SUPREME COURT OF QUEENSLAND

CITATION:	*Burragubba & Anor v Minister for Natural Resources and Mines & Anor* [2016] QSC 273
PARTIES:	**ADRIAN BURRAGUBBA** (first applicant) **LINDA BOBONGIE, LESTER BARNARD, DELIA KEMPPI AND LYNDELL TURBANE** (second applicant) **v** **MINISTER FOR NATURAL RESOURCES AND MINES** (first respondent) **ADANI MINING PTY LTD** (second respondent)
FILE NO/S:	SC No 5770 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application for statutory order of review
DELIVERED ON:	25 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2016
JUDGE:	Bond J
ORDER:	**The order of the Court is that the application for statutory order of review is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS FOR REVIEW – PROCEDURAL FAIRNESS – EXCLUSION OF PROCEDURAL FAIRNESS – PROCEDURES PROVIDED BY STATUTE – where the first respondent, pursuant to s 271A of the *Mineral Resources Act 1989* (Qld) ("MRA"), decided to grant mining leases to the second respondent – where the applicants did not notify an objection in accordance with the MRA – where the applicants submit that the decision of the first respondent breached the principles of natural justice because he did not give the applicants an opportunity to be heard before he made his decision – whether the MRA operates to define and to limit both the persons to whom the obligation to afford natural justice might extend and the subject matter in relation to which they might be heard ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS FOR REVIEW – ERROR OF LAW – where the applicants were some of the persons comprising a registered applicant in respect of a native title determination application in the National Native Title Tribunal ("NNTT") – where the

registered applicant was unsuccessful in the NNTT and commenced a judicial review proceeding in the Federal Court – where the first respondent referred to the proceedings in the NNTT and the proceeding in the Federal Court in his reasons – where the applicants submit that the first respondent made an error of law by concluding that native title issues were "resolved" – where the applicants submit that the first respondent failed to take into account the impact of the decision on the applicants' native title rights – where the applicants also submit that the first respondent failed to take into account the risk that the NNTT decision may be set aside – whether the first respondent made an error of law or failed to take into account relevant considerations

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS FOR REVIEW – RELEVANT CONSIDERATIONS – where the first applicant provided a document to "the State of Queensland" during the NNTT proceeding – where the applicants submit that the first respondent had constructive knowledge of the document – where the applicants submit that the first respondent failed to take into account the potential adverse impacts of the grant of the mining leases upon the native title rights or cultural interests asserted in the document – whether the first respondent was obliged to consider the document in circumstances where no objection had been notified in accordance with the MRA – whether there was a failure to take into account a relevant consideration

Administrative Decisions (Judicial Review) Act 1977 (Cth), s 5, s 15, s 16
Environmental Protection Act 1994 (Qld), s 194
Judicial Review Act 1991 (Qld), s 20
Mineral Resources Act 1989 (Qld), s 2, s 234, s 235, s 240, s 241, s 245, s 252, s 252A, s 252B, s 252C, s 260, s 261, s 265, s 268, s 269, s 271, s 271A, s 272, s 276
Native Title Act 1993 (Cth), s 28, s 38, s 39

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, cited
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323, cited
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252, cited
South Australia v O'Shea (1987) 163 CLR 378, considered
Twist v Randwick Municipal Council (1976) 136 CLR 106, cited

COUNSEL: D M Yarrow for the applicants
R M Derrington QC for the first respondent
D G Clothier QC, with S J Webster, for the second respondent

SOLICITORS: Just Us Lawyers for the applicants
Crown Law for the first respondent

Ashurst Australia for the second respondent

Introduction

[1] The applicants apply under the *Judicial Review Act 1991* (Qld) to set aside the decision of the first respondent, the Minister for Natural Resources and Mines (**Minister**), to grant three mining leases to the second respondent, Adani Mining Pty Ltd (**Adani**). The mining leases were granted in exercise of power under s 271A(1)(a) of the *Mineral Resources Act 1989* (Qld) (**MRA**).

[2] The applicants are some (but not all) of the persons comprising the registered applicant in respect of a native title determination application lodged pursuant to the *Native Title Act 1993* (Cth) (**NTA**). The land the subject of that application includes the areas of the mining leases.

[3] Before the Minister granted the mining leases, the National Native Title Tribunal (**NNTT**) had made two decisions under the NTA, the effect of which was that the proposed grant of the mining leases under the MRA would be regarded as valid future acts under the NTA. However, one of the applicants subsequently – but still before the grant of the mining leases under the MRA – commenced a proceeding under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**) which sought to obtain an order setting aside one of the NNTT decisions.

