IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B26 OF 2014**

BETWEEN: **QUANDAMOOKA YOOLOOBURRABEE ABORIGINAL CORPORATION RNTBC**

Plaintiff

AND: **STATE OF QUEENSLAND**

Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth of Australia (Intervening) by:

Australian Government Solicitor
4 National Circuit, Barton, ACT 2600
DX 5678 Canberra

Date of this document: 13 March 2015

File ref: 14109799
Simon Thornton | Gavin Loughton
Telephone: 02 6253 7287
Lawyer's E-mail: Simon.Thornton@ags.gov.au | Gavin.Loughton@ags.gov.au
Facsimile: 02 6253 7303

PART I FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the Internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) generally in support of Queensland.

PART IV LEGISLATIVE PROVISIONS

3. In addition to the provisions in Annexure B of the Plaintiff's Submissions and the provisions in Part V of the Defendant's Submissions, the applicable legislative provisions are ss 8, 10, 11, 94A and 199A-199E of the *Native Title Act 1993* (Cth) (**NTA**).

PART V ARGUMENT

SUMMARY OF COMMONWEALTH SUBMISSIONS

4. This case concerns the relationship between:

   4.1. an Indigenous Land Use Agreement (**ILUA**) between Ian Delaney on his own behalf and on behalf of the Quandamooka People, the plaintiff, and the State of Queensland (**State**) dated 15 June 2011 (**Quandamooka ILUA**), which deals with a range of land management and native title matters in relation to North Stradbroke Island.[1] ILUAs are provided for in the NTA. The Quandamooka People hold native title over most of North Stradbroke Island, as found in 2 agreed determinations by the Federal Court of Australia under s 87 of the NTA (**Quandamooka Determinations**);[2] and

   4.2. ss 9 and 12 of the *North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013* (Qld) (**Amendment Act**),[3] which concern various mining leases on North Stradbroke Island over land subject to the native title of the Quandamooka People, and provide in particular for the renewal of the mining leases and the replacement of the Environmental Approval for some of them with an expanded 'restricted mine path'.

5. Section 10 of the NTA provides that native title is recognised and protected in accordance with the NTA, s 11 that native title is not able to be extinguished

1 Special Case Book (SCB), 204.

2 SCB, 609.

3 Which inserted new ss 11A-11J and 17 into the *North Stradbroke Island Protection and Sustainability Act 2011*(Qld).

contrary to the NTA, and s 24OA specifically states that unless the NTA provides otherwise, a 'future act', that is a legislative or other act which affects native title rights and interests, is invalid to the extent it does so.

6. Renewal of mining leases over areas of North Stradbroke Island that are subject to native title, including provision for their renewal as provided for in s 9 of the Amendment Act, is a future act. It follows from s 24OA of the NTA that any such renewal of the mining leases, and provision for such renewal,[4] must comply with the NTA itself to affect native title. The Quandamooka ILUA does not refer to such renewals, and therefore compliance with the NTA is not provided through the Quandamooka ILUA and s 24EB. Rather, the renewals must comply with other provisions of the NTA, relevantly either ss 24IC (future acts that are permissible lease etc renewals) with s 24ID, or ss 24MA or 24MB (future acts that pass the freehold test) with s 24MD. Failure to do so would render the Amendment Act's provision for such renewals invalid to the extent they affect native title by operation of s 24OA of the NTA and s 109 of the Constitution. Other future acts will also need to comply with relevant provisions of the NTA to avoid invalidity under s 24OA and s 109 of the Constitution.

7. But the plaintiff does not argue for invalidity under s 24OA. Rather it argues that the terms of the Quandamooka ILUA itself, through ss 24EA and 87 of the NTA, and s 109 of the Constitution, render ss 9 and 12 of the Amendment Act invalid. The Commonwealth submits that invalidity does not arise on this basis.

8. As to Question 1 on the Special Case, the Commonwealth submits that there is no term, express or implied, in the Quandamooka ILUA that purports to bind the State 'not to enact ss 9 and 12 of the Amendment Act'.

