

IN THE ENVIRONMENT ADVISORY COMMITTEE, SOLOMON ISLANDS  
CASE NO. EAC 001/2018

BETWEEN: Tebukewa Mereki on behalf of the residents of Wagina (Appellant)

AND: Director of Environment and Conservation Division (Respondent)

Committee Members:

1. Reuben John Sulu (Chairman)
2. Ruth Liloqula (Member)
3. Robert Kaua (Member)
4. Christopher Vehe (Member)
5. Gideon Bouro (Member)
6. Frank Wickham (Member)
7. Jimmy Nuake (Member)

Barrister for Appellant: Trevor Wolwork, The Public Solicitors office  
Solicitor for Appellant: William Kadi, The Public Solicitors Office  
Solicitor for Respondent: Daniel Damilea, Attorney General's Chamber

Date of submission: 3<sup>rd</sup> October 2013  
Date of hearing: 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> December 2018

Variations in spelling of the name of the same person  
Tebukewa Mereki = Tebuka Mereki

Variations in the spellings of the same location  
Wagina = Waghena = Wagena = Vaghena  
Cookson = Kukson = Kuktin

### **Environment Advisory Committee Decision**

#### **Background**

This is an appeal by Tebukewa Mereki on behalf of the residents of Wagina against the decision by the Director of the Environment and Conservation Division (ECD) to issue a development consent to Solomon Bauxite Limited to mine bauxite at Wagina Island, Choiseul Province. The appeal was made pursuant to section 32(1) of the *Environment Act 1998*, hereafter referred to as the Act and Regulation 18 of the *Environment Regulations 2008*, hereafter referred to as the Regulations.

During the hearing, the committee noted that the written submissions and all evidence submitted by the appellant were not objected to by the respondent. Similarly, the written submissions and responses submitted by the respondent were not objected to by the appellant. All written submissions, evidence in chief and responses presented by both parties were therefore considered legitimate materials for the review and arbitration of this case.

## Grounds for the appeal

The appeal is made on the following grounds:

### (a) Regulation 18(1)(a)

- (i) The Director did not have the power to make a decision under section 24(3) to issue the consent because the legislative procedures for public consultation and publication of the Environmental Impact Statement (EIS) were not followed;
- (ii) The EIS does not contain sufficient information to assess the environmental impacts of the mine and does not meet the requirements of section 23 of the Act, Regulation 5 or Form 1 of schedule 2. As such the Director could not have been satisfied that these requirements were met for the purpose of section 24(1) of the Act; and
- (iii) The EIS does not contain sufficient information to allow the Director to be satisfied of the criterion specified in Regulation 14 including the requirement that ‘all reasonable steps will be taken to minimize any risk of environmental harm, as a result of the prescribed development’.

### (b) Regulation 18(1)(c)

The Director’s decision was inconsistent with the Convention on Biological Diversity (CBD) and Declaration on the Rights of Indigenous Peoples.

The appellant seeks that the committee take into account all relevant matters that are submitted and refuse the development consent issued by the Director and substitute the Director’s decision for its own. Where the committee does not agree to do so, then the appellant requests that the committee requires that the Environmental Impact Assessment (EIA) process to be repeated and further conditions imposed on any development consent.

## Matters for the committee to review and decide upon

To summarise the grounds of appeal, three matters are brought before the committee to review and decide upon. The first matter is whether due procedures as required by the relevant sections of the *Environment Act 1998* and relevant regulations of *Environment Regulations 2008* have been followed in the public consultation and publication of the EIS. The second matter is to review whether the contents of the EIS meets the requirements as prescribed by the relevant sections of the *Environment Act 1998* and relevant Regulations of the *Environment Regulations 2008*. The third matter to review is whether the Director’s decision was inconsistent with the Convention on Biological Diversity and Declaration on the Rights of Indigenous Peoples.

## Appellant’s case

On the first matter the appellant submitted that the EIA procedure for the Wagina Bauxite Mine did not comply with the requirements of the *Environment Act* and *Environment Regulations* due to the following reasons:

- A notice to inform the public of the development application and EIS was not published in any newspaper in Solomon Islands in contravention of Regulation 11(2). The newspaper notice is intended to be the first time that the public is officially informed of the EIA process. This is a vital step and should include information about the date and location of the consultation meeting;
- There is no evidence to suggest that a notice was put up in public places in the communities in which the prescribed development was to be undertaken. Failure to display such a public notice is a contravention of Regulation 11(2). In particular, it

appears that no notice was placed in Nikumaroro village; the closest community to the proposed mine. This notice should have been put up on or close to 5 February 2013, the date the Director approved the EIS for publication.

