CITATION:	*Territory Iron Pty Ltd v Minister for Mines and Energy* [2019] NTSC 28
PARTIES:	TERRITORY IRON PTY LTD v MINISTER FOR MINES AND ENERGY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	115 of 2015 (21554000)
DELIVERED:	30 April 2019
HEARING DATE:	4 May 2016
JUDGMENT OF:	Southwood J

CATCHWORDS:

STATUTORY INTEPRETATION – MINING – Whether the Minister for Mines and Energy must comply with s 43A(1) of the *Mining Management Act 2001* (NT), if under s 38(2) the Minister intends to vary the amount of security to be provided by an operation for a mine – Whether the Minister can vary an Authorisation by increasing the amount of security specified in an Authorisation, notwithstanding that at the time of the variation there is no contemplated future increase in the "level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation" – The power to vary an Authorisation under s 38(2) of the Act is constrained by s 43A(1) under the *Mining Management Act 2001* (NT) when it comes to varying the amount of security specified in the mandatory condition prescribed in s 37(2)(b)(i) –Order in the nature of certiorari that the decision of the review panel made on 28 August 2015 under s 70(5) of the *Mining Management Act 2001* (NT) determining that the plaintiff must pay to the

Department a security in the amount of $18,450,000.00 less the $5,368,502.00 is called up and quashed – Declaration that the review panel decision determining the amount of security the plaintiff must pay to the Department is invalid and of no force and effect by reason of a jurisdictional error

Financial Management Act 1995 (NT)
Interpretation Act 1978 (NT)
Mining Management Act 2001 (NT)
Mining Management Amendment Act 2013 (NT)

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384*; ICAC v Cunneen* (2015) 256 CLR 1; *Minister for Immigration v WZAPN* (2015) 254 CLR 610*; Taylor v Owners – Strata Plan 1564* (2014) 253 CLR 531; *Theis v Collector of Customs* (2014) CLR 664 – applied

REPRESENTATION:

Counsel:

Plaintiff:	PD Quinlan QC with him N Connolly
Defendant:	S Donaghue QC with him T Anderson

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Sou1902
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Territory Iron Pty Ltd v Minister for Mines and Energy [2019] NTSC 28
No. 115 of 2015 (21554000)

BETWEEN:

TERRITORY IRON PTY LD
Plaintiff

AND:

MINISTER FOR MINES AND ENERGY
Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 30 April 2019)

Introduction

[1] On 8 December 2008 the plaintiff was granted Authorisation 0479-01 by the Minister for Mines and Energy (the Minister) under s 36(4) of the *Mining Management Act 2001* (NT) (the Act) to conduct mining activities on mineral titles: MA389, EL24045, ML 2427, ML25087, ML25152, and ML25396. The mineral titles comprise the Frances Creek Mining Project which is an open cut iron ore mine.

[2] As at 8 December 2008, s 35(1) of the Act provided that the operator for a mining site must not carry out mining activities on the site unless the Minister has granted him or her an Authorisation. Before granting an Authorisation it was necessary for the Minister to be satisfied in accordance

with s 36(2)(a) of the Act (as then in force) that, among other things, the management system to be implemented on the site will promote the protection of the environment. All Authorisations were subject to a condition that the operator must comply with the current mining management plan for the mining activities to which the Authorisation relates and any additional conditions specified in the Authorisation by the Minister.

[3] Under s 37(2)(b) and (3)(c) and s 43 of the Act (as in force at 8 December 2008) the Minister could specify a condition that the operator provide a security for the purpose of securing any of the following: (a) the operator's obligation to comply with the Act or an Authorisation; (b) payment of costs and expenses in relation to the Minister causing an action to be taken to prevent, minimise or rectify environmental harm: (i) on the mining site; or (ii) outside a mining site if the environmental harm results from or may result from a mining activity; and (c) payment of costs and expenses of the Minister in relation to the Minister causing an action to be taken to complete rehabilitation of the mining site. As at 8 December 2008, the Act did not specify the manner in which the Minister must calculate the amount of the security to be provided by an operator. Nor was it statutorily mandated that there must be a condition on an Authorisation that an operator must provide a security to the Minister.[1]

1 Such a requirement was introduced by s 8 of the *Mining Management Amendment Act 2013* which amended s 37 of the *Mining Management Act 2001*. The amendments commenced on 1 October 2013.

[4] Nonetheless, when granted, Authorisation 0479-01 included the following conditions.

> 4. For the purposes of section 43 of the Act the Operator must provide an *initial* security in the amount of $2,600,000.00 in the form of an unconditional bank guarantee or cash.
> 5. The security provided under clause 4 will be *reassessed, and may be revised,* following each submission of an amended *Mining Management Plan* for acceptance by the Minister. The Operator must provide the revised security, in the form and amount and on the terms as required.

[5] Between December 2008 and January 2013 there were reassessments of the amount of the plaintiff's security based on certain parts of various mining management plans that were submitted by the plaintiff and the security was increased in stages to $5,368,502.00. The plaintiff paid this amount in cash to the Department of Mines and Energy (the Department). These increases in the amount of the security seem to have been made under condition 5 of Authorisation 0479-01. The increases were not the result of formal variations of the Authorisation.

[6] On 12 July 2013 the Act was significantly amended by the *Mining Management Amendment Act 2013*. Among other things, the amending Act: (i) made it a mandatory condition of an Authorisation that an operator must provide a security; (ii) made the provision or payment of the security specified in the condition compulsory; (iii) inserted s 43A of the Act which specified for the first time the manner in which the Minister was to calculate the amount of security to be provided by an operator; and (iv) provided for the compulsory payment of an annual levy by the operator of a mining site

for the purpose of: (a) providing revenue for the establishment of the Mining Remediation Fund under the *Financial Management Act 1995*, and (b) the effective administration of the Act in relation to minimising or rectifying environmental harm caused by mining activities.[2] The amendments commenced on 1 October 2013.

[7] As to the calculation of the amount of security, s 43A(1) of the Act states:

> The Minister is to calculate the amount of security *to be* provided by an operator by reference to the level of disturbance[3] *likely to be* caused by the mining activities *to be* carried out under the Authorisation granted to the operator.

[8] The Department's Security Calculation Procedure Advisory Note classified disturbances into the following standard categories: infrastructure, extractive work, hard rock pits and quarries, underground workings, tailings storage facilities and dams, stockpiles and waste rock dumps, exploration, and roads and tracks.

[9] On 7 July 2015 a Delegate of the Minister varied Authorisation 0479-01 under s 38(2) of the Act by deleting the previous conditions and inserting the following conditions.

> 1. In accordance with section 37(2)(a) of the Act, the Operator must comply with the mining management plan in force for the Site.

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2 s 10 *Mining Management Amendment Act 2013*.

3 Disturbance includes land clearing, earthworks, aboveground works, underground works, waterworks, extracting resources, stockpiling ore, establishing a camp for workers, blasting, stockpiling ore overburden waste materials or by-products, and an activity that is likely to have a significant impact on flora or fauna: see s 35(3) of the *Mining Management Act 2001*.

2. For the purposes of compliance with section 41(1)[4] of the Act, the specified interval is 12 months, commencing from [insert date].

3. In accordance with sections 37(2)(b)(i) and 43 of the Act the Operator must pay the Department a security in the amount of $28,017,059.00 (less $5,368,502.00 already provided). Payment is to be made in full within 30 days by bank guarantee on the terms set out in Annexure A to this instrument, or by instalments in accordance with the schedule set out in Annexure B to this instrument.

