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 SUBMISSIONS

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: ISSUES

2. The issue in these appeals is whether each of:
   (a) two petroleum exploration permits granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) (***PGER Act***); and
   (b) a mineral exploration licence granted under the *Mining Act 1978* (WA) (***Mining Act***),

   is a "lease" for the purposes of s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth) (***Native Title Act***).

3. The issue is the same in respect of each permit or licence so the composite term **exploration tenement** is used herein to refer to all three.

PART III: SECTION 78B NOTICES

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

PART IV: FACTS

5. The factual background is described at [6] – [9] Appellants' Joint Submissions filed on 9 August 2018 (**Appellants' Submissions**). There is no factual issue in contention. The Appellants' Chronology filed on 9 August 2018 is agreed.

Tjiwarl FC

6. The relevant factual context as found by the Full Court in *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (Tjiwarl and Tjiwarl #2)* [2018] FCAFC 8; (2018) 351 ALR491 (***Tjiwarl FC***) was that E57/676 was an 'exploration licence' granted pursuant to s 59 of the *Mining Act*.[1]

7. Pursuant to s 66 of the *Mining Act*, the holder of E57/676 was (and is) authorised to explore for minerals over the area subject to the licence and to undertake various acts that are, in summary, necessary or incidental to that exploration.[2]

8. Licence E57/676 covered an area of unallocated Crown land (referred to in the proceeding below as a portion of UCL 245) over which the Appellant had claimed the beneficial application of s 47B of the *Native Title Act*.[3]

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1 *Tjiwarl FC*, [79] (CAB 642).
2 *Tjiwarl FC*, [79] (CAB 642).

9. The Full Court found, unanimously, that E57/676 was a "mining lease" and, accordingly, a "lease", as those terms are defined by the *Native Title Act.* Therefore, pursuant to s 47B(1)(b)(i), s 47B did not apply to that portion of UCL 245 covered by E57/676.[4]

Ngurra FC

10. The relevant factual context as found by the Full Court in *Attorney-General (Cth) v Helicopter-Tjungarrayi (Ngurra Kayanta & Ngurra Kayanta#2)* [2018] FCAFC 35 (***Ngurra FC***) was that EP 451 and EP 477 (together, the **Permits**) were each an 'exploration permit' granted pursuant to the *PGER Act.*[5]

10 11. Pursuant to s 38 of the PGER Act, by force of the Permits, the Permit holders were (and are) authorised, subject to the PGER Act and in accordance with any conditions to which the relevant Permit is subject, to explore for petroleum and the carry on such operations and execute such works as are necessary for that purpose.[6]

12. The Permits together covered an area of unallocated Crown land over which the Appellant had claimed the beneficial application of s 47B of the *Native Title Act.*[7]

13. The Full Court found, unanimously, that the Permits were each a "mining lease" and, accordingly, a "lease", as those terms are defined by the Native Title Act. Therefore, pursuant to s 47B(l)(b)(i), s 47B did not apply to the area of land and waters covered by the Permits.[8]

20 **PART V: ARGUMENT**

Summary

14. This appeal concerns the meaning of the word "lease" as it appears in the *Native Title Act* and, in particular, s 47B(1)(b)(i).

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3 *Tjiwarl FC*, [65] and [81] (CAB 637 and 642).
4 *Tjiwarl FC*, [69] – [80] (CAB 639 – 642).
5 *Ngurra FC*, [12] (CAB 75).
6 *Ngurra FC*, [12] (CAB 75).
7 *Ngurra FC*, [2] and [3] (CAB 72).
8 *Ngurra FC*, [2] to [26] (CAB 72 and 80).

15. If an exploration tenement is a "lease" for the purposes of s 47B(1)(b)(i), s 47B will not apply to an area which, at the time a native title determination was made, was covered by the exploration tenement.

16. The appeal is not concerned with whether each exploration tenement itself extinguished native title (plainly each did not) but only with whether the exploration tenement fell within the statutory definition of "lease" and use of that term in s 47B(1)(b)(i).

17. For the reasons given by the Full Court, each of the exploration tenements is a lease for the purposes of s 47B(1)(b)(i).

10 18. That conclusion logically follows from the application of ordinary principles of statutory construction and, in particular, application of the definitions of "lease", "lessee", "mining lease" and "mine".

