IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B26 of 2014

BETWEEN:

**QUANDAMOOKA YOOLOOBURRABEE ABORIGINAL CORPORATION RNTBC**
Plaintiff

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and

**STATE OF QUEENSLAND**
Defendant

# ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING)

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**Part I: Certification**

1. This submission is in a form suitable for publication on the internet.

**Part II: Basis for intervention**

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth).

**Part III: Leave to intervene**

3. Not applicable.

**Part IV: Applicable legislative provisions**

4. South Australia adopts the Plaintiff's statement of the applicable legislative provisions.

**Part V: Submissions**

5. South Australia's submissions are confined to question [2] of the special case.[1]

6. In summary, South Australia submits:

   i. the relevant provisions of the *Native Title Act 1993* (Cth) (**NTA**) do not operate to confer upon Indigenous Land Use Agreements (**ILUAs**) the force and effect of a "law" for the purposes of s109 of the Constitution because;

      a. section 24EA(1) of the NTA confers upon an ILUA the status of a common law contract;[2]

      b. section 24AB(1) of the NTA establishes a lexical order for the application of provisions in Div 3 of Part 2 for the purposes of validation of future acts but does not thereby elevate the status of an ILUA to that of a "law" for the purposes of s109 of the Constitution; and

   ii. there is no inconsistency between the *North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013* (Q) (**2013 Amendment Act**) and the consent orders made under s87 of the NTA, and so any potential question about the application of s109 and the Federal Court's determinations does not arise.

**A The Legislative Scheme**

**(i) Introduction of ILUAs**

7. ILUAs were introduced into the NTA by the *Native Title Amendment Act 1998* (Cth) (**1998**

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1 SCB, 10.

2 *Native Title Act 1993* (Cth) (**NTA**) s 24EA(1)(a); *QGC v Bygrave (No 2)* (2010) 189 FCR 412 at 432 [63] (Reeves J).

**Amendments**) as part of the Commonwealth's "10 point plan", which was a response to the decision in *Wik Peoples v Queensland*.[3] Prior to that time, s21 of the NTA made general provision for the surrender of native title and the authorisation of "future acts" by agreement with native title holders.[4] Section 21 was considered inadequate because of uncertainty in some cases of whether native title existed or who the relevant native title holders were and thus there were perceived uncertainties attaching to the legal agreements made pursuant to s21.[5] Those uncertainties were addressed in the 1998 Amendments in three ways: first, by assigning statutory priority to ILUAs over other means of validation of future acts in the NTA;[6] second, by providing that registered ILUAs are binding on native title holders even in the absence of a determination and even where not all of the native title holders are parties to the ILUA;[7] and third, except in very limited circumstances[8], by restricting compensation to that payable under an ILUA.[9]

*(a) Three types of ILUA*

8. "Indigenous Land Use Agreement" is defined in s253 of the NTA by reference to the definitional provisions in ss24BA, 24CA and 24DA under subdivisions B, C and D within Division 3 of Part 2 of the NTA. Those subdivisions provide for the making of three types of agreements: "body corporate agreements", "area agreements", and "alternative procedure agreements" respectively.

9. The differences between the three types of agreement can be briefly summarised.

10. A "body corporate agreement" provides for the making of agreements with *all* registered native title bodies corporate for an area, where there are registered native title bodies corporate in relation to all the area and may only be made following a determination of native title.[10] So much follows from the definition of "registered native title body corporate" in s253 which proceeds by reference to ss193(2)(e), 193(2)(f) and 193(4), each of which is premised on a pre-existing determination of native title. The scope of matters that may be dealt with in a body corporate

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3 (1996) 187 CLR 1; see also Native Title Amendment Bill 1997 (Cth), Explanatory Memorandum at [1.2] (p. 3) and Ch 2 (pp 15-18).

4 NTA (as at 18 February 1998) s21(1)(a) and (b).

5 See Native Title Amendment Bill 1997 (Cth), Explanatory Memorandum at [7.2] (p. 67) referring to s21 prior to the 1998 amendments.

6 NTA s24AB(1).

7 NTA s24EA(1)(b) and (2). This provision has been described as a radical change from the common law applicable to agreements, which bind parties only: see *QGC v Bygrave (No 2)* (2010) 189 FCR 412 at 432 [62] (Reeves J).

