IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN No. P37 of 2018

Helicopter Tjungarrayi, Jane Bieundurry, Richard Yugumbarri, Frances Nanguri, Rita Minga, Eugene Laurel, Darren Farmer, Sandra Brooking, Bartholomew Baadjo, Joshua Booth, Bobby West

Appellants

State of Western Australia

First Respondent

Shire of Halls Creek

Second Respondent

Commonwealth of Australia

Third Respondent

HIGH COURT OF AUSTRALIA
FILED
19 SEP 2018
THE REGISTRY MELBOURNE

AND BETWEEN No. P38 of 2018

KN (Deceased) and Others (Tjiwarl and Tjiwarl #2)

Appellants

State of Western Australia and others

Respondents

APPELLANTS' JOINT REPLY SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Argument

2. ***The text and purpose of s 242(2)***: The submissions of the **State** of Western Australia (**WAS**) present an argument that for the purposes of the *Native Title Act 1993* (Cth) (the **NTA**) in general, and s 47B in particular, the term "lease" includes a "mining lease": WAS [21], [46], [64]. That does not, however, tackle whether the reference in s 47B(1)(b)(i) to a "freehold estate or lease" includes a "licence" or "authority" (or "permit") to explore for minerals (P38) or petroleum (P37). The response does not, with respect, confront the words of s 242(2) that:

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In the case only of references to a mining lease, the expression lease also includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory. (emphasis added)

3. The State side steps the opening words of s 242(2) by contending that the effect of the "definitional reference" to a mining lease in s 245 is "to bring licences and authorities within the definition of 'mining lease' and, therefore, 'lease'": WAS [47]-[48]. On the line of reasoning adopted by the Full Court, and supported by the State, the references to a mining lease in ss 242(2), 243 and 245, that is, in part of the Act's dictionary, operate to invest the expression "lease" with a substantive character it does not have under the Act.[1]

4. The references with which s 242(2) is concerned are those that may be found in the substantive parts of the NTA, not its dictionary in Pt 15, which contains "definitions of certain expressions that are used in the Act" (s 9 emphasis added), with Div 3 containing definitions relating to leases (s 241). That commences with s 242 providing that the expression lease includes the things in pars (a), (b) and (c) of sub-s (1) – including anything described or declared by a law to be a lease at the time of its creation (par (c)) – and, by sub-s (2), in the case only of references to a mining lease, also includes a licence or authority.

5. The purpose of s 242(2) is to enable the longer expression "licence issued, or authority given, by or under a law" to be supplied by the single expression "mining lease" wherever the NTA legislates on a mining lease by using that expression.[2] The NTA so enacts in the substantive parts that refer to a mining lease dealing with the non-extinguishment principle and the right to negotiate. In those parts, the inclusion of a licence or authority to mine by s 242(2) effectuates the particular objects of those provisions, a point the State does not address: AS [36]-[37]. In contrast, s 47B does not have a reference to a mining lease, so s 242(2) is simply not engaged, and reading in a licence or authority is contrary to the object of s 47B.

6. ***In any event, s 242(2) concerns rights to mine***: The mischief that s 242(2) addresses in enabling the longer expression "licence issued, or authority given, by or under a law" to be supplied by the single expression "mining lease" is revealed by a brief

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1 Cf *Gibb v Commissioner of Taxation* (1966) 118 CLR 628 at 635 (Barwick CJ, McTiernan and Taylor JJ).

2 *Mutual Acceptance Co v Commissioner of Taxation* (1944) 69 CLR 389 at 398-9 (Rich J); *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 69 (Windeyer J).

examination of State and Territory resource laws that intersect with the NTA. Those laws confer various types of rights with different nomenclatures (licence, claim, lease and so forth) that may be divided into:[3] (1) authority to enter land to search for minerals, of which an exploration licence over a large area is a more recent creature;[4] (2) a miner's right, mining claim or authorised holding that permits prospecting and mining of land on payment of a royalty on minerals extracted, and; (3) a mining or mineral lease for a longer (renewable) term and for which rent for possession of the land is paid in addition to royalties on minerals extracted.[5] An example of the second is a miner's right under the former *Mining Act 1904* (WA), continued despite repeal by the *Mining Act 1978* (WA), described by Barwick CJ in *Adamson v Hayes* as entitling "the holder to take possession of, occupy for mining purposes and mine, Crown land which has become a claim".[6] But it is only where the NTA refers to and legislates upon a mining lease that s 242(2) operates to bring in rights of that kind.

