



# National Native Title Tribunal

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## **Galaxy Resources Ltd/ Allan Bolton and Others on behalf of Southern Noongar / Alan Bolton and Others on behalf of Wagyl Kaip/ State of Western Australia, [2006] NNTTA 84 (6 July 2006)**

Last Updated: 7 July 2006

### **NATIONAL NATIVE TITLE TRIBUNAL**

*Galaxy Resources Ltd/ Allan Bolton and Others on behalf of Southern  Noongar / Alan Bolton and Others on behalf of Wagyl Kaip/ State of Western Australia, [\[2006\] NNTTA 84](#) (6 July 2006)*

**Application No: WF06/23**

**IN THE MATTER of the [Native Title Act 1993](#) (Cth)**

- and -

**IN THE MATTER of an inquiry into a Future Act Determination Application**

**Galaxy Resources Ltd (Applicant/grantee party)**

- and -

**Allan Bolton and Others on behalf of Southern  Noongar  (WC96/109) (Southern  Noongar  native title party)**

- and -

**Alan Bolton and Others on behalf of Wagyl Kaip (WC98/70) (Wagyl Kaip native title party)**

- and -

**The State of Western Australia (Government party)**

### **FUTURE ACT DETERMINATION**

**Tribunal:** Mr Dan O'Dea, Member

**Place:**  Perth 

**Date:** 6 July 2006

**Catchwords:** Native title -- future act -- application for determination for the grant of mining lease -- named applicants not signed state deed -- native title party as a whole consents to the determination -- consent determination that the act may be done.

**Legislation:** [Native Title Act 1993](#) (Cth), ss. 29, 31, 35, 38, 41, 109, 203  
[Mining Act 1978](#) (WA)

**Cases:** *James Dimer on behalf of Esperance Nyungar People (WC96/64)/Paul Winston Askins /James Ian Stewart/Western Australia 2006*, NNTT WF05/14 [\[2006\] NNTTA 70](#) (8 June 2006) Member O’Dea

*Bradley Foster & Ors (Waanyi People QC99/23)/Copper Strike/QLD 2006*, NNTT QF06/1 and QF06/2 [\[2006\] NNTTA 61](#) (19 May 2006) Member Sosso

*Gary Dimer and Others on behalf of the Widji People/Elizabeth Sambo, Dennis Sambo, Carlene Sceghi, Linda Champion and Nancy Wilson/Anne Joyce Nudding and Marjorie May Strickland on behalf of the Maduwongga People/Western Australia/Charles Joseph Boyes*, NNTT WF03/16 and WF03/17 [\[2003\] NNTTA 117](#) (18 November 2003) Hon CJ Sumner

*Monkey Mia Dolphin Resort Pty Ltd v Western Australia* [\[2001\] NNTTA 50](#); (2001) 164 FLR 361

**Hearing date:** 3 July 2006

**Representative of the grantee party:** Mr David Crook, Pioneer Nickel

**Counsel for the Mr Simon Blackshield**  
**native title parties:** South West Aboriginal land and Sea Council Aboriginal Corporation.



**Representatives of the Mr Trevor Creewel, State Solicitor’s Office**  
**Government party:** Ms Faye Mitchell, Department of Industry and Resources

## REASONS FOR FUTURE ACT DETERMINATION





[1] On 27 July 2005, the Government party gave notice under s 29 of the [Native Title Act 1993](#) (Cth) (‘the Act’) of a future act, namely the grant of mining lease M74/163 (‘the proposed licence’) under the [Mining Act 1978](#) (WA) to Galaxy Resources Ltd (‘the grantee party’).

[2] The area and location of the proposed licence is as follows:

- M74/163 – 486.17 hectares, 9 kilometres southeasterly of Ravensthorpe in the Shire of Ravensthorpe



The proposed licence overlaps two registered native title claims being Southern  **Noongar**   
(WC96/109, registered from 18 November 1996) at 100%, and Wagyl Kaip (WC98/70, registered from 29 September 1998) at 100%.