9. At any rate, and as to Question 2, terms of an ILUA under the NTA are not a law of the Commonwealth which can have the effect under s 109 of the Constitution of rendering invalid the terms of the Amendment Act. The terms of an ILUA have none of the indicia of legislation and are not legislative instruments or regulations, nor are they similar to industrial awards.

10. The NTA does give an ILUA some statutory effect. One effect is that a registered ILUA 'has effect as if it were a contract among the parties' (s 24EA(1)). This makes clear that the terms of the Quandamooka ILUA are not a law of the Commonwealth, but rather a contract, and therefore that any failure by the State to comply with a term needs to be enforced by contractual remedies.

11. Another effect is to enable future acts to be valid under the NTA (s 24EB(2)). But the NTA does not enable ILUAs to make future acts, such as the renewal of mining leases, invalid; only the NTA itself does this in s 24OA. Nor does the

---

[4] Pursuant to s 11D of the current version of the *North Stradbroke Island Protection and Sustainability Act 2011* (Qld) (which was inserted by s 9 of the Amendment Act), 'If the Minister considers that an application under section 11C has been properly made the Minister must renew the relevant mining lease'.

NTA enable the terms of ILUAs to have any other effect as a law of the Commonwealth.

12. Neither s 87 of the NTA nor a determination of native title under that section quarantine native title rights from State laws. Native title rights, including those that have been determined by the Federal Court, may be affected by State laws and things done under those laws, to the extent the NTA allows this. Rather, it is s 24OA, which quarantines and protects native title from State laws. The plaintiff has indicated by letter dated 10 March 2015 that it will not be pressing arguments in relation to the *Racial Discrimination Act 1975* (Cth) (**RDA**).

13. Question 1, and Question 2 if it is considered, should be answered 'no'.

OPERATION OF THE 'FUTURE ACT' REGIME

14. Before coming to the particular questions for the Court, it is necessary in this case to have a clear understanding of certain features of the NTA statutory regime; in particular how the 'future acts' regime in Pt 2, Div 3 of the NTA operates, including in relation to ILUAs (at [15]-[32] below) and the nature of consent determinations under s 87 of the NTA (at [33]-[37] below).

15. Division 3 of Part 2 of the NTA is headed 'Future acts etc and native title'.[5] As explained in the Second Reading Speech to the Native Title Amendment Bill 1997 (Cth), these provisions seek 'to answer the question: what acts can governments and others now undertake which may affect native title rights?'[6] The provisions implement the object of the Act in s 3(b) 'to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings'. Section 24AA(2), headed 'Overview', provides that, to the extent that a future act affects native title, it will be valid if covered by certain provisions of the Division, and invalid if not. 'Valid' is defined so as to include 'having full force and effect' (s 253).

16. This is effected by the overarching s 10 which provides that native title is recognised, and protected, in accordance with the NTA, and s 11 which provides that native title is not able to be extinguished contrary to the NTA, and then the specific 'future act' provisions:

    16.1. s 24OA, which provides that unless a provision of the NTA provides otherwise, a future act is invalid to the extent that it affects native title; and

---

5 The general operation of Pt 2, Div 3 before the major amendments made by the *Native Title Amendment Act 1998* (Cth) is discussed in *Western Australia v Commonwealth* (1995) 183 CLR 373, 453-4, 456-8 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (***Native Title Act Case***). The operation after those amendments is discussed in *Lardil Peoples v Queensland* (2001) 108 FCR 453, 461-5 [18]-[31], 470-3 [45]-[58] (French J), 481-2 [87]-[97] (Dowsett J); Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) [A2.40], [2.1150]-[2.1230]; Richard H Bartlett, *Native Title in Australia* (LexisNexis, 3rd ed, 2015) [23.4]-[23.13].

6 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 4 September 1997, 7889 [32] (Daryl Williams, Attorney-General and Minister for Justice).

16.2. Sub-div E-N of Div 3, which provide that the future acts to which they apply are valid to the extent that they affect native title.

17. A 'future act' is defined by s 233(1) as an act[7] that affects native title (or would affect native title if the act were valid), is not a 'past act',[8] and either:

17.1. consists of the making, amendment or repeal of legislation and takes place on or after 1 July 1993; or

17.2. is any other act that takes place on or after 1 January 1994.