4. For the purposes of section 37(2)(b)(ii) of the Act, the amount of the levy is to be calculated in accordance with section 44B of the Act and the Mining Management Regulations.[5]

[10] In error, condition 2 above does not state a commencement date, and arguably condition 4 was not varied in strict compliance with s 101 of the Act. Further, no Mining Management Regulations dealing with security have been made. However, nothing turns on these matters.

[11] Save that the amount of security specified in condition 3 was not calculated in accordance with s 43A of the Act, the varied conditions brought Authorisation 0479-01 into conformity with the amendments enacted by the *Mining Management Amendment Act 2013*. Of particular relevance to this proceeding is the increase amount of security in condition 3 to $28,017,059.00 (less $5,368,502.00 already provided), which is more than a fivefold increase in the amount of security.

[12] On 4 August 2015 the plaintiff made an application for a review panel to review the amount of security determined by the Delegate of the Minister.[6]

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4 S 41(1) of the Act provides that an operator must, at intervals specified in the Authorisation, review and, if necessary, amend the mining management plan for a mining site

5 There are no Mining Management Regulations which specify how an amount of security is to be calculated.

6 s 65(1) *Mining Management Act 2001*.

The plaintiff was partially successful. On 28 August 2015 a review panel established under s 66(1)(b) and s 69 of the Act set aside the 7 July 2015 decision of the Delegate of the Minister and, in accordance with s 70(5)(c) of the Act substituted a decision that the plaintiff must, inter alia, pay a security in the amount of $18,450,000.00. This meant that the plaintiff was required to provide an additional amount of security of $18,450,000.00 less the $5,368,502.00 security already paid. By reason of s 70(7) of the Act and s 46A(3) of the *Interpretation Act 1978*, the review panel's decision is taken to be a decision of the Minister.

[13] The plaintiff disputes the amount of security determined by the review panel. The plaintiff submits that the review panel committed a jurisdictional error when calculating the amount of security because it failed to have regard to, and properly apply, the statutory criteria in s 43A(1) of the Act. Rather than calculate the amount of security by reference to the level of disturbance which was likely to be caused by mining activities to be carried out after 28 August 2015, the review panel took account of: (i) the level of disturbance caused by past mining activities carried out under Authorisation 0479-01; and (ii) calculated the cost of rehabilitation and remediation required to address the existing level of disturbance which was caused by past mining activity. The plaintiff contends that: (i) by 2015 the Frances Creek Mining Operation was in a care, and maintenance and rehabilitation phase, and (ii) the level of disturbance to be caused by the remediation and rehabilitation works to be undertaken in the future was relatively minor.

[14] By an amended originating motion the plaintiff seeks the following orders.

1. An order in the nature of certiorari that the decision of the review panel made on 28 August 2015 under s 70(5) of the Act be called up and quashed.

2. A declaration that the review panel decision is a nullity or invalid or of no force or effect by reason of a jurisdictional error of law.

3. A declaration that the review panel decision is a nullity or invalid or of no force or effect by reason that it was without jurisdiction or not authorised by s 43A of the Act.

The main issues

[15] The main issues in the proceeding are as follows: (i) must the Minister comply with the provisions of s 43A(1) of the Act if, under s 38(2) of the Act, the Minister intends to vary the amount of security to be provided by an operator for a mine; and (ii) more particularly, can the Minister vary an Authorisation by increasing the amount of security specified in an Authorisation, notwithstanding that at the time of the variation there is no contemplated future increase in the "level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation".

[16] The questions are important because it can be difficult to estimate the level of disturbance to be caused by future mining activities. The level of disturbance may be significantly greater than expected for unforeseen reasons, and an operator may carry out mining activities which exceed the

mining activities specified in the current mining management plan which was approved under the Authorisation process.

[17] In my opinion, for the reasons stated below, the Minister's power to vary an Authorisation under s 38(2) of the Act is subject to the requirements of s 43A(1), and the Minister could not increase the amount of security specified in Authorisation 0479-01 to $18,450,000.00 because only very minor disturbance was likely to be caused by the closure and rehabilitation activities set out in the plaintiff's mining management plan which was conditionally approved on 15 March 2015.

Background

[18] All parties accept that the decision of the review panel to increase the amount of the plaintiff's security to $18,450,000.00 was made on the basis of land disturbance caused by past mining activities. However, it is instructive to consider the background against which the review panel made its decision. The background highlights the mischief the *Mining Management Amendment Act 2013* was intended to address, namely that before 1 October 2013 the object in s 3(e) of the Act was not being achieved. This was so despite the fact that before the commencement of the 2013 amendments, the Minister had unconstrained power under s 38(2) of the Act to retrospectively increase the amount of security required of an operator for a mining site.

[19] While the modern approach to statutory interpretation is to start and finish with the text of the relevant sections of an Act, the modern approach also

insists that context be considered in the first instance, and context is used in its widest sense. Context extends to the immediate context of the text, the internal context within the Act as a whole, the objects of the Act, the historical setting of the Act, relevant amendments, and the mischief or defect which any amendments are intended to address.[7]

[20] The object of the Act in s 3(e) is:

> to minimise liability of the Territory by *requiring the payment of security* to provide for rehabilitation of mining sites or to rectify environmental harm caused by mining activities.

[21] This object was not being achieved for the following reasons. First, it was not mandatory for an operator to provide security to the Minister. Second, the manner in which the amount of security was to be calculated was not specified in the Act. It was left to the discretion of the Minister or, in reality, the Minister's delegate to determine whether an Authorisation should contain a condition that the operator was required to provide a specific amount of security to the Minister. While some guidance was provided by the Department's Security Policy and Security Calculation Advisory Note, the amount of the security required of an operator was also left to the Minister's or the Minister's delegate's discretion. This not infrequently resulted in the Minister's delegate specifying an inadequate amount of security in an Authorisation. Third, the provisions of the Act

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7 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408*; Taylor v Owners – Strata Plan 1564* (2014) 253 CLR 531 at [35] – [40]; *Theis v Collector of Customs* (2014) CLR 664 at [22] – [23]; *Minister for Immigration v WZAPN* (2015) 254 CLR 610*; ICAC v Cunneen* (2015) 256 CLR 1 at [57].

dealing with minimising or rectifying environmental harm caused by mining activities were not being effectively administered.

[22] The mischief which the amending legislation was attended to address is apparent from the provisions of the *Mining Management Amendment Act 2013* which introduced a levy. Those provisions included the payment of a levy to provide funds for: (i) a Mining Remediation Fund (the Fund); and (ii) the effective administration of the Act in relation to minimising or rectifying environmental harm. The purpose of the Fund is to hold money in trust to be used by the Department in connection with minimising or rectifying environmental harm caused by unsecured mining activities. Unsecured mining activities are mining activities, whether carried out by a person before or after the commencement of s 46B of the Act, in relation to which a person provided no security, *or provided a security that has been expended*. At the time that the *Mining Management Amendment Act 2013* was enacted, it was estimated that legacy mines across the Northern Territory had a combined liability of $1 billion.[8]

[23] As stated at [6] above, the amendments made by the *Mining Management Amendment Act 2013* also 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*. 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

8 Second Reading Speech for the Mining Management Amendment Bill 2011.

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.

[24] In the Second Reading Speech for the Bill that became the *Mining Management Amendment Act 2013* the Minister stated:

> 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.

[25] The Frances Creek Mine Project is located 25 kilometres north of Pine Creek in the headwaters of the upper Mary River catchment. The mine produced iron ore from 2008 to 2014. In 2014 the mine went into a care and maintenance and rehabilitation phase.

