HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD AND GLEESON JJ

DAVID HARVEY & ORS APPELLANTS

AND

MINISTER FOR PRIMARY INDUSTRY AND RESOURCES & ORS RESPONDENTS

Harvey v Minister for Primary Industry and Resources
[2024] HCA 1
Date of Hearing: 5 September 2023
Date of Judgment: 7 February 2024
D9/2022

ORDER

1. *Appeal allowed.*

2. *Set aside order 1 of the orders made by the Full Court of the Federal Court of Australia on 29 April 2022 and in its place:*

   (a) *order that the appeal be allowed;*

   (b) *declare that the grant of ML 29881 under s 40(1)(b)(ii) of the* Mineral Titles Act 2010 *(NT) is a future act that is the creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining within s 24MD(6B)(b) of the* Native Title Act 1993 *(Cth); and*

   (c) *order that the first respondent be restrained from deciding the application for ML 29881 until completion of the procedures in s 24MD(6B) of the* Native Title Act 1993 *(Cth).*

3. *Each party bear its own costs of the appeal.*

On appeal from the Federal Court of Australia

Representation

S A Glacken KC with R W Kruse for the appellants (instructed by Northern Land Council)

S B Lloyd SC with L S Peattie for the first and second respondents (instructed by Solicitor for the Northern Territory)

R N Traves KC with M A Eade for the third respondent (instructed by Ward Keller)

CATCHWORDS

Harvey v Minister for Primary Industry and Resources

Native title – Native title rights – Mining – Mineral leases – Where s 24MD(6B) of *Native Title Act 1993* (Cth) entitles native title holders to certain procedural rights in relation to future acts that, relevantly, involve "the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility ... associated with mining" – Where Mount Isa Mines Limited carries on mining enterprise in Northern Territory – Where Mount Isa Mines Limited applied for mineral lease ("ML 29881") under *Mineral Titles Act 2010* (NT) to construct Dredge Spoil Emplacement Area ("DSEA") on pastoral lease – Where first and second appellants native title holders in respect of land comprising pastoral lease – Where third appellant relevant prescribed body corporate for the purposes of *Native Title Act* – Whether appellants entitled to procedural rights in s 24MD(6B) of *Native Title Act* – Whether proposed grant of ML 29881 constitutes creation of right to mine for sole purpose of construction of infrastructure facility associated with mining pursuant to s 24MD(6B)(b) of *Native Title Act* – Whether definition of "infrastructure facility" in s 253 of *Native Title Act* exhaustive – Whether DSEA infrastructure facility.

Words and phrases – "associated with mining", "definition", "dredging", "exhaustive", "explanatory memorandum", "extrinsic materials", "future act", "includes any of the following", "infrastructure facility", "mine", "mineral lease", "mining", "mining lease", "mining operations", "mining tenement", "native title holders", "ordinary meaning", "right to mine", "right to negotiate", "sole purpose", "statutory interpretation".

Acts Interpretation Act 1901 (Cth), s 15AB.
Mineral Resources (Sustainable Development) Act 1990 (Vic), ss 4(1), 14(1).
Mineral Resources Act 1989 (Qld), ss 234(1)(b), 316(2).
Mineral Resources Development Act 1995 (Tas), ss 3, 84(1)(a), 106(1).
Mineral Titles Act 2010 (NT), ss 11(1), 12(1), 40, 44, 74(2), 86, 148.
Mining Act 1971 (SA), ss 6(1), 48(1).
Mining Act 1978 (WA), ss 85(1)(d), 87(1).
Mining Act 1992 (NSW), s 73(1)(c).
Native Title Act 1993 (Cth), ss 24MD(6A), 24MD(6B), 26(1)(c)(i), 26(2), 226, 253.

1 GAGELER CJ, GORDON, STEWARD AND GLEESON JJ. The McArthur River Project is an enterprise carried on by the third respondent, Mount Isa Mines Limited ("Mt Isa Mines"), in the Northern Territory. The McArthur River Project comprises the mining of zinc-lead-silver ore, the processing, treatment and concentration of this ore, its storage, and its transportation for sale. The ore concentrate must travel 120 kilometres by road to the "Bing Bong" loading facility located on the Gulf of Carpentaria. There it is loaded onto a bulk-carrier vessel for transhipment to larger ocean-going ships. This part of the Gulf is shallow, and the bulk-carrier must use a navigation channel which needs to be maintained by regular dredging. The resulting dredged sediment is pumped onshore to a Dredge Spoil Emplacement Area ("DSEA"), which is of limited capacity and has been filling up. In 2013, Mt Isa Mines applied for a new mineral lease (to be called "ML 29881") under the *Mineral Titles Act 2010* (NT) to enable it to construct a new DSEA on a pastoral lease it owns nearby the Bing Bong loading facility.

2 The first and second appellants, Mr Harvey and Mr Simon, are native title holders in respect of the land comprising the pastoral lease.[1] The third appellant is the relevant prescribed body corporate for the purposes of the *Native Title Act 1993* (Cth). The proposed grant of ML 29881 will be a "future act" that will affect the appellants' native title for the purposes of the *Native Title Act*. It was not in dispute that the grant of ML 29881 will only be "valid" if it is "covered" by s 24MD in Subdiv M of Div 3 of Pt 2 of the *Native Title Act*.

3 The proposed grant of ML 29881 to Mt Isa Mines gives rise to the following three possible alternative consequences:

(a) pursuant to s 24MD(6A) of the *Native Title Act*, the appellants have the same procedural rights as if they held ordinary title to the land concerned ("freeholder rights"), but nothing more; or

(b) pursuant to s 24MD(6B) of the *Native Title Act*, in addition to the freeholder rights, the appellants have the statutory rights of notification, objection and consultation set out in that sub-section, because the grant will constitute "the creation ... of a right to mine for the sole purpose of the construction of an infrastructure facility ... associated with mining"; or

(c) pursuant to s 26(1)(c)(i) of the *Native Title Act*, the appellants have a statutory "right to negotiate" with Mt Isa Mines in accordance with Subdiv P of Div 3 of Pt 2, because the grant will constitute "the creation of

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1 *Ngajapa v Northern Territory* [2015] FCA 1249. The determination applies to the whole of Mt Isa Mines' pastoral lease.

> a right to mine ... except one created for the sole purpose of the construction of an infrastructure facility ... associated with mining".

4 The alternative rights are described in more detail below. Which of the alternatives is applicable to the grant of ML 29881 is the subject of this appeal.

5 The appellants contend that they are entitled to the freeholder rights under s 24MD(6A), as well as the procedural rights under s 24MD(6B). The Full Court of the Federal Court of Australia disagreed. It decided that the grant of ML 29881 could not constitute the creation of any "right to mine" and also that the proposed DSEA would not be an "infrastructure facility" for the purposes of s 24MD(6B)(b). On this basis the appellants had only the freeholder rights under s 24MD(6A). This appeal requires the Court to determine what constitutes a "right to mine", as that term is used in the *Native Title Act*, and what amounts to an "infrastructure facility" as defined by s 253 of the *Native Title Act*.

6 For the reasons set out below, the appeal should be allowed. The appellants are entitled to the freeholder rights under s 24MD(6A), as well as the procedural rights afforded by s 24MD(6B). The proposed grant of ML 29881 will constitute "the creation ... of a right to mine for the sole purpose of the construction of an infrastructure facility ... associated with mining".

The McArthur River Project

7 In 1992, Mt Isa Mines and the Northern Territory entered into an agreement for the development, construction and operation of the McArthur River Project ("the McArthur River Project Agreement"). Implementation of the agreement was authorised by the *McArthur River Project Agreement Ratification Act 1992* (NT).[2] Schedule 1 cl 1(1) defines the purposes of the project in the following way:

> "***McArthur River Project*** means the project to be developed by the Company in the Northern Territory of Australia relating to the mining of zinc-lead-silver from the mineral deposit known as the HYC deposit and the subsequent treatment, storage and transport of Ore and Concentrate within and between the Mineral Leases within the external boundaries of the northern portion of RO581 as at the date of this Agreement and any adjoining areas and the area of one Mineral Lease on the Bing Bong Pastoral Lease No 686 and adjacent Territory waters. The project is for the purposes of:

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2 *McArthur River Project Agreement Ratification Act 1992* (NT), s 4(1).

(a) mining of Ore;

(b) processing, treatment and concentration of Ore;

(c) storing Ore or Concentrate;

(d) transporting Concentrate for sale, export or further processing;

(e) exploration for minerals; and

(f) for such other purposes in connection with the McArthur River Project as are necessarily incidental to paragraphs (a), (b), (c), (d) and (e)."

8 Subsequently, the Northern Territory granted to Mt Isa Mines Mineral Leases 1121 to 1126 ("ML 1121 to 1126"). Mineral Leases 1121 to 1125 ("ML 1121 to 1125") address what Windeyer J described in *Wade v New South Wales Rutile Mining Co Pty Ltd* as "operations for getting at and getting out minerals".[3] Mineral Lease 1126 ("ML 1126") addresses the Bing Bong loading facility on the Gulf of Carpentaria. On the southern boundary of ML 1126 may be found the present DSEA.

9 Clause 4 of each of ML 1121 to 1125 describes the permitted activities authorised by those leases as follows:

"The Company may use or permit to be used the Lease Area for the purposes of:

(a) Mining, processing, treatment and concentration of the Ore including the treatment of tailings or other mining material and removal of Ore, Concentrate, tailings or other mining material from the Lease Area;

(b) the erection of machinery, conveyor apparatus, plant, buildings or other structures, or use thereof;

(c) impounding and retaining of waste resulting from the Mining, treatment or processing operations;

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3 (1969) 121 CLR 177 at 194.

(d) the erection and use of residential premises or recreational facilities for persons engaged in or connected with the McArthur River Project;

(e) the cutting and construction of water races, drains, dams and roads for use in connection with the McArthur River Project;

(f) the boring or sinking for, pumping or raising of, water for the use of that water for or in connection with the McArthur River Project;

(g) exploring for minerals on the Lease Area;

(h) the Mining and use of extractive minerals for or in connection with all or any of the purposes specified in paragraphs (a), (b), (c), (d), (e) and (f) of this clause; and

(i) such other purposes necessarily incidental to or in connection with paragraphs (a), (b), (c), (d), (e), (f), (g) and (h) of this clause, including the management, protection and rehabilitation of the Environment."

10 Clause 4 of ML 1126 describes the permitted activities authorised by that lease as follows:

"The Company may use or permit to be used the Lease Area for the purposes of:

(a) receiving, handling, storage and removal of Concentrate and other material and such other purposes in connection with and necessarily incidental to the Mining and the development, construction and operation of the McArthur River Project;

(b) the dredging of a channel and swing basin for a barge loading facility;

(c) the erection of machinery, conveyor apparatus, plant, buildings or other structures, or use thereof;

(d) the use of trucks, barges and other means of transport for deliveries to and from the Lease Area;

(e) the erection and use of residential premises or recreational facilities for persons engaged in or connected with the McArthur River Project;

(f) the cutting and construction of water races, drains, dams and roads for use in connection with the McArthur River Project;

(g) the boring or sinking for, pumping or raising of, water for the use of that water for or in connection with the McArthur River Project;

(h) exploring for minerals on the Lease Area;

(i) the Mining and use of extractive minerals for or in connection with all or any of the purposes specified in paragraphs (a), (b), (c), (d), (e), (f) and (g) of this clause; and

(j) such other purposes necessarily incidental to or in connection with paragraphs (a), (b), (c), (d), (e), (f), (g), (h) and (i) of this clause, including the management, protection and rehabilitation of the Environment.