18. An act 'affects' native title if it 'extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise' (s 227). Future acts generally include the compulsory acquisition of native title and the grant, or renewal, of mining leases over land subject to native title.[9] The renewal of a mining lease over areas of North Stradbroke Island subject to native title, and provision for the renewal by the amendments made by s 9 of the Amendment Act, would be partly inconsistent with the existence, enjoyment or exercise of that native title for the period of the renewals, and would therefore be future acts.

19. Section 24AA(3) explains that:

19.1. a future act will be valid if the parties to an ILUA within Sub-divs B (body corporate agreements)[10], C (area agreements[11] – the Quandamooka ILUA is an area agreement)[12] or D (alternative procedure agreements)[13] of Div 3 consent to it being done and, at the time it is done, details of the ILUA are on the Register of ILUAs (see s 199A); and

---

7 'Act' is defined to include: the making, amendment or repeal of legislation; the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument; the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters; the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise; the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation; and an act having any effect at common law or in equity (s 226(2)).

8 Relevantly, an act which is the making, amendment or repeal of legislation which takes place on or after 1 January 1994 cannot be a 'past act' (ss 228(2)(a)(i), (3)(c), (6)(d), (9)(e)). A non-legislative act which takes place on or after 1 January 1994 may be a 'past act' in certain circumstances (see ss 228(3), (4), (9)).

9 As to compulsory acquisition, see ss 24MD(2) and 25(1)(b). As to mining, see the notes under ss 24MA and 24MB and s 25(1)(a).

10 Which apply where there are registered native title bodies corporate in relation to all of the area in respect of which the agreement is made (s 24BC).

11 Which apply where there are no registered native title bodies corporate in relation to all of the area in respect of which the agreement is made (s 24CC).

12 SCB, 218.

13 Which apply where there is at least one registered native title body corporate in relation to land or waters in the area or at least one representative Aboriginal / Torres Strait Islander body for the area, but not where there are registered native title bodies corporate in relation to all of the area (s 24DD), and where the ILUA does not provide for the extinguishment of any native title rights or interests (s 24DC).

19.2. an ILUA may also validate a future act (other than an intermediate period act)[14] that has already been invalidly done.

20. The original 1993 NTA only provided for such agreements in very general terms.[15] These provisions were significantly extended by the *Native Title Amendment Act 1998* (Cth) (**1998 Act**) to achieve 'point 10 of the Ten Point Plan ... **to deal with future acts in accordance with ILUAs**'.[16] The then government's 10 Point Plan was a principal policy document for the 1998 Act,[17] and point 10 provided that 'measures would be introduced to facilitate the negotiation of voluntary but binding agreements as an alternative to more formal native title machinery.'[18] The Explanatory Memorandum stated that the new provisions 'are designed to give security for agreements with native title holders, whether there has been an approved determination of native title or not, provided certain requirements are met'.[19]

21. The outcome summarised by s 24AA(3) is effected by s 24EB and s 24EBA respectively. Section 24EB(1) provides that the consequences set out in s 24EB apply if a future act is done, and, when it is done, there are on the Register of ILUAs details of an ILUA that includes a statement to the effect that the parties consent to the doing of the act or class of act in which the act is included. The primary consequence in s 24EB is that the future act is valid to the extent that it affects native title in relation to land or waters in the area covered by the ILUA (s 24EB(2)). Other consequences are also prescribed by s 24EB(3)-(7), including application of the non-extinguishment principle[20] unless a relevant statement is included in the ILUA, and entitlements to compensation.

22. Section 24EA(1) provides that while details of an ILUA are entered on the Register of ILUAs, the ILUA has effect, in addition to any effect that it may have apart from s 24EA(1), as if:

22.1. it were a contract among the parties to the ILUA; and

22.2. all persons holding native title in relation to any of the land or waters in the area covered by the ILUA, who are not already parties to the ILUA, were bound by the ILUA in the same way as the registered native title bodies corporate, or the native title group, as the case may be.

---

14 Certain acts which took place during the period from 1 January 1994 to 23 December 1996 when native title existed (s 232A).

