability of MIM to expand activities of third party users at the port facility may be restricted or prevented by the inability to guarantee access to any areas within ML1126 that may become Aboriginal land.

Closure of Seas

A grant of intertidal zone in ML1126 would enable the Aboriginal landowners to make application under s12 *Aboriginal Land Act* (NT) for closure of the seas adjoining and within two kilometres of the area granted.

Operation of the Bing Bong loading facility is entirely reliant on access to seas as needed by the *Aburri* for the purposes of transporting mineral concentrate into the Gulf of Carpentaria for transshipping to ocean going vessels. If the seas adjacent to Aboriginal land within ML 1126 were closed and access was not available for coastal waters required by the *Aburri* for shipping operations then it would result in closing down all shipping operations and make the entire loading facility unusable.

The possibility of a sea closure occurring with attendant ability to close down the operation of the Bing Bong loading facility and cause wider disruption to commercial and recreational use of the region more widely has potential to cause serious detriment that would not be able to be overcome. This is detriment arising from the operation of Northern Territory legislation and not from the operation of ALRA.

Viability of the McArthur River Mine & New Projects

The mineral concentrate bulk loading operations at the Bing Bong loading facility continue to operate through the vessel *Aburri* which operates taking loads of mineral concentrate from the swing basin, through the channel and out to sea for transshipping to ocean going vessels.

There is no alternative feasible means of getting mineral concentrates from McArthur River Mine to market other than through the Bing Bong loading facility. The continued availability of the Bing Bong loading facility is critical for the continued viability of the McArthur River Mine. New projects in the region which have bulk loading requirements will also likely rely on the Bing Bong loading facility for their economic viability. It is noted that is the case in relation to the Roper Bar Iron Ore Project. Also, these projects may extend beyond mining operations. For example live cattle export and development of fisheries industries in the region are other industries that may require bulk loading facilities.

Significant detriment, threatening the viability of the McArthur River Mine and any other projects in the region requiring access to bulk loading facilities, will flow if the loading facility becomes unavailable or if operations on MLN1126 cannot be expanded or modified as needed to accommodate future projects. Detriment to the McArthur River Mine, from any threat to continued operations, puts at risk MRM's investment of more than \$360,000,000.00 in the Phase 3 expansion of the mine, in addition to earlier investments into the project, including \$34,000,000.00 construction costs in relation to the Bing Bong Loading Facility.

As mentioned in earlier correspondence the High Court decision in *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 (**Blue Mud Bay**) is inconsistent with some of the views expressed in the Land Claim Report as to rights of third parties (including MIM, MRM and Colinta). The exclusive rights to the inter-tidal zone that flow from the Blue Mud Bay decision will create increased pressure on Bing Bong loading facility as the only bulk loading facility in the region.

There may be significant areas of intertidal zone along the coastline in the region which are already or which become Aboriginal land where exclusive rights to use and occupation are vested in the relevant land trust. Restrictions on the ability to expand or modify the Bing Bong loading facility or to construct other facilities on the coastline in the region may have an inhibiting effect on industry in the region causing detriment to the Glencore Group through restrictions on its ability to modify or expand its operations, as well as a detrimental effect on industry and the community more widely by restricting the

ability of other businesses to secure tenure needed to enable construction of other coastal loading facilities in the region by other proponents.

Long term use of Bing Bong Loading Facility

The Bing Bong loading facility is not only an integral part of the McArthur River Mine, it is a key piece of infrastructure that may be used to support transportation services for mining, agriculture, tourism and other industries in the region beyond the expiry of MLN 1126. The evidence of Kevin Hendry confirmed that MRM intends to leave the Bing Bong wharf, swing basin and channel in situ following expiry of MLN 1126 to benefit industry in the region for the long term²⁰.

The proposal to leave these and any other facilities that may be useful for ongoing commercial usage may be threatened in the event of a land grant of intertidal areas in the vicinity of Bing Bong loading facility, and if so, MIM and MRM would suffer significant detriment as a result.

Effect on proposed patterns of land usage

Commissioner Olney confirmed that the McArthur River Basin is one of the most highly prospective areas in the Northern Territory for base metals and, "is one of the most intensively "pegged" regions in the Northern Territory with virtually the whole area covered by exploration licence applications"²¹. That is still the case. A copy of a map generated from the Department of Primary Industry and Resources, Strike system on 14 March 2018 is attached showing details of relevant mining and exploration tenure in the region.

Restrictions on the ability to use the existing Bing Bong loading facilities; to modify existing facilities and operations within MLN 1126; to expand bulk loading activities to any area as outside MLN 1126; or to be able to make loading facilities available for continued use once mining tenure expires are all matters which would, in addition to causing detriment to MIM and MRM, will impact on proposed patterns of land use in the region generally.

All these matters would likely inhibit industry in the region over the long term, which may have a material negative effect on the region and the Northern Territory as a whole, and which ought to be considered in the context of the effect which acceding to the claim would have on existing or proposed patterns of land usage in the region under s 50(3)(c) as well as being relevant to detriment to MRM and MIM for the purposes of s50(3)(b) ALRA.

Pastoral land issues

McArthur River Pastoral Lease continues to be operated as a working pastoral property by Colinta. The nature and extent of the pastoral operation remains much the same as the operations described in the evidence of David Daniell²² (there has been no material change in numbers of the livestock herd).

Cattle regularly graze along the coastal parts of the property, including by going onto the beach along the coastal boundary of McArthur River Pastoral Lease. In the event of a land grant Colinta will either have to fence the coastal boundary and paddocks or, obtain permits allowing use of the area for coastal operations beyond the mean high water mark. Issues concerning fencing mentioned in Mr Daniell's witness statement²³ still apply, although the likely cost of fencing will have materially increased.

²⁰ Exhibit MIM 3 p 9 [40]

²¹ Land Claim Report p74 [154]

²² Statement of evidence of David John Daniell Exhibit MIM7

²³ Pages 5-6 & 7 [26-29 & 36]

Colinta will suffer detriment as a result of any restrictions on its coastal land use activities arising from a land grant, including the cost of any fencing required, any restrictions and costs associated with obtaining permits, including the possibility that permits may not be obtainable. Any such restrictions will impact not only on commercial usage but also recreational usage of coastal areas of pastoral properties within the claim area²⁴.

In addition to detriment, these restrictions also go to matters concerning existing or proposed patterns of land usage for the purposes of s 50(3)(c) ALRA.

Thank you for your consideration in this matter.

Yours faithfully

A handwritten signature in blue ink, consisting of the letters 'D.K.' followed by a long horizontal stroke.

David Kerr
General Manager – Legal
Zinc Assets Australia

²⁴ See details pertaining to McArthur River Station referred to in pages 6-7 [30-35]