CITATION:	*Green & Ors v Minister for Mining and Industry* [2023] NTSC 18
PARTIES:	GREEN, Josephine Davey and GREEN, Jack and THE ENVIRONMENT CENTRE NORTHERN TERRITORY INCORPORATED v MINISTER FOR MINING AND INDUSTRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Supreme Court exercising Territory jurisdiction
FILE NO:	2021-00078-SC
DELIVERED:	21 April 2023
HEARING DATES:	16 and 17 February 2023
JUDGMENT OF:	Kelly J

CATCHWORDS:

ADMINISTRATIVE LAW – Whether reviewable error of law – Jurisdictional error – whether s 40(2)(g) of the *Mining Management Act* ("the Act") requires a mining management plan to include a plan and costing of closure activities after the planned closure of the mine – Ground of review not made out.

ADMINISTRATIVE LAW – Whether reviewable error of law – Jurisdictional error – whether the Minister calculated the security required to be provided by the operator in accordance with s 43A(1) of the Act – Ground of review not made out.

ADMINISTRATIVE LAW – Whether reviewable error of law – Jurisdictional error – whether the Minister's decision to approve the 2020 Mining Management Plan and issue the Authorisation for carrying out the mining activities referred to in the 2020 Mining Management Plan was unreasonable for the reason that the Minister mistakenly believed that the 2020 Mining Management Plan was compliant with Assessment Report 86 issued by the NT EPA and the recommendations therein – Ground of review not made out.

Environmental Assessment Act 1982 (NT), s 8A

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Mining Management Act 2001 (NT) s 16(1), s 34A, s 35(1), s 36(1), s 36(2), s 36(4), s 37(2)(b), s 37(2)(b)(i), s 40, s 40(1), s 40(2), s 40(2)(c), s 40(2)(f), s 40(2)(g), s 41, s 42(1), s 43A, s 43A(1), s 43(1), s 43(2)(c), s 46, s 46(1)

Mining Management Amendment Act 2013 (NT)

KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2021) 95 ALJR 666; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, referred to

Territory Iron Pty Ltd v Minister for Mines and Energy [2019] NTSC 28, distinguished

REPRESENTATION:

Counsel:

Plaintiffs:	O Jones with C Langford
Defendant:	S Lloyd SC with S Palaniappan

Solicitors:

Plaintiffs:	Environmental Defenders Office
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Green & Ors v Minister for Mining and Industry [2023] NTSC 18
No. 2021-00078-SC

BETWEEN:

JOSEPHINE DAVEY GREEN
First Plaintiff

JACK GREEN
Second Plaintiff

THE ENVIRONMENT CENTRE NORTHERN TERRITORY INCORPORATED
Third Plaintiff

AND:

MINISTER FOR MINING AND INDUSTRY
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT
(Delivered 21 April 2023)

[1] This is an application for judicial review of three decisions made by the Minister for Mining and Industry ("the Minister") in relation to the McArthur River Mine.

Background

[2] The McArthur River Mine is a lead and zinc mine about 60km southwest of Borroloola and 910km southeast of Darwin. Its current operator is McArthur River Mining Pty Ltd ("the Operator"), a wholly owned subsidiary of Glencore plc.

[3] The first plaintiff, Josephine Davey Green, is a Gudanji woman and the second plaintiff, her husband Jack Green, is a Garawa elder. Each is a native title holder in respect of land where the mine is situated. The third plaintiff, the Environment Centre (NT) Incorporated, is one of two independent environmental organisations that operate in the Northern Territory. Its objectives, as set out in its constitution, include "the protection of all aspects of the natural environment."

[4] The following background facts are non-contentious.

[5] The McArthur River Mine has been operating since 1995. The mining leases in relation to the mine expire on 4 January 2043.[1]

[6] The mine was originally an underground mine. It was later converted to open cut. In 2013, a problem occurred with the spontaneous combustion of toxic waste rock on the Northern Overburden Emplacement Facility of the mine and in July 2014, the Northern Territory Environmental Protection Authority ("NT EPA") determined that a new environmental impact

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1 *McArthur River Project Agreement Ratification Act 1992* (NT) s 4A(2).

assessment was required under the *Environmental Assessment Act 1982* (NT) in relation to works proposed at the mine to rectify the problem. Those works are referred to as the 'Overburden Management Project'.

[7] In March 2017, the Operator released a draft Environmental Impact Statement in relation to the Overburden Management Project for public comment. One of the aims of the Overburden Management Project was to address the environmental issues that had come to light from 2013 onwards. It also contemplated a significant expansion of the mining activities authorised to be carried out at the mine. Included at Appendix S to the draft Environmental Impact Statement was a Conceptual Mine Closure Plan. The Conceptual Mine Closure Plan was a plan for rehabilitation of the mining site at the completion of proposed mining activities at the mining site in 2037.

[8] In April 2018, following public comment and review by the NT EPA and the independent monitor, the Operator released a Supplementary Environmental Impact Statement.

[9] In July 2018, the NT EPA released its assessment report in relation to this Environmental Impact Statement ("Assessment Report 86"). The NT EPA did not consider the Conceptual Mine Closure Plan to be adequate. Assessment Report 86 made 30 recommendations, among them

Recommendation 12 requiring that tailings be disposed of in the open pit void[2] (rather than being covered *in situ*) on cessation of mining.

[10] In June 2019, the Commonwealth granted an approval for the Overburden Management Project under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the Commonwealth approval"). The conditions of the Commonwealth approval precluded the Conceptual Mine Closure Plan from being implemented in full. Relevantly, the Conceptual Mine Closure Plan planned for an eventual connection of the pit lake to the McArthur River. However, condition 4 of the Commonwealth approval was that the proposed pit lake remain hydraulically isolated from the McArthur River and its floodplain.

[11] In 2020, the Operator submitted a proposed amended mining management plan ("the 2020 Mining Management Plan") to the Department. The proposed 2020 Mining Management Plan and the appendices to that plan were provided to the former Minister in June and July 2020. However, before any decision was made in respect of the 2020 Mining Management Plan, the Northern Territory Government went into caretaker mode.

[12] In August 2020 (during the caretaker period), a delegate of the former Minister varied the Authorisation for the McArthur River Mine for the purpose of allowing the construction of a discrete component of the works during the dry season, pending determination of the application relating to

2 The open pit void is the hole left after the completion of open pit mining activities. When filled with water after the cessation of mining activities it is referred to as "the pit lake".

the Overburden Management Plan as a whole. The security amount was set, by reference to the then-current mining management plan (not the 2020 Mining Management Plan), at $519,669,461.[3]

[13] The new Minister was appointed on 8 September 2020 and on 13 November 2020, the Minister made three decisions:

(a) to approve the 2020 Mining Management Plan (as an amended mining management plan) under s 41 of the *Mining Management Act 2001* (NT) ("the Act");

(b) to approve a new security amount under s 43A of the Act; and

(c) based on the first two decisions, a decision to vary the Operator's Authorisation to conduct the activities set out in the 2020 Mining Management Plan.

[14] The plaintiffs have applied for judicial review of those three decisions.

Issues

[15] The plaintiffs say there are three issues in this proceeding:

(1) whether s 40(2)(g) of the Act requires a mining management plan to include a plan and costing of closure activities after the planned closure of the mine; (This is referred to as the Closure Plan issue).

3 Variation of Authorisation dated 10 August 2020: First Padovan Affidavit (n 27) CB Vol. 6, p. 2866.

(2) whether the Minister calculated the security required in accordance with s 43A(1) of the Act; (This is referred to as the Security Calculation issue); and

(3) whether the Minister's decision to approve the 2020 Mining Management Plan and issue the Authorisation for carrying out the mining activities referred to in the 2020 Mining Management Plan was unreasonable for the reason that the Minister mistakenly believed that the 2020 Mining Management Plan was compliant with Assessment Report 86 issued by the NT EPA and the recommendations therein, when it was not. (This is referred to as the Environment Protection Authority issue).