[26] Under condition 1 on Authorisation 0479-01 the plaintiff was required to comply with the activities and commitments in its current mining management plan for the Frances Creek Mine Project. Under condition 2 of Authorisation 0479-01 the plaintiff was required to review and amend (if necessary) its mining management plan at intervals not exceeding 12 months after the anniversary of the Authorisation (8 December 2008); or at intervals not exceeding 12 months after a date nominated in writing by the plaintiff and approved by the Minister. It is necessary to amend a mining management plan if any mining activities at a mining site are planned to exceed the limits of any mining activities approved under an existing Authorisation. Otherwise any such mining activity would be unlawful. Under condition 5 the plaintiff's security of $2,600,000.00 was to be

reassessed, and may be revised, following each submission of an amended mining management plan for acceptance by the Minister.

[27] The evidence before the Court about how the 'initial' security of $2,600,000.00 was calculated or why condition 4 of the Authorisation described the security as an 'initial security' is incomplete. The only relevant documents before the Court are the Department's Security Policy dated 20 June 2006, the Department's Security Calculation Procedure Advisory Note, and an M & E [Mines and Energy] Security Calculation Form dated 4 November 2008 which contains a summary of how the amount of security of $2,600,000.00 was calculated. It is unclear whether the plaintiff or a mining officer completed the Security Calculation Form. This is because the Department's Security Calculation Procedure Advisory Note seems to contemplate that the operator for a mining site will self-assess the amount of security to be provided to the Minister. Once completed, the self-assessment is to be reviewed by the Department against the operator's current approved mining management plan.

[28] Among other things, the Department's Security Calculation Procedure Advisory Note states the following.

- The operator should assess all mining interests (tenements, titles) pertaining to an Authorisation for current risks and disturbances in addition to potential liabilities planned during the period covered by the mining management plan.
- Unless there is a formal end land use agreement approved by the Minister, the closeout options chosen for site activities should as far as reasonably practicable return the disturbances to their pre-mining state.

- A security calculation tool [the M & E Security Calculation Form] is used for self-assessment. This broadly classifies disturbances into standard categories and provides suggestions on potential closeout techniques:
    - Infrastructure
    - Extractive Workings
    - Hard Rock Pits and Quarries
    - Underground Workings
    - Tailing Storage Facilities and Dams
    - Stockpiles and Waste Rock Dumps
    - Exploration
    - Roads and Tracks

    Only those sections of the form applicable to site activities need to be completed and techniques used may be adjusted to suit individual sites. Justification should be provided where the cost per unit of measure differs from the Department's recommended cost per unit of measure.

    […]
- Completed security calculation tools are reviewed against the current approved MMP [mining management plan] to ensure appropriate closeout techniques have been included for all site disturbances. Additional information may be obtained through audits, site inspections and closeout reviews.

[…]

- Once the established value of security has been endorsed based on the self-assessment and review by departmental officers a request for payment is dispatched to the Operator.

[29] As to the main "close out" cost, which was for Stockpiles and Waste Rock Dumps, the amount of the security for that cost item was assessed on 4 November 2008 as $1,566,654.00. The calculation of this amount was largely based on contouring and shaping an area of 105.84 hectares of stockpiles and waste rock deposits with no cap and seal, the application of 116,840 cubic metres of topsoil to this area, and revegetation by direct seeding of 116.84 hectares. There is no evidence before the Court which

confirms that these amounts were in fact verified by the Department. Nor is there any evidence about how the amounts were verified.

[30] The cost amount of $1,566,654.00 is in stark contrast to that contained in the M & E Security Calculation Forms dated 6 February 2014 and 1 May 2014 which has a cost amount of $21,114,744.00 for Stockpiles and Waste Rock Dumps. A significant part of the cost of $21,114,744.00 involves the complete capping of an area of 137.4 hectares of stockpiles and waste rock deposits with a cap that was two metres thick. The capping was necessary because of the build-up of potentially acid forming (PAF) material in the waste rock deposits. The M & E Security Calculation Form dated 1 May 2014, states that the last review of the amount of the plaintiff's security was in June 2009. This is consistent with the manner in which the additional amounts of security were calculated before 1 May 2014.

[31] A schedule of payments for the initial security of $2,600,000.00 was approved. The first payment was made in June 2009 and the final payment was made in September 2010. In late 2009 the need for an additional security of $812,800.00 was identified and another schedule of payments was approved to end in November 2010. In October 2010, security in another amount of $297,200.00 was required and this was paid in 2010 over two payments.

[32] Between 2011 and 2013, the plaintiff submitted a number of amended mining management plans for approval by the Minister. As a result of the inadequate information in these plans, none were approved. Nor was the

plaintiff's security properly reassessed during this period. However, a number of specific mining activities were approved during this period, and relatively minor increases in the plaintiff's security were required for these mining activities. For example, in May 2011 an additional security of $1,649,577.00 was required and a payment schedule was approved to 2012. The major cost items for this amount of security was for stabilising and infilling pits. A minor amendment in January 2013 resulted in an additional security amount of $8,925.00 being required by the Department.

[33] There are no field inspection reports for the period between 8 December 2008 and the end of 2012 before the Court. Departmental mining officers conducted field inspections on 23 February 2013 and 3 April 2013. The field inspection reports for those inspections state that the plaintiff continued to poorly manage the environmental aspects of the mine site. Particular concerns were expressed about the substantial surface area of PAF material and the potential interaction between pit waters and groundwater. In his Statement of Reasons dated 7 July 2015, Mr Peter Waggitt, Director, Mining Compliance, states that "officers of the DME became aware of, or obtained further information about, the following matters between 2011 and 2013:

(a) The high level of disturbance at the site.

(b) The excavation of substantial quantities of PAF material at the site.

(c) PAF material was being left exposed on the site which was likely to result in the contamination of groundwater.

(d) Two waste rock dumps on the site contained PAF material.

(e) One mining pit had been backfilled with PAF material which was not authorised under the mining management plan for the site.

(f) Three mining pits contained PAF in the pit walls.

(g) The Helene 3 waste rock dump footprint exceeded the area approved for the facility under the plaintiff's approved 2010/2011 mining management plan.

(h) The increased amounts of acidified wastewater on the site due to the plaintiff's management practices.

(i) The uncontrolled seepage of acidic water through the walls of Jasmine West pit into Jasmine Creek.

(j) The plaintiff could not demonstrate to the satisfaction of the Department that its mobile water treatment plant was able to successfully treat wastewater to ensure the treated water satisfied the 80% protection level for freshwater ecosystems as set out in the *Australian and New Zealand Guidelines for Fresh and Marine Water Quality* (2000).

(k) The plaintiff's mobile water treatment plant was not an appropriate long-term solution for treating wastewater at the site because it was an expensive process and did not address the source of the acidic water.

(l) There were insufficient structures at the site in which waste water could be stored appropriately, which resulted in the plaintiff needing to move wastewater around the site causing re-acidification of certain water bodies on the site such as the tailings storage facility and the Jasmine West and Rosemary mining pits.

(m) The plaintiff did not have sufficient water quality monitoring equipment to adequately monitor water quality.

(n) There had been largely insufficient and/or ineffective management of PAF material on the site.

(o) The lack of a comprehensive closure plan for the site."

[34] Mr Waggitt does not state precisely when the above matters became known to the Department. The Department should have taken steps to ensure that the plaintiff remedied the matters set out at [33] above as soon as they became known and there should have been a detailed reassessment of the plaintiff's security. However, the Department seems to have done very little until 16 October 2013 which is shortly after the 2013 amendments to the Act. While the plaintiff's failure to provide an adequate mining management plan may have made it difficult to definitively calculate the required amount of security, the Department was not precluded from reassessing the amount of the plaintiff's security by inspecting, monitoring and investigating the mining activities being carried out by the plaintiff.

