IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P37 of 2018

BETWEEN

Helicopter Tjungarrayi and Others

Appellants

State of Western Australia and Others

Respondents

AND BETWEEN

No. P38 of 2018

KN (Deceased) and Others (Tjiwarl and Tjiwarl #2)

Appellants

State of Western Australia and Others

Respondents

<u>APPELLANTS' JOINT OUTLINE OF ORAL ARGUMENT</u>

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

2. The Full Court erred in holding that an exploration licence is a lease within s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth) (**JBA 3**) by reference to the definitions of lease (s 242(2)), mining lease (s 245) and mine (s 253): *Tjiwarl FC* [72]-[77] **CAB 639-41**; *Ngurra FC* [8]-[12] **CAB 74-5**: contra *Tjiwarl TJ* [1194]-[1210] **CAB 459-61**; *Ngurra TJ* [55]-[59] **CAB 23**.

3. ***Section 242(2)*** provides that "[i]n the case <u>only</u> of <u>references to</u> a mining lease, the expression lease also includes a licence issued, or an authority given, by or under a
10 law" (emphasis added). Section 47B does not refer to a mining lease: cf *Tjiwarl FC* [76] **CAB 641**. Section 242(2):

   (1) ensures that mining licences and authorities which give rights similar to mining leases are treated in the same manner: *Ngurra TJ* [13]-[14], [16], [56]-[58], and quoting at [17] *Tjiwarl TJ* [1205], [1207] **CAB 13, 17, 23**; AS [38]-[39];

   (2) supplies the longer expression where the Act legislates on a "mining lease", not where it refers only to a "lease": AR [5]; *Gibb v Commissioner of Taxation* (1966) 118 CLR 628 at 635 (**JBA 9**).

4. ***The operative references to a "mining lease"*** that engage s 242(2) provide that if a past act (s 228) or an intermediate period act (s 232A) in Pt 2 Divs 2 and 2A is the
20 grant of a mining lease, it is a category C act to which the non-extinguishment principle applies (ss 15(1)(d), 22B(d), 231, 232D, 238), and that a previous extinguishing act in Div 2B that is the grant of a lease does not include a mining lease

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(ss 23B(2)(c)(i), (viii), 249C(1)), unless dissected into a separate construction lease (ss 23B(2)(c)(vii), 229(3)(b), 232B(3)(f), 245(2) (plainly inapt for an exploration licence): *Western Australia v Ward* (2002) 213 CLR 1 at [297]-[302] (**JBA 17**).

5. A reference to the grant of a lease "other than a mining lease" (ss 23B(2)(c)(viii), 232A(2)(e), 232B(3)(g), 249C(1)) or that "is not a mining lease" (ss 230(b), 232C(b)) does not support the conclusion that a reference to a lease includes a mining licence or authority: cf WAS [46], [66]; *Tjiwarl FC* [76] **CAB 641**. Rather, the drafting ensures that something described as a mining lease, licence or authority is treated in the same way as an exception to extinguishing acts, including where the instrument may be a lease because of s 242(1)(c): AR [13]-[14].

6. There is no occasion to read into the references to a mining lease in Divs 2-2B the definition of mine to include explore, let alone into the reference to "lease" in s 47B(1)(b)(i) in Div 4: cf *Tjiwarl FC* [73] **CAB 640**; *Ngurra FC* [8]-[9] **CAB 74**; contra *Tjiwarl TJ* [1206]-[1207] **CAB 461**; *Ngurra TJ* [56] **CAB 23** that "mining" in s 245(1) does not mean explore: AS [39]-[41]. The issuing of a licence to explore, if a past or intermediate period act, is a category D act in Divs 2-2A to which the non-extinguishment principle applies (ss 226(2)(b), 232, 232E), and not being described as a lease (s 242(1)(c)), Div 2B can have no application: AS [34]-[36]. (Similarly, although Div 3 refers to a mining lease, the future act provisions turn on the creation of a right to mine, not the grant of a mining lease: see [7]-[8] below).

