



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **Yanunijarra Aboriginal Corporation RNTBC**

First Appellant

Walalakoo Aboriginal Corporation RNTBC

Second Appellant

Malarngowem Aboriginal Corporation RNTBC

Third Appellant

10 **Kimberley Land Council Aboriginal Corporation**

Fourth Appellant

and

State of Western Australia

Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

- 20 2. Is a decision of a Government party under s 29(7) of the *Native Title Act 1993* (Cth) (the **NTA**) to include a statement that it considers the act is an act attracting the expedited procedure (see s 237) immune from judicial review?

Part III: Section 78B notice

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citations

4. The reasons for judgment below are:
 - (1) Full Court: *Yanunijarra Aboriginal Corporation RNTBC v Western Australia* (2026) 314 FCR 534 (**FC**) **CAB86**.
 - (2) Primary judge: *Yanunijarra Aboriginal Corporation RNTBC v Western Australia* [2025] FCA 490 (**PJ**) **CAB5**.

Part V: Facts

- 30 5. Each of the First, Second and Third Appellants is a registered native title body corporate determined in accordance with s 56 of the *NTA* to hold in trust the native

title rights and interests of the common law holders in relation to an area of land and waters in the Kimberley region of Western Australia. The Fourth Appellant, Kimberley Land Council Aboriginal Corporation (the **KLC**), is the representative Aboriginal/Torres Strait Islander body under NTA Part 11: PJ[11]–[12].¹

6. In 2023 the **State** of Western Australia, as the *Government party* (s 26(1)(b)), gave notice pursuant to s 29 of the NTA to each of the First, Second and Third Appellants, as a *native title party* (s 29(2)(a)), that the State intended to grant an exploration licence under the **Mining Act 1978** (WA) in relation to an area covered by the determinations of native title, being notices given on:²

- 10 (1) 30 June 2023 to the Third Appellant, Malarngowem Aboriginal Corporation RNTBC (**MAC**) in relation to EL80/5754: PJ[13] **AFM20 (MAC notice)**.
- (2) 8 September 2023 to the Second Appellant, Walalakoo Aboriginal Corporation RNTBC (**WAC**) in relation to EL04/2725: PJ[14] **AFM23 (WAC notice)**.
- (3) 8 September 2023 to the First Appellant, Yanunijarra Aboriginal Corporation RNTBC (**YAC**) in relation to EL04/2725: PJ[14] **AFM25 (first YAC notice)**.
- (4) 22 September 2023 to YAC in relation to EL80/5931: PJ[18] **AFM197 (second YAC notice)**.

7. Each notice included a statement under s 29(7) that the State considers the act, that is, the grant of an exploration licence under Part IV Div 2 of the *Mining Act*, is *an act attracting the expedited procedure* (defined in s 237: see below).
- 20

8. In 2022 the Department of Mines, Industry Regulation and Safety had published a series of documents relevant to the expedited procedure that the Appellants contended evidenced the **2022 Policy** applied by the State when issuing s 29 notices: PJ[24], [86], [88].³ The primary judge referred to the State’s use of a “risk matrix” to assess the level of risk that the National Native Title **Tribunal** might determine that the act does not attract the expedited procedure, if an objection was lodged by a native title

¹ The native title determinations include — First Appellant: *Kogolo v Western Australia* [2007] FCA 1703; Second Appellant: *Shaw v Western Australia* [2020] FCA 1700; Third Appellant: *John v Western Australia* [2019] FCA 697.

² Maps showing some tenement areas overlapping determination areas are at **AFM211, 277**.

³ See affidavits Constance Cocksey 29 February 2024 and annexures CEC1-CEC22 **AFM42-140**, and 11 April 2024 and annexures CEC23-CEC25, CEC30-CEC31, CEC36 **AFM223-264**; affidavit Justine Toohey 21 April 2024 [17]-[31] and annexures JMT22-JMT28 **AFM305-370**.

party: PJ[90(c)]. EL04/2725 was ranked 6–10 (Extremely Low) and EL80/5754 was ranked 11–16 (Low).⁴ The primary judge referred to the impacts of the State’s high volume use of the expedited procedure on native title holders (PJ[91], [97]–[100]);⁵ e.g. Robert Watson that it was “exhausting for us as a community going through these continuous and repetitive processes” (PJ[100(a)])⁶ and Desley Rogers that “we already proved native title, and objecting ... feels like we have to prove it again, every time, again and again”: PJ[100(b)].⁷

9. In relation to the four s 29 notices:

- 10 (1) On 6 November 2023 MAC lodged with the Tribunal an objection against the inclusion of the statement in the MAC notice under s 32(3): PJ[15] **AFM244**.
- (2) On 20 December 2023 WAC lodged with the Tribunal an objection against the inclusion of the statement in the WAC notice under s 32(3): PJ[16] **AFM229**.
- (3) On 21 December 2023 YAC lodged with the Tribunal an objection against the inclusion of the statement in the first YAC notice under s 32(3): PJ[16] **AFM234**.
- (4) YAC did not lodge an objection against the inclusion of the statement in the second YAC notice: PJ[19].

The objections were expressed to be under protest as to the Tribunal’s jurisdiction: see e.g. PJ[15] on the MAC objection **AFM248**.

- 20 10. On 22 December 2023 the Appellants commenced Federal Court proceedings by an originating application (**OA**) accompanied by a concise statement (**CS**) seeking relief in relation to the first three s 29 notices and the 2022 Policy under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**) or s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) (the **JA**) and ss 21 and 23 of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**): PJ[20] **AFM 8, 14**.

11. In relation to the inclusion of each expedited procedure statement in a s 29 notice:

⁴ See affidavit Constance Cocksey 29 February 2024 [41]–[42], [72]–[73] **AFM50-4**, annexures CEC5 risk matrix 1 November 2022, CEC6 risk matrix March 2021, CEC7 risk assessment sheet EL04/2725, CEC8 risk assessment sheet EL80/5754 **AFM84-91**. An assessment of risk document for EL80/5931 was not part of the evidence on the applications which was incomplete: PJ[32].

⁵ See affidavit Justine Toohey 21 April 2024 [68]–[75] **AFM325-7**.

⁶ See affidavit Robert Watson 18 April 2024 esp. [19]–[30] **AFM278**. The quote is from [23].

⁷ See affidavit Desley Rogers 18 April 2024 esp. [18]–[24] **AFM265**. The quote is from [23].

