IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B26 of 2015

BETWEEN: **Quandamooka Yoolooburrabee Aboriginal Corporation RNTBC**
Plaintiff

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and

State of Queensland
Defendant

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SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR NEW SOUTH WALES (INVERVENING)

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Part I:

1. The Attorney-General for the State of New South Wales (**NSW**) certifies that these submissions are in a form suitable for publication on the internet.

Part II:

2. NSW intervenes pursuant to s.78A of the Judiciary Act 1903 (Cth), generally in support of the defendant.

Part III:

3. This Part is not applicable.

Part IV:

4. The facts are set out in paragraphs 3 to 32 of the special case. NSW adopts the defined terms used in the special case. The applicable constitutional provisions and statutes are set out in paragraph 5 of the defendant's submissions (**DS**), and are relevantly extracted in Annexure B to the plaintiff's submissions (**PS**).

Part V:

Overview

5. In these submissions, NSW contends that:

   (a) the ILUA does not bind the defendant not to enact ss.9 and 12 of the Amendment Act, because the Queensland executive cannot bind its legislature not to enact certain legislation (NSW does not make any other submissions in relation to the proper construction of the ILUA);

   (b) even if the ILUA did so bind the defendant, the Amendment Act is not for that reason (or otherwise) inoperative under s.109 of the Constitution by reason of any inconsistency between the Amendment Act and s.24EA of the Native Title Act (**the NTA**);

   (c) at the level of principle, it is possible for a State law to conflict with an order of the Federal Court under s.87 of the NTA so as to give rise to a

s.109 inconsistency. But there is no such conflict between the Determinations and the Amendment Act in this case.

Executive lacks power to bind Parliament

6. NSW does not seek to make submissions on the broader questions concerning the construction of the ILUA.

7. However, NSW does seek to address the discrete point made by the plaintiff at paragraph 36 of its submissions, where it is said that the ILUA impliedly:

> ... obliges the defendant not to remove the non-renewability of ML1105, ML1109, ML1117, not to allow for their renewal for periods longer than those provided by the Principal Act, and not to change the conditions in the EA ... restricting the '*winning of a mineral*' to be conducted only within the 'restricted mine path' for ML1105 and ML1117, and to be conducted only until the end of 31 December 2019.

8. Such a term necessarily envisages that the Queensland executive government has purported to bind the Queensland legislature. For the following reasons, as a matter of principle, no such term should be implied.

9. The executive government of Queensland lacked the capacity to limit the exercise of legislative functions by way of contract. Such a contract would be inconsistent with the entrenched legislative power of the Queensland Parliament and the provision for responsible government in ss.1-2A of the Constitution Act 1867 (Qld) and s.42 of the Constitution of Queensland 2001. The power is one to "make laws for the peace welfare and good government of the colony in all cases whatsoever": Constitution Act 1867, s.2 (see also Australia Act 1986 (Cth), s.2).

10. As regards the relationship between the Commonwealth executive and the Commonwealth Parliament, it is well-established that the executive cannot by contract "tie the hands of future Parliaments": Magrath v The Commonwealth (1944) 69 CLR 156 at 169-170 per Rich J and 175 per McTiernan J; Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation (1948) 77 CLR 1 at 16-18 per Latham CJ and 28 per Dixon J. And, if by a contract the executive purports to warrant that legislation will or will not be passed, the passage of legislation contrary to that warranty cannot be an actionable breach of

contract: Perpetual Executors at 18 and 28; see also Magrath at 170 per Rich J. If the term proposed by the plaintiff were to be found to arise by implication in the ILUA, the term would be incapable of enforcement as a contractual obligation because the Amendment Act constitutes "a paramount law destroying the obligation of the promise": Perpetual Executors at 28.

11. These general principles have been treated as applicable to the constitutional arrangements of, for example, the States of Western Australia and Victoria: Re Michael; Ex parte WMC Resources Ltd (2003) 27 WAR 574 at 576 and Port of Portland v State of Victoria (2009) 27 VR 366 at 368-369 [3]-[6] per Maxwell P, 372-373 [29] and 379 [58] per Buchanan JA and 384 [87] per Nettle JA (in dissent in the result). On appeal from the latter decision, this Court noted but did not need to decide the issue: Port of Portland v Victoria (2010) 242 CLR 348 at 360 [14]. The scope of the legislative power vested in the Queensland Parliament demonstrates that these principles equally apply to Queensland's constitutional arrangements. Their effect would be to render any contractual provision entered into by the Queensland executive in the terms suggested by the plaintiff void as an attempt to fetter by contract the exercise as the State legislature sees fit of the legislative power vested in it.

