HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

David Harvey
First Appellant

Thomas Simon
Second Appellant

Top End (Default PBC/CLA) Aboriginal Corporation RNTBC ICN 7848
Third Appellant

and

Minister for Primary Industry and Resources
First Respondent

Northern Territory of Australia
Second Respondent

Mount Isa Mines Limited ACN 009 661 447
Third Respondent

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUE AND SUMMARY OF SUBMISSIONS

2. The issue in this appeal is whether the Full Court (**J**) erred in concluding that the proposed grant of Ancillary Mineral Lease 29881 (**MLA 29881**) for the purpose of a dredge spoil emplacement area (**DSEA**) would not constitute the "creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining" within the meaning of s 24MD(6B)(b) of the *Native Title Act 1993* (Cth) (**NTA**).

3. The Full Court supported its judgment on two independent bases, each of which must be successfully impugned by the Appellants in order to obtain relief. The first basis was that the grant of MLA 29881 would not constitute the creation or variation of a "right to mine" within the meaning of s 24MD(6B)(b) (**Right to Mine Issue**). The second was that the DSEA would not be an "infrastructure facility" within the meaning of s 253.

4. There are two corresponding pathways by which the appeal may be dismissed.

   (a) First, the Appellants challenge the construction of "infrastructure facility" adopted by the courts below but do not contest the application of that construction to the facts. If this Court agrees that the definition of "infrastructure facility" is exhaustive, the appeal should be dismissed: see [59]-[61] below.

   (b) Secondly, and regardless of the conclusion on that first issue, the proposed grant of MLA 29881 would not constitute the creation or variation of a "right to mine". This is the focus of the Territory's submissions: see [13]-[58] below.

5. The Full Court correctly resolved the Right to Mine Issue. The text, context and legislative history of s 24MD(6B)(b) demonstrate that the provision applies only to acts that comprise the creation or variation of a "right to mine": J [97]-[118] **CAB 137-145**. In this statutory context, a "right to mine" is a right to engage in primary production activities that typically involve the exploration for and extraction of minerals (or petroleum or gas) from the ground or rights necessary for that purpose: J [127] **CAB 149**. MLA 29881 would not constitute a "right to mine" because it would authorise activities that merely facilitate port maintenance operations. These activities are ancillary to mining in the sense that they assist to maintain a port, which is used to transport products that have been mined. However, they would take place well after mining has occurred (in respect of the transported products). Further, the activities would not occur to the transported minerals themselves, and they

would be conducted on land geographically distant from the primary production activities that constitute the mining: J [130]-[133] **CAB 150-151**.

6. Against those matters, the Appellants largely repeat submissions put and rejected below, and in several respects mischaracterise the trial judge (**TJ**) and Full Court's reasons. The Full Court's construction was influenced by the language of s 24MD(6B)(b) as a whole (cf AS [30]-[35]), expressly did not limit a "right to mine" to a mineral lease *stricto sensu* (cf AS [39]), and cohered with the legislative history and authorities: cf AS [36], [41]. The Court adopted a flexible and "fact specific" standard depending "on the nature of the activities authorised" by a grant: J [127], [131] **CAB 149, 150-151** cf AS [42]-[43]. Its construction reflects the balance struck by the legislature between the competing interests of native title holders, proponents and the state in the future act regime. It also ensures that native title holders retain, by reason of s 24MD(6A), the same rights as freeholders, consistent with the principle of non-discrimination that underpins the NTA: cf AS [37].

7. The appeal should be dismissed.

PART III: NOTICE UNDER THE JUDICIARY ACT

8. The matter does not require any notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: STATEMENT OF MATERIAL FACTS

9. The First and Second Respondents supplement and correct the Appellants' summary of the material facts as follows.

10. The Third Respondent, Mount Isa Mines Limited (**MIM**) operates the McArthur River Mine (**Mine**): J [2] **CAB 106**. By special project legislation, it was granted Mineral Leases (**ML**) 1121-1126.[1] MIM uses MLN 1121-1125 for the Mine, including for extracting, processing and treating ore and tailings: J [13]-[14] **CAB 108-109**. MLN 1121-1125 are inland: map at **CAB 86**.

11. MLN 1126 is located on the coast, geographically separate from MLN 1121-1125 and with a distinct purpose: J [13] **CAB 108-109**. It authorises MIM to operate the Bing Bong Port from which ore is shipped. Ore is loaded onto barges and transshipped through a channel to a larger vessel: J [18] **CAB 111-112**. The channel must be dredged, producing dredge spoil. MLA 29881, if granted, would authorise MIM to deposit that dredge spoil on a separate title area: J [20] **CAB 112-113**. MIM has historically deposited dredge spoil in a DSEA located along the southern boundary of MLN 1126, largely outside that title area and

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[1] *McArthur River Project Agreement Ratification Act 1992* (NT), s 4A(1) and Schedule 2.

on a pastoral lease held by MIM: TJ [2], [6], [94] **CAB 9-10, 52-53**; **AFM 262-4**. The use of that pastoral land for that purpose was historically authorised by non-pastoral use permits issued by the Pastoral Land Board: PJ [40] **CAB 29**; **AFM 231, 235**.[2] MLA 29881, if granted, would cover the area of the existing DSEA on the pastoral lease and a new DSEA.

12. Contrary to AS [15], the trial judge did not hold that MLA 29881 would be the creation of a "right to mine". On the trial judge's construction, that was not an independent element of s 24MD(6B)(b). On that view, a grant will fall within s 24MD(6B)(b) if it (a) involves an "infrastructure facility", (b) is for the sole purpose of the construction of that facility, and (c) if that facility is associated with mining: PJ [131] **CAB 67**. However, MLA 29881 did not satisfy the first element and, accordingly, did not fall within the subject phrase in s 24MD(6B)(b): PJ [135]-[142] **CAB 68-70**. It therefore did not constitute a "right to mine". The Full Court agreed with the trial judge's ultimate conclusion, but on the additional basis that a grant must first create a "right to mine" to fall within s 24MD(6B)(b) and MLA 29881 would not have that character. That conclusion flows naturally from the scheme of the NTA.