- Copies of the EIS were not made available to the rural communities before the meeting convened by the Ministry of Environment, Climate Change, Disaster Management and Meteorology (MECDM) on 20 February 2013 at Kukson. This is noted in the comments recorded at the EIS meeting on 20 February 2013 and is a clear breach of regulation 11(4). Compliance with this step is vital as it gives residents an opportunity to consider the proposal and prepare comments before the meeting;
- No meeting to consider the EIS, or other form of consultation, was held in Nikumaroro, the closest village to the tenement site. Of the more than 2000 residents of Wagina, only 23 people, all from the village of Kukson, attended the meeting;
- Only one copy of the EIS was made available to each village on Wagina. This meant that only 3 copies were provided for more than 2000 residents of Wagina to read and evaluate. It is not yet known whether these copies were provided within the 30 days allowed for objections or after, although it is clear that the copies were not provided before the meeting as required; and
- The vast majority of residents did not know about the EIA process, or see a copy of the EIS until late September 2013, after the Director issued the development consent.
- The Director did not comply with his obligation in relation to the meeting convened by the Deputy Director, as the minutes of 20 February 2013 do not provide a full record of the proceedings of the meeting, but instead only provided an overview of the topics discussed. The overview is not sufficient to determine whether the Deputy Director convening the meeting explained the contents, recommendations or finding of the EIS in sufficient detail.

On the second matter, the appellant submitted that the contents of the EIS do not meet the requirements as prescribed by the relevant sections of the *Environment Act 1998* and relevant Regulations of the *Environment Regulations 2008* due to the following reasons:

- The information contained in the EIS was so incomplete, outdated and unscientific that the director could not have regard “as far as practicable to the effect such development or expansion would have on the environment”, in breach of section 15 of the Act.
- The EIS prepared on behalf of Solomon Bauxite Limited (SBL) does not comply with the requirements of section 23 of the Act, regulations 5 and 7(1) of Form 1 of schedule 2 of the regulations (under section 29 of the Act). As such the Director’s publication of the EIS was inconsistent with section 24 of the Act and the Director’s decision to issue a development consent was a decision which was inconsistent with the requirements of the Act.
- As a result of SBL’s failure to comply with the requirements of section 23, regulations 5 and 7 and Form 1 to Schedule 2, the EIS did not contain sufficient information to allow the Director to be satisfied of the criterion set out in Regulation 14. The Director’s decision to issue the development consent without being satisfied on the requisite criterion in breach on the Act and Regulations.

On the third matter the appellant submitted that the Director’s decision was inconsistent with:

- the Convention on Biological Diversity as it failed to adequately consider the impacts of the project on biodiversity and to provide mitigation measures.
- that the Directors decision was inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples as it failed to include them to participate in matters that would affect their rights.

The appellant's affidavit evidence included his own affidavit and the affidavits of John Tebiria Rabaua, Aberaam Abera, Aresi Kiatoa and Henry Tebirata. The expert evidence in chief included expert reports pertaining to the EIS by David Boseto, David Hadley, Sara Beavis and Barry Noller. Further evidence in chief includes affidavits of Martha Manaka.

### **Respondents case**

The respondent's case was a submission in response to the appellant. On the first matter, the respondent stated that he has the power under section 24(3) as provided for under section 24(1) and Regulation 11 to make the decision to issue the development consent. According to the respondent section 24(1) which states that "*the Director having satisfied that an EIS meets the requirement of this Act shall cause such statement to be published in such a manner as he considers adequate or most effective for purposes of bringing it to attention of all public authorities and other persons whose interests are likely to be affected by the proposed development*". The respondent further submitted that the key considerations for the committee for its deliberation were:

- The prescribed development will be undertaken in a remote rural area with limited access to newspaper circulation and it is therefore not the most effective medium to inform the Wagena and Posarae rural communities and Choiseul Provincial Government about the EIS. It is these areas whose interest are likely to be directly and adversely affected by the proposal;
- Section 24(1) of the Environment Act empowers the Director to exercise discretion in relation to public disclosure of the EIS, as the Director deems effective and necessary;
- Notices about the availability of the EIS and meetings about the EIS have been issued on February 5, 2014 and published on Wagena Island in Kukson village and Choiseul Province in Posarae village and Taro Provincial Centre
- Meetings have been conducted by Environment Conservation Division (ECD) officers in the respective areas where the notices have been published
- Prior consultation was undertaken by Dr. Paulo (EIA consultant) with elders of Kuktin, Nikumaroro and Arariki settlements as part of the EIA process under the chairmanship of Mr. Tebukewa Mereki

