HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D9/2022

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

THIRD RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: PUBLICATION

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

Part II: ARGUMENT

(A) Introduction

2. The Full Court's judgment, that MLA 29881, if granted, was not caught by s 24MD(6B)(b) of the *Native Title Act 1993* (Cth) (**NTA**), was made on two independent bases: *first*, the grant would not create a "right to mine" within the meaning of s 24MD(6B)(b); and *second*, the grant was not for the construction of an "infrastructure facility" within the meaning of s 253. The appellants must successfully impugn both findings to obtain relief. The Full Court was correct on each basis. The appeal should be dismissed.

(B) Right to Mine

3. Section 24MD(6B)(b) is not a "composite" phrase. The appellants' criticisms of the Full Court should not be accepted (**AS [30]-[31]**). *First*, the reasoning of the trial Judge (TJ [130]-[132] **CAB, 67-68**), adopted by the appellants (**AS [27], [29], [33]**), was erroneous: (i) it was premised upon a misreading of *obiter* in *Banjima* [979]-[984], [1053]-[1055] (**JBA Tab 30**); (ii) the provision does not "stand alone"; (iii) it was and is unorthodox to find that part of a phrase (otherwise ignored) is met upon satisfaction of the balance; and (iv) the need to establish a "right to mine" does not render the provision inutile (FC [124], [127] **CAB 147, 149**). *Second*, the Full Court did not "*atomise*" the meaning of the provision (*cf* **AS [31]**). *Third*, the Full Court did not construe "right to mine" divorced from the balance of the provision (*cf* **AS [18], [31]**) (FC [124] **CAB 147**).

4. Section 24MD(6B)(b) comprises two elements: (i) a substantive element: the creation or variation of a "right to mine"; and (ii) a purposive element: the act is for the sole purpose of the construction of an infrastructure facility associated with mining. That conclusion is consistent with the statutory text and context. If an act falls within Subdiv P it is not captured by s 24MD(6B)(b) (s 24MD(6)(a)). The wording of the interconnected provision in Subdiv P, s 26(1)(c)(i), compels the conclusion that s 24MD(6B)(b) is concerned with a specific type of a "right to mine". That is reinforced by all related sections which exclude various types of "rights to mine" from the right to negotiate (**3RS [33], [40]**). Those provisions are to be construed harmoniously: *Project Blue Sky* at [70] (**JBA**, **Tab 23**).

5. Irrespective of whether s 24MD(6B)(b) is bifurcated or a composite phrase, the contention that "right to mine" is a deduction made from the balance of the section is impermissible. *First*, it ignores the principle that each aspect of the composite phrase is to do

work: *WRMF* at [149] (**JBA, Tab 32**); *Second*, the introductory phrase may not be disregarded if, by any other construction, it may be made useful: *Project Blue Sky* at [71] **(JBA, Tab 23).** There is no constructional choice: *Tjungarrayi* at [44]-[45] (**JBA, Tab 24**).

6. The Full Court's conclusion as to the breadth of the phrase "right to mine" in s 24MD(6B)(b) was correct. Without attempting an exhaustive definition, the expression "right to mine" refers to a future act that confers a right to engage in mining activities, which typically involves the exploration for and extraction of minerals (or petroleum or gas) and rights necessary for its meaningful exercise. It is a factual inquiry as to whether the activities authorised are necessary (FC [127] **CAB 149**).

7. *First*, the definition of "mine" in s 253 should be applied to the phrase "right to mine" in s 24MD(6B)(b). No contrary intention is to be found (FC [120] **CAB 145**).

8. *Second*, the appellants' construction (**AS [30]-[33]**) is contrary to the sound rule of construction to give the same meaning to the same words throughout the Act.

9. *Third*, the drafting technique employed is to use the phrase "right to mine" to describe an act subject to the right to negotiate, and then articulate various exceptions to that right.