- (1) The relief included a declaration that the expedited procedure statement had no lawful effect, the Tribunal had no jurisdiction to conduct an inquiry in relation to an objection, and the First, Second and Third Appellants have the right to negotiate the notified acts in accordance with s 31(1): OA[2(c)], [3(c)] **AFM11**.
- (2) The grounds of review were that the State failed to perform the task required by ss 29(7) and 237, in particular, that the State applied the 2022 Policy, failed to actively consider on material reasonably available to it whether the s 237 criteria were satisfied, or failed to do so reasonably, on a correct understanding of the law, on the basis of some material: CS[21], [23] **AFM18**.

10 The KLC claimed a declaration that the 2022 Policy and its implementation was inconsistent with the requirements of s 29(7): OA[4(a)], CS[19] **AFM12, 18**.

12. On 22 January 2024 the State filed an objection to competency: PJ[26] **AFM27**.
13. On 5 April 2024 the Appellants filed an interlocutory application seeking leave to amend to add claims for the second YAC notice (PJ [30] **AFM35**) on the same grounds of review with the same claim for declaratory relief, less reference to the Tribunal's jurisdiction: amended OA[3(c)] and CS[24A] **AFM187, 195**.
14. On 12 April 2024 the State filed an interlocutory application seeking summary judgment under FCA s 31A(2) and r 26.01(1)(a) or (d) of the *Federal Court Rules 2011* (Cth) (the **FCR**): PJ[31] **AFM39**.

20 15. On 16–17 May 2024 the primary judge heard the two interlocutory applications. The objection to competency had been overtaken by the State's application: PJ[28].

16. On 15 May 2025 the primary judge gave judgment and ordered that pursuant to FCA s 31A(2) and FCR r 26.01(1)(a) summary judgment be given for the State against the Appellants and dismissed the proceeding **CAB75**. Were it not for acceding to the State's summary judgment application, he would have granted the application for leave to amend to add claims for the second YAC notice: PJ[182].

30 17. The Appellants filed an application for leave to appeal **CAB77**. On 20 November 2025 the Full Court granted leave to appeal and on 12 February 2026 dismissed the appeal **CAB115**. The Full Court noted that the applications for the exploration licences in the first three s 29 notices had been withdrawn but that there remained a matter for decision as the application in the second YAC notice remained on foot. If

an appeal were allowed, on remittal the primary judge would need to deal with the matter generally, including the application for leave to amend to add claims on the second YAC notice: FC[14]–[17].

Part VI: Argument

A. Contextual points

18. The Appellants first seek to clear away the reasoning below that a decision under NTA s 29(7) by a Government party to invoke the expedited procedure is not amenable to judicial review (see Part VIC) and to then, in light of those points, propound the correct construction of the provisions and their limits, and the result that the Courts will, by judicial review, declare and enforce the law which determines the limits (see Part VID).⁸ Two contextual points should first be made.
19. *First*, as the Court observed in the *Native Title Act Case*, compliance with the code set by Part 2 Div 3 of the NTA is essential if future acts by governments are to validly affect native title.⁹ In that connection, if a Government party includes in a notice of its intention to do a future act a statement under s 29(7) that it “considers the act is an act attracting the expedited procedure”, the expedited procedure will apply instead of the normal negotiation procedure (ss 31(1), 32(2)) and the act may be done and will validly affect (extinguish or impair) native title, if the native title party does not lodge an objection with the Tribunal (ss 26(1), 28(1)(c), 32(2), 24MD(1)–(3)).
20. *Second*, on the reasoning below, s 32 will apply, and s 31 will not apply, only because of the fact of the statement in the notice even if the Government party has not considered whether the act meets the s 237 criteria, and that consideration is not subject to the ordinary statutory implication that it be done reasonably, on a correct understanding of the law, on the basis of some material:¹⁰ FC[55], [61]–[65], [74] and see Part VID below. What a Government party does under s 29(7) would be immune

⁸ To borrow from Mason, “The Analytical Foundations, Scope and Comparative Analysis of the Judicial review of Administrative Action” in Lindell (ed), *The Mason Papers* (2007) at 181 referring to, inter alia, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-6 (Brennan J).

⁹ *Western Australia v Commonwealth* (1995) 183 CLR 373 at 453, 470-2 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, Dawson J expressing agreement). Further references to the *Native Title Act Case* are to the joint reasons.

¹⁰ See in particular, *R v Connell; ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430-1 (Latham CJ); *Foley v Padley* (1999) 154 CLR 349 at 353 (Gibbs CJ), 370 (Brennan J); *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at [133] (Gummow J); *Minister for Immigration v SZMDS* (2010) 240 CLR 611 at [23] (Gummow ACJ and Kiefel J) [122] (Crennan and Bell JJ).

from challenge (incontestable)¹¹ despite its consequences for the protection of native title under the Act, which must be seen in light of *Mabo (No 2)* exposing as false the notion that executive power over land can be exercised as if it were the “patrimony of the nation”¹² and despite foundational principles that all government power is limited by law, the Courts declare what the law is, and the executive is to ascertain and comply with the law that limits its power.¹³ It is necessary to start with the terms of the NTA.

B. Applicable statutory provisions

21. The NTA seeks “to rectify the consequences of past injustices by the special measures in” the Act (Preamble) by which native title is recognised and protected in accordance with, and is unable to be extinguished contrary to, the Act (ss 10–11). By the “prima facie sterilisation of all acts which would otherwise defeat native title” done by s 11, the exceptions prescribed by the NTA that “permit the extinguishment or impairment of native title constitute an exclusive code”. It “governs the recognition, protection, extinguishment or impairment of native title”¹⁴ and (by s 7) it is to be read subject to the *Racial Discrimination Act 1975* (Cth) (the **RDA**) that protects native title against *discriminatory* extinction or impairment while the NTA protects native title against *any* extinction or impairment of native title subject to the exceptions it prescribes.¹⁵
22. Part 2 Div 3 of the NTA implements the Act’s objects to protect native title and establish the ways in which future dealings affecting native title may proceed and to set the standards for those dealings (ss 3(a)–(b)). Sub-divisions M and P, in providing that some acts (certain mining interests and acquisitions) must pass the freehold test and be subject to a right to negotiate, express the considerations upon which the Act is based stated in the Preamble¹⁶ that:

In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and, if, whenever appropriate, every reasonable efforts has been made to secure the agreement of the native title holders through a

¹¹ The language in *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [9] (Gummow, Hayne, Heydon and Crennan JJ) in the context of taxing statutes referring to *MacCormick v Commissioner of Taxation* (1984) 158 CLR 622 at 639–40 (the Court); *Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 221–2 (Dawson J). Further references to *Futuris Corporation* are to the plurality.