PART V: ARGUMENT

The statutory scheme of the NTA

13. In general terms, an act that takes place on or after 1 January 1994, which is not a past act, and which affects or would (if valid) affect native title is a "future act": s 233. The grant of MLA 29881 would, if made, be a future act: J [37] **CAB 118**. Unless the NTA provides otherwise, a future act is invalid to the extent that it affects native title: s 24OA. Subdivs A to N of Div 3 of Part 2 variously provide that certain future acts are valid, notwithstanding their effect on native title.

14. Subdiv M concerns acts that pass the "freehold test". Section 24MB(1) identifies the category of acts to which Subdiv M applies and, in general terms, adopts a policy of "non-discrimination" between the native title holders and freeholders: explained in J [42] **CAB 120**. Subdiv M relevantly provides for the validity of acts that could be done in relation to land on the assumption that native title holders held ordinary (that is, freehold[3]) title, rather than native title, to it: s 24MB(1). The grant of MLA 29881 would meet this requirement because such titles can also be granted over freehold land: J [41] **CAB 120**.

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[2] See *Pastoral Land Act 1992* (NT), s 85A: "The Board may… grant the lessee a non-pastoral use permit to use all or part of the land the subject of the lessee's pastoral lease for a purpose that is not pastoral purposes".

[3] See NTA, 253 ("ordinary title").

15. Where Subdiv M applies to a future act then, subject to Subdiv P (which deals with the right to negotiate[4]), the act is valid: s 24MD(1). In the case of the proposed grant of MLA 29881, two further effects of Subdiv M applying to it are that the non-extinguishment principle applies and compensation is payable: ss 24MD(3)(a) and (b) and 238.

16. Subdiv M creates a tiered system of procedural rights for native title holders. Sections 24MD(6)(a)-(d) identify four specific categories of acts, each of which has other procedures specific to it. Most relevantly, s 24MD(6)(a) stipulates an act to which Subdiv P applies (that is, an act that enlivens the right to negotiate procedure). If none of the paragraphs in s 24MD(6) is applicable, the procedures in subsection (6A) and, where applicable, subsection (6B) apply. Section 24MD(6A) confers on native title holders the same procedural rights as a freeholder. Section 24MD(6B) provides additional rights of objection and to an independent determination of any objection.

17. The procedures in s 24MD(6B) do not apply to every future act that does not fall within s 24MD(6)(a)-(d). They apply only to two specific sub-categories of future acts, each of which forms an exception from a broader category of future acts that fall within the more onerous obligations applicable under Subdiv P. In this way, and as the legislative history further reveals (see below), future acts that fall within s 24MD(6B) comprise subcategories of acts that would otherwise be subject to the right to negotiate but in respect of which a legislative decision has been made to require the relevant proponent and State or Territory only to comply with the less onerous procedures in s 24MD(6B).

18. In particular, the procedures in s 24MD(6B) apply only in respect of the subcategories of future acts that meet the preconditions in paragraphs (6B)(a) or (b). For an act that falls into none of the ss 24MD(6)(a)-(d) or (6B)(a) or (b) categories, only the procedural requirements in paragraph (6A) apply. The legislative intention, consistent with the overarching principle of non-discrimination, is that future acts outside of s 24MD(6)(a)-(d) generally ought to attract the procedures in s 24MD(6A). Only a certain subset of those acts that are carved out from Subdiv P ought to attract the additional procedures in s 24MD(6B). In this case, the Appellants asserted that MLA 29881 would fall within s 24MD(6B)(b).

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[4] The "right to negotiate" is a special procedural right attaching to certain future acts including, relevantly, "mining rights": s 25(1)(a) and J [44] **CAB 122-123**. Before the future act is done, the parties must negotiate with a view to reaching agreement about the act. If they do not reach agreement, an arbitral body or a Minister will make a determination about the act instead.

The Full Court's reasons concerning the Right to Mine Issue

19. In its terms, s 24MD(6B)(b) applies to a future act that comprises "the creation or variation of *a right to mine* for the *sole purpose of the construction of an infrastructure facility associated with mining*." As noted above, the Full Court determined that the proposed grant of MLA 29881 would neither be the "creation or variation of a *right to mine*", nor would the DSEA be an "*infrastructure facility*".

20. As to the Right to Mine Issue, the Full Court's reasoned in three parts. First, it concluded that, as a matter of construction, s 24MD(6B)(b) applied only to acts that comprised the creation or variation of a "right to mine": J [97]-[118] **CAB 137-145**. Secondly, in this context, a "right to mine" is a right to engage in mining activities that typically involve the exploration for and extraction of minerals (or petroleum or gas) from the ground or rights necessary for that purpose: J [127] **CAB 149**. Thirdly, MLA 29881 would not constitute a "right to mine" because it was directed to activities subsequent to mining (port maintenance to facilitate the shipment of ore, already mined) and which would be conducted on land distant from any primary production activity: J [130]-[133] **CAB 150-151**. The Full Court reached those conclusions in an orthodox way, having regard to the text, context and legislative history of s 24MD(6B)(b): J [96] **CAB 137**.

<u>The creation or variation of a "right to mine"</u>

21. As to the text, s 24MD(6B) must be read as being comprised of two elements. The first is a substantive element: the creation or variation of a "right to mine". The second is a purposive element: a governmental purpose, namely that the act be for the sole purpose of the construction of an infrastructure facility associated with mining: J [98] **CAB 137**. The words "right to mine" are part of the statutory formulation and must be given meaning.

