

*Lansen & Ors v NT Minister for Mines and Energy & Ors*  
[2007] NTSC 28

PARTIES: LANSSEN, HARRY and OTHERS

v

NORTHERN TERRITORY MINISTER  
FOR MINES AND ENERGY

AND:

NORTHERN TERRITORY OF  
AUSTRALIA

AND:

McARTHUR RIVER MINING PTY LTD

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING GENERAL  
JURISDICTION

FILE NO: 157 OF 2006 (20632687)

DELIVERED: 30 APRIL 2007

HEARING DATES: 26, 27, 28, 29, 30 MARCH 2007

JUDGMENT OF: ANGEL J

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Plaintiffs:	T Robertson SC and S Glacken
First and Second Defendants:	T Pauling QC and S Brownhill
Third Defendant:	G Gibson QC and K Barlow

*Solicitors:*

Plaintiffs:	R Levy, Principal Solicitor, Northern Land Council
First and Second Defendants:	Solicitor for the Northern Territory
Third Defendant:	Cridlands

Judgment category classification:	B
Judgment ID Number:	Ang200705
Number of pages:	14

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Lansen & Ors v NT Minister for Mines and Energy & Ors*  
[2007] NTSC 28  
No. 157 OF 2006 (20632687)

BETWEEN:

**HARRY LANSEN and OTHERS**  
Plaintiffs

v

**NORTHERN TERRITORY MINISTER  
FOR MINES AND ENERGY**  
First Defendant

**AND:  
NORTHERN TERRITORY OF  
AUSTRALIA**  
Second Defendant

**AND:  
McARTHUR RIVER MINING PTY LTD**  
Third Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 30 April 2007)

**Introduction:**

[1] This case concerns what is known as the McArthur River Mine.

- [2] The McArthur River Project is a mining project, the subject matter of the McArthur River Project Agreement which constitutes Schedule 1 of the McArthur River Project Agreement Ratification Act 1992 (NT).
- [3] The McArthur River Project concerns the land and waters comprised in current mineral leases MLN 1121–1126 (inclusive), MLN 582 and non–pastoral use permission NP 060.
- [4] The McArthur River mine site itself is contained within the five contiguous mineral leases MLN 1121–1125 (inclusive). It is located 45 kilometres south west of the town of Borroloola in the Gulf Region of the Northern Territory.

### **The Parties**

- [5] The plaintiffs are registered Native Title Claimants to land and waters affected by the McArthur River Project. The defendants concede the plaintiffs’ standing to bring the present proceedings.
- [6] The first defendant the Minister for Mines and Energy for the Northern Territory is and was at all material times responsible for the administration of the Mining Management Act 2001 (NT), the Mining Act 1980 (NT) and the McArthur River Project Agreement Ratification Act 1992 (NT).
- [7] The third defendant, McArthur River Mining Pty Ltd is the operator of the McArthur River Mine and Project Area.

## **The McArthur River Project**

- [8] The third defendant conducts activities on the McArthur River Project Area for the extraction and processing of zinc, lead and silver. The mine has been operated as an underground mine from 1993 until recently.
- [9] In early 2003 the third defendant was operating the mine pursuant to Authorisation No. 0059–01 dated 21 January 2003 granted by the Minister pursuant to s 36 Mining Management Act 2001 (NT).
- [10] During 2003 the third defendant proposed to convert the mine from an underground to an open cut operation in order more fully to exploit the resources and to extend the life of the mine from 25 years to 35 years.
- [11] On 13 October 2006 the first defendant the Minister for Mines and Energy approved the third defendant’s proposal to convert the mine from underground to open cut. In that regard the Minister made two decisions purportedly pursuant to the Mining Management Act 2001 (NT) namely:
- (a) per s 41 Mining Management Act 2001 (NT), he accepted an amended Mining Management Plan that provided for the mine to change from an underground operation to an open cut operation, and
  - (b) per s 38(2) Mining Management Act 2001 (NT), he granted Authorisation No. 0059–02 which required regular extensive independent environmental audits of the mine and the third

defendant McArthur River Mining Pty Ltd to provide a significantly larger security than had previously been required in respect of the underground mine in order to safeguard rehabilitation of the mine site following closure.