¹² *Native Title Act Case* (1995) 183 CLR 373 at 480–1; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 31, 52–3 (Brennan J).

¹³ *Abdel-Hady v Commonwealth* [2026] HCA 17 at [1] (Gageler CJ, Gleeson and Beech-Jones JJ).

¹⁴ *Native Title Act Case* (1995) 183 CLR 373 at 453.

¹⁵ *Native Title Act Case* (1995) 183 CLR 373 at 463.

¹⁶ The Preamble has been described as the “moral foundation” of the Act: *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [63] (Wilcox, French and Weinberg JJ.).

special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in manner that has due regard to their unique character.

In *North Ganalanja Aboriginal Corporation v Queensland*, Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ noted that it was inevitable that the common law recognition of native title and its protection by the RDA “would generate novel legal problems” and that the Preamble “indicates the legislative preference for resolving these problems by negotiation.”¹⁷

23. A non-legislative act is a *future act* (s 233) in relation to land or waters if it occurs after 1 January 1994 and *affects* (s 227) *native title* (s 223), that is, if the act is inconsistent with its continued existence or enjoyment (s 227). Unless the NTA provides otherwise, a future act is invalid to the extent it affects native title (s 24OA), that is, it will be of no force and effect (s 253 *valid*) “upon the regime of protection of native title otherwise prescribed by the Act”.¹⁸ Division 3 thus “prescribes the extent to which State law may affect the regime of protection of native title and, in doing so, prescribes the criteria which must be satisfied if the State law is to operate within the area relating to future acts left to it by the Act”.¹⁹

24. In the case of acts covered by Sub-div M that pass the freehold test, for the act to be valid it is also necessary to satisfy the requirements of Sub-div P dealing with the right to negotiate: ss 24AA(5), 24MD(1). Section 26(1) provides that the right to negotiate in Sub-div P applies to a future act if, relevantly, (a) Sub-div M (dealing with the freehold test) applies to the act, (b) the act is done by the Commonwealth, a State or a Territory (a *Government party*), and (c) the act is the creation of a right to mine or a compulsory acquisition, subject to certain exclusions (s 26(2)), including approved low impact mining acts (ss 26A–26C). By s 28(1), an act to which Sub-div P applies “is invalid to the extent it affects native title unless, before it is done, the requirements of one of ... the paragraphs [listed at (a) to (h)] are satisfied”. Sub-div P does not impose on a Government party an obligation to follow particular procedures, nor

¹⁷ (1996) 185 CLR 595 at 613-4. Further references to *North Ganalanja* are to the plurality.

¹⁸ *Native Title Act Case* (1995) 183 CLR 373 at 469.

¹⁹ *Native Title Act Case* (1995) 183 CLR 373 at 470.

prohibit or permit certain conduct. It deals with the consequences of whether or not certain conduct will validly affect native title.²⁰

25. If Sub-div P applies, before the act is done, the Government party must give notice to the relevant *native title party* (s 29(1)–(2)) and by s 29(7):

The notices under this section may include a statement that the Government party considers the act is an act attracting the expedited procedure.

Section 237 provides that:

A future act is an *act attracting the expedited procedure* if:

- 10 (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders ... of native title in relation to the land and waters concerned; and
- (b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders ... of native title in relation to the land and waters concerned; and
- (c) the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

- 20 26. If the s 29 notice does not include an expedited procedure statement, the *normal negotiation procedure* in s 31 applies, which requires good faith negotiation of an agreement, or in default of agreement, an arbitral determination, about doing the act and the conditions upon which it can be done: ss 31(1), 35, 38–39. If the s 29 notice does include an expedited procedure statement, the *expedited procedure* in s 32 applies and if a native title party does not lodge an objection with the *arbitral body* (the Tribunal: s 27(2)), the Government party may do the act and the act will be valid: ss 28(1)(c), 32(2). If a native title party does lodge an objection “against the inclusion of the statement” (s 32(3)), the Tribunal must “determine” whether or not the act attracts the expedited procedure. If it determines that it does, the Government party may do the act and the act will be valid: ss 28(1)(d), 32(4). If it determines that it does not, the normal negotiation procedure will apply: s 32(5).²¹

- 30 27. An act to which Sub-div P applies will be covered by Sub-div M (s 26(1)(a)) and, subject to Sub-div P, the act will be valid (s 24MD(1)) and will extinguish native title

²⁰ *Native Title Act Case* (1995) 183 CLR 373 at 471-2; *Fejo v Northern Territory* (1998) 195 CLR 96 at [17], [20] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) re then Sub-div B.

²¹ An objection may be withdrawn and the Government party may then do the act and the act will be valid (ss 28(1)(e), 32(6)), or an expedited procedure statement may be withdrawn in which case the normal negotiation procedure in s 31 will apply (s 32(7)), and the Tribunal may dismiss an objection for failure to proceed etc (s 148(b)).

or impair (suspend) native title by application of the *non-extinguishment principle* (s 238), depending upon the act: s 24MD(2)–(3). In the case of an act to which Sub-div M applies, other than an act to which Sub-div P applies or an approved low impact mining act (ss 26A–26C), native title parties have the same procedural rights²² as they would have in relation to the act on the assumption they instead hold a freehold title and, in the case of certain (infrastructure) acts, additional statutory rights of objection and consultation (ss 24MD(6)–(6B)).²³

C. The reasoning below

- 10 28. The Full Court accepted that when an expedited procedure statement is included in a s 29 notice, the “government party has made a decision of some kind” that “triggers certain statutory consequences” to disapply the normal negotiation procedure and that the Government party may do the act if an objection is not lodged: FC[61]–[62]. They do not mention that if the act is done, the consequences will be to extinguish or impair the native title rights and interests: s 24MD(2)–(3). The Full Court noted that the legal premise to the general law claims is the same as for the ADJR Act claims that s 29(7) requires the Government party to consider (form an opinion, view etc) whether the act meets the s 237 criteria, and rejected the general law claims for “substantially the same reasons set out” on the ADJR Act claims: FC[73]–[74].

Does a Government party need to “consider” if the act meets the s 237 criteria?

- 20 29. The Full Court rejected the case that s 29(7) requires the Government party to consider (form an opinion, view etc) whether the act meets the s 237 criteria on the basis that, in the context of the ADJR Act claims, s 29(7) does not involve a “substantive determination” as:²⁴

Section 29(7) is not expressed in terms that are conditioned upon the formation of an opinion by the Government party. The provision does not, for example, state that “if the Government party is satisfied” that an act is one attracting the expedited procedure, it may include a statement to that effect in the s 29 notice. Section 29(7) uses the word “considers”, which may be contrasted with the use of “determine” in s 32(4). (FC[63]).