22. That conclusion was consistent with the statutory context: J [99]-[101] **CAB 138**. Relevantly, if an act fell within Subdiv P, it necessarily fell outside s 24MD(6B): s 24MD(6)(a). Section 26 identifies when Subdiv P applies to a future act. For present purposes, it applies to the "*creation of a right to mine*, whether by grant of a mining lease or otherwise", "*except for one* created for the sole purpose of the construction of an infrastructure facility associated with mining": s 26(1)(c)(i). The word "one" refers to the "right to mine" and presupposes that the exception applies only to a "right to mine". As the note to s 26(1)(c)(i) indicates, this (purposive) subcategory of "rights to mine" is dealt with

in s 24MD(6B),[5] the language of the exception in s 26(1)(c)(i) being mirrored in the language of s 24MD(6B)(b). This statutory context compels the conclusion that s 24MD(6B)(b) is concerned with a specific subcategory of future acts that create or vary a "right to mine".

23. This construction of s 24MD(6B)(b) was also supported by the legislative history: J [107]-[118] **CAB 141-145**. Prior to the 1998 amendments to the NTA, those future acts captured by s 24MD(6B)(b) were subject to the right to negotiate on the footing that they created or varied a right to mine.[6] The former s 26(2)(a) of the NTA provided that the right to negotiate applied, *simpliciter*, to "the creation or variation of a right to mine, whether by the grant of a mining lease or otherwise".

24. The 1998 amendments were not intended to expand the scope of activities that constituted "mining": contra AS [41]. The general effect of the 1998 amendments was to *reduce* the scope of the word "mine" by excluding the taking of sand, gravel, rocks and soil from the surface of the land unless it was done for one of the purposes in paragraphs (d) or (e) of the definition.[7] Further, those amendments created "exceptions and different procedures for some acts *which would otherwise be subject to the right to negotiate* under [s 26 of] the NTA".[8] To effect that purpose, the former s 26(2)(a) was repealed and re-enacted as s 26(1)(c)(i), subject to the new proviso (addressing a particular subcategory of rights to mine). Section 24MD(6B)(b) was inserted in mirror terms to prescribe the different procedural rights that would attach to the excluded acts (in circumstances where these rights to mine would no longer be subject to the right to negotiate process): J [46] **CAB 123**.[9] The extrinsic material said that the "amendment removes *the creation of a right to mine* from the operation of [s 26] (and thereby from the right to negotiate) if it is one created for the sole purpose of constructing an infrastructure facility associated with mining": J [115] **CAB 144**.

<u>The meaning of "mine"</u>

25. As to the content of the concept of "mining", the Full Court noted that the NTA does not define the phrase "right to mine": J [47] **CAB 123-124**. It recognised that the word "mine" as a verb is capable of a range of meanings, that it takes it meaning from its context, and that some caution must be adopted in applying cases that have considered similar phrases

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5 The note forms part of the NTA: *Acts Interpretation Act 1901* (Cth), s 13(1); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, [24] (French CJ).
6 M Perry and S Lloyd, *Australian Native Title Law*, (2018, 2nd ed, Lawbook Co.), [25.40] and [24MD.40].
7 See *Native Title Amendment Act 1998* (Cth), Schedule 1, Item 64.
8 *Native Title Amendment Bill 1997* (Cth), Explanatory Memorandum, [18.4], [19.3], [19.5].
9 *Native Title Amendment Bill 1997 (No. 2)* (Cth), Supplementary Explanatory Memorandum in relation to Government Amendments H32-34 and H46-7.

in different statutory contexts (such as "mining operations" in revenue legislation): J [122] and [125] **CAB 146-148**.

26. Accepting that the word "mine" may take much of its meaning from context, it nevertheless has a commonly understood – or *prima facie*[10] – meaning which may then be extended or confined by the statutory context: contra AS [32].[11] As the Appellants accept (AS [32]), the ordinary meaning of "mining" was historically confined to the recovery of minerals by underground working,[12] though in modern conditions it includes any operation (for example, open pit) for getting at minerals.[13] That agrees with the dictionary definition of the verb, being "to dig in the earth for the purpose of extracting, and to extract, ores, coal, etc": J [121] **CAB 146**. The gravamen is acts of primary production for winning the mineral.

27. The NTA uses the verb in a similar way. "Mine" is defined non-exhaustively in s 253 to incorporate and extend this ordinary meaning: J [120]-[121] **CAB 145-146**. It includes (a) exploring or prospecting for things that may be mined, (b) extracting petroleum or gas from land or from the bed or subsoil under waters, or (c) quarrying. However, it does not include extracting, obtaining or removing sand, gravel, rocks or soil from the natural surface of the land, or of the bed beneath waters, for a purpose other than (d) extracting, producing or refining minerals from the sand, gravel, rock or soil, or (e) processing the sand, gravel, rocks or soil by non-mechanical means.

28. That definition extends the ordinary concept of mine because exploration and prospecting, extracting minerals from below the water, and quarrying do not fall within the ordinary conception of "mining": J [121] **CAB 146**. However, it still focuses attention on the primary acts of production.[14] For example, s 253(d) and (e) contemplate that mining will include "producing or refining minerals from [extracted] sand, gravel, rocks or soil" and "processing [extracted] sand, gravel, rocks or soil". It thus contemplates activities that may include those up to the point of where a saleable product is produced.[15] But there is nothing

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[10] *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509, 524 (the Court).

[11] See *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, [34] (French CJ, Kiefel, Bell and Keane JJ) and *FMG Pilbara Pty Ltd v NC (deceased)* [2012] NNTTA 103, [27] (Member O'Dea). See also *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629, 647-8 (Dixon J); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [94] (Edelman J).

[12] *Lord Provost and Magistrates of Glasgow v Farie* (1888) 13 App Cas 657, 687 (Lord Macnaghten).

[13] *Waratah Gypsum Pty Ltd v Federal Commissioner of Taxation* (1965) 112 CLR 152, 160 (McTiernan J); *Australian Slate Quarries Ltd v Federal Commissioner of Taxation* (1923) 33 CLR 416, 418-9 (Knox CJ).