19. *First*, a mining lease is a lease that permits the lessee to use land or waters covered by the lease solely or primarily for "mining" (s 245). Consistently with the definition of "mine" (s 253) the reference in the definition of "mining lease" to "mining" includes exploring or prospecting for minerals or petroleum: see paras [31] to [38].

20. *Second*, an instrument which permits a "lessee" as defined in s 243, to use land solely or primarily for exploring or prospecting for things that may be mined is a lease that "permits the lessee to use the land or waters covered by the lease solely or primarily
20 for mining" i.e. is a "mining lease" as defined in s 245 and a "lease" as defined in s 242. It follows that each of the exploration tenements, being a licence or authority given by the State to use land or waters solely or primarily for the exploration of minerals or petroleum, is a "mining lease" for the purpose of the *Native Title Act*: see paras [39] to [54].

21. *Third*, the reference to "lease" in section 47B(1)(b)(i) is a reference to a "lease", as defined in s 242 and includes a "mining lease" and, in particular, "licences" or "authorities" whose instruments are for the purposes of "mining": see para [55] to [66].

22. *Fourth*, nothing raised in Part E of the *Appellants' Submissions* warrants a different
30 conclusion to the above: see para [67] – [75].

The legislative provisions

23. Section 47B(1) relevantly provides:

> 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) ....
>
> (emphasis added)

24. Whether or not something is a "lease", or one of various classes of lease, for the purposes of the *Native Title Act* is defined by Part 15, Division 3.

25. Section 241 of the *Native Title Act* provides that "[t]his Division contains definitions relating to leases".

26. "Lease" is defined in s 242 as follows:

> (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.
>
> *References to mining 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.

27. "Lessee" is defined in s 243 as follows:

> (1) Subject to subsection (2), the expression lessee includes any person who, by assignment, succession, sub-lease or otherwise, acquires, enjoys or is entitled to exercise any of the interests under the lease of a lessee (including of a person who is a lessee because of another application or applications of this section).
>
> *Lessee of certain mining leases*
>
> (2) In the case of a lease that is a mining lease because of subsection 242(2) (which covers licences and authorities given by or under laws), the expression lessee means:
>
> (a) the person to whom the licence mentioned in that subsection was issued, or the authority so mentioned was given; or
>
> (b) any person who, by assignment, succession or otherwise, acquires or enjoys the licence or authority or is entitled to exercise rights under the licence or the authority.

28. Various classes or categories of lease are also defined in Part 15 Division 3 of the *Native Title Act*, including mining leases, commercial leases, agricultural leases, pastoral leases, residential leases and community purpose leases.

29. Relevantly, "mining lease" is defined in s 245 of the *Native Title Act*. Section 245(1) relevantly provides:

> 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.

30. The *Native Title Act* does not define "mining" but does define "mine" in s 253:

> ***mine*** includes:
>
> (a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c); or
>
> (b) extract petroleum or gas from land or from the bed or subsoil under waters; or
>
> (c) ...

"Mining" includes exploring or prospecting for minerals or petroleum

31. A mining lease is a lease that permits the lessee to use land or waters covered by the lease solely or primarily for "mining".

32. The Full Court held, in accordance with s 18A of the *Acts Interpretation Act 1901* (Cth), that, as a cognate word, the word "mining" was to be construed consistently with the defined word "mine". It follows that, because for the purposes of the *Native Title Act* to "mine" includes "to explore for things that may be mined", including petroleum, that a lease that permits the lessee to use land solely or primarily for exploring or prospecting for things that may be mined is a lease that permits use of the land solely or primarily for mining.[9]

33. That construction is clearly correct, as a matter of logic and grammar.

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[9] *Tjiwarl FC*, [72] and [73] (CAB 639); *Ngurra FC* [8] – [9] (CAB 74).

