HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No P37/2018

HELICOPTER TJUNGARRAYI & ORS APPELLANTS

AND

STATE OF WESTERN AUSTRALIA & ORS RESPONDENTS

Matter No P38/2018

KN (DECEASED) AND OTHERS (TJIWARL AND TJIWARL #2) APPELLANTS

AND

STATE OF WESTERN AUSTRALIA & ORS RESPONDENTS

Tjungarrayi v Western Australia
KN (deceased) and Others (Tjiwarl and Tjiwarl #2) v Western Australia
[2019] HCA 12
17 April 2019
P37/2018 & P38/2018

ORDER

Matter No P37/2018

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 16 March 2018 in proceeding WAD 444 of 2017 and, in their place, order that the appeal to the Full Court be dismissed.*

Matter No P38/2018

1. *Appeal allowed.*

2. *Set aside orders 1 and 2(c) made by the Full Court of the Federal Court of Australia on 1 February 2018 in proceeding WAD 218 of 2017 and, in place of order 1, order that the appeal be allowed in part.*

On appeal from the Federal Court of Australia

Representation

S A Glacken QC with S J Wright SC for the appellants in each matter (instructed by Central Desert Native Title Services)

J A Thomson SC, Solicitor-General for the State of Western Australia, with G J Ranson for the first respondent in each matter (instructed by State Solicitor's Office (WA))

Submitting appearances for the third respondent in P37/2018 and the third to tenth, twelfth, thirteenth and sixteenth respondents in P38/2018

No appearance for the second respondent in P37/2018 and the second, eleventh, fourteenth and fifteenth respondents in P38/2018

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Tjungarrayi v Western Australia
KN (deceased) and Others (Tjiwarl and Tjiwarl #2) v Western Australia

Aboriginals – Native title rights – Extinguishment of rights – Where s 47B of *Native Title Act 1993* (Cth) provides that any historic extinguishment of native title rights and interests is to be "disregarded" for purposes of claim for determination of native title rights and interests over vacant Crown land – Where s 47B(1)(b)(i) provides that provision does not apply if relevant area is covered by "lease" – Where s 242(2) relevantly provides that "[i]n the case only of references to a mining lease, the expression *lease* also includes a licence ... or an authority" – Where native title claim groups sought native title determinations over land including parcels of unallocated Crown land – Where claim areas intersected with areas covered by petroleum exploration permits granted under *Petroleum and Geothermal Energy Resources Act 1967* (WA) or mineral exploration licence granted under *Mining Act 1978* (WA) ("exploration tenements") – Where native title right to exclusive possession had been extinguished – Whether exploration tenements were "lease[s]" within exclusion in s 47B(1)(b)(i).

Words and phrases – "declared to be or described as a lease", "disregarded", "extinguishment", "historic extinguishment", "in the case only of references to", "lease", "mineral exploration licence", "mining lease", "native title", "non-extinguishment principle", "petroleum exploration permit", "principle of non-discrimination", "textual reference".

Mining Act 1978 (WA), Pt IV Div 2.
Native Title Act 1993 (Cth), ss 47B, 242, 243, 245, 253.
Petroleum and Geothermal Energy Resources Act 1967 (WA), Pt III Div 2.

1 KIEFEL CJ, BELL, KEANE AND EDELMAN JJ. Generally speaking, when native title rights and interests are extinguished the extinguishment is permanent[1]. The rights and interests do not revive even if the act that caused the extinguishment ceases to have effect[2]. However, where any of s 47, s 47A or s 47B of the *Native Title Act 1993* (Cth) ("the NTA") applies, prior extinguishment of native title rights and interests may be "disregarded" for the purposes of a claim to establish native title.

2 In particular, s 47B provides that any historic extinguishment of native title rights and interests is to be disregarded for the purposes of a claim for a determination of native title rights and interests over vacant Crown land. However, by virtue of s 47B(1)(b)(i), the provision does not apply if the relevant area of land is "covered by a ... lease". These appeals raise for consideration the meaning of the word "lease" in this context.

The claims

3 Each of the present appeals arises out of a claim for a determination of native title by a claim group. In each claim there were, in the terminology of the *Land Administration Act 1997* (WA) ("the LAA"), parcels of unallocated Crown land occupied by claim group members[3]. In each claim the traditional laws and customs acknowledged and observed by the native title claim group in relation to the claim area conferred rights to possession, occupation, use and enjoyment of the claim area to the exclusion of all others. The right to exclusive possession had been extinguished by acts of partial extinguishment that occurred before the enactment of the NTA, but non-exclusive rights to access, use and remain on the claim area remained recognisable as native title rights.

4 In each claim the claim group argued that the right to exclusive possession could be recognised as a native title right if the historic extinguishment of that right could be disregarded under s 47B of the NTA. The State of Western

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1 *Native Title Act 1993* (Cth), s 237A; *Fejo v Northern Territory* (1998) 195 CLR 96 at 131 [56]-[58]; [1998] HCA 58; *Western Australia v Brown* (2014) 253 CLR 507 at 523 [39]; [2014] HCA 8.

2 See *Native Title Act 1993* (Cth), s 237A.

3 Section 3(1) of the LAA defines "unallocated Crown land" to mean land "in which no interest is known to exist, but in which native title within the meaning of the [NTA] may or may not exist" and land "which is not reserved, declared or otherwise dedicated under [the LAA] or any other written law".

Australia countered that s 47B did not apply to the extent that the relevant areas were covered by petroleum exploration permits or mineral exploration licences because each such permit or licence was a "lease" within the exclusion in s 47B(1)(b)(i).

5 In Matter No P37 of 2018 ("the Ngurra matter"), the issue is whether a petroleum exploration permit granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) ("the Petroleum Act") is a "lease" within the meaning of s 47B(1)(b)(i). The issue arose because parts of the claim area intersected with parts of the permit areas covered by petroleum exploration permits EP 451 and EP 477.

6 In Matter No P38 of 2018 ("the Tjiwarl matter"), the issue is whether a mineral exploration licence granted under the *Mining Act 1978* (WA) is a "lease" within the meaning of s 47B(1)(b)(i). The issue arose because parts of the claim area intersected with parts of the licence areas covered by several mineral exploration licences. By the time of the appeal to the Full Court of the Federal Court, only mineral exploration licence E57/676 was in issue.

7 For convenience, petroleum exploration permits and mineral exploration licences will be referred to collectively as "exploration tenements".

Native Title Act

8 Section 47B deals with claims for native title determinations pursuant to s 225 of the NTA relating to vacant Crown land. Section 47B(1) identifies the circumstances in which the provision applies. It is in the following terms:

> "This section applies if:
>
> (a) a claimant application is made in relation to an area; and
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> (b) when the application is made, the area is not:
>
> (i) covered by a freehold estate or a lease; or
>
> (ii) covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose; or

(iii) subject to a resumption process (see paragraph (5)(b)); and

(c) when the application is made, one or more members of the native title claim group occupy the area."

9 By operation of s 47B(2), any previous extinguishment by the creation of any prior interest in relation to the claim area must be disregarded for all purposes under the NTA in relation to the application identified in s 47B(1).

10 Further, s 47B(3) relevantly provides:

"If the determination on the application is that the native title claim group hold the native title rights and interests claimed:

(a) the determination does not affect:

(i) the validity of the creation of any prior interest in relation to the area".

11 Within Div 3 of Pt 15 of the NTA, s 241 provides that "[t]his Division contains definitions relating to leases".

12 Section 242 provides:

"(1) The expression ***lease*** includes:

(a) a lease enforceable in equity; or

(b) a contract that contains a statement to the effect that it is a lease; or

(c) anything that, at or before the time of its creation, is, for any purpose, by a law of the Commonwealth, a State or a Territory, declared to be or described as a lease.

(2) In the case only of references to a mining lease, the expression ***lease*** also includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory."

13 A licence or authority that would not otherwise be recognised as a lease may be a lease for the purposes of select provisions of the NTA by reason of the operation of s 242(2). So much is expressly recognised by s 243(2). Section 243 provides:

"(1) Subject to subsection (2), the expression ***lessee*** includes any person who, by assignment, succession, sub-lease or otherwise, acquires, enjoys or is entitled to exercise any of the interests under the lease of a lessee (including of a person who is a lessee because of another application or applications of this section).

(2) In the case of a lease that is a mining lease because of subsection 242(2) (which covers licences and authorities given by or under laws), the expression ***lessee*** means:

(a) the person to whom the licence mentioned in that subsection was issued, or the authority so mentioned was given; or

(b) any person who, by assignment, succession or otherwise, acquires or enjoys the licence or authority or is entitled to exercise rights under the licence or the authority."

14 Sections 242(2) and 243(2) contemplate that an authority or licence may be identified as "a lease that is a mining lease" for the purposes of an operative provision of the NTA by reference to a mining lease in that provision.

15 Section 245 defines a "mining lease" as one kind of lease. Section 245(1) provides:

"A ***mining lease*** is a lease (other than an agricultural lease, a pastoral lease or a residential lease) that permits the lessee to use the land or waters covered by the lease solely or primarily for mining."

16 As s 241 declares, ss 242 and 245 are "definitions relating to leases". Section 242(2) works together with s 245(1) so that where an operative provision of the NTA refers to a mining lease, the mining lease to which reference is made is taken to include a licence or authority that would not otherwise be recognised as a lease for the purposes of the Act. But the meaning of the term "mining lease" in s 245(1) is not itself expanded by the operation of s 242(2). To read the provisions in that way would be to fail to recognise that they work together to provide definitions relating to leases, and would deprive the condition upon the operation of s 242(2) expressed in its prefatory words of its intended effect. It would be as if the prefatory words of s 242(2) were "[i]n the case of s 245(1)".

17 Division 4 of Pt 15 contains further definitions. In particular, s 253 defines "mine" in the following way:

"***mine*** includes:

(a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c)); or

(b) extract petroleum or gas from land or from the bed or subsoil under waters; or

(c) quarry;

but does not include extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or of the bed beneath waters, for a purpose other than:

(d) extracting, producing or refining minerals from the sand, gravel, rocks or soil; or

(e) processing the sand, gravel, rocks or soil by non-mechanical means."

Exploration tenements

18 The rights conferred by the exploration tenements in this case are characteristic of the kind of licence or authority that may be taken to have been in the contemplation of the drafter of s 242(2) of the NTA. It is readily apparent from a review of the rights conferred on holders of exploration tenements that the relatively exiguous rights so conferred are a far cry from the rights characteristic of a lease in the usual sense of the word, particularly the right of exclusive possession[4].