15 Section 21(1) of the original 1993 NTA provided that native title holders may 'under an agreement with the Commonwealth, a State or Territory' either '(a) by surrendering their native title rights and interests ... extinguish those rights or interests' or '(b) authorise any future act that will affect their native title'.

16 Emphasis added. Explanatory Memorandum, Native Title Amendment Bill 1997, [7.1]. The relevant provisions of the Explanatory Memorandum, Native Title Amendment Bill 1997 (No 2) are the same.

17 Explanatory Memorandum, Native Title Amendment Bill 1997, Ch 2.

18 Explanatory Memorandum, Native Title Amendment Bill 1997, [2.11].

19 At [7.2], quoted in *Edwards v Santos* (2011) 242 CLR 421, 431 [24] (Heydon J).

20 Defined in s 238.

23. Further, s 24EA(2) provides that, to avoid doubt, a person is not bound by the ILUA unless they are a party to the ILUA or a person to whom s 24EA(1)(b) applies.

24. Section 24EA(3) provides that the NTA does not prevent a State doing any legislative or other act to give effect to its obligations. The Explanatory Memorandum states in relation to this provision that 'if the agreement is to be supported by legislation so that it can be fully implemented, the relevant parliament can pass that legislation despite any other provision in the NTA.'[21]

25. Importantly, an ILUA is not the only path to validity for future acts. As s 24AA(4) explains, a future act will also be valid to the extent to which it is covered by other provisions in Pt 2, Div 3. Of particular relevance to the renewal of mining leases over native title land are provisions which provide for the validity of:

25.1. acts involving renewals (noted in s 24AA(4)(f), and provided for in s 24IA, with ss 24IC and 24ID); and

25.2. acts that pass the freehold test (noted in s 24AA(4)(j), and provided for in s 24MD, with ss 24MA and 24MB).

26. Each of the paths to validity falls within one of Sub-div F-N of Pt 2, Div 3. Provisions within each subdivision provide that future acts of the kinds covered by the particular subdivision will be valid to the extent that they affect native title, and set out the effect of the acts on native title (commonly the non-extinguishment principle applies), procedural steps to be fulfilled in relation to the acts, and entitlements to compensation for the acts. The procedural rights and entitlements to compensation vary between the subdivisions. It is therefore important to know under which provision a future act is valid (see Note to s 24AB(2)).

27. Section 24AB addresses this by providing that:

27.1. to the extent that a future act is covered by s 24EB (which deals with the effect of ILUAs on future acts), it is not covered by any of the sections listed in s 24AA(4); and

27.2. to the extent that a future act is covered by one of those sections, it is not covered by a section that is lower in the list (save in respect of a future act covered by both ss 24JAA and 24KA).

It is clear that 'covered by' in this context means that the requirements of the relevant section are met, with the result that the provision for validity operates, for example s 24EB(1) for the ILUA provisions.

28. The structure of Pt 2, Div 3 is that future acts which are subject to a registered ILUA, or fall within the other specified paths, are valid under the NTA, and only

[21] Explanatory Memorandum, Native Title Amendment Bill 1997, [7.6]. Section 24EA(3) is discussed further at [76] below.

those which fall outside all the paths are invalid. There is no capacity within the NTA scheme for an ILUA itself to make a future act invalid; this is simply not its role. Invalidity only flows from s 24OA.

29. The use of the terms 'valid' and 'invalid' in the NTA operate on State legislation through s 109 of the Constitution. As the plurality stated in the *Native Title Act Case*, the use of the term 'valid' in the NTA 'marks out the areas relating to native title left to regulation by State and Territory laws,' and 'invalid' marks out 'the areas relating to native title regulated exclusively by the Commonwealth regime'.[22]

10 30. In the Commonwealth's submission, ss 9 and 12 of the Amendment Act insofar as their operation affects native title, including in particular by any renewal of the mining leases, must comply with the NTA to avoid invalidity under s 24OA of the NTA and s 109 of the Constitution.

31. The Quandamooka ILUA does not refer to the renewals provided for in s 9 of the Amendment Act. Therefore compliance with the NTA is not provided for by s 24EB(1) with s 24EB(2).