[16] Although it is convenient to deal with the plaintiffs' case under these three headings, in reality, the plaintiffs' case in relation to the Closure Plan issue and the Security Calculation issue is an integrated one. In summary, the plaintiffs say that:

(a) under s 35(1) of the Act an operator of a mine may only carry out mining activities on a mining site with an Authorisation from the Minister;

(b) section 36(1) of the Act provides that an operator for a mining site who requires an Authorisation because of s 35(1) must apply in writing to the Minister for the Authorisation;

(c) section 36(2) provides that the application under s 36(1) must be accompanied by, (inter alia), the mining management plan for the mining site;

(d) under s 36(4) the Minister is empowered to decide the application by approving the mining management plan and granting the Authorisation, or refusing to approve the mining management plan and refusing to grant the Authorisation, there being no other available option;

(e) section 40(2)(g) of the Act requires a mining management plan to include a plan and costing of closure activities;

(f) section 37(2)(b) provides that it is a condition of every Authorisation that (with a not presently relevant exception), the operator must provide a security of the amount, in the form, and on the terms, specified in the condition; (This is mirrored in s 43(1) which provides that an operator who carries out mining activities under an Authorisation must provide the Minister with a security in relation to the activities in accordance with the condition of the Authorisation mentioned in s 37(2)(b)(i).)

(g) section 43A(1) provides that the Minister is to calculate the amount of security to be provided by an operator by reference to the level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation granted to the operator;

(h) the reference in s 40(2)(g) to "a plan and costing of closure activities" refers to the activities necessary to rehabilitate the mining site after the completion of all of the mining activities authorised by the Authorisation (ie at the proposed end of the life of the mine);

(i) likewise the reference in s 43A to "the level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation granted to the operator" refers to the level of disturbance likely to be caused by the whole of the mining activities described in the mining management plan which is to be the subject of the Authorisation for which the security is to be provided (ie during the whole of the planned life of the mine);

(j) the Operator in this case submitted to the Minister a purported mining management plan (the 2020 Mining Management Plan) which did not contain a plan and costing of the closure activities referable to the level of disturbance likely to be caused by the whole of the mining activities described in the 2020 Mining Management Plan (ie a plan to rehabilitate the mining site after the planned end of the life of the mine), but rather a plan and costing for the unplanned closure of the mine at the end of 2020 ("the Unplanned Closure Plan");

(k) the Minister purported to calculate the security to be provided by the Operator as a condition of the Authorisation by reference to the activities and costings in the Unplanned Closure Plan;

(l) the Unplanned Closure Plan was not "a plan and costing of closure activities" within the meaning of s 40(2)(g);

(m) as a consequence, the 2020 Mining Management Plan was not a mining management plan as defined in s 40(2); was not a mining management plan within the meaning of ss 36(1) and (2); and could not form the basis of a valid decision by the Minister under s 36(4) to "approve the mining management plan and grant the Authorisation";

(n) also as a consequence, the Minister's calculation of the security was not in accordance with the mandatory requirement in s 43A(1) to calculate the security by reference to the likely disturbance caused by mining activities throughout the life of the mine;

(o) hence the purported decisions by the Minister on 13 November 2020, to fix the amount of the security, to approve the 2020 Mining Management Plan, and to grant an Authorisation for mining activities to occur in accordance with the 2020 Mining Management Plan, were void and of no effect, as is the Authorisation granted by the Minister on that date.

[17] The Environment Protection Authority issue is a separate ground of review.

Evidence

[18] The plaintiffs tendered the following documents they rely upon:

- EXHIBIT P1: a bundle of five maps of the McArthur River Mine

- EXHIBIT P2: Environment Protection Agency Report 86 (Vol 7 Tab 130)
- EXHIBIT P3: Environmental Impact Statement (Chapter 3) (Vol 7 Tab 122)
- EXHIBIT P4: Conceptual Mine Closure Plan (Vol 7 Tab 121)
- EXHIBIT P5: Commonwealth Approval and reasons (Tabs 138 and 139)
- EXHIBIT P6: Mining Management Plan 2020 approved by the Minister (Tab 19). (This is the one being challenged in these proceedings)
- EXHIBIT P7: Unplanned Closure Plan (Tab 57)
- EXHIBIT P8: Recommendation to the Minister by the Department (Vol 5 Tab 59)
- EXHIBIT P9: Statement of Reasons for Approval on Mining Management Plan 2020 (Vol 5 Tab 60)
- EXHIBIT P10: Appendix B to Statement of Reasons (Vol 2 Tab 20)
- EXHIBIT P 11: Authorisation (Vol 5 Tab 61)
- EXHIBIT P12: Notification of Approval (Vol 5 Tab 62)
- EXHIBIT P13: Memo from Minister for Mining and Industry to Minister for the Environment (Vol 5 Tab 63)
- EXHIBIT P14: Letter from the Minister for Mining and Industry to the Environment Protection Agency (Vol 5 Tab 64)

[19] The defendant tendered several bundles of documents, including two volumes which, it is common ground, contained the whole of the material before the Minister at the time the decisions were made. The defendant also relied upon four affidavits of Armando Valentino Padovan, Senior Executive Director within the Mines Branch of the Northern Territory Department of Industry, Tourism and Trade ("the Department").

[20] In an affidavit dated 24 June 2022,[4] Mr Padovan deposed to the procedures within the Department for granting Authorisations and calculating the security to be provided as a condition of those Authorisations.

Mine Management Plans (MMPs) generally

7. MMPs consist of a number of elements including:

    a. Descriptions of the mining activities for which the operator requires authorisation;

    b. Details of the management system; and

    c. Plans and costing of closure activities.

8. For small operations (e.g. exploration, extractives or short duration mining (1-2 years)) the MMP will likely detail the mining activity as well as rehabilitation and closure activities. The security amount will be calculated for the entire operation and be paid in advance of any mining activities commencing.

9. For larger mining operations where activities are planned to occur over an extended period of time, such as the Mine, a staged approach is often adopted.

10. In those circumstances, the Department's approach is for:

    a. The stages of mining activities to be identified;

    b. The security amount associated with each stage to be calculated; and

    c. The mining activities not to proceed until the associated security is received.

11. The 'staged approach' means that the security amount can be amended if there are changes or developments in the manner in which the proposed mining activities are expected to progress, or the methods available to prevent, minimise or rectify environmental harm.

    (punctuation in original)

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4 EXHIBIT D3.

[21] Mr Padovan deposes that the Authorisation of the 2020 Mining Management Plan and the calculation of the security to be provided by the Operator followed this procedure and he provides some details about that process (acronyms omitted).[5]

> 15. Whilst the 2020 Mining Management Plan describes the mining operation as it is anticipated to occur for the remainder of the life of the Mine, the 2020 variation of Authorisation and 2020 Unplanned Closure Plan are intended to operate together so that mining activity (and the associated security) amount is staged; that is, the Operator cannot progress with mining activities unless the security for those activities is paid in advance of causing the disturbance.
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> 16. As well as outlining the plan proposed to be followed in the event of the mine closing unexpectedly, the 2020 Unplanned Closure Plan identified the aspects of the 2020 Mining Management Plan which were planned to occur over the following 12 months.
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> 17. The Planned Key Activities for 2020 were included in Table 2 in the 2020 Unplanned Closure Plan (commencing at page 1380 of AVP-4 to the First Padovan Affidavit).
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> 18. Condition 99 of the 2020 variation of Authorisation requires the Operator to provide an Unplanned Closure Plan by 31 August of each year, accompanied by a related security estimate.
>
> 19. Condition 11 of the 2020 variation of Authorisation provides for the security amount to be reassessed and revised following the assessment and approval of an amended Unplanned Closure Plan (or an amended mining management plan, or a third party assessment of the security).
>
> 20. Condition 12 of the 2020 variation of Authorisation requires the new security amount to be provided prior to creating new disturbance.
>
> 21. The information contained in the Unplanned Closure Plan is used to calculate the total security amount required to be provided before the disturbance is created by the proposed activities.

5 EXHIBIT D3 paras [15] to [24].

22. Since the 2020 Unplanned Closure Plan, the Operator has lodged two further Unplanned Closure Plans, in 2021 and 2022, which resulted in the security amount for the Mine being increased by $5,113,442 in 2021 and $71,360,300 in 2022.