### **The Issues**

[12] In these proceedings the plaintiffs challenge the validity of the Minister for Mines and Energy's decisions. They say the Minister acted in excess of his powers under the Mining Management Act 2001 (NT) by purporting to approve the change from underground to open cut mining via the acceptance of an amended Mining Management Plan submitted by the third defendant pursuant to s 41 Mining Management Act 2001 (NT) when the Act in its terms required approval via a variation or revocation and grant of an Authorisation pursuant to s 36 Mining Management Act 2001 (NT) to carry on open cut mining activities.

[13] Alternatively, if contrary to their first submission, the Mining Management Act 2001 (NT) did authorise the Minister for Mines and Energy to approve the conversion of the McArthur River mine to open cut by acceptance of an amended Mining Management Plan, the plaintiffs say the Minister failed to comply with the requirements of s 82 (c) Mining Management Act 2001 (NT) because he had regard to an environmental assessment which itself did not comply with the applicable Environmental Assessment Administration Procedures 1984 (NT) and his decision was therefore invalid.

- [14] The plaintiffs accept that a change in mining activities at a mine site can be approved by acceptance of an amended Mining Management Plan under s 41 Mining Management Act 2001 (NT) but they say only within the terms of an existing Authorisation and where the proposed change has been the subject of a full environmental assessment.
- [15] The defendants for their part say the change from underground to open cut mining is the proper subject matter of an amended Mining Management Plan rather than that of an Authorisation. They say Authorisation No. 0059–01 is in respect of and confined to “mining activities”. An Authorisation is for “mining activities” which are to be carried out in compliance with conditions, one of which is compliance with the current Mining Management Plan in respect of those mining activities: s 37(2) (a) Mining Management Act 2001 (NT). “Mining activity” is defined to mean, amongst other things, exploration for minerals, mining of minerals, processing of minerals and other matters. The definition of “mining activity” describes various classes or types of activity as falling within the meaning of the term. It does not discriminate amongst specific activities falling within those general classes or types.
- [16] The defendants say the Mining Management Act 2001 (NT) does not require a change of method of mining at a mine site to be effected by way of a variation of an Authorisation or the grant of a new Authorisation. Although the proposed change from underground to open cut of the mine involved a different method of mining it did not involve a different “mining activity” as

defined by the Act. “Mining of minerals” is a “mining activity” regardless of whether it is conducted by an underground or an open cut method.

[17] The defendants say Authorisations granted pursuant to s 36 Mining Management Act 2001 (NT) are not intended to authorise specific methods of mining. That this was so was said to be supported by s 34 Mining Management Act 2001 (NT) in so far as it provides that before exercising a power or performing a function under Part 4 “in relation to an Authorisation” the Minister for Mines and Energy was required to have regard to the mining interest held in respect of the mining activities to which the Authorisation related and to any conditions of that mining interest and nothing in the Mining Act (NT) restricts the method that might be employed to extract minerals the subject of the subject mineral leases and nor do the conditions attaching to the subject mineral leases purport to restrict the method of extraction of the minerals.

[18] The subject mineral leases address the method of mining operation at the mine in the context of what the lease describes as a “Mine Plan”. Clause 6(8) of each of MLNs 1121–1125 (inclusive) provides that –

“(8) the company may from time to time vary or modify its operations on the Lease Area but should those variations or modifications substantially affect the method, scale or location of those operations as set out in the Mine Plan, the Company shall, prior to the commencement of such variation or modification of those operations, submit an amendment to the Mine Plan to the Secretary for approval in accordance with sub-clause (4) of this clause.”

[19] It was submitted that because the conditions of any Authorisation necessarily had to be consistent with the conditions of the third defendant's mining interest and because of the provisions of s 34(2) Mining Management Act 2001 (NT), it follows that any substantial change to the method of the mining operation need be approved by the Minister by way of an approval of an amended Mining Management Plan.