Provided that pursuant to the Agreement the Company is entitled to permit the use of the facilities on the Lease Area by third parties for purposes other than the McArthur River Project."

11 We do not know with precision what activities proposed ML 29881 will authorise. It is not, however, in dispute that the activities described in the application for that mineral lease correctly state what the general object and purpose of ML 29881 will be:

"McArthur River Mining (MRM) operates the Bing Bong Loading Facility through which concentrates produced at the Mine are loaded onto a self propelled barge and then transhipped onto Ocean Going Vessels for export throughout the world.

The loading Facility is predominately located on Mineral lease MLN 1126 and consists of a concentrate storage shed and barge loading conveyor system, a swing basin and navigation channel.

At the time of construction in 1994/95 an area on the southern boundary of the Mineral Lease was developed into a dredge spoil deposition area. The swing basin and navigation channel require regular dredging to remove silts and muds from the channel to ensure that sufficient under keel clearance is maintained to enable safe operations for the barge.

Dredged material has been deposited in the spoil area during the course of several dredging campaigns spanning 15 years, however the capacity of the

spoil area has now been reached and as such an additional dredge spoil area needs to be constructed.

Works proposed will include the construction of a new dredge spoil area similar in size and design to the existing spoil area and will include engineered internal and external walls and internal and external drains to carry sea water to the existing drainage channel and back out to sea.

The new dredge spoil area will have sufficient capacity to cover anticipated dredging requirements out to the end of mine life."

12 Having regard to the terms of ML 1121 to 1126, two aspects of the McArthur River Project should be observed. First, the mining takes place in a very remote part of Australia. Secondly, it is an essential part of the McArthur River Project that its zinc-lead-silver concentrate be transported to the Bing Bong loading facility, and thereafter to ships in the Gulf of Carpentaria. As the Full Court observed below, the Gulf is "very shallow".[4] Because of this, a navigation channel from the Bing Bong loading facility as well as a swing basin had initially to be dredged and then maintained. Thus, the terms of ML 1126 expressly authorise "the dredging of a channel and swing basin for a barge loading facility". Mt Isa Mines uses a bulk-carrier to deliver its concentrate along this channel and out to sea for delivery to ocean-going vessels.

13 The maintenance of the channel and swing basin produces silt and sand in slurry form known as "dredge spoil". This spoil is pumped to the present DSEA, which is located partly on land forming part of ML 1126 and partly on the same pastoral lease which will be used for the new DSEA and which is nearby the Bing Bong loading facility. The presently existing DSEA comprises a series of ponds (or cells) and a retention basin surrounded by a perimeter drain, which is an open-air drain. The walls of each cell are made from dried natural material. Gravity separates the water from the silt, resulting in dry silt which is then used to make or remake the walls of each cell. The perimeter drain extends around the DSEA to a discharge point on the tidal mud flats east of the Bing Bong loading facility.

14 All of these activities are needed for Mt Isa Mines to export the product of its mine. They are all part of one singular enterprise, namely the McArthur River Project. Within that project, there are no boundaries between different activities;

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4 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 270 [18(a)] per Jagot, Charlesworth and O'Bryan JJ.

everything is directed at the delivery of concentrate by the bulk-carrier to the ships at anchor in the Gulf of Carpentaria.

15 In that respect, certain observations of this Court in *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* are apt.[5] In that case, the taxpayer had a manganese mine on Groote Eylandt in the Gulf of Carpentaria. It undertook an offshore survey to determine where port facilities might best be established and what dredging and navigational aids might be needed. One of the questions for determination was whether the survey constituted the carrying on of "mining operations" on a "mining property" for the purposes of s 122(1) of the then *Income Tax and Social Services Contribution Assessment Act 1936-1964* (Cth). This Court found that it did. Barwick CJ, McTiernan and Menzies JJ said:[6]

> "As we follow the matter, without a port at Milner Bay and an approach to this port through the shallows of the Gulf of Carpentaria the taxpayer's mining operations, which had begun upon its mining property, could not have been effectively developed. We consider that to make an approach to a port which is found to have been part of a mining property is also to develop the mining property itself. It is like the provision of an access road to enable the potentialities of the mining property to be developed."

16 The proposed DSEA will enlarge the present DSEA and will be of a similar size and have the same features. Recognising that the grant of this tenement would constitute a "future act" that would affect native title for the purposes of the *Native Title Act*, the Northern Territory Department of Mines and Energy, now the Department of Primary Industry and Resources ("the Department"), gave notice of the application to grant ML 29881 to the third appellant and the Northern Land Council in 2016, purportedly in accordance with s 24MD(6A) of that Act. In 2019, after some delay, the Department also gave notice to the Northern Land Council of its intention to grant ML 29881. This caused the appellants to seek injunctive relief to prevent the issue of ML 29881 and a declaration that the proposed grant of the lease was invalid, because, amongst other things, the procedures under s 24MD(6B) of the *Native Title Act* had not been followed.

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5 (1969) 120 CLR 240.

6 *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* (1969) 120 CLR 240 at 278.

The original Native Title Act

17 When originally enacted in 1993, subject to compliance with Subdiv B of Div 3 of Pt 2 of the *Native Title Act*, a "permissible future act" was valid.[7] An "impermissible future act", being an act which was not a permissible future act, was invalid to the extent that it affected native title.[8] Pursuant to s 26(2)(a) of the *Native Title Act*, as it then was, one permissible future act was "the creation of a right to mine, whether by the grant of a mining lease or otherwise". The creation of a "right to mine" triggered rights of negotiation for native title holders under Subdiv B of Div 3, outlined in *North Ganalanja Aboriginal Corporation v Queensland*.[9] The term "right to mine" was not defined, but the term "mining lease" and the word "mine" were defined. Section 245(1) relevantly defined a "mining lease" 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."

18 The terms "agricultural lease", "pastoral lease" and "residential lease" were also defined. It is not necessary to set out their definitions. The word "lease" was defined specifically in relation to mining by s 242(2) as follows:

> "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."

19 The word "mine" was defined in s 253 as follows:

> "'**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

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7 *Native Title Act*, s 23(2).

8 *Native Title Act*, s 22.

9 (1996) 185 CLR 595 at 616 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

(c) quarry".

20 The Explanatory Memorandum which accompanied the introduction of the *Native Title Bill 1993* (Cth) stated that the definition of the word "mine" "is not an exhaustive one" and "is wider than what might be thought to be the ordinary meaning of the term".[10]

The present Native Title Act

21 In 1998, the *Native Title Act* was substantially amended. A new Div 3 was enacted dealing with the treatment of "future acts", being acts which take place after 1 January 1994 and which affect native title.[11] The word "act" is relevantly defined by s 226(2)(b) to include "the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument". An "act" affects native title if it extinguishes native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.[12]

22 Generally speaking, a future act is invalid to the extent that it affects native title unless the future act is "covered" by certain provisions of Div 3 of Pt 2 of the *Native Title Act*.[13] One of those provisions is s 24MD, which covers future acts that pass the "freehold test" and which for that reason come within the application of Subdiv M of Div 3.[14] By operation of s 24MD(1), a future act to which Subdiv M applies is valid, subject to Subdiv P.

23 By operation of s 24MB(1), a future act (other than the making, amendment or repeal of legislation) passes the freehold test, so as to come within the application of Subdiv M and to be rendered valid by s 24MD(1) subject to Subdiv P, if the act could be done in relation to the land concerned if the native title holders held ordinary title instead of native title to that land. The example

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10 Australia, House of Representatives, *Native Title Bill 1993*, Explanatory Memorandum at 104.

11 *Native Title Act*, s 233.

12 *Native Title Act*, s 227.

13 *Native Title Act*, s 24AA(2).

14 *Native Title Act*, s 24AA(4)(j).

which appears underneath s 24MB(1) explains that this includes the grant of a mining lease. It states:

> "An example of a future act covered by this subsection is the grant of a mining lease over land in relation to which there is native title when a mining lease would also be able to be granted over the land if the native title holders instead held ordinary title to it."

24 As the proviso to s 24MD(1) indicates, the validity of some future acts covered by s 24MD also depends on satisfaction of the requirements of Subdiv P of Div 3 of Pt 2 of the *Native Title Act*.[15] Subdivision P is headed "Right to negotiate". Broadly speaking, it requires negotiation with a view to reaching an agreement with native title holders before a future act is done. If no agreement can be reached, an arbitral body or a Minister may instead make a relevant determination.[16] If the procedures in Subdiv P are not complied with, the act is invalid to the extent that it affects native title.[17]

25 The kinds of future acts to which Subdiv P applies are identified in summary form in s 25(1). Section 25(1)(a) identifies one of those kinds of future acts as "certain conferrals of mining rights". In that respect, former s 26(2)(a) was replaced by s 26(1)(c)(i).[18] That provision, which lies at the heart of this appeal, states that Subdiv P applies to a future act if (in addition to other conditions being met) the act is "the creation of a right to mine, whether by the grant of a mining lease or otherwise, except one created for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining". The phrase "right to mine" remains undefined.

26 The exception for which s 26(1)(c)(i) provides to the general rule it enacts is for a particular type of right to mine. The exception applies to a right to mine "for the sole purpose of the construction of an infrastructure facility ... associated with mining". If the future act is the creation of that type of right to mine, then Subdiv P has no application. The result of Subdiv P having no application in such event is that, by operation of s 24MD(6)(a), the future act has the "consequences" set out in s 24MD(6A) and (6B).

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15 See *Native Title Act*, s 24AA(5).

16 *Native Title Act*, s 25(1)-(3).

17 *Native Title Act*, s 25(4).

18 *Native Title Amendment Act 1998* (Cth), Sch 1 item 9.

27 The consequence set out in s 24MD(6A) is the conferral on native title holders of the freeholder rights referred to above. Section 24MD(6A) provides:

> "The native title holders, and any registered native title claimants in relation to the land or waters concerned, have the same procedural rights as they would have in relation to the act on the assumption that they instead held ordinary title to any land concerned and to the land adjoining, or surrounding, any waters concerned."

28 The consequence set out in s 24MD(6B) is relevantly the conferral on native title holders of the rights to be notified, to object and to be consulted, enumerated in s 24MD(6B)(c) to (g) in respect of a future act within the exception to s 26(1)(c)(i).[19] Section 24MD(6B)(b) relevantly describes that consequence as applicable to a future act that is "the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining".

29 To summarise the foregoing, the creation of a right to mine is generally a future act which results in an application of the right to negotiate procedure set out in Subdiv P of Div 3 of Pt 2 of the *Native Title Act*. The act is invalid if that procedure is not followed. However, relevantly, there is a "carve-out" for the creation of a right to mine "for the sole purpose of the construction of an infrastructure facility ... associated with mining". Where that carve-out from the negotiation procedure set out in Subdiv P is applicable, the notification, objection and consultation procedure in s 24MD(6B)(c) to (g) must be followed.

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19 In general terms, s 24MD(6B)(c) to (g) relevantly provide for the Northern Territory government to give notice of the future right to mine to relevant native title holders; for those holders to have the opportunity to object within two months to the doing of that act; for the government, or the person who requested or applied for the act, to consult with the native title holders about ways of minimising the act's impact on native title rights and interests and, if relevant, about access to land or waters; for the objection then to be heard by an independent person or body, if after eight months from the date of notification the objection has not been withdrawn; and for that person or body to determine the objection.