8 Relevantly, compensation is only payable where the exclusions in s24EB(4), (5) and (6) do not apply and the native title holder would be entitled to compensation under s17(2) on the assumption that the compensation was for a "past act": see s24EB(7).

9 NTA s24EB(4)-(6).

10 NTA ss24BC, 24BD(1), 193(1), 193(2)(e), 193(2)(f), 193(4) and 253.

agreement are prescribed in s24BB, including the doing of future acts,[11] the validation of future acts,[12] withdrawing, amending or otherwise varying applications for a determination of native title or compensation applications under s61,[13] and fixing compensation for past, intermediate period or future acts.[14]

11. "Area agreements" provide for the making of agreements with native title claimants where there is no native title determination in relation to all of the area and where there are registered native title bodies corporate for some (but not all[15]) of the relevant area or indeed where there is no registered native title body corporate for the area.[16] The scope of the matters that may be dealt with in an area agreement is prescribed in s24CB and with the exception of the addition of s24CB(g), is the same as that which applies to body corporate agreements. The NTA requires all persons within a native title group to be parties to an "area agreement".[17] Where a native title claimant is registered, the group consists of the registered claimants in relation to the area,[18] all registered native title bodies corporate,[19] and for any non-claimed or non-determined area where there is neither a registered claimant or a registered body corporate, any person who claims to be a native title holder in the claimed/non-determined area, and any representative body for the non-claimed/determined area.[20] In any other circumstance, the native title group consists of any person who claims native title and any representative Aboriginal/Torres Strait Islander body for the area.[21] Importantly, if an agreement provides for the extinguishment of native title rights and interests by surrendering them to the Commonwealth or a State or Territory,[22] the relevant body politic must be a party to the agreement.[23] In other circumstances, the relevant body politic may be a party to an agreement.[24] As with other types of agreement, an area agreement may be given for any consideration and subject to any conditions.[25]

12. "Alternative procedure agreements" provide for the making of agreements in similar terms to area agreements save that alternative procedure agreements are more limited in effect. Such agreements cannot provide for the extinguishment of native title[26] and the non-extinguishment

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11 NTA s24BB(a).
12 NTA s24BB(aa).
13 NTA s24BB(b).
14 NTA s24BB(ea).
15 NTA s24CC.
16 NTA s24CD(3).
17 NTA s24CD(1).
18 NTA s24CD(2)(a).
19 NTA s24CD(2)(b).
20 NTA s24CD(2)(c)(i) and (ii).
21 NTA s24CD(3).
22 See NTA s24CB(e).
23 NTA s24CB(5).
24 NTA s24CB(5).
25 NTA s24CE.
26 NTA s24DC.

principle applies to all future acts covered by the agreement.[27] Alternative procedure agreements can only be made where there is not a registered body corporate for all of the land and waters in the area[28] but there must be at least one registered body corporate for the area or one representative body[29] and all relevant governments must be a party.[30]

13. The NTA provides for registration of ILUAs. The procedure with respect to "area agreements" (the underlying ILUAs in this case) is as follows. Parties to an agreement may apply to the Native Title Registrar[31] for registration of the ILUA if all the parties to the agreement agree.[32] It is a condition of registration[33] that the registrar be satisfied that the ILUA has been "authorised" by the relevant native title group. The NTA prescribes the framework for the authorisation of ILUAs[34] in terms similar to the authorisation of native title determination or compensation applications.[35] On receipt of an application, the Registrar must give notice of the agreement[36] which must include a statement which notifies persons claiming to hold native title of the right to object to registration of the agreement on the ground of a defect of authorisation[37] or for want of consultation.[38] The Registrar's discretion with respect to the decision to register an ILUA is heavily circumscribed by the NTA. Where the statutory pre-conditions are satisfied, the Registrar must register the ILUA.[39] If there is non-compliance with the statutory pre-conditions, the Registrar is prohibited from registering the ILUA.[40]

*(b) Effect of registration*

14. The principal effect of registration of an ILUA is identified in s24EA(1), which provides:

> (1) While details of an agreement are entered on the Register of Indigenous Land Use Agreements, the agreement has effect, in addition to any effect that it may have apart from this subsection, as if:
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> (a) it were a contract among the parties to the agreement; and
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> (b) all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the