12. The position is not altered by the procedures provided by the NTA for the registration of an ILUA or the provisions dealing with the consequences of registration. As the Full Federal Court said in Murray v National Native Title Tribunal (2003) 132 FCR 402 at 407 [17], the NTA 'discloses an intention that [ILUAs] should have contractual effect at common law' (referring to ss.24BE, 24CE, 24DF and 24EA(2) – although note the further issue addressed below at [29]-[31] regarding potential obstacles to their validity as a common law contract). Subdivisions B-E of Part 2, Division 3 of the NTA should be understood in that context and evince no objective intention to depart from the principles just identified (it would be surprising if they did as such an approach would likely attract the principle in Melbourne Corporation v Commonwealth (1947) 74 CLR 31). Indeed, the opposite is true: any 'effect' conferred upon an ILUA by s.24EA(1), in addition to that which it would have apart from that subsection, is that which the ILUA would have 'as if' it were a contract. As such, the Court should strain against any

construction of the ILUA that includes the implication of a term in the form proposed by the plaintiff. The result may be different if the alleged implied term, set out above, was cast as an undertaking by the defendant to use all lawful and effective means to ensure that those matters were achieved, as envisaged by Nettle JA, in dissent in Portland, at 384 [86], by reference to Ansett Transport Industries (Operations) Pty Ltd v Commonwealth (1977) 139 CLR 54. But that is not the plaintiff's case. Question 1 should be answered 'No' for that reason.

Is the Amendment Act invalid under s.109 of the Constitution by reason of inconsistency between the Amendment Act and s.24EA and s.87 of the NTA?

13. The following assumes that the ILUA did impose an obligation upon the defendant to the effect of that contended for by the plaintiff, such that it was bound not to enact ss.9 and 12 of the Amendment Act.

14. The plaintiff correctly observes the starting point in all s.109 cases must be an analysis of the laws in question and of their true construction: Momcilovic v The Queen (2011) 245 CLR 1 at 111 [242] per Gummow J (French CJ agreeing at 74 [111] and Bell J agreeing at 241 [660]). But the plaintiff's case arises from a fundamental misconception about the operation of the NTA. In particular, properly construed, the NTA does not confer upon a registered ILUA the force and effect of a Commonwealth law (cf PS [17]). The plaintiff's submissions to the contrary fail to appreciate a number of important features of the broader statutory design, to which it is convenient to turn.

The scheme of the Native Title Act

15. Where a State or Territory does an 'act' such as the passing of legislation (note s.225(2)(a)) which 'affects' native title, the 'force and effect' of that act falls to be determined in accordance with the balance of the NTA. As Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ explained in Western Australia v The Commonwealth (Native Title Act Case) (1995) 183 CLR 373 at 469, that is how the reference to 'valid' and related terms are to be understood in the NTA:

> [T]he use of the term ["valid"], its derivatives or its opposite .., so far as those respective terms relate to a State law, must be taken to mean having, or not having (as the case may be) full force and effect upon the regime of

> protection of native title otherwise prescribed by the Act. In other words, those terms are not used in reference to the power to make or the making of a State or Territory law but in reference to the effect which a State law, when validly made, might have in creating an exception to the blanket protection of native title by s.11(1). In using the term "valid", the Act marks out the areas relating to native title left to regulation by State and Territory laws or the areas relating to native title regulated exclusively by the Commonwealth regime.

(see also the definition of 'valid' in s.253 of the NTA to which their Honours there referred).

16. State legislation extinguishing or 'affecting' native title otherwise than as provided for by the NTA will attract the operation of s.109 of the Constitution. It will do so because it will fall outside the 'areas relating to native title left to regulation by State and Territory laws': see the Native Title Act Case at 468 at 470 (although note, as to non-compliance with certain of the procedural requirements in Part 2, Division 3, Lardil v Queensland (2001) 108 FCR 453 at 471-473 [48]-[58] per French J and at 486-487 [115]-[121] per Dowsett J and see also the more tentatively expressed views of Merkel J at 477 [72]).