30 The changes made in 1998 also included a narrowing of the definition of "mine" by the exclusion of certain activities.[20] The definition is now expressed as follows:[21]

> "***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."

31 The definition of the term "infrastructure facility", a phrase which appears in s 24MD(6B)(b) and s 26(1)(c)(i), was also added to s 253 in 1998.[22] It is as follows:[23]

> "***infrastructure facility*** includes any of the following:
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> (a) a road, railway, bridge or other transport facility;
>
> (b) a jetty or port;
>
> (c) an airport or landing strip;

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20 *Native Title Amendment Act 1998* (Cth), Sch 1 item 64.

21 *Native Title Act*, s 253.

22 *Native Title Amendment Act 1998* (Cth), Sch 1 item 63.

23 *Native Title Act*, s 253.

(d) an electricity generation, transmission or distribution facility;

(e) a storage, distribution or gathering or other transmission facility for:

(i) oil or gas; or

(ii) derivatives of oil or gas;

(f) a storage or transportation facility for coal, any other mineral or any mineral concentrate;

(g) a dam, pipeline, channel or other water management, distribution or reticulation facility;

(h) a cable, antenna, tower or other communication facility;

(i) any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (h) and that the Commonwealth Minister determines, by legislative instrument, to be an infrastructure facility for the purposes of this paragraph."

32 The Explanatory Memorandum which accompanied the *Native Title Amendment Bill 1997* (Cth) ("the 1997 Explanatory Memorandum") recorded that the term "infrastructure facility" was to bear "its ordinary meaning" but "also" was to include "a number of listed facilities".[24] These are then listed in a table. It also stated:[25]

> "Within its ordinary meaning, an infrastructure facility is a facility (generally a fixture) necessary for the provision of services or to support the development and operation of major developments. The infrastructure can be provided either by a government or the private sector."

33 The Supplementary Explanatory Memorandum which accompanied the *Native Title Amendment Bill 1997 (No 2)* (Cth) ("the Supplementary EM") explained the reason for the carving out from the right to negotiate conferred by Subdiv P of a future act constituted by the creation of a right to mine for the sole

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24 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 184.

25 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 184.

purpose of the construction of an infrastructure facility associated with mining. The reason lay in the special nature of the works to be undertaken:[26]

> "The Government believes that it is not appropriate to subject future acts of this kind to the right to negotiate. ... Such infrastructure is increasingly being provided by non-Government entities, especially in remote and regional Australia. It is appropriate however that in relation to acts of this kind, which may have the result of extinguishing native title altogether, native title holders be given procedural rights essentially the same as others but which ensure that the special nature of their rights can be taken into account."

34 The scope of s 24MD(6B)(b) was described in the Supplementary EM in the following way:[27]

> "New subsection 24MD(6B) will also apply to the grant of a mining lease for the sole purpose of the construction of an infrastructure facility associated with mining (paragraph 24MD(6B)(b)). The grant of a mining lease of this kind is exempt from the right to negotiate (see subparagraph 26(1)(c)(i) ...) but the consequences set out in new subsection 24MD(6B) will apply to grants of this kind in addition to the procedural rights provided in subsection 24MD(6A)."

35 The Supplementary EM described the "sole purpose" test in s 24MD(6B)(b) as follows:[28]

> "The words 'sole purpose' have been used to make it clear that the creation of the right to mine with which the infrastructure facility is associated is *not* removed from the right to negotiate by this amendment. The fact that an infrastructure facility may, when constructed, also provide services to the local community, will not prevent the relevant grant being for the sole purpose of constructing the infrastructure."

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26 Australia, House of Representatives, *Native Title Amendment Bill 1997 (No 2)*, Supplementary Explanatory Memorandum at 19.

27 Australia, House of Representatives, *Native Title Amendment Bill 1997 (No 2)*, Supplementary Explanatory Memorandum at 19-20.

28 Australia, House of Representatives, *Native Title Amendment Bill 1997 (No 2)*, Supplementary Explanatory Memorandum at 23 (emphasis in original).

36 The Supplementary EM also made clear that the grant of a mining lease that allowed *both* mining and the construction of infrastructure would *not* pass the sole purpose test.[29]

The Mineral Titles Act

37 As is typical of State and Territory laws regulating mining, the *Mineral Titles Act* provides for the issue of a range of statutory permissions or authorisations to facilitate mineral exploration, mining and all those ancillary activities associated with a modern mining project. These statutory permissions or authorisations, which manifest themselves in a range of different ways, confer statutory rights to conduct activities which would otherwise be illegal in the Northern Territory.[30] Each is distinctly labelled. The *Mineral Titles Act* thus provides for the issue of a "mineral exploration licence"; a "mineral exploration licence in retention"; a "mineral lease"; an "extractive mineral exploration licence"; an "extractive mineral permit"; an "extractive mineral lease"; and a "mineral authority".[31] Care must be taken not to take too much from these names. This Court has previously cautioned about the "looseness of terminology" in this field of endeavour.[32]

38 Division 3 of Pt 3 of the *Mineral Titles Act* provides for the application for, and grant of, a "mineral lease". A "mineral lease" is defined to be a "mineral title" that gives the holder the right to occupy the title area and the exclusive right to do a number of activities.[33] One of these is "mining for minerals" or "extractive minerals".[34] "Mining" is defined as the extraction of minerals from land by:

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29 Australia, House of Representatives, *Native Title Amendment Bill 1997 (No 2)*, Supplementary Explanatory Memorandum at 20.

30 *Mineral Titles Act*, s 148.

31 *Mineral Titles Act*, s 11(1).

32 *Western Australia v Ward* (2002) 213 CLR 1 at 158 [287] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576 at 583 [14] per French CJ, Gummow, Heydon, Crennan and Kiefel JJ.

33 *Mineral Titles Act*, s 40(1).

34 *Mineral Titles Act*, ss 40(1)(b)(i) and 44(2)(a).

underground, surface or open-cut workings; on-site leaching; dredging; and another method prescribed by regulation.[35]

39 Another activity which a mineral lease granted under the *Mineral Titles Act* may distinctly authorise involves no mining at all: it is the conducting of activities that are "ancillary to mining" where the activity of mining is authorised by a different mineral lease. Section 40(1)(b)(ii) of the *Mineral Titles Act* thus provides:

> "A ***mineral lease*** is a mineral title that gives the title holder:
>
> ...
>
> (b) the exclusive right to:
>
> ...
>
> (ii) conduct activities in the title area that are ancillary to mining conducted under another ML granted to the title holder (for example, operating a treatment plant); ..."

40 It is not in dispute that ML 29881, if issued, would be an ancillary mineral lease for the purposes of s 40(1)(b)(ii). It is also not in dispute, for the purposes of s 24MD(6B)(b) of the *Native Title Act*, that the "sole purpose" of ML 29881 would be to authorise the construction of a new DSEA, and nothing else, and that it would be "associated with mining", namely the mining at the McArthur River Project.

41 Two more provisions in the *Mineral Titles Act* must be referred to. First, s 74(2) addresses what is to occur if the grant of a mineral title would be a "future act" for the purposes of the *Native Title Act*. It provides:

> "If the Minister is satisfied the grant of a mineral title will be a future act in relation to any of the proposed title area of the application for the grant, the Minister may grant the mineral title only if satisfied all procedures under the [*Native Title Act*] relevant to the future act have been followed."

42 The appellants contend that ML 29881 cannot be granted because "all procedures" under the *Native Title Act* have not "been followed", namely the procedures mandated by s 24MD(6B) of that Act.

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35 *Mineral Titles Act*, s 12(1).

43 Secondly, there is s 86. It obliges the holder of a mineral title to conduct authorised activities in a title area "actively".

44 Consistently with the foregoing, the McArthur River Project Agreement does not define the McArthur River Project as confined to the activities of exploration and extraction; it extends it to the treatment, storage and transport of ore and concentrate within and between the mineral leases comprising the project as well as the "adjacent Territory waters".

Proceedings below

The primary judge

45 It was submitted before the primary judge that s 24MD(6B)(b) contains two distinct limbs: first, it requires the creation of a "right to mine"; and secondly, it requires that this right be for the "sole purpose" of constructing an "infrastructure facility ... associated with mining". Reliance was placed upon an earlier interlocutory decision of the Federal Court in *Smith v Tenneco Energy Queensland Pty Ltd*.[36] That case concerned the grant of a licence pursuant to the *Petroleum Act 1923* (Qld) to construct a natural gas pipeline to carry gas from a gas field over hundreds of kilometres to consumers. Drummond J decided that the licence did not confer a "right to mine" for the purposes of s 26(2)(a) of the *Native Title Act* in the form it took before the 1998 amendments.

46 The primary judge rejected that approach. Section 24MD(6B) was instead a "standalone provision" and the phrase "the creation ... of a right to mine for the sole purpose of the construction of an infrastructure facility ... associated with mining" needed to be "read compendiously".[37] On this basis, the questions to be asked were: does the right meet the sole purpose test; does it involve an infrastructure facility as defined; and is it associated with mining?[38] Affirmative answers to each of these questions would result in the satisfaction of s 24MD(6B)(b) to the exclusion of s 26(1)(c)(i) of the *Native Title Act*. This construction of s 24MD(6B)(b) was also said to be supported by an earlier decision of the Federal Court in *Banjima People v Western Australia [No 2]*, where Barker J

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36 (1996) 66 FCR 1.

37 *Friday v Minister for Primary Industry and Resources* [2021] FCA 794 at [130] per Reeves J.

38 *Friday v Minister for Primary Industry and Resources* [2021] FCA 794 at [131] per Reeves J.

decided that the words of the provision comprised a "compendious phrase" which should be construed as "standing alone".[39]

47 Applying this test, the primary judge decided that proposed ML 29881 did not satisfy the words of s 24MD(6B)(b); that was because the new DSEA would not be an "infrastructure facility" as defined. In that respect, the word "includes" in the definition was to be construed as "means and includes"; this was said to be "common ground" amongst the parties.[40] The DSEA therefore had to fall within one of the listed types of infrastructure set out in the definition of that term at paras (a) to (h). The two most likely were paras (f) and (g).

48 The primary judge decided that the proposed DSEA did not fall within either paragraph. The dredge spoils did not constitute "coal, any other mineral or any mineral concentrate" for the purposes of para (f) and the construction of a drain to remove sea water from the DSEA would not be a "water management, distribution or reticulation facility" for the purposes of para (g).[41] His Honour otherwise decided that it was premature to adjudicate upon what freeholder rights the appellants might have had for the purposes of s 24MD(6A).[42]

The Full Court

49 The Full Court rejected the primary judge's construction of s 24MD(6B)(b) as a standalone provision. Instead, the Full Court decided that ss 24MD(6B)(b) and 26(1)(c)(i) had to be construed harmoniously or in a "complementary manner".[43] This meant that the phrase "right to mine" in s 26(1)(c)(i) had to bear the same meaning when deployed in s 24MD(6B)(b).[44] In that respect, the definition of

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39 (2013) 305 ALR 1 at 175 [1054]-[1055].

40 *Friday v Minister for Primary Industry and Resources* [2021] FCA 794 at [136] per Reeves J.

41 *Friday v Minister for Primary Industry and Resources* [2021] FCA 794 at [140]-[141] per Reeves J.