On the second matter the respondent submitted that Section 23 of the Environment Act, Regulation 5 and Form 1 of Schedule 2 of the Environmental Regulations 2008 are concerned with the content of the EIS. Form 3 of the Regulations provides the general form or format whereby the EIS can be presented. The relevance and applicability of some of the information requirements specified in these legislative provisions and procedures need to be properly contextualised. The point is the provisions are only generic, not site specific and, even do not consider the nature of the development proposal, as the case may be. The EIA as such can be adopted to suit particular project circumstance using, as appropriate the matters provided for in Section 23. The respondent then further submitted a detailed description of the manner in which an EIA is to be conducted, the scientific and legal basis for the different steps and key considerations for the committee's deliberations.

### **Were legislative procedures for public consultation and publication of the EIS followed?**

In considering this matter the committee considers how section 24 and Regulation 11 should be interpreted. It is the committee's view that all the steps provided for in section 24 and Regulation 11 must be undertaken. The intention of section 24 and Regulation 11 is to ensure that all who may be affected are informed about the proposed development. The Respondent both in his written and oral submissions, as well as during the cross examination admitted that, no public notice about the publication of the EIS was published in a newspaper, that is regularly published in Solomon Islands. Although he submitted that notices were displayed in villages on 5<sup>th</sup> February 5<sup>th</sup> 2013, no evidence was provided, only records of meetings. Regulation 11(2) says "*The notice of the application shall be published in a newspaper that is published regularly in Solomon Islands;*" The Committee is of the view that the use of the word '*shall*' is mandatory, that is, it must be done. It is clear that the Respondent interprets the very last part of Regulation 11(2) where it says "...*published in such a manner as the Director shall think appropriate*" as giving him the discretion to publish the EIS in any manner he considers adequate. However, the spirit of Section 24 and Regulation 11(2) is very clear. There are Wagina and Choiseul people who live in Honiara or other locations in Solomon Islands, so having notices only in the villages would not be able to bring it to "*the attention of all people who may be affected*". Furthermore, having notices only in the villages will fail to bring it to the attention of all public authorities. Even having notices in the village was not done properly as it was clear that no notices or public consultations were done at Nikumaroro, the village closest to the proposed bauxite mine. The architects of the Act know full well that those who may have an interest in any particular development may not only reside in communities near the proposed development site, but may live in other locations or in urban centres; undertaking all the requirements provided in Section 24 and Regulation 11 will ensure that there is a high probability of informing as many people as possible including people who are from Wagina and Choiseul who live in different parts of the Solomon Islands or in different countries.

The Committee noted that the EIS was published as two separate documents on two different dates; the first one was published on December 2012 while the supplementary one was published on June 2013. It is clear that public consultations about the EIS were undertaken when the EIS was still half completed. From Tebukewa Meraki's affidavit the EIS published on December 2012 was only made available to the communities after consultations were done, note before the public consultations. Such an action prevented those who may be affected to closely read and appropriately comment on the EIS during the consultations. Those who may be affected have not had the opportunity to comment on the supplementary part of the EIS as it was published after public consultations have already been done.

In considering all materials submitted by both parties, the committee unanimously concluded that legislative procedures for public consultation and publication of the EIS were not followed.

### **Did the contents of the EIS meet the requirements prescribed by the relevant sections of the Environment Act 1998 and relevant regulations of the Environment regulations 2008?**

In deciding on this matter, the committee considers the EIS requirements pursuant to the Act and Regulations (i.e. Section 23 of the *Environment Act 1998*, Regulation 5 and Form 1 and Form 3 of the second schedule of the *Environment Regulations 2008*), the substance of the EIS in its entirety and the expert evidence in chief by David Boseto, David Hadely, Sara Beavis and Barry Noller.

Although the EIS covers the general contents required by the Act and the Regulations, it is the committee's view that the substance of the EIS fell well below the standards of a respectable EIS. A major part of the EIS is a desktop study and while field visits were undertaken no proper scientific study to inform the EIS was undertaken.