23. As at the date of this affidavit, the total security amount held in respect of the Mine is $476,476,968.

24. The 2022 Unplanned Closure Plan outlined the planned activities and expected disturbance over the next 3 years, and the 2022 security amount was calculated on that basis.

The Closure Plan issue

[22] Section 35(1) of the Act provides that the operator for a mining site may carry out mining activities on the site only if the Minister has granted the operator an Authorisation to do so. Section 36(1) provides that an operator for a mining site who requires an Authorisation because of s 35(1) must apply in writing to the Minister for the Authorisation. Section 36(2) provides (inter alia) that the application must be accompanied by the mining management plan for the mining site.

[23] Section 40 of the Act deals with mining management plans. Section 40(1) provides that a mining management plan is a plan for the management of a mining site for which the operator requires an Authorisation to carry out mining activities. Section 40(2) provides that a mining management plan must include a number of specified things including a description of the mining activities for which the operator requires an Authorisation [s 40(2)(c)]; plans of proposed and current mine workings and infrastructure [s 40(2)(f)]; and a plan and costing of closure activities [s 40(2)(g)].

[24] “Closure activities” are not defined in the Act. It is common ground that they include the activities necessary to rehabilitate the mining site after the closure of the mine and that these are the activities referred to in s 46(1) (set out below).

[25] The plaintiffs contend that what is required by s 40(2)(g) is a plan for the intended closure of the mine at the end of the intended mining activities described in the mining management plan for which Authorisation is sought – not a plan dealing with a hypothetical closure at some earlier point in time. In this case, the Minister authorised (or purported to authorise) mining activities by the Operator at McArthur River Mine on the basis of the 2020 Mining Management Plan which described mining activities taking place through to 2037, but which included the Unplanned Closure Plan - a plan and costing of an “unplanned closure” at the end of 2020.

[26] The plaintiffs contend that the Unplanned Closure Plan included in the 2020 Mining Management Plan was not a “plan and costing of closure activities” within the meaning of s 40(2)(g); and hence the 2020 Mining Management Plan was not a mining management plan within the meaning of s 36(2), such that the Minister had no power to grant an Authorisation under s 36(4) based on the 2020 Mining Management Plan, and the Minister fell into jurisdictional error by purporting to do so.

[27] The plaintiffs submit that the statutory context in which s 40(2)(g) appears supports the view that what is meant by “closure activities” in s 40(2)(g)

must be closure activities after the finish of the proposed mining activities described in the mining management plan.

(a) Section 16(1) provides that the operator for a mining site must ensure that the environmental impact of mining activities is limited to what is necessary for the establishment, operation and closure of the site. The plaintiffs say that this can only refer to closure of the site at the end of the proposed mining activities, and submit that the term should bear the same meaning throughout the Act.

(b) Section 42(1) provides that the operator for a mining site must notify the Minister in writing of the proposed cessation of mining activities on the site that is not in accordance with the mining management plan as soon as practicable before cessation. The plaintiffs contend that this too supports the plaintiffs' construction of s 40(2)(g).

(c) Section 43(2)(c) provides that one of the purposes for which the security which an operator must give pursuant to s 43(1) is the payment of costs and expenses in relation to the Minister taking an action to complete rehabilitation of the mining site. The plaintiffs contend that it would not be possible for the Minister to assess the costs and expenses of rehabilitating the site without knowing what the operator's plan for closure of the mine is.

(d) The plaintiffs also rely on s 46 which provides:

(1) On completion of the rehabilitation of a mining site to the satisfaction of the Minister, the operator for the site may apply to the Minister for a certificate of closure in respect of the site.

(2) When the operator has met the closure criteria for the mining site, the Minister must:

(a) issue to him or her a certificate of closure in respect of the site; and

(b) return or relinquish any outstanding security provided by the operator.

(3) In this section, "closure criteria" means the standard or level of performance, as specified in the mining management plan for the mining site, that demonstrates successful closure of the site.

The plaintiffs say that this has implications for the construction of s 40(2)(g). They contend that "successful closure" can only be accomplished at the end of proposed mining activities on the site, and that, therefore, "closure criteria" can only mean the criteria specified in a closure plan which sets out what is to be done to rehabilitate the site after the conclusion of the planned mining activities described in the mining management plan (ie at the end of the planned life of the mine).

[28] I do not agree that the scheme of the Act compels a restrictive construction of s 40(2)(g) which would limit the reference to "a plan and costing of closure activities" to a plan for closure of the mine at the end of the planned life of the mine described in the mining management plan. The sections relied upon by the plaintiffs as leading to that conclusion (set out at [27] above) do not in fact support such a conclusion.

(a) I see no reason why "closure of the site" in s 16(1) must necessarily mean closure of the site at the end of the planned life of the mine rather

than simply “closure of the site” after cessation of mining activities on the site whenever and however that may occur.

(b) The fact that, under s 42(1), the operator for a mining site must notify the Minister in writing of the proposed cessation of mining activities on the site that is not in accordance with the mining management plan does not carry with it the necessary implication that the closure plan included in the mining management plan for the purpose of s 40(2)(g) must be a plan for closure of the mine at the end of all planned mining activities on the site.

(c) The reasoning in [27](c) above, in relation to s 43(2)(c) assumes what the plaintiffs set out to prove, namely that the security to be provided must be security for the rehabilitation of the mining site after all of the intended mining activities described in the mining management plan have been carried out.

(d) In s 46, it seems to me that “successful closure” simply means the successful implementation of the closure plan – whatever it may be – and that the term could be equally as applicable to an unplanned closure plan for unintended closure before the completion of planned mining activities as to a final closure plan.

[29] The plaintiffs rely heavily on obiter remarks of Southwood J in *Territory Iron Pty Ltd v Minister for Mines and Energy*[6] ("*Territory Iron*"). In that case, Southwood J discussed amendments to the Act made by the *Mining Management Amendment Act 2013* (NT) which, among other things, made it mandatory for an operator to provide a security to the Minister and specified the manner in which the amount of security was to be calculated in s 43A, which was introduced as part of those amendments. As part of that discussion, Southwood J said:[7]

> It is apparent from s 35(1), s 36(5), s 37(2)(a), s 40(1) and (2)(g) and s 43A of the Act that the security is intended to cover all disturbances to be caused by mining activities to be carried out over the whole life of a mining project including closure and rehabilitation activities.

[30] Southwood J quoted a portion of the Second Reading Speech for the *Mining Management Amendment Act* :[8]

> Section 43 is amended to clarify the purpose of the security and a new section 43A is added to specify the amount of the security to be provided. It relates to the level of the environmental disturbance for that operation. It also provides for regulations to prescribe processes around the calculation and application of a security.

[31] Later, his Honour made the following remarks about the scheme of the Act.

> A fundamental aspect of the Act is the requirement for an operator for a mining site to obtain an Authorisation to commence mining from the Minister before any mining activities can be undertaken. The application for an Authorisation must be accompanied by a mining management plan. Among other things, a mining management plan must

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6 [2019] NTSC 28.

7 at [23].

8 at [24].

> include: (i) a description of the mining activities (including decommissioning and rehabilitation of a mining site) for which the operator requires Authorisation; (ii) details of the mine management system; (iii) plans of proposed and current mine workings and infrastructure; (iv) a plan, and costings, of closure activities; and (v) any other details or plans required by the Minister. The requirements that the mining management plan is to include a description of the decommissioning and rehabilitation of the mining site and a plan and costings of closure activities means that an original mining management plan (submitted at the time an operator applies for an Authorisation) is to cover the whole life of the mining operation.[9]
>
> …
>
> It is apparent from a reading of s 43A(1) of the Act, and the multiple use of the words "to be" in the subsection, that the subsection is a forward-looking provision. Subsection 43A(1) of the Act requires the Minister to calculate the amount of security by reference to the level of disturbance expected as a result of the planned mining activities which will be carried out in the future under the Authorisation. This stands to reason because the amount of security must be specified on an Authorisation which must be obtained before any mining activities can be carried out on a mining site. The Act places an onus on the Minister's delegate to as accurately as possible calculate the amount of security required for the whole life of a mining operation prior to the commencement of mining activities. If the security is inadequately calculated prior to the grant of an Authorisation it will not secure the objects set out in s 43(2) of the Act.
>
> Subsection 43A(1) is found in Part 4 of the Act. When Part 4 of the Act is read as a whole, it is apparent that the Act contemplates that an operator is to inform the Minister of the full scope of all mining activities planned to be carried out on the mining site and the security is to cover the level of disturbance caused by all planned future mining activities including any disturbance caused by mine closure and rehabilitation activities.[10]

[32] These remarks are obiter. *Territory Iron* concerned a successful challenge to security fixed by the Minister, purportedly pursuant to s 43A, but calculated by reference to disturbances caused by mining activities at the

9 at [62].