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27 See NTA s24EB(3).
28 NTA s24DD(1).
29 NTA s24DD(2).
30 NTA s24DD(3).
31 Defined in s253 by reference to the appointment provisions in Part 5 (s95).
32 NTA s24CG(1).
33 NTA s24CG(3).
34 NTA s251A. Where an ILUA is certified by a representative body, the NTA requires the representative body to be of the opinion that reasonable efforts have been made to identify all persons who hold or may hold native title in the area have been identified and they have authorised the agreement: s203BE(5).
35 NTA s251B.
36 NTA s24CH.
37 NTA s24CH(2)(d) and 24CI.
38 NTA s24CH(2)(d).
39 NTA s24CK(1) and 24CL(1).
40 NTA s24CK(1) and 24CL(1).

> agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be.

15. The terms of s 24EA(1)(a) are clear and express. It may be that the use of the words "as if" show "that the basis of the calculation is to be a hypothesis different from the actual fact."[41] In *Re Macks; Ex parte Saint*[42] McHugh J said "the expression always introduces a fiction or a hypothetical contrast. It deems something to be what it is not or compares it with what it is not."[43] The use of phrases such as "as if" are "a convenient device for reducing the verbiage of an enactment".[44] However, "perhaps paradoxically, it is to be expected that this very lack of verbiage will give rise to various textual awkwardness".[45] When used the words need to be carefully construed to determine the statutory purpose underlying the expression.[46] It may be that the legislature intended to create a statutory fiction or alternatively, the legislature may have made provision for the removal of any doubt which might otherwise arise.[47]

16. In this case, the better view is that the legislature intended the words to serve both purposes. That is, on the one hand, the words "as if" remove any doubt that might otherwise arise with respect to the status of an ILUA. Such a purpose reflects the fact that it may often be the case that a pre-registration ILUA, which is no more than an agreement, might otherwise take effect as a contract at common law. Whether that is so would be a matter to be determined according to principles governing the law of contract. In this context, the words in s24EA(1) remove any doubt about the status to be accorded a registered ILUA by deeming that it take effect as a contract. On the other hand, the words also perform the function of ensuring that the additional statutory consequences arising from s24EA(1)(b) apply to an ILUA; consequences not otherwise attaching to a common law contract. In this way, s24EA(1) creates a fiction by deeming what would otherwise be the case in a conventional contractual setting by extending the binding effect of the ILUA to non-parties. The subsection also confirms that the contractual effect attaching to an ILUA by force of the common law is not in any way removed by the registration of that ILUA on to the Register.

17. The words "in addition to any effect that it may have apart from this subsection" in s24EA(1) advert to the other effects arising from the registration of ILUAs provided for by ss24EB and 24EBA, which concern, amongst other things, validation of prospective[48] and previous (invalid)[49] future acts, the conditional exclusion of the right to negotiate procedure in subdiv P of Div 3 of

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41 *Union Fidelity Trustee Co of Australia Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 177 at 187 (Kitto J).
42 (2000) 204 CLR 158.
43 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 203 [115] (McHugh J).
44 *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65 (Windeyer J); *R v Hughes* (2000) 202 CLR 535 at 551 [24] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
45 *R v Hughes* at 551 [24].
46 *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 at 348 (Rares J).
47 *Macquarie Bank Ltd v Fociri Pty Ltd* (1992) 27 NSWLR 203 at 207 (Gleeson CJ).
48 NTA s24EB(2).
49 NTA s24EBA(2) and (3).

Part 2,[50] the conditional application of the non-extinguishment principle[51] and restriction on compensation.[52]

18. Section 24EA(3) provides:

> If the Commonwealth, a State or a Territory is a party to an indigenous land use agreement whose details are entered in the Register of Indigenous Land Use Agreements, this Act does not prevent the Commonwealth, the State or the Territory doing any legislative or other act to give effect to any of its obligations under the agreement.

19. Section 24EA(3) is facultative; it permits the doing of an act, including the enactment of legislation, to give effect to obligations arising under an ILUA. In so doing, s24EA(3) achieves at least two purposes. First, it reinforces the operation of s8 of the NTA which ensures that the scope of the field covered by the operation of the NTA is not so complete as to preclude the operation of State legislation that is capable of operating concurrently with the NTA. Second, it removes any doubt about the ability of a State to give effect to its obligations under an ILUA without the risk of invalidity attaching to such an act arising from the operation of Div 3 of Pt 2, thus empowering the State to undertake a range of activities[53] to give effect to an agreement.