[35] It is apparent from the above matters that the amount of security required from the plaintiff by the end of 2013 was insufficient to guarantee that the plaintiff met its obligations under its Authorisation and the Act. Nor was the security sufficient to secure the payment of costs and expenses in relation to the Minister taking action to prevent, minimise or rectify any environmental harm caused by the mining activities, or pay the costs and expenses of the Minister taking action to complete the rehabilitation of the mining site.

[36] On 30 July 2013 the plaintiff submitted a further mining management plan to the Department.

[37] On 16 October 2013 Mr Waggitt sent a letter to the Plaintiff's Mine Operations Manager of the plaintiff which stated the following.

> I refer to the above plan submitted to the Department *on 30 July 2013*. Departmental officers have reviewed this document and have identified that additional information is required to be submitted in order for approval to proceed.
>
> Due to the inadequacies in previous MMP submissions the Department has not approved a Mining Management Plan for the Frances Creek Mine Project since 2011 (DME Ref: MR2010/0520) and a water management plan has not been approved since October 2010 (DMR Ref: MR2010/0252). Therefore it is important that the 2013 MMP is acceptable to the Department.
>
> The information sought has been included as an instruction[9] to you in Attachment A. It is strongly recommended that you make appropriate arrangements to ensure your compliance with these instructions by providing:
>
> - Additional information in response to the comments provided in Attachment B to the Department by 12:00 pm (ACST) 29 November 2013.

9 *Mining Management Act 2001* s 62(1)(e).

> No further extensions will be granted. If the information submitted is not of a suitable quality and not submitted by this deadline an infringement notice will be issued.
>
> […]

[38] Attachment A to the letter dated 16 October stated:

> I, PETER WAGGITT, am a Mining Officer appointed under section 59 of the *Mining Management Act* (the "Act"). Pursuant to section 62(e) of the Act, Territory Iron Pty Ltd is instructed to:
>
> 1. On or before 12:00 p.m. (ACST) 29 November 2013 to deliver to the Department responses to the comments and/or an amended Mining Management Plan which includes amendments addressing these comments along with any other amendments required as a result of your review of the Mining Management Plan and any changes to the management system in operation or mining activities being undertaken on the mining site.
>
> It is an offence under section 62(2) of the *Mining Management Act* to fail to comply with the instructions of a Mining Officer. Penalties apply to these offences.
>
> If you fail to comply with any one or all of the requirements in this Instruction further action may be taken by the Mining Officer or the Minister including revocation of any authorisation and any action considered reasonably necessary to protect the environment or to ensure compliance with the Act, the Authorisation or the management system.

[39] Attachment B to Mr Waggitt's letter provided a detailed statement about: (i) the amendments required to be made to the mining management plan the plaintiff submitted to the Department on 30 July 2013; (ii) the additional plans and designs the Department required; (iii) the additional information required by the Department; (iv) the changes to the plaintiff's management systems that were required by the Department; and (v) the security calculations required by the Department.

[40] In December 2013 the Executive Director of Mines entered into negotiations with the plaintiff's representatives to determine the amount and form of

further security that would be required from the plaintiff. On 11 December 2013 the plaintiff submitted a further mining management plan which was conditionally approved by the Department. It is unclear whether this mining management plan was submitted in accordance with the written instruction to the plaintiff dated 16 October 2013. No evidence has been placed before the Court about whether the plaintiff complied with the written instruction dated 16 October 2013, or not. Nor does it appear that any infringement notice was issued by the Department.

[41] On 6 February 2014 a security calculation was undertaken by the Department and at that time it was estimated that the security to be provided by the plaintiff should be increased to $23,830,206.00.

[42] On 20 March 2014 Departmental mining officers carried out a further inspection of the mine site. Once again significant environmental issues were noted, and the plaintiff was directed to undertake certain works and provide certain information to the Department.

[43] Before 21 April 2014 the plaintiff provided the Department with a Closure Liability Estimate Report and a Closure Plan. On 21 April 2014 the plaintiff sent a letter to the Department in which it stated that as at November 2013 the plaintiff estimated its current liability for closure of the mine to be $26,000,000.00. The letter went onto state that the plaintiff had calculated that there should be a "security bond" of $20,000,000.00 and looked forward to finalising the process of determining the security amount and the payment schedule in the near future.

[44] On 1 May 2014 the Department reassessed the plaintiff's security and determined that the plaintiff should provide a security of $31,130,065.53. On 24 June 2014 a memorandum was sent by a senior officer in the Department to the Security Assessment Board. The memorandum stated the following.

> […]
>
> The Department currently holds $5,368,502.00 against this Authorisation for previous disturbances. Due to the process of scheduled payments over multiple years it appears that a thorough reassessment of the site has not been undertaken and the project disturbance has slowly crept beyond the security held.
>
> The environmental liability of the site has increased due to the excavation of PAF material. Management of this material to date has been ineffective with little or no capping of PAF material in WRDs.[10] Exposed PAF material is resulting in acidic runoff that contains elevated heavy metal concentrations i.e. acid and metalliferous drainage (AMD).
>
> The security has not been updated for some time and this appears to be due to the incremental creep of their operation due to numerous amendments submitted mid-reporting period. Although some security for amendment has been requested, a complete reassessment of the operation has not been carried out since 2011.
>
> Furthermore, some activities such as the backfilling of Helene 3 Pit and the extension of the Helene 3 WRD were poorly described in an earlier MMP. It is believed these activities may have been missed by mining officers and not included in security calculations at the time.
>
> […]
>
> The proposed Elizabeth Marion amendment is also being considered in this submission which will assist to streamline DME approvals at the conclusion of the EPA process under the EAA.
>
> Elizabeth Marion will include three open pits, one waste rock dump and a ROM and stockpile area. No additional infrastructure will be required as all crushing and processing will be carried out on the existing site.
>
> […]
>
> Waste rock material at the Elizabeth Marion site has not been sufficiently characterised at this time to indicate whether there will be

10 Waste rock deposits.

problematic material (acid, metals or saline leachate) stored in the WRD. Further kinetic testing is planned for inclusion in the EIS and is planned to be ongoing. Territory Iron indicate that the known PAF material will be transported to the existing Frances Creek mine WRDs.

Territory Iron continues to submit unacceptable documentation and until the conditional approval of the 2013/14 MMP they had not had a Mining Management Plan (MMP) approved for two years. Hence, a full security calculation for the project has not been conducted since 2011. Although increases in the security have occurred as MMP Amendments were approved the security currently held no longer reflects the level of disturbance present.

[…]

The security estimated by Territory Iron in the latest revised submission is $23,202,089.00 for the Frances Creek mine and $701,887.00 for Elizabeth Marion (total $23,903,976.00).

The department calculation came to $32,074,641.00 ($31,148,271.00 Frances Creek & $926,370.00 EM).

This included full costing of cover designs for both the TSF[11] and WRDs at the Frances Creek Mine site. Costing for the Elizabeth Marion WRD assumes that there will be no AMD issues, however TI has not demonstrated this to DME satisfaction as yet but are committed to undertaking kinetic testing as part of the EIS process.

This assessment was calculated utilising aerial imagery, maps, plans and details of proposed activities from within the Mining Management Plans.

[…]

The SKM calculation takes into account only the current liability as at November 2013. The Department must consider the future disturbance for the next 12 months of proposed works.

