IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN No. P37 of 2018

Helicopter Tjungarrayi, Jane Bieundurry, Richard Yugumbarri, Frances Nanguri, Rita Minga, Eugene Laurel, Darren Farmer, Sandra Brooking, Bartholomew Baadjo, Joshua Booth, Bobby West

Appellants

State of Western Australia

First Respondent

Shire of Halls Creek

Second Respondent

Commonwealth of Australia

Third Respondent

AND BETWEEN No. P38 of 2018

KN (Deceased) and Others (Tjiwarl and Tjiwarl #2)

Appellants

State of Western Australia and others

Respondents

APPELLANTS' JOINT SUBMISSIONS

Part I: Certification as to form of submissions

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

Part II: Concise statement of the issue

2. Is:

   (1) a petroleum exploration permit granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) (the ***Petroleum Act***) (P37 of 2018);

10 (2) a mineral exploration licence granted under the ***Mining Act*** *1978* (WA) (P38 of 2018);

   a "lease" within s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth) (the **NTA**)?

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Part III: Notice under section 78B of the Judiciary Act

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

Part IV: Citation of reasons for judgment below

4. The reasons for judgment below are:

P37 of 2018

(1) Full Court: *Attorney-General (Cth) v Helicopter-Tjungarrayi (Ngurra Kayanta & Ngurra Kayanta#2)* [2018] FCAFC 35 (***Ngurra FC***) (**CAB 68**) (North, Jagot and Rangiah JJ).

(2) Primary judge: *Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v Western Australia (No 2)* [2017] FCA 587 (***Ngurra TJ***) (**CAB 8**) (Barker J).

P38 of 2018

(1) Full Court: *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (Tjiwarl and Tjiwarl#2)* [2018] FCAFC 8; (2018) 351 ALR 491 (***Tjiwarl FC***) (**CAB 613**) (North, Dowsett and Jagot JJ).

(2) Primary judge: *Narrier v Western Australia* [2016] FCA 1519 (***Tjiwarl TJ***) (**CAB 129**) (Mortimer J).

Part V: Factual background

5. In each case:

(1) The rights and interests possessed under the traditional laws and customs acknowledged and observed by the native title claim group in relation to the claim area confer possession, occupation, use and enjoyment of the claim area to the exclusion of all others.

(2) The traditional right of exclusive possession had been extinguished by valid historic acts of partial extinguishment, but traditional rights to access, use and remain on the claim area remained recognisable as native title rights.

(3) The traditional right of exclusive possession could be recognised as a native title right, and determined so under s 225 of the NTA, if the historic extinguishment of that right could be disregarded under s 47B, that is, if,

when the claims were made, there were areas of vacant Crown land occupied by claim group members. The text of s 47B is set out at [15] below.[1]

(4) Within the claim area there are, in the terminology of the *Land Administration Act 1997* (WA) (the **LAA**), parcels of unallocated Crown land (**UCL**), occupied by claim group members.

(5) When the claims were made the UCL areas were covered, in part, by an exploration tenement; in *Ngurra*, by two petroleum exploration permits (EP 451 and EP 477), and in *Tjiwarl*, by a mineral exploration licence (E57/676).

(6) The **State** of Western Australia contended that s 47B of the NTA could not apply to the extent the UCL areas were covered by these exploration tenements because each petroleum exploration permit or mineral exploration licence was a "lease" within the exclusion in sub-par (i) of s 47B(1)(b).

6. ***The Ngurra native title claims (P37)*** covered an area within the Great Sandy Desert in Western Australia. Parts of the claim area intersected parts of the permit areas covered by petroleum exploration permits EP 451 and EP 477 granted under the *Petroleum Act*. The instruments of grant are in the **Appellants' Further Materials** at **AFM 37, 58** (EP 451 ex B.2, B.7) and **AFM 127** (EP 477 ex B.19), and the permit areas are depicted on the map at **AFM 35** (ex B.1). The claim area was divided into Parts A and B, and a determination of exclusive native title was made over the area not overlapped by the permits (Part A).[2] A trial on the s 47B issue proceeded[3] for the rest of the claim area (Part B) that was overlapped by a part of the EP 477 permit area in the north-east (shaded purple on the map) and by a part of the EP 451 permit area to the south-east (shaded blue).

7. In addition to the State's contention that each permit was a lease within sub-par (i) of s 47B(1)(b) of the NTA, the Attorney-General of the **Commonwealth** of Australia intervened and contended that each permit was a permission or authority under which the land is to be used for a particular purpose within sub-par (ii) of s 47B(1)(b). The primary judge rejected each contention and made a determination of exclusive native title for Part B of the claim area: determination, clause 3 at **CAB 36**. The Full Court dismissed an appeal by the Commonwealth, but allowed

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1 The companion provisions in ss 47 (pastoral lands) and 47A (reserve lands) had no application.

2 *Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v Western Australia* [2016] FCA 910 (Barker J).

3 On a statement of facts by the claimants (**AFM 7** ex A1), in the main agreed to by the State and Commonwealth (**AFM 18, 23** ex A2-A3), and a bundle of tenure documents (**AFM 30** ex B).

the State's appeal and varied the determination so that the native title in Part B of the claim area is non-exclusive: orders **CAB 97** (the determination of exclusive native title in Part A remains).