19 Division 2 of Pt III of the Petroleum Act provides for the grant of petroleum exploration permits and petroleum drilling reservations. An application for a petroleum exploration permit may be made under ss 30 and 31. The application may be refused or granted under s 32. The rights conferred by a petroleum exploration permit are set out in s 38(1), which provides:

"A petroleum exploration permit, while it remains in force, authorises the permittee, subject to this Act and in accordance with the conditions to

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4 *Radaich v Smith* (1959) 101 CLR 209 at 222; [1959] HCA 45; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 213; [1973] HCA 7; cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69; [1992] HCA 23.

which the permit is subject, to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area."

20 Section 43 provides that a petroleum exploration permit may be granted subject to such conditions as the Minister specifies in the permit, including conditions with respect to work in or in relation to the permit area. Section 15 provides that, subject to the Act and certain conditions, the authority conferred by s 38 is exercisable on any land within the permit area. Section 91B provides that conditions may prohibit the holder from entering specified land. Section 117 provides that operations must be conducted in a manner that least interferes with the surface of any land and with other rights and uses.

21 Division 2 of Pt IV of the *Mining Act* provides for the grant of mineral exploration licences. An application for a mineral exploration licence may be made under s 58, and the application may be refused or granted under s 59. Section 62 provides that expenditure conditions attach to a licence, and s 63 provides for conditions not to use ground disturbing equipment without approval of a works program and to backfill all disturbances. Other conditions may be imposed under s 63AA to prevent injury to land.

22 The rights conferred on the holder of a mineral exploration licence are set out in s 66:

> "An exploration licence, while it remains in force, authorises the holder thereof, subject to this Act, and in accordance with any conditions to which the licence may be subject –
>
> (a) to enter and re-enter the land the subject of the licence with such agents, employees, vehicles, machinery and equipment as may be necessary or expedient for the purpose of exploring for minerals in, on or under the land;
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> (b) to explore, subject to any conditions imposed under section 24, 24A or 25, for minerals, and to carry on such operations and carry out such works as are necessary for that purpose on such land including digging pits, trenches and holes, and sinking bores and tunnels to the extent necessary for the purpose in, on or under the land;
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> (c) to excavate, extract or remove, subject to any conditions imposed under section 24, 24A or 25, from such land, earth, soil, rock, stone, fluid or mineral bearing substances in such amount, in total

during the period for which the licence remains in force, as does not exceed the prescribed limit, or in such greater amount as the Minister may, in any case, approve in writing;

(d) to take and divert, subject to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act water from any natural spring, lake, pool or stream situate in or flowing through such land or from any excavation previously made and used for mining purposes and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with exploring for minerals on the land."

23 Pursuant to s 67, the holder of a mineral exploration licence has priority for the grant of a mining lease, which confers rights to extract minerals, or a general purpose lease to use the land for purposes directly connected with mining operations, in respect of any part of the land the subject of the licence.

The Tjiwarl matter

24 In the Federal Court of Australia, Mortimer J held that the mineral exploration licence was not a "lease" within the meaning of s 47B(1)(b)(i)[5].

25 On appeal, the Full Court of the Federal Court of Australia (North, Dowsett and Jagot JJ) disagreed, holding that the mineral exploration licence was a "lease" within s 47B(1)(b)(i). Their Honours reasoned as follows[6]:

> "The defined word 'mine' in s 253 of the NTA is a verb. The verb includes 'explore or prospect for things that may be mined'. By s 253, this meaning must be given to 'mine' in the NTA, unless the contrary intention appears. It follows that cognate words, such as 'mining', are to be construed consistently with the word 'mine' (s 18A of the *Acts Interpretation Act 1901* (Cth)).
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> The scheme established by Div 3 of Pt 15 is clear. There is no reason not to give the word 'mining', wherever it appears in Div 3, the meaning given to 'mine' by s 253. Accordingly, when s 245 refers to a

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5 *Narrier v Western Australia* [2016] FCA 1519 at [1207].

6 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521 at 539 [72]-[73].

> mining lease being a lease that permits land to be used solely or primarily for the purpose of 'mining', the word 'mining' is to be given the same meaning as 'mine' in s 253. As a result, a lease that permits the lessee to use land solely or primarily for exploring or prospecting for things that may be mined is a lease that permits use of the land solely or primarily for mining. Where the contrary is intended, as for example in s 26C(4)(c)(i) of the NTA, express words are used. Thus, s 26C(4)(c)(i) refers to 'mining for opals or gems (other than mining consisting of exploring, prospecting or puddling)'. And to work out what 'lease' and 'lessee' mean in s 245, the answers are to be found in s 242(2) (references to 'mining lease' includes a licence issued or authority given) and s 243(2) (in the case of a lease that is a mining lease because of s 242(2), the expression lessee means the person to whom the licence was issued or authority given and their successors)."

26 Their Honours went on to describe as "untenable" the argument that s 242(2) applies only where the words "mining lease" appear in the operative provision of the NTA, so that s 47B(1)(b)(i) was not engaged by the mineral exploration licence. Their Honours held that in the context of Div 3 of Pt 15, "mining leases" are a kind of lease, and that the purpose of ss 242(2) and 243(2) is to ensure that instruments described in the laws from which they are derived as licences or authorities to mine[7] are taken to be mining leases, and thus leases, for the purposes of the NTA[8].

27 Their Honours concluded[9]:

> "The reference to 'lease' in s 47B(1)(b)(i) of the NTA thus includes any mining lease. And 'mining lease' includes any licence to mine. And a licence to mine includes a licence to explore or prospect things to mine. As a matter of construction, accordingly, the primary judge erred in concluding ... that a 'mining lease' involves a narrower concept than that of the defined verb 'mine'."

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7 Which includes exploring or prospecting for things to mine by virtue of s 253.

8 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521 at 540 [76].

9 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521 at 540 [77].

The Ngurra matter

28 In the Federal Court, Barker J followed Mortimer J's decision at first instance in the Tjiwarl matter, and held that neither of the petroleum exploration permits is a "lease" within s 47B(1)(b)(i)[10].

29 On appeal to the Full Court, the claim group conceded, subject to a presently immaterial qualification, that the decision of the Full Court in the Tjiwarl matter was not distinguishable, and accepted that the Court would be bound to follow it. The Full Court (North, Jagot and Rangiah JJ) declined[11] to hold that the decision of the Full Court in the Tjiwarl matter was wrong, and proceeded to apply the same reasoning to the petroleum exploration permits in the Ngurra matter[12].

Section 242(2) of the Native Title Act

30 Section 242(2) is expressly conditioned in its operation by the prefatory words, "[i]n the case only of references to a mining lease". This condition requires a "reference" to a mining lease in the operative provision of the NTA in any particular case. The condition is not satisfied by an operative provision that does not make reference to a mining lease.

31 In each matter, the Full Court's reasoning fails to recognise that, according to the ordinary and natural meaning of s 242(2), it is engaged *only* where the operative provision of the NTA contains an express textual reference to a "mining lease". In each case, the Full Court applied s 242(2) as if the opening words of s 242(2), "[i]n the case only of references to a mining lease", were "[i]n the case of a mining lease".

32 Nothing in the context in which s 242 appears suggests that the prefatory words of s 242(2) should not be given effect according to their ordinary and natural meaning. In this regard, reference may be made to various provisions of

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10 *Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v Western Australia [No 2]* [2017] FCA 587 at [53].

11 *Attorney-General (Cth) v Helicopter-Tjungarrayi (Ngurra Kayanta & Ngurra Kayanta #2)* (2018) 359 ALR 256 at 259 [7].

12 *Attorney-General (Cth) v Helicopter-Tjungarrayi (Ngurra Kayanta & Ngurra Kayanta #2)* (2018) 359 ALR 256 at 260 [12].

the NTA which refer to a "lease (other than a mining lease)"[13]. It was suggested in the reasons of the Full Court in the Tjiwarl matter[14] that these provisions manifest a convention on the part of the drafter of the NTA expressly to exclude mining leases from the scope of operative provisions when that was the intention of the legislation. It was suggested in argument that this drafting convention was consistent only with the conclusion of the Full Court. This suggestion must be rejected. It fails to appreciate that the express exclusion of mining leases from these provisions is necessary to exclude mining leases *altogether* from their scope of operation. In other words, these provisions exclude all mining leases that fall within s 242(1). These exclusions are not concerned with whether or not the references to "mining lease" in their context are to be taken to include a licence or authority pursuant to s 242(2).

33 The view that the Full Court in each matter failed to give effect to the prefatory words of s 242(2) draws support from the text and purpose of s 47B itself.

Section 47B of the Native Title Act

34 The exclusions in s 47B(1)(b) from the statutory imperative to "disregard" the prior extinguishment of native title should not be construed more widely than is necessary to give effect to their terms. In this regard, s 47B(3)(a)(i) ensures that a successful native title determination, aided by the obligation to "disregard" the prior extinguishment of native title provided for by s 47B(2), will not adversely affect the validity of any prior interest granted by a government in relation to the area.

35 The evident purpose of s 47B is to facilitate the grant of native title under the NTA, notwithstanding historic extinguishment, where the land in question is actually occupied by the native title claimants and the claimed native title would not be inconsistent with extant rights of a holder of the fee simple or a lease. The collocation of "freehold" with "lease" in s 47B(1)(b)(i) is eloquent of the nature of the extant interest in land that is regarded as an obstacle to a successful native title determination with the aid of s 47B. The interest of the holder of a freehold

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13 Namely, ss 21(3)(a), 23B(2)(c)(viii), 24IC(4)(c), 43A(2)(a)(i).

14 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521 at 540 [76].

estate or a lease under the general law was sufficient to extinguish native title rights and interests under the common law[15].

36 It makes little sense, in terms of the evident purpose of s 47B, that extant exploration tenements should be an insuperable obstacle to the availability of native title when the grant of the rights characteristically conferred by exploration tenements would not have extinguished native title rights and interests under the common law in the first place[16]. Further, when the grant of an exploration tenement is not treated by the general law as inconsistent with the continued subsistence of ordinary freehold title, it is not to be supposed that the NTA treats native title rights and interests less favourably in the absence of a clear expression of that intention[17].

37 On the other hand, it is in full accord with the evident purpose of s 47B that the relatively low level of the intensity of use and occupation of land characteristically authorised by exploration tenements[18] should not deny the possibility of a grant of native title to native title claimants who are in actual occupation of the land. Further, the rights conferred on the holders of exploration tenements are as capable of co-existing with native title rights and interests as they are with the rights of owners of freehold title under the general law.

38 Whether the position is otherwise in relation to lands the subject of a mining lease in the narrower sense defined by s 245(1)[19] is an issue that need not be resolved for the determination of these appeals. The only question which needs to be decided is whether the exploration tenements are "leases" within s 47B(1)(b)(i). The exploration tenements in question are leases for the purposes of the NTA only where s 242(2) operates to produce that result, and, as has been seen, the condition of its operation has not been met in the case of s 47B(1)(b)(i).