10 at [81]-[82].

mining site in the past. Southwood J held that this was not allowable; s 43A requires the Minister to calculate the security by reference to "the level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation granted to the operator": that is to say, it is forward looking.

[33] The questions before this Court concerning the construction of the term "closure activities" in s 40(2)(g) and of "the level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation" in s 43A, were not before the Court in *Territory Iron*, and Southwood J did not have the benefit of counsels' assistance on those questions.

[34] In my view, while the remarks of Southwood J at [23] of *Territory Iron* to the effect that the security calculated by the Minister pursuant to s 43A is intended to cover all disturbances to be caused by mining activities to be carried out over the whole life of a mining project including closure and rehabilitation activities, is undoubtedly correct, it does not necessarily follow, as his Honour said at [83], that "the security is to cover the level of disturbance caused by all planned future mining activities", or at least it does not necessarily follow that security must be given for all planned future activities at the time the initial Authorisation is granted.

[35] As Southwood J said at [23] of *Territory Iron*, the evident purpose of the security provisions of the Act is to provide security for "all disturbances to be caused by mining activities to be carried out over the whole life of a

mining project". That purpose is set out in s 43(2) of the Act in the following terms:

> The purpose of the security is to secure any of the following:
>
> (a) the operator's obligation to comply with this Act and the Authorisation;
>
> (b) the payment of costs and expenses in relation to the Minister taking an action to prevent, minimise or rectify environmental harm caused by mining activities:
>
> (i) on the mining site to which the Authorisation relates; or
>
> (ii) outside the mining site if the environmental harm results from or may result from a mining activity carried out on the site;
>
> (c) the payment of costs and expenses in relation to the Minister taking an action to complete rehabilitation of the mining site.

[36] In my view, the reference to "closure plan" in s 40(2)(g) does not necessarily refer to a final closure plan at the end of proposed or planned mining activities. If the mine closes, then, by definition, what went before that closure constitutes "the life of the mine". Assuming the security calculations are done properly, the regime put in place by the Department (set out at [21] above) ensures that security will be given for "the level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation" during the life of the mine – however long that may be. If the mine closes unexpectedly during any year of operation, the security calculated by the Minister and given by an operator as a condition of the Authorisation for that mine will be sufficient to cover the likely closure and rehabilitation activities necessitated by that unplanned closure. If the mine does not close unexpectedly in that year of operation, the operator is obliged to submit a new closure plan setting out the cost of the

likely closure and rehabilitation activities necessitated by a closure in the following year, and so on. Each set of costings submitted will cover all disturbances to be caused by mining activities to be carried out over the whole life of a mining project if the mine closes during that year. If the mine does not close unexpectedly, then the closure plan submitted at the end of the planned activities will cover all of the disturbances likely to be caused by the mining activities during the whole planned life of the mine.

[37] Southwood J adverted to the process of periodic review of mining management plans elsewhere in the judgment in *Territory Iron*:[11]

> Part 4 of the Act requires mining management plans to be regularly reviewed and, if necessary amended. No mining activities included in an amended plan can be commenced until it is approved by the Minister. Logically, the security is to be reassessed when an amended mining management plan is submitted and this will involve an assessment of the level of disturbance likely to be caused by the mining activities to be carried out under the amended mining management plan. When making these later calculations of the amount of security, there is nothing to prevent the Minister's delegate having regard to the level of past disturbance when determining the level of disturbance likely to be caused by mining activities to be carried out under the amended mining management plan.

[38] His Honour concluded with this description of the scheme of the relevant provisions in the Act:

> While there is a risk that the amount of security may be underestimated when it is calculated by reference to the level of disturbance likely to be caused by the mining activities to be carried out in the future, it is apparent from the other provisions in the Act that Parliament intended that risk to be managed and contained in the following manner.

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11 at [83].

1. Ensuring that the proposed mining management plan is in accordance with good industry practice and contains all details and plans required by the Minister.

2. Ensuring that that the management system for the mining site as detailed in the mining management plan will, as far as practicable, operate effectively in protecting the environment.

3. At intervals specified in an Authorisation or as required in writing by the Minister, recalculating the amount of disturbance likely to be caused by the mining activities to be carried out in the future. When reassessing the level of future disturbance as a mining project progresses, the Minister may have regard to the level of disturbance caused by past mining activities.

4. Ensuring the operator complies with the Act, the Authorisation, and the mining management plan which is in force by monitoring mining activities and prosecuting operators who are in breach of their obligations under an Authorisation or the Act.

5. Revoking an Authorisation if an operator for a mining site is failing to comply with an Authorisation or the requirements of the Act.

6. Recovering any shortfall in the amount of security under s 44(5) and s 83(5) of the Act. Those sections recognise that the amount of security calculated in accordance with s 43A(1) of the Act may be inadequate and enable any shortfall to be recovered by the Minister as a debt payable to the Territory.

[39] Such a regime does not require s 40(2)(g) to be read as requiring the closure plan in a mining management plan to be a plan for closure at the end of all of the planned or proposed mining activities in the Authorisation – although it may do so. It is necessary for the closure plan to deal with the disturbance likely to be caused by mining activities "to be carried out" in the period the plan refers to, whether that is the entire intended life of the mine, or as in the case of the Unplanned Closure Plan, the period to the end of 2020, or some other period (as in the 2022 unplanned closure plan submitted by the Operator, referred to in EXHIBIT 3 PARA [24]). This is

discussed further below under the heading of the 'Security Calculation issue'.

[40] The plaintiffs' construction of s 40(2)(g) is not favoured by a purposive construction. The purpose behind the statutory regime of requiring the operator to submit a mining management plan that includes a plan to rehabilitate the mining site upon closure of the mine, along with a costing of that rehabilitation, and for the Minister to require security based on the level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation granted to the operator (that is to say, the likely cost of rehabilitating the site following that disturbance), is to ensure that there are sufficient resources available to carry out such a restoration. If the operator fails to restore the site, the Minister may have recourse to the security to recoup the cost to the public purse of the Minister having to do so. That purpose is equally well served by a construction of s 40(2)(g) which gives flexibility to the Minister to require the provision of staged closure plans and the provision of security for the estimated cost of rehabilitating the mine should it close at the end of each current year of the life of the mine. Under the staged approach adopted by the Minister, no further disturbance is authorised until security for the likely cost of rehabilitation following that disturbance has been provided.

The Security Calculation issue

[41] The plaintiffs claim that the security fixed by the Minister was not calculated in accordance with s 43A of the Act as it should have been calculated by reference to the costs that would be incurred to rehabilitate the mining site after closure of the mine at the end of the proposed mining activities described in the 2020 Mining Management Plan – ie in 2037. Instead it was calculated by reference to the cost of the unplanned closure plan in the mining management plan. The plaintiffs assert that, by failing to calculate the security on the required statutory basis set out in s 43A, the Minister fell into jurisdictional error: there has been a constructive failure to fix security.

[42] Section 43A(1) provides:

> The Minister is to calculate the amount of security to be provided by an operator by reference to the level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation granted to the operator.