[4] The applicants contend that the Minister's decision to grant the mining leases should be set aside on four grounds, which between them raise the following issues:

(a) first, whether the Minister's decision involved breach of the principles of natural justice because he did not give the applicants an opportunity to be heard before he made his decision;

(b) second, whether the Minister failed to take into account a relevant consideration, namely the potential adverse impacts of the grant of mining leases upon the native title rights or cultural interests asserted by the applicants; and

(c) third, whether the Minister made any error of law or failed to take into account a relevant consideration when he decided: (1) that native title issues had been resolved by the two NNTT decisions; and (2) that he was not prepared to postpone making his decision to await the outcome of the attempt to set aside one of the NNTT decisions.

[5] As to the first two issues, the Minister and Adani submit that an insurmountable problem for the applicants is that under the MRA the only persons entitled to have their objections heard in relation to a grant of a mining lease are those who have notified their objection within a mandatory statutory time frame and then only in relation to the grounds of objection they have notified within the time frame. Thus the legislative scheme operates to define and to limit both the persons to whom the obligation to afford natural justice might extend and the subject matter in relation to which they might be heard. This is fatal to the applicants' case, they not having notified any objection at all within time.

[6] As to the third issue, the Minister and Adani submit that the Minister made no relevant error. First, he correctly regarded the two NNTT decisions as operative notwithstanding the existence of an application to set them aside. Second, it must be inferred that he was aware of the legal difficulties which might arise if, subsequent to his decision, the NNTT decision was set aside. Third, his determination to take that risk was entirely a matter for him and the applicants could not identify any legal error in his approach.

[7] I will turn first to identify the procedural framework applicable to the grant of mining leases under the MRA. Then I will identify the steps which were taken under and in relation to

relevant NTA processes; the steps which were taken (and, more importantly, not taken) under the MRA procedural framework; and the relevant aspects of the Minister's reasons. Finally I will consider each of the issues raised by the applicants.

The procedural framework for the grant of mining leases under the MRA

[8] Pursuant to s 2 of the MRA, the principal objectives of the MRA include –

(a) by s 2(a), "to … encourage and facilitate prospecting and exploring for and mining of minerals";

(b) by s 2(e), "to … ensure an appropriate financial return to the State from mining";

(c) by s 2(f), "to … provide an administrative framework to expedite and regulate prospecting and exploring for and mining of minerals".

[9] Chapter 6, Part 1 of the MRA provides for the grant of mining leases.

[10] Pursuant to s 234(1), the Minister may grant to an eligible person or persons, a mining lease for all or any of the purposes stated in that section. Section 235 sets out certain general entitlements of a holder of a mining lease, including entering into the area of the mining lease and doing all the things permitted or required under it.

[11] An application for a mining lease may be made by an eligible applicant following the marking out of the boundaries of the land the subject of the application: ss 240 to 241. The requirements for an application are set out in s 245. Amongst other things the applicant for a mining lease must –

(a) provide the prescribed details of the land proposed to be the subject of the mining leases;

(b) give reasons why the mining lease should be granted in the area and shape sought;

(c) identify the minerals sought to be mined; and

(d) be accompanied by evidence addressing other prescribed topics relevant to the assessment of the merit of the proposed application.

[12] Upon being satisfied that the applicant is eligible to apply for the mining lease and that the applicant has complied with the requirements of the MRA with respect to the application, the chief executive is to prepare a certificate of application for a mining lease in the approved form: s 252(1). The number of the proposed mining lease and the date and time the application was lodged must be endorsed on the certificate of application: s 252(2). Pursuant to s 252A(2), following that endorsement, the chief executive must, within 5 business days of the date mentioned in s 252A(1):

(a) fix the last day for lodging objections to the application; and

(b) give the applicant for the mining lease a certificate of public notice in the approved form.

[13] I interpolate that the last day for lodging objections to the application is defined as the "last objection day". As will appear, it is a date of great significance to any person who might ever wish to object to the proposed mining lease.

[14] The last objection day must be at least 20 business days after the certificate of public notice is given: s 252A(3). The certificate of public notice must state the number of the proposed mining lease, the day and time the application for the mining lease was lodged, the last objection day and where the application or any additional documents given to the chief executive about the application may be inspected: s 252A(4). The chief executive must,

from the giving of the certificate of public notice to the applicant until the end of the last objection day, keep a copy of the certificate of public notice available for inspection at the places the chief executive considers appropriate: s 252A(5).

[15] Pursuant to s 252B(1), the applicant must, within the notice period:

(a) post a copy of the certificate of public notice on the datum post of the land the subject of the proposed mining lease;

(b) durably engrave or mark the number of the proposed mining lease on the datum post; and

(c) give a copy of the certificate of application and the application for mining lease to certain persons, including the owners of the land the subject of the proposed mining lease and the relevant local government.

[16] The applicant must ensure that the posted certificate of public notice remains posted until the end of the last objection day for the application: s 252B(3). The applicant must publish a copy of the certificate of public notice or a notice in the approved form about the certificate in an approved newspaper circulating generally in the area of the relevant land: s 252B(4). The publication must take place at least 15 business days before the last objection day or at an approved shorter period before the last objection day: s 252B(5). The applicant must provide the chief executive with a declaration of compliance with s 252B: s 252C(1). Without the declaration, the Land Court must not make a final recommendation to the Minister about the application for the mining lease, other than a recommendation to reject the application, and may refuse to hear any matter about the application: s 252C(2).