17. The making of legislation by a State or Territory will affect native title in the relevant sense "if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise": s.227. That notion of affectation is a critical element of a "future act" as defined in s.233 (see subsection (1)(c) and see also s.24AA(1)). On the plaintiff's case, the Amendment Act fell within that definition: it was an act in relation to land and waters in the North Stradbroke Island region consisting of the making of legislation (s.233(1)(a)(i)); it took place after 1 July 1993; it is not a "past act" (see s.228); and, on the plaintiff's case (PS [54-55]), apart from the NTA, the Amendment Act either:

(a) validly 'affects' the native title rights and interests of the Quandamooka people in relation to those land and waters (s.233(1)(c)(i) of the NTA), or

(b) is invalid to an extent (by reason of the operation of the Racial Discrimination Act 1975 (Cth)); would be valid to that extent if the native title of the Quandamooka people did not exist; and would 'affect' that

native title if it were valid to that extent (s.233(1)(c)(ii) of the NTA and note the Native Title Act Case at 462 and 483).

18. If the making of a particular State law is a future act, Division 3 of Part 2 of the NTA provides a hierarchical cascade of methods by which such an act can, in the sense identified in the Native Title Act Case, 'validly' affect native title. If more than one of those methods is applicable, only one will apply. In such a case the order of application is determined by s.24AB(1) and (2) read with s.24AA(4).

19. At the apex of that hierarchical cascade are the provisions of the NTA providing for the making of ILUAs: see s.24AB(1) referring to a case in which a future act is 'covered by' s.24EB(1). But in the current matter, it does not appear to be contended by either the plaintiff or the defendant that the making of the Amendment Act was 'covered by' that provision. In particular, it appears to be common ground that the ILUA did not include a statement meeting the statutory description in s.24EB(1)(b) (that the parties consented to the doing of that act, or consented to it being done on conditions): PS [48], DS [22], [39]. Nor is it said that there are any other relevant registered ILUAs that would so engage s.24EB.

20. As such, the remaining provisions of the hierarchy would remain to be worked through: s.24AB(2). If it is not 'covered by' any of those provisions, the Amendment Act will be 'invalid' to the extent it affects native title in the sense explained in the Native Title Act Case: s.24OA. That is, it will fall outside the area relating to native title left to regulation by State and Territory laws. That area of permissible State regulation is circumscribed by the cumulative effect of s.11 (defining the circumstances in which native title may be extinguished), Division 3 as a whole (prescribing the area in which future acts are valid) and s.24OA read with s.24AA(2) (confirming that the only way in which a future act may validly affect native title is via satisfaction of one of the routes included in Division 3).

21. If that point is reached, the Amendment Act would be found to be inconsistent with some or all of those provisions of the NTA and s.109 will in those circumstances render it inoperative. However, the plaintiff does not seek to rely upon an argument of that nature.

Section 24EA and the submissions of the plaintiff

22. The submissions of the plaintiff will have the effect of inserting a hiatus after the very first step in the cascading analysis contemplated by the NTA. A conclusion that a 'future act' is not 'covered by' s.24EB (including by reason of the fact that there is no statement to the effect that the parties agree to the doing of such an act within the meaning of s.24EB(1)(b)) would otherwise lead to consideration of whether it is covered by one of the sections in the list in s.24AA(4)(a)-(k): see again s.24AB(1) and (2). But the effect of the plaintiff's submission is that that circumstance in fact leads to a quite different result (one which radically departs from that suggested by the text and structure of the Act): that is, that any further consideration of those matters is forestalled and, consequentially, that any such future act is invalid.

23. And, if that submission is accepted, the same truncation would seemingly apply to any case in which the parties have:

(a) determined to deal with the subject matter of the doing of 'particular future acts, or future acts included in classes' (see, in respect of area agreements, s.24CB(a)); and

(b) done so in an 'exhaustive' fashion or at least done so without expressly stating that other future acts may be undertaken: see PS [28], [36], [48] and [59].

24. Such a submission (which does violence to the statutory design) should not be accepted unless there is a clear textual basis for doing so. Section 24EA (upon which the plaintiff principally relies) provides no such basis.

25. The plaintiff's submission rests upon the proposition that s.24EA of the NTA recognizes an agreement to which it applies and gives it 'force' as a contract between certain parties and non-parties: it is said to owe 'its existence to and [enjoy] the statutory protection' of that Act. That, it is said, means that such an agreement has the 'force and effect of [a Commonwealth] law': PS [16], [17].