[43] The Act then provides, in s 37(2)(b)(i), that such security be provided as a condition of any Authorisation. The plaintiffs contend that, given that it is a mandatory condition of every Authorisation that security be provided, the Court should infer that the legislative intention was for an Authorisation granted, in which there has been a constructive failure to fix the security should be void.[12]

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12 relying on *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR at [91]

[44] The plaintiffs contend that it is clear that the mining activities to be carried out under the Authorisation granted to the Operator in the present case are all of the activities described in the 2020 Mining Management Plan. The plaintiffs rely on a range of documents, including documents emanating from the Department, chief among them being the covering letter from the Minister to the Operator dated 13 November 2020, enclosing the variation to the Authorisation for mining at McArthur River Mine which authorises the mining activities in the 2020 Mining Management Plan.[13] That letter says (inter alia):

> Please find attached Variation to Authorisation 0059. This Variation has the following effect.
>
> Mining activities are authorised: *(Details are given.)*
>
> This Variation authorises the additional mining activities associated with the document McArthur River Mine *Mining Management Plan January 2020, Version 1.0. (ie the 2020 Mining Management Plan)*

[45] The 2020 Mining Management Plan[14] states:[15]

> This Mining Management Plan (MMP) provides for the continuation of activities at the Mine and BBLF[16], as well as commencement of activities generally consistent with the Overburden Management Project (OMP).
>
> …

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13 EXHIBIT P12; The plaintiffs also place reliance on a Memo from the Minister to the Minister for the Environment, also dated 13 November 2020 [EXHIBIT P13], which advises: "I am writing to inform you of my recent decision to approve an amended Mining Management Plan for the McArthur River Mine and vary the Authorisation granted to [the Operator] under the *Mining Management Act 2001*, enabling the Overburden Management Project to proceed.

14 EXHIBIT P6

15 on page ES-1.

16 the Bing Bong Loading Facility on the Gulf of Carpentaria approximately 95 km north of the Mine.

Planned activities are shown in Figure ES-1 and include:

- continued development of the Open Pit;
- continued development and emplacement of overburden in the North Overburden Emplacement Facility;
- continued processing of ore, and stockpiling, trucking and barging of concentrate product;
- continued deposition of thickened tailings at the Tailings Storage Facility (TSF) Cells 1 and 2;
- development of stockpiles, laydown area and quarries/ borrow areas;
- supporting activities required to monitor and assess [the Operator's] performance against key environmental objectives; and
- other associated minor infrastructure, plan, equipment and activities and modifications to existing structure, plant, equipment and activities.

Further details on the planned activities are presented in Section 4.

[46] Section 4 of the 2020 Mining Management Plan contains details of mining activities planned to be carried out at the mine until 2037.[17]

[47] The defendant contends that there is a distinction between the scope of the Authorisation and the mining activities to be carried out under the Authorisation. Granted that the Authorisation covers all of the mining activities described in the 2020 Mining Management Plan, the defendant contends that the only mining activities which could lawfully be carried out under that Authorisation are those set out in the planned key activities for

17 2020 Mining Management Plan p 39.

2020, set out in Appendix P to the 2020 Mining Management Plan (ie the Unplanned Closure Plan).[18]

[48] The defendant relies for this contention on Part 3 of the Unplanned Closure Plan and Conditions 4, 6, 10, 11, 12 and 99 of the Authorisation.[19] Schedule A to the Authorisation sets out the "Conditions of Authorisation". These include:

- **Condition 4:** The Operator may only conduct mining activities identified in the MMP[20] *[ie the 2020 Mining Management Plan]* within the mine subject to any Conditions contained in the Act, this document and the Conditions commitments and systems contained in the MMP.
- **Condition 6:** The Operator must on 31 August 2021 and on each anniversary of that date (or such other date as nominated by the Operator and approved by the Minister), review the approved MMP and if necessary, amend the MMP.
- **Condition 10:** The Operator must provide to the Minister a security of $400,003,226 in the form of cash or an unconditional bank guarantee prior to undertaking any mining activities authorised by this Variation of Authorisations 0059-01 and 0059-02.
- **Condition 11:** The security provided for under Condition 10 will be reassessed, and may be revised, following the submission, assessment and approval of *(inter alia)*:

  …

  c) an amendment to the Unplanned Closure Plan.
- **Condition 12:** The revised security amount to be provided under Condition 10 is to be provided prior to creating the new disturbance covered under the revised security …
- **Condition 99:** From the date of authorisation of the Overburden Management Project, the Operator must annually submit to the

18 EXHIBIT P7.

19 EXHIBIT P11.

20 MMP is defined in section 1 of the Conditions as the 2020 Mining Management Plan.

> Department an Unplanned Mine Closure Plan on or before 31 August, starting 2021, to the Department, which is accompanied by a related security estimate.

[49] The combined effect of these Conditions is that the Operator is only authorised to carry out mining activities (and so create new disturbances) which are covered by security. The security provided by the Operator is, initially, that calculated by the Minister by reference to the Unplanned Closure Plan should the mine close unexpectedly at the end of 2020 – that is to say by reference to the disturbance likely to be caused by the Key Activities for 2020 set out in the 2020 Mine Management Plan. In subsequent years the security is to be that calculated by the Minister under s 34A by reference to the revised mining management plans and associated unplanned closure plans and costings submitted each year by the Operator. By virtue of Condition 12, no mining activities may be carried out until security is provided that covers those activities – or more accurately, is calculated by reference to the disturbance likely to be caused by those activities.

[50] That is to say, the combined effect of these provisions is that, during 2020, the Operator could only lawfully carry out those mining activities scheduled for 2020. The Minister has fixed security calculated as the cost of rehabilitating the mining site should the mine close at the end of carrying out those activities. The Operator is obliged to submit a new unplanned closure plan setting out the cost of the activities necessary to rehabilitate the mining site should it close at the end of the activities to be carried out

during 2021, and the Minister will fix a fresh security amount based on the Minister's assessment of those costs. The defendant points out that in fact that has already been done twice – for 2021 and 2022. If at any time during a given year the Operator wants to depart from the program set out for that year, the Operator must submit an amended mining management plan (with amended costings for an unplanned closure at the end of the current year) and apply for an amended Authorisation.

[51] In addition, the Conditions of Approval contain the following Conditions dealing with the development of a planned closure plan towards the end of the proposed activities at the Mine.

- **Condition 96:** From the date of authorisation of the Overburden Management Project, the Operator must submit an updated Mine Closure Plan with each MMP that builds upon the closure concepts in the Overburden Management Project.
- **Condition 97:** The Mine Closure Plan required under Condition 96 must:
  a) detail how key mine domains will be rehabilitated to achieve the Overburden Management Project closure objectives;
  b) address outcomes of the reviews by independent technical and closure panels in accordance with Condition 21 with respect to mine closure;
  c) incorporate relevant outcomes from the rehabilitation trials defined in Condition 87.
- **Condition 98:** Five years prior to the planned closure of the mine, the Operator must:
  a) finalise the Mine Closure Plan required under Condition 96;
  b) submit to the Department the plan for approval by the Minister;
  c) following approval, the Mine Closure Plan must be implemented by the Operator in full.

[52] In my view, the Minister was not obliged to fix the security at an amount calculated by reference to the disturbance expected to be caused during the whole of the planned life of the mine. While that may be appropriate (or mandatory) in the case of some mining management plans, the 2020 Mining Management Plan has been structured so that the mining activities to be carried out under the Authorisation are limited to those which are specified in the 2020 Mining Management Plan to be carried out in 2020. That being the case, the Minister was entitled to calculate the security by reference to the closure plan which detailed the activities necessary to rehabilitate the mining site should the mine close at the end of 2020, when those mining activities were complete.

[53] The plaintiffs have made a second submission in relation to the calculation of the security by the Minister. The plaintiffs say that the decision by the Minister to fix the security at $400,003,226 is legally unreasonable because:

(a) the end dates for certain rehabilitation activities (in particular water and environmental monitoring)[21] have been fixed arbitrarily, and the periods specified are so disproportionate to the periods of monitoring which the mine Operator's own documents specify to be necessary, to the knowledge of the Minister, that no reasonable Minister could have used these arbitrarily chosen time periods to calculate the security; and

21 Other end dates said to have been chosen arbitrarily are project management, security fence maintenance revegetation management, fire break maintenance, seepage management and "active recovery treatment of problem leachate". The same general principles apply in relation to each of these complaints.

(b) no allowance was made in the calculation of the security for certain activities which are obviously necessary from the information provided by the Operator and known to the Minister.