[14] *Banjima People v Western Australia (No. 2)* (2013) 305 ALR 1 (***Banjima***), [1053] (Barker J)

[15] In a similar context, see *Regional Director of Customs (WA) v Dampier Salt (Operations) Pty Ltd* (1996) 67 FCR 108 (FCAFC), 120 (the Court) ("The mining operation will not necessarily be complete when a mineral has been extracted from ore, or where salt is produced… It will be necessary that the mineral (salt) produced be saleable") quoted at J [125] **CAB 148**.

in the definition that extends to steps beyond primary production and the point at which the object of the mining is directed: contra AS [32].

29. Moreover, as the Full Court observed (and the Appellants do not deny), this definition was intended to inform the meaning of derivative phrases through the NTA, such as "right to mine": J [120] **CAB 145-146**.[16] When discussing the scope of the right to negotiate, and the "creation of a right to mine", the extrinsic material to the *Native Title Act Bill 1993* (Cth) referred to the definition of "mine" in (now) s 253.[17] That definition, in turn, said that it picked up derivatives of "mine", such as "mining" and "mined".[18] This was reiterated in the 1998 amendments.[19] Section 25(a) describes the subject of s 26(1)(c)(i) as "*mining* rights".

30. In that statutory context, the Full Court said the phrase in issue "cannot be given an unduly narrow construction" limited only to "extraction of minerals": J [124] and [102] **CAB 147**. "Without attempting to be exhaustive" and acknowledging the analysis will always be "fact specific", the Full Court said a "right to mine" might be comprised of a right to engage in exploration or extraction or to engage in activities necessary for such a right, including activities for evaluating, processing, refining or treating materials: J [127] **CAB 149**.

Application to MLA 29881

31. Applying that fact specific approach, the Full Court held that MLA 29881 would not confer a "right to mine" for two cumulative reasons. The first was that MLA 29881 would authorise activities on land geographically distant from the land on which mining was occurring (ML 1121-1125): J [131] **CAB 150-151**. Secondly, the activities authorised by MLA 29881 would support the shipment of ore already in a saleable form, not the mining of ore or its processing into a saleable form: J [132] **CAB 151**. That sits comfortably with the common sense notion that "mining" does not encompass the transportation of ore to customers, let alone activities that merely facilitate such transport. Nothing in the definition of "mine", or in ss 26(1)(c)(i) or 24MD(6B)(b), extended the concept to those activities.

Compendious phrase

32. Against that background, the Appellants raise a number of discrete objections to the Full Court's construction, which were largely considered and dismissed below. The

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[16] In relation to "right to mine", see *Banjima* (2013) 305 ALR 1, [981]-[982] (Barker J); *FMG Pilbara Pty Ltd v NC (deceased)* [2012] NNTTA 103, [20] (M O'Dea). In relation to "mining lease", see *Tjungarrayi v Western Australia* (2019) 269 CLR 150, [58] (Gageler J) and [71] and [84] (Nettle J); *Banjima*, [1053], [1335]-[1338] (Barker J). See also *Acts Interpretation Act 1901* (Cth), s 18A.

[17] Explanatory Memorandum, to the *Native Title Bill 1993* (Cth), Part B, p 19.

[18] Explanatory Memorandum, to the *Native Title Bill 1993* (Cth), Part B, p 104.

[19] Explanatory Memorandum to the *Native Title Amendment Bill 1997* (Cth), [19.6].

Appellants' primary complaint is that the Full Court did not read the words "right to mine" as part of a composite phrase: AS [30]-[37]. They says that, if ss 24MD(6B)(b) and 26(1)(c)(i) are read in that way, a "right to mine" *always* includes a right to construct anything falling within the definition of "infrastructure facility" that is associated with mining: AS [32]. There are four difficulties with that submission.

33. The first is that it mischaracterises the Full Court's reasons. The Full Court did not analyse the words "right to mine" in an "atomised" way "divorced from the larger expression in which they appear": cf AS [31]. The Full Court expressly recognised that a "right to mine" cannot be given an unduly narrow construction restricted to the extraction of minerals (that is, its ordinary meaning) because the legislature "contemplated that a right to mine might be created for the sole purpose of the construction of an infrastructure facility associated with mining": J [124] and also [102] **CAB 147, 139**. It thus accepted that all words in the sentence can inform the meaning of others: cf AS [32].[20]

34. Secondly, as identified by the Full Court, the Appellants' construction gives the words "right to mine" no work to do: J [98] **CAB 137**. Section 24MD(6B)(b) would be engaged whenever any kind of right is created or varied for the sole purpose of the construction of an infrastructure facility associated with mining, reading out the words "right *to mine*".

35. The words "right to mine" were placed by the drafter at the start of the phrase, indicating that the provision is directed to a particular kind of substantive right (a "right to mine") exercisable for a particular purpose ("for the sole purpose of the construction of an infrastructure facility associated with mining"). The Appellants give that purpose a controlling operation that then subsumes the rest of the statutory phrase. However:

(a) A court construing a statutory provision "must strive to give meaning to every word of the provision".[21] The words "right to mine" cannot be rendered superfluous "if by any other construction they may… be made useful and pertinent".[22]

(b) That is so even if s 24MD(6B)(b) is characterised as a "compendious phrase".[23] In that universe, it will often be necessary to consider the composite expression initially

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[20] That is what is required when construing a composite phrase: *Zappia v Comptroller General of Customs* (2017) 254 FCR 363, [31] (Davies J, in dissent but upheld on appeal in *Comptroller-General of Customs v Zappia* (2018) 265 CLR 416, [24] and [32] (Kiefel CJ, Bell, Gageler and Gordon JJ).

[21] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[22] *Project Blue Sky Inc v Austalian Broadcasting Authority* (1998) 194 CLR 355, [71] (McHugh, Gummow, Kirby and Hayne JJ) quoting *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffiths CJ).