8. ***The Tjiwarl native title claims (P38)*** covered an area in the Goldfields region of Western Australia. Parts of the claim area intersected parts of the licence areas covered by mineral exploration licences granted under the *Mining Act*, but by the time of the appeal to the Full Court, only one was in issue, licence E57/676: *Tjiwarl FC* [65] (**CAB 637**). A register search for licence E57/676 is at **AFM 203** (ex R9.2). The area covered by the licence is depicted on the map of the determination area at **CAB 596** (reproduced in A3 size at **AFM 217**). The E57/676 licence area straddled a portion of the parcel UCL 245 in the north-west of the claim area.[4]

9. In that respect, the claim area included two large parcels of unallocated Crown land (UCL 245 and 246) occupied by claim group members: *Tjiwarl TJ* [1260] (**CAB 474**). The primary judge rejected the State's contention that s 47B did not apply to the extent the UCL parcels were covered by a mineral exploration licence: *Tjiwarl TJ* [1194]-[1210] (**CAB 459-61**) and made a determination of exclusive native title for UCL 245 and 246: determination, clause 3 at **CAB 495**. The Full Court allowed the State's appeal and varied the determination so that the native title in the portion of UCL 245 that was covered by licence E57/676 is non-exclusive: orders **CAB 656** (the determination of exclusive native title in the rest of UCL 245 and in UCL 246 remains).

Part VI: Argument

A. Applicable statutory provisions

10. ***The Native Title Act*** has as its main objects to provide for the recognition and protection of native title, to establish ways in which future dealings affecting native title may proceed, and to permit validation of past and intermediate period acts invalidated because of the existence of native title (s 3). Native title is thus recognised and protected in accordance with, and is unable to be extinguished contrary to, the NTA (ss 10-11).

11. The Preamble to the NTA states the considerations upon which it was enacted as a special measure for the advancement and protection of Aboriginal peoples. As a

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[4] See also land tenure map **AFM 213** (ex R9 p.16).

Full Federal Court remarked in *Northern Territory v Alyawarr*, the Preamble declares the "moral foundation upon which the NTA rests" with the "explicit intention to recognise, support and protect native title", which remains so despite the Act containing provisions adverse to native title.[5] The stated considerations include that where appropriate native title should not be extinguished but revive after a validated act ceases to have effect.

12. An act which was wholly valid when it was done and was effective then to extinguish or impair native title is unaffected by the NTA. Such an act neither needs nor is given force and effect by the NTA. But acts purporting to extinguish or impair native title inconsistent with the *Racial Discrimination Act 1975* (Cth) (the **RDA**) that occurred after 31 October 1975 require validation. An act that is valid (or validated) has force and effect upon the protection of native title otherwise prescribed by the NTA.[6]

13. Legislation made on or after 1 July 1993 is only able to extinguish native title in accordance with the confirmation of extinguishment provisions in Pt 2 Div 2B or the future act provisions in Div 3, or by validation of past and intermediate period acts under Divs 2 and 2A (s 11(2)). The *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA), enacted in conformity with the NTA, so provides for acts attributable to Western Australia.

14. Where native title is extinguished, it is permanently extinguished, and the native title rights cannot revive even if the act that caused the extinguishment ceases to have effect (s 237A). The contrary, however, obtains where ss 47, 47A or 47B apply to disregard prior extinguishment in relation to pastoral lands held by or for native title claimants (s 47), or lands held for the benefit of Aboriginal peoples occupied by native title claimants (s 47A), or vacant Crown land occupied by native title claimants (s 47B).

15. Section 47B is titled ***Vacant Crown land*** and provides that:

> *(1) This section applies if:*
>
> *(a) a claimant application is made in relation to an area; and*
>
> *(b) when the application is made, the area is not:*
>
> *(i) covered by a freehold estate or a lease; or*
>
> *(ii) covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred*

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5 (2005) 145 FCR 442 at [63] (Wilcox, French and Weinberg JJ).

6 *Western Australia v Commonwealth (**Native Title Act Case**)* (1995) 183 CLR 373 at 454-5, 469.

by the Crown in any capacity... under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose; or

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

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

An area is subject to a "resumption process" referred to in sub-par (iii) if all interests in relation to the area are acquired, resumed or revoked with an ongoing intention to use the area for public purposes or a particular purpose: s 47B(5)(b). Where s 47B applies, by sub-ss (2) and (3) historic extinguishment is disregarded, and the non-extinguishment principle (s 238) applies, in the following terms:

(2) For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the creation of any prior interest in relation to the area must be disregarded.

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

(a) the determination does not affect:

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

...

(b) the non-extinguishment principle applies to the creation of any prior interest in relation to the area.

For the purposes of s 47B, the "creation of a prior interest" does not include an act that confirms or confers Crown ownership of natural resources: s 47B(5)(a).

16. Section 238 of the NTA sets out the effect of a reference to the non-extinguishment principle applying to an act. An example of the operation of the principle is given in sub-s (8) in its application to a validated category C past act that is the grant of a mining lease. The native title rights will have no effect in relation to the lease while it is in force, and after the lease expires, the rights will again have full effect.

17. The provisions of the NTA dealing with the validation of past acts (Pt 2 Div 2) and intermediate period acts (Pt 2 Div 2A), the confirmation of extinguishment by valid or validated acts (Pt 2 Div 2B), and the allowance of valid future acts (Pt 2 Div 3), treat the grant of a mining lease in the following ways.

18. As for past dealings that affect native title, the non-extinguishment principle applies to the grant of a mining lease as a (validated) past act[7] occurring before 1 January 1994 (ss 15(1)(c), 19(1), 231 (category C)) or (validated) intermediate period act[8] occurring between that date and 23 December 1996 when *Wik* was decided[9] (ss 22B(d), 22F, 232D (category C)).[10] An exception is where the mining lease is dissected to a separate lease under s 245(3) (see [20] below) for a city, town or private residences, in which case native title is extinguished in relation to the part of the lease area upon which the construction has occurred (ss 229(3)(b), 232A(3)(f) (category A)). The grant of a mining lease is not treated as a previous exclusive possession act (occurring before 23 December 1996 that is valid including because of validation under Pt 2 Divs 2 and 2A), other than to the extent it is dissected to a separate lease under s 245(3) for a city, town or private residences (ss 23B(2)(c)(vii)-(viii), 23C(1), 23E, 249C).