10. *Fourth*, a "right to mine" is ordinarily created under a State or Territory statute. How "mine" or "mining" is defined in those Acts is relevant: *ICI Australia* at 541, 581 (**JBA, Tab 20**). In each, the primary focus is the extraction of minerals (**3RS [57]**). None of the definitions are consistent with the meaning attributed to right to mine in s 24MD(6B)(b) by the appellants.

11. *Fifth*, the Full Court's interpretation of "right to mine", in an appropriate factual circumstance, can sensibly extend to any of the enumerated categories of "infrastructure facilities" defined in s 253 if such facilities are necessary for the meaningful exercise of mining rights: *Ward* at [308] (**JBA, Tab 26**) (FC [124], [127] **CAB 147, 149**).

12. *Sixth*, although "right to mine" must extend to "the construction of an infrastructure facility associated with mining" (FC [102], [124] **CAB 139, 147**), there is no warrant to extend it indiscriminately to all such facilities. That is another means by which the introductory phrase is ignored (FC [98] **CAB 137**) and is tantamount to reading the words "right to mine" as "grant" or "mineral lease or licence". The preferable approach is to give effect to s 24MD(6B)(b) in a manner which allows the harmonious accommodation of the word "mine" or its derivatives in the NTA: *Project Blue Sky* at [69]-[71] (**JBA, Tab 23**).

13. *Seventh*, it is supported by the legislative history. Those grants governed by s 24MD(6B)(b) were historically categorised as "*rights to mine*" in what was s 26(2)(a) of the

NTA (**JBA, Tab 4**) and were subject to the right to negotiate provisions. The re-enactment of s 26(2)(a) as s 26(1)(c)(i) carved out a subset of "mining rights" (NTA s 25(1)(a)) (FC [44] **CAB 122-3**) – being those that meet the purposive element – and altered and lessened the procedural rights available for "rights to mine" of the stated kind.

14. MLA 29881 (if granted) is not captured by s 24MD(6B)(b). It will authorise the development of an area to deposit and store dredged sediment; activities associated only with the shipment of mined and processed product to oceangoing vessels from a geographically separate mining lease (FC [130]-[133] **CAB 150-1**).

(B) Infrastructure facility

15. The text, context and statutory purpose compel the conclusion that the "infrastructure facility" definition in s 253 is exhaustive. The *obiter* in *Slipper* (**JBA, Tab 37**), is with respect erroneous. The contrary was not argued. The ordinary meaning adopted in *Slipper* was said to be relatively narrow (when it was very broad) and, as applied, comprised solely a dictionary definition of only one part ("infrastructure") of the composite phrase ("infrastructure facility"). The Full Court's finding that the definition was exhaustive should be preferred.

16. *First*, each enumerated thing is squarely an "infrastructure facility" as ordinarily understood (FC [147]-[148] **CAB 156**): *YZ Finance* at 402-3 (**JBA, Tab 28**). *Second*, many types of "infrastructure facilities" are highly specific and exclusionary (FC [149] **CAB 156-7**). *Third*, subparagraph (i) of the definition, which empowers the Minister to determine by legislative instrument that any other thing similar is an infrastructure facility, would be otiose if the definition was inclusive (FC [150] **CAB 157**). *Fourth*, the words of the chapeau are "*any of the following*" (FC [141] **CAB 157**). *Fifth*, there is a discernable statutory purpose for an exhaustive definition. An inclusive definition would materially curtail the right to negotiate in the event of a compulsory acquisition (FC [152] **CAB 157**), and for certain types of "rights to mine" (i.e., processing and treatment plants).

17. MLA 29881, if granted, is not an "infrastructure facility" as defined. It does not enlarge MLN 1126 (*cf* **AS [51], [52]**). It is an area to deposit and store dredged sediment. That it broadly "facilitates" transportation of mined product from MLN 1126 does not make it a transportation facility (FC [159] **CAB 160**). That a peripheral aspect of the area is that it drains supernatant wastewater does not convert it into a "water management facility" nor a "drain or dam". That is not its sole purpose. (FC [160] **CAB 160**).

Dated: 4 September 2023

Roger N Traves KC