HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

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

APPELLANTS' REPLY

Part I: Certification

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

Part II: Reply

2. This reply to the submissions by the Minister and the Territory (**1-2R**) and MIM (**3R**) adopts the defined terms used in the Appellants' submissions in chief (**AS**).

3. ***A composite, single test:*** MIM's contention that the words, "a right to mine for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining", used in s 24MD(6B)(b) of the NTA, do not function as a composite, single test, is not reasonably open: 3R [38] cf 3R [79] that "infrastructure facility" is a "composite phrase". The legislative text does not stipulate two distinct requirements.[1] While the Territory argues that s 24MD(6B)(b) "must be read as being comprised of two elements" (1-2R [21]), it appears to accept that the text must be taken as a whole, contending that the Full Court considered the words "right to mine" in their immediate context: 1-2R [33] citing FC [102], [124] **CAB 139, 147**.

4. The Full Court may have acknowledged that the words "right to mine" are influenced by the reference to an infrastructure facility associated with mining (FC [102] last sentence **CAB 139**), but their Honours acted on the supposition that s 24MD(6B)(b) "defines a future act that satisfies two elements": FC [97] **CAB 137**; contra TJ [130] **CAB 67**. Treating a "right to mine" as a separate functional element caused atomisation and glossing: cf 1-2R [44]; 3R [67]. In place of the statutory text, the Full Court posits that a "right to mine" in the NTA refers to a future act that (1) "confers a right to engage in mining activities" by exploration and extraction, and (2) "encompasses rights necessary for its meaningful exercise": FC [127] **CAB 149**. The second limb appears intended to lessen a perceived "tension" within s 24MD(6B)(b) if a "right to mine" is confined to the extraction of minerals: FC [102] **CAB 139** cf TJ [133] **CAB 68**.

5. The first limb jars with the "sole purpose" test, which, on the Appellants' case, resolves any apparent "tension" and provides greater certainty than the Full Court's "fact specific" gloss: AS [42]–[43]. The exception cannot be engaged if the act confers rights other than to construct an infrastructure facility associated with mining. If it includes rights to explore and extract minerals, the right to negotiate applies instead. The second

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[1] *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415 at [149] (Flick, Mortimer and Banks-Smith JJ) referring to *XYZ v Commonwealth* (2006) 227 CLR 532 at [19] (Gleeson CJ).

limb distorts the words of connection. The infrastructure facility may, or may not, be "necessary for the meaningful exercise" of a right to explore and extract minerals; it might be convenient. The connection is whether it is "associated with mining".

6. ***The NTA in its current amended form:*** The Territory argues that former s 26(2)(a) used a concept of a "right to mine" as "the sole discrimen" for the application of the right to negotiate and, so the argument runs, the 1998 amendment identifies a subset of a right referenced to "the same (already judicially construed) expression". The argument appears to be that the reference to a "right to mine for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining" added in 1998 could not affect some earlier judicially established (and narrower) meaning of what is a "right to mine": 1-2R [36]–[37]; also 3R [42].

7. The submission presumably relies upon *Smith v Tenneco Energy Queensland Pty Ltd*, mentioned at 1-2R [48], which concerned a licence to construct and operate a pipeline.[2] The issue arose in an interlocutory injunction application and was considered in the space of three sentences. After noting the definition of *mine* in s 253 includes extracting petroleum or gas, Drummond J said no more than: "The grant of a licence to carry gas many hundreds of kilometres from the gas well to consumers is not, in my opinion, the creation of a right to mine within s 26(2)(a)".[3] That hardly, with respect, conveys a settled meaning taken to have been adopted by the 1998 amendment.[4] The proposition is remarkable given, as Dixon J said in *Deputy Commissioner of Taxation v Stronach*, the "expression 'mining' is a familiar source of difficulty".[5] All that may be settled is that the meaning of "mine" is readily controlled by context and subject matter.[6]

8. Whatever meaning a "right to mine" may have had before the 1998 amendment, it must now be construed in the light of that amendment,[7] which is not simply a re-enactment

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2 Defined to exclude pipelines at drilling wells: *Petroleum Act 1923* (Qld) s 2; cf s 44(b) petroleum lease conferring rights to construct works necessary to enjoy rights of extraction.

3 (1996) 66 FCR 1 at 5; distinguished in *Re Tjupan Peoples* (1996) 134 FLR 462 at 473 (Member O'Neil).

4 *Re Alcan Australia Ltd; ex parte Federation of Industrial and Engineering Employees* (1994) 181 CLR 96 at 106 (the Court) and noting the criticisms of such an approach: for example, *Flaherty v Girgis* (1987) 162 CLR 574 at 594 (Mason ACJ, Wilson and Dawson JJ).

5 (1936) 55 CLR 305 at 313.

6 *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576 at [13] (the Court) referring to *NSW Associated Blue-Metal Quarries Ltd v Commissioner of Taxation* (1956) 94 CLR 509 at 522 (Dixon CJ, Williams and Taylor JJ): AS [32].