42 *Friday v Minister for Primary Industry and Resources* [2021] FCA 794 at [177] per Reeves J.

43 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 297 [117] per Jagot, Charlesworth and O'Bryan JJ.

44 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 297 [117]-[119] per Jagot, Charlesworth and O'Bryan JJ.

"mine" in the *Native Title Act* assumed some importance. The Full Court did not doubt that the definition had to be applied to the phrase "right to mine" in both ss 26(1)(c)(i) and 24MD(6B)(b).[45] The Full Court held, and indeed it was common ground, that the definition incorporated the ordinary meaning of the word "mine", which was the extraction of minerals from the ground, but extended that definition to, for example, the activity of exploration.[46] The question then was to identify "the range of activities that is intended to be encompassed within the phrase 'to mine'".[47] The Full Court answered that question in the following way:[48]

> "Without attempting an exhaustive definition, the statutory text, context and purpose indicates that the expression 'right to mine' in the [*Native Title Act*] refers to a future act that confers a right to engage in mining activities, which typically involve the exploration for and extraction of a mineral (or petroleum or gas) from the ground, and encompasses rights necessary for its meaningful exercise. The rights necessary for its meaningful exercise will depend upon the nature of the mining activity being undertaken, but will typically include activities of the kind referred to in s 44(1) of the *Mineral Titles Act* such as: the evaluation, processing or refining of minerals in the title area; the treatment of tailings and other material in the title area; the storage of waste and other material in the title area; and the removal of minerals from the title area. Rights to undertake those activities are ordinarily necessary for the meaningful exercise of a right to mine. Typically, each of those categories of activities will be directly associated with and form part of the mining activity on a given parcel of land. Rights permitting such activities can be appropriately described as a right to mine. However, the application of the statutory phrase 'right to mine' will always be fact specific."

50 The Full Court rejected an attempt to read the phrase "right to mine" as a reference to a mineral lease or licence. It recognised that such a lease or licence

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45 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 297 [120] per Jagot, Charlesworth and O'Bryan JJ.

46 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 298 [122] per Jagot, Charlesworth and O'Bryan JJ.

47 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 298 [122] per Jagot, Charlesworth and O'Bryan JJ.

48 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 300 [127] per Jagot, Charlesworth and O'Bryan JJ.

might confer "a right to conduct activities that are ancillary to mining and in a different area to the mining activities".[49] But, their Honours said, such a lease was not a "right to mine" because the *Native Title Act* used the term "mineral lease" elsewhere in the Act (such as s 46) and Parliament had made a conscious choice not to use that term in s 26(1)(c)(i) or in s 24MD(6B)(b).[50]

51 The Full Court concluded that ML 29881 would not, when granted, create a "right to mine". That was so for two reasons. First, the DSEA would be constructed on land which is separate from the land upon which mining takes place.[51] Secondly, the DSEA would be concerned with the shipment of ore. The ordinary meaning of mining "does not encompass the transportation of mined ore to customers".[52] As a result, the activities which would be undertaken at the DSEA would be too "remote" from mining and could not "be regarded as necessary for the meaningful exercise of a right to mine", thus precluding the characterisation of ML 29881 as a "right to mine".[53]

52 The Full Court went on to consider whether the DSEA would constitute an "infrastructure facility" as defined. It decided that the DSEA would be an infrastructure facility within the ordinary meaning of that phrase.[54] No challenge has been made to that conclusion.

53 However, departing from the view earlier adopted in *South Australia v Slipper*,[55] the Full Court held that Parliament did not intend to use that ordinary

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49 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 300 [128] per Jagot, Charlesworth and O'Bryan JJ.

50 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 300 [128] per Jagot, Charlesworth and O'Bryan JJ.

51 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 301 [131] per Jagot, Charlesworth and O'Bryan JJ.

52 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 301 [132] per Jagot, Charlesworth and O'Bryan JJ.

53 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 301 [130] per Jagot, Charlesworth and O'Bryan JJ.

54 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 309-310 [162] per Jagot, Charlesworth and O'Bryan JJ.

55 (2004) 136 FCR 259.

meaning but instead intended that the items listed in the definition of "infrastructure facility" were to be an exhaustive list of qualifying facilities. Several reasons were given for this conclusion. They principally included the "highly specific nature" of some of the items listed;[56] the Minister's power to determine that "any other thing that is similar to" the matters listed is an infrastructure facility;[57] and that it was understandable that Parliament would wish to be prescriptive when defining an exception to the right to negotiate afforded by Subdiv P of Div 3 of Pt 2 of the *Native Title Act*.[58]

54 The Full Court did not consider that the statement in the 1997 Explanatory Memorandum that the term "infrastructure facility" was to have "its ordinary meaning" justified a contrary conclusion. That was because the *Native Title Amendment Bill 1997* (Cth) was subject to significant further amendments following the publication of that Memorandum, including with the introduction of para (b) of s 24MD(6B) and other amendments made to provisions which had used the term "infrastructure facility". The Full Court reasoned as follows:[59]

> "[S]tatements that appeared in an early version of an explanatory memorandum expressing a conclusion as to the legal effect of a statutory definition, where the substantive provisions that deploy the definition are subsequently amended in a material way, cannot be given significant weight in ascertaining the meaning and effect of the resulting enactment."

55 The Full Court also rejected any application of para (f) of the definition. The words "storage" and "transportation" were said to describe the function or purpose of the structure in question.[60] Here, the DSEA will not be a storage facility

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56 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 306 [149] per Jagot, Charlesworth and O'Bryan JJ.

57 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 306 [150] per Jagot, Charlesworth and O'Bryan JJ.

58 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 306-307 [152] per Jagot, Charlesworth and O'Bryan JJ.

59 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 307-308 [155] per Jagot, Charlesworth and O'Bryan JJ.

60 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 308-309 [159] per Jagot, Charlesworth and O'Bryan JJ.

for any mineral, nor will it transport any mineral.[61] The Full Court also rejected any application of para (g) of the definition. Whilst the proposed DSEA will have drains and a channel to carry sea water, its sole purpose is not to be a "water management ... facility"; rather its purpose is to store dredge spoil.[62]

Mining tenements

56 The variety of mining tenements that may be issued under the *Mineral Titles Act* is not unusual. State and Territory laws which regulate the exploitation of natural resources recognise that activities which are ancillary or subordinate to the central activities of getting at and getting out a mineral may form part of the exploitation of a mine. Indeed, a mining tenement might authorise only ancillary activities and nothing else. Contemporary examples sufficiently illustrate these propositions.

57 First, s 85(1)(d) of the *Mining Act 1978* (WA) provides that the holder of a mining lease may "do all acts and things that are necessary to effectually carry out mining operations in, on or under the land". Section 87(1) of the same Act provides for the grant of a general purpose lease for the purpose of erecting, placing and operating machinery in connection with the mining operations carried on by the lessee; for depositing or treating minerals or tailings obtained from any land in accordance with the Act; and for using the land for any other specified purpose directly connected with mining operations.[63]

58 Secondly, there is s 73(1)(c) of the *Mining Act 1992* (NSW). It provides that the holder of a mining lease may carry out "ancillary mining activity". That is a term defined in the Dictionary to that Act to mean any activity prescribed by the regulations as an ancillary mining activity. Clause 7 of the *Mining Regulation 2016* (NSW) defines "ancillary mining activity" relevantly to include the construction, maintenance or use (in or in connection with mining operations) of: any building or mining plant; any road, railway, tramway, bridge or jetty; any

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61 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 308-309 [159] per Jagot, Charlesworth and O'Bryan JJ.

62 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 309 [160] per Jagot, Charlesworth and O'Bryan JJ.

63 At the time of the amendments made to the *Native Title Act*, ss 85(1)(d) and 87(1) of the *Mining Act 1978* (WA) were in materially the same terms.

reservoir, dam, drain or water race; any cable, conveyor, pipeline, telephone line or signalling system; any bin, magazine or fuel chute; and any plant nursery.[64]

59 Thirdly, there is s 14(1) of the *Mineral Resources (Sustainable Development) Act 1990* (Vic), which provides that the holder of a mining licence not only may carry on "mining" but may also "construct any facilities specified in the licence, including drives, roads, water races, tailing dumps, tailing dams, drains, dams, reservoirs and pipe-lines", and "do anything else that is incidental to that mining". This Act also provides for the issue of an "infrastructure mining licence", which is defined in s 4(1) to mean "a mining licence solely for the construction of a facility or other infrastructure to be used for the purpose of mining under another mining licence".[65]

60 Fourthly, there is s 234(1)(b) of the *Mineral Resources Act 1989* (Qld), which provides that the Minister may grant a "mining lease" for "such purposes, *other than mining*, as are specified in the mining lease and that are associated with, arising from or promoting the activity of mining" (emphasis added). Section 316(2) of the same Act permits the Minister to grant to a person a "mining lease" for the transportation of a thing through, over or under land that is not part of the person's existing or prospective mining lease so long as, relevantly, the Minister is satisfied that the proposed lease is for a purpose "associated with" activities performed under the person's mining lease.[66]

61 Fifthly, there is Pt 8 of the *Mining Act 1971* (SA), which is entitled "Miscellaneous purposes licences". Section 48(1) in Pt 8 provides that a miscellaneous purposes licence is a "mineral tenement that is granted for ancillary

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64 At the time of the amendments made to the *Native Title Act*, s 73(1)(c) of the *Mining Act 1992* (NSW) did not refer to the carrying out of an "ancillary mining activity" but rather to "any mining purpose". However, the term "mining purpose" was at that time defined in cl 6 of the *Mining (General) Regulation 1997* (NSW) in materially the same way as the definition now appearing of the term "ancillary mining activity".

65 Section 14(1) of the *Mineral Resources (Sustainable Development) Act 1990* (Vic), then titled the *Mineral Resources Development Act 1990*, was in existence at the time of the amendments made to the *Native Title Act*. However, at that time there was no provision for the issue of an "infrastructure mining licence".

66 Sections 234(1)(b) and 316(2) of the *Mineral Resources Act 1989* (Qld) were materially the same at the time of the amendments made to the *Native Title Act*, save that the Governor in Council (not the Minister) then had power to grant a mining lease for the purposes of those provisions.

operations". Section 6(1) of that Act relevantly defines the term "ancillary operations" as "ancillary operations for the carrying on of any business that may be conducive to the effective conduct of mining operations or operations associated with providing amenities for persons engaged in the conduct of mining operations".[67]

62 Sixthly, there is s 106(1) of the *Mineral Resources Development Act 1995* (Tas). It permits the holder of a mining lease or "former lessee" to apply for a lease, amongst other things, to store any building, machinery, mining product or other property on the land or to enable work "associated with" mining on other land to be carried out. Pursuant to s 84(1)(a) of that Act, a mining lease permits the holder to carry out "mining operations". This term is relevantly defined in s 3 to mean any operations or work on a lease area to obtain or treat minerals, or to store or contain minerals or waste material generated by mining on that lease area, or operations or work "associated with" mining.[68]

63 It is also now well recognised that the treatment, processing, storage and transport of a mine's product following extraction of a mineral may also constitute a part of a given mining project. There are no necessary or artificial boundaries of when a mining project starts or finishes. It will all depend on the nature and circumstances of the mining project in question. Thus, albeit in a different statutory context, a majority of the Full Court of the Federal Court decided that the transportation of low-grade bauxite by a 51-kilometre-long "conveyer" to a

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67 At the time of the amendments made to the *Native Title Act*, the *Mining Act 1971* (SA) contained a more detailed list of purposes which a miscellaneous purposes licence could be granted for: s 52(3). They were: for the carrying on of any business that may conduce to the effective conduct of mining operations or provide amenities for persons engaged in the conduct of mining operations; for establishing and operating plant for the treatment of ore recovered in the course of mining operations; for drainage from a mine; or for the disposal of overburden or any waste produced by mining operations. But, much like the present Act, it also included "any other purpose ancillary to the conduct of mining operations". The phrase "ancillary operations" was not defined.