[17] An entity may, on or before the last objection day for the application, lodge with the chief executive an objection in writing in the approved form: s 260(1). Particular owners of land may lodge objections within a different time frame: s 260(2). An objection shall state the grounds of objection and the facts and circumstances relied on by the objector in support of those grounds: s 260(3). Each objector must serve a copy of the objection lodged by it on the applicant on or before the last day that an objector may lodge an objection: s 260(4). An objection may be withdrawn by written notice and a withdrawal cannot be revoked: s 261.

[18] Notably, there is no power in the chief executive to extend the time for an objection to be lodged or to accept an objection that is not properly made.

[19] If a properly made objection is made for an application for a mining lease, the chief executive must refer the application and all properly made objections to the Land Court for hearing: ss 265(1) to (4). The Land Court must then fix a date for hearing and immediately give written notice of the date to the chief executive, the applicant and each person who lodged a properly made objection: s 265(5).

[20] The Land Court is obliged to hear the application and objections thereto and all other matters that pursuant to the Part are to be heard, considered or determined by the Land Court in respect of that application at the one hearing of the Land Court: s 268(1). At that hearing, the Land Court shall take such evidence, shall hear such persons and inform itself in such manner as it considers appropriate in order to determine the relative merits of the application, objections and other matters and shall not be bound by any rule or practice as to evidence: s 268(2). However, critically, the Land Court shall not entertain an objection to an application or any ground thereof or any evidence in relation to any ground if the objection or ground is not contained in an objection that has been duly lodged in respect of the application: s 268(3).

[21] Pursuant to s 269(1), upon such a hearing, the Land Court shall forward to the Minister:

(a) any objections lodged in relation thereto;

(b) the evidence adduced at the hearing;

(c) any exhibits; and

(d) the Land Court's recommendation.

[22] Relevantly, the Land Court's recommendation must consist of a recommendation to the Minister that the application be granted or rejected in whole or in part: s 269(2). A recommendation may include a recommendation that the mining lease be granted subject to such conditions as the Land Court considers appropriate: s 269(3). Section 269(4) lists in 13 separate subparagraphs the matters that the Land Court must take into account and consider when making its recommendation.

[23] Relevantly, pursuant to s 271[1], in considering an application for the grant of a mining lease, the Minister must consider:

(a) any Land Court recommendation for the application; and

(b) the matters mentioned in s 269(4).

[24] Pursuant to s 271A, the Minister may, after considering the criteria under s 271 for a mining lease application, decide to:

(a) grant the applicant a mining lease for the whole or a part of the land in the application;

(b) reject the application; or

(c) refer the matter to the Land Court to conduct a hearing or further hearing on the application generally or on specific matters raised by the Minister.

[25] The Minister may also determine a condition of a mining lease if the Minister considers it is in the public interest: s 276(1A).

[26] If the Minister refers the matter back to the Land Court, the Land Court must fix a date for hearing and immediately give written notice of the date to the chief executive, the applicant and each person who lodged an objection in accordance with s 260: s 272.

Relevant events under the NTA

[27] Subdivision P of Division 3 of Part 2 of the NTA provides for a right to negotiate process. That process applies to certain acts that will affect native title. The creation of a right to mine (such as the grant of a mining lease) is such an act.

[28] Pursuant to s 28 of the NTA, an act that is the subject of the right to negotiate process is invalid to the extent it affects native title unless one of the scenarios set out in the subparagraphs of s 28(1) of the NTA exists before the act is done. One such scenario is a determination by the NNTT under s 38 that the act may be done or may be done subject to conditions: see s 28(1)(g).

[29] Such a determination by the NNTT can be made on application after a period for negotiation in good faith has passed without result. The options open to the NNTT are (1) to determine that the act must not be done, (2) to determine that it may be done, or (3) to determine that it may be done subject to conditions to be complied with by any of the parties. In making its determination, the NNTT must take into account the matters set out in s 39 being:

(a) the effect of the act on:

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[1] It was common ground that the requirement to consider matters set out in s 271(c) are not relevant to the circumstances of this case, so those matters are not summarised.

(i) the enjoyment by the native title parties of their registered native title rights and interests; and

(ii) the way of life, culture and traditions of any of those parties; and

(iii) the development of the social, cultural and economic structures of any of those parties; and

(iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and

(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;

(b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;

(c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;

(d) any public interest in the doing of the act;

(e) any other matter that the NNTT considers relevant.

[30] On 8 November 2010 Adani applied under the MRA for the grant of the first of the three mining leases the subject of this application, namely ML70441. On 9 July 2013 Adani applied for the grant of the second and third of those mining leases, namely ML70505 and ML70506. The right to negotiate process under the NTA was engaged and applications made to and determined by the NNTT separately in relation to, on the one hand, ML70441 and, on the other hand, ML70505 and ML70506.