[54] The costing shown on the Security Calculation submitted by the Operator for rehabilitation of the mining site in the event of an unplanned closure at the end of 2020,[22] specifies, under the heading "POST CLOSURE WATER QUALITY MONITORING WORKSHEET", only ten years monitoring for all categories of monitoring described. The Minister essentially adopted these calculations when calculating the security required by the Operator for the Authorisation for the 2020 Mining Management Plan. The Department performed its own calculations and arrived at a figure less than that calculated by the Operator (namely $395,393,901),[23] so, on the advice of the Department, the Minister adopted the Operator's figure of $444,448,029.

[55] In relation to the arbitrary fixing of end dates, the plaintiffs rely on information produced by the Operator in the 2020 Mining Management Plan (including a graph), which shows that the mining site will require monitoring for at least a hundred years – and up to a thousand years.

(a) Page 30 of the Unplanned Closure Plan[24] recites:

> The closure objectives are as follows:

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22 EXHIBIT P15.

23 EXHIBIT P16 (The Department's "Assessment of January 2020 MMP – MRM Unplanned Closure Plan and Security").

24 Annexure P to the 2020 Mining Management Plan.

Safe to Humans and Wildlife

- Post-mining landscape will be left in a condition:

  # safe and secure for humans and animals for short term (0–100 years); and

  # safe for humans and animals for long-term (100–1,000 years).

  …

Non-Polluting

- Manage surface water and groundwater such that environmental values and ecosystems are maintained downstream of the mineral lease boundary in the short term (0-100 years), and within the McArthur River in the long-term (100-1,000 years).

(b) Page 31 of the Unplanned Closure Plan contains the following definition of "monitoring":

- **Monitoring** is the stage once the land has settled and the site is developing towards its desired final attributes. Some remedial active management may be required within the monitoring stage if monitoring results suggest that this is needed to achieve specific completion criteria. The monitoring stage is further divided into proactive monitoring and reactive monitoring reflecting changes in the frequency of monitoring and the decreasing requirement for remediation.

(c) Page 94 of the Unplanned Closure Plan contains the following in the table headed "8. Assumptions":

Post Closure Monitoring	Security assessment allows for 10 years post closure environmental monitoring. It is assumed that a post closure monitoring plan will be developed in consultation with the Closure Panel and DPIR on establishment of this working group.

(d) Page 98 of the Unplanned Closure Plan contains the following under the heading "9.5. Succession Pathways":

> During mine closure, an extensive closure monitoring program will be conducted to investigate the success of rehabilitation and whether completion criteria are being achieved. The need for ongoing monitoring will be continuously assessed during the adaptive management phase, and the frequency of monitoring will shift as the project moves into the proactive monitoring and reactive monitoring phases (plate 3).

Plate 3, on p 99 is labelled PLATE 3: PROPOSED STAGED APPROACH TO UNPLANNED CLOSURE OPERATIONS AND MANAGEMENT and contains the following graph.

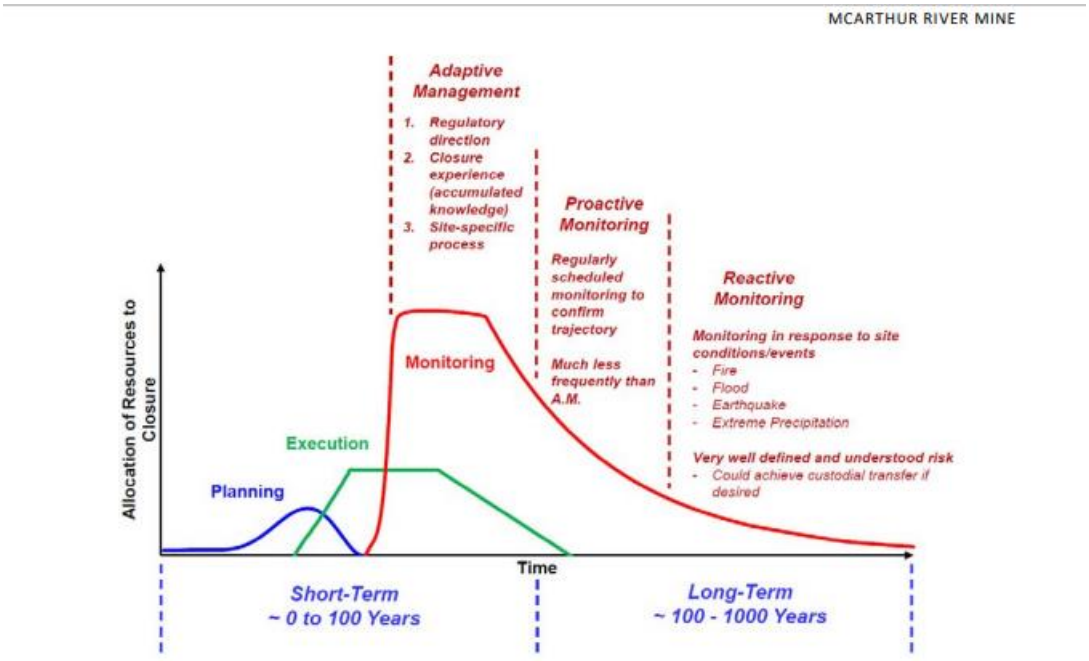

PLATE 3: PROPOSED STAGED APPROACH TO UNPLANNED CLOSURE OPERATIONS AND MANAGEMENT

That section continues:

> Rehabilitation will be monitored during operations and after final rehabilitation has been completed to validate rehabilitation performance and identify any additional work required to meet success criteria.

[56] The plaintiffs rely heavily on the graph on page 99 (reproduced above) which shows monitoring extending out to 1,000 years and shows proactive monitoring beginning in 100 years' time. Given that timetable in the Unplanned Closure Plan, the plaintiffs say it is plainly unreasonable for the Minister to have calculated the security required on the basis of only ten years monitoring costs which is out by at least one, possibly two orders of magnitude.

[57] The plaintiffs contend that not only was it unreasonable to arbitrarily choose end dates for these matters that are orders of magnitude smaller than the estimated time periods specified in the 2020 Mining Management Plan, but that by doing so, the Minister impermissibly fettered her discretion by following a pre-printed form of security calculation tool.[25] The relevant columns in that pre-printed form are headed "Enter No. of years 0-10". The plaintiffs contend, in the alternative, that this use of the pre-printed form amounted to the inflexible application of a policy to require security for the cost of a maximum of ten years monitoring, in either case leading the Minister into jurisdictional error.[26]

[58] In relation to amounts within the security calculation that are said by the plaintiffs to be inadequate the defendant contends as follows.

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25 A blank security calculation tool is in evidence as EXHIBIT P21.

26 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 95 ALJR 666 at [54]; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [55]; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640

(a) The provision of a pre-printed form of Security Calculation tool on which the Operator set out its security calculations did not amount to either a fettering of the Minister's discretion or the inflexible application of a policy. The form clearly specified that it could be adjusted as necessary.

(b) The security calculation was based on the disturbance expected to be caused by the Key Activities outlined in Table 2 of the Unplanned Closure Plan to occur in 2020. The disturbance caused by those activities will only be a portion of the disturbance expected over the life of the mine, and the rehabilitation required will similarly be limited to rehabilitating only that level of disturbance.

(c) The Act does not specify the items required to be included in any closure plan or security calculation, and it is not open to the plaintiffs to seek a merits review of the Minister's decisions.

(d) The plaintiffs have not discharged their onus of proving that the amounts or years referred to are inadequate or unreasonable.

(e) The end dates for monitoring and maintenance are not arbitrary, and are reasonable and sufficient in the circumstances. The security calculation provided by the Operator was independently audited by an expert body, and that audit was before the Minister. The Court should be slow to infer unreasonableness in circumstances where the Minister was guided by independent expert advice in her decision.