32. Consequently, the renewals must comply with other provisions of the NTA, relevantly either ss 24IC (future acts that are permissible lease etc renewals) with s 24ID, or ss 24MA or 24MB (future acts which pass the freehold test) with
20 s 24MD. Failure to do so will render the Amendment Act's provision for the renewals invalid by operation of s 24OA of the NTA and s 109 of the Constitution, to the extent they affect native title. Further, the renewals may need to comply with procedural requirements in the NTA, in particular the 'right to negotiate' in Pt 2, Div 3, Sub-div P of the NTA.[23] Failure to comply with this right to negotiate process when required also brings invalidity (see ss 24ID(1)(a), 24MD(1) and 28). The State appears generally to acknowledge this position at [70] of its Annotated Submissions. Other future acts provided for by ss 9 and 12 of the Amendment Act also need to comply with a relevant provisions of the NTA to avoid invalidity under s 24OA and s 109 of the
30 Constitution.

OPERATION OF THE 'CONSENT DETERMINATION' REGIME

33. Part 4 of the NTA deals with determinations of the Federal Court. Its provisions apply in proceedings in relation to applications filed in the Federal Court that relate to native title (s 80). Division 1C deals with agreements and unopposed applications. It contains provisions dealing with: agreements to do things in relation to an application (s 86F); with what the Court may do if an application is unopposed (s 86G); and with the power of the Court if the parties reach agreement about either the terms of an order of the Court in relation to the

---

22 (1995) 183 CLR 373, 469 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

23 The 'right to negotiate process' applies to some renewals of a right to mine in accordance with s 24IC (see s 26(1A)) and the creation of some rights to mine including some renewals in accordance with the freehold test (s 26(1)(c)(i)). The definition of 'mine' in s 253 does not include some removal of sand, and there are a range of exclusions from the right to negotiate process, including in particular for some renewals (s 26D).

proceedings (s 87) or if agreement is reached on a proposed determination for part of an area covered by an application (s 87A).

34. Section 87 applies if (s 87(1)):

34.1. agreement is reached between the parties on the terms of an order of the Federal Court in relation to the proceedings, part of the proceedings or a matter arising out of the proceedings;

34.2. the terms of the agreement, in writing and signed by or on behalf of the parties, are filed with the Court; and

34.3. the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court.

35. By s 87(1A), the Court is given a discretion, to be exercised if it appears to the Court to be appropriate, to act in accordance with whichever of s 87(2) or s 87(3) is relevant, and s 87(5) if it applies in the particular case.

36. If the agreement is on the terms of an order of the Court, the Court may make an order in, or consistent with, those terms without holding (or completing) a hearing (s 87(2)). If the agreement relates to a part of the proceedings or a matter arising out of the proceedings, the Court may, by its order, give effect to the terms of the agreement without dealing at the hearing with the part of the proceedings or the matter arising to which the agreement relates (s 87(3)).

37. Section 94A (found in Pt 4, Div 3, headed 'Orders') provides that an order in which the Federal Court makes a determination of native title must set out details of the matters mentioned in s 225.

QUESTION 1: PROPER CONSTRUCTION OF THE ILUA

38. The plaintiff does not argue for the invalidity of ss 9 and 12 of the Amendment Act under s 24OA of the NTA and s 109 of the Constitution (as discussed at [32] above). Rather, it argues for invalidity under the terms of the ILUA itself, through ss 24EA and 87 of the NTA, and s 109 of the Constitution.

39. Therefore, Question 1 on the Special Case asks whether the Quandamooka ILUA properly construed, binds the State not to enact ss 9 and 12 of the Amendment Act. Whether it does so is a matter of construction of the terms of the ILUA, the object of which is to ascertain and give effect to the objective intention of the parties, and requires consideration not only of the text of the agreement, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.[24] The Quandamooka ILUA expressly provides for it to operate within the NTA regime, so that regime is an

---

[24] *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-7 [35] (French CJ, Hayne, Crennan and Kiefel JJ); *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461-2 [22] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

important consideration: it is not lightly to be concluded that the parties intended to frame the Quandamooka ILUA in such a way as to operate at variance with the principal statute that governs it.