20. Section 24EC makes clear that subdiv E does not preclude the Commonwealth or States and Territories from making other agreements or legislating in relation to the making of other agreements relating to native title rights and interests "other than agreements consenting to the doing of future acts".

21. As is clear from the above, while the primary purpose of ILUAs is to facilitate agreements to provide certainty with respect to "future acts", ILUAs are also used as a means of compensating native title holders for extinguishment of native title without the need for a formal determination of a compensation application by the Federal Court. While the NTA expressly permits legislative action[54] to give effect to the terms of a registered ILUA or in relation to the making of other agreements (other than agreements consenting to the doing of future acts),[55] it does not expressly regulate the relationship between State legislation and registered ILUAs and expresses no intention in terms equivalent to s51 of the *Conciliation and Arbitration Act 1904* (Cth) at the time of *Collins v Charles Marshall (**Collins**)*.[56] Rather, the validity of any "future act", including the validity of legislative acts that are "future acts", is to be determined in accordance with the detailed

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50 NTA s24EB(1)(c).
51 NTA s24EB(3).
52 NTA s24EB(4)-(7).
53 Such as the granting of a lease to a third party: see Explanatory Memorandum, *Native Title Amendment Act 1998* (Cth), 75 [7.22].
54 NTA s24EA(3).
55 NTA s24EC.
56 (1955) 92 CLR 529 at 548; see [23] and note 61 below.

legislative scheme established in Div 3 of Pt 2 of the NTA.

**(ii) Section 87**

22. Section 87 of the NTA provides for the making of native title determinations by consent. Such determinations must take effect subject to the jurisdiction conferred on the Federal Court by the NTA. There is no doubt that the jurisdiction conferred on the Federal Court by s87 is broad[57] but s87 must also be construed by reference to the Act as a whole.

23. Relevantly, ss8 and 238 encapsulate the twin principles that the NTA is not intended to affect the operation of State laws capable of operating concurrently with the NTA and that, subject to extinguishment at common law and specified exceptions validating certain acts,[58] the non-extinguishment principle applies to acts validly affecting native title rights and interests. This is consistent with the underlying principle that native title rights and interests are subject to Commonwealth and State law: *Mabo v State of Queensland (No 2)*,[59] *Western Australia v Commonwealth (Native Title Act Case)*.[60] It is for this reason that the standard form of order made under s87 of the NTA is expressed in terms that the determination is subject to "the Laws of the State and the Commonwealth" as is the case with the determinations in the present case.[61] Accordingly, while s87 vests the Federal Court with a broad jurisdiction to make determinations by consent, that jurisdiction must be understood to operate in the context of native title law generally, which recognizes the application of Commonwealth and State laws that may validly affect the exercise of native title rights and interests.

## B Constitutional inconsistency

**Section 109 - the applicable principles**

24. The applicable principles underlying s109 are settled. Firstly, "[w]hen a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid": *Victoria v Commonwealth (**Kakariki**)*.[62] Secondly, "if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete

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57 See s87(6) and (7).

58 Divisions 2 and 2A of Pt 2 provide for the validation of "past acts" and "intermediate period acts" respectively. The validation of category A and B "past acts" and category A and B "intermediate period acts" extinguish native title (see ss15(1)(a),(b) and (c) and 22B(a), (b) and (c) respectively) but category C and D "past acts" and category C and D "intermediate period acts" are subject to the non-extinguishment principle in s238 (see ss15(2) and 22B(d) respectively).

59 (1992) 175 CLR 1 at 50-51, 63 (Brennan J), 110 (Deane and Gaudron JJ).

60 (1985) 183 CLR 373 at 422, 469 (Mason CJ, Brennan, Deane Toohey, Gaudron, and Mchugh JJ).

61 **SCB**, Vol 3, 529 and 611.