Differences between the Department's and the (sic) Territory Iron's calculations have been discussed with the operator through meetings and emails for the existing site. No discussions have taken place regarding the Elizabeth Marion security estimate at this stage.

[…]

It is recommended that an additional security of $26,792,734.00 (to bring the total security held to $32,161,236) is requested to cover the proposed level of disturbance as detailed in the MMP for the Frances Creek Mine and the Elizabeth Marion amendment.

11 Tailings storage facility.

[45] The statements in the above memorandum to the effect that a full security calculation had not been conducted since 2011 are not accurate. The reality is that a full security calculation was probably never carried out until 6 February 2014. The security calculations prior to 6 February 2014 which resulted in the increases in the amount of security from $2,600,000.00 to $5,368,502.00 were not full security calculations.

[46] On 14 August 2014 the Security Assessment Board met and approved the security of $32,161,236.00 recommended in the memorandum dated 24 June 2014. The primary difference between the security determined by the Security Assessment Board and the plaintiff was in the cost of capping the stockpiles and waste rock dumps. The minutes of the meeting of the Security Assessment Board also note the following.

> Members were advised that the Department had met with the Minister about a time indicator to wind down operations. It was suggested that at the end of August they would commence winding down and be in care and maintenance by October. Territory Iron is committed to gaining approval for the Elizabeth Marion site and they want to commence next year. Depending on the price of iron ore they may still be able to operate until the end of the year.

[47] On 27 August 2014 the Executive Director of Mines informed the plaintiff by letter that: (i) an assessment of the plaintiff's mining management plan had determined that a total security amount of $31,148,271.00 was required for the Frances Creek Mining Project; (ii) the amount of $31,148,271.00 had been reviewed and approved by the Security Assessment Board; (iii) as a consequence of the NT Government's initiative to introduce a legacy mines program, the total amount of the security to be held by the Department is to

be reduced by 10 percent; (iv) the amended amount was $28,033,444.00: (v) as the Department currently holds $5,368,502.00 as security for the operation, a 'top up' security of $22,664,942.00 was required to be paid; and (vi) Authorization 0479-01 had been varied to include a condition requiring payment of an annual levy. Attached to the letter was a certified copy of what was said to be the varied Authorisation. Condition 9 of that document states that it replaces the prior instrument of Authorisation applicable to the Frances Creek Mine Project. The Authorisation was signed by the Executive Director of Mines as delegate of the Minister for Mines and Energy. However, the document was defective in a number of ways. For example, although the document has a subheading, Variation 1, it purports to be issued under s 36(4) of the Act, not as varied under s 38(2) of the Act. So far as any levy was concerned, s 101(2) of the Act expressly stipulates that the Minister must give the operator a notice under s 38(2) varying the authorisation to include the relevant condition under s 37(2)(b)(ii) of the Act. However, in the end, the Department did not rely on this particular varied Authorisation.

[48] On 28 August 2014 representatives of the plaintiff met with representatives of the Department. At that meeting the representatives of the Department agreed to provide the plaintiff with a further explanation of the decision to increase the plaintiff's security. On 8 September 2014 the General Manager of Operations of the Department wrote a further letter to the plaintiff. The letter is similar to the 27 August 2014 letter. However, there was some variation in the security figures. The adjusted security amount was stated to

be $31,130,066.00. The amended amount after allowing for a reduction of 10 per cent was stated to be $28,017,059.00, and the 'top up' security amount was stated to be $22,648,557.00.

[49] On 24 September 2014 the plaintiff made an application to the Chief Executive Officer of the Department and the Chairman of the Mining Board seeking a review of the decision of the Minister's Delegate to vary the amount of the plaintiff's security. The plaintiff stated in the application that the decision of the Minister's Delegate was invalid and the plaintiff was not obliged to provide the security purportedly required by the varied Authorisation. There were two principle grounds for the application. First, the security had not been calculated in accordance with s 43A of the Act. Second, the increase in the amount of the security had not been effected in accordance with s 37(2)(b)(i) of the Act because the amount and form of the security was not set out in a condition on the varied Authorisation. This application for a review ultimately caused the Minister's Delegate to revoke the varied Authorisation dated 27 August 2014 and issue another varied Authorisation dated 7 July 2015.

[50] On 4 December 2014 there was a meeting between Departmental mining officers and the plaintiff's employees at the mine site and Departmental mining officers conducted a field inspection. Environmental risks were identified and potential contaminant pathways were acknowledged. It was recommended that the plaintiff provide a Care and Maintenance mining management plan to the Department by 31 December 2014. The mining

management plan was to focus on water management and any works being conducted for closure of the Frances Creek Mine Project.

[51] In March 2015 the plaintiff submitted a further mining management plan to the Department. On 22 April 2015 there was a further field inspection of the mine site by Departmental mining officers and a detailed report was prepared following the inspection. The purpose of the inspection was to assess the current status of the mine site and inform the Directors of the Department about the mine's status before they met with representatives of the Noble Group who were now the parent company of the plaintiff. The report notes that the plaintiff ceased mining operations in 2014 and provided an overview of current and future environmental risks associated with the Frances Creek Mine Project. Those risks included both the risks associated with the waste rock dumps and the open pits. The report recommended what work was necessary to: (i) manage the current risks; (ii) plan for recommencement of operations; and (iii) provide "considerations" for eventual closure.

[52] There is no evidence before the Court that following the provision of the field inspection report referred to at [51] above there was a meeting between the directors of the Department and representatives of Noble Group. In any event, as stated, on 7 July 2015 the Delegate of the Minister for Mines and Energy, Mr Peter Waggitt, revoked the varied Authorisation dated 27 August 2014 and issued another varied Authorisation. Mr Waggitt gave the following reasons for his decision.

1. The quantum of the existing security held in respect of the site was inadequate.
2. The security should be increased such that the total amount of the security held in respect of the site is $31,130,066 consistent with the recommendations of the DME officers carrying out the assessment of the required revised security amount and the recommendations of the Security Assessment Board.
3. The amount referred to in paragraph (2) above should be reduced by ten percent consistent with the DME's practice following the introduction of the annual mining levy in 2013.
4. Taking into account the ten percent reduction, the total amount of revised security the [plaintiff] was to provide was $28,017,059.
5. As the DME already held security in the amount of $5,368,502 in respect of the site, the plaintiff is required to provide an additional security in the sum of $22,648,557.
6. The additional security must be provided in a form that is easily able to be drawn upon by the Minister if and when necessary and cannot contain any limitations upon the Minister's ability to claim upon the security. The unsecured guarantee offered by the [plaintiff] in its letter of 24 September 2014 was not a security within the meaning of section 43(1) of the Act.
7. The additional security was therefore to be provided by way of:
   (a) cash in instalments pursuant to a payment summary annexed to the decision; or
   (b) a security instrument acceptable to the Minister.

[53] On 4 August 2015 the plaintiff made an application to review Mr Waggitt's decision of 7 July 2015 on the following grounds.

1. The security amount is excessive having regard to current evidence of future rehabilitation requirements.
2. The security amount calculation has not been carried out in accordance with section 43A of the Act, having regard to the content of the mining management plan lodged by [the plaintiff].
3. The security amount is inconsistent with the [Department's] management of the security for Frances Creek to date.
4. The security amount will cause unmanageable financial hardship to [the plaintiff] based on its current financial position.

5. The security amount takes no account of rehabilitation undertaken by [the plaintiff] over time and makes no provision for the staged return of any increased security.