68 Both ss 84(1)(a) and 106(1) of the *Mineral Resources Development Act 1995* (Tas) were in existence at the time of the amendments made to the *Native Title Act*, although s 106(1) was confined only to a lease in respect of a former lessee in relation to land to store any building, machinery, mining product or other property on the land.

refinery formed part of the carrying on of "mining operations".[69] Again in a different statutory context, the Federal Court recognised that railway equipment used to transport iron ore to a port where a crushing facility was located constituted the use of machinery in carrying out mining operations.[70] These cases emphasise that modern mining will often involve highly integrated processes in order to produce a product that can be sold. Illustrating that fact, the Full Court of the Federal Court made the following observations in *Regional Director of Customs (WA) v Dampier Salt (Operations) Pty Ltd*:[71]

> "(1) The point where a mining operation starts and finishes will be a question of fact to be decided in each case. However, the Court should not adopt a narrow view of the extent of 'mining operations' so as to frustrate the legislative intent of providing a concession to the mining industry.
>
> (2) Relevant to this factual conclusion will be the ascertainment of the object of the particular taxpayer's operations.
>
> (3) Generally the mining operation will continue until there has been produced that which is the object of the particular taxpayer's operation of mining.
>
> (4) The mining operation will not necessarily be complete when a mineral has been extracted from ore, or where salt is produced, immediately there has been a recognisable salt product, be that brine or crystallised salt. It will be necessary that the mineral (salt) produced be saleable.
>
> (5) The mere fact that a mineral is saleable will not necessarily be determinative, if the production of that mineral at that place by that taxpayer would be uneconomic. Perhaps everything can be said to be saleable for a price, but what is necessary is that the mineral in

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69 *Commissioner of Taxation v Reynolds Australia Alumina Ltd* (1987) 18 FCR 29 at 35 per Beaumont J, 45 per Burchett J.

70 *Robe River Mining Co Pty Ltd v Federal Commissioner of Taxation* (1990) 21 ATR 1068 at 1077-1079 per Lee J.

71 (1996) 67 FCR 108 at 120 per Einfeld, Hill and Carr JJ; cf *Federal Commissioner of Taxation v Resource Capital Fund IV LP* (2019) 266 FCR 1 at 45-50 [145]-[161] per Besanko, Middleton, Steward and Thawley JJ.

question be economically saleable at least by a person in the position of the particular taxpayer.

(6) Activities directed to improving that which is extracted, for example pelletising, may fall outside the ambit of the 'mining operation'. However, they may form part of the mining operation where the activity is closely associated with the actual extraction of the mineral. Normally this close association may be indicated by physical proximity, but lack of physical proximity will not necessitate the conclusion that the mining operation has concluded: *Northwest Iron* [(1986) 9 FCR 463]. The degree of integration of the activity with the actual mining process will, obviously, thus be relevant."

64 Different considerations may arise where a statute requires distinctions to be drawn between different phases of mining, such as exploration and then production or development. Distinguishing between these phases will be a matter of fact and degree depending upon the exact nature and circumstances of the mining project in question.[72]

A "right to mine"

65 It is against the foregoing background that the phrase "right to mine" in s 26(1)(c)(i) of the *Native Title Act* must be construed. Contrary to the reasons of the Full Court, a "right to mine" is not a reference to a specific authority or permission which a mining lease might convey, such as a right of extraction. It is not, for example, referring to one of the "rights" listed in s 40(1) of the *Mineral Titles Act*. Nor should it be confined to the activity of "getting at and getting out" minerals.

66 In its particular statutory context, the phrase "right to mine" should be construed as a composite term used to denote all those mining tenements which are capable of being issued under State and Territory natural resource laws. The *Native Title Act* uses such a phrase precisely because it is sufficiently descriptive of the very many different types of mining tenements that can be created under State and Territory natural resource laws and of the very many different names by

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72 cf *Mount Isa Mines Ltd v Federal Commissioner of Taxation* (1954) 92 CLR 483; *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* (1969) 120 CLR 240; *Wyong Shire Council v Associated Minerals Consolidated Ltd* [1972] 1 NSWLR 114; *Re BHP Petroleum Pty Ltd and Collector of Customs* (1987) 11 ALD 413; *Re ZZGN and Federal Commissioner of Taxation* (2013) 95 ATR 831.

which such tenements are identified. And, as set out above, mining tenements can convey a wide variety of permissions or authorities not confined to the act of getting at and getting out a mineral. That is why the term "right to mine" is followed by the phrase "whether by the grant of a mining lease or otherwise". That phrase is an express recognition of the very many types of mining tenements which exist. That is to say, the inclusion of that phrase makes plain that Parliament intended that the phrase "right to mine" have a broad application which would embrace every sort of mining tenement issued by the States and the Territories and that a "mining lease" as defined is merely one type of such a tenement. The term "mining lease" is otherwise needed for Div 2 of Pt 2 of the *Native Title Act*, which is concerned with the validation of past acts. Thus, for example, a "category C past act" is defined in s 231 as a past act consisting of the grant of a "mining lease".

67 A similar issue of construction concerning a "right ... to mine" petroleum was considered by the Full Court of the Federal Court in *Mitsui & Company (Australia) Ltd v Federal Commissioner of Taxation*.[73] Whilst the case concerned a very different statutory context, it has utility here in understanding the meaning to be attributed to the phrase "right to mine". In *Mitsui*, in issue was the definition of a "mining, quarrying or prospecting right" in s 995-1 of the *Income Tax Assessment Act 1997* (Cth). The relevant part of that definition is as follows:

> "***mining, quarrying or prospecting right*** is:
>
> (a) an authority, licence, permit or right under an Australian law to mine, quarry or prospect for minerals, petroleum or quarry materials".

68 The taxpayer in that case had acquired an interest in a production licence granted under the *Petroleum (Submerged Lands) Act 1967* (Cth) which conferred rights to explore for and to produce petroleum. The taxpayer nonetheless contended that it had acquired two separate rights to mine for the purposes of the definition, as distinct from an interest in one singular mining tenement. The Full Court summarised that argument as follows:[74]

> "The Taxpayer contends that the word 'right', as contemplated by the term 'mining, quarrying or prospecting right', is not restricted or limited to the instrument or title under or pursuant to which the right was conferred, such as, in this case, production licence WA-28-L. Rather, it says, mining, quarrying or prospecting rights are to be identified by reference to the

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73 (2012) 205 FCR 523.

74 (2012) 205 FCR 523 at 532 [39] per Emmett, Bennett and Gilmour JJ.

> substantive statutory rights conferred on the holder of such a production licence. ... To conclude otherwise, it contends, would fail to recognise that the production licence itself conferred no rights. Rather, it says, the Petroleum Act confers various rights upon the holder of a production licence, once particulars of the holder, or the holder of an interest, are entered in the Register. The relevant rights in this case are the right to recover petroleum and the right to explore for petroleum. The Taxpayer says that each of those rights is a right under an Australian law, one being a right to mine for petroleum, and another being a right to explore for petroleum."

69 The argument was rightly rejected by the Full Court. The type of asset the taxpayer had acquired was an interest in an "authority", "licence", "permit" or "right", being a mining title under an Australian law, together with all underlying rights that are incidents of the mining title. The phrase "right ... to mine" did not refer to one of the underlying rights that happen to be incidents of a mining title.[75] The Full Court thus concluded:[76]

> "Thus, the words 'authority', 'licence', 'permit', 'right' and 'lease' are descriptive of the various types of mining titles that might arise under various Australian laws. The fact that a particular Australian law dealing with a mining title might use a different term to convey the concept of authority, permission or licence to mine, quarry or prospect, such as the term 'retention lease' in the Petroleum Act, does not mean that that mining title cannot fall within the definition. It will do so if it can fairly be characterised as an authority, licence, permit or right to mine, quarry or prospect for minerals or petroleum."

70 So too here the phrase "right to mine" is "descriptive of the various types of mining titles that might arise under various Australian laws".

71 The foregoing conclusion is consistent with the broad and inclusive definition of "mine" in the *Native Title Act*. It would be anomalous in the context of the *Native Title Act* if that word were to fail to embrace all of the various activities which are essential to a mining project, whether or not ancillary or subordinate to it, and which are authorised by State and Territory mining legislation. It is also consistent with the description in the Supplementary EM of

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75 (2012) 205 FCR 523 at 534 [47] per Emmett, Bennett and Gilmour JJ.

76 (2012) 205 FCR 523 at 534-535 [50] per Emmett, Bennett and Gilmour JJ.

the creation of a right to mine in s 24MD(6B)(b) as being "the grant of a mining lease"[77]. In other words, a "right to mine" is a species of a mineral tenement.

A "right to mine" for the "sole purpose": s 24MD(6B)

72 The foregoing conclusion is also supported by the language of s 24MD(6B)(b). Two observations should be made. First, in 1998 Parliament was plainly of the view that there could exist or did exist under State and Territory laws a power to create a "right to mine" which would be confined to the creation of an infrastructure facility which would be associated with mining. Given, for example, the terms of s 40(1)(b)(ii) of the *Mineral Titles Act*, and the various State Acts described above dealing with mining leases which authorise ancillary activities, Parliament's consideration of State and Territory natural resources laws was correct. In that respect, proposed ML 29881 will be a "mineral lease" which will not authorise mining, in the sense understood by the Full Court, but will instead be limited to the construction of the DSEA.

73 Secondly, the phrase "associated with mining" is important. The presence of these words contradicts the interpretation of this provision favoured by the Full Court. If, as the Full Court reasoned, a "right to mine" in s 24MD(6B)(b) is a reference to "a right to engage in mining activities, which typically involve the exploration for and extraction of a mineral (or petroleum or gas) from the ground, and encompasses rights necessary for its meaningful exercise",[78] the phrase "associated with mining" would have no work to do. It would not be needed. But those words are required when the phrase "right to mine" bears the broad meaning described above when combined with the "sole purpose" test. It ensures that any mineral tenement authorising the construction of an infrastructure facility, and nothing else, must be linked in some way to an actual mine. That link is necessary because the type of tenement that s 24MD(6B)(b) has in mind is not one that authorises actual mining in the sense described by the Full Court below. Such a tenement would fail the "sole purpose" test. So much was confirmed by the terms of the Supplementary EM set out above. The type of tenement which will be subject to s 24MD(6B)(b) will thus bear a narrow character; it must only authorise the construction of an infrastructure facility, and no other substantive activity.

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77 Australia, House of Representatives, *Native Title Amendment Bill 1997 (No 2)*, Supplementary Explanatory Memorandum at 19-20.

78 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 300 [127] per Jagot, Charlesworth and O'Bryan JJ.