The proposed mining will be on Wagina and due emphasis should be given to record the ecological aspects of Wagina Island and its surrounding environment. Consider chapter 2 of the EIS on Page 19 where it describes the Biological Environment; It gives emphasis on making a description of the terrestrial flora and fauna of Solomon Islands in general than Wagina in particular. Where it does, it only makes general statements of the presence of the named flora and fauna in Wagina without proper scientific confirmation. Consider for example the fourth paragraph about insects: *"Insects are plentiful; however, a detailed study has not been undertaken...."*. Towards the end of that paragraph it stated that *"The detailing of these species will be undertaken as a monitoring and evaluation exercise during the development and operations phase"*. The committee finds this approach rather unscientific and improper for an EIS. Baseline knowledge of the environment needs to be undertaken right from the beginning, this will be the basis by which impacts can be assessed later during the actual operation. If the detailing is conducted during the development and operational phase, this is rather late and compromises the core spirit of developing environment baseline. The sub-standard quality of the EIS in its biological baseline assessment is further confirmed by David Boseto's expert evidence in chief. Point 5 of the summary of David Boseto's expert evidence in chief is quoted here: *"The EIS report lacks baseline biological diversity of flora and fauna that can be used as a bench mark for any future monitoring activity to evaluate the health of Biodiversity on Vaghena Island."* Point 6 of David Boseto's expert evidence summary further states: *'There are no discussions of concepts like species richness, evenness, diversity in detail, as well as some of the indices we use to measure community structure.'*

Sara Beavis in her expert evidence in chief submitted that the EIS does not contain sufficient information to adequately assess the potential environmental impacts of the project as it relates to ground water and surface water impacts. Risks to surface groundwater and surface water includes contamination of surface waters as runoff during large rainfall events, contamination of areas beyond the boundaries of the project due to run off, over abstraction of water and contamination of groundwater from septic systems and mining activities. The EIS in its present form has not included all reasonable approaches that should be considered to minimise any risk of environmental harm. Let alone the absence of identification of short-term, medium and long term risks associated with the intended operations. The rehabilitation and mine closure requirements for the project as approved are very limited and insufficient evidence is provided to suggest that sustainable groundwater and surface water management will occur in the long term.

Of relevance to the expert evidence in chief provided by Sara Baevis, the committee noted one aspect of risk mitigation and management that will be undertaken is the construction of sediment ponds. The following questions however are raised on this proposed mitigation strategy: will there be no leaching of materials and chemicals into the Seleana river which may permeate through to the marine environment and the Arnavon Marine Conservation Area? Has there been any consideration for heavy rain and overflow of these sediment ponds? What happens when the sediments are full? The EIS however has not addressed these questions. Unless of course these questions are addressed in the Environment Management Plan (EMP), which was not indicated in the EIA at all. These questions were raised since the EIA failed to provide intended approaches to them.

David Hadley in his expert evidence in chief submitted that the social impact assessment is inadequate since it does not provide sufficient detail to allow a full evaluation of the potential impacts that this major development may have upon the existing residents Wagina. The EIS listed the potential benefits and negative impacts of the development and proposed measures that will be implemented to mitigate the negative impacts. Attention is drawn to section 6.5 of the EIS which stated that *the island residents do not use the land on which the mine is to be developed except for cattle grazing and as a thoroughfare*. The appellant submitted that this information is outdated and that the last time cattle were on the Island was during colonial days. David Hadley's expert brief notes that the land on which the mine is to be developed is used *'in an ongoing and continued fashion for the purposes of; a) growing plants, including general food crops for consumption and sale as well as at least one cocoa plantation; and b) cutting timber with which to build houses; canoes, schools and community gardens, and as cut firewood for cooking*. Such uses are also confirmed by David Boseto's expert evidence in chief.

Expert evidence in chief provided by Barry Noller further emphasized the deficiencies of the EIS which further supports the aforementioned expert evidence in chief.

The committee noted that according to the EIS, the bauxite mine area is only 16Km<sup>2</sup> of the total 78Km<sup>2</sup> of the Island (20% of the Island). While the proposed bauxite mine area is only 16Km<sup>2</sup>, it fails to consider the land area that will be required for infrastructure and haul roads. Looking at Figure 11.5 on page 22 of the EIS, the prospecting licence application boundaries of the land occupies almost 60% of the island. What will become of the people of Wagina if the mining occupies such a significant area of Wagina Island? Where will they obtain their material to construct their homes and resources to support their livelihoods?