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15 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 71, 108, 135, 176; [1996] HCA 40; *Fejo v Northern Territory* (1998) 195 CLR 96 at 131 [56]-[58].

16 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 68-69.

17 cf *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 437-438; [1995] HCA 47; *Western Australia v Ward* (2002) 213 CLR 1 at 105-107 [121]-[124]; [2002] HCA 28.

18 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 68-69.

19 cf *Western Australia v Ward* (2002) 213 CLR 1 at 162-163 [299].

Conclusion and orders

39 The appeals should be allowed.

40 In Matter No P37 of 2018, the orders of the Full Court of the Federal Court made on 16 March 2018 in proceeding WAD 444 of 2017 should be set aside, and in their place it should be ordered that the appeal to the Full Court be dismissed.

41 In Matter No P38 of 2018, orders 1 and 2(c) made by the Full Court of the Federal Court on 1 February 2018 in proceeding WAD 218 of 2017 should be set aside, and in place of order 1 it should be ordered that the appeal be allowed in part.

42 GAGELER J. I agree with the orders proposed by Kiefel CJ, Bell, Keane and Edelman JJ and I agree with their Honours' construction of s 242(2) of the *Native Title Act 1993* (Cth) ("the NTA"). I write separately to reject a logically anterior argument of the appellants concerning the construction of s 47B(1)(b)(i) and to address the reasons given by the Full Court of the Federal Court for its construction of s 242(2).

Construction of s 47B(1)(b)(i)

43 At its most ambitious, the appellants' argument is that the term "lease" in s 47B(1)(b)(i) is to be read in collocation with that section's reference to a "freehold estate" to connote only a leasehold estate in the land and so to exclude in its entirety the extended definition of "lease" in s 242. The argument is made by invoking the evidently intended beneficial operation of s 47B and is sought to be supported by the reasons expressed in *Northern Territory v Alyawarr* for preferring the narrower of two textually available constructions of the expression "public purposes" in s 47B(1)(b)(ii)[20].

44 The principle that beneficial legislation is to be construed beneficially is a manifestation of the more general principle that all legislation is to be construed purposively[21]. Application of that more general principle to the NTA is mandated by the requirement of s 15AA of the *Acts Interpretation Act 1901* (Cth) that the construction of a provision of a Commonwealth Act that would best achieve the purpose or object of such an Act is to be preferred to each other interpretation. The principle assists in making constructional choices between competing interpretations that are textually available[22].

45 The principle legitimately weighs in favour of a construction which gives s 47B wider application if and to the extent that a constructional choice is open on the text of the NTA. That is how the principle was appropriately applied in *Alyawarr*.

46 To attempt to apply the principle to exclude application of the definition of "lease" in s 242 to the term "lease" in s 47B(1)(b)(i), however, is to stretch the principle too far. To be borne in mind is that "no legislation pursues its purposes

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20 (2005) 145 FCR 442 at 494-495 [187].

21 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at 270 [92]; [2016] HCA 50.

22 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at 255-256 [32], explaining *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433, 435; [1984] HCA 14. See also *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374 at 388-390; [1980] HCA 2.

at all costs" and that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law"[23]. The unqualified use in s 47B(1)(b)(i) of the term defined in s 242 for the purposes of the whole of the NTA is indicative of a legislative choice that the definition in s 242 is to apply.

47 Section 242(1)(c)'s inclusion within the definition of "lease" of "anything that, at or before the time of its creation, is, for any purpose ... declared to be or described as a lease" by a State law was held in *Western Australia v Ward* to be sufficient to pick up mining leases granted under the *Mining Act 1978* (WA)[24]. The consequence of such mining leases being picked up by s 242(1)(c) as "leases" within the meaning of the NTA was that those leases were held in *Ward* also to be "mining leases" within the meaning of the NTA by operation of the definition of "mining lease" in s 245(1)[25]. Neither a mineral exploration licence granted under the *Mining Act* nor a petroleum exploration permit granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) ("the Petroleum Act") is declared to be or described as a "lease" under Western Australian law. So, s 242(1)(c) does not operate to pick up either such a licence or such a permit as a "lease" within the meaning of the NTA.

48 As the Full Court correctly recognised in each of the decisions under appeal, if a mineral exploration licence granted under the *Mining Act* or a petroleum exploration permit granted under the Petroleum Act is to meet the description of a "lease" within s 47B(1)(b)(i), that result could be brought about only through the operation of s 242(2). The determinative issue in each appeal is therefore as to the construction of s 242(2).

The Full Court's construction of s 242(2)

49 Section 242(2) provides that "[i]n the case only of references to a mining lease, the expression ***lease*** also includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory". Section 242(2),

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23 *Rodriguez v United States* (1987) 480 US 522 at 525-526 (emphasis in original), quoted in *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 633 [41]; [2013] HCA 36 and *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at 271 [93].

24 (2002) 213 CLR 1 at 162 [298]-[299]; [2002] HCA 28.

25 (2002) 213 CLR 1 at 162 [298]-[299].

like any other statutory definition, "should be approached on the basis that Parliament said what it meant and meant what it said"[26].

50 The Full Court construed s 242(2) to have the effect that any reference in the NTA to a "lease" is to be read as encompassing a "mining lease" and, as so read, is to be understood as encompassing a licence or authority to mine given by or under a Commonwealth, State or Territory law.

51 The Full Court reached that construction having regard to two considerations. The first consideration was its inference from the language of the definitions in ss 242, 243, 245 and 253, and also from passages in a Supplementary Explanatory Memorandum to the Bill for the NTA[27], of a "legislative intention to treat all licences and authorities to mine as leases for the purpose of the NTA"[28]. The purpose of ss 242(2) and 243(2), in the Full Court's opinion, was to "ensure that instruments described as licences or authorities to mine (which include exploring or prospecting for things to mine by s 253) are taken to be a mining lease, and thus a type of lease for the purposes of the NTA"[29].

52 The second consideration to which the Full Court had regard was that, throughout the NTA, specific exclusions of a "mining lease" from references to a "lease" are effected by use of the formula "a lease (other than a mining lease)". It would not be necessary to exclude a "mining lease" from a reference to a "lease", the Full Court said, unless such a reference would otherwise include a "mining lease"[30].

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26 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420; [1994] HCA 54. See also *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 310; [1995] HCA 36.

27 Australia, Senate, *Native Title Bill 1993*, Supplementary Explanatory Memorandum at 17.

28 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521 at 539-540 [73]-[75].

29 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521 at 540 [76]. See also *Attorney-General (Cth) v Helicopter-Tjungarrayi (Ngurra Kayanta & Ngurra Kayanta #2)* (2018) 359 ALR 256 at 259-260 [11]-[12].

30 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521 at 540 [76], referring to ss 21(3)(a), 23B(2)(c)(viii), 24IC(4)(c) and 43A(2)(a)(i) of the NTA. See also ss 230(b), 232A(2)(e)(i) and 232C(b)(i) of the NTA.

53 In my opinion, the considerations which led the Full Court to adopt its construction of s 242(2) – that any reference in the NTA to a "lease" extends to a licence or authority to mine given by or under a Commonwealth, State or Territory law – are at best equivocal.

54 The Supplementary Explanatory Memorandum to the Bill for the NTA undoubtedly pointed to a legislative intention, apparent on the face of ss 242(2) and 243(2), to treat licences or authorities to mine in the same way as "mining leases". But it contained nothing to indicate a legislative intention to treat all licences or authorities to mine given by or under Commonwealth, State or Territory laws as "leases" for all purposes of the NTA.

55 Logically, exclusion of a "mining lease" from a reference to a "lease" by use of the formula "a lease (other than a mining lease)" compels not the conclusion that all "mining leases" are "leases" but only the conclusion that some "leases" are "mining leases". The exclusion works to remove from a "lease" a "mining lease" that is a "lease" by operation of s 242(1)(c), and does nothing more.

56 The fundamental difficulty with the Full Court's construction is that it fails to engage with the prefatory words of s 242(2), by which the extension of "lease" to include a licence issued, or an authority given, is applicable "[i]n the case only of references to a mining lease". Naturally read in the context of a definitional provision, the expression "references to a mining lease" connotes textual references to a "mining lease". Properly construed, all that s 242(2) does is to require that a textual reference in the NTA to a "mining lease" be read as extending to a mining licence issued, or a mining authority given, by or under a Commonwealth, State or Territory law.

57 Accordingly, s 242(2) does not inform the construction of s 47B(1)(b)(i). Because s 47B(1)(b)(i) does not contain a textual reference to a "mining lease", there is no occasion for s 242(2) to expand the meaning of "lease" in s 47B(1)(b)(i) beyond the meaning set out in s 242(1).

58 No doubt, it would have been possible to draft ss 242, 243, 245 and 253 of the NTA differently so as to include all of the incidents of any textual reference to a "mining lease" within the one definitional section. That the sections have not been drafted that way does not detract from their coherence. Each section operates to complement the others without duplication or conflict. Section 242(2) confines itself to explicating the meaning of "lease" within the expression "mining lease". The operation of s 242(2) to expand the meaning of "lease" within the expression "mining lease" then provides the occasion for the expanded meaning of "lessee" in s 243(2). The expanded meaning of "lease" in s 242(2) and the expanded meaning of "lessee" in s 243(2) then combine to give precise content to the expressions "lease" and "lessee" as used in the definition of "mining lease" in s 245(1). Sections 2 and 18A of the *Acts Interpretation Act*

operate to ensure that the meaning of "mining" in each of those interlocking definitions corresponds with the definition of "mine" in s 253 of the NTA.

59 NETTLE J. The question for decision in these appeals is whether an exploration licence granted under the *Mining Act 1978* (WA)[31] or two petroleum exploration permits granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA)[32] each constitute a "lease" within the meaning of s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth) ("the NT Act"). For the reasons which follow they do not.

Relevant statutory provisions

Non-extinguishment principle

60 Division 2 of Pt 15 of the NT Act defines a "past act" as, relevantly, an act which occurred before 1 January 1994 when native title existed in relation to particular land and waters[33]. The Division defines four categories of "past act": a Category A past act[34], which in substance is defined as either the grant of a freehold estate or "a commercial lease, an agricultural lease, a pastoral lease or a residential lease" granted before 1 January 1994 and extant as at 1 January 1994; a Category B past act[35], which in substance is defined as the grant of a lease (other than a Category A past act or a mining lease) granted before 1 January 1994 and extant as at that date; a Category C past act[36] consisting of the grant of a mining lease; and a Category D past act[37], which is defined as any past act that is not a Category A, B or C past act.