26. In Sankey v Whitlam (1978) 142 CLR 1 at 89 (in the course of dealing with the effect of s.105A(5) of the Constitution) Mason J spoke of the distinction between a

statutory provision which merely gives validity to a contract and makes its provisions binding on the parties, thereby "overcoming some obstacle to its validity or operation", and one which "goes further by imposing a statutory obligation on the parties to carry out the terms of the contract, thus giving them the force of law" (referring to the judgment of Lord Cairns LC in Caledonian Railway Co v Greenock and Wemyss Bay Railway Co (1874) LR 2 Sc & Div 347 at 349). His Honour also there observed that that distinction has been accepted and acted upon in later cases (to which his Honour also referred).

27. NSW submits that s.24EA goes no further than the "overcoming of some obstacle" to the validity or operation of ILUAs, and should not be understood as intended to give the agreements the force of law.

28. The plaintiff points to the "unique features" of a registered ILUA, being that s.24EA(1)(b) extends the agreement's contractual force to certain native title holders not party to the agreement. That is, undoubtedly, a feature of a registered ILUA distinguishing it from a contract at common law. It reflects the sui generis, communal nature of native title: see Mabo v Queensland (No 2) (1992) 175 CLR 1 at 58-63 per Brennan J.

29. But it is just those features that point up why there may well be doubts about whether, in light of the doctrine of privity of contract, individual native title-holders who have not personally agreed to the terms of an ILUA can be bound at common law to its terms. A group of native title holders is unlike a company, which the common law has long recognized as having its own legal personality and thus capacity to contract. A group of native title holders do not have separate legal personality and so are not, apart from the provisions of the Act, necessarily capable of entering into a contract at common law other than by each agreeing to do so, or through an agent-principal relationship: see the observations of Reeves J in QGC Pty Limited v Bygrave (No 2) (2010) 189 FCR 412 at 432-434 [64]-[70] and note also 440-441 [97]-[100].

30. Focusing on the provisions relating to area agreements (the ILUA category into which the ILUA falls), it is mandatory that "[a]ll persons in the native title group ... in relation to the area" be parties to the agreement: s.24CD(1). The term "native title

group" is then defined in s.24CD(2), principally by reference to a body corporate that is a representative body under Part 11 of the NTA or a registered native title claimant (i.e. the individual person or persons authorized as applicants in relation to a native title claim: s.253). Any applicant for registration of an area agreement must certify or state that the making of the agreement has been authorised by all those who hold or may hold native title in relation to the area (ss.24CG(3) and 203BE(5)).

31. Authorisation for these purposes is defined in s.251A to mean authorisation of the making of the agreement either, "where there is a process of decision-making that, under the traditional laws and customs of the persons who hold or may hold ... the native title", in accordance with that process, or, if there is no such process, in accordance with "a process of decision-making agreed to and adopted by" those persons: see Fesl v Delegate of the Native Title Registrar (2008) 173 FCR 150 at 169 [71]. Whether this process would suffice at common law to empower the "authorised" person to in fact bind all the persons who hold or may hold native title to an agreement is doubtful. The removal of those and other similar doubts (see eg Carlton Cricket & Football Social Club v Joseph [1970] VR 487 at 499) is the mischief met by s.24EA(1). The plaintiff is incorrect to suggest that it goes further and imposes a statutory obligation on the parties to carry out the terms of the agreement.

32. The plaintiff's reliance on s.24EA(3) is also misplaced. In the extrinsic materials, the object of that provision was identified as follows:

> To avoid doubt, the Bill states that the NTA will not prevent the Commonwealth, a State or a Territory from enacting any legislation, or doing any other act, to give effect to its obligations under an ILUA. This applies where the Commonwealth, State or Territory is a party to the agreement [subsection 24EA(3)]. An example of an act that a government may need to do is grant a lease to another party to the agreement (Explanatory Memorandum to the Native Title Bill 1997 at 7.2.2).

33. That is, it does no more than confirm that such an act will not need to otherwise meet the requirements of Part 2, Division 3 for 'validity'.

Application of section 109 of the Constitution

34. Having regard to the above, the issue regarding the asserted engagement of s.109 is straightforward.

35. As Gummow J explained in Momcilovic, the Constitution was framed, at least insofar as s.109 is concerned, by reference to positivist Austinian doctrine. That includes, in particular, the notion that each 'law' of the Commonwealth and each 'law' of a State will comprise a norm or rule of conduct that each lays down and the attached sanctions or remedies: see at 106-107 [229]-[233] and see also Hayne J at 126-127 [291], [292]. The essential concept is that a 'law' for the purposes of s.109 involves the inseparable elements of 'command', 'duty' and 'sanction' imposed by a sovereign authority: at 106 [229], 126 [291].