19. As for future dealings that affect native title, the creation of a right to mine after 1 January 1994 (and which is not a past act or an intermediate period act) is a (valid) future act to which the non-extinguishment principle applies if it passes the freehold test, that is, if the act could be done if the native title holders instead hold a freehold title to the land (ss 24MB, 24MD(3)).[11] The right to negotiate applies to a future act that is the "creation of a right to mine, whether by the grant of a mining lease or otherwise" (s 26(1)(c)(i)).[12] It does not apply to an act (the later act) that is the creation of the right to mine if an earlier act consisting of a right to explore or prospect took place to which the right to negotiate applied and an agreement or determination was made under ss 31 or 38 for doing the later act: s 26D(2).

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7 An act is a ***past act*** if, when native title existed in relation to particular land, a non-legislative act took place before 1 January 1994 (when the NTA commenced) and it was invalid to any extent but would not have been if native title did not exist: s 228(2).

8 An act is an ***intermediate period act*** if, when native title existed in relation to particular land, an act took place between 1 January 1994 and 23 December 1996 and it was invalid to any extent because of non-compliance with the future act provisions of Pt 2 Div 3 or for any other reason but would have been valid if native title did not exist: s 232A(2).

9 *Wik Peoples v Queensland* (1996) 187 CLR 1.

10 The non-extinguishment principle also applies to a category D act, being an act that is not in category A (freehold estate or leases), category B (certain leases), or category C (mining leases): ss 15(1)(d), 22B(d), 232, 232E.

11 Section 24MB refers to "ordinary title" defined in s 253 as a freehold estate in fee simple.

12 It also applies to the variation of such a right to extend the area to which it relates (s 26(1)(c)(ii)) and to a permissible renewal of a lease, licence, permit or authority where the renewal creates a right to mine: ss 24ID(1), 26(1A).

20. Part 15 contains definitions of certain other expressions that are used in the NTA (s 9). Section 242 provides that:

> *(1) The expression* ***lease*** *includes:*
>
> *(a) a lease enforceable in equity; or*
>
> *(b) a contract that contains a statement to the effect that it is a lease; or*
>
> *(c) anything that, at or before the time of its creation, is, for any purpose, by a law of the Commonwealth, a State or a Territory, declared to be or described as a lease.*
>
> *(2) In the case only of references to a mining lease, the expression lease also includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory.*

Section 245(1) provides that:

> *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.*

Section 245(2) and (3) provide that a mining lease is taken to consist of separate leases where a city, town or residence has been constructed on part of the land covered by the lease. That part is taken out and treated as a separate (extinguishing) lease and the remainder as a (non-extinguishing) mining lease.[13] Section 253 has other definitions:

> ***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;*
>
> ....

And:

> ***explore*** *includes:*
>
> *(a) conduct a geological, geophysical or geochemical survey;*
>
> *(b) take samples for the purpose of analysis*

21. ***The Land Administration Act*** consolidates and reforms the law in Western Australia about Crown land (long title). It makes provision to reserve and dedicate Crown land (Pt 4), and for the sale, lease and licencing of Crown land (Pt 6), being land other than alienated land (s 3(1)). It has particular provision for dealings in

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[13] See ss 15(1)(a), (d), 22B(a), (d), 23B(2)(c)(vii)-(viii), 229(3)(b), 231, 232B(3)(f), 232D.

respect of unallocated Crown land (e.g. by dedication under ss 28(2), 56(5)) and for land to have that status on forfeiture or termination of existing interests or restrictions (ss 35(4), 36(10), 58(6)). "Unallocated Crown land" is Crown land in which no interest is known to exist (aside from native title) and which is not reserved, declared or otherwise dedicated under the LAA or any other written law (s 3(1)). An "interest", in relation to Crown land, means a charge, Crown lease, easement, lease, mortgage, profit à prendre or other interest, but does not include a mining, petroleum or geothermal energy right (s 3(1)).

22. ***The Mining Act*** consolidates the law relating to mining in Western Australia (long title). All minerals are property of the Crown (s 9). Part IV provides for the grant of mining tenements by way of prospecting licences (Div 1), exploration licences (Div 2), retention licences (Div 2A), mining leases (Div 3), general purpose leases (Div 4), and miscellaneous licences (Div 5). Mining is not to commence on private land (held under freehold or certain leasehold (s 8)) unless compensation to the owner or occupier of the land is agreed or determined (s 35). "Mining" is defined to include prospecting and exploring, as well as "mining operations" for extracting and treating minerals (s 8).

23. An application for an exploration licence is to be accompanied by a proposed works program (s 58). A licence is granted for a period of five years but may be extended (s 61). Expenditure conditions attach to a licence (s 62) together with conditions not to use ground disturbing equipment without approval of a works program and to backfill all disturbances (s 63). Other conditions may be imposed to prevent injury to land (s 63AA). Section 66 provides that an exploration licence "authorises the holder … subject to this Act, and in accordance with any conditions to which the licence may be subject" to enter the land the subject of the licence and to explore for minerals, and to carry out operations and works necessary for that purpose. The holder of an exploration licence has priority for the grant of a mining lease that confers rights to extract minerals (s 85), or a general purpose lease to use the land for purposes directly connected with mining operations (s 87), in respect of any part of the land the subject of the exploration licence (s 67).

24. ***The Petroleum Act*** relates to the onshore exploration for, and exploitation of, petroleum and geothermal energy resources (long title). It makes provision separate to the *Mining Act* by which substances covered by the *Petroleum Act* are excluded from the definition of minerals (s 8(1)), but tenements under each may be granted in relation to the same land: *Petroleum Act* s 117(c); *Mining Act* s 159. All

petroleum and geothermal energy resources are property of the Crown (s 9). Part III makes provision for the grant of exploration permits or drilling reservations to authorise exploring for petroleum (Div 2), retention leases which authorise evaluation and retention of title to a prospective petroleum production area (Div 2A), and production licences conferring rights to extract petroleum (Div 3).

