



HIGH COURT OF AUSTRALIA

7 February 2024

HARVEY & ORS v MINISTER FOR PRIMARY INDUSTRY AND RESOURCES & ORS
[2024] HCA 1

Today, the High Court unanimously allowed an appeal from a judgment of the Full Court of the Federal Court of Australia. The principal issue was whether the proposed grant of a mineral lease under the *Mineral Titles Act 2010* (NT) would constitute "the creation ... of a right to mine for the sole purpose of the construction of an infrastructure facility ... associated with mining" for the purpose of s 24MD(6B)(b) of the *Native Title Act 1993* (Cth) ("the NTA").

The McArthur River Project is an enterprise carried on by Mount Isa Mines Limited ("Mt Isa Mines") in the Northern Territory. The McArthur River Project comprises the mining of zinc-lead-silver ore, the processing, treatment and concentration of this ore, its storage, and its transportation for sale. Once mined, the ore concentrate must travel 120 kilometres by road to the "Bing Bong" loading facility located on the Gulf of Carpentaria. There it is loaded onto a bulk-carrier vessel for transshipment to larger ocean-going ships. The bulk-carrier must use a navigation channel which needs to be maintained by regular dredging. The resulting dredged sediment is pumped onshore to a Dredge Spoil Emplacement Area ("DSEA"). In 2013, Mt Isa Mines applied for a new mineral lease ("ML 29881") under the *Mineral Titles Act 2010* (NT) to enable it to construct a new DSEA on a pastoral lease it owns. The first and second appellants, Mr Harvey and Mr Simon, are native title holders in respect of the land comprising the pastoral lease. The third appellant is the relevant prescribed body corporate for the purposes of the NTA.

Before the primary judge, the appellants relevantly argued that they were entitled to the procedural rights afforded by s 24MD(6B) of the NTA on the grounds that the grant of ML 29881 constituted the "creation ... of a right to mine for the sole purpose of the construction of an infrastructure facility ... associated with mining". However, the primary judge held that ML 29881 did not satisfy the words of s 24MD(6B)(b). On appeal, the Full Court held that the phrase "right to mine" refers to a "future act" that confers a right to engage in mining activities. ML 29881 would not, when granted, create a "right to mine" because the new DSEA would be constructed on land which is separate from the land upon which mining takes place, and it would be concerned with the shipment of ore. As a result, the activities which would be undertaken at the DSEA would be too "remote" from mining and could not be regarded as "necessary for the meaningful exercise of the right to mine." The Full Court went on to consider whether the DSEA would constitute an "infrastructure facility" as defined in s 253 of the NTA. Whilst the new DSEA would be an infrastructure facility within the ordinary meaning of that phrase, the Full Court held that Parliament did not intend to use that ordinary meaning but instead intended that the items listed in the definition of "infrastructure facility" were to be an exhaustive list of qualifying facilities. The Full Court held that the DSEA did not fall within any of those enumerated items.

The High Court held that the decision to grant ML 29881 will constitute the creation of a right to mine for the sole purpose of constructing an infrastructure facility associated with mining. In its particular statutory context, the phrase "right to mine" should be construed as a composite term used to denote all those mining tenements which are capable of being issued under State and Territory natural resource laws. As ML 29881 will be a "mineral lease" for the purposes of the *Mineral Titles Act*, it will be a "right to mine". Moreover, in accordance with the Explanatory

Memorandum to the *Native Title Amendment Bill 1997* (Cth), the term "infrastructure facility" as defined in s 253 of the NTA bears its ordinary meaning and is not confined to the items listed in the definition. That conclusion is also confirmed by the statutory architecture employed in s 253 and the use of the word "includes" in the definition of "infrastructure facility". The proposed DSEA will therefore be an "infrastructure facility". Accordingly, the appellants are entitled to the procedural rights afforded by s 24MD(6B) of the NTA.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*