In its own deliberation and assessment, the committee noted that the EIS has not given consideration to: a) the possible impacts of bauxite on the marine environment if it spills out during loading or carried to the marine environment by surface water runoff; b) impacts of frequent big ships plying through that marine environment and possible ship grounding and oil spills; and c) the possible impacts of the aforementioned on the nearby Arnavon Marine Conservation Area – the only national marine protected area which has been in existence for several decades.

In the response to the expert evidence in chief, the respondent is of the view that bauxite mine at Wagina will only be a small mine and that the scientific rigour emphasised by the expert witness which are of Australian or UK standards do not need to apply in Solomon Islands. The Respondent in his response further submitted that although the EIS was limited, it was sufficient to make a decision. The committee disagrees with this view; the people of Solomon Islands deserve to have the highest standards of scientific rigour applied to any EIS undertaken.

When considering all the submissions made by both parties, the evidence pointing to the deficiencies of the EIS outweigh any evidence which supports the quality of the EIS. The committee has come to a decision that the contents of the EIS do not meet the requirements prescribed by the relevant sections of the Environment Act 1998 and relevant regulations of the Environment regulations 2008.

### **Was the Directors decision to issue a development consent inconsistent with the Convention on Biological Diversity (CBD) and the Declaration on the Rights of Indigenous Peoples?**

The committee is of the view that this matter relates closely to the matter on the content and quality of the EIS as required by Section 23 of the *Environment Act 1998*, Regulation 5 and Form 1 and Form 3 of the second schedule of the *Environment Regulations 2008*. If the EIS is properly done and all social and environmental safeguards and mitigations are considered the

commitments to the CBD in terms of environmental protection and protection of species biodiversity will be fulfilled. The deficiencies in the EIS, together with its inadequacies in the environmental and social impact and planned mitigation measures shows that the decision to issue a development consent is inconsistent with the CBD.

From the submissions received by the committee the communities who will be impacted by the development of the mine are residents of Wagina who were settled by the British Colonial Government in the 1950's and the indigenous people of Choiseul who live in nearby islands and the Choiseul mainland. Consultations were in 3 communities in Wagina and 1 community on the Choiseul mainland. These consultations were to inform the communities of the impending development of a bauxite mine on the Island of Wagina and the presentation of the results of the EIS to them. The record of meeting held on 20<sup>th</sup> February 2013 had the following statements towards the bottom: *“Most of this community have made objection on this proposed mining project and have also highlighted the risks they might encounter if the project proceed on. The provincial member further stated that some environmental threats were already seen on the small Islands such impact from Climate change. Therefore, introducing of the mining on the Vaghena island will add on to the existing environmental impacts.* It is clear that the Respondent only makes a decision to inform the communities of the decisions made by the Respondent and the developers of the mine. That the local communities were not involved and neither were their views taken into account when decisions on the issuance of a development consent was made. The committee is of the decision that the issuance of a development consent is inconsistent with the Declaration on the Rights of the Indigenous Peoples.

#### **Environmental Advisory Committee's final decision on the case**

After considering all the submissions and evidence the committee is of the decisions that:

- legislative procedures for public consultation and publication of the EIS were not followed;
- the EIS submitted does meet the requirements of the Environment Act 1998 and Environment Regulations 2008. The EIS in its current form is a mere listing and cursory treatment of the requirements of the Act and Regulations and has not provided acceptable levels of measurable impacts that are based on rigorous and referenced science and best practice. While some mitigation measures are noted, they are rather vague and generic. It is not enough for an EIS to note vague and generic mitigation measures in an EMP and fail to identify whether there will be short or long term environmental impacts;
- the decision to issue a development consent is inconsistent with the Convention on Biological Diversity and the Declaration on the Rights of Indigenous Peoples;
- a mine tenement covering 60% of a small island will have tremendous environmental impacts on water quality, air quality, the ecology and the marine environment. It will also have a dramatic and likely irreversible impact on the more than 2000 residents of the island who rely on the sea and land for their livelihood. The same will be for the nearby islands and marine environment.

The Environment Advisory Committee by a majority decision refuse to grant the Development Consent to Solomon Bauxite Limited. The Environment Advisory Committee hereby revoke the Director's decision to issue the Development Consent. Pursuant to section 32(5) of the Environment Act 1998, the Environment Advisory Committee hereby substitute its own decision for that of the Director. The decision is effective forthwith upon serving of this decision to the Counsels of both parties.