25. Section 38(1) provides that a petroleum exploration permit authorises the permittee, "subject to this Act and in accordance with the conditions to which the permit is subject", to explore for petroleum, and to carry out operations necessary for that purpose, in the permit area. Section 43(1) provides that a permit may be granted subject to such conditions as the Minister specifies in the permit, including conditions with respect to work in or in relation to the permit area (s 43(2)). Subject to the Act, the authority conferred by s 38 is exercisable on any land within the permit area (s 15(1)). Conditions may prohibit the holder from entering specified land (s 91B) and operations must be conducted in a manner that least interferes with the surface of any land and with other rights and uses (s 117).

26. ***Preliminary comment on statutory provisions***: Three points should be noted now. *First*, the NTA singles out the grant of a mining lease, but not other kinds of leases, for application of the non-extinguishment principle. This informs the construction of s 242(2) addressed in Part C below. *Second*, a mining tenement (mineral lease or exploration licence) is not an interest in land. This informs the construction of s 47B(1)(b)(i) considered in Part D. *Third*, s 47B directs attention to the status of an area when the claim is made, and s 245 defines a mining lease by reference to permitted use of land. If the Full Court is correct, there is then an issue, considered in Part E, as to how one might ascertain if the s 47B area is covered by an exploration licence permitting use of that area when the claim is made, and which further illustrates why the Full Court erred in its construction.

B. The Full Court's reasoning

27. ***Tjiwarl***: The Full Court held that an exploration licence granted under the *Mining Act* is a "lease" within sub-par (i) of s 47B(1)(b) of the NTA by reason of the definitions of "lease", which in the case only of references to a "mining lease" includes a licence or authority (s 242(2)), and "mine" which includes "explore" (s 253). The Full Court reasoned that an exploration licence is a type of mining lease, and a mining lease is a type of lease, so an exploration licence is a "lease" for all purposes under the NTA, including s 47B(1)(b)(i): *Tjiwarl FC* [76]-[77] (**CAB 641**). Their Honours considered that s 66 of the *Mining Act* "permits the lessee to

use the land ... solely or primarily for mining" so as to meet the criterion of a mining lease in s 245(1) of the NTA: *Tjiwarl FC* [79]-[80] (**CAB 642**).

28. ***Ngurra***: The Full Court likewise held that a petroleum exploration permit under the *Petroleum Act* is, by reason of the definitions of "lease" (s 242(2)) and "mine" (s 253), a lease within s 47B(1)(b)(i), following *Tjiwarl FC*: see *Ngurra FC* [5]-[6] (**CAB 73**). Their Honours considered that as s 38 of the *Petroleum Act* permits the holder to explore the permit area for petroleum, the criterion of a mining lease in s 245(1) of the NTA was met: *Ngurra FC* [8]-[13] (**CAB 74-5**). The permit conditions did not matter on a view that condition 1(2) concerns the commencement of work required by condition 1(1), and compliance requires the carrying out of physical works on the land in the form of exploration wells: [17], [19]-[20] (**CAB 77-8**). The Full Court considered that a permit could also be a permission or authority under which the land is to be used within s 47B(1)(b)(ii), but not on the facts of this case: [31], [38] (**CAB 81, 84-5**).

29. The reasoning of the Full Court is erroneous, and the contrary conclusion at first instance is to be preferred, for several reasons.

C. The text and context of s 242

30. ***The text of s 242(2)***: The Full Court's use of the extended definition of "lease" in s 242(2) of the NTA jars with the opening words of the sub-section that "in the case only of references to a mining lease", the expression "lease" includes a licence or authority (emphasis added). The Full Court has applied the definition as if the underlined words were not there. But for the potential engagement of s 242(2), an exploration licence is not a lease, either in a general law sense or by application of the definition in s 242(1). Their Honours' observation that a mining lease is a "type of lease" does not support the conclusion that the words of s 242(2) can be disregarded: *Tjiwarl FC* [76] (**CAB 641**): and see [34] below.

31. Section 47B(1)(b)(i) does not refer to a "mining lease"; it is only where a provision has a reference to a "mining lease" that, by s 242(2), the word "lease" can include a licence or authority issued or given under a law of the Commonwealth, State or Territory (here the WA *Mining Act* or *Petroleum Act*).

32. ***Context***: The Full Court's application of the defined terms "lease" and "mine" paid no regard to the context of s 47B of the NTA as the relevant substantive enactment, nor to the context in which the NTA does refer to "mining lease" which informs the purpose of s 242(2). The Full Court eschewed context, holding that the "definitions

must be given effect according to their terms" (*Ngurra FC* [11] (**CAB 75**)). The Full Court adverted to what was said to be a legislative purpose of the statutory definitions (*Tjiwarl FC* [76] (**CAB 641**)), but did not grapple with: (1) why certain provisions of the NTA refer to a "mining lease" and what the definition in s 242(2) thereby achieves, and; (2) why s 47B does not refer to a mining lease.

33. The Full Court, with respect, made a "fortress out of the dictionary"[14] definitions without regard to the context in which those aids to construction[15] are to be employed within the substantive enactment.[16] Regard to context and purpose, in its widest sense, is part of the task of ascertaining the meaning of the statutory text.[17] As the primary judge in *Tjiwarl* remarked, the State's contention, later accepted by the Full Court, "distorts the exclusion in s 47B(1)(b)(i) and does not give effect to the text of s 242(2)": *Tjiwarl TJ* [1200] (**CAB 460**), followed in *Ngurra TJ* [55] (**CAB 23**).