[31] On 7 May 2013, the NNTT determined that the grant of ML 70441 to Adani may be done and on 8 April 2015, the NNTT determined that the grant of MLs 70505 and 70506 to Adani may be done[2].

[32] Pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), a person aggrieved by a decision of an administrative character made under an enactment may apply to the Federal Court for an order for review on various grounds. Under s 16 of the ADJR Act, on an application for a statutory order of review, the Federal Court may make a range of orders, including quashing or setting aside the decision or part of the decision.

[33] Section 15 of the ADJRA Act deals with the effect which an application under s 5 has on the status of the decision which is challenged. Essentially, unless the Court or a Judge intervenes, the challenged decision continues to operate according to its terms. Section 15 provides:

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2 There was no direct evidence of the fact of these steps having happened. Neither of the NNTT decisions were in evidence before me. The only evidence before me of the timing of those steps and of their outcome was to be found in the Minister's reasons for ultimately granting the 3 leases at [89] to [91], which reasons were exhibited to the affidavit of the first applicant, Mr Burragubba. Objection might have been taken to the admissibility of the paragraphs of the reasons as proof of the truth of their contents, but that did not occur, presumably because the fact of those events having happened is not controversial.

> (1) **The making of an application to the Federal Court under section 5 in relation to a decision does not affect the operation of the decision** or prevent the taking of action to implement the decision **but**:
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> (a) **the Court or a Judge may, by order, on such conditions (if any) as it or he or she thinks fit, suspend the operation of the decision**; and
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> (b) the Court or a Judge may order, on such conditions (if any) as it or he or she thinks fit, a stay of all or any proceedings under the decision.
>
> (2) The Court or a Judge may make an order under subsection (1) of its or his or her own motion or on the application of the person who made the application under section 5.

[34] On 6 May 2015 Mr Burragubba filed an application under the ADJR Act seeking (amongst other things) an order setting aside the 8 April 2015 NNTT determination. It was common ground that there has never been any order by a Court or a Judge suspending or staying the operation of the determination. It follows that the filing of the application did not affect the operation of the decision.

[35] The State of Queensland, Adani and the NNTT were respondents to Mr Burragubba's application. The application contended that –

(a) the decision of the NNTT had been induced or affected by dishonest and misleading conduct by Adani; and

(b) the NNTT decision was flawed because the NNTT failed to take into account the content of particular communications made by the applicant and another person.

[36] On 19 August 2016 Reeves J delivered a judgment dismissing Mr Burragubba's application.

[37] On 8 September 2016, Mr Burragubba filed a notice of appeal against the decision of Reeves J. The appeal has not been determined.

Relevant events under the MRA

[38] In the meantime, the following steps had been taken under the MRA.

[39] Certificates of application and certificates of public notice in respect of the mining lease applications issued on 16 April 2014, with the last objection day being 17 June 2014.

[40] One objection to the mining lease applications was lodged by Land Services of Coast and Country Pty Ltd on 16 June 2014. It was common ground that no objections were lodged by any of the present applicants before the last objection day.

[41] Adani lodged its statutory declaration of compliance under s 252C of the MRA on 20 June 2014.

[42] On 29 September 2014, the mining lease applications and objection were referred to the Land Court for hearing. On the same day, the Department of Environment and Heritage Protection referred Adani's application for an environmental authority pursuant to the *Environmental Protection Act 1994* (Qld) to the Land Court for decision.

[43] On 15 December 2015, the Land Court recommended that the mining leases be granted and the environmental authority be issued, in each case subject to the inclusion of additional conditions.

[44] On 2 February 2016, the Department of Environment and Heritage Protection decided pursuant to s 194 of the *Environmental Protection Act*, that the environmental authority be approved with the conditions recommended by the Land Court. The environmental authority was issued on 3 February 2016 and a copy given to the Principal Mining Registrar.

[45] On 4 March 2016, Adani filed with the Principal Mining Registrar a compensation agreement with the Isaac Regional Council for road reserves in the area of MLAs 70441 and

70505. This agreement included the consent of the Council as owner of the reserves pursuant to s 271A(2)(a) of the MRA.

[46] On 18 March 2016, the Minister's Department provided him with a brief recommending the grant of MLs 70441, 70505 and 70506.

[47] On 3 April 2016, the Minister decided to grant the mining leases. Reasons were given on 13 May 2016.

The Minister's reasons

[48] The Minister's reasons were divided into five sections:

(a) a background section, in which the Minister set out a chronology of the critical events up to and including the timing of his decision;

(b) an evidence section in which he summarised the evidence or other material on which made his findings on material questions of fact;

(c) his findings on material questions of fact in relation to the decision;

(d) the reasons for his decision; and

(e) a conclusion.