7. This also answers the State's reference to the extrinsic material: WAS [49]-[54]. The material reveals an intention to treat a licence or authority to mine as a *mining lease*, not as a *lease* for all purposes under the NTA: cf WAS [49]. As the last sentence of the Supplementary Explanatory Memorandum quoted at WAS [54] makes clear, it is only mining licences and authorities "which give similar rights to mining leases" which are treated in the same manner, being how the judgment at first instance in *Ngurra* dealt with the point: *Ngurra TJ* [56] **CAB 23**; AS [38]-[40]. A licence to explore confers an authority (a bare licence) to enter land to search for minerals, to enable the holder to go on to land of another without becoming a trespasser.[7] It confers

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3 See the survey in **Forbes and Lang**, *Australian Mining and Petroleum Laws* 2nd Ed (1987) Chapters 6-10, and *Halsbury's Laws of Australia* Title 170 Energy and Resources – (3) Exploration Titles [170-600]-[170-1636], and (4) Mining Titles [170-1650]-[170-2425] (July 2016).

4 Forbes and Lang at [803]; for example, in Western Australia, on enactment of the *Mining Act 1978* (WA) and New South Wales in 1963: ***Wade** v New South Wales Rutile Mining Co* (1969) 121 CLR 177 at 192 (Windeyer J).

5 The statutory origin of a mining lease in Australia can be traced to early Victorian Acts, of which the *Mining Statute 1865* (Vic) provided the model for other jurisdictions: Forbes and Lang at [103], [105], [109]; Armstrong, *The Law of Gold Mining in Australia and New Zealand* 2nd Ed (1901) at 4-5, 11. The common law position in England on a mining lease, mining licence, and (bare) licence to explore is noted below at fn (8).

6 (1973) 130 CLR 276 at 288 dissenting in the result, but to like effect, see 305 (Gibbs J), 315 (Stephen J). For examples of mining production titles other than by a "lease", see *Mineral Resources (Sustainable Development) Act 1990* (Vic) mining licence, *Mining Act 1992* (NSW) mineral claim, *Mineral Resources Act 1989* (Qld) mining claim, *Opal Mining Act 1995 (SA)* precious stones claim, and prior to repeal by the *Mineral Titles Act 2010* (NT), see *Mining Act 1980* (NT) mineral claim.

7 *Wade* (1969) 121 CLR 177 at 190 (Windeyer J).

no interest in the minerals (except for testing) or rights to the surface of the land: *Mining Act* ss 63, 66 (exploration licence) cf ss 82, 85 (mining lease); *Petroleum Act* ss 38, 43 (exploration permit) cf ss 62, 66 (production licence).[8] If s 242(2) of the NTA is first construed independently of the operative provisions – which is the State's approach – and with due regard to the ordinary meaning[9] of the term mining lease, and which s 245(1) reflects, that extrinsic material confirms that s 242(2) is directed only to a licence or authority that is similar to a mining lease.

8. Put differently, ss 242(2) and 245(1) do not comprehend something that is not in substance[10] a mining lease, that is, a grant of rights, for a term, to go on to and occupy land, and to work a mine on or in the land, and to take or appropriate the minerals when severed from the land, by way of a sale of minerals payable over the term as royalties.[11] The nomenclature used is not determinative;[12] rights of that kind can be conferred by a thing called a lease, licence or authority. The State's selection and assignment of the defined terms so as to equate a mining lease with an exploration licence involves what Stamp J described in *Bourne v Norwich Crematorium* as a:[13]

> *... process of philology and semasiology. English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which one has assigned to them as separate words so as to give the sentence or phrase*

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8 At common law, a licence to enter lands and search for minerals that confers no interest in the minerals found was considered a bare licence, distinguished from a mining licence conferring an interest in minerals once severed, and in turn distinguished from a mining lease where the grantee has possession of the land: *Halsbury's Laws of England* 2nd Ed vol 22 [1299], [1328]-[1329]; Bainbridge, *The Law of Mines and Minerals* 5th Ed (1901) at 280.

9 Where a defined term is used in different contexts in the substantive parts of an Act, consideration of the definition in isolation as an initial step may be useful, including by reference to the ordinary meaning of the term: *Hastings Co-op v Port Macquarie Council* (2009) 171 LGERA 152 at [17] (NSWCA Basten JA, Allsop P agreeing).

10 Cf *Esso v Ministry of Defence* [1990] 1 Ch 163 at 169 (Harman J) holding that the inclusion of "interest" in a definition of "dividends" was confined to interest on securities or shares and did not encompass interest on an award of damages.