[23] *Vokes Ltd v Laminar Air Flow Pty Ltd* (2018) 263 FCR 523 (FCAFC), [18] (the Court); *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415 (FCAFC), [149] (the Court).

in parts and then construe those parts by reference to the phrase as a whole.[24] Close attention must still be paid to the text "and this requires a focus on *the words used*".[25]

(c) These principles apply with particular force because the phrase "right to mine" and the sole purpose exception were deliberately juxtaposed by legislative amendment.[26]

36. The third difficulty is that the Appellants' construction cannot be reconciled with the statutory context and the legislative history: contra AS [41]. The history of ss 24MD(6B) and 26 shows that the concept of a "right to mine" was formerly the sole discrimen for the application of s 26. The sole purpose test was intended to identify a subset of a species of right already identified in an earlier form of the Act, being a kind of right that continued to be used by reference to the same (already judicially construed) expression. The sole purpose test was not intended to render the principal expression ("right to mine") superfluous.[27]

37. The Appellants rely on the inclusion in ss 24MD(6B) and 26(1)(c)(i) of the words "the construction of an infrastructure facility… associated with mining" and suggest that, because of their presence, a "right to mine" must always include a right for that purpose. However, those words were absent from the NTA before the 1998 amendments, and the purpose of those amendments was to stratify the procedural requirements for acts that constituted the creation or variation of a right to mine, not to expand that concept: see [24] above.

38. The fourth error is that the Appellants' construction requires s 24MD(6B)(b) to be read as a "standalone provision": AS [31] and TJ [130] and [132] **CAB 67-68**. To do so is to ignore the necessary link between s 24MD(6B)(b) and s 26 outlined above. It is cardinal rule of statutory interpretation that no section may be construed in isolation from the enactment of which it forms a part.[28] Rather, a construction must be preferred that gives ss 24MD(6B)(b) and 26(1)(c)(i) a harmonious operation: J [104] **CAB 140**.[29]

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[24] *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 402 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ).
[25] *Keasey v Director of Housing* (2022) 66 VR 45 (VSCA), [22]-[23] (the Court).
[26] *Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2014] QCA 330, [12] Fraser JA (Muir and Morrison JJA agreeing).
[27] *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53, [8] (Gleeson CJ and Callinan J).
[28] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason J).
[29] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [70] (McHugh, Gummow, Kirby and Hayne JJ)

39. The NTA uses the phrases "mine" and "right to mine" repeatedly.[30] Those phrases must be presumed to have a consistent meaning throughout the NTA,[31] particularly as the verb "mine" is informed by a statutory definition[32] and because the extrinsic material makes clear that the definition was intended to inform all derivative phrases in the Act: see [29] above. Its other uses are consistent with a meaning directed to physical acts of primary production. The NTA refers to "mining (other than fossicking)" (s 24LA(1)(b)(v)), "opal and gem mining" (ss 24MB and 26C(1)(b)), "gold or tin mining" (s 26B) and "opal or gem mining areas" (s 26C(1)(b)). It would be absurd to read the verb "mine" in those contexts as including (as the Appellants say it must) any subordinate aspect of a mining operation, no matter how functionally removed and geographically distant the activities are from primary production: cf AS [32], [34]. On the Appellants' construction, a licence granted for the sole purpose of constructing a telecommunications tower to support a mining operation would constitute a "mining lease" because it would permit the grantee to use the lands covered by the licence "solely or primarily for mining".[33]

Mining lease 'stricto sensu'

40. The Full Court's construction does not merely restate the effect of a mining lease *stricto sensu*: contra AS [39] and [43]. That also mischaracterises the Full Court's reasons. The Full Court was aware that a "mining lease" is defined in s 245(1) of the NTA as a "lease… that permits the lessee to use the land or waters covered by the lease *solely or primarily for mining*": J [123] **CAB 147**. It also quoted *Western Australia v Ward* (2002) 213 CLR 1 at [308] for the proposition that "a grant of a right (in this case to mine) encompasses *those rights necessary for its meaningful exercise*": J [124] and [62] **CAB 147**.

41. Armed with that awareness, the Full Court expressly did not confine a "right to mine" to mining leases in those senses. The Full Court's conclusion, summarised in J [127] **CAB 149**, distinguished between two sets of rights that will "typically" fall within the class of "rights to mine". The first are rights authorising "exploration for and extraction of minerals".

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30 As to "right to mine" see NTA, ss 22EA(1)(a)(i) and (iii), 22H(1)(a)(i) and (iii), 24MB(2)(c), 26(1A)(c), 26A(2), 26B(3) and (5), 26C(1), (1A) and (4), 26D(1) and (2), 40(a) and (b), and 43B(a) and (c). As to "mine" or "mining" see, for example, ss 24LA(1)(b)(v) ("mining (other than fossicking by using hand-held implements"), 24MB((2) ("opal or gem mining"), 26B ("approved gold or tin mining act"), 26C(1)(b) ("opal or gem mining area") and (c) ("mining (other than puddling) only for opals or gems"), 228(5)(a) ("mining only for a particular mineral"), 245(1) ("A ***mining lease*** is a lease… that permit the lessee to use the land or waters covered by the lease solely or primarily for mining") and 253 ("***major earthworks*** means earthworks (other than in the course of mining)").

31 *Registrar of Titles of the State of Western Australia v Franzon* (1975) 132 CLR 611, 618 (Mason J).

32 *Mammoth Investments Pty Ltd v Donaldson* [2022] WASCA 144, [49] (Quinlan CJ, Beech JA and Bleby AJA); *Carroll v Secretary to the Department of Justice* [2015] VSCA 156, [22(2)] (Whelan JA, Redlich and Weinberg JJA agreeing).

33 See NTA, s 245(1) and the extended definition of lease in s 242(2).

The second are "rights necessary for the exercise of those primary rights". According to their Honours, the scope of the latter will "depend upon the nature of the mining activity" in question, but will "typically" include activities "of the kind able to be conferred under s 40(1)(b)(i) of the *Mineral Titles Act*" because "those activities are ordinarily necessary" for extraction. The Full Court considered that *those rights*, independent of any right to extract minerals, can be characterised as a "right to mine": cf AS [39].