- 30 The Full Court reasoned that it was “significant” that the objection provisions (s 32(3)–(4)) refer to “the *inclusion of the statement* as distinct from (for example) a

²² A *procedural right*, in relation to an act, means “(a) a right to be notified of the act; or (b) a right to object to the act; or (c) any other right that is available as part of the procedures that are to be followed when it is proposed to do the act”: s 253.

²³ See the summary of the three possible alternatives in *Harvey v Minister for Primary Industry and Resources* (2024) 278 CLR 116 at [3] (Gageler CJ, Gordon, Steward and Gleeson JJ).

²⁴ The language in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 (Mason CJ).

decision of the Government party to include the statement or the *formation of an opinion* by the Government party” (FC[64] emphasis in original) and that the objection procedure before the Tribunal is not directed to “demonstrating error in the view formed by the Government party” FC[65] quoting PJ[137]. The significance is unclear. An objection to inclusion of the statement within s 32(3)–(4) simply refers to the decision under s 29(7) that, on the text of s 29(7), is taken when the Government party considers the act attracts the expedited procedures. In any event, those provisions do not cut down what engages s 29(7) and, as acknowledged by the primary judge in the passage quoted at FC[65], that involves forming a “view”.

- 10 30. The distinction made between “considers” and “satisfied” is unsound.
31. *First*, the Full Court construes s 29(7) as if it read “the Government party may include a statement that the expedited procedure applies”, but the text is that a notice “may include a statement that the Government party considers the act is an act attracting the expedited procedure”, that is, the Government party has considered the s 237 criteria.
32. *Second*, as the Court observed in *Wilkie v Commonwealth*, to cast a precondition by reference to the “satisfaction” of the repository of the power invokes an “established drafting technique” used for more than a century to make the holding of a particular state of mind a precondition to the exercise of power.²⁵ The understanding of the legislative object, traced to *Bankstown Municipal Council v Fripp*,²⁶ is to introduce
 20 “into the criterion elements of opinion or belief”, and requiring a decision maker to be “satisfied” of a state of affairs is “an example” of the technique.²⁷ However, a precondition of that kind is not expressed (or implied) uniformly and will exist “be it an opinion, belief, state of satisfaction or suspicion”²⁸ and so forth. In *Australian Heritage Commission v Mount Isa Mines Ltd*, the Commission could enter a place in the Register of the National Estate “where the Commission considers that a place ... should be recorded as part of the *national estate*”, defined with criteria of social and

²⁵ (2017) 263 CLR 487 at [98] quoting *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at [39] (Gageler J).

²⁶ (1919) 26 CLR 385 at 403 (Isaacs and Rich JJ).

²⁷ *Eshetu* (1999) 197 CLR 611 at [130] (Gummow J); *Re Minister for Immigration; ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [54] (McHugh and Gummow JJ).

²⁸ *Plaintiff M70/2011 v Minister for Immigration* (2011) 244 CLR 144 at [57] (French CJ). To that one may add “if it appears”, engaging the need for there to be material before the decision maker to reasonably conclude that the criteria is met e.g. for a show cause notice: *Associated Dominions Assurance Society Pty Ltd v Balmford* (1951) 84 CLR 249 at 263–4 (Dixon, Webb and Kitto JJ). And if formed on the basis of findings of fact, they must be based on some supporting material, unless based on personal knowledge or matters commonly known: *Eshetu* (1999) 197 CLR 611 at [145]–[147] (Gummow J); *Minister for Immigration v Viane* (2021) 274 CLR 398 at [17] (the Court).

environmental significance etc. The decision to enter a place in the Register was reviewable at general law “on the grounds expressed in numerous authorities”,²⁹ and while jurisdictional fact grounds under the ADJR Act were not open, the decision was not “immune from judicial review” on other grounds going to the Commission’s consideration of whether the place met the statutory criteria.³⁰

33. *Third*, Sub-div P deploys the drafting technique by using terms like “considers”, “opinion” and “satisfied” as functional equivalents.³¹ So, for example:

(1) The Minister may determine that an act allowing low impact and small scale mining activities is not subject to the right to negotiate on being “satisfied” that there will be substitute procedural rights (ss 26A(6), 26B(7)),³² and the determination may be revoked if the Minister “considers” that circumstances have changed (ss 26A(8), 26B(9), 26C(4), (5A), (6)).

(2) If the Minister “considers” it to be in the national interest or in the interests of a State or a Territory to overrule a determination of the Tribunal (other than a s 32(4) expedited procedure determination), the Minister may make a declaration that it is overruled or that it is overruled and that conditions set out in the declaration are to be complied with by any parties (s 42(2)).

(3) Alternative State and Territory procedural laws can take effect in place of Sub-div P upon the Minister being “satisfied” as to certain matters, which will occur if, “in the opinion” of the Minister, those laws address certain criteria (ss 25(5), 43(2), 43A(4)).

The terminology is not consistent, but the evident object, as identified in *Fripp*, is to introduce elements of opinion or belief into the criterion for action. There is no reason why “considers” in s 29(7) should be read differently to not serve that object,

²⁹ (1997) 187 CLR 297 at 303 referring to *Buck v Bavone* (1976) 135 CLR 110 at 118-9 (Gibbs J).

³⁰ (1997) 187 CLR 297 at 308.

³¹ And see and compare the criteria in s 10(1) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) that the Minister may make a declaration if “satisfied” as to the significance of an area and has “considered” such other matters he thinks relevant considered in *Tickner v Chapman* (1995) 57 FCR 451 (Black CJ, Burchett and Kiefel JJ).

³² See e.g. Native Title (Approved Exploration etc. Acts–New South Wales) (Mining) Determination 2000 (Cth) with procedural rights in *Mining Act* 1992 (NSW) Part 3 Div 5, and Native Title (Approved Exploration etc. Acts–Queensland) (Low Impact Exploration Permits) Determination 2000 (Cth) with procedural rights in Part 15 Divs 1-2 of the *Mineral Resources Act 1989* (Qld) inserted by s 55 of the *Native Title (Queensland) State Provisions Amendment 1999* (Qld), as considered (reviewed) in *Queensland v Central Queensland Land Council* (2002) 125 FCR 89.

especially where all the provisions (ss 26A–26C, 29(7), 42–43A) operate as carve outs from the right to negotiate adjudged by Parliament as a special measure necessary for the equal enjoyment of the rights to own and inherit property protected by the RDA: see Part VID. That the Tribunal “determines” if the act in fact attracts the expedited procedure, with the consequences specified in s 32(4)–(5), does not bear upon whether (and how) the Government party “considers” the act does, with the consequences specified in ss 31(1) and 32(2): cf FC[63].