[59] I do not accept that the Minister fettered her discretion or inflexibly applied a policy by the use of the pre-printed form of Security Calculation tool. The plaintiffs have failed to establish that use of the form involved the Minister inflexibly following a particular policy or fettering her discretion to allow for longer periods of monitoring under the various headings. There is no evidence that the Minister inflexibly followed a policy of allowing for only ten years monitoring costs in calculating the security required from an Operator, other than the use of the pre-printed form. The printed form contains certain assumed costs and formulae for calculating the costs of various items, next to which (in red) are the words, "Adjust formula if necessary." The front of the form also contains the following statement (also in red):

> Operators may use DPIR Cost per unit Of Measurement as a guide or insert their own cost and UOM – adjust form as necessary.

Further, the Operator did not follow the form slavishly when developing its own costings but inserted an additional page of calculations.

[60] So far as unreasonableness is concerned, the defendant contended that the ten year cut off for monitoring was not arbitrarily chosen. The defendant pointed to the Western Australian Government's Environmental Protection Authority's "Guidelines for Preparing Mine Closure Plans (May 2015)",[27] which, it is common ground, was available to the Minister, and which states:

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27 EXHIBIT D5 (Defendant's tender bundle) Tab 141 p 4952.

> In the early stages of the project or where detailed information on closure performance is not available, a minimum monitoring period after closure should be provided for in the Mine Closure Plans, usually in the order of 10 years.

[61] The plaintiffs submitted that the McArthur River Mine could hardly be said to be in its early stages as it had been operating as an open cut mine since at least 2008. The defendant disputes this, pointing out that the mine was planned to operate until 2037 and the overburden from the mine was predicted to reach approximately 595 Mt of waste rock.[28] Assessment Report 86 by the NT EPA in reporting on the 2020 Mining Management Plan[29] states:

> Overburden has been placed at the current site since 2008 and currently contains about 25 Mt of waste rock.

[62] The defendant also relies on the fact that the Department did its own calculations and came to a figure less than that submitted by the Operator, but conservatively adopted the Operator's figure; and the fact that the security calculation was checked by independent auditors who approved the figure arrived at by the Minister. The defendant contended that it cannot be said to be legally unreasonable for the Minister to have obtained advice from the Department (who checked the figures provided by the Operator by reference to and using periods of time for monitoring which are consistent with the Western Australian Environmental Protection Agency Guidelines)

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28 EXHIBIT P2 (Assessment Report 86) p 4402.

29 EXHIBIT P2 p 4390.

and further advice from an independent expert who audited the calculations and approved the amount so fixed. I agree.

[63] The plaintiffs also say that the calculation of the security amount does not make allowance for a number of required matters. In particular, there is no allowance for ongoing maintenance of several major pieces of infrastructure which are planned to remain in place after the closure of the mine - the mine levy wall and the Western and Southern perimeter run-off dams. The defendant concedes that these are not mentioned specifically in the security calculation but contends:

(a) that the amounts involved are minor;[30]

(b) that they are in any event covered in the substantial contingency allowance of 15% included in the calculation;[31] and

(c) that their non-inclusion would be, at worst, an error in calculation and would not amount to jurisdictional error or result in invalidity of the amount of security fixed or the Authorisation granted.

[64] The plaintiffs also claim that it was unreasonable for the Minister to calculate the security by reference to the Operator's calculations when those calculations made allowance for maintenance on remaining earthworks to be limited to a period of only two years.

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30 In supplementary written submissions the defendant calculated that the addition of the Western and Southern perimeter run-off dams to the cost of maintenance in the calculation of the security would have added an additional $25,027.20 which is 0.00625% of the security amount of $400,003,226 obtained.

31 EXHIBIT P15.

[65] The defendant contends that this is not unreasonable. Section 9.2.3 of the Conceptual Mine Closure Plan[32] prepared by the Operator in relation to the planned closure of the mine at the end of the proposed life of the mine site, states, in relation to the earthworks:

> It is expected that for the first few years, until vegetation is established, maintenance will be requited on localised eroded areas and drainage lines.[33]

[66] The defendant also points to the assumption made in the Department's Security Calculation tool[34] that the person calculating the security should "assume 20% failure rate for the total areas of constructional landforms *(ie earthworks)* for a period of 2 years (if not stipulated otherwise)". The defendant submits that the plaintiffs have not shown that either of these assumptions, which led to the calculation for post closure maintenance of earthworks based on a two year period, was unreasonable. It was for the plaintiffs to call expert evidence to show that these assumptions are unreasonable, if that is their contention, and they have failed to do so. That submission should be accepted.

[67] The plaintiffs dispute that the assumption of 20% failure rate for earthworks for a period of two years is applicable to infrastructure such as the Western and Southern perimeter run-off dams which is intended to remain on site permanently. I do not have sufficient evidence on which to base an

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32 EXHIBIT P4 p 3526.

33 This plan was rejected by both the Department and the Commonwealth as a final Closure Plan but on other grounds, not affecting this statement of expectation.

34 EXHIBIT P21

assessment as to whether or not this assumption is appropriate. However, even if the plaintiffs' contention that the two year assumption is inappropriate were to be accepted, the plaintiffs would not be entitled to the relief sought. I agree with the defendant's contention that this ground of review is essentially impermissibly seeking a merits review of the Minister's calculation of the security amount.

[68] It may be that some of the plaintiffs' criticisms of the adequacy of the security amount are justified; it is not for this Court to make findings about that, and there is insufficient information before the Court to enable me to do so in any event. I agree with the defendant's submission that the fixing of the security cannot be said to be legally unreasonable in the circumstances. The Minister made a bona fide effort to fix the security in an adequate amount in accordance with the method of calculation mandated by s 43A. The Minister did not apply the wrong test, and did not fail to take into account any considerations mandated by the Act. Any errors in the calculation which may exist are factual errors, not amenable to correction by this Court on an application for judicial review. Merits review of the Minister's decision is not available in this Court.

[69] The plaintiffs submit that "it is incorrect to reason that, because the omitted costs were only a fraction of the overall security amount, their … exclusion[35] was not a material error" and that "the question, properly understood, is

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35 The plaintiffs characterise this as an "irrational exclusion". The plaintiffs' submission that the omission of some categories of expense from the calculation of the security amount renders the decision to fix the security in the amount that was chosen legally unreasonable has been rejected for reasons set out above.

whether, had the error not been made, there would have been a different decision". The plaintiffs say that inclusion of the omitted amounts would have resulted in a different decision – ie fixing the security at a higher amount. That submission cannot be accepted. In substance, the decision under review is the decision to grant the Authorisation. To characterise the decision as the fixing of the precise amount of the security is to invite a back door merits review under the guise of judicial review.

[70] This ground of review has not been made out.

The Environment Protection Authority issue

[71] The plaintiffs contend that the Minister's decision to approve the 2020 Mining Management Plan is unreasonable because it was reached on the basis of a fundamental mistake of fact. The Minister recites in the Reasons for Decision that the Closure Plan in the 2020 Mining Management Plan was consistent with the NT EPA's recommendations whereas in fact it was inconsistent. The plaintiffs contend that this fundamental error led to the Authorisation being void: something has gone so wrong in the reasoning process as to render the decisions to approve the 2020 Mining Management Plan and grant the Authorisation legally unreasonable.

[72] The plaintiffs rely on the passage in the Minister's Reasons[36] in which the Minister (in reality the Department officials advising the Minister) says:

36 EXHIBIT P9 p 4.

> The amended [2020 Mining Management Plan] application seeks approval to undertake mining activities under the [2020 Mining Management Plan] consistent with the [Overburden Management Project Environmental Impact Statement] and associated recommendations in the NT EPA Assessment Report 86 made under the *[Environment Protection] Act*.
>
> …
>
> Based on my requirements under the [*Mining Management Act*] to consider the NT EPA Assessment Report 86 on the Overburden Management Project, I have considered and determined the following.
>
> - The amended [mining management plan][37] seeks approval to undertake activities that are consistent with the [Overburden Management Project Environmental Impact Statement]and the NT EPA Assessment Report 86 recommendations, subject to the *[Environment Protection] Act* the outcomes of which I must consider, as per Section 105 of the *[Mining Management] Act*.
>
> - Relevant NT EPA recommendations, included as conditions in Authorisation 0059, triggered by the amended [mining management plan] have been addressed. There are some differences in [Tailings Storage Facility] activities described in the [2020 Mining Management Plan] compared to the approach recommended in the NT EPA Assessment Report 86. In summary, the different approaches put forward in the [2020 Mining Management Plan] are an increase in the Tailings Storage Facility footprint due to measures to improve the structural integrity of the facility and an increased level of detail provided to manage the Tailings Storage Facility in situ in the event of an unplanned closure. These have been assessed as delivering the NT EPA's overarching environmental outcome of maintaining the McArthur River in a healthy condition at all times.