34. As observed by the plurality in *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service*:[10]

> It is of fundamental importance that statutory definitions are construed according to their natural and ordinary meaning unless some other course is clearly required. It is also of fundamental importance that limitations and qualifications are not read into a statutory definition unless clearly required by its terms or its context, as for example if it is necessary to give effect to the evident purpose of the Act. [footnotes omitted]

35. Contrary to the Appellants' apparent contention,[11] it is neither expressed nor to be implied from the *Native Title Act* that the term "mining" where used in the Act (including in the definition of "mining lease") has a distinct and narrower meaning from "mine" and "mined" such that a mining authority that permits (only) exploration it will never be an authority permitting "mining".[12]

36. To the contrary, that "mining" includes exploration or prospecting is also confirmed from the *Native Title Act* as a whole, which refers to "mining consisting of exploration or prospecting" (s 26C(4)(c)(iii)) in recognition that the term "mining" includes and may consist of those activities. Further, as observed by the Full Court,[13] where the contrary is intended, express words are used. For example, s 26C(4)(c)(i) refers to "mining for opals or gems (other than mining consisting of exploring, prospecting or puddling) ...".

37. To the extent that the Appellants have proposed a distinction between a right to explore for minerals or petroleum and a right to extract or recover those minerals or petroleum it is a distinction drawn from different legislative regimes and from other authorities in other contexts and not one contained in the *Native Title Act*.[14] "Mine" and "mining" are clearly and definitively defined in the *Native Title Act* for its purposes.

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[10] *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 310 (per Brennan CJ, Gaudron and McHugh JJ).

[11] Cf. *Appellants' Submissions* at [34] – [41].

[12] Cf. *Appellants' Submissions* at [34] – [41], in particular [35] and [39].

[13] *Tjiwarl FC*, [73] (CAB 640).

[14] See *Appellants' Submissions*, [39] – [40]. The cases cited at *Appellants' Submissions* footnote 27 were not considering whether "mining" included exploration or prospecting and were directed to the words "mine" and "mining" in s 122A of the *Income Tax and Social Services Contribution Assessment Act* (Cth). These provisions are not analogous to the *Native Title Act*.

38. Similarly, nowhere does the *Native Title Act* say or imply that "mine" includes "explore" only for the limited purpose of facilitating the "right to negotiate".[15] Such a limitation could readily have been, but is not, included in the definitions in s 253 or in Part 15 Division 3. Nor is any implication to be drawn from the operation of Part 2 Divisions 2, 2A and 3 of the *Native Title Act* to the effect that the expression "mining lease" in the *Native Title Act* is intended to include licences or authorities permitting extractive mining, but not licences or authorities permitting exploration.[16]

Each exploration tenement is a "mining lease"

39. Having found that "mining" includes "exploring for minerals" and "exploring for petroleum" the Full Court found, correctly, that an instrument which permits the lessee to use land solely or primarily for exploring or prospecting for things that may be mined is a lease that "permits the lessee to use the land or waters covered by the lease solely or primarily for mining" i.e. is a "mining lease" as defined in s 245 and a "lease" as defined in s 242.

40. As already noted, a mining lease is a "lease ... that permits the lessee to use the land or waters covered by the lease solely or primarily for mining". (emphasis added)

41. In determining the meaning of the term "lease" and "lessee" in section 245 it is necessary to have regard to ss 242(1) and (2) and s 243(3) of the *Native Title Act.*

42. Section 242(1) provides an expansive definition of "lease", extending, for example, to "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." It therefore follows that things that are described in legislation as leases, whether or not they comprise a lease at common law[17] and confer a recognised interest in land, are "leases" for the purposes of the *Native Title Act.* A thing described under a State law as a mining lease will accordingly be a "lease" as defined in s 242(1) and where the term is used in s 245, in the definition of "mining lease".[18]

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[15] Cf. *Appellants' Submissions,* [40].
[16] Cf. *Appellants' Submissions,* [40].
[17] *Wilson v Anderson* (2002) 213 CLR 401, p.434 / [58] – [59].
[18] Such as mining leases under Part IV, Division 3 of the *Mining Act 1978.*

43. That a "mining lease" is a "lease" is also supported by Division 3 of Part 15 generally including s 241, which provides that Division 3 contains definitions "relating to leases", s 243, which defines "lessee", includes s 243(2), which refers to "a lease that is a mining lease" and s 245, which defines "mining lease", commences "[a] mining lease is a lease...".