[3] The native title parties with respect to these proceedings are:

- Aden Eades, Allan Bolton, Dallas Coyne, Glen Colbung, Name Withheld for Cultural Reasons and Rita Dempster on behalf of the Southern  **Noongar**  Families (WC96/109) ('Southern  **Noongar** '); and
- Alan Bolton, Glen Colbung, Hazel Brown, Ken Colbung, Kevin Miller, Mark Smith, Mingli Wanjurri-Nungala, Rita Dempster, Rose Pickett and Sam Miller on behalf of Wagyl Kaip (WC98/70) ('Wagyl Kaip')

[4] On 16 June 2006, being a date more than six months after the s.29 notice was given, the grantee party made an application pursuant to s.35 of the Act for a future act determination under s.38 ('the application').



[5] Paragraph 10 of the application states:

'An Agreement and State Deed has been executed by five of the six Applicants on the Southern  **Noongar**  Native Title Claim (the 1st Native Title Party).  
An Agreement and State Deed has been executed by five of the nine Applicants on the Wagyl Kaip Native Title Claim (the 2nd Native Title Party).'

[6] Appended to the application is a minute of a consent determination in the following terms, executed by Mr David Crook and Michael Fotios on behalf of the grantee party. The minute was later executed by Mr Trevor Creewel (State Solicitor's Office) on behalf of the Government party:

**'CONSENT DETERMINATION UNDER SECTION 38 OF THE NATIVE TITLE ACT 1993 (CTH)**

1. The Government Party has complied with the requirements of s.31(1)(a) of the [Native Title Act 1993](#).
2. The Government Party, the Native Title Party and the Grantee Party has complied with the requirements of s.31(1)(b) of the [Native Title Act 1993](#).
3. The Government Party, the Native Title Party and the Grantee Party consents to a determination under s.38 of the [Native Title Act 1993](#) that the 'act' being the grant of **Mining Lease Application 74/163** may be done.'

[7] On 20 June 2006 a copy of a s.31(1)(b) agreement ('State Deed') executed by the grantee, Government and Southern  **Noongar**  parties, with the exception of one deceased native title named applicant, was lodged with the Tribunal by the Government party in accordance with s.41A(1)(a) of the Act. Appended to the State Deed is a letter from the Government party confirming they have sighted death certificate number 105767K for the deceased named applicant.



[8] On 29 June 2006 the following affidavits were submitted with regard to Wagyl Kaip:

- Affidavit of Kevin Fitzgerald, Senior Project Officer, South West Aboriginal Land and Sea Council ('SWALSC'), dated 29 June 2006.
- Affidavit of Jo-Anne Jones, Legal Assistant, SWALSC, dated 29 June 2006.
- Affidavit of Simon Charles Blackshield, Principal Legal Officer, SWALSC, dated 29 June 2006.





[9] The Tribunal has power to make a determination with the consent of the parties and it will normally be appropriate to do so where the parties (and particularly the native title

party/parties) are legally represented and those representatives have advised the Tribunal of the consent. The Tribunal will hear the parties to satisfy itself that the consent determination is appropriate (*Monkey Mia Dolphin Resort Pty Ltd v Western Australia* [2001] NNTTA 50; (2001) 164 FLR 361).

## The inquiry



[10] On 3 July 2006, the Tribunal conducted a hearing at which all parties were represented. Mr Simon Blackshield from SWALSC appeared as counsel for the Southern  **Noongar**  and Wagyl Kaip native title parties, Mr David Crook represented the grantee party, and Mr Trevor Creewel and Ms Faye Mitchell appeared for the Government party.

## *Southern* **Noongar**

[11] On the basis that the Southern  **Noongar**  native title party has executed a State Deed permitting the grant of the proposed licence (with the exception of one deceased named applicant) and that the State Deed has been lodged with the Tribunal by the Government party in accordance with s.41A(1)(a) of the Act, I am satisfied that the Southern  **Noongar**  native title party have agreed to the grant of the proposed licence and consent to a determination in the terms sought.

## *Wagyl Kaip*

[12] The Wagyl Kaip, Government and grantee parties confirmed their consent to the determination in the terms sought. The parties stated that the reason for seeking the determination was because the State Deed had not been executed by three of the Wagyl Kaip named applicants, Mr Mark Smith, Mr Sam Miller and Mr Kevin Miller.