[20] The defendants say Authorisation No. 0059–01 does not contain any conditions which precluded a change in the nature, scope or method of mining activities. The conditions of the Authorisation, consistently with the provisions of the Mining Management Act, permit the operator to make significant changes to the mining activities or management systems on the mining site via an amended Mining Management Plan acceptable to the Minister. Authorisation No. 0059–01 makes no reference to underground mining methods and contains no conditions addressing or incorporating the outcome of a 1992 environmental assessment of underground mining. There is nothing, they say, in the terms of Authorisation No. 0059–01 which precludes its continued application to and operation upon open cut mining methods.

[21] For these, amongst other reasons, the defendants say the plaintiffs' claims must fail.

### **The Mining Management Act 2001 (NT)**

- [22] As stated in its long title the Mining Management Act 2001 (NT) provides for the authorisation of mining activities, the management of mine sites and the protection of the safety and health of persons and of the environment on mine sites and for related purposes. One of the objects of the Act is “to protect the environment and the safety and health of all persons on mining sites in the Territory” by a number of means including the authorisation and monitoring of mining activities and requiring appropriate management of mining sites; s 3(b) Mining Management Act 2001 (NT).
- [23] The Act demonstrates an intention that the goal of environmental protection is to be achieved by both the authorisation provisions and the provisions relating to the mining management plan.
- [24] The Mining Management Act 2001 (NT) is divided into Parts. Authorisations and Mining Management Plans are dealt with in Part 4, headed “Mining Activities”. Part 2 headed “Management and Competencies” provides that the operator for a mining site is responsible for the control and management of the site and the mining activities carried out on the site: s 9(1). An operator’s obligations include an obligation to establish, implement and maintain an appropriate safety, health and environmental protection management system for the site: s 16(2)(c). This is one of a number of matters required by s 16 to ensure that the environmental impact of mining activities carried out on the site is limited to what is necessary for the establishment, operation and closure of the site

and, so far as is practicable, to operate and maintain the site to minimise risk to the safety and health of the workers on the site.

[25] Part V Mining Management Act 2001 (NT) comprises five Divisions.

Division 1, headed “Exercise of Powers by Minister” requires that before exercising the power or performing a function under the Part in relation to an Authorisation, the Minister must have regard to the mining interest held in respect of the mining activities to which the Authorisation relates and any conditions of that mining interest, and that, in granting or varying an Authorisation that relates to a mining interest held under the Mining Act, the Minister must ensure that the conditions of the Authorisation are not inconsistent with the conditions of the mining interest: s 34(1) and (2) Mining Management Act 2001 (NT).

[26] Division 2 headed “Authorisation to carry out mining activities” contains the provisions relating to Authorisations. Division 3, headed “Mining Management Plan” contains the provisions relating to such plans. Authorisations and approved Mining Management Plans comprise complimentary mechanisms for achieving the objects of protecting the environment and safety and health of persons on mining sites.

[27] Section 35(1) provides that the operator of a mining site must not carry out mining activities on the site unless the Minister has granted an Authorisation. Penalties are set out for breach of this provision. Section 39 provides that the operator of a mining site granted an Authorisation must

comply with the Authorisation as in force from time to time. Penalties are also set out for a breach of this provision. An Authorisation permits mining activities be carried on in compliance with the specified conditions it contains, one of which is compliance with the current Mining Management Plan in respect of the mining activities to which the Authorisation relates: s 37(2)(a) Mining Management Act.

[28] Section 35(2) permits the operator for a mining site to apply to the mining Minister for “an Authorisation to carry out on the site the mining activities specified in the application”. Section 35(3) requires such an application to be accompanied by “the Mining Management Plan in respect of the mining activities specified in the application”. Section 40 provides that a Mining Management Plan is to include in respect of the proposed mining activities to be carried out on the mining site: (a) the identification and description of the mining activities, (b) particulars of the implementation of the management system to address safety and health issues, (c) particulars of the implementation of the management system to address environmental issues, (d) a plan and costing of closure activities, (e) particulars of the organisational structure, (f) plans of current and proposed mine workings and infrastructure and other information or documents required by the Minister.