[54] After the receipt of the plaintiff's application for a review, the Chairperson of the Mining Board and the presiding member of the review panel, Mr Brian Hearne, sent an email to the Department seeking answers to a number of questions. In response to those questions, the Department stated the following.

1. The plaintiff did not always submit an amended mining management plan for approval under the *Mining Management Act* on an annual basis. On some occasions the plaintiff submitted its amended mining management plan late.

2. The total security to be held for the site was not revised between 2011 and 2013 as the Department was unable to approve an amended mining management plan for the entire site during that period.

3. Following the submission and [conditional] approval of an amended mining management plan for the entire site in 2013 [presumably on 11 December 2013] the plaintiff prepared calculations for the revised security required in respect of the site. The plaintiff notified the Department of its calculations in March and April 2014.

4. The Department reviewed the revised security calculations submitted by the plaintiff and determined that the plaintiff's security calculations were inadequate.

[55] On 28 August 2015 the review panel made the following decisions.

> 4.1 The security amount decision *be set aside and substituted* with the following:
>
> (a) the [plaintiff] must pay to the [Department] a security in the amount of $18,450,000 (less $5,368,502 already provided) (the Security Amount);
>
> [The Review Panel then went on to make orders about the development of a fully costed Revised Site Closure Plan, approval of that plan by the Department, the execution of the approved plan, an Agreed Site Closure Cost, and a 12 monthly review of the Revised Site Closure Plan. All of these orders were arguably well beyond the powers of the review panel[12] under the *Mining Management Act* but no point has been taken about that.]
>
> 4.2 Security Form Decision: The Panel *confirms* the Security Form Decision that the security be paid by bank guarantee or cash.
>
> 4.3 Review Timing Decision: The Panel *varies* the Review Timing Decision to insert a commencement date of 31 August 2015.

[56] The review panel stated that it made the following findings of material fact.

> (a) The area of the Site disturbed since 2011 has remained largely unchanged, however the environmental risk and impacts have changed due to significant changes in the character and volume of waste material stockpiled and waste water stored on site during that period as a result of activities carried out by the [plaintiff].
>
> (b) The current existing security held for the site is $5,368,502 (the Existing Security) and *is estimated to be insufficient to cover the cost of the required closure works as required under the Act*.
>
> (c) The actual works required to achieve site closure, and the cost of these works, is not yet precisely known due to inadequate information and data being available to understand and detail all closure requirements including to accurately calculate these costs.
>
> (d) The Frances Creek Mine is presently operating in "care and maintenance" mode, and there are no mining activities being carried out. A properly qualified and experienced management team is in place and being maintained.

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12 Under s 70(5) of the *Mining Management Act* the Review Panel must decide the review by confirming the decision under review; or varying the decision under review; or setting aside the decision under review and making a decision in substitution for it.

(e) The [plaintiff] has undertaken to manage the site in accordance with good practice and in accordance with the law. Additional staff with significant local site closure management experience have recently been employed.

(f) The [plaintiff] has not decided whether to close the site permanently, recommence mining operations when market conditions allow, sell the site to another operator, or continue to operate on a care and maintenance basis.

(g) It may take between 6 and 18 months to complete the required detailed closure studies including characterisation of the waste material (in respect of both volumes and chemical characteristics) on the site.

[57] The review panel gave the following reasons for decision.

7.1 Observations by the Panel and the [Department] during site inspection show PAF material generated and stockpiled increased in the period 2011 to present.

7.2 Observations by the Panel and the [Department] during site inspections, the SKM report, interviews with the staff employed by the [plaintiff], reports and calculations by the Department staff indicate current site closure costs in the range of $20,000,000 to $30,000,000. These amounts, however, are presently only estimates, and all parties agree the final actual cost could vary significantly.

7.3 Staff from each of the [plaintiff] and the Department both stated to the panel that characterisation of waste material (in respect of both volumes and chemical characteristics) has not been adequately done, and that this work is required before a detailed closure plan can be finalised and cost determined.

7.4 The Panel considers that the quantum of Existing Security held in respect of the site is inadequate to secure the matters set out in section 43(2) of the Act.

7.5 The panel considers the increase of the security amount to $28,017,059.00 is excessive for the reasons:

(a) the Department's process in making a determination on the security amount was delayed such that the operations of the [plaintiff] have now significantly changed;

(b) the demonstrated willingness of the [plaintiff] to accept responsibility for its operations and to undertake works to rehabilitate the site;

(c) the mine is presently operating in "care and maintenance" mode and there are no mining activities being carried out; and

(d) the quantities and qualities of waste rock to be made safe for closure are unknown.

7.6 In addition to the above, it is understood by the Panel that the [plaintiff] considers there is suitable material on site that could be used for rehabilitation which would reduce the rehabilitation costs calculation.

7.7 Based on the information available to the Panel and as a result of the Panel's investigation, the Panel has determined that the amount of security most suitable is $18,450,000. The Panel notes that this amount was previously offered by the [plaintiff] on 21 April 2014 in writing to the [Department] and is based on the plaintiff's most recent assessments. The security amount is calculated by reducing the midpoint estimate provided by the plaintiff by 10% in accordance with current arrangements
(i.e. $20,500,000 - $2,050,000 = $18,450,000).

7.8 The decision of the Panel to reduce the security amount from that determined by the [Department] is made understanding that this change potentially incurs some risk for the Territory. However, given the financial position of the [plaintiff] and the state of operations at the mine, it is the Panel's view that its decision provides the best method of minimising the liability of the Territory in the circumstances. Further, the reduction of the amount of security is made contingent on the understanding that the process of managing the site closure activities […] is strictly followed by the plaintiff.

[58] The background to this application reveals a sequence of events which from time to time in the Northern Territory results in unsecured mining activities within the meaning of s 46B of the Act, which cannot necessarily be solved by resorting to s 38(2) of the Act because of the impaired financial circumstances of the operator. This is particularly so in this case given the plaintiff's statement in its submission to the review panel dated 4 August 2015 that "[t]he Security Amount will cause unmanageable financial hardship to TIPL based on its current financial position."

[59] The Department's administration of the Act in relation to minimising and rectifying the environmental harm caused by the plaintiff's mining activities

was poor and the Department allowed the substandard mining management system of the plaintiff to persist for far too long. The Department's administration of the Frances Creek mining operation may be summarised as follows. First, the calculation of amount of the initial security by the Department was substantially inadequate. The amount of security bore no relation to the level of disturbance likely to be caused by the planned mining activities and the likely mine closure and rehabilitation and remediation costs. It was inadequate to secure the plaintiff's obligation to comply with the Act and Authorisation 0479-01. Second, despite the extensive powers given to the Minister and the Department, the Department failed to: (i) be satisfied that the management system as detailed in the plaintiff's mining management plan was appropriate for the mining activities described in the plan, and would, as far as practical, operate effectively in protecting the environment; (ii) implement audits, inspections, investigations, monitoring and reporting between 2009 and 23 February 2013 to ensure the plaintiff's compliance with good industry practice and its obligations under Authorisation 0479-01 and the Act; (iii) regularly and adequately reassess the amount of security required from the plaintiff until May 2014 by which time the 2013 amendments to the Act had commenced; (iv) claim adequate security from the plaintiff until the Frances Creek Mine was in a care and maintenance phase and the plaintiff was in impaired financial circumstances; and (v) failed to give adequate consideration to the consequences of the 2013 amendments to the Act.