62 *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (*Kakariki*) (Dixon J); cited (and applied) in *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [28] (the Court); see also *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14] (the Court) applying both *Victoria v Commonwealth* and *Telstra v Worthing* reiterated in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 523 [37]-[38] (the Court).

statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent": *Kakariki* at 630.[63] Thirdly, the notions of "altering", "impairing" or "detracting from" the operation of a Commonwealth law refer to the State law undermining the Commonwealth law in a significant and not trivial manner: *Jemena Asset Management (3) Pty Ltd v Conivest Ltd* (***Jemena***).[64] Fourthly, the tests regarding constitutional inconsistency are for the purposes of discerning whether a "real conflict" exists between a Commonwealth law and a State law: *Jemena* at 525 [42]. Fifthly, the extent of any inconsistency "depends on the text and operation of the respective laws": *Western Australia v Commonwealth (Native Title Act Case)*;[65] *Wenn v Attorney-General (Vic)*.[66] Sixthly, "[t]he expressions 'a law of the State' and 'a law of the Commonwealth' in s109 are sufficiently general for s109 to be capable of applying to inconsistencies which involve not only a statute or provisions in a statute, but also … an industrial order or award, or other legislative instrument or regulation, made under a statute": *Jemena* at 523 [38]. More succinctly, while instruments such as awards are not themselves "laws" of the Commonwealth, they have the force and effect of "laws" where the machinery by which they are made so provide: *Jemena* at 516 [11]; *Clyde Engineering Co Ltd v Cowburn*;[67] *Ex parte McLean*;[68] *Colvin v Bradley Bros Pty Ltd*;[69] *Collins*.[70]

25. The first principle gives rise to the description of "direct inconsistency" and the second "indirect inconsistency". The appropriate focus in applying the second principle is whether the Commonwealth law "cover[s] the subject matter": *Jemena* at 524 [40]; *Ex parte McLean* at 483.

26. If inconsistency is established, the provisions of the State Act are not invalid in the sense of ultra vires the State Parliament: *Carter v Egg and Egg Pulp Marketing Board (Vic)*;[71] *Wenn v Attorney-General (Vic)*;[72] *Jemena* at 525 [44]. Rather, the provisions of the State Act are rendered inoperative to the extent that they conflict with the Commonwealth law.

*Section 109 self-executing*

27. Importantly, the underlying analysis in *ex parte McLean*[73] makes it plain that s109 inconsistency applies by its own force and does not depend upon the terms of a provision replicating the effect

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63 (1937) 58 CLR 618 at 630 (Dixon J).
64 (2011) 244 CLR 508 at 525 [41] (the Court).
65 (1995) 183 CLR 373 at 465 (Mason, Brennan, Deane, Toohey, Gaudron and McHugh JJ).
66 (1948) 77 CLR 84 at 120 and 122 (Dixon J).
67 (1926) 37 CLR 466 at 494-496, 499 (Isaacs J).
68 (1930) 43 CLR 472 at 479 (Isaacs CJ and Starke J), 480 (Rich J), 484-485 (Dixon J).
69 (1943) 68 CLR 151 at 158 (Latham CJ).
70 (1955) 92 CLR 529 at 548-549 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ).
71 (1942) 66 CLR 557 at 573 (Latham CJ).
72 (1948) 77 CLR 84 at 120, 122 (Dixon J).
73 (1930) 43 CLR 472.

of s109. Thus, s109 operated in the industrial awards cases not by reason of the provision in the *Conciliation and Arbitration Act* that expressly prescribed such a result:[74] *Collins* at 548-549; *TA Robinson & Sons Pty Ltd v Haylor.*[75] An express provision of the sort that appeared in the *Conciliation and Arbitration Act* (and now appears in slightly different form in s29(1) of the *Fair Work Act 2009* (Cth)) assists in ascertaining the intention of the Commonwealth Parliament rather than operating of its own effect: *Jemena* at 517 [11]. In that sense, the view expressed in *Dao v Australian Postal Commission*[76] that "it must be remembered that ... the question of inconsistency can arise only because of the provisions of s65 of [the *Conciliation and Arbitration Act*]"[77] is perhaps too broadly stated. It is not s65 which produces that result, but the provisions empowering the making of the award. As a matter of principle, the Commonwealth Parliament cannot produce or avoid s109 inconsistency by recitation; but it can express an intention to deal exhaustively with a particular subject matter and thereby give rise to a construction that speaks to s109 of the Constitution.