42. For similar reasons, the Full Court's construction does not destroy the exception that underpins the existence of s 24MD(6B)(b): contra AS [35] and [39], considered at J [81] and [102] **CAB 134, 139**. On the Full Court's construction, a right to mine may extend beyond a right to extract and treat minerals and to include a right to construct infrastructure that is supplemental to that purpose, so as to create a saleable product. Where some pre-existing right to mine authorises that extraction and treatment (so that Subdiv P has already been complied with once in relation to the project), the creation of subsequent rights to mine for the sole purpose of constructing infrastructure supplemental to those primary production activities will fall within s 24MD(6B)(b). By contrast, an act that authorises the construction of infrastructure facilities that are subsequent to or apart from that process of recovery of minerals is not the creation of a "right to mine".

43. Nor did the Full Court hold that the grant of a right conferred under s 40(1)(b)(ii) of the *Mineral Titles Act 2010* (NT) will never constitute the creation of a "right to mine": contra AS [40]. On the contrary, s 40(1)(b)(ii) gives the example of a "treatment plant", which the Full Court expressly said may fall within s 24MD(6B)(b): J [124] **CAB 147**.

Mining operations

44. The Full Court's conclusion did not depend on principles developed in revenue cases dealing with terms such as "mining operations": contra AS [36]. Those principles were alluded to by Barker J in *Banjima* (2013) 305 ALR 1 at [981] when discussing the meaning of the expression "right to mine". However, the Full Court said that "[c]onsiderable caution is required" in considering those cases because the result in those cases turned on the particular legislation in issue: J [125] **CAB 147-148**. It then noted that "the expression 'mining operations' which were the subject of consideration in [those cases] differs from the expression 'right to mine'": J [126] **CAB 149**. Nothing in J [127] and [130]-[132] suggests that the test applied by the Full Court depended on those authorities, rather than the text of ss 24MD, 26 and 253 of the NTA.

45. In any event, the phrase "mining operations" is generally broader than "mining".[34] But even in the former context the phrase would not be understood to extend to the activities authorised by MLA 29881. The common or ordinary meaning of "mining operations" concerns the recovery of the mineral, stopping short at the point where the mineral is treated merely for its better utilisation.[35] Thus, the transport of coal onto ships in a way to increase the marketability of the product is ordinarily not part of "mining operations".[36] MLA 29881 is a further step removed from that process.

Infrastructure facility

46. In two respects, the Appellants contend that the meaning of ss 24MD(6B)(b) and 26(1)(c)(i) should be controlled by the definition of "infrastructure facility" in s 253: AS [34], [40]. However, that definition operates beyond those provisions. By s 26(1)(c)(iii), the compulsory acquisition of native title for the purpose of making grants to third persons will ordinarily engage the right to negotiate. However, that will not be the case if "the purpose of the acquisition is to provide an infrastructure facility": s 26(1)(c)(iii)(B). It is therefore not permissible to reason backwards from the definition of "infrastructure facility" to a conclusion that, whenever an act confers a right to construct one of the facilities in paragraphs (a)-(e) of the definition associated with mining, the act confers a "right to mine". *South Australia v Slipper* (2004) 136 FCR 259 concerned the operation of s 26(1)(c)(iii)(B) and did not consider s 24MD(6B)(b) or the qualifying words "right to mine": cf AS [34].[37]

Prior authorities

47. Prior authority contradicts the Appellants' construction: cf AS [41]. The first consideration of the Right to Mine Issue was by the Western Australian Mining Warden in *Re Samantha Gold NL* (Warden's Court, Coolgardie, 4 May 1995). In that case, Reynolds SM held that Miscellaneous Licences 15/197 and 15/199 for water bores and pipelines did

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[34] *Banjima* (2013) 305 ALR 1, [981] (Barker J); *Federal Commissioner of Taxation v Broken Hill Pty Ltd* (1969) 120 CLR 240 at 244-5 (Kitto J) and, on appeal, 272-3 (Barwick CJ, McTiernan and Menzies JJ); *Parker v Commissioner of Taxation (Cth)* (1953) 90 CLR 489, 494 (Dixon CJ).

[35] *Abbott Point Bulk Coal Pty Ltd v Collector of Customs* (1992) 35 FCR 371 (FCAFC), 378-9 (Ryan and Cooper JJ), quoting from *Commissioner of Taxation (Cth) v Broken Hill Pty Co Ltd* (1969) 120 CLR 240, 273 (Barwick CJ, McTiernan and Menzies JJ), but see also 244-5 (Kitto J). See also *Commissioner of Taxation (Cth) v Henderson* (1943) 68 CLR 29, 45 (Latham CJ) and 50 (Starke J); *Regional Director of Customs (WA) v Dampier Salt (Operations Pty Ltd* (1996) 67 FCR 108 (FCAFC, 120B-E (the Court); *State Rail Authority (NSW) v Collector of Customs* (1991) 33 FCR 211 (FCAFC), 215 (the Court).

[36] *Abbott Point Bulk Coal Pty Ltd v Collector of Customs* (1992) 35 FCR 371 (FCAFC), 379-80 (Ryan and Cooper JJ), 389-90 (French J).

[37] *South Australia v Slipper* (2004) 136 FCR 259 (FCAFC), [77] (Branson J, Finn and Finkelstein JJ agreeing).

not confer "rights to mine" and therefore did not engage original s 26(2) of the NTA.[38] That was because nothing was being mined from the water extracted under those licences.

48. In *Smith obo Gunggari People v Tenneco Energy Queensland* (1996) 66 FCR 1, Drummond J similarly focused on the relationship between the activities authorised by a grant and primary production. His Honour held, at [24], that a licence to construct and operate a pipeline to convey gas was not "the creation of a right to mine" within the meaning of the original s 26(2). The pipeline was one to convey gas (the finished product of a mining operation) to consumers and this would occur "many hundreds of kilometers from the gas well to consumers". MLA 29881 is even further removed from mining than the pipeline licence. It has a similar geographic distance, but it would not be used to transport the finished product to consumers. It would be used for spoil from the channel to facilitate that transport.