No express term

40. There is no express term to this effect. It may be accepted that the list of Agreed Acts found in Sch 2 of the ILUA[25] is an exhaustive description of those future acts which the native title party has, under **cl 6 of the ILUA**:

    40.1. consented to, in accordance with s 24EB(1)(b) of the NTA;

    40.2. agreed that native title is extinguished by, in accordance with s 24EB(1)(d); and

    40.3. agreed are validated to the extent they were invalid, in accordance with s 24EBA(1)(a),

    as provided by cl 6.4 of the ILUA.[26]

41. But there is no express statement that no other future acts will be done by the State in respect of the land or waters the subject of the ILUA,[27] whether in cl 6 or otherwise.[28] The Quandamooka ILUA does not expressly prohibit the doing of any other future acts, or deny consent to such acts, or prohibit the making of ss 9 and 12 of the Amendment Act and the future acts they provide for.[29]

No basis for implication

42. The plaintiff's case must be that a term prohibiting the doing of any other future acts is implied into the ILUA by its construction. The ILUA is a formal contract, complete on its face, with the consequence that, for a term to be implied, the following conditions must be satisfied:[30]

---

25 SCB, 243.

26 SCB, 217. The identification in item 15 of Sch 2 of a class of future acts 'not otherwise addressed in items 1-14' does not do so because item 15, like the other items in Sch 2, simply defines a class of acts to which consent is given, namely the Routine, Procedural and Significant Acts (identified in Sch 20) which do not otherwise fall within items 1-14 of Sch 2: SCB, 243-4.

27 If the Amendment Act is an act which validly affects native title or would affect native title if it were valid, and it is not a past act, it is a future act (s 233(1)).

28 The acknowledgement by the parties in cl 13.10 that the Environmental Authorities will continue in force (SCB, 222) does no more than record the mutual knowledge or belief of the parties of a state of affairs outside the Quandamooka ILUA's terms which provides a context in which it was made. To 'acknowledge' such a fact is not to make a binding promise about it, particularly when contrasted with the other words used by the parties to create binding promises, such as 'represents and warrants (cl 4.2: SCB, 216), 'consents' (cl 6.1(a),(b): SCB, 217)) and 'agrees' (cll 6.1(c),(d): SCB, 217; 11.3; 13.1(b)-(f): SCB, 219-20; 18.1; 18.2: SCB, 223; 20.3: SCB 224).

29 SCB, 243-4.

30 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282-3 (Lord Simon, Viscount Dilhorne and Lord Keith), approved in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 605-6 (Mason J, the other members of the Court agreeing); *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 347 (Mason J, Stephen and Wilson JJ agreeing). See also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 422 (Brennan CJ, Dawson and Toohey JJ), 442-3 (McHugh and Gummow JJ).

42.1. the term must be reasonable and equitable;

42.2. the term must be necessary to give business efficacy to the contract;[31]

42.3. the term must be obvious;

42.4. the term must be capable of clear expression;[32] and

42.5. the term must not contradict any express term of the contract.

The plaintiff does not expressly address any of these requirements.[33]

43. Rather, the plaintiff relies on the absence from the 'exhaustive list' of Agreed Acts, in cl 6 and Sch 2, of matters effected by the Amendment Act (providing for renewal of the mining leases and expansion of the restricted mine path),[34] and on surrounding circumstances known to the parties.

44. But to describe the list of 'Agreed Acts' in the Quandamooka ILUA as an 'exhaustive list' is of no assistance.[35] It is true that these are the only acts agreed to in the Quandamooka ILUA by the plaintiff. But it does not follow that there can be implied into the Quandamooka ILUA that for all time thereafter while it is registered, no other future acts are or will be agreed to by the plaintiffs, or, more significantly, that for all time thereafter the State agrees that it will not undertake any other possible future acts.

45. As noted above (at [20]-[21]), and below (at [74]), the key purpose of ILUAs in the NTA is to give validity to a particular suite of identified future acts. This is disclosed by the terms of s 24EB, which gives statutory effect to this aspect of an ILUA.[36] The Quandamooka ILUA adopts this purpose in cl 6. There is no provision in the NTA which gives statutory effect to a term of an ILUA denying validity to a particular suite of identified acts, or to all unspecified future acts

---

31 The ILUA is effective to do what it expressly provides, ie to give consent to the doing of the future acts it describes. The implication of a term that no other future acts may be done is not necessary to give the ILUA efficacy.