[73] The plaintiffs contend that these paragraphs demonstrate that the Minister made her decision under the following fundamental mistake of fact.

(a) The differences between the approach recommended in Assessment Report 86 and that put forward in the 2020 Mining Management Plan cannot properly be described as "an increased level of detail provided

37 ie the 2020 Mining Management Plan.

to manage the Tailings Storage Facility in situ in the event of an unplanned closure". Assessment Report 86 recommended that, on the closure of the mine, the tailings be stored in pit void (ie the hole left after open pit mining is completed) and covered with water.[38] The NT EPA specifically rejected the proposal in the Conceptual Closure Plan to store the tailings in situ, and that was one of the reasons why the Conceptual Closure Plan was rejected.

(b) As a result it is untrue to say that the 2020 Mining Management Plan is "consistent with the … recommendations in the NTEPA Assessment Report 86", and the Minister made her decisions under the fundamental mistake of fact that this was true.

[74] The defendant contends that the Minister was not obliged to follow all of the recommendations in Assessment Report 86. Under s 8A of the *Environment Assessment Act 1982* (NT),[39] if the responsible Minister makes a decision in relation to a proposed action after receiving an assessment report from the NT EPA, the relevant Minister must:

a. notify the NTEPA of that decision; and

b. if the decision is "contrary to the assessment report", the Minister must:

ii) include in that notice reasons why the decision is contrary to the assessment report; and

38 EXHIBIT P2 Assessment Report 86 Recommendation 12 (Tab 130 p 4425).

39 It is common ground that this section of the former Act continued to apply by virtue of s 300 of the *Environment Protection Act* as Assessment Report 86 was completed before the commencement of the *Environment Protection Act 2019.*

iii) table the notice in the Legislative Assembly within 6 sitting days after making the decision.

[75] Therefore, if the proposal to deal with tailings by storing them in situ in the event of an unplanned closure of the mine in 2020 made in the Unplanned Closure Plan annexed to the 2020 Mine Management Plan was contrary to recommendations in Assessment Report 86, the only obligation the Minister had was to notify the NT EPA and table that notification in the Legislative Assembly. The defendant contends that one cannot discern from that, a legislative intention that a failure to do so would render the decision void.

[76] That submission by the defendant ignores the real thrust of the plaintiffs' submission in relation to the paragraphs set out above. The plaintiffs contend that the real defect in the Minister's decision is not that the Minister failed to notify the NT EPA that the 2020 Mining Management Plan was inconsistent with recommendation 22 in Assessment Report 86, but that the Minister's decisions were based on the mistaken belief that there was no inconsistency. This, the plaintiffs contend, would render the decision to approve the 2020 Mining Management Plan void.

[77] The defendant however, challenges the factual basis for the plaintiffs' submission that the Minister was acting under a mistaken belief that the 2020 Mining Management Plan was consistent with the recommendations in Assessment Report 86. The defendant contends that the Minister was aware of the "conceivable inconsistency" between recommendation 12 in

Assessment Report 86 and the proposal in the Unplanned Closure Plan to deal with the tailings in situ and, on advice from the Department, reasoned her way to the conclusion that there was in fact, properly understood, no such inconsistency. Further, that reasoning process could not be said to have been unreasonable.

[78] The defendant's submission to this effect is that, first and foremost, the overriding objective of the NT EPA, expressed in Assessment Report 86, is the continued health of the McArthur River. That was the purpose behind the recommendation in condition 12 to store the tailings in the pit void, and the defendant contends that it was only ever anticipated that tailings from the Tailings Storage Facility would be returned to the open pit void at the time of the planned closure of the mine after the completion of all proposed mining activities in 2037.

[79] In summary, the purpose behind returning the tailings to the empty pit was to prevent the tailings being exposed to oxygen and the associated risk of toxic substances being formed by oxidation of material in the tailings. When the pit is approximately 430 metres deep, it reaches an anoxic zone.[40] At that level, the tailings can be returned to the pit, covered with water and so safely stored. The pit was proposed to be deep enough to store tailings in the anoxic zone by the proposed end of the life of the mine. At the stage that mining in the open pit had reached in 2020, the pit had not yet reached

40 literally, a zone without oxygen

that anoxic zone: it was not yet deep enough to put into effect the disposal plan set out in recommendation 12 of Assessment Report 86. Because that disposal plan is predicated on the anoxic level having been reached, it impliedly applies only after that level has been reached. Hence returning the tailings to the pit void should there be an unplanned closure of the mine during 2020 would not advance the overarching objective of ensuring the health of the McArthur River.

[80] That reasoning is set out in a briefing to the Minister by the Department on 16 September 2020 in a PowerPoint presentation headed "MRM 2020 MMP Assessment Summary under Mining Management Act, 2001".[41] The presentation refers to the Unplanned Closure Plan and says:[42]

> MRM 2020 MMP – Unplanned Closure Plan
>
> TSF
>
> - In-situ capping of tailings using cover system
> - Cover system (0.5m thick CCL +0.7m thick capillary break layer + 2m thick growth medium layer + 0.1m thick topsoil)
> - Significant increase in cost compared to 2013-2015 MMP
>
> Matters for consideration
>
> - Assessment Report 86 (Summary & Recommendations)
>
> > *"…. The NT EPA is firmly of the view that any option must meet the NT EPA's overarching environmental outcome."*
>
> - Unknown environmental outcomes:

41 EXHIBIT D5 (Defendant's tender bundle) Tab 29 pp 2035 ff.

42 at p 15 Tab 29 p 2036.

- Tailings deposition in pit void in unplanned closure not assessed as part OMP-EIS – risks unknown
- Pit Lake modelling involving tailings deposition at planned mine closure:
    - Pit depth developed to maximum extent (430m) – pit depth at end of 2020 estimated to be approx. 200 m
    - Predictive modelling assumes tails deposited and submerged under water cover, within anoxic zone
- Given those assumptions not satisfied (ie if tailings deposited in pit – will not be within anoxic zone) – environmental outcomes unknown and likely will not meet NT EPA overarching outcome

[81] The plaintiffs contend that this reasoning is faulty. The fact that the recommended method of tailings disposal in Assessment Report 86 would not achieve the overarching objective of preserving the health of the McArthur River, does not justify reverting to another unsatisfactory method of disposal: the Minister ought to have insisted on a third method. There are several answers to this contention:

(a) There is no evidence that the proposal in the Unplanned Closure Plan was a reversion to an unsatisfactory disposal method and some (albeit tenuous) evidence to the contrary in that the briefing note to the Minister quoted above noted: "Significant increase in cost compared to 2013-2015 MMP".

(b) Unless the plaintiffs can establish that the chain of reasoning adopted by the Department and accepted by the Minister to reach the conclusion that the Unplanned Closure Plan was "consistent with the [Overburden

Management Project Environmental Impact Statement] and associated recommendations in the NT EPA Assessment Report 86" in that it has "been assessed as delivering the NT EPA's overarching environmental outcome of maintaining the McArthur River in a healthy condition at all times," was so unreasonable that no reasonable Minister could have come to that conclusion, the conclusion and resulting approval is not amenable to judicial review by this Court. For the reasons set out above, in particular that the plan to deposit the tailings in the pit void would not have achieved any practical environmental purpose at the depth reached by the pit in 2020, the plaintiffs have fallen well short of demonstrating that this opinion was unreasonable in the requisite sense and this ground of review also fails.

[82] The plaintiffs have failed to establish that the decisions of the Minister which have been challenged in this proceeding have not been made in accordance with the mandatory requirements in the Act or that the decisions are unreasonable.

[83] The plaintiffs' applications for orders in the nature of certiorari quashing the decisions and for declarations that the decisions are ultra vires are dismissed.

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