34. *Fourth*, elsewhere throughout Div 3 the variable procedural rights that attach to an act in Sub-divs G to N turn upon the objective circumstances of the act without any element of opinion or belief. Compare the scheme in Sub-div P that attaches the expedited procedure on whether the “Government party considers” the s 237 criteria of “not likely” to interfere, disturb etc are met, with that in say Sub-div G dealing with primary production activities on pastoral leases, or Sub-div K dealing with facilities for services to the public, or Sub-div L permitting low impact future acts. The criteria used in those provisions depend upon the actual existence (or non-existence) of the fact or facts to which the provisions refer:³³ see ss 24GB(1), 24GC(1), 24GD(1), 24GE(1), 24KA(1), 24LA(1). The s 237 criteria speak of whether the act is “not likely” to have certain effects on the native title holders’ continued use and enjoyment of the land and waters concerned that involve, as in *Australian Heritage Commission*, “matters of opinion and degree”³⁴ where the decision maker will be subject to the “familiar grounds of judicial review”, but not for want of jurisdictional fact.³⁵
35. *Fifth*, contra FC[70] (adopting PJ[153]), there is some support for the Appellants’ construction of s 29(7) in the legislative history. The *Explanatory Memorandum to the Native Title Amendment Bill 1997* stated (at [20.24]) with respect to the re-enactment of the existing expedited procedure provision (formerly s 29(4)) that: “As under existing NTA, a notice under section 29 may specify that the Government party thinks the act will attract the expedited procedure”. The explanation given by Parliament ought not be ignored when it is consistent with the statutory architecture

³³ See *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391 (Dixon J); *Australian Heritage Commission* (1997) 187 CLR 297 at 303 (the Court); *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 at [38]–[44] (Spigelman CJ).

³⁴ (1997) 187 CLR 297 at 301 (the Court) citing *Buck* (1976) 135 CLR 110 at 118–9 (Gibbs J).

³⁵ *Australian Heritage Commission v Mount Isa Mines* (1995) 60 FCR 456 at 466 (Black CJ) dissenting and approved (1997) 187 CLR 297 at 303–4.

of Div 3 and the interchangeable use within Sub-div P of “considers”, “opinion” and “satisfied” in provisions that operate to modify application of the right to negotiate.³⁶

Fragmentation and uncertainty?

36. The Full Court rejected the construction that s 29(7) requires a Government party to consider (form an opinion, view etc) whether the act attracts the expedited procedure, and would be amenable to review, on the view that that “would be productive of fragmentation” because there “would be two avenues of review” and that this would “give rise to uncertainty” about when the Tribunal’s jurisdiction is engaged and when an act is valid: FC[67]–[68].

10 37. This assumes constructional choice and that certain consequences favour the selection of one construction over another.³⁷ The premise is that if a Government party does not consider whether the act meets the s 237 criteria when invoking the expedited procedure, challenging that results in inconvenience to Government and grantee parties. And the Full Court’s choice is curious when the consequence of treating as valid an act not conforming with the statutory regime will be the extinguishment or impairment of native title unless the native title party undertakes proceedings in the Tribunal: ss 24MD(1)–(3), 28(1)(c), 148(b). That is not likely to be imputed when the right to negotiate regime is an element of the protection of native title which is one of the Act’s main objects.³⁸ The perception of inconvenience also overlooks that if the requirements of Sub-div P are not satisfied, an act is “invalid to the extent that it affects native title” (s 28(1)). For example, a grant may be made without going through the right to negotiate and if it is later determined that native title exists over some part of the lease area, the lease is only invalid in relation to that part of the area.³⁹

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38. Three further points.

³⁶ Cf *Harvey* (2024) 278 CLR 116 at [75]–[76] (Gageler CJ, Gordon, Steward and Gleeson JJ), [108] (Edelman J) on extrinsic material relating to s 26MD(6A).

³⁷ See cases cited *Tjungarrayi v Western Australia* (2019) 269 CLR 150 at [106] (Nettle J).

³⁸ *Smith v Western Australia* (2001) 108 FCR 442 at [23] (French J) on s 237, approved in *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 at [18] (Spender, Sundberg and McKerracher JJ). And in the context of s 47B, see *Tjungarrayi* (2019) 269 CLR 150 at [36] (Kiefel CJ, Bell, Keane and Edelman JJ), [44] (Gageler J), [106] (Nettle J), [127] (Gordon J).

³⁹ See *Explanatory Memorandum to the Native Title Amendment Bill 1997* at [20.27] re amending former s 28(1) that previously provided “the act is only valid if...”. And on such an act not being void, see *Narrier v Western Australia* [2016] FCA 1519 at [1011] (Mortimer J).

39. *First*, there is nothing unusual about a statutory scheme accommodating two avenues of review but here, what the Tribunal does under s 32(4)–(5) is not a review of what the Government party has done under s 29(7). As such, it is not in the *Brian Lawlor* territory where a tribunal’s jurisdiction is engaged by the (mere) fact of the decision because “exclusion from review of decisions made without power would remove from review those decisions most in need of review”:⁴⁰ cf PJ[143]. There are separate pathways to the validity of a future act (s 28(1)(c) and (d)).

40. *Second*, the solution to fragmentation, if that occurs, lies in the discretion to withhold relief.⁴¹ In the scenario posited at FC[68] of a native title party not lodging an objection and later challenging the validity of the s 29 notice after the act was done, acquiescence and waiver is obvious.⁴² Likewise if a native party lodged an objection, participated in an expedited procedure inquiry (ss 75, 139), and later sought to challenge the inclusion of the statement under s 29(7).⁴³ And if the act were done, the supervening interests of the grantee party would likely preclude relief.⁴⁴ (Of course, such considerations are irrelevant for the claims on the second YAC notice where no objection was lodged or for the claim for declaratory relief on the 2022 Policy).

41. *Third*, Sub-div P prescribes the procedures by which an executive act asserting power over public resources may validly affect native title. The procedures should be understood as mandating compliance as essential preliminaries. As with the Warden in *Forrest & Forrest Pty Ltd v Wilson*, the Tribunal’s jurisdiction ought, having regard to that legislative policy, depend upon compliance with the conditions precedent, and the public interest is not served by allowing non-compliance that “might imperil the honest and efficient enforcement of the statutory regime”.⁴⁵

⁴⁰ *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338 at 367 (Smithers J); *Plaintiff M174/2016 v Minister for Immigration* (2018) 264 CLR 217 at [39]–[40] (Gageler, Keane and Nettle JJ), [82] (Gordon J), [95] (Edelman J).