7. ***The operative references to "mine"*** that engage the definition in s 253 to include explore are in Div 3 which provide, relevantly, that if a future act (s 233) is a renewal of a lease, licence, permit or authority that "creates a right to mine" (s 26(1A)(c)), or is "the creation of a right to mine, whether by the grant of a mining lease or otherwise" (s 26(1)(c)(i)), or is the "variation of such a right" (s 26(1)(c)(ii)), it attracts the right to negotiate in Sub-div P, subject to certain exceptions (ss 26(1)(c)(i), 26A-26D, 43A), and the non-extinguishment principle applies (s 24MD(3)).

8. A future act might create a right to mine or explore, or both (as is the case with extractive tenements where exploration is incidental to mining): AS [39]; *Mining Act 1978* (WA) s 85(2)(a) (s 8 "mining") (**JBA 5**); *PGER Act 1967* (WA) s 62 (**JBA 7**). That "mine" includes "explore" in a reference to the creation of a right to mine is consistent with the structure of Div 3 (ss 26D(2), 227, 233) and of intersecting resource laws by which the holder of a licence to explore has priority for the grant of an extractive tenement: *Mining Act* s 67; *PGER Act* ss 50, 53. But as Div 3 refers to the creation of a right to mine, whether or not by a mining lease, there is no basis to transpose into its references to "mining lease" the definition of mine (explore) cf

references to "mine" and "mining" (ss 22EA(1)(a) & (2)(b), 22H(1)(a) & (2)(b)), or to "mining" (ss 24GA(2), 24GE(e)(ii), 24IC(1)(e), 24LA(1)(b)(v)): AS [35]-[37].

9. ***The context of s 47B*** confirms the construction adopted at first instance is preferable:

(1) Section 47B(1)(b) stipulates when Crown land is available for claim despite historic extinguishment, that is, land that is not (i) alienated by freehold or lease, (ii) dedicated to a public or particular purpose, or (iii) being resumed for such a purpose. The qualifications on the application of s 47B:

(a) reflect when Crown land is no longer available for disposal or other use, whereas the grant of a mining tenement does not affect the character of vacant Crown land: e.g. *Land Administration Act 1997* (WA) s 8 (**JBA 4**);

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(b) continue prior extinguishment when the land is covered by dealings that are in the nature of extinguishing acts (e.g. ss 23B(2)-(3), 24MD(2)), whereas a mining tenement is not of that nature (see [4], [7] above), and native title will revive where acts of that kind cease to have effect.

(2) In that context, it is incongruous that an authority (a bare licence) to enter land to search for minerals reserved to the Crown, a non-extinguishing event, would be a lease that continues prior extinguishment. The clearest of words (which are not provided by s 242(2)) are needed to read lease in s 47B(1)(b)(i), which ordinarily, and in context, does not comprehend an exploration licence: AS [42]-[43]; *Ngurra TJ* [57] **CAB 23**.

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(3) Alternatively, the Full Court holds that a licence to explore can be a permission or authority under which land is to be used for a particular purpose within sub-par (ii) of s 47B(1)(b): *Ngurra FC* [31], [38] **CAB 81, 84**. To read sub-par (i) as also including an exploration licence construes the qualifications on the application of s 47B more widely than is necessary to achieve their purpose (as to which see (1)(b) above): AS [46]; *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [187] (**JBA 12**).

10. If there is ambiguity, the remedial object of s 47B that land occupied by Aboriginal peoples to which they maintain their connection be restored to traditional ownership when extinguishing acts cease to have effect justifies the construction that a lease in s 47B(1)(b)(i) does not include an exploration licence: AS [43]-[44]; *R v Toohey; ex parte Attorney-General (NT)* (1980) 145 CLR 374 at 388-90 (**JBA 14**); *Ngurra TJ* [57]-[58] **CAB 23**.

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8 November 2018

Sturt Glacken **Stephen Wright**