34. ***References to a "mining lease"***: A mining lease might be a "type of lease" in the definitions relating to leases in Pt 15 Div 3 (*Tjiwarl FC* [76] (**CAB 641**)), but it is specifically distinguished from other kinds of leases: ss 245(1), 246(1) (the words "other than").[18] It is so distinguished as the non-extinguishment principle (s 238) applies only to the grant of a mining lease, not those other kinds of leases, as a past or intermediate period act (Pt 2 Divs 2-2A), and the grant of a mining lease, but not those other kinds of leases, is excepted from confirmation of extinguishment (Pt 2 Div 2B).[19] As for a valid future act to which the non-extinguishment applies (s 24MD(3)), it is necessary that the act pass the freehold test. The note to s 24MB(1) refers to the grant of a mining lease as an example. A grant of those

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14 *Cabell v Markham* 148 F(2d) 737 at 739 (1945) (Learned Hand J) quoted in *Theiss v Collector of Customs* (2014) 250 CLR 664 at [23] (the Court).

15 *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635 (Barwick CJ, McTiernan and Taylor JJ); *Kelly v R* (2004) 218 CLR 216 at [84], [103] (McHugh J).

16 ***Alcan** (NT) Alumina v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [45], [47] (Hayne, Heydon, Crennan and Kiefel JJ)

17 *SZTAL v Minister for Immigration* (2017) 91 ALJR 936 at [14] (Kiefel CJ, Nettle and Gordon JJ), [35]-[37] (Gageler J), [82] (Edelman J).

18 In contrast, an agricultural, pastoral or residential lease may also be regarded as a commercial lease: s 246(1); *Daniel v Western Australia* (2004) 212 ALR 51 at [35] (Nicholson J).

19 Under s 23G(1)(b) a valid or validated non-exclusive pastoral lease or agricultural lease granted before 23 December 1996 will confirm that native title rights to control access are extinguished and other native title rights "suspended" where the grant is not inconsistent with their continued existence: as to which, see *Western Australia v **Ward*** (2002) 213 CLR 1 at [191]-[194]. That is not the application of the non-extinguishment principle in s 238 where native title rights are deemed to continue to exist even when the act is inconsistent with their continued existence.

other kinds of leases would not pass the freehold test, and being treated as if held under freehold title, the land would not be Crown land available for disposition.[20]

35. This further confirms why s 242(2) is engaged only in the case of references to a "mining lease"; the definitions ensure that an instrument that permits use of the land for mining (s 245(1)) engages the non-extinguishment principle. It does not follow, however, that "mining" in "mining lease" means exploration and that a licence to explore is a mining lease. If an exploration licence is a past or intermediate period act,[21] it would engage the non-extinguishment principle as a (residual) category D act,[22] and it would not engage the confirmation of extinguishment provisions, which concern the grant of a freehold estate or lease. Further, the future act provisions engage with the creation of a right to mine, and "mine" includes "explore" (s 253). Thus, there is no need to read mining lease as including an exploration licence.

36. When one has regard to the provisions that engage the non-extinguishment principle that reference a "mining lease", and to the right to negotiate provisions that reference the "creation of a right to mine, whether by the grant of a mining lease or otherwise", it is evident that s 242(2) serves the particular purpose of facilitating those provisions in connection with those references. The extended definition of the expression "lease" in s 242(2), where there is a reference to a "mining lease", addresses the mischief that rights to mine may be conferred by instruments (to use a neutral term) given varying terms in different jurisdictions.[23] That is done by reading references to "mining lease" as including something which satisfies the criterion of a mining lease in s 245(1), but that the law under which it is granted describes as a licence or authority.

37. These operative provisions also need to be understood against the background that, consistently with the RDA, the NTA adopts the rights of other title holders as the

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20 Compare the observations that a grant cannot be superseded by a subsequent inconsistent grant and the effect of the RDA in conferring on native title holders equivalent protection in the *Native Title Act Case* (1995) 183 CLR 373 at 439.

21 Cf *Mineralogy v NNTT* (1997) 150 ALR 467 at 481-2 (Carr J) that an exploration licence was not a past act where the rights granted were exercisable indiscriminately over pastoral, freehold and vacant Crown land and therefore did not offend the RDA.

22 Sections 15(1)(d), 22B(d), 232, 232E.

23 For example, *Mineral Resources (Sustainable Development) Act 1990* (Vic) "mining licence" – *Mining Act 1992* (NSW) "mineral claim", *Planning and Development Act 2007* (ACT) "licence". The extraction of petroleum is undertaken pursuant to a "production licence": *Petroleum Geothermal Energy Resources Act 1967* (WA).

benchmarks for the treatment of native title holders.[24] *First,* the non-extinguishment provisions equate the treatment of native title holders to that of a freeholder or leaseholder being able to resume full possession of the land on expiration of any and all mining tenements: *Mining Act* s 113 (and definition of mining tenement in s 8(1)).[25] *Second,* the right to negotiate provisions place native title holders in a position, like the holders of other titles, to negotiate and agree upon compensation before operations are done under a mining tenement: *Mining Act* s 35; *Petroleum Act* s 20. Resources laws typically give a holder of exploration rights priority to the later grant of extraction rights over the same land: *Mining Act* s 67; *Petroleum Act* s 50. The NTA enables agreement on compensation at the exploration stage to cover the later creation of mining extraction rights (s 26D(2)).[26] That "mine" can include "explore" facilitates the right to negotiate over "the creation of a right to mine".

38. Contrary to *Tjiwarl FC* [74] (**CAB 640**), there is no evident legislative intention to treat an exploration licence as a mining lease. The legislative history cited ([74]-[75] **CAB 640-1**) reveals an intention to treat mining licences and authorities "which give similar rights to mining leases in the same manner". Prior to the insertion of sub-s 242(2), a mining tenement could only be a "lease" and therefore a "mining lease" if it was declared to be or described as a lease by the law under which it was granted (s 242(1)(c)).