44. That conclusion is also apparent from the context of the NTA as a whole.

45. In sections of the *Native Title Act*, mining leases are specifically excluded from a reference to a "lease". For example:

(a) s 21(3)(a), which refers to "a grant of a freehold estate or a lease (other than a mining lease)";

(b) s 23B(2)(c)(viii), which refers to "any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters";

(c) s 43A(2)(a)(i), which refers to "...a freehold estate in fee simple or by a lease (other than a mining lease)"; and

(d) s 230(b), which refers to a "past act consisting of the grant of a lease where ... the lease is not a mining lease".

(e) s 232A(2)(e)(i), which refers to "a grant of a freehold estate or a lease (other than a mining lease)"; and

(f) s 232C(b)(i), which refers to a "past act consisting of the grant of a lease where...the lease is not a mining lease".

46. Each of these provisions only makes logical sense if the term "lease" otherwise includes a mining lease. That is, the specific exclusion of mining leases on these occasions where the term "lease" is used can only be necessary because "lease" otherwise includes mining leases.

47. Section 242(2) further extends the definition of what comprises a "lease", although limited to the class/category of leases referred to as "mining leases" (ie not extending to other classes/categories of lease such as commercial leases, agriscultural leases, pastoral leases, residential leases or community leases), providing that 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. It follows that the definitional reference to "mining lease" includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory, and is a lease as defined in s 242.

48. That conclusion is supported by s 243(2)(a) which provides that "[i]n the case of a lease that is a mining lease because of s 242(2)" the expression lessee relevantly means "the person to whom the licence mentioned in that subsection was issued, or the authority so mentioned was given." This confirms expressly that the effect of s 242(2) is to bring licences and authorities within the definition of "mining lease" and, therefore, "lease".

10 49. As found by the Full Court,[19] the legislative intention to treat all licences and authorities to mine as leases for the purposes of the *Native Title Act* is evident from the plain words of the statutory scheme.

50. It is also supported by reference to extrinsic materials.

51. Sections 242(2) and 242(3) of the *Native Title Act* were not included in the first draft of the Native Title Bill (**Bill**). After further consultation following the introduction of the Bill, various amendments were made to the Bill, including the insertion of what are now s 242(2) and s 243(2).

52. The Supplementary Explanatory Memorandum, Native Title Bill 1993 (Cth) (**Supplementary Explanatory Memorandum**) provides the following in respect of
20 the insertion of s 242(2):

> The addition of subclause (2) provides that for the purposes of mining leases only, licences or authorities to mine are to be treated in the same way as mining leases. This amendment is part of a package of amendments to treat licences and authorities to mine in the same way as mining leases. The related amendments are found in amendments 66 and 67.[20]

53. "Amendments 66 and 67" is a reference to a consequential amendment to the definition of "lessee" as a result of the expanded definition of "lease". That amendment is now reflected in s 243(2) of the *Native Title Act*, which provides, in effect, that in the case of a lease that is a mining lease (which covers licences and

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[19] *Tjiwarl FC*, [74] (CAB 640)
[20] Supplementary Explanatory Memorandum at page 17, Amendment 65.

authorities), the expression "lessee" means a person to whom the licence or authority was given, or any person who subsequently acquires the licence or authority.

54. In respect of amendments 66 and 67, the Supplementary Explanatory Memorandum states:[21]

> This clause defines what is meant by the term 'lessee' for the purposes of this Bill. The addition of subclause (2) makes it clear that for the purpose of a mining licence or authority that is a mining lease because of subclause 227(2) [now subsection 242(2)] a person holding such a licence or authority is to be regarded as a lessee for the purposes of the Bill. These amendments are also consequential upon the treatment of mining licences and authorities which give similar rights to mining leases in the same manner for the purposes of this Bill.

The reference to a "lease" in s 47B(1)(b)(i) includes a reference to a "mining lease"

55. For the reasons outlined above, the reference to "lease" in s 47B(1)(b)(i) of the *Native Title Act* includes any "mining lease" which, in turn, includes any "licence or authority" to explore or prospect things to mine.

56. Having found that each exploration tenement was a "mining lease", the Full Court found, correctly, that s 47B(1)(b)(i) of the *Native Title Act* was not satisfied in respect of that portion of unallocated Crown land covered by that lease.[22]

57. Contrary to the *Appellants' Submissions* at [41] – [43], there is no ambiguity in the words of s47B (nor in ss 241, 242 or 245) and resort to the beneficial nature of s 47B or of the NTA as a whole is not required in interpreting those sections.[23] Section 47B of the *Native Title Act* operates according to its terms.