61 Section 15 of the NT Act provides in relation to past acts which are attributable to the Commonwealth[38] that, in substance, a Category A past act extinguishes the native title concerned; a Category B past act extinguishes native

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31 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521.

32 *Attorney-General (Cth) v Helicopter-Tjungarrayi (Ngurra Kayanta & Ngurra Kayanta #2)* (2018) 359 ALR 256.

33 NT Act, s 228.

34 NT Act, s 229. This section also refers to s 245(3), dealing with the dissection of mining leases, which is not relevant for the purposes of this judgment.

35 NT Act, s 230.

36 NT Act, s 231.

37 NT Act, s 232.

38 The NT Act permits the States and Territories to validate certain past acts with the same effect as s 15: NT Act, s 19.

title to the extent of inconsistency between the act and native title; and a Category C or a Category D past act engages the "non-extinguishment principle".

62 Division 2 of Pt 15 also defines[39] an "intermediate period act" as, relevantly, an act which took place between 1 January 1994 and 23 December 1996 when native title existed in relation to particular land and waters. The Division then provides for four categories of intermediate period acts: a Category A intermediate period act[40], which is in substance the grant or vesting of a freehold estate and of certain leases (other than a mining lease); a Category B intermediate period act[41], which is in substance the grant of a lease that is not a Category A intermediate period act or certain leases including a mining lease; a Category C intermediate period act[42], which is the grant of a mining lease; and a Category D intermediate period act[43], which is any intermediate period act that is not a Category A, B or C intermediate period act.

63 Section 22B of the NT Act provides in relation to intermediate period acts which are attributable to the Commonwealth[44] that, in substance, a Category A intermediate period act extinguishes native title in relation to all land or waters concerned; a Category B intermediate period act extinguishes native title to the extent of inconsistency between the act and native title; and a Category C or a Category D intermediate period act engages the "non-extinguishment principle".

64 Section 238 of the NT Act defines the "non-extinguishment principle" in effect by means of a set of rules which prescribe the effect on native title rights and interests of acts that are either wholly or partially inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests. Section 238(2) provides in substance that, although an act to which the non-extinguishment principle applies may affect native title in relation to land or waters, the native title rights and interests are not extinguished either wholly or partially. Sub-sections (3) and (4) of s 238 provide that, if the act is wholly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, they continue to exist in their entirety but have no effect

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39 NT Act, s 232A.

40 NT Act, s 232B.

41 NT Act, s 232C.

42 NT Act, s 232D.

43 NT Act, s 232E.

44 The NT Act permits the States and Territories to validate certain intermediate period acts with the same effect as s 22B: NT Act, s 22F.

in relation to the act and, if the act is partially inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, they continue to exist in their entirety but have no effect in relation to the act to the extent of the inconsistency. Section 238(6) provides in substance that when and if the act or its effects cease to operate, the native title rights and interests again take effect in full. Pertinently, s 238(8) provides that:

> "An example of the operation of this section is its application to a category C past act consisting of the grant of a mining lease that confers exclusive possession over an area of land or waters in relation to which native title exists. In such a case the native title rights and interests will continue to exist but will have no effect in relation to the lease while it is in force. However, after the lease concerned expires (or after any extension, renewal or re-grant of it to which subsection 228(3), (4) or (9) applies expires), the rights and interests again have full effect."

Application of non-extinguishment principle to vacant Crown land

65 Section 47B was introduced[45] into the NT Act by the *Native Title Amendment Act 1998* (Cth) as part of a suite of amendments consequent on this Court's decision in *Wik Peoples v Queensland*[46]. It was designed to allow native title claimants who are in occupation of vacant Crown land over which native title has been extinguished, but over which there are no longer competing third party rights, to engage the non-extinguishment principle and so claim native title with respect to that land notwithstanding its prior extinguishment[47]. Section 47B(1) provides that:

> "This section applies if:
>
> (a) a claimant application is made in relation to an area; and
>
> (b) when the application is made, the area is not:
>
> (i) covered by a freehold estate or a lease; or

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45 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 68 [5.56].

46 (1996) 187 CLR 1; [1996] HCA 40.

47 See Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 62-63 [5.29]; Australia, Senate, *Parliamentary Debates* (Hansard), 11 March 1998 at 863.

(ii) covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose; or

(iii) subject to a resumption process (see paragraph (5)(b)); and

(c) when the application is made, one or more members of the native title claim group occupy the area."

66 Section 47B(2) provides, in substance, that, except in the three circumstances identified in s 47B(1), any extinguishment of native title rights and interests by any prior interest in relation to the area claimed in the application must be disregarded. Section 47B(3) provides, in substance, that, although the validity of the prior interest remains unaffected, its effect on the native title rights and interests is to be determined in accordance with the non-extinguishment principle.

"Lease" and "mining lease"

67 Section 242 of the NT Act defines "lease" as follows:

"(1) The expression ***lease*** includes:

(a) a lease enforceable in equity; or

(b) a contract that contains a statement to the effect that it is a lease; or

(c) anything that, at or before the time of its creation, is, for any purpose, by a law of the Commonwealth, a State or a Territory, declared to be or described as a lease.

References to mining lease

(2) *In the case only of references to a mining lease*, the expression ***lease*** also includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory." (emphasis added)

68 Section 243(2) provides in relation to the definition of "lessee" that:

> "*Lessee of certain mining leases*
>
> (2) In the case of a lease that is a mining lease because of subsection 242(2) (which covers licences and authorities given by or under laws), the expression ***lessee*** means:
>
> (a) the person to whom the licence mentioned in that subsection was issued, or the authority so mentioned was given; or
>
> (b) any person who, by assignment, succession or otherwise, acquires or enjoys the licence or authority or is entitled to exercise rights under the licence or the authority."

69 Section 245(1) defines "mining lease", relevantly, as follows:

> "A ***mining lease*** is a lease (other than an agricultural lease, a pastoral lease or a residential lease) that permits the lessee to use the land or waters covered by the lease solely or primarily for mining."

70 Section 253 provides for multiple definitions and, relevantly, defines "mine" thus:

> "***mine*** includes:
>
> (a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c)); or
>
> (b) extract petroleum or gas from land or from the bed or subsoil under waters; or
>
> (c) quarry;
>
> but does not include extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or of the bed beneath waters, for a purpose other than:
>
> (d) extracting, producing or refining minerals from the sand, gravel, rocks or soil; or
>
> (e) processing the sand, gravel, rocks or soil by non-mechanical means."

71 The NT Act does not define "mining" but s 18A read with s 2(2) of the *Acts Interpretation Act 1901* (Cth) provides in effect that, unless the contrary intention appears, where a word or phrase is given a particular meaning in an

Act, other parts of speech and grammatical forms of that word or phrase have corresponding meanings. There is nothing in the NT Act which suggests a contrary intention. Thus, for the purposes of "mining lease" the meaning of the participial adjective "mining" corresponds to the verb "mine" as defined by s 253.

72 Section 246 defines a "commercial lease", relevantly, as:

> "(1) A ***commercial lease*** is a lease (*other than a mining lease*) that permits the lessee to use the land or waters covered by the lease solely or primarily for business or commercial purposes." (emphasis added)

Proceedings at first instance

73 In *Narrier v Western Australia*, the primary judge (Mortimer J) held[48] that an exploration licence granted under the *Mining Act* was not a "mining lease" and, thus, was not a "lease" for the purposes of s 47B(1)(b)(i). Following the decision in *Narrier*, the primary judge in *Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v Western Australia [No 2]* (Barker J) held[49] that each of two petroleum exploration permits granted under the *Petroleum and Geothermal Energy Resources Act* was not a mining lease and therefore not a lease.

74 Both primary judges held[50] that, despite the definition of "mine" in s 253, s 245(1) defines "mining lease" more narrowly as a mining lease which requires the subject land to be used solely or primarily for mining, and that there was no evidence that the licence or permits in question permitted the holder to use the land or waters solely or primarily for mining.

Proceedings on appeal to the Full Court of the Federal Court of Australia

75 On appeal from the decision of the primary judge in *Narrier*, the Full Court of the Federal Court (North, Dowsett and Jagot JJ) held[51] that there was no reason *not* to give the word "mining" in Div 3 of Pt 15 of the NT Act the meaning which corresponds to "mine" in s 253, and thus that no more was

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48 [2016] FCA 1519 at [1208].

49 [2017] FCA 587 at [59].

50 *Narrier v Western Australia* [2016] FCA 1519 at [1207]; *Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v Western Australia [No 2]* [2017] FCA 587 at [55]-[58].

51 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521 at 539 [73].

needed to establish that the exploration licence was a mining lease for the purposes of s 245(1) than that the licence permits the licensee to use the land or waters covered by the licence solely or primarily for mining in that sense. The Full Court rejected[52] the native title claim group's contention that s 242(2) operates only upon the words "mining lease" wherever they appear as such. Their Honours held that the purpose of ss 242(2) and 243(2) is to ensure that instruments described as "licences" or "authorities to mine" (which includes exploring or prospecting for things to mine) are taken to be a "mining lease", and thus a type of "lease" for the purposes of the NT Act. Accordingly, the area covered by the exploration licence in question was held not to be land to which s 47B of the NT Act applied.

76 On appeal from the decision of the primary judge in *Tjungarrayi*, the Full Court of the Federal Court (North, Jagot and Rangiah JJ) followed that Court's decision in *Narrier* and held[53] that the exploration permits were mining leases and, thus, were leases for the purposes of s 47B(1)(b)(i).

Meaning of "lease" in s 242(1)

77 The Full Courts in *Narrier* and *Tjungarrayi* were correct in their construction of ss 242, 243 and 245(1). They were right to hold that the combined effect of those provisions is that an exploration permit or licence is a "mining lease" within the meaning of s 245(1) and, therefore, a "lease" within the meaning of s 242. But the Full Court in each case were not correct in holding that "lease" in s 47B(1)(b)(i) includes a "mining lease". As will be explained, "lease" in s 47B(1)(b)(i) is used in the sense of "lease (other than a mining lease)" in the same way that it is used in that sense in several other provisions of the NT Act.

78 In *Western Australia v Ward*, a majority of this Court held[54] that a "mining lease" within the meaning of s 245(1) is a "lease" within the meaning of s 242. It was not suggested in these appeals that that point was wrongly decided. What is in issue is whether a "mining lease" within the meaning of s 245(1) includes "a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory" within the meaning of s 242(2).

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52 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521 at 540 [76]-[77].

53 *Attorney-General (Cth) v Helicopter-Tjungarrayi (Ngurra Kayanta & Ngurra Kayanta #2)* (2018) 359 ALR 256 at 260 [12], 264 [25].