39. The legislative history to s 242(2) supports the view that it is only a licence or an authority that gives similar rights to mining leases that will be relevant, and such an instrument must, as provided by s 245, permit use of land solely or primarily for mining: *Tjiwarl TJ* [1206]-[1207] (**CAB 461**); *Ngurra TJ* [56] (**CAB 23**). The primary meaning of "mining" is to extract or recover minerals, once found, not to search (explore) for them.[27] Specific statutory definitions may extend mining operations to exploration in particular contexts, as in s 8 of the *Mining Act*, for

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24 *Native Title Act Case* (1995) 183 CLR 373 at 453, 483; NTA s 7.

25 And see Second Reading on the Native Title Bill by the Prime Minister that the "validation of mining leases will not extinguish native title rights, which can again be exercised in full after the grant, and any legitimate renewals, have expired", and after referring to s 113 of the WA *Mining Act* observing: "How can we offer native title holders any less?": House of Representatives, *Parliamentary Debates* 16 November 1993 at 2880. The *Petroleum Act* does not have an equivalent provision, but the compensation provisions of s 17(2) speak of an owner or occupier being deprived of possession of the land by the carrying on of operations.

26 And before the insertion of s 26D(2) in 1998, agreement under former s 21 of the NTA to the doing of later future act meant the later grant was a permissible future act: see former s 235(8)(c).

27 *New South Wales Associated Blue Metal Quarries v Commissioner of Taxation* (1955) 94 CLR 509 at 522 (Dixon CJ, Williams and Taylor JJ); *Commissioner of Taxation v Imperial Chemical Industries Australia* (1972) 127 CLR 529 at 563 (Barwick CJ).

example, so that the holder of a mining lease can explore for minerals on the lease area: see ss 85(2), 117 (subject to provision for the grant of a special prospecting licence over part of the lease area to another: s 85B).

40. As explained above, in the NTA "mine" can include "explore" (s 253) to facilitate the right to negotiate the "creation of a right to mine" (s 26(1)(c)(i)). It does not follow that "mining" in "mining lease" (s 245(1)) means exploration, or that an instrument that permits only exploration is a mining lease for all purposes of the NTA: cf *Tjiwarl FC* [73] (**CAB 640**); contra *Tjiwarl TJ* [1207] (**CAB 461**); *Ngurra TJ* [56] (**CAB 23**).

10 41. In the particular context of s 47B, the primary judge in *Ngurra* was therefore correct to conclude that, at the least, whether the exclusion in sub-par (i) covered a licence to explore, and not to mine, is ambiguous, and the ambiguity should be resolved in favour of the result that s 47B is to apply: *Ngurra TJ* [57]-[58] (**CAB 23**).

D. The text and context of s 47B

42. *First*, as the title to s 47B indicates, the three exclusions in par (b) reflect the features of vacant (or unallocated) Crown land as land that is not alienated by freehold or lease (sub-par (i)), and not dedicated and set apart (sub-par (ii)), or acquired or resumed (sub-par (iii)), for some particular or public use (formerly known as "waste lands" of the Crown).[28] Sub-paragraphs (i), (ii) and (iii) of
20 s 47B(1)(b) thus provide the criteria of when land is vacant Crown land, and do so against a background where Crown lands legislation in each State and Territory may define Crown land with some variation.[29] One point is incontrovertible though; a right to mine minerals reserved to the Crown is not an interest in relation to land[30] that takes land out of the stock of Crown land available for disposal or use by the

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28 *Wik* (1996) 187 CLR 1 at 172 (Gummow J). And in the context of sub-par (ii), see *Ngurra TJ* [97] (**CAB 32**) that the condition conveys the state of affairs in the line of authorities considered in *Ward* (2002) 213 CLR 1 at [217]-[242] of when the Crown has applied land to a purpose or use, whereas the grant of an exploration tenement over Crown land leaves the land available for other disposition and use; contra *Ngurra FC* [39] (**CAB 85**).

29 See the varying terminology and definitions in *Land Administration Act 1997* (WA) s 3 "Crown land" and "unallocated Crown land"; *Land Act 1994* (Qld) Schedule 6 "unallocated State land"; *Crown Land Management Act 2016* (NSW) s 1.5 "vacant Crown land"; *Crown Lands Act 1976* (Tas) s 2 "Crown land"; *Crown Land Management Act 2009* (SA) s 3 "unalienated Crown land"; *Crown Land (Reserves) Act 1978* (Vic) ss 3, 4 and 8; *Crown Lands Act* (NT) s 3 "Crown lands"; *Land Titles Act 1925* (ACT), Dictionary, "Crown land".

30 *TEC Desert v Commissioner of State Revenue* (2010) 241 CLR 576 at [14], [28] (the Court).

Crown.[31] Section 47B(1)(b) being concerned with when land is vacant Crown land, sub-par (i) is directed to when land is alienated by grant of an estate or interest so as to no longer be Crown land available for disposal or use by the Crown (being the actions within sub-pars (i), (ii) and (iii)).

43. *Second*, s 47B is beneficial in serving the object of the NTA to recognise and protect native title (s 3(a)) and in giving effect to the consideration stated in the Preamble that where appropriate native title should not be extinguished but revive. The negative conditions or limitations in sub-pars (i), (ii) and (iii) of s 47B(1)(b) should not be construed more widely than is necessary to give effect to their terms,[32] consistent with the need to construe the section in a way that effectuates the beneficial purpose it serves.[33] The primary judge in *Ngurra* thus held correctly that the ambiguity as to whether the exclusion in sub-par (i) covered an exploration licence should be resolved in favour of the result that s 47B is to apply: *Ngurra TJ* [57]-[58] (**CAB 23**), considered above.

