



7 August 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 the response by the Glencore Group to the submissions by the Northern Land Council (NLC) dated 16 July 2018 (NLC's submissions) in relation to the McArthur River Region Land Claim No. 184.

### **Boundary of PPL 1051**

Paragraphs 52-54 in the NLC's submissions address issues concerning the boundary of PPL 1051 adjacent to the claim area. This is a jurisdictional issue in that land within PPL 1051 is not unalienated Crown land and not available for claim.

Paragraph 53 of the NLC's submissions opens with the observation that the claimable area was always the intertidal zone seaward of the high watermark boundary of PPL 1051, and [54] closes with the assertion that a passage from the Report of Commissioner Olney "has no relevance to the intertidal zone in the area of the port".

This closing observation does not clarify that the relevance of the boundary of PPL 1051 is in determining the area that is claimable as stated at the start of [53] in the NLC's submissions, and not to determining the area of the intertidal zone as referred to at the end of [54]. There is a small area of intertidal zone in the swing basin and the channel which is within PPL 1051 and that area is not claimable<sup>1</sup>.

As indicated in the NLC's submissions [52] those parts of PPL 1051 excavated for the loading facility remain alienated Crown land not available for claim regardless of whether there is now an intertidal zone within PPL 1051.

It is incorrect that Commissioner Olney made no findings about the location of the boundary of PPL 1051. He made findings in regards to the boundary so far as it relates to the loading facility. He found that, "it is clear from the evidence that the port facility, particularly the swing basin and the wharf have been constructed landward of the original coastal boundary of PPL 1051"<sup>2</sup>.

<sup>1</sup> See discussion on this at pages 2-3 of my letter dated 16 March 2018 (please note also that the NLC's submissions do not comment on the finding by Commissioner Olney referred to here that there is no intertidal zone at the vertical wall of the swing basin).

<sup>2</sup> McArthur River Region Land Claim No. 184 (Report No. 62) (the Land Claim Report) at page 69 [142]

In the absence of any contrary evidence the finding by Commissioner Olney at [142] of the Land Claim Report supports the statement in page 2 of my letter dated 16 March 2018 (**my letter**), referred to in the NLC's submissions at [55]. There is no record of any contrary evidence. As mentioned in page 3 of my letter [footnote 16] there appears to have been no evidence put that the boundary of PPL may have changed as a result of construction of the swing basin. The NLC's submissions at [52] acknowledge that the excavation of the Bing Bong loading facility "did not change the boundary of the pastoral lease".

Footnote 15 in my letter, which is mentioned at [54] in the NLC's submissions, refers to the first sentence at [143] of the Land Claim Report. The passage from the Land Claim Report relates to the Bing Bong loading facility and does not concern an area immediately west of the mouth of the McArthur River as asserted in the NLC's submissions.

### **Agreement making**

The contention in the NLC's submissions at [56] that there is "a high probability that an agreement could be reached to enable MIM/MRM to continue its operations ..." is speculative. The fact remains there is a possibility that no such agreement might be achievable in which case MIM/MRM will suffer detriment that is terminal to the operations dependent on obtaining such agreement. If an agreement is reached then MIM will still suffer detriment being the consideration payable under such agreement. In either scenario there will be detriment that cannot be overcome.

The McArthur River Mine project is a major mining operation of high importance to the Northern Territory economy in which the Glencore Group has made major capital investments. If MIM is in a position of requiring an agreement with an Aboriginal Land Trust for its operations it will not be in an ordinary negotiating position compared to a proponent seeking to construct a major project on land that is already Aboriginal land.

MIM may end up having to negotiate agreements which are critical to the continued operation of the project. An Aboriginal Land Trust aware that MIM is reliant on reaching an agreement to keep its operations functioning will be at a significant negotiating advantage compared to an Aboriginal Land Trust negotiating with a proponent for a new major project where the proponent is yet to commence construction of the project and has no imperative to keep it running.

The probability of a relevant agreement being reached between MIM and an Aboriginal land trust should not be given material weight. It is speculation whether an agreement can be reached and if so on what terms. If an agreement is reached there will still be detriment to MIM that cannot be overcome, and the level of that detriment may be significant and will turn on the terms of any agreement reached. Again it is speculation as to what terms might be agreed through any process of negotiation.

### **Closure of Seas**

NLC's submissions at [57] make the point that in the event of a sea closure it will be the Northern Territory government that would take the detrimental action. The person or entity that may take an action causing detriment is not relevant to the question of detriment that you must have regard to under s 50(3)(b) ALRA therefore, nothing in that submission detracts from the fact that such a closure will lead to detriment. In any event, if such a closure occurred it would, almost inevitably, occur by reason of circumstances relevant to the fact that the adjacent land is Aboriginal land.

## Other Activities

Non-mining activities are not inconsistent with MLN 1126 as suggested in the NLC's submissions at [59]. I draw your attention to:

- (a) the final part of clause 4 in MLN 1126 which states that "Provided that pursuant to the Agreement the Company is entitled to permit the use of the facilities on the Lease Area by third parties for the purposes other than the McArthur River Project"<sup>3</sup>; and
- (b) uses other than the McArthur River Project (including non-mining uses) are permitted by clause 10(2) of the McArthur River Project Agreement which provides that MIM "shall be the manager and operator of the port and shall be entitled to licence or permit the use of the port or parts of the port by other persons".

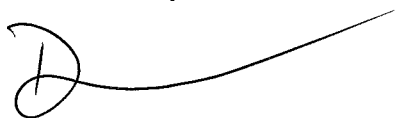
In addition any pastoral and non-pastoral uses are potentially supported by PPL 1051. Non pastoral use permits can be approved for non-pastoral uses on pastoral properties in the Northern Territory<sup>4</sup>.

The fact that there are no other major mining projects that have been approved in the McArthur River region since the McArthur River Mine commenced construction in 1993 is not indicative that the region is not highly prospective for minerals more widely. Major mining projects are not large in number. The McArthur River Mine is the last major mine to be developed throughout the entire Northern Territory. There have since been a number of smaller mine projects developed in the Northern Territory and consistent with the fact that the McArthur River region is highly prospective for base minerals<sup>5</sup> the Roper Bar Iron Ore Project has recently been developed in the region. The Bing Bong loading facility is used in connection with that project as outlined in my letter.

Also, as outlined in my letter there is clear evidence of exploration interest in mining in the McArthur River region based on the high proportion of ground under exploration licence tenure in the region. Exploration companies take a targeted approach to exploration, and the high proportion of exploration tenure in the region is indicative of high prospectivity of the area in the eyes of explorers. Although the level of future required use of the Bing Bong loading facility by users other than MIM and Britmar (Aust) Pty Ltd, in connection with the two existing mining projects in the region, cannot be predicted with any certainty the Bing Bong loading facility is currently the only bulk shipment facility in the region, and it will be vital infrastructure for any industries requiring bulk shipment in the region.

Thank you for your consideration in this matter.

Yours faithfully



**David Kerr**  
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<sup>3</sup> MLN 1126 is at Annexure A to exhibit MIM 3.

<sup>4</sup> Refer Northern Territory, Non-Pastoral Use Guidelines 2016 issued by the Pastoral Land Board Northern Territory

<sup>5</sup> This was recognised as a fact by Commissioner Olney in the Land Claim Report at page 74 [154].