54 (2002) 213 CLR 1 at 162-163 [299] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2002] HCA 28.

79 Other things being equal, it would be open to read the words "in the case only of references to a mining lease" in s 242(2) as having one or other of two meanings: either that, in the case of a mining lease, the expression "lease" includes a "mining lease" and a licence or authority of the kind specified in s 242(2); or that, wherever in the NT Act, other than in the definition of "mining lease" in s 245(1), there is a reference to a "mining lease", the reference is to be read as including a licence or authority of the kind specified in s 242(2). There are, however, at least five features of the NT Act which point in favour of the former construction and against the latter.

80 First, s 242(2) is part of s 242, and so, in form and therefore as a matter of apparently intended effect, it is definitive of a "lease", not a "mining lease". It is as if s 242(2) stated "in the case of a mining lease". In effect, s 242(2) extends the concept of "lease" for the purposes of the NT Act.

81 Secondly, the use of the expression "in the case only of references to a mining lease" is, in form and so as a matter of apparently intended effect, equally applicable to all references to "mining lease" within the NT Act. That includes the most proximate and obvious reference to "mining lease", in s 245(1). Thus, reading ss 242(2) and 245(1) together in the definitional context in which they appear, and with the aid of the definition of "mine" in s 253 and the effect of s 18A of the *Acts Interpretation Act*, "mining lease" in the reference to "mining lease" in s 245(1) presents as a lease that permits the lessee to use the land or waters covered by the lease solely or primarily for mining *and also includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory to use the land or waters covered by the licence or authority solely or primarily for exploring or prospecting for things that may be mined or for extracting petroleum or gas from land or from the bed or subsoil under waters*.

82 Thirdly, s 243(2) refers to "a lease that is a mining lease because of subsection 242(2) (which covers licences and authorities given by or under laws)". Section 243(2) thus necessarily proceeds from the premise that the effect of s 242(2) combined with s 245 is to include a licence within the meaning of "mining lease" and so within the meaning of "lease". If that were not the case, s 243(2) should have been drafted in terms that: "in the case of a reference to a mining lease".

83 Fourthly, if s 242(2) were not intended to inform the meaning of s 245, there would be little point in the enactment of s 242(2). It was submitted before this Court that, rather than informing the meaning of s 245(1), the purpose of s 242(2) was to ensure that, in those provisions of the NT Act which expressly exclude "mining lease" from "lease", the exclusion should be taken to include a licence or an authority within the meaning of s 242(2): for example, s 23B(2)(c)(viii) defines a previous exclusive possession act as including, inter alia, "any lease (other than a mining lease)"; s 24IC(4)(c) deals with future acts

which are permissible lease renewals and refers to a "perpetual lease (other than a mining lease)"; s 43A(2)(a)(i) deals with an exception to the right to negotiate with respect to an area that is, inter alia, covered by a "lease (other than a mining lease)"; s 230(b) defines Category B past acts as the grant of a lease where "the lease is not a mining lease"; s 232A(2)(e)(i) states that an intermediate period act must not be preceded by a "lease (other than a mining lease)" covering the land affected by the act; and s 232B(3)(g) defines a Category A intermediate period act as including a "lease (other than a mining lease)". But the submission makes little sense. Ex hypothesi, but for s 242(2) a licence or an authority within the meaning of s 242(2) would not be included in "mining lease" in s 245(1) or, therefore, in "lease" in s 242(1). There would be little point in enacting s 242(2) if its only purpose were to exclude from the definition of "mining lease" what would not have been in "mining lease" but for the enactment of s 242(2).

84 Fifthly, the extrinsic materials show that it was intended that "mining lease" include a mining or exploration permit or licence. The Explanatory Memorandum to the *Native Title Bill 1993* (Cth) explained[55] the definition of "mine" as follows:

> "'**mine**'
>
> The definition of this term is not an exhaustive one and is wider than what might be thought to be the ordinary meaning of the term. It includes exploring or prospecting for anything that may be mined. It also includes extracting petroleum, gas or water from land or from the bed or subsoil under waters, and quarrying. *The definition is also picked up [sic] the derivatives of 'mine' such as 'mining' and 'mined'*." (emphasis added)

85 After the *Native Title Bill* was first introduced to Parliament, the Government proposed a number of amendments as a result of continued consultation with interested parties and a majority report of the Senate Standing Committee on Legal and Constitutional Affairs[56]. Section 242(2) formed part of those amendments. A Supplementary Explanatory Memorandum which dealt with the amendments stated[57] in respect of s 242(2):

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55 Australia, House of Representatives, *Native Title Bill 1993*, Explanatory Memorandum Part B at 104.

56 Australia, Senate, *Native Title Bill 1993*, Supplementary Explanatory Memorandum at 2.

57 Australia, Senate, *Native Title Bill 1993*, Supplementary Explanatory Memorandum at 17.

> "The addition of subclause (2) provides that for the purposes of mining leases only, licences or authorities to mine are to be treated in the same way as mining leases. *This amendment is part of a package of amendments to treat licences and authorities to mine in the same way as mining leases.* The related amendments are found in amendments 66 and 67." (emphasis added)

86 The Supplementary Explanatory Memorandum further stated[58], with respect to related amendments 66 and 67 concerning the expanded definition of "lessee" in s 243(2):

> "This clause defines what is meant by the term 'lessee' for the purposes of this Bill. The addition of subclause (2) makes it clear that for the purpose of a mining licence or authority that is a mining lease because of subclause 227(2) [now s 242(2)] a person holding such a licence or authority is to be regarded as a lessee for the purposes of the Bill. These amendments are also consequential upon the treatment of mining licences and authorities which give similar rights to mining leases in the same manner for the purposes of this Bill."

87 There is no suggestion in any of the extrinsic materials that the intention was to confine the operation of s 242(2) to express references to "mining lease" in substantive provisions of the Act. All indications are that it was designed to ensure that mining or exploration licences or authorities are treated as mining leases.

88 It should be concluded that a "mining lease" as defined by s 245(1) of the NT Act means a "lease" that permits the lessee to use the land or waters covered by the lease solely or primarily for mining and also includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory to use the land or waters covered by the licence or authority solely or primarily for exploring or prospecting for things that may be mined or for extracting petroleum or gas from land or from the bed or subsoil under waters. And consistently with this Court's decision in *Ward*, it should be held that a "lease" within the meaning of s 242(1) of the NT Act includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory to use the land or waters covered by the licence or authority solely or primarily for exploring or prospecting for things that may be mined or for extracting petroleum or gas from land or from the bed or subsoil under waters.

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58 Australia, Senate, *Native Title Bill 1993*, Supplementary Explanatory Memorandum at 17.

Meaning of "lease" in s 47B

89 It does not follow, however, that "lease" in s 47B(1)(b)(i) includes "mining lease". Like all statutory definitions, the definition of "lease" in s 242(1) yields to contrary intention[59] and here a contrary intention is apparent. Granted, there are a number of provisions in the NT Act which expressly exclude "mining lease" from "lease". In addition to those already mentioned, s 21(3)(a), which was inserted into the NT Act at the same time as s 47B, provides an overview of the validation of intermediate period acts and refers to "a grant of a freehold estate or a lease (other than a mining lease)". And assuming consistency of approach, it would be open to conclude on that basis that, where it is intended in the NT Act to exclude "mining lease" from "lease", "mining lease" is expressly excluded, and, otherwise, "mining lease" is to be taken as included. But the practice of expressly excluding "mining lease" from "lease" when it is intended that it be excluded is not consistent throughout the NT Act.

90 For example, in s 24LA, which deals with low impact future acts, sub-s (1)(b)(ii) provides for an exclusion in these terms: "the act does not consist of, authorise or otherwise involve ... the grant of a lease over any of the land or waters". There is no express exclusion of "mining lease" from "lease" but it is apparent from the fact that s 24LA(1)(b)(v) separately excludes "mining (other than fossicking by using hand-held implements)" that it was not intended that "lease" should include "mining lease". In s 24GE, which validates future acts consisting of rights granted to third parties on non-exclusive agricultural or pastoral leases, including a future act which "confers on any person (including the lessee) a right ... to extract, obtain or remove sand, gravel, rocks, soil or other resources (except so far as doing so constitutes mining)", it is apparent from the fact that s 24GE(1)(d) excludes a future act that is "the grant of a lease" and s 24GE(1)(e) includes a future act that confers a right to extract sand, gravel, rocks or other resources that "lease" does not include "mining lease"[60]. There are also provisions such as s 24JAA(1)(b)(i) and s 24JA(2)(d), which refer to "lease" without an express exclusion of "mining lease", where it is obvious that, because those provisions pertain to the construction, operation, use etc of public facilities to benefit Aboriginal peoples or Torres Strait Islanders, and the granting of leases to statutory authorities respectively, those provisions could not apply to mining

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59 *In the Matter of The Fourth South Melbourne Building Society* (1883) 9 VLR (E) 54 at 58; *Transport Accident Commission v Treloar* [1992] 1 VR 447 at 449 per McGarvie and Gobbo JJ; *Buresti v Beveridge* (1998) 88 FCR 399 at 401. See also Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 261-262 [6.2], 317-319 [6.67].

60 See Australia, Senate, *Parliamentary Debates* (Hansard), 5 December 1997 at 10565.

leases. In sum, in each case, the context dictates that "lease" does not include "mining lease".

91 The context for the construction of s 47B is principally informed by its engagement of the non-extinguishment principle as prescribed in s 238. As was earlier noted, s 47B(3) provides, in substance, that, although the validity of the creation of a prior interest remains unaffected, its effect on the native title rights and interests in question is to be determined in accordance with the non-extinguishment principle. And the non-extinguishment principle defined in s 238(3) and (4) provides in substance that, if the act is wholly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, they continue to exist in their entirety but have no effect on the act and, if the act is partially inconsistent with the native title rights and interests, they continue to exist but have no effect on the act to the extent of the inconsistency. Section 238(6) has the effect that when and if the act expires or ceases to have effect, the native title rights and interests again take effect in full. And importantly, s 238(8) posits as an example of an act to which the non-extinguishment principle applies the act of granting a mining lease, and explains that, although the native title rights and interests will have no effect on the mining lease, upon its expiration the native title rights and interests will once again have full force and effect.

92 If "lease" in s 47B(1)(b)(i) included "mining lease", it would mean that a mining lease, which itself engages the non-extinguishment principle, would preclude the application of the non-extinguishment principle to the creation of any prior interest in land which is vacant Crown land, at least until after the mining lease expires. Textually, that bespeaks a contrary intention that, in s 47B(1)(b)(i), "lease" does not include "mining lease". This is supported by the legislative history of s 47B.