⁴¹ *Futuris Corporation* (2008) 237 CLR 146 at [10] citing *Glennan v Commissioner of Taxation* (2003) 77 ALJR 1195 at [15]–[18] (the Court) and referring to the authorities collected in *Re McBain; ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [279] (Hayne J). Also *Forster v Jododex* (1972) 127 CLR 421 at 438–9 (Gibbs J). In the context of s 16 of the ADJR Act, see *Bond* (1990) 170 CLR 321 at 338–9 (Mason CJ) and Allars, *Australian Administrative Law* (2025) at [15.33].

⁴² *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82 at [53]–[57] (Gaudron and Gummow JJ, Gleeson CJ and Hayne JJ agreeing).

⁴³ *Hoffman-Law Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 320 (Denning MR) considered in *Aala* (2000) 204 CLR 82 at [57] (Gaudron and Gummow JJ).

⁴⁴ Cf *Brown v West* (1990) 169 CLR 195 at 212 (the Court) (declaration); *McBain* (2002) 209 CLR 372 at [279] (McHugh J) (quashing).

⁴⁵ (2017) 262 CLR 510 at [64]–[65] (Kiefel CJ, Bell, Gageler and Keane JJ) cf [115] (Nettle J dissent).

D. The limits on s 29(7) and consequences of breach

42. Having cleared the points put against the Appellants, the proper construction of s 29(7) and its limits, whether a thing done in breach of the limits is denied legal force,⁴⁶ and how that may be enforced, can be stepped out this way.

Implication of the usual reasoning condition

43. First, if, as submitted above, s 29(7) requires the Government party to consider (form an opinion, view etc) whether the act meets the s 237 criteria, there is nothing textually or contextually to displace the ordinary implication that it be formed reasonably, on a correct understanding of the law, and on the basis of some material. As Latham CJ said in *R v Connell; ex parte Hetton Bellbird Collieries Ltd*:⁴⁷

[W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist. A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power.

In *Connell* the power turned on whether an Industrial Authority was “satisfied” that rates of remuneration were “anomalous” within the meaning of the regulation. This presented the question of “whether or not there was evidence upon which the Authority could be satisfied that rates were anomalous”, the prosecutor having submitted that there “was not any evidence upon which a reasonable person could form the opinion that there was an anomaly in the sense of [the regulation]”.⁴⁸

44. Construing s 29(7) as conditioned in this way is consistent with the evaluative nature of the s 237 criteria that presupposes a basis for the opinion expressed in the statement, and with the interaction between ss 29(7), 31(1) and 32(2). It would be odd if Parliament intended that Government parties, the bodies politic acting in the context of the NTA as the guardian of all interests which include those of native title holders,⁴⁹ could invoke the expedited procedure when there were no grounds for including the

⁴⁶ To adapt *LPDT v Minister for Immigration* (2024) 280 CLR 321 at [2]-[4] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

⁴⁷ (1944) 69 CLR 407 at 430.

⁴⁸ (1944) 69 CLR 407 at 435; argument Kitto KC at 422: see the account of *Connell* in *Eshetu* (1999) 197 CLR 611 at [133]-[135] (Gummow J).

⁴⁹ On negotiated claims, see *Western Bundjalung People v Attorney-General (NSW)* [2017] FCA 992 at [20] (Jagot J); *Yaegl People (No 2) v Attorney-General (NSW)* [2017] FCA 993 at [16] (Jagot J).

s 29(7) statement⁵⁰ and as if they did not have to deal fairly with their indigenous people.⁵¹ That jars with the evident object of s 29(7) and the s 237 criteria which calls for Government parties, as “the only repositories of power capable of extinguishing or impairing native title”,⁵² to consider the likely effects of the act on the native title holders’ use and enjoyment of the land under their traditions before deciding whether to invoke the expedited procedure. The good faith obligations imposed on governments in the normal negotiation procedure (s 31(1)) are “directed to obtaining an accord ... in a manner that respects the connection with that land of indigenous people” expressing a “moral conception involving a moral duty” by a Government party to native title parties “to properly engage in a process of negotiation”.⁵³ When the Preamble “indicates the legislative preference for resolving these problems by negotiation”,⁵⁴ why would Parliament intend that a Government party can invoke the expedited procedure other than according to the “rules of reason”?⁵⁵

Lack of force and effect on protection of native title if s 29(7) breached

45. *Second*, as six Justices of the Court said in *Attorney-General (Tas) v Casimaty*:⁵⁶

*Project Blue Sky Inc v Australian Broadcasting Authority*⁵⁷ demonstrates that the statutory consequences of non-compliance with a statutory condition of an exercise of power is as much a question of statutory construction as is the content of the condition. On the proper construction of a statute prescribing such a condition, non-compliance with the condition might result in an exercise of power that is invalid, might result in an exercise of power that is not invalid but that is nevertheless an unlawful act capable of being restrained by injunction, or might give rise only to political, administrative or other non-legal consequences.⁵⁸

The power of a polity to do an act that affects native title will derive from other laws dealing with land and waters, but in order for the act to validly affect native title, it is

⁵⁰ The view taken in *Western Australia v Ward* (1996) 70 FCR 265 at 271 (Lee J); contra *Holt v Manzie* (2001) 114 FCR 282 at [25] (Olney J) that “[t]he option to include the statement is entirely unfettered” but not referring to *Ward*.

⁵¹ See Finn, “Public Trusts, Public Fiduciaries” (2010) 38 *Federal Law Review* 335 at 349-50 contrasting *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342 (Griffith CJ) on the “traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects”.

⁵² *Native Title Act Case* (1995) 183 CLR 373 at 469; also 475, 478.

⁵³ *Brownley v Western Australia* (1999) 95 FCR 152 at [21]-[22] (Lee J).

⁵⁴ *North Ganalanja* (1996) 185 CLR 595 at 614.

⁵⁵ The language of Kitto J in *R v Anderson; ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 quoted in *Minister for Immigration v Li* (2013) 249 CLR 332 at [24] (French CJ) and cited [90] (Gageler J), (2024) 283 CLR 1 at [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

⁵⁷ (1998) 194 CLR 355.