7 *Commissioner of Stamps (SA) v Telegraph Investment Co* (1995) 184 CLR 453 at 463 (Brennan CJ, Dawson and Toohey JJ); *Plaintiff S297/2013 v Minister for Immigration* (2014) 255 CLR 179 at [25] (Crennan, Bell, Gageler and Keane JJ).

of the words "right to mine", without more.[8] The NTA now speaks of a "right to mine" for "the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining". Ascribing to the words "right to mine" a controlling operation (3R [38], [50]) does not give the (added) "sole purpose" of the act work to do in the NTA's intersection with State and Territory mining laws providing for infrastructure mining tenements: FC [124], [127] **CAB 147, 149** referring to s 40(1)(b)(i) and s 44, not s 40(1)(b)(ii), of the MTA: AS [40], [43]; cf 1-2R [35], [40]–[41]; 3R [66], [70].

9. Following the 1998 amendment, infrastructure mining tenements have been considered to engage s 24MD(6B) in decisions of the Federal Court, Native Title Tribunal and the Mining Warden's Court (WA).[9] Many assume so without detailed reasoning (1-2R [53]–[54] re *Banjima*), but that may reflect a consensus that given the amended text, the contrary view is not open.[10] No prior authority controls: cf 1-2R [47]–[54].

10. ***The broadened conception of "mine":*** Confining a "right to mine" in s 24MD(6B)(b) and s 26(1)(c)(i) to the point of a saleable product constrains the inclusive definition of *mine* in s 253: 1-2R [28], [39], [42]. The construction adopted by the trial judge, applying *Banjima*, does not read away the words "right to mine": cf 1-2R [34], 3R [27], FC [98] **CAB 137**. It recognises that the composite phrase used for the mining infrastructure exception in s 24MD(6B)(b) and s 26(1)(c)(i) indicates that *mine* is broader than the focus of that inclusive definition: TJ [130]–[134] **CAB 67–8**.[11]

11. This may be consistent with s 26(1)(c)(i) referring to the creation of a right to mine "whether by the grant of a mining lease or otherwise, except one created for the sole purpose of the construction of an infrastructure facility … associated with mining." A mining lease, as defined in s 245, permits use of the area "solely or primarily for mining". That may concern the focus of the (inclusive) definition of "mine" in s 253 as

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8 *City of Ottawa v Hunter* (1900) 31 SCR 7 at 10; *Baini v The Queen* (2012) 246 CLR 469 at [42]-[45] (Gageler J); Pearce, *Statutory Interpretation* (9th Ed) at [3.38].

9 *Banjima* (2013) 305 ALR 1 at [983]-[985] (rail line); *Narrier v Western Australia* [2016] FCA 1519 at [1143]-[1147] (pipeline and power line), [1151]-[1153] (road) (Mortimer J) – the appeal assumed that the road licence was within s 24MD(6B)(b): *BHP Billiton Nickel West v KN* (2018) 258 FCR 521 at [8]; *Australian Manganese v Western Australia* (2008) 218 FLR 387 at [7] (Sumner DP) (haul road); *Western Desert Lands Aboriginal Corporation* (2009) 232 FLR 169 at [21] (Sumner DP) (roads); *Kurana v Mineralogy Pty Ltd* [2001] WAMW 29 at 8-9, 19-21 (steel plant); *BHP Billiton v Karriyarra Native Title Claimants* [2004] WAMW 22 at [3] (roads, railway); *FMG Pilbara v Yindjibarndi Aboriginal Corp* [2011] WAMW 13 at [1], [78] (railway); *Hunt on Mining Law of Western Australia* (5th Ed) at 344.

10 Cf *Re KL Tractors Ltd* (1961) 106 CLR 318 at 338 (Fullagar J) that a dearth of direct authority may reflect a consensus that the point is untenable.

11 *Banjima* (2013) 305 ALR 1 at [983]-[985], [1053]-[1056] (Barker J); similarly, *Narrier v Western Australia* [2016] FCA 1519 at [1146] (Mortimer J).

the exploration and extraction of minerals, being the conclusion in *Banjima*.[12] A "right to mine" might be created "otherwise" than by a mining lease (as defined). The exception can be engaged by some other kind of mining tenement that has as its "sole purpose" the construction of an infrastructure facility "associated with mining". Or an infrastructure mining tenement may be a "mining lease" but is subject to the sole purpose test, as the extrinsic material suggests: *Supplementary Explanatory Memorandum* pp.19-20, 23.[13] On either view, the structural fit between s 24MD(6B)(b) and s 26(1)(c)(i) is effected by the sole purpose test that ensures the provisions operate harmoniously: AS [32] cf 1-2R [38]; 3R [39], [41]; FC [104] **CAB 140**.