36. By overcoming obstacles to the validity or operation of ILUAs through the enactment of s.24EA, the Commonwealth Parliament has not purported to impose a command or duty to obey those instruments as an exercise of the sovereign authority of the paramount legislature (let alone providing for particular remedies or sanctions for the breach of any such command or duty). And so it is incorrect to assert that it has cloaked those agreements with the force and effect of Commonwealth law. That would only be the case if it gone further and had sought to impose a statutory obligation to obey their terms (the second possibility identified in Sankey). It has not done so.

37. What it has done is to place such agreements within the milieu of general law contractual obligations ('as if' each such agreement were a contract among the parties; and 'as if' the other persons referred to in s.24EA(1)(b) were bound 'in the same way'). There is, in those circumstances, an analogy to be drawn with Re Residential Tenancies Tribunal; Ex Parte Defence Housing Authority (1997) 190 CLR 410 at 432-433 (per Dawson, Toohey and Gaudron JJ, with Brennan CJ, McHugh and Gummow JJ agreeing on that point). That is, those agreements operate within the legal framework provided by the common law and State law (and any applicable Commonwealth law).

38. Focusing upon that part of the framework provided by State law: it is plain that a State may legislate in a manner that alters (or even extinguishes) its contractual obligations. None of that would, in itself, engage s.109. The other provisions of Division 3 would remain to be worked through in the manner outlined above.

39. The plaintiff's contrary contentions overlook those matters and should be rejected for those reasons.

40. It can also be noted that the issue of whether the legislation should include a provision allowing ILUAs to be made statutory instruments with the force of Commonwealth law was raised before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund during its inquiry into the Native Title Amendment Bill 1997. Submissions made to the Joint Committee in relation to the Act on behalf of the National Native Title Tribunal by Justice French (in his role as President) and Registrar Lane observed of the proposed s.24EA:

> The limitation of the operation of an indigenous land use agreement to contractual operation means that any legislative support for the terms of such agreements, other than those relating to the validation of future acts, are to be derived from provisions of other Commonwealth, State or Territory laws. It is respectfully submitted that it is desirable that such agreements be able, at the option of the parties, to be given the status of a statutory instrument and thus have the force of a law of the Commonwealth ("Response to the Native Title Amendment Bill", incorporated into the Committee's Hansard on 23 September 1997 and ultimately tabled in the Senate on 28 October 1997 as Paper No. 9808, emphasis added).

41. That submission was not taken up as a recommendation by the Committee in its subsequent report (see the Tenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund) or by the Commonwealth Parliament. To the extent that the somewhat difficult language of s.24EA gives rise to any ambiguity, those extrinsic materials and the legislative history provide (at least some) assistance in confirming that their meaning is that set out above: s.15AB(b) of the Acts Interpretation Act 1901 (Cth).

The cases dealing with awards made under Commonwealth Industrial legislation are inapposite

42. It also follows from the above that the analogy the plaintiff seeks to draw between a registered ILUA and an award made pursuant to Commonwealth industrial arbitration legislation is inapposite. As was made clear by this Court in Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011) 244 CLR 508 at 516 [11]:

> For the purposes of s.109, an industrial award, whilst not itself a law of the Commonwealth, has the force and effect of such a law where so provided by the machinery of the Commonwealth statute. (emphasis supplied)

43. In each of the cases dealing with industrial awards cited by the plaintiff in paragraph 17, the Commonwealth statute evinced an intention that the federal industrial award would comprise an exhaustive and exclusive determination of the matters to which it was addressed (Collins v Charles Marshall Pty Ltd (1955) 92 CLR 529 at 547 per Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ):

> The basis of the application of s.109 to a State law affecting industrial relations regulated by an award is not that the award is a law of the Commonwealth within the meaning of s.109 but that the *Conciliation and Arbitration Act* constitutes the inconsistent Federal law inasmuch as it means that an award purporting to make an exhaustive regulation shall be treated as the exclusive determination of the industrial relations which it affects.