[49] There are only a few matters which must be noted about the contents of the Minister's reasons.

[50] First, the Minister's departmental brief dated 18 March 2016 contained evidence described as "Documented Native Title Outcome for ML 70441" and "Documented Native Title Outcome for MLs 70505 and 70506": see reasons at [27]. There is no direct evidence as to the contents of those two attachments, but it may be inferred that they reflected the outcome of the work of departmental officers which the Minister described at [28] in these terms:

> DNRM undertakes an assessment of all land covered by each mining lease application to establish whether native title has been extinguished and records this process on a form now called a "documented native title outcome", but previously called a "native title work decision".

[51] Second, I infer that the contents of those attachments were the source of the Minister's findings at [89] to [91] where the Minister stated (emphasis added):

> 89. **Native title has been resolved**.
>
> 90. ML 70441 proceeded through the right to negotiate (RTN) process under the *Native Title Act 1993* (Cth) (NTA), pt 2, div 3, subdiv P. On 7 November 2012, Adani lodged a Future Act Determination Application (FADA) in the National Native Title Tribunal (NNTT) pursuant to ss 35 and 75 of the NTA. **On 7 May 2013, the NNTT determined that the grant of ML 70441 to Adani may be done. Accordingly, the grant of ML 70441 would be a valid future act: NTA, ss 28 and 38, and so I found that Native Title had been resolved for the grant of ML 70441**.
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> 91. **On 8 April 2015, the NNTT determined that the grant of MLs 70505 and 70506 to Adani may be done. Accordingly, those grants would also be valid future acts, and so I found that Native Title had been resolved for MLs 70505 and 70506**.

[52] Third, the Minister's findings on material questions of fact proceeded by reference to the 13 discrete subparagraphs set out in s 269(4) of the MRA which, by s 271(b), the Minister was required to consider.

[53] Fourth, the Minister had become aware of Mr Burragubba's application to set aside the NNTT's 8 April 2015 determination, which the Minister had earlier concluded had resolved native title by finding the leases "may be done" with the result that the grant of the leases would be a valid future act under the NTA. It is unclear how the Minister became so aware.

It may have been via the mechanism of the Departmental briefing notes to which I have earlier referred. In any event, the Minister stated at [112] to [114]:

> **Native title challenges**
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> 112. I am aware that Adrian Burragubba has applied to the Federal Court for judicial review of the NNTT's 8 April 2015 determination that the grant of MLs 70505 and 70506 may be done. The Federal Court has reserved its decision.
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> 113. That did not affect my ability to grant the mining lease. My intention on 29 October 2015 was to await the outcome of Mr Burragubba's judicial review application. It was not apparent at that time how long the judicial review proceeding would take. In the event, the application was heard on 23 and 24 November 2015 and there was a further hearing on 1 and 2 February 2016.
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> 114. Ultimately I considered that the public interest in proceeding to a final decision outweighed any interest in awaiting the Court's decision and I therefore proceeded to make the final decision on the MLAs on 3 April 2016.

[54] I infer that as at 29 October 2015 –

(a) even though the Land Court had not yet reached its decision and the Minister had not yet received his formal departmental brief, the Minister must have been aware of the fact of the 8 April 2015 NNTT determination and the fact that an application for judicial review had been made and not decided; and

(b) the Minister reached the preliminary view that any determination by him should await the outcome of the application for judicial review, presumably because he must have been giving some thought to what he might do when the time came for him to make a decision under ss 271 and 271A of the MRA.

[55] When the time actually came for him to make a decision under ss 271 and 271A of the MRA the Minister gave further consideration to the question whether he should postpone making his decision until he knew the outcome of the judicial review application and determined that he should not, for the reasons he gave.

[56] As at the time of his decision on 3 April 2016 not to await the outcome of the judicial review application, it is evident, given the terms of his reasons at [89] to [91] quoted above, that the Minister (1) was aware of the two NNTT decisions (2) was aware of the terms of ss 28 and 38 of the NTA and (3) had formed the views that in consequence thereof the grants of MLs 70441, 70505 and 70506 to Adani would be valid future acts under the NTA and the mere fact of the existence of an unresolved judicial review application did not affect his power validly to grant the MLs.

[57] However, his evident knowledge of the NNTT decisions; of the relevant sections of the NTA and of the interrelationship between them suggest that the likely explanation for his initial view that he should await the outcome of Mr Burragubba's application was his appreciation that there was a risk that the NNTT decision might be set aside and the preferable course was to await the outcome and not take the risk. Ultimately, and for the reasons he gave, he changed his mind.