44. As with s 47 (pastoral leases) and s 47A (reserves), s 47B is an exception to the general law position that once extinguished native title cannot be revived.[34] Sections 47 and 47A can be engaged even though the subject lands might be covered by a mining tenement: e.g. *Mining Act* s 8(1) (Crown land held under pastoral lease); *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) Pt IV (mining interests over Aboriginal land). There is no evident policy reason why s 47B would be treated differently. The purpose of ss 47A and 47B is the same, that is, to enable Aboriginal people in occupation of an area where there are no longer competing third party interests to have the Court disregard the earlier tenure history when determining their native title rights and interests: *Ngurra TJ* [80] (**CAB 29**).[35]

45. *Third*, these conclusions are consistent with the terms of s 47B by which the extinguishing effect of a prior "interest" to be disregarded extends to the creation

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31 On the history of mining laws in relation to Crown land and private land, see ***Wade*** *v New South Wales Rutile Mining Co* (1969) 121 CLR 177 at 186-195 (Windeyer J).

32 *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [187] (Wilcox, French and Weinberg JJ).

33 *R v Toohey; ex parte Attorney-General (NT)* (1980) 145 CLR 374 at 390 (Stephen, Mason, Murphy and Aickin JJ) and *R v Kearney;ex parte Jurlama* (1984) 158 CLR 426 at 433 (Gibbs CJ) dealing with when Crown land is available for claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

34 ***Fejo*** *v Northern Territory* (1998) 195 CLR 96 at [46], [56]-[58] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

35 Referring to *Coulthard v South Australia* (2014) 218 FCR 148 at [112] (Mansfield J).

of a right or power or privilege over land (s 253 definition of *interest* in par (b)), but not the conferral or confirmation of Crown ownership of natural resources: s 47B(5)(a). An exploration tenement is a liberty or power to go onto Crown or private land to search for minerals reserved to the Crown.[36] Section 47B expressly continues the extinguishing effect of reserving minerals,[37] but otherwise operates so as to disregard any extinguishment caused by the grant of a tenement conferring power to go onto the land.[38] Having so provided, it is incongruous that the section would not apply where an exploration tenement currently exists.

46. *Fourth,* the text of sub-par (ii) refers to a "permission or authority", akin to the language of s 242(2) that refers to a licence or authority, and in contradistinction to the text of sub-par (i) that refers to a "freehold estate or lease" that ordinarily connotes a proprietary interest in land. In *Ngurra* the Full Court reasoned that an exploration tenement could be within sub-par (ii) as a permission or authority to use land for a particular purpose, provided that the area referred to in s 47B(1) is to be so used. On the facts that was not made out as only some relatively confined part of the wider permit area, which may or may not be in the s 47B claim area, is to be so used: *Ngurra FC* [31], [38] (**CAB 81, 84-5**).[39] The text of sub-par (ii) lends support to the view that "lease" in sub-par (i) does not include a licence or permit.

E. What if s 47B(b)(i) did cover an exploration licence?

47. For present purposes, let it be assumed that a "lease" within s 47B(1)(b)(i) includes an exploration licence by reading the definitions into the text of s 47B as the substantive enactment[40] as follows:

> *This section applies if:*
>
> *(a) a claimant application is made* ***in relation to an area****; and*
>
> *(b)* ***when the application is made, the area is not****:*
>
> *(i)* ***covered by*** *a freehold estate or a lease*
>
> in the case only of references to a mining lease, also including **a licence issued or an authority given**, by or under a law of the Commonwealth, a State or a Territory [s 242(2)]

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36 *Wade* (1969) 121 CLR 177 at 188-93 (Windeyer J).

37 As to which see *Ward* (2002) 213 CLR 1 at [383] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

38 As to the extinguishing effect of mining leases, see *Ward* (2002) 213 CLR 1 at [309]; and more generally *James v Western Australia* (2010) 184 FCR 582 (Sundberg, Stone and Barker JJ).

39 Although the point does not presently arise, to be clear the Appellants would submit that the reasoning of the primary judge on why an exploration tenement is not within s 47B(1)(b)(ii) is to be preferred: *Ngurra TJ* [90]-[99] (**CAB 30-2**).

40 *Alcan* (2009) 239 CLR 27 at [40] (Hayne, Heydon, Crennan and Kiefel JJ).

that permits the lessee or **person** to whom a licence was issued or the authority was given [s 243(2)] **to use the land** or waters **covered by the** lease, **licence or authority solely or primarily** for mining [s 242(2), 245(1)]; and

mine includes **[to] explore** or prospect **for things that may be mined**, including petroleum [s 253]; ...

...

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

10 48. The bolded words highlight the difficulty in the Full Court's construction that mining in the definition of mining lease (s 245(1)) means exploration, and lease in s 47B(1)(b)(i) means a licence to explore. Section 47B(1) directs attention to the status of the area referred to in the section, and at a particular point in time. But s 245(1) defines a mining lease by reference to permitted use of the lease area,[41] unlike an agricultural, pastoral or community lease defined also by reference to the purpose of grant,[42] or a freehold estate not conditioned by permitted use or purpose of grant.[43] The criterion of a mining lease as permitted land use is emphasised by the dissection provisions in s 245(2)-(3) that if part of a mining lease area is used for construction of a city, town or private residence, that part is taken out.[44]

20 49. An exploration licence may cover a large area of which the claim area may only be a small part. Here, permit EP 451 covered an area of 15,928 square kilometres[45] and EP 477 an area of 13,961 square kilometres,[46] of which the claim area was a small part: map at **AFM 35**. Licence E57/676 covered a large area[47] of which the

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41 And see *Explanatory Memorandum to the Native Title Bill 1993* p 95 on the definition of mining lease (then clause 230, now s 245) that: "If the area covered by a lease comprises land and waters, then the permitted use of both the land and waters together must be considered to determine whether such use is solely or primarily for mining. It is not sufficient that the permitted use of either the land or the waters is solely or primarily for mining".