⁵⁸ Citing *Clayton v Heffron* (1960) 105 CLR 214 at 246-7 (Dixon CJ, McTiernan, Taylor and Windeyer JJ); *Miller v Minister for Immigration* (2024) 278 CLR 628 at [25] (the Court).

necessary to conform with the NTA. The sense in which “invalid” is used in the NTA means that if the requirements of Sub-div P are not satisfied, an act is “invalid to the extent that it affects native title” (s 28(1)) in not having force and effect upon the protection of native title prescribed by the Act.⁵⁹

46. If s 29(7) is breached by a failure to consider whether the act attracts the expedited procedure, the statutory consequence is that there is no statement under s 29(7) having legal effect and by s 31(1) the normal negotiation procedure will apply. That construction is compelled by the terms of ss 24MD(1), 24OA and 28(1), and confirmed by the legislative intent expressed in s 25(4) that:

10 If the procedures in this Subdivision are not complied with, the act will be invalid to the extent that it affects native title.

That follows from the observation of the Court in the *Native Title Act Case* that compliance with the code set by Part 2 Div 3 is essential if future acts by governments are to validly affect native title,⁶⁰ the *Forrest & Forrest* analogy that procedures prescribed in a regime conferring powers to grant rights to exploit resources of the State are essential preliminaries,⁶¹ and that native title parties can obtain relief to secure compliance with the NTA’s procedures.⁶² There is no evident reason why that is not so if a Government party’s consideration of the 237 criteria does not conform to reasonableness as a statutory implication of s 29(7)⁶³ or that Parliament intended that the expedited procedure apply on the mere fact of the statement, without more.⁶⁴

Anomalous outcomes: premises to NTA Part 2 Div 3 Sub-div P

47. *Third*, where Sub-div P applies, the assumption is that native title parties will have the special right to negotiate (substantive equality) in place of the freeholder procedural rights (formal equality) in Sub-div M: s 24MD(6). The scheme is informed by the equality of treatment mandated by the RDA and the NTA’s benchmarking of freehold title for the treatment of native title:⁶⁵ s 24MB(1), Preamble and s 7. In the case of certain mining infrastructure tenements, instead of the right to negotiate, native title

⁵⁹ *Native Title Act Case* (1995) 183 CLR 373 at 469.

⁶⁰ (1995) 183 CLR 373 at 453, 467.

⁶¹ (2017) 262 CLR 510 at [7], [64] (Kiefel CJ, Bell, Gageler and Keane JJ) and cases cited. And see *Yanunijarra Aboriginal Corporation v Western Australia* (2020) 276 FCR 53 at [89]-[93] (Rares, White and Banks-Smith JJ) that the approach in *Forrest & Forrest* may apply to Sub-div P.

⁶² *Fejo* (1998) 195 CLR 96 at [33], [39] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); see relief in *Harvey* (2024) 278 CLR 116 at [5], [84] re s 24MD(6B).

⁶³ See *Li* (2013) 249 CLR 332 at [90] (Gageler J) and cases collected fn (185).

⁶⁴ See *Minister for Immigration v Moorcroft* (2021) 273 CLR 21 at [16] (the Court).

⁶⁵ See *Native Title Act Case* (1995) 183 CLR 373 at 483-4.

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parties will have the equivalent freeholder procedural rights under s 24MD(6A) and the additional procedural rights under s 24MD(6B)(b). In Western Australia, s 24MD(6A) will pick up the procedural rights in Part III Div 3 of the *Mining Act* dealing with mining on private land, requiring compensation to be agreed or determined before mining (exploration) commences (s 35),⁶⁶ and rights to object and to be heard on an application in Part IV Div 2 (s 59). Several points follow. First, the exercise of procedural powers under the *Mining Act* may be reviewed on the basis of non-compliance with implied limits on the powers.⁶⁷ Second, as recognised in *Forrest & Forrest*, statutory powers concerning the disposition of public resources exist for the public's interest and as such breach of the procedures will invalidate an act of disposition.⁶⁸ Third, no different analysis should apply to the procedures in the NTA that protect native title in recognition that those resources are not the patrimony of the body politic concerned.⁶⁹ Fourth, to suggest otherwise runs counter to the parity of treatment that was the “fundamental consideration which impelled” the common law recognition of native title⁷⁰ and which underpins the RDA and NTA.⁷¹ Fifth, the procedures must be seen in light of the right to negotiate being adjudged by Parliament in the Preamble as a special measure “as may be necessary” for the equal enjoyment of the rights protected by the RDA, with s 29(7) delineating what is reasonably necessary to attain that object⁷² by carving out acts that are not likely to have the

⁶⁶ See s 8 *mining, mining tenement, private land* but noting entry permits may be granted under s 30 to search and take mineral samples or mark out a tenement

⁶⁷ See, e.g. *Re Minister for Resources; ex parte Cazaly Iron Pty Ltd* (2007) 34 WAR 403 (whether decision to grant tenement affected by *Wednesbury* unreasonableness, forbidden considerations etc); *Forrest & Forrest Pty Ltd v Minister for Mines* (2017) 51 WAR 425 (whether Minister required to have regard to most current material available).

⁶⁸ *Forrest & Forrest* (2017) 262 CLR 510 at [63]-[65] (Kiefel CJ, Bell, Gageler and Keane JJ).

⁶⁹ *Native Title Act Case* (1995) 183 CLR 373 at 453, 480-1.

⁷⁰ *Commonwealth v Yunupingu* (2025) 99 ALJR 519 at [79] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

⁷¹ *Northern Territory v Griffiths* (2019) 269 CLR 1 at [20], [75]-[76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

⁷² Article 1(4) Convention on the Elimination of All Forms of Racial Discrimination; *Gerhardy v Brown* (1985) 159 CLR 70 at 133 (Brennan J), 149 (Deane J); *Maloney v The Queen* (2013) 252 CLR 168 at [18]-[21] (French CJ) [127]-[130] (Crennan J), [178]-[183] (Kiefel J), [302], [356]-[358] (Gageler J) cf [92]-[93] (Hayne J), [242] (Bell J). See also Second Reading on the Native Title Bill 1993 (Prime Minister) that “[a]s indicated in the Preamble, the legislation constitutes a special measure providing as it does significant benefits such as ... a special right of negotiation on grants affecting native title: Hansard 16 November 1993 at 2878; *Explanatory Memorandum to the Native Title Amendment Bill 1997* at [18.25]-[18.26] that “in amending the right to negotiate provisions, the Government is exercising the discretion it has in relation to instituting, maintaining and re-formulating such special measures” and “[i]n the amendments to the procedural rights of native title holders in the right to negotiate (for example ... the power of Ministerial exclusion of ‘approved exploration etc acts’ [s 26A]), care has generally been taken to ensure that native title holders enjoy special rights or rights similar to those enjoyed by non-native title holders” and [20.24] that s 29(7) re-enacted former s 29(4).

effects on the enjoyment of native title stipulated in s 237 if “the Government party considers” the act meets those criteria.