Alleged breach of natural justice

[58] The applicants complain that the Minister failed to comply with the principles of natural justice because –

(a) the Minister was aware that –

(i) the applicants asserted the existence of native title rights and interests in the area of ML 70505 or ML 70506 in the native title determination application in the Federal Court;

(ii) those alleged native title rights and interests were not considered in the Land Court;

(iii) Mr Burragubba's judicial review application had been made but not finalised,

but nevertheless concluded that "[native title] had been resolved" for ML 70505 and ML 70506 without giving the applicants an opportunity to address him on that conclusion or on the question whether he should postpone his decision to await the outcome of the judicial review application; and

(b) the Minister had constructive knowledge of a document which articulated the particular nature of the native title rights and cultural interests of Mr Burragubba[3], which might be adversely affected by the grant of mining leases, and did not give him an opportunity to be heard on that question.

[59] The proposition that the Minister had constructive knowledge of the relevant document cannot be accepted. The evidence relied on to support that conclusion was the statement in Mr Burragubba's affidavit that during proceedings before the NNTT he gave the document to "the State of Queensland", which was a party to the proceedings. Such evidence could not, without more, justify a finding of constructive knowledge on the part of the Minister.

[60] But the more fundamental question is whether the applicants could ever be owed any right to be heard, none of the applicants having given notice of objection before the last objection day.

[61] Observance of the principles of natural justice is ordinarily regarded as a condition attached to (and governing the exercise of) a statutory power by which the rights and interests of people might be adversely affected. In *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258 to 259 French CJ, Gummow, Hayne, Crennan and Kiefel JJ observed (footnotes omitted):

> In *Annetts v McCann* it was said that it could now be taken as settled that when a statute confers power to destroy or prejudice a person's rights or interests, principles of natural justice regulate the exercise of that power. Brennan J in *Kioa v West* explained that all statutes are construed against a background of common law notions of justice and fairness. His Honour said:
>
> > "[W]hen the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that 'the justice of the common law will supply the omission of the legislature'. The true intention of the legislation is thus ascertained."
>
> The implication of the principles of natural justice in a statute is therefore arrived at by a process of construction. It proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power of the kind referred to in *Annetts v McCann*.
>
> Observance of the principles of natural justice is a condition attached to such a statutory power and governs its exercise, as Brennan J further explained in *Kioa v West*. A failure to fulfil that condition means that the exercise of the power is inefficacious. A decision arrived at without fulfilling the condition cannot be said to be authorised by the statute and for that reason is invalid.
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> In *Annetts v McCann* Mason CJ, Deane and McHugh JJ said that the principles of natural justice could be excluded only by "plain words of necessary intendment". And in *Commissioner of Police v Tanos* Dixon CJ and Webb J said that an intention to exclude was not to be assumed or spelled out from "indirect references, uncertain inferences or equivocal considerations". Their Honours in *Annetts v McCann* added that such an intention was not to be inferred from the mere presence in the statute of rights consistent with some natural justice principles.
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> The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness, derives

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3 Exhibit AB-6 to the affidavit of Mr Burragubba.

from the principle of legality which, as Gleeson CJ observed in *Electrolux Home Products Pty Ltd v Australian Workers' Union*, "governs the relations between Parliament, the executive and the courts". His Honour said:

> "The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."

[62] Of course, as the High Court acknowledged, the principles of natural justice may be excluded so long as the legislature's intention so to do is made sufficiently plain. In *Twist v Randwick Municipal Council* (1976) 136 CLR 106 Barwick CJ put the proposition in this way (at 109 to 110, emphasis added):

> The common law rule that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power is both fundamental and universal: …. **But the legislature may displace the rule and provide for the exercise of such a power without any opportunity being afforded the affected person to oppose its exercis**e. **However, if that is the legislative intention it must be made unambiguously clear.** In the event that the legislation does not clearly preclude such a course, the court will, as it were, itself supplement the legislation by insisting that the statutory powers are to be exercised only after an appropriate opportunity has been afforded the subject whose person or property is the subject of the exercise of the statutory power. **But, if the legislation has made provision for that opportunity to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court, being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme**. But, if it appears to the court that the legislature has not addressed itself to the appropriate question, the court in the protection of the citizen and in the provision of natural justice may declare that statutory action affecting the person or property of the citizen without affording the citizen an opportunity to be heard before he or his property is affected is ineffective. The court will approach the construction of the statute with a presumption that the legislature does not intend to deny natural justice to the citizen. Where the legislation is silent on the matter, the court may presume that the legislature has left it to the courts to prescribe and enforce the appropriate procedure to ensure natural justice.

[63] I have indicated already that the Minister and Adani contend that the relevant terms of the MRA plainly reveal an intention to define and to limit both the persons to whom the obligation to afford natural justice might extend and the subject matter in relation to which they might be heard.

[64] For their part, the applicants sought to resist that conclusion by pointing out that s 271A was a conferral of power on the Minister to grant mining leases the occasion for the exercise of which could be reached by either of two routes. First, it could be reached after a process in the Land Court and consequent upon the provision to the Minister of a Land Court recommendation, in which case the Minister would be under a statutory duty to consider the Land Court's recommendation and the matters mentioned in s 269(4). Second, if there had been no objections at all, there would never be a Land Court process and s 271 would be reached by the application and the supporting material going to the Minister in which case he would be under a statutory duty to consider the matters mentioned in s 269(4).