42 See ss 247, 248, 249A. A commercial and residential lease is defined by permitted use (ss 246, 249), although an agricultural, pastoral or residential lease, may be regarded as a commercial lease as well (s 246(1)).

43 *Fejo* (1998) 195 CLR 96 at [44], [47]. The NTA does not define what is a freehold estate (cf "ordinary title" s 253) although it has various provisions and exceptions as to the extinguishing effect of a grant or vesting of a freehold estate: e.g. s 23B(2)(c)(ii), (3), (9), (9C).

44 *Ward* (2002) 213 CLR 1 at [302], [305] noted that the effect is that the part of the mining lease upon which construction has occurred is taken to be separate from the remainder of the mining lease and a condition of extinguishment is that it is reasonably likely that the structures would continue to be used if mining were to cease.

45 Affidavit Maia Williams 15 November 2016 at [9], [13] (**AFM 171** ex C).

46 Affidavit Maia Williams 15 November 2016 at [17], [21] (**AFM 172** ex C).

47 Initially granted as 60 blocks, reduced to 22 blocks: see register search at **AFM 205**. Each block is on a meridian position of latitude and longitude one minute apart: *Mining Act* s 56C.

claim area (a part of UCL 245) was a fraction: map at **AFM 217**. Also, conditions may attach on when and where use might be permitted. The locale and temporal reference points in s 47B render the *when and where* part of the inquiry as to the content of the rights[48] necessary to ascertain if s 47B applies.

50. In *Ngurra* the Full Court reasoned that the exploration tenements "permit the lessee to use the whole of the land only for mining, which is all that s 245 requires": [13] (**CAB 75-6**, reading mining to mean exploration). Presumably that means all of the permit area, but at [16] (**CAB 76**) their Honours queried, but did not decide, that if the conditions of permit EP 451 prohibiting entry to certain land applied to the claim area, then s 47B(1)(b)(i) might not be engaged. A condition prohibiting entry would mean that the instrument does not permit the holder to use that land, although exploration by geological study, survey or the like might occur without entry.[49] No different result should obtain for conditions by which the permit holder "shall not commence any works or petroleum exploration operations in the permit area except with, and in accordance with the approval in writing of the Minister" (condition 1(2) at **AFM 42-3, 60-1** (EP 451) and **AFM 144** (EP 477)). To read away the conditions on the basis that the permittee is obliged to seek approval (*Ngurra FC* [20] (**CAB 78**)) misses the point about *when and where*, for the purposes of s 47B(1)(b)(i), the permission stipulated in s 245(1) exists.

51. The point also arises in *Tjiwarl* as an application for a mineral exploration licence requires submission of a works program (*Mining Act* s 58) and the conditions of the licence include that ground disturbing work not be done without prior approval, again without reference to any part of the licence area: see condition 4 cf condition 8 as to a part (**AFM 207** E57/676).[50] The effect is that when the claimant application

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48 As to which see *Ward* (2002) 213 CLR 1 at [78], [150], [308]; *Western Australia v Brown* (2014) 253 CLR 507 at [34], [40], [44]-[45], [57] (the Court).

49 The tables of works, one of which for EP 451 is set out at *Ngurra TJ* [86] (**CAB 30**), were replaced from time to time, and those in place when the claimant application was made (30 June 2015) are at **AFM 79** (EP 451 ex B.17) and **AFM 166** (EP 477 ex B.34). The petroleum exploration permits were also subject to requirements imposed under ss 95 and 115 of the *Petroleum Act* which required, inter alia, approval for drilling operations: see instrument accompanying letter at **AFM 80** (ex B.18) and guidelines item 501 at **AFM 106**. And see aerial survey approvals for EP 451 (**AFM 67** ex B.9) and EP 477 (**AFM 153** ex B.26) as part of the exploration works referred to in the tables of works.

50 There was no evidence of any such approval: *Tjiwarl TJ* [1207] (**CAB 461**).

is made, permitted use of the particular s 47B area for exploration, as part of the wider licence area, is uncertain, if not unknown, at that time.[51]

52. In *Ngurra* the Full Court reasoned that an exploration tenement could be a permission or authority under which the land "is to be used" within s 47B(1)(b)(ii), were it not for the nature of the physical works (once approved) to the land being confined (two exploration wells) and the land the subject of the permits being large. Therefore, only "some relatively confined part" of the wider permit area, "which *may or may not* be in the claim area", is to be so used: *Ngurra FC* [38] (**CAB 84-5**) (emphasis added).[52] While the criterion of a mining lease in s 245(1) is whether the instrument "permits" the holder "to use the land", to ascertain if s 47B(1)(b)(i) applies – the *when and where* – it would still become necessary to ask whether, when the application is made, the instrument permits the use of the area referred to in s 47B. The answer is the same: it *may or may not*.

53. This uncertainty produced by the Full Court's construction further demonstrates why the phrase "freehold estate or lease" in s 47B(1)(b)(i) cannot be read as a reference to a licence to explore.

Part VII: Orders sought

54. The Appellants seek the orders set out in the notices of appeal (**CAB 115** (P37 *Ngurra*), **709** (P38 *Tjiwarl*)).

Part VIII: Length of oral argument

55. The Appellants estimate that they require approximately 1.5 hours to present oral argument in chief.

Dated: 9 August 2018

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51 Compare *Ward* (2002) 213 CLR 1 at [150] that a grant of rights may be incapable of identification without the taking of some further step.

52 That follows the holding in *Banjima People v Western Australia* (2015) 231 FCR 456 at [112]-[114] (Full Ct) in the context of s 47B(1)(b)(ii) that an exploration licence under the *Mining Act* did not require or permit use of any identified portion of the licence area.