49. The trial judge considered *Smith* was not persuasive because it preceded the amendments to the NTA that inserted s 24MD(6B)(b): TJ [132] **CAB 67-68**. However, *Smith* concerned the ambit of the phrase "right to mine" in the former s 26(2)(a) of the NTA, which (as noted above) was the precursor to s 26(1)(c)(i) and was in similar terms, save that it contained no proviso. For the reasons above, if a future act does not create a "right to mine" within the meaning of s 26(1)(c)(i), it cannot fall within s 24MD(6B)(b).

50. Later, in *Re Tjupan Peoples* (1996) 134 FLR 462, the National Native Title Tribunal distinguished *Smith* and considered that the grant of Miscellaneous Licences No L53/76 and L36/60 would constitute the creation of a "right to mine". The purposes of those Licences were to "facilitate the supply and transportation of process water from numerous non-artesian wells… *for use at… Mt Keith Nickel Mine*" (emphasis added).[39] They thus concerned activities directed to the production of saleable ore, not activities after that point. It was significant to the Tribunal that "the grantee party did not produce evidence that construction of the pipelines, roads and powers is in fact *subsequent or ancillary to the extraction of the mineral*".[40] The Member distinguished *Smith* because "the pipeline is not designed to carry the finished product of a mining operation to the consumer, *but to carry water for use on the site of the mining operations*."[41] Contrary to AS [41], *Smith* and *Re Tjupa* represented a settled understanding of a "right to mine" before the 1998 amendments.

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38 *Re Samantha NL* (Warden's Court, Coolgardie, 4 May 1995), 6-8 (Reynolds SM).
39 *Re Tjupan Peoples* (1996) 134 FLR 462, 466 (Member O'Neill).
40 Ibid, 473.
41 Ibid.

By incorporating those words into ss 24MD(6B)(b) and 26(1)(c)(i), Parliament may be taken to have intended them to bear the meaning which had been judicially attributed to them.[42]

51. This same understanding was applied again after those amendments in *FMG Pilbara Pty Ltd v NC (deceased)* [2012] NNTTA 103. The Tribunal considered *Smith* and *Re Tjupan Peoples* and held that the grant of Miscellaneous Licence L47/368 did not create a "right to mine" and did not attract the right to negotiate. The Miscellaneous Licence authorised the grantee to construct a road, borefield, powerline, pipeline, communication facility, water management facility and accommodation.[43] Member O'Dea said at [29] that "it is clear from the language of ss 29(1)(c)(i) (*sic*) and 24MD(6B) that [an] act must… consist of the creation of a right to mine" and that, because of the infrastructure exception, "it is reasonable to infer that 'mine' in the context of s 29(1)(c)(i) (*sic*) and 24MD(6B) means (or at least includes) the extraction of substances that may be mined *as well as the operations for getting at and getting out those substances*." On that basis, a "'right to mine' for the purposes of the [NTA] extends to activities that support or are ancillary to an existing right to extract or recover minerals [but] an act which authorises or permits the doing of things subsequent to or apart from that process of recovery is not the 'creation of a right to mine'." As with MLA 29881, Miscellaneous Licence L47/368 was outside that conception.[44]

52. Finally, in *Banjima* (2013) 305 ALR 1, Barker J concluded that the grant of Miscellaneous Licence L45/147 did not attract the right to negotiate. L45/147 was for the construction of a rail line used to transport iron ore from a mine to a port. His Honour said that L45/147 was arguably part of "mining operations", was an "infrastructure facility", was "associated with mining", and was for the "sole purpose" of constructing that facility. Nevertheless, his Honour said at [982] that:

> "… it seems to me to involve impermissible reasoning to say that, because the grant of the right to construct the railway is associated with mining, it is therefore 'mining'. Unless one can contend the words of subs [26](1)(c)(i) are to be taken to mean that a grant not for the sole purposes of construction of a tenure infrastructure associated with mining, involves 'the creation of a right to mine', which I do not think one can in the overall context of the NTA, then the claimants' argument must fail."

53. Barker J elsewhere suggested at [985] that the railway licence nevertheless fell within s 24MD(6B)(b). However, that was on the alternative supposition that "the claimants were right about the application of Subdiv P to the future act".

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[42] *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106 (the Court) and the authorities in fn 39.
[43] *FMG Pilbara Pty Ltd v NC (deceased)* [2012] NNTTA 103, [2] (Member O'Dea).
[44] Ibid, [41] and [58].

54. The trial judge placed reliance on Barker J's comments about the phrase in s 24MD(6B)(b) at [1053]-[1056]: TJ [130], [134] **CAB 67-68**. However, in that passage, Barker J was considering a different issue, being whether the Yandi rail leases were "mining leases" within s 245. His Honour concluded they were not because the word "mine" is focused on physical, primary acts and not associated with activities that facilitate the conduct of broader mining operations: [1053]. To the extent that conclusion rested on the view that s 24MD(6B)(b) must be read as a "standalone", compendious phrase, that view was expressed for a tangential purpose, the reasoning behind it was not exposed, and it cannot be reconciled with the textual and structural matters set out in [21]-[29] above: contra AS [33].

Beneficial construction

55. The Appellants engage in two errors concerning the reach and generally beneficial purpose of the NTA. The first is the assumption that s 24MD(6B)(b) must extend to all ancillary mining interests because mining laws have often provided for investigatory, production and ancillary interests: AS [43]. That submission is premised on an *a priori* assumption about the "desired or desirable reach or operation" of s 24MD(6B)(b), but the provision's language is the proper guide to the legislature's intention.[45] The Appellants' construction turns mechanically on the formal designation of the interest in issue, and on the supposition that an ancillary interest will always be "associated with mining". That the "right to mine" is a matter of substance and not of form follows from the phrase that immediately follows the expression in s 24MD(6B)(b), which makes the form of the "right to mine" immaterial. The Full Court's "fact specific" approach addresses the substance of the right, coheres with the statutory language, and operates uniformly despite formal differences between mining legislation or practices in different jurisdictions.