[65] Either way, submitted the applicants, the MRA did not express a constraint on the Minister which was equivalent to the constraint which s 268(3) imposed on the Land Court, namely that it could not entertain an objection to an application or any ground thereof or any evidence in relation to any ground if the objection or ground is not contained in an objection that has been duly lodged in respect of the application. That being so, submitted the applicants, the application of first principle suggested that they should have been given the

right to be heard. They relied in particular on the oft-cited observations by Brennan J in *Kioa v West* (1985) 159 CLR 550:

(a) at 628:

> A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to taken into account in deciding upon its exercise; [and]

(b) at 629:

> Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made.

[66] Notably, submitted the applicants, s 271 of the MRA must be taken to contemplate that the Minister is permitted, in fulfillment of his duty to consider the matters mentioned in s 269(4), to consider new information, not appearing in any report by the Land Court. That must be so if the application gets to the Minister via the second route. And there is no reason why it should not be so if the application gets to the Minister via the first route. In fact he did so on this occasion, because the Land Court decision made no mention whatsoever of native title and he evidently received and considered information which permitted him to conclude that native title had been resolved. The applicants relied on the following observations by Mason CJ in *South Australia v O'Shea* (1987) 163 CLR 378 at 389 to contend that the legislative scheme should be taken to accommodate the possibility that the Minister might have to grant a right to be heard which is beyond that provided for by Land Court and the processes before it (emphasis added):

> The scheme for which s. 77a provides is not unfamiliar. It allows a place for the presentation of the offender's case - before the Board when it is considering whether it should make a recommendation for release. There are many illustrations of this legislative model which entails the holding of an inquiry by a body authorized to make a recommendation to a Board or Minister which may make a decision rejecting the recommendation without conducting any further inquiry: see *Taylor v. Public Service Board (NSW)*; *Kioa v. West*; *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd*. **The hearing before the recommending body provides a sufficient opportunity for a party to present his case so that the decision-making process, viewed in its entirety, entails procedural fairness. If the decision-maker intends to take account of some new matter, not appearing in the report of the recommending body, and the party has had no opportunity of dealing with it, the decision-maker should give him that opportunity: *Peko-Wallsend*.**

[67] I agree with the submission advanced by the Minister and Adani that the relevant terms of the MRA plainly reveal an intention to define and to limit both the persons to whom the obligation to afford natural justice might extend and the subject matter in relation to which they might be heard. That intention is revealed by the following features of the statutory scheme:

(a) The mechanism for the creation and public notification of "the last objection day".

(b) The requirement that objectors must lodge their objection on or before "the last objection day" and must do so in a form which identifies the grounds of objection and the facts and circumstances relied on.

(c) The absence of power in the chief executive to extend the last objection day, once it has been set.

(d) If there are objections, there is a reference to the Land Court, notice of which is given only to the chief executive, the applicant and each person who duly lodged an objection.

(e) The Land Court hearing gives a right to be heard to the applicant and to objectors, but the Land Court is constrained against entertaining an objection or any ground thereof

or any evidence in relation to any ground, if the objection or ground is not contained in an objection that has been duly lodged.

(f) The fact that an objection may be withdrawn but that the withdrawal may not be revoked.

(g) The fact that there is a contemplation that one outcome of the Minister's exercise of power might be neither to grant or to reject but to refer an application back to the Land Court, but in that case, notice of the hearing is only given to the chief executive, the applicant and each person who duly lodged an objection.

[68] It is true that the constraint which s 268(3) imposes on the Land Court is not expressly imposed on the Minister. But I do not think that it could possibly be consistent with the intention of the legislature (especially bearing in mind the express statutory objective that the MRA would provide an administrative framework to expedite and regulate prospecting and exploring for and mining of minerals) that the s 271 and 271A stage would operate in the way contended for by the applicants. On their theory, the intention of the legislature must have been that at the ministerial decision making stage any person whose interests were likely to be affected by the mining lease under consideration would be given an opportunity to deal with relevant matters adverse to their interests. And that would be so whether or not they had failed to lodge an objection before the last objection day. Such an approach would entirely defeat the structured and deliberately confined approach taken by the legislature. It would open up that stage to a process which was broader than the Land Court process. I think the legislature has revealed an intention inimical to the applicants having the right to be heard for which they contend.

[69] It may well be that at the ministerial decision making stage and in consequence of taking new matters into account which were adverse to the interests of interested parties, the Minister might have to accord a further right to be heard to interested parties. However, the key to that proposition is "interested parties". The evident intention of the legislature is that such a right would be limited to those who had already established themselves as interested parties via their compliance with the legislative mechanisms directed to that outcome. Support for that conclusion is found in the provisions of s 271A(1)(c) and s 272, which contemplate the possibility of the Minister referring the matter back to the Land Court, but provide only for notice of the hearing to be given to the chief executive, the applicant and each person who duly lodged an objection.