(See also Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 466 at 490-491 per Isaacs J: "the Commonwealth Act ... indicates its intention that, however extensive the dispute may be, the Arbitration Court is to investigate and decide it and every part of it so as to end the dispute ... As to the industrial conditions in dispute, an award by force of the Act covers the field" (emphasis in original) and Ex parte McLean (1930) 43 CLR 472 at 484 per Dixon J: "the Act ... enable[s the arbitrator] to prescribe completely or exhaustively what upon any subject in dispute shall be [the disputants] industrial relations" and s.109 thus has the effect of giving the award "an exclusive operation which might appear equivalent almost to paramountcy".)

44. By contrast, the plaintiff expressly disavows any contention that the Commonwealth law in this case evinces a legislative intention to deal completely and exclusively with the law governing a particular subject matter: paragraphs 58-59. It is difficult, on that basis, to understand what analogy the plaintiff says can usefully be drawn with the industrial award cases.

Express provisions dealing with the interaction between Commonwealth and State law (and their absence)

45. It is also noteworthy that Commonwealth industrial conciliation and arbitration legislation considered in these cases included provisions expressly providing for the paramountcy of Commonwealth awards over inconsistent State legislation: see s.30 of the Conciliation and Arbitration Act 1904 (Cth), being the legislation considered in the cases cited in the plaintiff at paragraph 17 (noting that s.30 was repealed but substantially reenacted as s.43M and renumbered as s.51 by ss.8 and 26 of the Conciliation and Arbitration Act 1947 (Cth); itself repealed but substantially reenacted as s.16BA and renumbered as s.65 by ss.7, 10 and 54 of the Conciliation and Arbitration Act 1956 (Cth)) and, in relation to Jemena, ss.152(1) and 170LZ(1) of the Workplace Relations Act 1966 (Cth) prior to 27 March 2006, and s.17(1) of that Act on and after 27 March 2006).

46. While such a provision (or a provision providing for the obverse, that is, expressly preserving the concurrent operation of State laws) cannot be determinative of the question whether s.109 is engaged, it assists in the construction of the operative provisions of the statute: Momcilovic at 119-121 [267]-[272] per Gummow J (French CJ agreeing at 74 [111] and Bell J agreeing at 241 [660]), at 134 [316] per Hayne J and at 238-239 [654] per Crennan and Kiefel JJ. And similarly, the absence of such a provision can be significant: at 122 [276] per Gummow J.

47. In the current case the statute displays both features, operating at different levels: at the level of generality, section 8 expressly provides that the NTA is not intended to affect the operation of any law of a State or Territory that is capable of operating concurrently with the NTA (in the familiar form discussed in R v Credit Tribunal; Ex Parte General Motors Acceptance Corporation (1977) 137 CLR 545). In addition, looking more specifically at sub-division E, there is a telling absence: there is no provision dealing with the interaction of a registered ILUA and an inconsistent State law akin to the Commonwealth industrial legislation identified above. That matter is rather left to be dealt with by State law, 'as if' it were a contract, and on the same terms as all other contracts.

48. Each of those matters reinforces the construction advanced by NSW and the submission that s.109 is not relevantly engaged.

'Tests' for inconsistency

49. Finally, as regards this issue it is necessary to make three points regarding the plaintiff's attempt to bring itself within this Court's established doctrine regarding s.109. First, the plaintiff invokes Gummow J's notion of the State enactment detracting from an 'implicit negative' to be discerned from the federal enactment: see Momcilovic at 116 [261] and 122 [276] and cf PS [59]. That, as his Honour said at 116 [261], rests upon the notion that the detailed character of the federal law may evince an objective 'intention' (in the sense identified in Zheng v Cai (2009) 239 CLR 446 at 455-456) to deal 'completely and thus exclusively' with the law governing a particular subject matter. But that is the very proposition that the plaintiff says that it does not seek to advance (see again PS [58]). And the Court would reject it in any event because, for the reasons given above, no such intention can be discerned from the NTA that an ILUA would have that effect.

50. Second, the plaintiff also seeks to rely upon the notion that a State law may engage s.109 because it alters, impairs or detracts from the Commonwealth law: PS [8], [9], [53] and [59]. But that notion similarly refers to the circumstance where there is to be discerned an 'intention' that the Commonwealth law will operate to the exclusion of a relevant State law: New South Wales v Commonwealth (1983) 151 CLR 302 at 330 per Mason J. And that again turns upon the proper construction of the Commonwealth law: Grace Brothers Pty Limited v Magistrates Court (NSW) (1988) 84 ALR 492 at 503-504 per Gummow J and see eg Lacey v Attorney General (Qld) (2011) 242 CLR 573 at 592 [44].