74 It follows that, in the usual case, a grant of a mining tenement should be governed by the negotiation procedure set out in Subdiv P of Div 3 of Pt 2 of the *Native Title Act*; in contrast, the procedure set out in s 24MD(6B) is likely to apply in only a narrower class of cases involving the grant of a mining tenement, given the presence of the sole purpose test. In either case, the creation of a right to mine (and putting aside any express exclusions such as those found in s 26(2) of the *Native Title Act*) does not result in the conferral upon native title holders of only freeholder rights, and no more.

"Infrastructure facility"

75 Two considerations suggest that the Full Court was incorrect to depart from the view adopted in *South Australia v Slipper*[79] that the term "infrastructure facility" bears its ordinary meaning and is not confined to the items of equipment listed in the definition of that term. The first is the statement in the 1997 Explanatory Memorandum set out above that the term was to have "its ordinary meaning" *in addition* to the facilities listed in the table and referred to above. That table then refers to the "[t]hings *specifically* listed as infrastructure facilities".[80] It is true that after this was written in 1997 a great many more amendments were made to what was then the *Native Title Amendment Bill 1997* (Cth) (which subsequently became the *Native Title Amendment Act 1998* (Cth)). Importantly, this included the introduction of s 24MD(6B)(b). However, nothing is said in the Supplementary EM that followed which contradicts what was said in the 1997 Explanatory Memorandum. If Parliament had wanted to reverse its earlier explanation of the meaning of the term "infrastructure facility" it could easily have done so.

76 Secondly, there is the statutory architecture employed in s 253. That provision contains 75 definitions. On 51 occasions Parliament uses the word "means" to indicate that what follows is an exhaustive definition. On 16 occasions the phrase "has the meaning given by" is used and there is a cross-reference to another section in the *Native Title Act* where the applicable meaning may be found. On seven[81] occasions Parliament has used the word "includes" and on one occasion

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79 (2004) 136 FCR 259 at 276-278 [77]-[85] per Branson J (with whom Finn J and Finkelstein J agreed on this issue).

80 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 185 (emphasis added).

81 On one separate occasion the words "means" and "includes" are used: see the definition of "claimant application".

the phrase used is "has a meaning affected by" certain other sections. Throughout s 253 Parliament has thus made choices about how to express a given definition and uses the word "includes" in contrast to the word "means". The function served by using the word "includes" in contrast to the word "means" in a definition, as it was put in *Corporate Affairs Commission (SA) v Australian Central Credit Union*,[82] "is commonly both to extend the ordinary meaning of the particular word or phrase to include matters which otherwise would not be encompassed by it and to avoid possible uncertainty by expressly providing for the inclusion of particular borderline cases".

77 In the case of the definition of "infrastructure facility", the word used is "includes", and there is no reason to doubt that this word was chosen with deliberation. The word signifies that what follows after it is not intended to be an exhaustive expression of meaning and that the words "infrastructure facility" must also bear their ordinary meaning. That signification is not altered by the addition of the words "any of the following".

78 The 1997 Explanatory Memorandum sufficiently expresses that ordinary meaning when it describes an infrastructure facility as a "facility (generally a fixture) necessary for the provision of services or to support the development and operation of major developments. The infrastructure can be provided either by a government or the private sector."[83] Given that it is accepted that the DSEA would be an "infrastructure facility" as that term is ordinarily understood, it is unnecessary to consider whether the DSEA would fall within the ordinary and natural meaning of the words found in paras (f) and (g) of the definition.

79 The reasons of the Full Court do not sufficiently support a contrary conclusion. First, it is true that the items listed in paras (a) to (i) of the definition on occasion use specific qualifying words. Thus, para (f) describes a "storage or transportation facility" but only for "coal, any other mineral or any mineral concentrate". The Full Court reasoned that any other type of storage or transportation facility would surely be excluded. This "drafting style" was, their Honours said, difficult to reconcile with an inclusionary definition.[84] The better

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82 (1985) 157 CLR 201 at 206-207 per Mason A-CJ, Wilson, Deane and Dawson JJ.

83 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 184.

84 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 306 [149] per Jagot, Charlesworth and O'Bryan JJ.

view, however, is that the use of specific qualifying words serves the purpose of putting beyond any doubt the status of particular infrastructure.

80 Secondly, the Full Court relied upon the content of para (i), which confers on the Minister a power to determine that a thing "similar to any or all of the things mentioned in paragraphs (a) to (h)" is also an infrastructure facility. If the definition was inclusive, it was said, para (i) would not have been needed.[85] But, if the function or purpose of listing specific items of infrastructure was for the sake of greater clarity and certainty, then it follows that the existence of the power conferred by para (i) is to serve the same end. It permits miners to seek clarification about particular items of possible infrastructure associated with mining. As such, the presence of this power is not inconsistent with a definition which is inclusive.

81 Thirdly, the Full Court observed that the term "infrastructure facility" is used only three times in the *Native Title Act*: as part of an exception to each of s 26(1)(c)(i) and (iii) and in delineating the application of s 24MD(6B)(b). After noting the explanation given in the Supplementary EM for the exclusion from Subdiv P for rights to mine which permit the construction by non-government entities of "roads, gas pipelines and the like", the Full Court said that it was "understandable" that Parliament would wish to deploy a definition of "infrastructure facility" that would be "exhaustive" in nature.[86] But again, that assumed understanding is directly contrary to the ordinary meaning of the word "includes" and the language of the 1997 Explanatory Memorandum. Moreover, there is nothing in the language of the Supplementary EM, or in any other extrinsic materials, that supports such an understanding. Rather, it makes more sense that Parliament would want to use an open-ended definition that would permit it to include all of the various types of infrastructure that might be needed, now and in the future, associated with mining. The cornucopia of different mining tenements, described above, which presently under State and Territory laws authorise ancillary works for a mining project supports that conclusion.

82 It follows that the term "infrastructure facility" serves to identify circumstances in which native title holders have the right to negotiate and when they have the different rights conferred by s 24MD(6B). The purpose of providing for the different rights was to ensure that the special rights of native title holders were adequately protected but without affording the right to negotiate, which was

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85 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 306 [150] per Jagot, Charlesworth and O'Bryan JJ.

86 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 306-307 [152] per Jagot, Charlesworth and O'Bryan JJ.

considered inappropriate in the case of the creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining. Treating the definition of "infrastructure facility" as inclusive is congruent with that purpose.

Proposed ML 29881

83 For the foregoing reasons the decision to grant ML 29881 is a future act that is the creation of a right to mine for the sole purpose of constructing an infrastructure facility associated with mining for the purpose of s 24MD(6B)(b) of the *Native Title Act*. It will be a "mineral lease" for the purposes of the *Mineral Titles Act*, and thus will be a "right to mine". It is not in dispute that its sole purpose will be to construct the DSEA and that this will be "associated" with the McArthur River Project. Finally, as set out above, the proposed DSEA will be an infrastructure facility for the purposes of the *Native Title Act*.

84 The appeal should therefore be allowed. The following relief should be granted:

(1) Appeal allowed.

(2) Set aside order 1 of the orders made by the Full Court on 29 April 2022 and in its place:

(a) order that the appeal be allowed;

(b) declare that the grant of ML 29881 under s 40(1)(b)(ii) of the *Mineral Titles Act* is a future act that is the creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining within s 24MD(6B)(b) of the *Native Title Act*; and

(c) order that the first respondent be restrained from deciding the application for ML 29881 until completion of the procedures in s 24MD(6B) of the *Native Title Act*.

(3) Each party is to bear its own costs of the appeal.

EDELMAN J.

An appeal about two concepts: "right to mine" and "infrastructure facility"

85 The issue on this appeal concerns the rights that the appellants, who are native title holders, have under the *Native Title Act 1993* (Cth) over land which is the subject of a proposed mineral lease to Mount Isa Mines Ltd, the third respondent ("Mt Isa Mines"), for the construction of a proposed Dredge Spoil Emplacement Area ("DSEA"). The background is carefully set out in the joint reasons of Gageler CJ, Gordon, Steward and Gleeson JJ ("the joint reasons"). I agree with the orders proposed in the joint reasons and I gratefully adopt their Honours' description of the background.

86 The first issue on this appeal arises because the Full Court of the Federal Court of Australia held that the native title holders have only ordinary freeholder rights[87] because the proposed mineral lease that Mt Isa Mines applied for would not constitute the creation of a "right to mine".[88] The native title holders submit that they also have statutory rights of notification, objection and consultation because the proposed mineral lease would constitute the creation of a "right to mine".[89] I agree with the joint reasons that, contrary to the conclusion of the Full Court, the mineral lease for which Mt Isa Mines applied would constitute the creation of a right to mine. The phrase "right to mine" describes all the rights that arise under any State or Territory mining or mineral tenement, whether described as a "mining lease" or otherwise.

87 The effect of Mt Isa Mines having a right to mine is that the native title holders were entitled to greater rights than the ordinary freeholder rights to which the Full Court limited them. Subject to a possible exception, the native title holders would be entitled to the suite of rights in Subdiv P of Div 3 of Pt 2 of the *Native Title Act*, compendiously entitled the "right to negotiate". An alternative suite of rights, which would arise if the exception applied, still involves greater rights than ordinary freeholder rights but involves what the parties on this appeal and the Full Court described as "lesser protections" than the right to negotiate.[90] That

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87 *Native Title Act 1993* (Cth), s 24MD(6A), described as "the same procedural rights as [the native title holders] would have in relation to the act on the assumption that they instead held ordinary title to any land concerned".

88 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 301 [130].

89 *Native Title Act 1993* (Cth), s 24MD(6B).

90 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 300-301 [129].

alternative suite of rights is made up of the rights in s 24MD(6B) of notification, objection and consultation. The native title holders would lose their statutory right to negotiate, and obtain instead the lesser protection of that alternative suite of rights, if Mt Isa Mines' right to mine was "created for the sole purpose of the construction of an infrastructure facility".[91]

88 The sole purpose of Mt Isa Mines' proposed mineral lease is the construction of the DSEA. So, if the DSEA is an infrastructure facility, the native title holders are not entitled to a statutory right to negotiate and would be limited to the lesser statutory rights of notification, objection and consultation.[92]

89 The second issue in this Court concerns the reasoning of the Full Court that although the DSEA is an infrastructure facility within the application of the ordinary meaning of that phrase,[93] the definition of "infrastructure facility" in s 253 of the *Native Title Act* is exhaustive[94] and the DSEA does not fall within that exhaustive definition.[95] Perhaps for forensic reasons designed to emphasise the breadth of a "right to mine" to support their argument on the first issue, the native title holders argued that "infrastructure facility" should have an extremely broad meaning, removing their statutory right to negotiate in a wide range of circumstances, and limiting them in those circumstances to diminished statutory rights of notification, objection and consultation (albeit rights that are still greater than ordinary freeholder rights). In departing from the conclusion of the Full Court in this respect, this argument of the native title holders can now be seen to have been contrary to their interests.

90 In this Court, the joint reasons depart from the conclusion of the Full Court on the second issue by concluding that the definition of "infrastructure facility" in s 253 is not exhaustive so that the definition includes the ordinary denotation of an infrastructure facility. Since it was common ground that the DSEA fell within the ordinary denotation of "infrastructure facility", the joint reasons do not explore the boundaries of that ordinary meaning. Nor do these reasons.

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91 *Native Title Act 1993* (Cth), s 26(1)(c)(i).

92 *Native Title Act 1993* (Cth), s 24MD(6B)(b) read with the remainder of s 24MD(6B).

93 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 309-310 [162].