[70] The result is that in my view the fact that none of the applicants had given notice of objection before the last objection day is an insuperable obstacle to the applicants' contention that the Minister failed to comply with the principles of natural justice. Not having availed themselves of the opportunity to lodge an objection based on the impact of the proposed mining leases on the native title rights and cultural interests which they assert, they were not owed any further obligation of natural justice. For the same reason they were not entitled to be heard on the question of the timing of the Minister's decision.

Alleged failure to take into account of potential adverse impacts on the applicants' native title rights or cultural interests

[71] The applicants contend that the Minister's decision was an improper exercise of power for the following reasons.

[72] First, the Minister was aware that the applicants asserted the existence of native title rights and interests in the area of ML 70505 or ML 70506 in the native title determination application in the Federal Court. The Minister's reasons do not allude to the impact of MLs 70505 and ML 70506 upon those native title rights and, accordingly, it may be inferred that

the Minister did not consider that impact. This was a failure to take into account a relevant consideration because adverse impacts on such rights amount to "adverse environmental impact" in the sense of that phrase in s 269(4)(j) of the MRA.

[73] Second, and similarly, the Minister had constructive knowledge of the document to which I have referred at [58](b) and [59] above which articulated the particular nature of the native title rights and cultural interests of Mr Burragubba[4]. The Minister's reasons do not allude to the impact of MLs 70505 and ML 70506 upon those native title rights and cultural interests and, accordingly, it may be inferred that the Minister did not consider that impact. This was a failure to take into account a relevant consideration for the same reason as the previous paragraph.

[74] As to the first matter:

(a) The Minister did take into account potential adverse impacts on the applicants' native title rights or cultural interests. He did so by (1) having regard to the two NNTT decisions and the terms of ss 28 and 38 of the NTA and (2) forming the views that in consequence thereof the grants of MLs 70441, 70505 and 70506 to Adani would be valid future acts under the NTA and the mere fact of the existence of an unresolved judicial review application did not affect his power validly to grant the MLs.

(b) But in any event, and for the reasons I have expressed under the previous heading, the Minister was not obliged to consider such material, unless it was raised by someone who had lodged an objection within time in a form which permitted of the consideration of such issues.

[75] As to the second matter the Minister did not have constructive knowledge of the document for the reasons expressed at [59] above. Further, even if the Minister did have such knowledge, at most the document amounted to an objection not duly made under the MRA and, for the reasons I have expressed in the previous paragraph, the Minister was not obliged to consider such material.

Alleged errors in finding native title issues had been resolved

[76] The applicants contend that –

(a) the Minister erred in law by concluding that native title issues were "resolved", and mining leases would be valid under s 28 of the NTA if granted;

(b) it may be inferred that the Minister failed to consider the existence of a risk to the rights conferred by MLs 70505 and ML 70506 from the prospect of a future setting aside of the NNTT's 8 April decision, that failure being properly characterised as a failure to take into account a relevant consideration; and

(c) these matters meant that the Minister erred in law in applying s 269(4)(l) of the MRA (namely, whether "any good reason has been shown for a refusal to grant") the Minister being obliged to consider that provision by s 271(b) of the MRA.

[77] I reject those contentions for three reasons.

[78] First, the Minister did not err in law by concluding that native title issues were "resolved", and mining leases would be valid under s 28 if granted. The two NNTT decisions had concluded that the act of granting the leases may be done. There was no application to review the first NNTT decision so the Minister was plainly correct in relation to ML 70441. And, in relation to the other two MLs, at the time of the Minister's decision to grant the

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4 Exhibit AB-6 to the affidavit of Mr Burragubba.

leases, the second NNTT decision was properly regarded as operative, notwithstanding that Mr Burragubba's application had been filed but not determined: see [31] to [34] above.

[79] Second, I decline to infer that the Minister failed to consider the existence of the risk to which reference is made. I accept that it is often legitimate to infer from the fact that the reasons of an administrative decision maker do not refer to a matter, that the matter was not considered to be material: cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 per McHugh, Gummow and Hayne JJ. But in this case, that argument cannot be accepted. Rather, for the reasons expressed at [53] to [57] above, I infer the contrary.

[80] Finally, in my view the gravamen of the applicants' complaint is that the Minister should have determined not to run the risk that the second NNTT decision might be set aside and should have decided to await the outcome of Mr Burragubba's application. But the formation of a judgment on the merits of that choice was a matter for the Minister. It was for him to make the judgment on which was the better approach and to give the appropriate weight to the considerations affecting that choice, unless, of course, his decision was attacked for legal unreasonableness in the sense explained in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. Such an attack was expressly disavowed by the applicants.

Conclusion

[81] The application for statutory order of review is dismissed. I will hear the parties on costs.