48. In those settings, the notion that a Government party has an unfettered option to invoke the expedited procedure and avert the legislative preference for negotiations,⁷³ without judicial scrutiny of whether a Government party has considered if the act meets the s 237 criteria, jars with the premises of the future act regime.⁷⁴

General law declaratory relief

- 10 49. *Fourth*, if, as submitted, s 29(7) is subject to the usual statutory implication, whether, consequentially upon the inclusion of an expedited procedure statement under s 29(7), the normal negotiation procedure in s 31 does not apply and the expedited procedure in s 32 does apply, is a legal controversy involving a matter under federal law to be properly quelled by declaratory relief. YAC seeks to vindicate the claimed right that the normal negotiation procedure applies and to attack the claim by the State, expressed in the s 29 notice, that it does not.⁷⁵ Invoking federal jurisdiction for that claim for declaratory relief affords a remedy that operates “to declare invalidity and restrain the implementation of invalid exercises of power”.⁷⁶ And because there is “an absence of the *Bond* restrictions in the alternative avenues of review under ... s 39B of the *Judiciary Act*”,⁷⁷ the Full Court erred to reject the general law claims for the reasons given on the ADJR Act claims that were tethered to a (*Bond*) distinction
- 20 between a “procedural step” and a “substantive determination”: FC[60]–[63], [74].

ADJR Act claims

50. *Fifth*, whatever be the precise scope of any “*Bond* restrictions” post *Griffith University v Tang* for the operation of the ADJR Act (ss 3, 5), a decision of a Government party to invoke the expedited procedure under s 29(7) affects legal rights by force of the enactment providing for new rights and obligations consequentially upon that decision (as specified in ss 28, 31 and 32).⁷⁸ The NTA is “the source of the decision’s legal effect”.⁷⁹ The resulting engagement of the ADJR Act is not lessened by any supposed

⁷³ *North Ganalanja* (1996) 185 CLR 595 at 614.

⁷⁴ Cf *Holt v Manzie* (2001) 114 FCR 282 at [25] (Olney J) .

⁷⁵ See *Edwards v Santos Ltd* (2011) 242 CLR 421 at [34]–[45] (Heydon J, other Justices agreeing).

⁷⁶ *Futuris Corporation* (2008) 237 CLR 146 at [47].

⁷⁷ *Griffith University v Tang* (2005) 221 CLR 99 at [62] (Gummow, Callinan and Heydon JJ).

⁷⁸ Cf *Tang* (2005) 221 CLR 99 at [89] (Gummow, Callinan and Heydon JJ); *Fuller v Lawrence* (2024) 282 CLR 512 at [13]–[15] (the Court).

⁷⁹ *Glasson v Parkes Rural Distributions Pty Ltd* (1984) 155 CLR 234 at 241 (the Court) quoted in *Tang* (2005) 221 CLR 99 at [76].

distinction between a procedural step and a substantive determination: cf FC[61]–[62]. In any event, the concept of a “substantive determination” adopted by the Full Court (FC[62]) reflected the concern in *Bond* of challenges to intermediate stages of decision-making.⁸⁰ It is inapt here as the action taken by a Government party under s 29(7) is not a step in decision-making by a Government party; it is the decision by a Government party that produces the effects specified in ss 28(1)(c), 31(1), and 32(1).

Disposition: triable issue

- 10 51. Finally, the Full Court said “that it was unnecessary to reach a conclusion as to whether the inclusion of an expedited procedure statement in a s 29 notice can *ever* be amenable to judicial review under the general law” on the basis that the “claims in the present case are not maintainable”: FC[75] emphasis in original. However, the basis for summary judgment was that such a decision is not reviewable, at all, not that the particular grounds could not be sustained: FC[4]–[6]. If there is a possibility of judicial review in some circumstances, whether the particular grounds engaged those circumstances was properly a matter for trial.⁸¹

Part VII: Orders

52. The Appellants seek the orders in the notice of appeal **CAB125**.

Part VIII: Time estimate

53. The Appellants estimate that 1.5 hours will be required for oral argument in chief.

20 **Dated: 29 July 2026**



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⁸⁰ See *Tang* (2005) 221 CLR 99 at [29], [61] (Gummow, Callinan and Heydon JJ) referring to *Bond* (1990) 170 CLR 321 at 337 (Mason CJ).

⁸¹ *Spencer v Commonwealth* (2010) 241 CLR 118 at [31] (French and Gummow JJ), [46] (Hayne, Crennan, Kiefel and Bell JJ), [61] (Heydon J).

ANNEXURE TO APPELLANTS' SUBMISSIONS

No	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	<i>Administrative Decisions (Judicial Review) Act 1977</i> (Cth)	22 January 2026 (Compilation 131)	ss 3, 5, 16	Currently in force; relevant provisions unchanged.	
2.	<i>Federal Court of Australia Act 1976</i> (Cth)	11 December 2024 (Compilation 59)	ss 21, 23, 31A	Currently in force; relevant provisions unchanged.	
3.	<i>Federal Court Rules 2011</i> (Cth)	11 June 2026 (Compilation 11)	r 26.01(1)(a), (d)	Currently in force; relevant provisions unchanged.	
4.	<i>Judiciary Act 1903</i> (Cth)	11 December 2024 (Compilation 51)	s 39B	Currently in force; relevant provisions unchanged.	
5.	<i>Mining Act 1978</i> (WA)	28 May 2026	s 8, Part III Div 3, Part IV Div 2	Currently in force; relevant provisions unchanged.	
6.	<i>Mining Act 1992</i> (NSW)	30 May 2000 to 22 December 2000 (Reprint No 3)	Part 3 Div 5	Date of the determination Minister under s 26A NTA	17 October 2000
7.	<i>Native Title Act 1993</i> (Cth)	12 June 2024 (Compilation 50)	Preamble, ss 3–10, Part 2 Div 3, ss 56, 75, 139, 148–149, 162, 213, 223, 227, 233, 237, 238, 253	Currently in force; relevant provisions unchanged.	
8.	<i>Native Title (Queensland) State Provisions Amendment 1999</i> (Qld)	As enacted	s 55 (to the extent inserting Part 15 Divs 1-2 into <i>Mineral Resources Act 1989</i> (Qld))	Provisions considered for purposes of determination under s 26A NTA	31 May 2000