[13] The affidavit of Mr Blackshield at paragraphs 2 to 6 outlines the decision making process of the Wagyl Kaip native title claim group in its negotiations with the grantee party over the proposed licence. Mr Blackshield deposes that in late 2003 and early 2004 a working party for the Wagyl Kaip and Southern  **Noongar**  Claims was established consisting of two representatives of each family group who have assumed responsibility for the negotiation of agreements in relation to future acts. On 6 April 2006 a negotiation team was appointed by the working party to conclude an agreement with the grantee party over the proposed licence. On 17 May 2006 the agreement was reached and on 18 May 2006 the working party unanimously accepted the agreement and instructed all named applicants to execute the State Deed for the proposed licence. None of the Wagyl Kaip named applicants appear to have been represented on the working party or the negotiation team.

[14] Kevin Fitzgerald at paragraphs 3 to 6 of his affidavit, and Jo-Anne Jones at paragraph 3 of hers, describe the unsuccessful attempts taken to contact Mr Mark Smith, including visiting his residence and via telephone. Mr Blackshield at paragraphs 7 and 8 of his affidavit describes the attempts to contact Messrs Kevin and Sam Miller. At paragraph 8 Mr Blackshield deposes to the nature of a telephone discussion where Mr Kevin Miller indicated that he would not sign anything because of the steps being taken by the Wagyl Kaip to remove him as an applicant. Ms Jones at paragraph 2 deposes to a conversation she had with the wife of Mr Sam Miller to the effect that her

husband was unlikely to sign anything as he had been 'out of it too long now'.

- [15] As the designated representative body under the Act, SWALSC has a formal role in protecting the interests of native title holders (ss.203B(4), 203BC(1)(a)), representing claimants in relation to their claim and related future act matters (s.203BB(1)(b)), being satisfied that persons they represent including native title parties understand and consent to a course of action (s.203BC(1)(b)) in accordance with the requirements of the Act (s.203BC(2)). The Tribunal is to carry out its functions in an informal and prompt way (s.109(1)) and is not bound by technicalities, legal forms or rules of evidence (s.109(3)). Unless there is anything to suggest the contrary the Tribunal is entitled to accept as evidence the advice of legal representatives engaged by a representative body on whether the appropriate consent has been given by a native title party.
- [16] Prior to the hearing, Mr Kevin Miller advised a Tribunal officer via telephone that he may, in the company of Mr Sam Miller, attend the hearing or submit a statement to the effect that they do not consent to the determination. Mr Miller did not indicate why he did not consent to the determination. Mr Miller did not attend the hearing, nor did he contact the Tribunal regarding his attendance or submit any material with regard to the application. The evidence provided in the affidavits filed by SWALSC indicate that the named applicants who have failed to sign have failed to do so because of ongoing disputes of a general nature with their fellow named applicants and claimants. There is no suggestion that they have any particular difficulty with the nature or content of the particular agreement the subject of this consent application.
- [17] The Tribunal has on numerous occasions held that a native title party is all the named applicants for a native title determination acting jointly or collectively and not each individually named person. Where it is clear that the native title party or claim group as a whole consent to a determination despite dissent from some named applicants, the Tribunal will make a determination by consent (see for example *Gary Dimer and Others on behalf of the Widji People/Elizabeth Sambo, Dennis Sambo, Carlene Sceghi, Linda Champion and Nancy Wilson/Anne Joyce Nudding and Marjorie May Strickland on behalf of the Maduwongga People/Western Australia/Charles Joseph Boyes*, NNTT WF03/16 and WF03/17 [\[2003\] NNTTA 117](#) (18 November 2003) Hon CJ Sumner; *Bradley Foster & Ors (Waanyi People QC99/23)/Copper Strike/QLD 2006*, NNTT QF06/1 and QF06/2 [\[2006\] NNTTA 61](#) (19 May 2006) Member Sosso; and *James Dimer on behalf of Esperance Nyungar People (WC96/64)/Paul Winston Askins /James Ian Stewart/Western Australia 2006*, NNTT WF05/14 [\[2006\] NNTTA 70](#) (8 June 2006) Member O'Dea). The arrangements designed to facilitate an inclusive decision-making process described in Mr Blackshield's affidavit, important as they may be, cannot be seen to replace or override the authority conferred on the named applicants by the Act. Nevertheless, in this matter I am satisfied that based on the evidence provided the Wagyl Kaip native title party as a whole have agreed to the grant of the proposed licence and consent to a determination in the terms sought.

## Determination

- [18] By consent the determination of the Tribunal is that the act, namely the grant of Mining Lease M74/163 to Galaxy Resources Ltd, may be done.

**Mr Dan O'Dea**  
**Member**

**6 July 2006**