[60] The Department's poor administration of the Act permitted the level of disturbance caused by the plaintiff's mining activities and consequential closure and remediation and rehabilitation costs to vastly exceed the initial security required by the Minister. As a result of the manner in which the Department administered the Act it has assumed the risk that the Northern Territory may incur the costs of rehabilitating the Frances Creek Mine. It is for these kinds of reasons that there is a significant environmental problem with legacy mines in the Northern Territory and it was necessary to enact the *Mining Management Amendment Act 2013*.

Overview of the legislative framework

[61] The Act is based on the principle of cooperative regulation[13] under which operators for mining sites are required to take primary responsibility and accountability for the conduct and management of mining activities. However, the Minister and the Department also have fundamentally important roles to play under the Act. The seven objects in s 3 of the Act include the object in s 3(b) of protecting the environment by: (i) the *authorisation and monitoring* of mining activities; (ii) *requiring* appropriate management of mining sites; (iii) requiring operators for mining sites to establish, implement and maintain a management system for the site; (iv) implementing *audits, inspections, investigations, monitoring and reporting to ensure compliance* with agreed standards and criteria; and (v) specifying the obligations of all persons on mining sites with respect to protection of

13 Second Reading Speech of the Bill that became the *Mining Management Act 2001*.

the environment. These are all matters which involve the Minister and the Department. The Minister and mining officers are given extensive powers in the Act to ensure that the object of protecting the environment is achieved.

[62] 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* 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.

[63] The Minister may decide the application for an Authorisation by: (i) approving the mining management plan and granting the Authorisation; or (ii) refusing to approve the mining management plan and refusing to grant the authorisation. Before approving the mining management plan, the Minister must be satisfied that: (i) *the management system* for the mining

site is appropriate for the mining activities in the plan and will as far as practicable operate effectively in protecting the environment; and (ii) the mining activities in the plan will be carried out in accordance with good industry practice. The Minister has the capacity to request more information and plans before approving a mining management plan.

[64] It is a statutorily mandated condition of an Authorisation that the operator for the mining site must comply with the mining management plan for the site. The operator for a mine cannot conduct mining activities beyond the scope of a current mining management plan. In addition, the Minister may, among other things, impose conditions on an Authorisation about (i) the protection of the environment; (ii) the outcomes of an environmental assessment of mining activities undertaken under the *Environmental Assessment Act*; and (iii) the form and frequency of periodic reports about mining activities carried out on the mining site. Further, the operator for a mining site must at intervals specified by the Minister in the Authorisation for the site, or as required in writing by the Minister review, and, if necessary, amend and seek approval for the amended mining management plan for the site.

[65] Under s 16 of the *Mining Management Act* 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. For that purpose, the operator must, among other things: (i) establish and maintain an appropriate management structure of competent persons for the

site; (ii) establish, implement and maintain an appropriate environment protection management system for the site; (iii) provide adequate resources for the implementation and maintenance of the management system; and (iv) ensure, by regular assessment, that the management system operates effectively.

[66] Under s 29 of the *Mining Management Act* as soon as practicable after the operator for a mining site becomes aware of the occurrence of an environmental incident or a serious environmental incident on the site, the operator must notify the Chief Executive Officer of the occurrence. An environmental incident means an incident on a mining site that causes environmental harm. Environmental harm means any harm, or any potential harm (including the risk of harm and future harm) to, or adverse effect on, the environment of any degree or duration. It includes environmental nuisance.

[67] Part 7 of the *Mining Management Act* is headed Mining Officers. Section 59 of the Act provides that the Minister may in writing appoint a person to be a mining officer. Among other functions, a mining officer has the following functions: (i) to enforce the Act; (ii) to monitor management systems on mining sites; (iii) to inspect and audit mining sites and mining activities to assess the levels of environmental risk and the operator's compliance with the Authorisation and management system for the mine; and (iv) to ensure that timely corrective or remedial action is taken to prevent environmental harm or risk of environmental harm. Subject to the Act, a mining officer has

the following powers in respect of the mining site: (i) to inspect the site at any time; (ii) to obtain access to parts of the site or to information necessary to enable a mining officer to perform his or her functions; (iii) to require a person to provide information that is reasonably necessary to assist the mining officer perform his or her functions under the Act and for the administration and enforcement of the Act; (iv) to issue written instructions to the operator; (v) to direct the operator to take action to ensure compliance with the Authorisation, the management system or other obligations under the Act; and (vi) to take any other action that may be reasonably necessary to protect the environment and to ensure compliance with the Act, the Authorisation and the management system.

[68] The obligations imposed on an operator for a mine under the Act may be enforced by regulatory and criminal sanctions. The Act creates the following offences. There are environmental offences for conduct that results in contravention of an environmental obligation and material environmental harm. It is an offence not to notify the Chief Executive Officer of an environmental incident. It is an offence for an operator for a mining site to engage in conduct that results in contravention of an Authorisation that is in force for a mining site. It is an offence not to comply with a requirement, instruction or direction of a mining officer. It is an offence to obstruct an official who is acting in an official capacity.

[69] The ultimate liability to rehabilitate mine sites remains with the operator. However, under s 83 of the Act the Minister has power to cause action to be

taken on a mining site that the Minister considers necessary and the Minister may cause action to be taken to complete rehabilitation of a mining site. Under s 44(5) and (7) and s 83(5) of the Act, if the Minister causes action to be taken on a mining site and the security is less than the reasonable costs incurred by the Minister, the difference between the amount of security and the reasonable costs of the Minister is a debt due and payable to the Territory. If no security has been provided by an operator for a mining site, under s 83(5) of the Act the costs and expenses incurred by the Minister in having action taken on a mining site is a debt due and payable to the Territory by the person whose act or failure to act made the action necessary.

Security under the Act prior to 2013 amendments

[70] As stated, prior to the 2013 amendments to the Act it was not compulsory for an operator for a mining site to provide a security to the Minister unless the Minister at his or her discretion imposed such a condition on an Authorisation. Further, the Act did not prescribe how the security was to be calculated. However, if that condition was imposed on an Authorisation the security was required for the same purposes as a security is now required and it was necessary to pay the security in accordance with the imposed condition before mining activities could commence.

[71] Prior to the 2013 amendments, s 43 of the Act stated:

> A security required by the Minister under a condition of an Authorisation is for the purpose of securing any of the following:

(a) an operator's obligation to comply with this Act or an Authorisation;

(b) payment of costs and expenses in relation to the Minister causing an action to be taken to prevent, minimise or rectify environmental harm:

(i) in a mining site; or

(ii) outside a mining site if the environmental harm results from or may result from a mining activity;

(c) payment of costs and expenses in relation to the Minister causing an action to be taken to complete rehabilitation of a mining site.

[72] Sections 38(2), 44 and 83 of the Act were in the same terms as they are now. Those sections have not been amended since the Act commenced. Yet, as I have stated, there were difficulties with the increasing liability of the Northern Territory for unsecured or legacy mines and the object in s 3(e) of the Act was not being adequately achieved.

[73] It is to be noted that s 38 and s 41 of the Act were amended by the *Mining Management Amendment Act 2011*. Section 11 of that Act inserted a new s 38(3) which stated that the Minister must not vary an Authorisation unless satisfied the management system included in the current or amended mining management plan: (a) is appropriate for the mining activities described in the plan; and (b) as far as practicable operate effectively in protecting the environment. The purpose of that amendment was to assist in determining how the operator intends to ensure that the variation sought will not be of a detrimental nature. Section 12 of that Act repealed sections 40 and 41 of the Act and inserted new sections 40 and 41 of the Act. Subsection 41(1) of the Act as amended, and currently in operation, requires an operator for a mining site, at intervals specified in the Authorisation for the site or as

required in writing by the Minister to: (a) review and, if necessary, amend the mining management plan for the site; and (b) if the plan is amended - submit the amended plan to the Minister for approval. Subsection 41(3), as amended and currently in operation, requires an amended mining management plan to clearly identify the amendments. Subsection 41(4) as amended and currently in operation, provides that the Minister may by written notice to the operator, approve the amended plan or refuse to do so. Subsection 41(5) as amended and currently in operation, provides that an amended mining management plan has no effect unless it has been approved by the Minister

The 2013 amendments to the Act

[74] The *Mining Management Amendment Act 2013* relevantly amended the Act as follows.

