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

and

STATE OF WESTERN AUSTRALIA
First Respondent

and

SHIRE OF HALLS CREEK
Second Respondent

and

COMMONWEALTH OF AUSTRALIA
Third Respondent

AND BETWEEN: No. P38 of 2018

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

and

STATE OF WESTERN AUSTRALIA AND OTHERS
Respondents

FIRST RESPONDENT'S JOINT ORAL OUTLINE

PART I: CERTIFICATION OF SUITABILITY FOR PUBLICATION

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

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PART II: OUTLINE OF ORAL SUBMISSIONS

2. Section 47B(2) of the *Native Title Act* (**NTA**) enacts a statutory principle which requires prior extinguishment of native title to be disregarded in respect of land which is the subject of a native title application. This principle does not apply to land within three classes, at the time of when the application is made. The three classes of exempt land are: (a) land covered by a freehold estate or a lease; (b) Crown reserves and similar reservations; and (c) land subject to a resumption process: s.47B(1)(c).

The Operation and Subject Matter of s.47B

3. The three classes of land to which the principle of disregarding prior extinguishment does not apply are classes in which another person has interests which would compete with, or affect, the traditional rights which would otherwise be recognised if the principle in s.47B applied.

4. The land to which the principle in s.47B applies is not expressly defined, save by exclusion of the three classes. However, the heading to s.47B describes the land to which the provision applies positively as "Vacant Crown land". This heading is part of the NTA: *Acts Interpretation Act* (Cth), s.13. That indicates that s.47B was only intended to apply to vacant land which is not subject to any competing rights.

5. The operation of s.47B is tested at a single point in time, namely when the application is made. The principle in s.47B is not concerned with the ongoing interaction of traditional rights and competing interests in the land after that point. Eg, a pastoral lease over land is a "lease" for the purposes of s.47B(1)(c): s.242(1) and s.248. Even though a pastoral lease will expire, s.47B does not provide that prior extinguishment should be disregarded after the pastoral lease expires. The principle in s.47B never operates. That is so, even though a pastoral lease may cover a large area, and only involve minor use of the land.

6. Section 47B exempts land subject to a mining production tenement which is described as a "lease": s.242(1)(c), 245(1), Reply Submissions, [12], *Ward v WA* (2002) 213 CLR 1 at [299]. If s.47B does not also exempt land covered by other

mining tenements, it would treat production leases, production licences and exploration tenements differently. That would be odd where:

(a) no distinction has been expressly drawn between mining production and exploration tenements for any purpose in the NTA. The Supplementary Explanatory Memorandum for s.242 specifically suggests that there is no distinction: *Tjiwarl* (Full Court) at [74]-[75];

(b) the appellants apparently say that a mining production tenement which is called a "licence" or "authority" is not a "lease" for the purposes of s.47B(1)(b)(i), even though in substance it is no different to a statutory mining lease: Reply Submissions, [8]-[12];

(c) the holder of a mining production lease has no liability to compensate a traditional owner, but potentially native title claimants would argue that the holder of an exploration tenement is required to compensate them for affecting native title rights where prior extinguishment is disregarded "for all purposes": s.47B(2).

7. These matters concerning the subject matter and operation of s.47B show that the principle of disregarding prior extinguishment was only intended to apply to land in which there would be no competing interests with native title, if prior extinguishment of native title were to be disregarded, ie Vacant Crown land.

The Language of the Native Title Act

8. Section 242(1) provides an inclusive definition of "lease". This includes anything in Div 3 which contains definitions relating to "leases".

9. Where the expression "mining lease" is used, but only in that case, this expression also includes a licence or authority: s.242(2). Section 242(2) does not separately state what the licence or authority will permit or authorise the holder of the licence or authority to do. That is for the definition of "mining lease" in s.245.

10. Section 245 uses the expression "mining lease". The definition in s.245 is therefore expanded by s.242(2). Section 245 defines a "mining lease" as a lease (and therefore also a licence or authority) that permits the lessee (and the licensee or authorised

person) to use land or waters covered by the lease solely or primarily for mining. That definition is then applied wherever the term "lease" is used and whenever it extends to cover a "mining lease".

11. The term "mining" in s.245 should be construed consistently with the definition of "mine" in s.253. It therefore extends to mining exploration tenements, as well as mining production tenements. Here, the tenements give rights to the tenement holders to use the land solely or primarily for mining: *Mining Act*, s.66, *Petroleum Act*, ss.15, 38.

The Appellants' Arguments

12. The expansion of the definition of "mining lease" by s.242(2) does not operate independently of s.245, and only whenever a provision apart from s.245 uses the expression "mining lease". Section 242(2) says nothing about the content of the licence or authority. It must be read with s.245 to make sense.

13. The purpose of s.242(2) is not to ensure a right to negotiate, or the application of the non-extinguishment principle, to the grant of licences or authorities which permit mining production. The future act provisions engage with all "rights to mine". Licences or authorities which permit mining production, if not a grant of a "mining lease" which is a Category C Past Act or Category C Intermediate Period Act (ss.231 and ss.232D), would be a Category D Past Act or Category D Intermediate Period Act (ss.232 and 232E). The non-extinguishment principle applies either way.

14. The word "mining" in s.245(1) should not be construed differently to "mine" in s.253. Where "mining" is used in the NTA without meaning exploration, this is specifically excluded: s.26C(4)(c)(i). Further, if exploration tenements are not "leases" and do not authorise "mining", this may mean that s.24GE applies to some exploration tenements, rather than the later Subdivisions M and P. That is both unorthodox and contrary to their case.

Dated: 8 November 2018

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