HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

No. D9 of 2022

BETWEEN:

David Harvey

First Appellant

Thomas Simon

Second Appellant

Top End (Default PBC/CLA) Aboriginal Corporation RNTBC ICN 7848

Third Appellant

and

Minister for Primary Industry and Resources

First Respondent

Northern Territory of Australia

Second Respondent

Mount Isa Mines Limited ACN 009 661 447

Third Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE FIRST AND SECOND RESPONDENTS

Part I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Right to mine

2. Section 24MD(6B)(b) applies to the creation or variation of a "right to mine": **NT [21]-[24]**. As originally enacted, the *Native Title Act 1993* (Cth) (**NTA**) distinguished between "permissible" and "impermissible future acts" (ss 22, 23, 235 and 236 (**Vol. 1 Tab 4**)). Permissible future acts included acts which could be done if native title holders instead held freehold (s 235(5)). That category fell into two sub-categories. The first conferred the same procedural rights as freeholders (s 23(6)). The second conferred elevated "right to negotiate" procedures (ss 26-44). Section 26 identified the acts to which the "right to negotiate" applied, including, relevantly, acts which created a "right to mine" (s 26(2)(a)-(c)). The current statutory scheme reflects the same division between acts that attract the same rights as freeholders, which do not constitute rights to mine (s 24MD(6A)), and those that attract elevated procedural rights, and which comprise a right to mine (s 24MD(6B) and 26(1)(c)) (**Vol. 1, Tab 3**).

3. A "right to mine" is a right of exploration or extraction, or a right to engage in activities necessary for the exercise of such a right: **NT [25]-[30]**. "Right to mine" is not defined, but "mine" is defined non-exhaustively: s 253. That definition expands the ordinary meaning of "mine" (**NT [26]**) by including exploration, the extraction of petroleum or gas, and quarrying. The definition nevertheless focuses on primary acts of production: ***Banjima*** *People v Western Australia (No 2)* (2013) 305 ALR 1, [1053] (**Vol. 4 Tab 30**). It informs the meaning of derivative phrases, such as "right to mine": **NT [29]**.

4. Section 24MD stratifies procedural rights which may be associated with mining: **NT [16]-[18]**. The "right to negotiate" in Subdiv P applies to the grant of a right to mine, which will be followed at least once in relation to each mine. If a miner requires a further right to mine, but this is for the sole purpose of constructing an infrastructure facility associated with mining, the procedures in s 24MD(6B) apply. Where a miner requires tenure for infrastructure that is not for mining, the procedures in s 24MD(6A) apply.

5. The proposed grant of MLN 29881 falls into the last category: **NT [31]**. It would authorise activities physically separate from mining on MLN 1121-1125 to support dredging on MLN 1126: see similarly *Smith v Tenneco Energy* (1996) 66 FCR 1 (**Vol. 4 Tab 36**).

Appellant's Propositions I-III: Composite expression, "right to mine" and "mine" D9/2022

6. The Appellants' primary submission is that s 24MD(6B)(b) is a composite expression and the words "right to mine" create no separate criterion: **AS [30]**. That construction gives the words "right to mine" no work to do: **NT [34]-[35]**. It cannot be reconciled with the statutory scheme, which refers to "right to mine" *simpliciter* (ss 22EA, 22H, 24MB(2)(c), 26(1A), 26A(2), 26B(2), 26C(1) and (1A), 26D, 40 and 43B), and where s 24MD(6B) operates as an exception to s 26(1)(c), which applies to "rights to mine": **NT [24], [37], [39]**. The Full Court's construction gives s 24MD(6B)(b) work to do when "mine" is understood in its extended sense used in the NTA: compare **PJ [132] (CAB 67-8) and J [102], [120]-[127] (CAB 139, 145-9)**.

10 7. The Full Court construed the phrases "right to mine" and "mine" in an orthodox way. Their Honours read the words "right to mine" in the context of s 24MD(6B)(b) as a whole: **J [102], [124] (CAB 139, 147) contra AS [31]**. Their Honours noted that the meaning of "mine" may be influenced by its context: **J [122], [125] (CAB 146-8) contra AS [32]**.

Appellant's Proposition IV-V: standalone provision and "infrastructure facility"

8. Section 24MD(6B)(b) cannot be construed as a "standalone" provision: **NT [38]; J [104] (CAB 140); contra AS [33]** and *Banjima* [1055] **(Vol. 4 Tab 30)**. Section 24MD(6B)(b) operates as an exception to s 26(1)(c), and uses the same language. The words "mine" and "right to mine" are used throughout the NTA, the definition of "mine" was intended to form derivative phrases: **NT [29]**. The words must be given a consistent meaning.

20 9. The definition of "infrastructure facility" in s 253 does not control the meaning of "right to mine": **NT [46] contra AS [32]**. That phrase has work to do beyond s 24MD(6B)(b): s 26(1)(c)(iii)(B). The definition of "infrastructure facility" was drafted for that purpose:

(a) In 1993, the right to negotiate was enlivened by a compulsory acquisition of native title or for the creation of a right to mine: s 26(2)(a) and (d) (**Vol. 1 Tab 3**).

(b) The *Native Title Amendment Bill 1997* (Cth), as originally introduced (**Territory's Book of Further Materials**), proposed altering this by providing that the acquisition of native title for an "infrastructure facility" would not engage the "right to negotiate": s 26(1)(c)(iii)(B). "Infrastructure facility" was defined for this purpose (s 253) and was drafted without regard to the words "right to mine".

30 (c) The *Bill* was amended to insert s 24MD(6B) to introduced a new intermediate tier of procedural rights: *Supplementary Explanatory Memorandum to the Native Title Amendment Bill 1997* (Cth), pp. 19-21 (**JBA Vol. 5 Tab 40**) to address the anomaly that the "right to negotiate" procedures might apply to a "right to mine" for the sole

purpose of constructing infrastructure associated with mining (which would suppress native title), but lesser procedural rights would apply to a compulsory acquisition for that purpose (and which would extinguish native title). D9/2022

(d) The purpose of these amendments was to *lessen* the procedural requirements that would otherwise attach to certain acquisitions and grants of rights to mine, not to create a new category of acts to which more onerous procedures would apply.

Appellant's Propositions VI-VII: the Full Court's "gloss"

10. The Full Court's construction did not "gloss" the statutory language: **contra AS [34], [36]**. The Court employed orthodox principles of statutory construction and said the inquiry would be fact specific: **J [127] (CAB 149)**.

Appellant's Proposition VIII: sole purpose

11. Sections 24MD(6B)(b) and 26(1)(c)(i) do not divide all acts into two categories: those which permit both mining and construction of infrastructure associated with mining, and those which only permit the latter: **contra AS [35]**. That reads s 24MD(6B) as if it applied generically to any "act" (s 226), but the legislature adopted the distinct language of a "right to mine". Sections 24MD(6B)(b) and 26(1)(c)(i) distinguish between "rights to mine" granted for different *purposes*.

Appellants' Proposition IX: Beneficial construction

12. It does not assist the Appellants to say that the NTA is generally "beneficial legislation": **NT [55]-[58]**. No legislation pursues its purposes at all costs and s 24MD(6B) operates as an exception to *lessen* the rights which applied to a particular category of "right to mine". A beneficial approach should not distort the balance reflected in the statutory text.

Banjima

13. *Banjima* (**Vol. 4 Tab 30**) contradicts rather than supports the Appellants' case: **NT [52]-[54]**.

Dated: 5 September 2023

Stephen Lloyd SC