## C Application

### (i) Section 24EA and s109

28. There is little doubt that the "future act" provisions of the NTA "cover the subject matter" in so far as the validity of future acts is concerned. So much is apparent from the comprehensive scheme set out in Div 3 of Pt 2, Pt 8A and relevant definitional provisions[78] in the NTA. Taken as a whole, that scheme manifests an intention on the part of the Commonwealth Parliament to deal conclusively with the validity of future acts. Key provisions of Div 3 of Pt 2 also manifest that intention: ss24AA(1)-(4), 24AB, 24OA.

29. The comprehensiveness of the scheme established by the NTA is also evident in the manner in which it deals with ILUAs. Relevantly, the NTA prescribes: the types of ILUA (subdivs B, C, and D of Div 3 of Pt 2); the manner in which ILUAs must be authorised (s251A); who they bind (ss24E(1)(b), 24EA(2)); registration (see eg, ss24BG, 24CG and 24DH and Pt 8A) and the statutory consequences that flow from registration (ss24EA(1)(a); 24EB, 24EBA, 24EC). Accordingly, the text and structure of the NTA manifests an intention to deal comprehensively with future acts and the statutory consequences that arise from the registration of an ILUA.

30. The NTA establishes a lexical order for the application of the validation provisions: s24AB. That

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74 *Conciliation and Arbitration Act* (originally s30, then s51, then s65); *Industrial Relations Act 1988* (Cth) s152(1); *Workplace Relations Act 1996* (Cth) s17(1); *Fair Work Act 2009* (Cth) s29(1).

75 (1957) 97 CLR 177 at 182-183 (the Court).

76 (1987) 162 CLR 317.

77 (1987) 162 CLR 317 at 337.

78 See e.g., definitions of "future act" (s233), "act" (s226), and "act affecting native title" (s227).

lexical order clearly prioritizes the validating effect of ILUAs over the balance of the validating provisions of Div 3 of Pt 2: s24AB(1) and (2). Therefore, to the extent that a future act is validated by the terms of an ILUA its validity is not to be determined in accordance with any other validating provision of Div 3 of Pt 2. Conversely, to the extent that an act is *not* validated by an ILUA, the act *may* be validated by other provisions of Div 3 of Pt 2 in accordance with the lexical order prescribed by s24AB. That result is manifest in the text and structure of Div 3 of Pt 2.

31. In light of the above, the validity of any particular "act" is to be resolved in two steps.

32. The first step concerns the identification and characterisation of the "act" asserted to be a "future act" as defined by the NTA. If the relevant "act" is a "future act", then it is necessary to proceed to step 2. In the present case, the first step involves the construction of the provisions of the 2013 Amendment Act to ascertain whether they affect native title in their terms or legal and practical operation. South Australia makes no submission with respect to the construction of the 2013 Amendment Act. However, if the 2013 Amendment Act does not give rise to a "future act" the questions in the special case, at least with respect to s24EA, do not arise because the validity of the 2013 Amendment Act is not impugned on any other basis under Div 3 of Pt 2.

33. The second step arises if, and only if, the 2013 Amendment Act gives rise to a future act. This is to have its validity determined in accordance with Div 3 of Pt 2 of the NTA. The appropriate inquiry is whether the asserted "future act" is valid by reference to the validating provisions of the NTA applied in their lexical order. Ordinarily, this step involves a comprehensive analysis of the terms of Div 3 in their application to the particular "future act". However, in the present case, the terms of the special case preclude that ordinary analysis. Rather, the special case asks, somewhat abstractly, whether s24EA of the NTA renders the 2013 Amendment Act inoperative by virtue of the terms of a registered ILUA. That is to say, the special case seeks to give s24EA an operation that would render the balance of Div 3 of Pt 2 redundant whenever there was a question concerning the validity of a future act and an existing ILUA dealt with the same subject matter of the relevant "future act".

34. Text and structure as well as principle militate against such a construction.

35. First, such a construction is internally inconsistent with the logic underlying the lexical ordering of Div 3 of Pt 2. Such a construction ought to be avoided in that an Act is to be construed on the "basis that its provisions are intended to give effect to harmonious goals": *Project Blue Sky Inc v Australian Broadcasting Authority*.[79] A harmonious construction of Div 3 of Pt 2 requires subdiv E

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79 (1998) 194 CLR 355 at 381-382 [70] (McHugh, Kirby, Gummow and Hayne JJ).

to be accorded priority in the determination of the validity of future acts. It is not, however, to be accorded exclusivity in the determination of validity because of the existence of an ILUA which deals with the validity of future acts. The ILUA is to be construed in accordance with its terms and will either validate the relevant future act or not. If it does not validate a future act the balance of the NTA operates according to its terms.