Historical development of specific sections of NT Act

(i) Mining leases

93 From the outset of the NT Act, the Parliament drew a distinction between, on the one hand, leases thought to confer exclusive possession, such as commercial, agricultural, pastoral and residential leases – which the NT Act treats[61] as extinguishing native title – and, on the other, mining leases – which leave[62] native title intact. In June 1993, before the introduction of the *Native*

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61 NT Act, ss 229(3)(a), 15(1)(a).

62 NT Act, ss 231, 15(1)(d).

Title Bill[63], the Government released a discussion paper, entitled "Mabo: The High Court Decision on Native Title", in which it provided reasons for the distinction later drawn in the Bill, and now in the NT Act, between Category A, B, C and D past acts. The paper discussed[64] four broad legislative options to provide for the validation of existing grants of interests in land made after 31 October 1975 when the *Racial Discrimination Act 1975* (Cth) came into force and to make native title subject to the grants. They were: (1) legislation to confirm the continued existence of native title in all cases but subject to validated grants, with compensation; (2) legislation to confirm the continued existence of native title where possible but subject to validated grants, with compensation, and recognise the extinguishment of native title where necessary to validate grants, with compensation; (3) the same legislative approach as in (2) but only upon a trigger, possibly a relevant finding of a court or tribunal that the grant is actually invalid; and (4) legislation to provide for the validation of grants but leave for later determination by a court what impact that would have on native title, and provide for compensation in light of that.

94 The paper opined[65] that options (2) and (3) "would have the merit of minimising the extinguishment of native title resulting from the validation of grants", and could be made to operate as follows: (a) where the native title interest and the grant coexist without the grant extinguishing or affecting the native title; (b) where the grant and the native title interest are able to be made to coexist, which "is possible, for example, with the grant of a mining lease, where provision could be made for the native title to continue to exist subject to the lease for the period of the lease, and then to revive to its pre-lease extent"; and (c) where the grant and the native title interest cannot be made to coexist, for example native title and a grant of freehold.

95 As to (a), the paper stated[66] that as there is no conflict between the grant and native title there is therefore no need for remedial action. By contrast, as to

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63 The *Native Title Bill* was read for the first time on 16 November 1993: see Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2877.

64 Department of the Prime Minister and Cabinet, "Mabo: The High Court Decision on Native Title", Discussion Paper, June 1993 at 43-44.

65 Department of the Prime Minister and Cabinet, "Mabo: The High Court Decision on Native Title", Discussion Paper, June 1993 at 44-45.

66 Department of the Prime Minister and Cabinet, "Mabo: The High Court Decision on Native Title", Discussion Paper, June 1993 at 45.

(c), it was observed[67] that two steps would be necessary: extinguishment of the native title that would have been extinguished but for the operation of the *Racial Discrimination Act*, and validation of any grants that were wholly or partly invalid by operation of that Act. Most significantly for present purposes, it was observed[68] in relation to (b):

> "[T]he native title need not be extinguished. The native title could be confirmed subject to, or restricted by, the grant for the period of the grant, with compensation for that restriction, and the grant validated.
>
> In effect, this approach would modify the common law position set out in *Mabo (No 2)*[69] that a grant inconsistent with native title rights extinguishes those rights. This would therefore involve:
>
> - the Commonwealth or the States and Territories confirming, and providing for the continued existence of, native title notwithstanding certain types of grants made since 1975, but subject to or restricted by those grants and with compensation for that impairment; and
>
> - the States and Territories validating their grants and the Commonwealth its grants.
>
> In addition to the desirability in principle of protecting native title to the maximum extent possible ...
>
> *This approach has its most obvious application in relation to mining leases*. It is the same as that generally followed when a mining lease is issued over, for example, a freehold property. In the case of other finite leases (eg tourism), however, the general principle could be more difficult to apply." (emphasis added)

96 Consequent upon the discussion paper, in September 1993 the Government released a paper entitled "Mabo: Outline of Proposed Legislation on Native Title" which outlined key provisions of the proposed *Native Title Bill*.

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67 Department of the Prime Minister and Cabinet, "Mabo: The High Court Decision on Native Title", Discussion Paper, June 1993 at 46-47.

68 Department of the Prime Minister and Cabinet, "Mabo: The High Court Decision on Native Title", Discussion Paper, June 1993 at 45-46.

69 *Mabo v Queensland [No 2]* (1992) 175 CLR 1; [1992] HCA 23.

It grouped[70] past grants, according to type, into three categories (named Categories 1 to 3). Category 1 grants were described as comprised of, inter alia, freehold estates and "a leasehold estate that is a residential, pastoral, tourist or other lease prescribed in regulations made under this Act other than a Category 2 grant". A Category 2 past grant was defined as "mining (including petroleum) grants". The paper emphasised that the validation of Category 2 past grants *did not involve the extinguishment of native title*, and that the native title holders would be able to reassert their rights when the period of the grant had ended or the grant had been surrendered, rescinded, forfeited or purchased by native title owners. The paper added that, in the case of any mining lease which gave exclusive possession of the lease area, native title rights could not be exercised in the area for the period of the lease, but could be exercised thereafter.

97 To the same effect, in a statement on 2 September 1993 accompanying the paper, the then Prime Minister, Mr Keating, announced[71] with respect to the main provisions of the proposed *Native Title Bill*:

> "[T]he Bill will not leave up in the air what implications this validation of past grants has for existing native title. It will make clear that for freehold, and for residential, pastoral and tourist leasehold grants, the validation extinguishes any native title rights inconsistent with those grants. *For mining leases, and lesser interests over land such as licences and permits, the validation will not extinguish the native title. But the Bill will confirm that any native title is subject to the lease or licence for as long as it runs. I emphasise that this is totally consistent with existing practice in relation to mining leases over other private interests in land*." (emphasis added)

98 So also, in the Second Reading Speech in the House of Representatives, the Prime Minister stated[72]:

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70 Commonwealth of Australia, "Mabo: Outline of Proposed Legislation on Native Title", September 1993 at 34-36.

71 "Statement by the Prime Minister, the Hon P J Keating, MP: Mabo Legislation", 2 September 1993 at 2. See also Commonwealth of Australia, "Mabo: Summary Guide to Proposed Legislation on Native Title", September 1993 at 2; Department of the Parliamentary Library, Parliamentary Research Service, "*Native Title Bill 1993*", 23 November 1993 at 6.

72 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2880. See also the observations of Mr Crean, the then Minister for Primary Industries and Energy, in debate: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 November 1993 at 3533.

> "Validation of mining leases will not extinguish native title rights, which can again be exercised in full after the grant, and any legitimate renewals, have expired. This is not discrimination against the mining industry, or some radical departure from existing practice. Let me quote, for example, section 113 of the Western Australian Mining Act. It states:
>
> > When a mining tenement expires or is surrendered or forfeited, the owner of the land to which the mining tenement related may take possession of the land forthwith ...
>
> How can we offer native titleholders any less?"

99 The Explanatory Memorandum to the *Native Title Bill* further emphasised[73] the intended distinction between mining leases and other leases in a discussion of cl 231 of the Bill, concerning the definition of commercial lease (now s 246(1) of the NT Act), as follows:

> "In order to be a commercial lease a lease must permit the lessee to use the land or waters covered by the lease solely or primarily for business or commercial purposes. Such purposes are not defined but are left to be interpreted according to the general law having regard to the particular circumstances of each case.
>
> Subclause 231(2) provides examples of the use of land for business or commercial purposes. Whether such use is the sole or primary use will be a question for determination in the circumstances of each particular case. ...
>
> *Ordinarily a mining lease would be a commercial lease but mining leases have been excluded from this definition. Mining leases form a special category* ... An agricultural or pastoral lease can still be a commercial lease. The definitions of an 'agricultural lease', 'pastoral lease' and 'residential lease' are not intended to limit what can fall within the definition of a 'commercial lease'." (emphasis added)

(ii) 1997 amendments

100 As mentioned earlier, s 47B was enacted as part of a suite of amendments introduced into the NT Act primarily to overcome uncertainties arising from this Court's decision in *Wik* regarding the extent of extinguishment of native title by

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73 Australia, House of Representatives, *Native Title Bill 1993*, Explanatory Memorandum Part B at 96-97.

grants of interest made prior to that decision[74]. One of the principal purposes of the amendments was to introduce Div 2B of Pt 2 of the NT Act in relation to the confirmation of past extinguishment of native title by certain valid or validated acts. As was explained[75] in the Explanatory Memorandum to the *Native Title Amendment Bill 1997* (Cth), it was intended that those provisions would limit uncertainty in relation to the extinguishment of native title by grants of interest:

> "The purpose of the proposed amendments dealing with confirmation of extinguishment of native title is to limit this uncertainty. The effect will be to confirm that native title is extinguished on exclusive tenures (such as freehold and residential leases) and extinguished to the extent of any inconsistency on non-exclusive agricultural and pastoral leases. Consistent with the *Wik* decision, the rationale for such confirmation is that the rights conferred and/or the nature of the use of the land is such that the exclusion of others (including native title holders) must have been presumed when the tenure was granted. The amendments will put the matter beyond doubt."

101 The scheme of Div 2B was to introduce the concepts of "previous exclusive possession acts"[76] and "previous non-exclusive possession acts"[77] and to provide that, if acts to which the Division applies are previous exclusive possession acts, the acts will have completely extinguished native title[78], and, if acts to which the Division applies are previous non-exclusive possession acts, the acts will have extinguished native title to the extent only of any inconsistency[79]. Those provisions were augmented by s 61A, which provides in substance that, subject to s 61A(4), a claimant application cannot be made over an area where there has been a previous *exclusive* possession act – thereby reflecting "the fact that such acts have been confirmed as extinguishing native title"[80]; and a claimant

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74 See Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 4 [1.5], 35-36 [4.3]-[4.5].

75 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 53 [5.3].

76 NT Act, s 23B.

77 NT Act, s 23F.

78 NT Act, ss 23C, 23E.

79 NT Act, ss 23G, 23I.

80 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 275 [25.26].

application over an area in relation to which there has been a previous *non-exclusive* possession act cannot claim *exclusive* possession in relation to that area – "because such acts of their nature mean that the native title holders can no longer have exclusive possession of the area concerned"[81].

102 The significance of exclusive possession was further emphasised in a newly introduced Sch 1 to the NT Act, containing lists of leases and other interests considered, on the basis of common law, to have conferred exclusive possession and thereby to have extinguished native title ("Scheduled interest")[82], and by the inclusion of a Scheduled interest in the definition of a previous exclusive possession act in s 23B(2). Notably, the definition of a Scheduled interest in s 249C expressly excludes mining leases. Most significantly, however, s 61A(4) provides that s 61A operates subject, among other provisions, to s 47B, which, as has been seen, permits the extinguishment by a previous exclusive possession act or a previous non-exclusive possession act to be disregarded where the section applies.