51. Third, as those first two points suggest, the plaintiff's submissions on those matters largely reduce to a recitation of verbal formulae used in earlier decisions. There is, as Gummow J observed in Momcilovic at 112 [245], a danger that such an approach will obscure the principal task at hand, being one of statutory construction. And for the reasons given above, properly construed there is no 'real conflict' between the Amending Act and the provisions of the NTA dealing with ILUAs: see Jemena at 525 [42].

Federal Court determinations

52. A State law may be inconsistent with the NTA (and thus inoperative to the extent of that inconsistency pursuant to s.109 of the Constitution) where it alters, impairs or detracts from the conferral of jurisdiction under s.87 of the NTA by "directly or indirectly precluding, overriding or rendering ineffective an actual exercise of that jurisdiction" (that is, the making of an order by the Federal Court in the exercise of that power): P v P (1994) 181 CLR 583 at 601, 603 per Mason CJ, Deane, Toohey and Gaudron JJ.

53. But that is not the case here. The plaintiff's attack focuses upon those aspects of the Determinations that determined that native title exists over the relevant areas and determined that the nature and extent of other rights and interests in relation to the relevant area were as set out in a schedule to each Determination: PS [39], [40], [50]. Those matters were each aspects of the making of 'a determination of native title' and were required to be included in the Determinations by force of s.94A, read with s.225. The latter provides that a determination of native title is a determination as to 'whether or not native title exists in relation to a particular area' and if it does exist a determination of:

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease--whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

54. As is clear from those matters (each of which was required to be addressed in the determination of native title), such a determination is directed to rights and liabilities as they exist at a particular point in time (the date upon which the order is made). An

order addressing such matters will not preclude the doing of 'future acts' affecting the native title of the Quandamooka people recognised by those determinations. Any such acts purporting to affect native title after the date of the order would rather fall to be dealt with (in the manner outlined above) in accordance with Division 3 of Part 2 of the NTA.

55. Again, the scheme of the NTA plainly contemplates that operation. For example Subdivision B of Division 3 of Part 2 (ILUAs (body corporate agreements)) necessarily proceeds upon such an assumption. For that subdivision deals specifically and exclusively with ILUAs where there is already a native title determination in force: see s.24BC and s.193 read with the definition of "registered native title body corporate" in s.253. That is, the statutory object of that subdivision is to allow parties who have the benefit of a native title determination to make agreements about, inter alia, future acts: note s.24BB(a). Those provisions would have little work to do if the doing of such acts was, in any event, precluded by the making of a determination. This demonstrates a legislative intention that the detailed regime in Division 3 of Part 2 would continue to operate following a determination of native title, whether that determination be by consent under s.87 or otherwise.

56. And so where, as here, the act in question is the making of a State statute, that will not alter, impair or detract from the operation of the law conferring jurisdiction on the Federal Court so as to engage s.109, unless it purports to provide that the rights and liabilities of the parties as at the date of the making of the Determinations were other than as contained in the order. The Amendment Act did not do so. The plaintiff's further contention (PS [51]) that the orders of the Federal Court were "premised upon the continued and unaltered existence of the Principal Act" finds no basis in the terms of the Determinations.

57. As to what is said by the plaintiff at PS [55], the same answer applies. And, in any event ss. 13(1)(b) and (5) of the NTA expressly provide for the variation or revocation of an approved determination where 'events have taken place since the determination was made that have caused the determination no longer to be correct'. That, as this Court observed in Western Australia v Ward (2002) 213 CLR 1 at 71-72 [32], gives such a determination an 'indefinite character' which 'distinguishes it from a declaration of legal right as ordinarily understood in such authorities as

International General Electric Co of New York Limited v Commissioners of Customs and Excise [1962] Ch 784 at 789'. And so, even if the determination is 'no longer correct' by reason of the making of the Amendment Act, the statute has anticipated that possibility and provided for it.

58. Question 2 should be answered 'Unnecessary to answer' on the basis that the answer to Question 1 is 'No'. If Question 1 were to be answered 'Yes', then Question 2 should be answered 'No'.

Racial Discrimination Act

59. NSW understands that the plaintiff does not press this aspect of its submissions (PS [57]) and does not address those aspects of its argument.

Part VI:

60. NSW estimates that 20 minutes should be sufficient to present its oral argument.

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