11 *Western Australia v* ***Ward*** (2002) 213 CLR 1 at [285] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) referring to *Newcrest Mining v Commonwealth* (1997) 190 CLR 513 at 616 (Gummow J), *Wade* (1969) 121 CLR 177 at 192 (Windeyer J), *Gowan v Christie* (1873) LR 2 Sc & Div 273 at 284 (Lord Cairns), *Munro v Didcott* [1911] AC 140 at 148-9 (PC).

12 Cf *Ward* (2002) 213 CLR 1 at [287] referring to *Wik Peoples v Queensland* (1996) 187 CLR 1 at 117 (Toohey J) in turn referring to *Wade* (1969) 121 CLR 177 on the looseness of terms like "mining lease".

13 [1967] 1 WLR 691 at 695-6, quoted in *Esso v Ministry of Defence* [1990] 1 Ch 163 at 169 (Harman J). See also *Mutual Acceptance Co v Commissioner of Taxation* (1944) 69 CLR 389 at 398 (Rich J) that a definition is not an "exercise in philology. It is a mechanical device to save repetition".

a meaning which as a sentence or phrase it cannot bear without distortion of the English language.

9. ***The context provided by the NTA's references to mining lease and s 47B***: The State, as with the Full Court (*Ngurra FC* [11] **CAB 75**)), eschews the context provided *first*, by the NTA's references to a mining lease, and *second*, by s 47B(1)(b) in defining when land under claim is to be treated as vacant Crown land: WAS [58]-[62] cf AS [34]-[46]. The soundest reading of statutory text, however, will accord with both the words used and with their context.[14] A definition may be read down if it is necessary to give effect to the statutory purpose,[15] although here there is no occasion to do so given the opening words of s 242(2). Nevertheless, the State's case that the meaning of s 47B "is determined by the statutory definitions" (WAS [58]) runs counter to the instruction, described by McHugh J in *Kelly v The Queen*, that:[16]

> *... the better – and I think the only proper – course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.*

10. The State does not take issue with the Appellants' characterisation of the object of s 47B, nor apparently with the Appellants' case that the Full Court's construction jars with that statutory context. As with the Full Court, it points only to the definitional provisions: *Tjiwarl FC* [76] **CAB 641**; WAS [59], [61]. If, as submitted above, the words of s 242(2) indicate that it is only in the case of a reference to a mining lease that a lease includes a licence or authority, the absence of a reference in s 47B is consistent with its object to disregard historic extinguishment where Aboriginal people remain in occupation of an area: AS [44]. The absence of a reference to a mining lease in sub-par (i) of s 47B(1)(b), and by extension a licence or authority (s 242(2)), is also consistent with the text and structure of s 47B by which an authority to use land for a particular purpose can be within sub-par (ii): AS [46].

11. The difficulty in the State's approach is portrayed by it commencing with the definition of mine in s 253 and ending with the definition of mining lease in s 245, so

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14 *Wade* (1969) 121 CLR 177 at 185 (Windeyer J).

15 *Owners of Shin Kobe Maru v Empire Shipping Co* (1994) 181 CLR 404 at 420 (the Court).

16 (2004) 218 CLR 216 at [103] in dissent, but see [43] (Gleeson CJ, Hayne and Heydon JJ) referring to statutory object but holding that it did not compel a particular construction.

as to contend that an instrument that permits exploration is a mining lease, but glossing over the very definition of lease in s 242: WAS [32], [39], [46] cf [47]-[48]. Consistent with the very structure of Pt 15 Div 3, and the substantive task posed by s 47B(1)(b)(i) in referring to a "freehold estate or lease", one needs to commence with the definition of lease in s 242. The words of s 242 then need to be read into s 47B(1)(b)(i) and the operative section construed in an extended sense (that a lease might include a licence or authority) or a confined sense (that it might not). In doing so, the very opening words of s 242(2) cannot be ignored, and regard must be had to the immediate context of s 47B(1)(b) in defining when land under claim is to be treated as vacant Crown land, and the broader context of the object of the section in recognising native title.

12. The effect of s 242(1)(c) is that an instrument that is "declared to be or described as a lease" by the law under which it is created can be a lease for the purposes of s 47B(1)(b)(i). That can include something that, in a general law sense, is a licence rather than a lease.[17] A statutory (pastoral) lease that permits use of the land for maintaining cattle (s 248) is not a lease in a general law sense,[18] but s 242(1)(c) treats it otherwise.[19] Crown lands legislation may typically enable the grant of another form of tenure that permits the same land use but described as a (grazing) licence,[20] which is not treated as a lease by the NTA. This also answers WAS [47]-[48], [62] (last sentence); it is the definition of lease in s 242(1), especially par (c), not s 242(2), by which something that is not a general law lease, that is, a statutory mining lease, can be a lease for the purposes of the NTA.[21]

13. Hence, the relevant inquiry in this case is not whether a particular reference in a substantive part of the NTA (s 47B) to a lease includes a mining lease, but rather, whether the reference includes an exploration licence or authority: cf WAS [46]. The only pathway is by s 242(2), but it cannot be taken unless there is a reference to a mining lease; a reference to a lease is not enough. It is therefore misdirected to point

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17 See generally, *Radaich v Smith* (1959) 101 CLR 209 at 222 (Windeyer J).