58. In particular, the term "lease" is defined in Part 15, Division 3 of the *Native Title Act*. It is not defined in, or by, s 47B(1)(b)(i). The meaning of the defined terms used in s 47B(1)(b)(i) is determined by the statutory definitions; not *vice versa*. Whether or not something is a "lease" for the purposes of the *Native Title Act* is defined by Part 15, Division 3.

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[21] Supplementary Explanatory Memorandum at page 17, Amendments 66 and 67.

[22] *Tjiwarl FC,* [81] (CAB 642); *Ngurra FC*, [9], [11] and [12] (CAB 74-75).

[23] See *Attorney General (Western Australia) v Her Honour Judge Schoombee* [2012] WASCA 29, [41] – [42] (Martin CJ, with whom Newnes and Murphy JJA agreed) which concerned a beneficial act namely *Criminal Injuries Compensation 2003* (WA). See also *Victims Compensation Fund Corp v Brown* [2003] HCA 54; (2003) 77 ALJR 1797, 1804 [33].

59. Therefore, while s 47B might be a beneficial provision in which the exceptions should not be read any more broadly than what the plain meaning of the words require,[24] it is respectfully submitted that the construction arrived at by the Full Court results precisely from giving effect to the plain meaning of the words used in the *Native Title Act*. The Full Court did not, as the Appellants submit at [33], make a "fortress out of the dictionary" definitions.[25] On the contrary, it simply applied, in context, the particular definitions required by the statute itself.

60. The function of a definition is not to enact substantive law, but to provide an aid in construing the statute.[26] Once it is clear that a definition applies, the only proper course is to read the words of the definition into the substantive enactment and then construe the substantive enactment, whether in its extended or confined sense, in context and bearing in mind its purpose and the mischief that is was designed to overcome.[27]

61. While undoubtedly an aid to construction, the broader objects of the *Native Title Act* do not provide a basis to read ss 47B, 242, 243, 245 and 253 other than in accordance with their ordinary, natural, meaning.[28] The purpose is to be gleaned from the text of those provisions in their context.[29]

62. In any event, the *Appellants' Submissions* at [42] appear to proceed from presuppositions about the purpose and effect of section 47B which are not justified by the words used in the section itself (nor by any surrounding context). Section 47B does not seek to define the land to which it applies by reference to notions (again, imported from other judicial authorities or general land law principles arising in other contexts) such as whether or not that land is subject to an "interest in relation to

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[24] *Northern Territory of Australia v Alyawarr* (2005) 145 FCR 442.

[25] See *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 310 (Brennan CJ, Gaudron & McHugh JJ). Ironically, Justice Learned Hand's admonition against "making a fortress out of the dictionary" in *Cabell v Markham* (1945) 148 F(2d) 737 concerned the unquestioning application of the ordinary meaning of words not, as in the present case, with statutory definitions specifically chosen by the legislature.

[26] *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 310 (Brennan CJ, Gaudron and McHugh JJ).

[27] *Kelly v The Queen* (2004) 218 CLR 216 [103] (McHugh J); *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 [12] (McHugh J).

[28] See e.g. *S v Australian Crime Commission* (2005) 144 FCR 431, 439 (Mansfield J); *Minister for Urban Planning and Authorities* (1996) 91 LGERA 31, 78 (Cole JA). See also *Wacando v The Commonwealth* [1981] HCA 60; (1981) 148 CLR 1.

[29] *Municipal Officers' Association of Australia v Lancaster* (1981) 54 FLR 129, 153 (Evatt and Northrop JJ).

land" or otherwise "available for disposal or use". Section 47B(1)(b) is not to be regarded simply as a synonym for "waste land of the crown". Relevantly, s 47B(1)(b)(i) asks whether there is "a freehold estate or a lease" over the particular area. As discussed, the extended definition of "leases" in s 242(2) picks up mining leases which are not recognised at common law as leases. If the answer to that question is "yes", then s 47B(2) does not apply.

63. The question is whether a "mining lease" is included in the term "lease" in section 47B having regard to the provisions of the *Native Title Act* as a whole, not by reference to any presupposition as to the reach of s 47B.