12. ***An interpretative safeguard:*** Contrary to 1-2R [55]–[58]; 3R [46]–[47], the Appellants do not invoke any concept of "generally beneficial" legislation. The point is that an interpretive safeguard of the statutory right to a hearing should be favoured as the words of s 24MD(6B)(b) "present a range of possible meanings": FC [96] **CAB 137**.[14] To say that the NTA is the product of compromise misses the point; nor is it correct that s 24MD(6B) offers no benefit in the protection of native title: 3R [47]; 1-2R [57]–[58]. Section 24MD(6B) provides a right to be heard on the impacts of an act on native title.

13. Not only does giving primacy to the "sole purpose" test to resolve the "tension" within the provision (FC [102] **CAB 139**; TJ [133] **CAB 68**) provide greater certainty than the Full Court's "fact specific" gloss (FC [127] **CAB 149**: AS [42]–[43] cf 1-2R [6], [55]; 3R [29(a)], [51], [73]), but it upholds the right of native title holders to be heard which is designed to "ensure that the special nature of their rights can be taken into account": *Supplementary Explanatory Memorandum* p.19: TJ [132] **CAB 67–8**.[15]

14. ***Infrastructure facility:*** The Territory had supported the Appellants' case that the definition of "infrastructure facility" is not exhaustive: FC [73] **CAB 132**. Despite its role below confined to construction issues (FC [68] **CAB 131**),[16] the Territory now

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12 (2013) 305 ALR 1 at [977]-[984] re s 26(1)(c)(i), [1053]-[1057] re s 245 mining lease, cf [1651]-[1652] whether a general purpose lease under the *Mining Act 1978* (WA) is a category C past act mining lease (s 231), assumed so in *James v Western Australia* (2010) 184 FCR 582 at [3(6)], [4], [43], [83] (Sundberg, Stone and Barker JJ) if invalid; also *Ward* (2002) 213 CLR 1 at [321], [336]-[342] fn (451).

13 Cf *Native Title (Right to Negotiate–Alternative Provisions) (Queensland Laws about Mining Leases) Determination 2000* (Cth) made under s 43 with respect to mining leases within the *Mineral Resources Act 1989* (Qld), including infrastructure mining tenements within ss 234 and 316: see AS fn (38).

14 AS [37] fn (28) citing *Buck v Comcare* (1996) 66 FCR 359 at 364-5 (Finn J); *Australian Postal Corporation v Forgie* (2003) 130 FCR 279 at [64]-[68] (Black CJ, Merkel and Stone JJ).

15 Cf *Plaintiff S297/2013 v Minister for Immigration* (2014) 255 CLR 179 at [64] (Crennan, Bell, Gageler and Keane JJ).

16 TJ [65] **CAB** 39; *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13.

makes no submission and appears content were the appeal to fail on that score: 1-2R [4(a)], [59]. MIM makes two points not previously addressed at AS [44]–[50]. *First*, it contends that an inclusive definition of "infrastructure facility" would narrow the right to negotiate acts of compulsory acquisition by expanding the infrastructure exception in s 26(1)(c)(iii)(B): 3R [83]. *Slipper* suggests otherwise, given that the ordinary meaning requires that the work be a subordinate part of some particular undertaking.[17] *Second*, MIM argues that there is no anomaly in leaving out of the definition various things that would be within the ordinary meaning of an infrastructure facility "associated with mining" on the basis that they will create a right to mine not exempt from the right to negotiate: 3R [85] cf AS [49]. But if that is the sole purpose of the act, the right to negotiate cannot be engaged. It highlights the point that the Full Court gives s 24MD(6B)(b) little or no meaningful operation in relation to infrastructure mining tenements not covered by the right to negotiate because of their (sole) purpose.

15. In relation to pars (f) and (g) of the definition, the Territory submits that if the definition is exhaustive, the Appellants did not contest the application of that construction to the facts: 1-2R [4(a)], [60]. The submission is unclear. On appeal ground 1(2) **CAB 92**, the Appellants contended that if the definition is exhaustive, the trial judge erred in not finding, on the facts, that each of par (f) and (g) applied: see FC [67], [158]–[160] **CAB 131, 160–1**. As for the further arguments on pars (f) and (g), *first*, 3R [86]–[88] is at odds with the findings that the works under ML 29881 are ancillary to mining within s 40(1)(b)(ii) of the MTA by enlarging the DSEA to facilitate the transportation of ore concentrate and, for that reason, are associated with mining within s 24MD(6B)(b) of the NTA: TJ [96], [135] **CAB 53, 68**; FC [135] **CAB 151**. *Second*, 1-2R [61] uses par (f) for an argument that the words in the definition must be met before reading it as part of the substantive enactment (cf AS [48], [51]; FC [159]–[160] **CAB 160**), but on that argument, par (g), referring to a "dam, pipeline or channel or other water management … facility", is met on the facts: FC [162] **CAB 161**; **AFM 185, 207, 257–8**.

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[17] (2004) 136 FCR 259 at [79], [84].