94 No submissions appear to have been made on this point in *South Australia v Slipper* (2004) 136 FCR 259.

95 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 308 [157].

91 During the hearing, and for a time subsequently, I held the contrary view that the Full Court was correct on this point. As the Full Court said, the "statutory text, context and purpose are strong indications that the definition of 'infrastructure facility' is an exhaustive definition".[96] On the other hand, as the joint reasons in this Court point out, the Explanatory Memorandum (a source of extrinsic context which did not feature heavily in written or oral submissions) is very clear and specific in its explanation that the definition of "infrastructure facility" is not intended to be exhaustive.[97]

92 This appeal therefore presents a rare instance of a clash between (i) apparently strong indications of intention to be attributed to Parliament derived from the statutory text and its context in the Act and (ii) an apparently clear expression of an intention to the contrary to be attributed to Parliament from context arising from extrinsic materials (or, perhaps more accurately, information contained in documents extrinsic to the legislation). That clash is not to be resolved by an attempt to adopt one and to disregard the other. All context must be reconciled. There can be only one manifested parliamentary intention. For the reasons below, the extrinsic material in this appeal, which was neither redundant, contrived, nor obviously mistaken, is so clear and so specific on this point that it must reshape the understanding of what might otherwise be seen as strong indications of a contrary intention to be attributed to the Parliament from the statutory text and its context within the Act. Contrary to my initial view, the definition of "infrastructure facility" is not exhaustive and the native title holders do not have a statutory right to negotiate but have only the lesser statutory rights of notification, objection and consultation. This issue is the focus of the remainder of these reasons.

The purpose of diminishing the rights of native title holders from the right to negotiate

93 The Supplementary Explanatory Memorandum which accompanied the *Native Title Amendment Bill 1997 (No 2)* (Cth) clearly provides for the purpose of diminishing the rights of native title holders where the sole purpose of the creation of a right to mine is the construction of an infrastructure facility associated with mining:[98]

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96 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 308 [157].

97 See Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum.

98 Australia, House of Representatives, *Native Title Amendment Bill 1997 (No 2)*, Supplementary Explanatory Memorandum at 19.

> "The Government believes that it is not appropriate to subject future acts of this kind to the right to negotiate. They include the provision of infrastructure, such as roads, gas pipelines and the like. Such infrastructure is increasingly being provided by non-Government entities, especially in remote and regional Australia. It is appropriate however that in relation to acts of this kind, which may have the result of extinguishing native title altogether, native title holders be given procedural rights essentially the same as others but which ensure that the special nature of their rights can be taken into account."

94 In other words, the view was taken that the importance of the provision of infrastructure, such as roads and gas pipelines, whether by government or private parties, required native title holders' statutory right to negotiate to be reduced to statutory rights of notification, objection and consultation. That purpose reveals that there are core examples of infrastructure facilities associated with mining that must be included within the concept. Those core examples, such as the examples given of roads and gas transmission facilities, are contained in the list of included matters in s 253 of the *Native Title Act*. At the periphery, however, there may be many examples where there might be disputes regarding whether something is an infrastructure facility associated with mining. The purpose of diminishing the rights of native title holders in relation to infrastructure facilities does not reveal how to resolve whether a disputed circumstance falls within the list of included matters or whether the list of matters should be expanded to include other, perhaps more peripheral, examples that might fall within the application of the ordinary meaning of an infrastructure facility associated with mining.

The text of s 253 and its context in the *Native Title Act*

95 The definition of "infrastructure facility" in s 253 of the *Native Title Act* provides as follows:

> "***infrastructure facility*** includes any of the following:
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> (a) a road, railway, bridge or other transport facility;
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> (b) a jetty or port;
>
> (c) an airport or landing strip;
>
> (d) an electricity generation, transmission or distribution facility;
>
> (e) a storage, distribution or gathering or other transmission facility for:
>
> (i) oil or gas; or
>
> (ii) derivatives of oil or gas;

(f) a storage or transportation facility for coal, any other mineral or any mineral concentrate;

(g) a dam, pipeline, channel or other water management, distribution or reticulation facility;

(h) a cable, antenna, tower or other communication facility;

(i) any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (h) and that the Commonwealth Minister determines, by legislative instrument, to be an infrastructure facility for the purposes of this paragraph."

96 There are four features of statutory text and context in the Act that combine strongly to suggest that the listed items constitute the exhaustive content of an infrastructure facility so that any dispute about the content of an infrastructure facility must be resolved only by reference to that list.

97 First, the definition is expressed as one that "includes *any of the following*" (emphasis added). On the one hand, it is possible to see this expression merely as a compendious way of saying "includes" (rather than "means") like in numerous other instances in the *Native Title Act* where the definition is one that "includes" a list of matters. On the other hand, a different expression has been chosen. The different expression can be seen to address cumulative possibilities and to contain the matters that would be expected to be included. The same expression, "includes any of the following" rather than "includes", is also used in s 226(2), which is said to "affect[] the meaning of *act* in references to an act affecting native title and in other references in relation to native title".[99] In s 226(2), the expression ("includes any of the following") departs from the ordinary meaning of an "act" and provides what appear to be cumulative but exhaustive possibilities for matters that fall within the defined term "act".

98 The use of the expression "includes any of the following" in this exhaustive way is also consistent with the ordinary conversational maxim of quantity. A child who is told that they can have an ice cream which "includes any of the following: scoop of ice cream, cone, flake" would not, without unreasonable ambition (but perhaps with different words), ask whether the ice cream also includes content at the periphery of the application of its ordinary meaning, such as sprinkles.

99 Secondly, the term "infrastructure facility" is not one that has a single ordinary meaning capable of consistent application. The application of its ordinary meaning can change according to context and over time. For instance, in the context of government infrastructure facilities, core examples might be schools,

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99 *Native Title Act 1993* (Cth), s 226(1).

hospitals or sporting fields.[100] In the context of military infrastructure facilities, a core example might be military barracks.[101] But, as Gageler J rightly pointed out during oral argument, and in polite understatement, the submission by the native title holders that schools, hospitals, sporting fields or military barracks fell within the application of the ordinary meaning of "infrastructure facility" in the context of mining was likely not their best point.

100 Thirdly, to the extent that "infrastructure facility" has an ordinary meaning that falls to be applied in the context of mining, the definition of "infrastructure facility" does not appear to follow the usual technique of a non-exclusive list which provides for matters that extend the application of an ordinary meaning or which clarifies applications that might be in doubt. Instead, the definition provides for matters that are the core examples of mining infrastructure facilities, namely those matters that are fundamental or necessary for the mining operation itself (such as roads, railways, and bridges) as well as generalisations from those matters (other "distribution ... facility" or "other communication facility").[102] Indeed, with the detail of the content of the listed matters, it strains the imagination to identify any infrastructure facility that is part of an integrated mining operation which is *not* contained in the list. Assuming, without the need to decide, that the DSEA—a storage area for dredge spoil—does not fall within para (f) or para (g) of the definition of "infrastructure facility", then the DSEA would be similar to matters in those paragraphs and capable of being the subject of a determination by the Commonwealth Minister under para (i).

101 Fourthly, the likely intention that the listed matters in the definition of "infrastructure facility" be exhaustive is reinforced by the catch-all provision, in para (i), for the Commonwealth Minister to determine by a legislative instrument that "any other thing that is similar" to the listed matters is an infrastructure facility. In its original form prior to a 2007 amendment,[103] para (i) provided that the determination by the Commonwealth Minister was required to be in writing, with a separate provision making such a determination a disallowable instrument.[104] If

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100 See *Macquarie Dictionary*, 7th ed (2017), vol 1 at 779, "infrastructure", sense 2.

101 See *The Oxford English Dictionary*, 2nd ed (1989), vol 7 at 950, "infrastructure".

102 *Native Title Act 1993* (Cth), s 253 (definition of "infrastructure facility"). See *YZ Finance Company Pty Ltd v Cummings* (1964) 109 CLR 395 at 398-399, 403.

103 *Native Title Amendment (Technical Amendments) Act 2007* (Cth), Sch 4 item 33, amending *Native Title Act 1993* (Cth), s 253 (para (i) of the definition of "infrastructure facility").

104 *Native Title Act 1993* (Cth), s 214, repealed by *Native Title Amendment (Technical Amendments) Act 2007* (Cth), Sch 4 item 29.

the purpose of para (i) were merely for a determination to remove any doubt about matters that fell within the application of the ordinary meaning of "infrastructure facility" then it is difficult to see why such a determination would be disallowed and what utility there could have been in disallowance.

102 Despite the strength with which these four matters suggest that the definition of "infrastructure facility" is exhaustive, there remains some ambiguity. An alternative possibility is that the listed items in s 253 are merely examples of the application of the ordinary meaning of "infrastructure facility" in the context of mining, designed to put those matters beyond doubt with a power for the Commonwealth Minister to determine, by legislative instrument, to put further (and similar) matters beyond doubt. That possibility is reflected in the approach that is preferred by the joint reasons. That possibility also means that the clear terms informing the extrinsic context to s 253 cannot be dismissed as redundant, contrived or obviously mistaken.

The extrinsic context to s 253

103 The Explanatory Memorandum to the *Native Title Amendment Bill 1997* (Cth) provided that "infrastructure facility" was to bear "its ordinary meaning" but "*also*" was to include "a number of listed facilities".[105] Table 19.3 of the Explanatory Memorandum listed those facilities in substantively the same terms as those that became paras (a) to (i) of the definition of "infrastructure facility" in s 253.

104 The proposed Bill for which this Explanatory Memorandum was produced was substantially amended before it became the *Native Title Amendment Act 1998* (Cth). One amendment extended the application of the definition of "infrastructure facility" from the context of future acts that were compulsory acquisitions so as to apply also to future acts that involved the creation of rights to mine in what became s 26(1)(c)(i). But the Supplementary Explanatory Memorandum that was produced after this amendment did not suggest that there had been any intention to change the meaning of "infrastructure facility". Indeed, the same purpose of s 26(1)(c)(i) exists for the exclusion of a right to negotiate from future acts of compulsory acquisition, and for the diminished rights of native title holders, where "the purpose of the acquisition is to provide an infrastructure facility"[106].

105 The question of statutory interpretation that arises is how to reconcile two matters. On the one hand, there is an apparently strong indication from the statutory

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105 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 184 (emphasis added).

106 *Native Title Act 1993* (Cth), s 26(1)(c)(iii)(B).

text and context in the *Native Title Act* that the listed matters in the definition of "infrastructure facility" were intended by Parliament to be exhaustive. On the other hand, there is a clear and unequivocal indication in the Explanatory Memorandum that the listed matters in the definition of "infrastructure facility" were not intended by Parliament to be exhaustive.

The role of extrinsic materials in statutory interpretation

Common law

106 An attempt to understand the meaning of speech without any context is like an attempt to understand the meaning of a painting before the paint is applied to the canvas. Context conveys meaning. The same is true of the words used in Acts of Parliament. "It is the legislative provision as an item of speech, not its words in isolation considered as language, which must be understood."[107] The speech conveyed by the words of an Act of Parliament must be understood by ordinary people, "those who are subject to the law's commands", who "are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage".[108] In order to put those words in context, the most fundamental aspect of the process of understanding ordinary usage of words generally involves a reader or listener inferring the intentions, objects, purposes and designs of the speaker. Hence, for centuries, the common law interpretative process of reading words in their context has been described as a search for the "intention of the Legislature".[109]

107 Almost from the inception of this Court, there was an insistence upon interpreting statutory words according to the intention of Parliament. As Griffith CJ said, referring to a passage which he reiterated and summarised in numerous later cases,[110] "the only rule for the construction of Acts of Parliament

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107 Campbell and Campbell, "Why Statutory Interpretation Is Done as It Is Done" (2014) 39 *Australian Bar Review* 1 at 42.