64. For the reasons outlined previously, as a matter of proper construction, "mining leases" are not excluded from "leases" for the purpose of s 47B(1)(b)(i).

65. Nothing in s 47B(1)(b)(i) or elsewhere in the *Native Title Act* warrants modification of the effect of the otherwise clear words of the definitional provisions to give the term "lease" a separate and distinct meaning than what it is otherwise defined to be.

66. To the extent that the Appellants may, in substance, be inviting the Court to construe s47B(1)(b)(i) as reading, in effect, "... lease (other than a mining lease)" that ought be rejected. Where the *Native Title Act* is referring to a lease other than a mining lease, it says so. If mining leases were similarly meant to be excluded from the treatment of a "lease" under s 47B, the legislature easily could have done so using the same exclusionary form of words found elsewhere in the *Native Title Act*. It did not do so.

Part E of the Appellants' Submissions

67. The Appellants' argument in Part E of the *Appellants' Submissions* appears to be, in effect, that by reason of conditions which may attach to the grant of exploration tenements there may be some spatial or temporal uncertainty as to whether and where permission to use the land for mining purposes (the criterion in s 245(1) *Native Title Act*) has been given by the grant of the exploration tenements; and that the determination of the application of s 47B is thereby rendered difficult or impracticable, leading to the conclusion that "lease" ought not be read as including a

reference to a licence to explore. That argument was correctly, it is submitted, rejected by the *Ngurra FC* Full Court[30].

68. The Appellants' contentions appear to conflate substantively different *Native Title Act* provisions and legal concepts.

69. *First*, the Appellants appear to conflate the requirement in s 47B(1)(b)(ii) that land "is to be used" for a particular purpose with the definition in s 245(1) of a mining lease being "a lease ... that permits the lessee to use the land or waters covered by the lease solely or primarily for mining".

70. Section 245(1) of the *Native Title Act* is not concerned with whether the land "is to be used" for a particular purpose.[31] It is concerned with a permission given to the lessee to use land and waters.[32] The dicta from the *Ngurra* Full Court referred to in *Appellants' Submissions* at [52] concerned s 47B(1)(b)(ii), which draws attention to whether land or waters "*is to be used*". That is not the test for inclusion in s 245(1), or for the application of s 47B(1)(b)(i).

71. *Second*, the Appellants[33] appear to conflate the issue addressed in dicta in *Western* Australia *v Ward*[34] and *Western Australia v Brown*[35], being the criteria for determining inconsistency between native title and non-native title rights for the purpose of reckoning extinguishment of native title, with the substantively different issue of the construction of s 245(1) and s 47B(1)(b)(i), neither of which concerns extinguishment by the grant of the exploration tenements (or mining leases at all).

72. The definition of "permit" of the *Native Title Act* in s 244 does not require that in order for something to be permitted for the purposes, there be an immediate and unconditional approval in place to undertake activities which are permitted by the grant of the relevant lease. The fact that conditions may be placed upon the exercise of a right is neither surprising nor does it amount to the withholding of a right conferred by force of statute.

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30 *Ngurra FC*, [11]-[19] (CAB 77).
31 *Ngurra FC*, [7] and [23] (CAB 73 and 79).
32 *Ngurra FC*, [9]-[10] (CAB 74); *Tjiwarl FC*, [80] (CAB 642).
33 *Appellants' Submissions* [49]-[51].
34 (2002) 213 CLR 1.
35 (2014) 253 CLR 507.

73. *In addition,* the construction of the term "permits" pressed for by the Appellants must apply to *any* lease for which the *Native Title Act* directs an enquiry as to what the lease permits the lessee to do.

74. By way of example, a "residential lease" is a lease that permits the lessee to use the land or waters covered by the lease solely or primarily for constructing or occupying a private residence.[36] A lease which permitted the construction of a residence subject to relevant planning and development approvals being obtained would apparently not, on the Appellants' construction of "permit", be a residential lease.

75. In any event, the effect of the statutory definitions ought not affect their proper construction where, as in the present case, they are clear and unambiguous.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

76. It is estimated that the oral argument for the State will take 1 hour.

Dated: 6 September 2018

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[36] *Native Title Act*, s 249.