103 Evidently, therefore, the object of the exercise was to exclude mining leases from the range of interests which could stand in the way of the recognition of native title under s 47B. As Senator Campbell stated[83] during the Second Reading Speech for the *Native Title Amendment Bill* in the Senate, the purpose of s 47B is to enable indigenous people who are in occupation of an area of vacant Crown land over which there are no longer any competing third party rights to claim native title and have the court disregard the previous extinguishment of native title. Similarly, as Senator Minchin, the then Special Minister of State and Minister Assisting the Prime Minister, added in the course of debate[84]:

> "[W]here Aboriginal people are on a reserve or occupying vacant crown land over which a past lease has affected either partial or full extinguishment, it is to be disregarded for the purposes of determining the native title claims. I think it is only fair and proper to set aside the common law effect of that past grant in order that Aboriginal people currently occupying that land, either by reserve or vacant crown land, can make a full native title claim regardless of the past extinguishing effect of previous grants."

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81 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 275 [25.27].

82 See NT Act, s 249C. See also Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 413 [36.2].

83 Australia, Senate, *Parliamentary Debates* (Hansard), 11 March 1998 at 863.

84 Australia, Senate, *Parliamentary Debates* (Hansard), 5 December 1997 at 10510.

Conclusions on s 47B(1)(b)(i)

104 Given that, before the enactment of s 47B, the non-extinguishment principle applied, and that it continues to apply, to land in respect of which native title has not been extinguished by a Category A or B past act but which is affected by a Category C or D past act – by engaging the non-extinguishment principle in relation to Category C and D past acts – and given, further, that the object of s 47B(1)(b)(i) is to disregard the extinguishment of native title by Category A and B past acts in relation to vacant Crown land – and to deal with the "creation of a prior interest" by engagement of the non-extinguishment principle – it would be ex facie illogical if s 47B did not apply to vacant Crown land the subject of a Category C past act. The same reasoning would apply with respect to land the subject of a Category D past act. By contrast, the purpose of s 47B(1)(b)(ii) is to exclude the operation of s 47B in cases of land reserved, proclaimed, dedicated or conditioned for designated public purposes or a particular purpose, which, as the Full Court of the Federal Court has observed[85], is no doubt intended to minimise the impact of native tile determination applications on areas set aside by proclamation or otherwise under statutory authority for public or particular purposes. Clearly enough, in such cases, different considerations apply[86].

105 Section 47B(1)(b)(i) may also be contrasted with s 44H of the NT Act, which provides in substance that, for the avoidance of doubt, if the grant, issue or creation of a lease, licence, permit or authority is valid (including because of any provision of the NT Act) and requires or permits the doing of any activity, an activity done in accordance with the lease, licence, permit or authority prevails over the native title rights and interests and any exercise of them but does not extinguish them. In that context, despite the reference to both lease, and licence, permit or authority, it appears that "lease" means lease in its defined sense of including a mining lease and therefore an exploration or prospecting permit or licence, and that the reference to licence, permit or authority is to embrace licences, permits or authorities to carry out activities other than mining, exploration or prospecting[87].

106 Ultimately, s 47B(1)(b)(i) permits of a constructional choice: between a meaning which would allow the non-extinguishment principle to operate in

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85 *Northern Territory v Alyawarr* (2005) 145 FCR 442 at 494-495 [187].

86 See and compare *Banjima People v Western Australia* (2015) 231 FCR 456 at 496-498 [110]-[117]; *Tucker (on behalf of the Banjima People) v Western Australia [No 2]* (2015) 328 ALR 637 at 647-648 [33].

87 See and compare *Banjima People v Western Australia [No 2]* (2013) 305 ALR 1 at 185-186 [1113]-[1116].

relation to vacant Crown land affected by a mining lease and a meaning which would not. As has now been seen, the former fits with considerations of context, purpose and legislative history[88], while the latter does not. Since inconvenient and improbable constructions are not lightly to be imputed to the legislature where an alternative construction is open[89], it should be concluded that the purpose of s 47B(1)(b)(i) is to prevent s 47B operating on land encumbered by Category A or B past acts and to allow the non-extinguishment principle to operate with respect to vacant Crown land the subject of competing interests that do not extinguish native title or are capable of operating subject to the non-extinguishment principle.

107 On that basis, it follows that "lease" in s 47B(1)(b)(i) does not include a "mining lease" – it means "lease (other than a mining lease)" – and, therefore, that "lease" in s 47B does not include a petroleum exploration permit or an exploration licence.

Conclusion and orders

108 The appeals should be allowed.

109 In Matter No P37 of 2018, the orders of the Full Court of the Federal Court made on 16 March 2018 should be set aside and in their place it should be ordered that the appeal to the Full Court be dismissed**.**

110 In Matter No P38 of 2018, Orders 1 and 2(c) made by the Full Court of the Federal Court on 1 February 2018 should be set aside and in place of Order 1 it should be ordered that the appeal be allowed in part.

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88 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] per Kiefel CJ, Nettle and Gordon JJ, 374 [35]-[37] per Gageler J; [2017] HCA 34.

89 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321 per Mason and Wilson JJ; [1981] HCA 26; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2.

111 GORDON J. Each of the appellants, acting on behalf of a native title claim group – respectively, the Ngurra people and the Tjiwarl people – made native title determination claims under the *Native Title Act 1993* (Cth) over vacant Crown land which was partly subject to a mineral exploration licence or a petroleum exploration permit.

112 Each claim group was determined to have native title rights and interests in the vacant Crown land but it was determined that their rights to exclusive possession had been extinguished by other prior valid historic acts[90].

113 Section 47B(2) of the *Native Title Act*, under the headings "Vacant Crown land covered by claimant applications" and "Prior extinguishment to be disregarded", provides that, for all purposes under the *Native Title Act* in relation to a claimant application over vacant Crown land, any extinguishment of native title rights and interests in a claim area by the creation of any prior interest in relation to the area must be disregarded. That is, when determining, under s 225 of the *Native Title Act*, whether native title exists in relation to a particular area of vacant Crown land, the historic extinguishment of the native title by any prior interest is to be "ignored"[91]. However, in certain circumstances, the historic prior interests are not to be ignored.

114 The effect of s 47B(1)(b) is that the historic prior interests are not to be ignored if, *at the time the application is made*, the area is, relevantly: (i) "covered by a freehold estate or a lease"; (ii) "covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose"; or (iii) "subject to a resumption process".

115 In the *Ngurra* appeal[92], the Full Court of the Federal Court of Australia accepted that petroleum exploration permits are capable of constituting a

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90 See *Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v Western Australia [No 2]* [2017] FCA 587 at [1]; *Narrier v Western Australia* [2016] FCA 1519 at [34], [970].

91 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 69 [5.60].

92 *Attorney-General (Cth) v Helicopter-Tjungarrayi* (2018) 260 FCR 247. In the *Tjiwarl* matter at first instance, Western Australia did not press its submission regarding s 47B(1)(b)(ii), given the findings of the Full Court in *Tucker (on behalf of the Banjima People) v Western Australia [No 2]* (2015) 328 ALR 637: see *Narrier* [2016] FCA 1519 at [1194]; see also *Banjima People v Western Australia* (2015) 231 FCR 456 at 496-498 [107]-[118].

permission or authority under which land is to be used for a particular purpose within s 47B(1)(b)(ii)[93]. However, their Honours held that "[g]iven the nature of the actual physical works to the land appear[ed] to be relatively confined (two exploration wells) and the land the subject of the permits authorised to be used [was] large", their Honours were not satisfied that the permits before the Court could be characterised as ones under which the whole or any part of the land was to be used for the particular purpose of exploring for petroleum, and therefore that the permits did not engage s 47B(1)(b)(ii)[94]. That finding was not challenged on appeal to this Court.

116 Thus, in these appeals, the issue is whether the Full Court of the Federal Court was in each case correct to conclude[95] that a mineral exploration licence or petroleum exploration permit is a "lease" within the meaning of s 47B(1)(b)(i). The answer is "no". The text and structure of the *Native Title Act* – and, in particular, s 47B(1)(b) – do not support, and do not require, the shoe-horning of a mineral exploration licence or a petroleum exploration permit into a "lease" within the meaning of s 47B(1)(b)(i).

117 Division 3 of Pt 15 of the *Native Title Act* "contains definitions relating to leases"[96]. Section 242(1), in Div 3 of Pt 15, provides that the expression "lease" includes (a) a lease enforceable in equity, (b) a contract that contains a statement to the effect that it is a lease, or (c) "anything that, at or before the time of its creation, is, for any purpose, by a law of the Commonwealth, a State or a Territory, declared to be or described as a lease". It is an inclusive definition; it extends beyond a common law lease; it includes any instrument that is described by law as a lease. Thus, as this Court held in *Western Australia v Ward*[97], the definition of "lease" in s 242(1) includes a mining lease granted under s 71 of the *Mining Act 1978* (WA)[98].

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93 *Attorney-General (Cth)* (2018) 260 FCR 247 at 256 [30]-[31].

94 *Attorney-General (Cth)* (2018) 260 FCR 247 at 258-259 [37]-[38].

95 *BHP Billiton Nickel West Pty Ltd v KN (Deceased)* (2018) 258 FCR 521 at 537-541 [65]-[81]; *Attorney-General (Cth)* (2018) 260 FCR 247 at 250-251 [8]-[12].

96 *Native Title Act*, s 241. See also *Native Title Act*, s 9.

97 (2002) 213 CLR 1 at 158-159 [288], 162-163 [298]-[299]; [2002] HCA 28.

98 See also Australia, House of Representatives, *Native Title Bill 1993*, Explanatory Memorandum Part B at 94.

118 At this point, it is important to recognise that neither a mineral exploration licence under the *Mining Act*, nor a petroleum exploration permit under the *Petroleum and Geothermal Energy Resources Act 1967* (WA), is declared to be or described as a lease and therefore neither satisfies s 242(1)(c) of the *Native Title Act*.

119 Section 242(2), headed "References to mining lease", provides that:

> "*In the case only of references to a mining lease*, the expression ***lease*** also includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory." (emphasis added)

120 The question is whether s 242(2) extends the definition of "lease" to include mining leases, mining licences and other authorities to mine throughout the *Native Title Act* or only when the Act refers to "lease" in the expression "mining lease". The answer is the latter. That conclusion is compelled by the text and structure of the *Native Title Act* and its legislative history.