108 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 340.

109 See, eg, *Reniger v Fogossa* (1551) 1 Plow 1 at 8 [75 ER 1 at 13]; *Stradling v Morgan* (1560) 1 Plow 199 at 204-205 [75 ER 305 at 312-315]; *Williams v Pritchard* (1790) 4 T R 2 at 3 [100 ER 862 at 862]; *R v Brady* (1797) 2 Leach 803 at 807 [168 ER 501 at 503]; *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at 143 [8 ER 1034 at 1057]; *Hawkins v Gathercole* (1855) 6 De G M & G 1 at 22 [43 ER 1129 at 1136].

110 See *Tasmania v The Commonwealth and Victoria* (1904) 1 CLR 329 at 339; *The President of the Shire of Arapiles v The Board of Land and Works* (1904) 1 CLR 679 at 686; *Local Board of Health of Perth v Maley* (1904) 1 CLR 702 at 710; *The*

is that they should be construed according to the intent of the Parliament which passed the Act".[111] This is not the intention of a real person or an aggregated intention of a group of people. Instead, statutory interpretation adapts the ordinary interpretative techniques of understanding language by reference to intention of a real person to treat statutory words as spoken by a notional person, a Parliament, with its intentions, objects, purposes and designs attributed from context: "the duty of a court is to give the words of a statutory provision the meaning that the legislature is *taken to have* intended them to have".[112]

108 Until relatively recently in the life of the common law, it was impermissible to have regard to information contained in extrinsic materials as part of the context to determine the meaning that Parliament was taken to have intended.[113] That older approach had the benefit of simplicity and clarity for an ordinary reader of legislation who might not consider all extrinsic material. The older approach avoided the wastage of time and expense in trawling through extrinsic materials which rarely contain information that can shed light on an issue in court. But the older approach was highly artificial. Extrinsic information or knowledge, including reasonable expectations of compliance by Parliament with social norms or fundamental common law principles, is often employed in the process of interpretation. It is hard to justify ignoring extrinsic information that reveals specific purposes and intentions merely because it is contained in extrinsic material.

109 One way in which the rule which purported to exclude extrinsic materials was relaxed was by permitting consideration of information contained in extrinsic materials but only if that information would not contradict a plain meaning of the statutory text. On that approach the information in extrinsic materials could not contradict a so-called "plain meaning" of statutory text even if the information revealed that the "plain meaning" of the text was contrary to the clear intention of Parliament. For instance, in *Re Bolton; Ex parte Beane*,[114] Mason CJ, Wilson and

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Master Retailers' Association of NSW v The Shop Assistants Union of NSW (1904) 2 CLR 94 at 107; *Higgins v Berry* (1908) 6 CLR 618 at 625.

111 *Dixon v Todd* (1904) 1 CLR 320 at 326-327, quoting *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at 143 [8 ER 1034 at 1057].

112 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] (emphasis added).

113 See, eg, *Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd* (1977) 139 CLR 449 at 457, 461-462, 470, 476-478. cf at 479-481.

114 (1987) 162 CLR 514 at 518. See also *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 550; *Nominal Defendant v GLG Australia Pty Ltd* (2006)

Dawson JJ said, in the context of considering statements in a second reading speech that were "quite unambiguous[]":

> "But this of itself, while deserving serious consideration, cannot be determinative ... The words of a Minister must not be substituted for the text of the law ... It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."

110 This approach incorrectly appeared to suggest that the words of a statute have meaning independently of the intention with which Parliament is understood to have used them. If applied strictly, this approach would mean that if oversight or error led to an obvious mistake in the text of a written law then courts would be required to apply the words of the statute consistently with a "plain" semantic meaning divorced from extrinsic information or knowledge, even where the extrinsic information or knowledge is no more than the recognition of reasonably expected social norms or fundamental common law principles that Parliament is generally taken to respect. For instance, a statute which provided that the evidence of a witness could be impeached "in any unlawful way" was correctly interpreted by a court as meaning "in any lawful way".[115] "[I]f the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance."[116]

111 The modern common law approach is not so constrained. The modern approach has now been approved and applied many times,[117] even if its spirit has

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228 CLR 529 at 538 [22]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31]-[32].

115 Gold, "Absurd Results, Scrivener's Errors, and Statutory Interpretation" (2006) 75 *University of Cincinnati Law Review* 25 at 56-57, discussing *Scurto v Le Blanc* (1938) 184 So 567.

116 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

117 See *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at 175 [28]; *R v Hughes* (2000) 202 CLR 535 at 544 [1]; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at 280-281 [11]; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 230-231 [124]-[125]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 521-522 [52]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14]; *R v A2* (2019) 269 CLR 507 at 521 [32].

not always been entirely respected. That modern approach was set out by Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club Ltd*.[118] Referring to information in the reports of law reform bodies and speaking of context "in its widest sense", which includes the identification of external matters such as "the existing state of the law and the mischief which ... the statute was intended to remedy", their Honours said that context is "considered in the first instance, not merely at some later stage when ambiguity might be thought to arise". Their Honours clarified that context is not limited to information contained in extrinsic documents but also includes the application of reasonable expectations concerning any "inconvenience or improbability of result" that could arise on one interpretation of the statutory text which would then be inconsistent with "the legislative intent".[119] The modern approach thus generally aligns the techniques for interpretation of statutes with the techniques for interpretation of ordinary speech. Nevertheless, since the intention is that of a notional Parliament, and not any individual member or collection of members, even statements in second reading speeches or Explanatory Memoranda are only part of the context to be considered.

The Acts Interpretation Act 1901 *(Cth), s 15AB*

112 Section 15AB of the *Acts Interpretation Act* was enacted before the modern common law approach to statutory interpretation had solidified. There are, superficially, two main differences between the operation of the common law rules of statutory interpretation and s 15AB. First, rather than considering all text and all context at once, s 15AB contemplates that the court will first consider the text and the context within the Act before then considering context that arises from information in extrinsic material. Secondly, s 15AB contains various gateways to the consideration of information in extrinsic material, in effect: (i) to "confirm" a meaning that would arise from the text of the provision, its context in the Act, and the Act's purpose or object;[120] (ii) to determine a meaning where the text of the provision is ambiguous or obscure (including when an ambiguity, including a latent ambiguity, arises because an apparently unambiguous meaning is not confirmed);[121] or (iii) to reject a manifestly absurd or unreasonable meaning that would arise from the text of the provision, its context in the Act, and the Act's purpose or object.[122]

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118 (1997) 187 CLR 384.

119 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

120 *Acts Interpretation Act 1901* (Cth), s 15AB(1)(a).

121 *Acts Interpretation Act 1901* (Cth), s 15AB(1)(b)(i).

122 *Acts Interpretation Act 1901* (Cth), s 15AB(1)(b)(ii).

113 These two differences should not be overstated. There will very rarely be a difference in practice between the common law rules of statutory interpretation and the application of the discretion in s 15AB in relation to either (i) the information in extrinsic materials to which regard can be had, or (ii) the process by which information in extrinsic materials will be considered. As to the information in extrinsic materials to which regard can be had, the extent to which the s 15AB gateways will restrict resort to such information might often depend only upon the extent of judicial imagination because s 15AB has no minimum threshold of ambiguity and without full context there is almost always potential for some patent or latent ambiguity. As to the process by which information in extrinsic materials will be considered, the iterative, two-stage, approach ultimately still requires the information in extrinsic materials to be assimilated with the text of the provision, its context within the Act, and the Act's purpose or object in order to ascertain a single meaning.

114 An expansive approach to the extrinsic materials to which s 15AB permits recourse is also consistent with the nature of that provision as generally facilitative and as one which is designed to expand resort to information in extrinsic materials, and not as one that is intended to constrain the development of the common law rules of statutory interpretation.[123] But one respect in which the common law rules of statutory interpretation must conform with s 15AB is the weight to be given to information contained in extrinsic materials. Only one approach can be taken to the weight to be given to the information in extrinsic materials when assimilating statutory text with all context.

115 As s 15AB(3)(a) provides, in considering the weight to be given to the information in extrinsic materials it is necessary to have regard to "the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act". The effect of s 15AB(3)(a) is therefore that in the process of assimilating all context, s 15AB requires that some extrinsic information or knowledge, such as that which is based on reasonable expectations of social norms or fundamental common law principles, generally be given greater weight than other information which is derived from extrinsic materials.

116 This general consideration of the weight of information in extrinsic materials does not prevent the reconsideration of even an apparently strong meaning of the statutory text and context within the Act if the information in the extrinsic materials is particularly cogent, clear and specific. Nor does this general consideration deny that information derived from some kinds of extrinsic materials may often have greater general weight than information derived from others. An

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123 Stubbs, "From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation" (2006) 34 *Federal Law Review* 103 at 123.

Explanatory Memorandum, for instance, is an important and weighty extrinsic source of information. As Dharmananda has observed of Explanatory Memoranda generally,[124] the central role of Ministers and their departments in drafting Explanatory Memoranda, unlike other extrinsic materials apart from second reading speeches, "invites the available implication that these materials are more reflective of 'government intent'".

Applying the extrinsic statutory context in this appeal

117 The approach taken by the Full Court followed the iterative process of s 15AB. The Full Court first dealt with the textual and contextual matters within the *Native Title Act*, which by themselves provided strong support for a conclusion that the listed matters in the definition of "infrastructure facility" were exhaustive.[125] After reaching this conclusion based on these matters in isolation, the Full Court proceeded to address the statements in the Explanatory Memorandum "[a]gainst those textual and contextual indications".[126] The Full Court treated the statements in the Explanatory Memorandum as having "little weight" because it was said that the treatment in the Explanatory Memorandum of "the infrastructure facility exclusion only applied to future acts that were compulsory acquisitions, not rights to mine", a concept added later.[127]

118 As explained above, however, Parliament cannot be taken to have had a different intention in relation to the meaning of "infrastructure facility" when applied to compulsory acquisitions from that which it had when applying that meaning to the creation of a right to mine. And the Explanatory Memorandum is crystal clear that the definition of "infrastructure facility" is not intended to be exhaustive.

119 The clarity and specificity of the statements in the Explanatory Memorandum and its relevance to the second issue on this appeal require that the text and context of the definition of "infrastructure facility" in s 253 be viewed through the prism of the clear manifested intention expressed in the Explanatory

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124 Dharmananda, "Using Parliamentary Materials in Interpretation: Insights from Parliamentary Process" (2018) 41 *University of New South Wales Law Journal* 4 at 34. See also at 12.

125 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 305-307 [147]-[152].

126 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 307 [153].

127 *Harvey v Minister for Primary Industry and Resources* (2022) 291 FCR 263 at 307 [155].

Memorandum. Independently of the information in that extrinsic material, the text and context of s 253 provide strong support for an exhaustive definition of "infrastructure facility" but there remains some ambiguity and a degree of uncertainty. When viewed through the prism of the clarity and specificity of the statements in the Explanatory Memorandum, the text and context must be understood in the manner expressed in the joint reasons.

Conclusion

120 I agree with the orders proposed in the joint reasons.