56. The second error is the Appellants' uncritical reliance on the NTA's general status as beneficial legislation: AS [37], considered at J [63] and [129] **CAB 130, 150**. No legislation pursues "a single purpose at all costs", such that "[w]here the problem is one of doubt about *the extent* to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem".[46] In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, this Court dismissed a similarly uncritical reliance

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[45] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [26] (French CJ and Hayne J); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [47] (the Court).

[46] *Construction Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, [40]-[41] (Crennan, Kiefel, Bell, Gageler and Keane JJ), quoting *Carr v Western Australia* (2007) 232 CLR 138, [5] (Gleeson CJ).

on beneficial purpose of land rights legislation where the meaning of particular words (e.g. "right to mine") was in issue.[47]

57. The submissions is particularly inapt because s 24MD(6B) does not have a beneficial purpose. To accept that the NTA as a whole has a beneficial purpose does not mean that every provision or phrase has a beneficial purpose or is to be construed beneficially.[48] The purpose of the provision must be identified. The evident purpose of ss 24MD(6A) and (6B) and 26(1)(c) was to stratify the procedural obligations which attach to a future act. Section 24MD(6B) is an exception provision – not a beneficial provision – which carves out future acts which would otherwise have attracted the right to negotiate and ascribes lesser procedural rights. It should not be given a necessarily liberal construction.[49]

58. Finally, the NTA, and the future act provisions in particular, are the "product of compromise and political negotiation".[50] Some incidents of this compromise are that complying future acts are validated *vis-à-vis* native title (s 24MD(1)) but they do not extinguish native title and compensation is payable: s 24MD(3)(a) and (b). The Full Court's conclusion, that the Appellants are entitled to rights under s 24MD(6A) rather than those in s 24MD(6B), reflects another incident of that compromise.

Infrastructure Facility Issue

59. If the Full Court erred in resolving the Right to Mine Issue, it is nevertheless necessary for the Appellants to impugn the Full Court's finding that the DSEA would not constitute an "infrastructure facility" within the meaning of s 253. The Territory does not address whether that definition is exhaustive or inclusive. However, if the Court is persuaded that the definition is exhaustive, the appeal should be dismissed.

60. The primary judge and the Full Court made concurrent findings of fact that the DSEA did not fall within the classes of facility in paragraphs (f) or (g) of the definition: J [158]-

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47 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, [32]-[33] (French CJ, Kefel, Bell and Keane JJ) and [92] (Gageler J).

48 *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, [29] (French CJ, Crennan, Kiefel and Keane JJ).

49 *Chief Executive Officer of Customs v Adelaide Brighton Cement Ltd* (2004) 139 FCR 147, [17] (Black CJ), citing *Ross v Secretary, Department of Social Security* (1990) 21 FCR 241, 244 (the Court).

50 *Fejo v Northern Territory of Australia* (1998) 195 CLR 96, [76] (Kirby J); *Western Australia v Manado* (2020) 270 CLR 81, [46] (Nettle J). See similarly *Minister for Immigration and Ethnic Affairs v Teo* (1995) 57 FCR 194 (FCAFC), 206-7 (the Court). In *Tjungarrayi v Western Australia* (2019) 269 CLR 150 at [44]-[45], Gageler J was considering the proper construction of s 47B of the NTA, which permits the disregarding of historic extinguishment over areas of vacant Crown land. It does not represent the same practical balance that ss 24MD(6A) and (6B) and 26 strike between native title holders, proponents and the state: cf AS [37] fn 30.

[161] **CAB 160-161** and TJ [140] **CAB 69**. There was no appeal from those findings as a matter of fact.

61. The Appellants suggest that the courts below misconstrued paragraphs (f) and (g) of the definition because they did not read them with the words "associated with mining" in s 24MD(6B)(b): AS [51], summarised at J [67] **CAB 39**. However, those words appear in a different provision and do not control the content of the definition, which has broader work in the statutory scheme: see [46] above. The natural import of paragraph (f) is (for example) that the facility is itself used to store or transport coal, any other mineral or any mineral concentrate. The facility must first have that character before it can be an "infrastructure facility associated with mining" for the purposes of ss 24MD(6B)(b) and 26(1)(c)(i).

PART VI: ESTIMATED TIME

62. The First and Second Respondents estimate that 60 minutes will be required for presentation of oral argument.

Dated: 3 March 2023

Stephen Lloyd SC
Sixth Floor Chambers
Stephen.Lloyd@sixthfloor.com.au
(02) 9235 3753

Lachlan Peattie
Solicitor-General's Chambers
Lachlan.Peattie@nt.gov.au
(08) 8999 6682

ANNEXURE

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the particular statutes and statutory instruments referred to in the third respondent's submissions are as follows:

No	Description	Version	Provisions
1.	*Acts Interpretation Act 1901* (Cth)	Current (Compilation No 36, 20 December 2018 to present)	Sections 13 and 18A.
2.	*McArthur River Project Agreement Ratification Act 1992* (NT)	Current (4 May 2007)	Section 4A and Schedule 2.
3.	*Mineral Titles Act 2010* (NT)	Current (1 July 2021)	Sections 40 and 44.
4.	*Native Title Act 1993* (Cth)	As enacted	Sections 26 and 253 ("mining").
5.	*Native Title Act 1993* (Cth)	Current (Compilation No 47, 25 September 2021 to present)	Sections 22EA, 22H, 24LA, 24MB, 24MD, 24AO, 25, 26, 26A, 26B, 26C, 26D, 47B, 228, 233, 238, 242, 245 and 253.
6.	*Pastoral Land Act 1992* (NT)	Current (31 March 2022)	Section 85A.