[29] Pursuant to Clause 6 of the Administrative Procedures (NT) promulgated under s 7(1) Environmental Assessment Act (NT) the Minister for Mines and Energy being the Minister responsible for authorising the third defendant’s

proposed action was required to notify the Minister for the Environment of the third defendant's proposed action. Pursuant to Clause 8(2) Administrative Procedures (NT) the Minister for the Environment was required to consider whether a public environmental report or an environmental impact statement was necessary and inform the proponent and the responsible Minister that either was necessary or alternatively that administrative procedures were at an end. In the event a public environment report or an environmental impact statement was required Clause 8(4) Administrative Procedures (NT) provides that the Minister for Environment should cause a notice to be published in such newspapers and on such occasions as the Minister considered appropriate inviting public comment upon matters relating to the environment which the Minister considered necessary to be dealt with in any public environment report or environmental impact statement relative to the third defendant's proposed actions.

### **The Scope of Authorisation No. 0059-01**

[30] Authorisation No. 0059-01 contains no identification or description of the nature, scope or methods of mining. This is consistent with s 34 sub-ss (1) and (2) Mining Management Act 2001 (NT) and the circumstance that the nature, scope and methods of mining activities to be conducted at the mine site are matters which are required to be identified and described, that is, particularised, in the Mining Management Plan: S 40 Mining Management Act 2001 (NT). Authorisation No. 0059-01, like the mining interests held

in respect of the mining activities to which it relates, is not in its terms limited by reference to the nature, scope or method of mining activities.

[31] On 19 September 2002 McArthur River Mining Pty Ltd lodged with the Department:

- (a) an application for an Authorisation under s 35 of the Mining Management Act 2001 (NT);
- (b) a nomination of an operator of a mining site under s 10(4) Mining Management Act 2001 (NT); and
- (c) Mining Management Plan September 2002 – September 2003 under s 35(3) Mining Management Act 2001 (NT).

in relation to the McArthur River mine.

[32] The mining activities specified in the third defendant’s application for Authorisation were as follows:

“Underground lead/zinc/silver mine, processing plant, and Bing Bong Port facility”.

[33] On 21 January 2003 Authorisation No. 0059–01 was granted to the third defendant McArthur River Mining Pty Ltd in relation to the McArthur River mine. That Authorisation was “to carry out mining activities” on the subject mining site.

[34] By s 35(2) Mining Management Act 2001 (NT) an operator applies for “an Authorisation to carry out on the site *the mining activities specified in the application*”. (emphasis added)

- [35] Under s 36(1) Mining Management Act 2001 (NT) the Minister is empowered to grant “the Authorisation”, that is, the Authorisation sought in the application pursuant to s 35(2) Mining Management Act 2001 (NT).
- [36] The terms of s 35 and s 36 Mining Management Act 2001 (NT) require that the Authorisation be read together with and subject to that specified in the application for Authorisation. Authorisations unsought can not be granted.
- [37] The Authorisation sought was not “to carry out mining activities” of whatever type, for whatever minerals, and by whatever methods as may from time to time profitably be the subject of a Mining Management Plan acceptable to the Minister for Mines and Energy. The Authorisation sought was for a mine of a particular generic description, namely an “underground lead/zinc/silver mine”. The Authorisation as sought and granted no more comprehends an open cut mine than a gold mine or a coal mine.

**Conclusion:**

- [38] Authorisation No. 0059–01 does not authorise the third defendant’s proposed open cut mining operation. The proposed open cut mining operation is statutorily prohibited in the absence of an Authorisation: s 35(1) Mining Management Act 2001 (NT).
- [39] The Minister for Mines and Energy’s acceptance of the amended Mining Management Plan was of no effect because the Mining Management Plan was not in respect of the mining activities to which Authorisation No. 0059–01 related: cf. s 37(2) Mining Management Act 2001 (NT).

[40] I shall hear the parties as to the terms of relief and as to costs, the plaintiffs to bring in Minutes of Order. Liberty to speak to the Minutes.

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