HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 05 Sep 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	D9/2022
File Title:	Harvey & Ors v. Minister for Primary Industry and Resources &
Registry:	Darwin
Document filed:	Form 27F - Outline of oral argument
Filing party:	Appellants
Date filed:	05 Sep 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Propositions to be advanced in oral argument

2. ***NTA's mining infrastructure proviso***: Section 26(1)(c)(i) of the *Native Title Act 1993* (Cth) (the **NTA**) **JBA1/3** provides that the right to negotiate in Pt 2 Div 3 Sub-div P applies to a future act if 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;
>
> Note: Rights to mine created for the sole purpose of the construction of an infrastructure facility associated with mining are dealt with in subsection 24MD(6B).

3. ***A right to mine:*** The Full Court erred by pulling apart the composite expression and construing, for the purposes of the proviso, a "right to mine" as an act that (1) "confers a right to engage in mining activities" by exploration and extraction, and (2) "encompasses rights necessary for its meaningful exercise": FC [97], [119], [127] **CAB137**, **145**, **149**; contra TJ [130]–[131] **CAB 67**; AS [30]–[34].

4. The *first limb* jars with the "sole purpose" test as the proviso is not engaged if the act confers rights other than to construct an infrastructure facility associated with mining: TJ [132]–[133] **CAB67–8** cf FC [102] **CAB139**; AS [42]–[43]; Reply [5], [13]. The

second limb distorts the words of connection, which are whether the infrastructure facility is "associated" with mining: AS [34], [39]; Reply [5]. The Full Court's construction does not allow the proviso to operate according to its terms.

5. The proviso qualifies what is a right to mine. The natural significance of the text is that an act within the proviso is included in the subject matter of a right to mine: AS [32]–[33]; *Craies on Statute Law* (7th Ed) 218–9. That is consistent with:

(1) The creation of a "right to mine … by the grant of a mining lease or otherwise", i.e. by a title other than a lease that permits the use of land "solely or primarily for mining": s 245 *mining lease*, 253 *mine*; AS [33]; Reply [11]; TJ [134] **CAB68**; *Banjima* (2013) 305 ALR 1, [983]–[985], [1053]–[1056] **JBA4/30**.

(2) The interlocking of s 24MD(6B)(b) and s 26(1)(c)(i) that pivots on the "sole purpose" test (AS [35]), so that an act that permits:

(a) both mining and the construction of an infrastructure facility associated with mining engages the right to negotiate in Sub-div P; e.g. *Mineral Titles Act 2010* (NT) (**MTA**) ss 40(1)(b)(i), 44 **JBA1/5**; MLN 1121 **AFM55**;

(b) only the construction of an infrastructure facility associated with mining engages the alternative right to be heard in s 24MD(6B); e.g. MTA ss 40(1)(b)(ii), 84; MLN 1126/MLA 29881 **AFM135, 171**.

(3) The legislative history removing the creation of a right to mine from Sub-div P if it is one created for the *sole purpose* of constructing an infrastructure facility associated with mining, using "sole purpose" to make clear that the creation of the right to mine with which the infrastructure is associated is *not* so removed: TJ [132]–[133] **CAB68** citing *1997 Supplementary EM* pp.19-20, 23 **JBA5/40** quoted TJ [111]–[113] **CAB59–60**; AS [40]–[41]. There is no mention of a threefold procedural classification for mining rights: cf FC [129] **CAB 150**.

(4) The NTA's intersection with State and Territory resource laws for infrastructure tenements "ancillary", "associated" or "connected" with mining that informs the understanding of the mining infrastructure exception: *1993 EM* p.5 **JBA5/38**; *ICI Australia* (1972) 127 CLR 529, 541–2, 581 **JBA3/20**; *Tjungarrayi* (2019) 269 CLR 150, [18], [36] **JBA3/24**; AS [43] fn 38; e.g. *Mineral Resources Act 1989* (Q) s 234 **JBA2/7**; *Mineral Resources Development Act 1995* (T) s 106 **JBA2/8**.

6. ***Infrastructure facility:*** The view in *Slipper* (2004) 136 FCR 259 **JBA4/37** that the definition of *infrastructure facility* (s 253) comprehends such things that the term would ordinarily mean as well as those specifically listed should be preferred over the Full Court's conclusion that the listing is exhaustive (FC [157] **CAB159**):

   (1) In the drafting of the definitions in Part 15, care has been taken in the use of "is", "means", "meaning", "includes" **JBA1/3** p.130ff: AS [45] cf FC [145] **CAB156**.

   (2) Things other than those listed would fall within the ordinary meaning of an infrastructure facility, indicating that the definition is not exhaustive: Pearce, *Statutory Interpretation in Australia* (9th Ed) [6.8] **JBA5/42** referring to *Re Gray; ex parte Marsh* (1985) 157 CLR 351, 364: cf FC [147]–[148] **CAB156**.

   (3) The provision in par (i) to add things similar to that listed in pars (a) to (h) by legislative instrument allows for things that might not be within the ordinary meaning of an infrastructure facility, consistent with the purpose of removing infrastructure acts from Sub-div P: *Slipper* [78]–[98] e.g. a radioactive waste depository cf FC [149]–[152] **CAB156–8**; AS [45].

   (4) The *Slipper* view is confirmed by the extrinsic material which ought not be dismissed: *1997 EM* at [19.7]–[19.8] **JBA5/39**; *1997 Supplementary EM* p.23 **JBA5/40**; cf FC [155] **CAB158**; AS [50].

   (5) The Full Court's conclusion leads to the anomalous result that various things that would be an "infrastructure facility … associated with mining" are left out: cf FC [127] **CAB149**; e.g. *Mining Regulations 1981* (WA) reg 42B **JBA2/12**; *Mining Regulation 2016* (NSW) reg 7 **JBA2/14**; AS [49]; Reply [14].

7. Alternatively, if exhaustive, the findings of association with mining (not brought into play below) mean that the MLA 29881 works are within par (f) or par (g): AS [51]; Reply [15]: cf FC [159]–[160] **CAB160** referring to a "function or purpose" intrinsic to the thing in each paragraph rather than if the purpose is associated with mining.

Dated: 5 September 2023

Sturt Glacken **Rudi Kruse**