121 Section 242(2), in its terms, adopts a drafting technique which is used throughout the *Native Title Act*[99]. That sub-section provides that "[i]n the case *only* of *references to* a mining lease", the expression "lease" is to be given an extended meaning (emphasis added). The contrary view depends upon using the wider meaning given by s 242(2) to extend "lease" and not as s 242(2) requires – that the wider meaning operate only in the case of references to a "mining lease". Section 242(2) operates in a similar way to s 226(1), which alters the meaning of "act" in references to an act affecting native title and in other references in relation to native title. In each provision, the meaning of the word affected – "lease" or "act" – is changed when that word is used in a particular phrase or context in the *Native Title Act*.

122 Section 242(1) and (2) operate in the same way. The word "lease", when used on its own in the *Native Title Act*, includes, among other things, those instruments *declared by law* to be a lease[100]. An instrument declared or described as a mining lease by law is a "lease" that satisfies s 242(1)[101].

123 But "lease" as it appears in the expression "mining lease" has an extended meaning that includes licences issued, and authorities given, by a law of the

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99 See, eg, *Native Title Act*, ss 23B(2)(c)(vii), 24IC(2A)(b), 24MC, 24NA(1), 26(3), 44, 47A(4), 157(5), 184, 190E(12), 203FH(6)-(8), 226(1), 232B(3)(f), 238(1), 244(1) and 251D.

100 *Native Title Act*, s 242(1).

101 *Ward* (2002) 213 CLR 1 at 158-159 [288], 162-163 [298]-[299].

Commonwealth, a State or a Territory, by reason of s 242(2). Thus, where the expression "mining lease" is adopted in the *Native Title Act*, it captures a number of different kinds of instruments.

124 In s 245(1), a "mining lease" is defined as a "lease" that "permits the lessee to use the land or waters covered by the lease solely or primarily for mining". However, as explained, references to the words "mining lease" in the *Native Title Act* also include "a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory", by operation of s 242(2). Thus, not every instrument that is captured by a reference to a "mining lease" will also be captured by a reference to a "lease" when "lease" is used on its own in the *Native Title Act*.

125 That last statement requires unpacking. Where the word "lease" is used on its own, all that is required for an instrument to be caught is that the instrument meets the definition of "lease" in s 242(1). Division 3 of Pt 15 then provides definitions of particular types of leases by reference to characteristics additional to the broad definition of "lease" in s 242(1). A "mining lease" as defined in s 245(1) is one of those particular types of leases.

126 Section 243(2) does not alter the construction of s 242(1) and (2). Section 243(2) goes no further than to ensure that in any provision in which the extended meaning of mining lease applies by operation of s 242(2), the use of the word "lessee" is given content that operates sensibly with respect to any licence or authority brought within the operation of the relevant provision.

127 That construction of s 242(1) and (2) is reinforced by the legislative context and history of the *Native Title Act*. First, the Act proceeds on the principle of non-discrimination under which native title holders are, in many ways, to be treated the same as holders of freehold[102].

128 Second, consistent with that principle of non-discrimination, that construction of s 242(1) and (2) is reinforced by the references to "mining lease" in Pt 2 of the *Native Title Act*. Division 2 of Pt 2 concerns the validation of past acts. In that Division, if the past act is a grant of a "mining lease", the act is a "Category C past act"[103] to which the non-extinguishment

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102 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2880; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 437-438; [1995] HCA 47; *Ward* (2002) 213 CLR 1 at 105-107 [121]-[124]; but see at 95 [94]-[95].

103 *Native Title Act*, s 231.

principle applies[104]. Division 2B of Pt 2, in addressing confirmation of past extinguishment of native title by certain valid or validated acts, provides that a mining lease is *not* a "previous exclusive possession act"[105]. Moreover, because a "mining lease" is not an event which extinguishes native title, when certain types of mining lease are granted over native title land, native title holders are granted rights, among others, to negotiate[106] and to compensation under the similar compensable interest test[107].

129 And, as the Second Reading Speech to the *Native Title Bill 1993* (Cth) records, it was Parliament's intention to treat as a non-extinguishing event not only the grant of a mining lease but any mining tenement. As the then Prime Minister said[108]:

> "Validation of mining leases will not extinguish native title rights, which can again be exercised in full after the grant, and any legitimate renewals, have expired. This is not discrimination against the mining industry, or some radical departure from existing practice. Let me quote, for example, section 113 of the Western Australian Mining Act. It states:
>
> > When a mining tenement expires or is surrendered or forfeited, the owner of the land to which the mining tenement related may take possession of the land forthwith …
>
> How can we offer native titleholders any less?"

Under the *Mining Act 1978* (WA), a "mining tenement" was at the time, and remains[109], defined as, among other things, a prospecting licence, exploration

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104 See *Native Title Act*, ss 15(1)(d), 228, 231 and 238. The same approach is adopted in Div 2A, dealing with the validation of intermediate period acts: see *Native Title Act*, ss 22B(d), 232A and 232D.

105 *Native Title Act*, s 23B(2)(c)(i) and (viii), read with s 249C(1) (subject to ss 23B(2)(c)(vii) and 245(3)).

106 *Native Title Act*, ss 25 and 26(1A)-(1).

107 *Native Title Act*, ss 17(2)(c) and 240.

108 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2880.

109 The definition of "mining tenement" was extended to include a "retention licence" with effect from 1 July 1994: see *Mining Amendment Act 1993* (WA), s 10(2).

licence, mining lease, general purpose lease or a miscellaneous licence granted or acquired under that Act[110].

130 Thus, s 242(2) is intended to ensure that where the expression "mining lease" is used, licences or authorities to mine are treated in the same way as a mining lease, do not extinguish native title and, depending on the circumstances, provide to native title holders a right to negotiate and to compensation.

131 That construction is further reinforced by other provisions in the *Native Title Act*. Throughout the Act, there are provisions which apply to a "lease (other than a mining lease)"[111] or where "the lease is not a mining lease"[112]. These provisions recognise that a mining lease is a "lease"[113] within s 242(1) but that it separately has an extended meaning under s 242(2). Where these forms of expression are used, the Act is intended to apply to a lease but not to a mining lease at all – neither the definition within s 242(1) nor as expanded by s 242(2). Thus, s 242(2) operates to extend the meaning of "lease" in the expression "mining lease" to licences and authorities to mine in circumstances where the *Native Title Act* treats mining tenements as non-extinguishing events and confers certain rights on native title holders[114].

132 How does that construction then sit with s 47B? Section 47B is "a statutory mechanism designed to allow native title claimants who are in occupation of vacant Crown land to overcome the effect of past extinguishment and have their claim determined by the court"[115]. Section 47B(1)(b) identifies a field of exclusions from that general proposition. That is, it identifies with precision (in sub-paras (i)-(iii)) those competing interests which exist, *at the time that the application for determination of native title is made*, that permit the prior extinguishment to continue while that competing interest exists.

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110 *Mining Act 1978* (WA), s 8(1).

111 *Native Title Act*, ss 21(3)(a), 23B(2)(c)(viii), 24IC(4)(c), 43A(2)(a)(i), 232A(2)(e)(i), 232B(3)(g) and 246(1).

112 *Native Title Act*, ss 230(b) and 232C(b)(i).

113 At least because of *Native Title Act*, s 242(1)(c).

114 See, eg, *Native Title Act*, ss 23B(2)(c)(vii)-(viii), 24IC(4)(c), 26(1)(c)(i), 231 and 232D.

115 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 68 [5.56].

133 Section 47B(1)(b) employs a drafting technique used throughout the *Native Title Act*[116]: it starts with what might be described as the most extensive common law rights and interests in land to which the provision is intended to apply – such as freehold estates and leases – and then cascades down to lesser rights and interests – such as licences, permits and authorities. It may be that, on a given set of facts, a particular right or interest is captured by more than one paragraph of a provision. Or, in others, it may be that the particular right or interest is "cut off" at an early stage of the provision (where the paragraphs are cumulative). But if a particular right or interest is not – on the facts of the case – captured by any of the paragraphs of a provision, then it is not captured.

134 To extend s 47B(1)(b)(i) to licences and authorities would be to stretch the meaning of "lease", a greater interest, to encompass a type of interest that is already addressed in s 47B(1)(b)(ii): a "permission or authority" made or conferred by Commonwealth, State or Territory legislation, under which land "is to be used ... for a particular purpose". As stated earlier, it was not contended that the Full Court in the *Ngurra* appeal erred in concluding that a petroleum exploration permit is capable of constituting a permission or authority under which land is to be used for a particular purpose. Indeed, for present purposes, it is sufficient to note that the words "permission or authority" in s 47B(1)(b)(ii) are intended to reflect the fact that less extensive interests, such as a permit or authority, made or conferred in the context of the remainder of s 47B(1)(b)(ii), will be sufficient to defer the fact that historic extinguishment of the native title by any prior interest is to be "ignored".

135 Thus, in that context, s 47B(1)(b)(i) refers to a "lease", which, by its terms, includes a mining lease that satisfies the requirements of s 242(1). But that reference to "lease" does not, and is not intended to, extend to include the wider meaning of "mining lease" provided in s 242(2).

136 Section 24LA of the *Native Title Act* provides no support for a contrary view. Section 24LA, dealing with low impact future acts, lists a number of acts that are not of that nature. The "grant of a lease" as well as "mining (other than fossicking by using hand-held implements)" are two of the listed acts. That both are listed is unsurprising. To "mine" is defined in s 253 of the *Native Title Act* as including to "explore or prospect for things that may be mined" and to quarry. The reference to mining should not be equated with a "mining lease" because, consistently with the drafting technique described earlier, the word "mining" in this context may include interests less extensive than the grant of a mining lease

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116 See, eg, *Native Title Act*, ss 14(2), 19(2), 24GD(1), 24GE(1), 24ID(1), 24LA(1)(b) and 43A(2). The technique is also employed in the allocation of past acts and intermediate period acts into Category A, B, C and D classifications: see *Native Title Act*, ss 229-232 and 232B-232E.

including, for example, interests arising from a joint venture agreement or a commercial agreement between corporations or individuals. Indeed, in s 24LA(1)(b)(v), the reference is to any future "act"[117] that "does not consist of, authorise or otherwise involve" mining.

137 Accordingly, contrary to Western Australia's submissions, it is inappropriate to construe "lease" in s 47B(1)(b)(i) as including a reference to "mining lease" as expanded by s 242(2).

138 For those reasons, I agree with the orders proposed by Kiefel CJ, Bell, Keane and Edelman JJ.

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117 Defined as including the grant of a "licence, permit, authority or instrument" and "an act having any effect at common law or in equity": *Native Title Act*, s 226(2)(b) and (f).