36. Second, the lexical ordering of the validating provisions clearly contemplate that a future act may attract multiple bases of validity. What the NTA does is establish an orderly framework for determining which of several possibilities ought to be regarded as determinative. However, if the plaintiff's construction is correct, where an ILUA is registered, and the ILUA deals with particular "future acts", the mere existence of those two elements will positively oust the operation of the balance of Div 3 of the NTA and thus deny what the NTA makes plain: that a future act may be validated by a number of defined routes. While it is certainly the case that an ILUA that specifically validates a future act will conclude any inquiry under the NTA, there is no textual support for the view that an ILUA which takes its effect as a contract ousts the operation of the balance of Div 3 of the Pt 2 in circumstances where the terms of the ILUA do not validate a future act. The terms of s24EA(1)(a) and 24EA(3) do not produce such a result.

37. Section 24EA(1)(a) has a far more limited but important effect. It extends contractual rights to the contract for the period it remains on the register established under s199A. In so doing, s24EA(1)(a) thereby attracts contractual remedies for any breach. It is to be noted that the basis for the removal of an ILUA from the register is limited to fraud, duress and undue influence,[80] terms familiar to the setting aside of a contract at common law.

38. Section 24EA(3) provides certainty in relation to an act that is required in order to give effect to an agreement but where the act may otherwise be invalid under Div 3 of Pt 2. It also reinforces the express terms of s8 which removes any doubt that the NTA precludes the capacity of State's to legislate on matters affecting native title, so long as such legislation is capable of operating concurrently. Further, as a matter of principle, s24EA(3) ought not be construed to presumptively bind or fetter the future capacity of a State Parliament to enact legislation that amends earlier State legislation. While there is no doubt that the Commonwealth Parliament may enact legislation within the scope of the power conferred on it by the Constitution which may produce a result - via s109 - that renders inconsistent State legislation inoperative, the Commonwealth Parliament cannot legislate presumptively to preclude a State from legislating on a subject matter otherwise within the competence of a State Parliament.[81] Any inconsistency is a matter to be determined in accordance with the tests applicable to s109 and not by an *a priori*

80 NTA s199C(3).

81 See, eg, *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR at 424 (Latham CJ).

statutory preclusion that future State legislation is precluded.[82] The relevant constitutional prism for the resolution of disputes concerning the operation of State legislation is provided by s109 and the resolution, always, lies in the construction of the terms of the Commonwealth legislation and the terms of State legislation. Section 24EA(3) does not assist in determining the validity of a future act except in the limited sense in which it expressly permits the doing of a future act that may, but for s24EA(3), attract the operation of s24OA.

**(ii) Section 87 and s109**

39. In the present case, the order of the Court expressly contemplates the enactment of Commonwealth and State legislation.[83] So understood, the terms of the orders recognise and accommodate modifications that may arise for the exercise of determined native title rights and interests as a result of the ordinary operation of Commonwealth and State legislation. The terms of the orders themselves negate the asserted inconsistency with the 2013 Amendment Act. Therefore, the potential application of s109 jurisprudence as contemplated by Gaudron J in *Re Macks; ex parte Saint* does not arise.[84]

40. Any apparent conflict as to the effect of an act affecting native title rights and interests and the rights and interests recognised in a determination of native title made under s87 is to be resolved by recourse to the future act provisions of the NTA. If an "act" is a "future act", and there is an existing determination of native title rights and interests, given the existence of the detailed future act provisions of the NTA, the proper analysis is to proceed to determine validity by recourse to the future act provisions, not by reference to an overarching principle of inconsistency arising between a native title determination and a State Act.

**Part VI: Estimate of time for oral argument**

41. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

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82 *Jemena* at 525-526 [44]-[45] (the Court).
83 **SCB** 529 (see [7a], SCB 529, and [13] "Laws of the State and the Commonwealth", 530, and the same standard inclusions at **SCB** 611 and 612).
84 (2000) 204 CLR 158 at 186 [54].