18 See generally, *Wik Peoples v Queensland* (1996) 187 CLR 1.

19 And to similar effect in the context of a mining lease as a category C past act within Pt 2 Div 2 and an act excepted from the confirmation of extinguishment provisions of Pt 2 Div 2B, see the observations in *Ward* (2002) 213 CLR 1 at [299].

20 *R v Toohey; ex parte Meneling Station* (1982) 158 CLR 327 at 340-4 (Mason J), 351-4 (Wilson J).

21 The State appears to acknowledge that is so at WAS [42] citing *Wilson v Anderson* (2002) 213 CLR 1 at [58]-[59] (Gaudron, Gummow and Hayne JJ) where it was observed, with emphasis referenced to s 242(1)(c), that the definition of lease in s 242(1) is wide enough to encompass for the purposes of the NTA statutory interests which may not amount to a lease as understood by the common law. No reference was made to s 242(2), nor in *Ward* (2002) 213 CLR 1 at [297]-[299].

to instances in the non-extinguishment provisions where the NTA speaks of "a lease (other than a mining lease)" or "the grant of a lease where … the lease is not a mining lease": WAS [45]-[46], [66]. That drafting serves the function of ensuring that something described in mining legislation as a lease, licence or authority to mine is treated in the same way as an exception to what are treated as extinguishing leases, including where the instrument is a lease within the s 242(1) definition: AS [34]-[35].

14. Without the qualifying phrase "other than a mining lease", or a "lease that is not a mining lease", a reference in those sections to a lease could include something that fell within the s 242(1) definition of a lease, including a mining tenement which was described as or declared to be a lease by the law under which it was created (s 242(1)(c)). The qualifying phrase does not suggest that the word lease otherwise includes a licence or authority. In those sections, nothing is served by giving the word lease an expansive meaning as including a licence or authority, only to then exclude them by the qualifying phrase.

15. ***The impracticability of the Full Court's construction***: The Appellants acknowledge that the criterion of a mining lease in s 245(1) is whether the instrument "permits" the "holder to use the land covered by the lease solely or primarily for mining", whereas s 47B(1)(b)(ii) refers to a "permission or authority … under which … the land … is to be used … for a particular purpose": AS [52] cf WAS [69]-[70]. Nevertheless, if "lease" and "mining lease" within ss 47B(1)(b)(i) and 245 include an exploration licence, the locale and temporal reference points provided by s 47B(1) frame the necessary inquiry as to the content of the rights to be measured against the s 245 criterion of permitted use *as applied* within s 47B. This is not to conflate the task of statutory construction with a comparison of the rights so granted with subsisting native title rights as occurs in questions of extinguishment: AS [49] fn (48) cf WAS [71]. The point is that the terms of the grant may mean that the content of rights in relation to the s 47B area (*where*) at the time an application is made (*when*) is incapable of identification without some further step: AS [51].[22]

16. The State does not engage with the substance of the issue so presented by the Full Court's construction, other than giving the example of a residential lease granted subject to a condition requiring prior approval for the construction of a residence: WAS [73]-[74]. The example actually highlights why the reference in s 47B(1)(b)(i)

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22 Citing *Ward* (2002) 213 CLR 1 at [150].

to a lease does not comprehend a licence to explore for minerals or petroleum. If an instrument that permits use of the land solely or primarily for constructing or occupying a private residence (s 249(1) re "residential lease") satisfies one or more of pars (a), (b) and (c) of s 242(1), then it is a "lease" as defined by s 242(1). In the State's example, there is no potential for extension to a licence or authority, as there is under s 242(2) where there is a reference to a "mining lease". In that example, the relevant issue for s 47B(1)(b)(i) is whether the instrument is a lease, which it is by s 242(1), not whether it is a "residential lease" or some other kind of lease.

17. The State's submissions do not otherwise seek to answer the Appellants' case that in view of the conditions attaching to the exploration tenements, and the circumstance that the s 47B areas are a small part of the wider tenement areas, the uncertainty produced by the Full Court's construction further demonstrates why the phrase "freehold estate or lease" in s 47B(1)(b)(i) cannot be read as a reference to a licence to explore for minerals or petroleum: AS [49]-[52].

19 September 2018

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