[75] First, the Amending Act inserted a further object of the Act by inserting s 3(f). The further object of the Act is to require the payment of a levy to provide funds for: (i) a Mining Remediation Fund; and (ii) the effective administration of the Act in relation to minimising or rectifying environmental harm caused by mining activities. This object recognises that the Act was not being effectively administered in this regard.

[76] Second, s 37 of the Act was amended principally by inserting s 37(2)(i) and (ii) of the Act and making it compulsory that, unless an Authorisation relates to the Ranger Project Area, an Authorisation is subject to a condition that the operator *must*: (i) provide a security of the amount, in the form, and

on the terms, specified in the condition; and (ii) pay a levy of an amount specified in the condition.

[77] Third, s 10 of the Amending Act repealed s 43 and replaced the section with s 42A, an amended s 43, and s 43A. Section 42A is not relevant to this proceeding. Section 43 of the Act was amended by inserting subsection 43(1) which states:

> 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 section 37(2)(b)(i).

[78] Subsection 43(2) of the Act is in the same terms as the original s 43 of the Act. It is important to note that s 43 as originally enacted and s 43(2) of the Act, as now in operation, stipulate three purposes which are to be secured by the provision of a security. On their face there is arguably a disjunction between the purpose set out in s 43(2)(a) and the purposes set out in s 43(b) and (c) of the Act. However, all three purposes are to be secured by the provision of the security and the extent to which the Minister may incur costs and expenses in relation to: (i) the Minister taking an action to prevent, minimise or rectify environmental harm caused by mining activities; and (ii) the Minister taking an action to complete rehabilitation of a mining site, is in many respects contingent on securing an operator's obligation to comply with the Act and the relevant Authorisation. If the security is properly calculated for the whole of the mining operation and an operator complies with the Act and the Authorisation it is unlikely that the

Minister will have to take action to prevent, minimise or rectify environmental harm or to complete rehabilitation of the mining site.

[79] Fourth, the amending Act introduced the provisions in relation to the payment of a levy and the establishment of the Mining Remediation Fund.

[80] Section 43A of the act was inserted at the same time as the amended provisions of s 43 and immediately follows that section. It is clear from the structure of Part 4 Division 4 of the Act that the security referred to in s 43(1) is to be calculated in accordance with s 43A(1) of the Act.

[81] 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.

[82] 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. Mining activities can only occur once an Authorisation is obtained. The Minister may only grant an Authorisation once the Minister has approved the mining management plan and is satisfied that the management system as detailed in the plan will, as far as practicable, operate effectively in protecting the environment. The mining management plan must include a description of the mining activities for which the operator requires Authorisation including a plan and costings of closure activities. The Minister has the power to require an operator to provide further information, statistics or plans relevant to the site, or a mining activity on the site,[14] and may also require further details or plans to be included in a mining management plan.[15] An operator must comply with the mining management plan in force for the site. An amended mining management plan had no effect unless it had been approved by the Minister. The provisions of Part 4 of the Act give the Minister adequate power to take steps to calculate the amount of security to be provided by reference to the level of disturbance likely to be caused by the mining activities to be carried out under an Authorisation.

14 s 45.

15 s 40(2).

[83] 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.

[84] The respondent has submitted that because of the existence of imperfect knowledge at the time an Authorisation is granted there is a real risk that the determination of the level of disturbance likely to be caused by mining activities to be carried out on a mining site and therefore the calculation of the amount of security will invariably be inadequate. The respondent further submits that: (i) this risk may be overcome by amending the amount of security specified on an Authorisation under s 38(2) of the Act; and (ii) such an amendment is not inconsistent with s 43A(i) of the Act and ensures the objects in s 43(2)(b) and (c) are achieved. The difficulty with this submission is threefold. First, such an interpretation gives s 43A no work to do. All that s 43A of the Act does according to such an interpretation is state the obvious at the time the initial amount security is calculated. Second, the history of the operation of the Act is that prior to the 2013 amendments the

Department was not effectively administering the Act. From time to time mining management plans were not being adequately assessed to ensure the management system for the mining site as detailed in the plan would, as far as practicable, operate effectively in protecting the environment. From time to time mining activities were not being adequately audited, inspected and monitored and amounts of security were not being adequately and regularly reassessed until environmental problems arose or mining operations had reached a stage of care and maintenance. Third, given the plaintiff's statement that the security amount determined by the Minister will cause unmanageable hardship to the plaintiff based on its then financial position it is by no means certain that the risk of the Minister being exposed to a liability to pay the costs of environmental remediation and rehabilitation will be overcome by this means.

[85] Subsection 38(2) of the Act states:

> The Minister may on the Minister's own initiative, by written notice to an operator, *vary* or revoke an Authorisation.

[86] If s 38(2) is read in isolation, the Minister's power to vary an Authorisation appears to be a very wide power. However, the usual rules of statutory interpretation in such circumstances as arise in this case are: (i) provisions of general application give way to specific provisions when in conflict (*generalia specialibus non derogant*); and (ii) a later section in an Act prevails over and an earlier section. If the usual rules apply in this case then the wide power to vary an Authorisation in s 38(2) of the Act is constrained

by s 43A(1) of the Act when it comes to the Minister varying the amount of security specified in the mandatory condition prescribed by s 37(2)(b)(i) of the Act.

[87] In my opinion, those principles do apply in this case. 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.

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.

[88] If the Act were to be interpreted in a way which failed to place an onus on the Minister's delegate to take steps to ensure that the amount of security to be provided by an operator for a mining site was calculated as accurately as possible in the first place, and regularly reassessed as mining activities increase beyond the original mining management plan, there is a greater risk of mining operations becoming unsecured. Not infrequently, operators for mining sites have an impaired financial capacity once a mining operation goes into a care and maintenance phase. If an operator does not have the financial capacity to provide an appropriate amount of security at the commencement of mining activities then there must be a real concern about the capacity of the operator to conduct the planned mining activities in accordance with good industry practice.

[89] The Act does not contemplate that an operator for a mining site will be permitted to carry out mining activities which are causing harm to the environment unchecked and then be required to provide an amount of security which covers the cost of remediation and rehabilitation of the disturbances caused by past mining activities. The Act is structured in such a way as to minimise any potential harm to the environment.

Conclusion

[90] I find that the review panel made a jurisdictional error of law because when it determined the amount of security the plaintiff must pay the Department it failed to have regard to, and properly apply, the statutory criteria in s 43A(1) of the Act.

[91] I make the following orders:

1. An order in the nature of certiorari that the decision of the review panel made on 28 August 2015 under s 70(5) of the Act determining that the plaintiff must pay to the Department a security in the amount of $18,450,000.00 less the $5,368,502.00 is called up and quashed.

2. A declaration that the review panel decision determining the amount of security the plaintiff must pay to the Department is invalid and of no force and effect by reason of a jurisdictional error of law.

[92] I will hear the parties further as to any ancillary orders and costs.