32 The Plaintiff has not identified with precision or at all what the implied term would say.

33 Plaintiff's Annotated Submissions filed on 6 February 2015 (**Plaintiff's Submissions**), [26]-[36].

34 Plaintiff's Submissions, [32]-[33].

35 Plaintiff's Submissions, [28], [32], [36].

36 In *Fesl v Delegate of the Native Title Registrar* (2008) 173 FCR 150, 156-7 [21], Logan J observed as follows:

> The statutory provision for the making of an area agreement in respect of an area even where there are no registered native title claimants or registered native title bodies corporate balances two of the main objects of the [NTA]. Out of an abundance of caution and evidencing the recognition by the Parliament of the importance of native title, it liberalises membership of a 'native title group' in those circumstances to the extent of permitting those who do nothing more than claim to hold native title in relation to an area to have an opportunity to be heard and to have an opportunity to participate in decision-making. In this fashion the provision can be seen as a benign endeavour, out of an abundance of caution, to preserve native title where it may exist, fulfilling the objection in s 3(a) [NTA]. At the same time, by permitting the making in such circumstances of a consensual agreement the effect of which may be to extinguish native title by a future act done under the authority of a registered agreement, the [NTA] serves the object in s 3(b) by establishing a way in which a future dealing concerning native title may proceed.

which fall outside the ILUA for all time into the future. This legislative context tells against an implication of such a term in the Quandamooka ILUA. Such an implication could have serious consequences for the future management and regulation of land on North Stradbroke Island, and any purpose of this kind should be expressed in clear and plain terms, and should not be the subject of an implication.

46. In any event, such an outcome would be incongruous within the future act regime, for the following reasons. First, an ILUA should not preclude the native title party from entering into another ILUA pursuant to which it consented to the doing of other future acts, by the State or by a third party, in respect of the land or waters the subject of the ILUA. If registered, that other ILUA should be effective to validate the future acts it covers in accordance with s 24EB(2) of the NTA.

47. Secondly, an ILUA should not preclude the doing of a future act which was covered by one of the other provisions identified in s 24AA(4), ILUAs being only one of the paths by which a future act can be validly done under the NTA. Such an outcome would deny the operation and effect of those provisions.

48. It would also be incongruous with s 24AB, which prescribes the hierarchy of operation of the future act regime by reference to whether a future act 'is covered by' s 24EB. A future act is so covered only if, when it is done, there is a registered ILUA 'that includes a statement to the effect that the parties consent to the doing of the act or class of act in which the act is included' (s 24EB(1)(b)).

49. Even accepting that the surrounding circumstances known to the parties include the circumstances referred to in the Second Reading Speech for the Bill for the *North Stradbroke Island Protection and Sustainability Act 2011* (Qld) (**Principal Act**), an attempt to use of the statement by the Premier upon the introduction of the Bill to support contractual liability gives rise to issues of parliamentary privilege.[37] Further, the provisions of the Principal Act itself[38] are laws of the State, not terms of the ILUA. It cannot follow from simply the terms of the Principal Act that the parties intended (in the relevant sense) to create on the State's part an obligation, enforceable by the plaintiff and/or the native title party, not to pass legislation which altered or affected what was provided by the Principal Act, or (as appears to be the plaintiff's case) do any act in respect of the land and waters covered by the ILUA other than those listed in Sch 2 of the ILUA.

---

37 Section 8(1) of the *Parliament of Queensland Act 2001* (Qld) provides that '[t]he freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly'. Section 8(2) declares that 'subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688)'. The protection of parliamentary privilege extends to use of statements in Parliament in contractual disputes involving the relevant government: *Amann Aviation v Commonwealth* (1988) 19 FCR 223, see especially 230-1 (Beaumont J).

38 Plaintiff's Submissions, [35].

50. These matters deny the existence of an implied term in the ILUA that the only future acts which may ever be done in relation to the land and waters covered are those listed in Sch 2.

51. Finally, if the Special Case Question asks whether (leaving s 109 of the Constitution aside) the ILUA binds the State legislature from legislating to pass a law (which could be enforced by injunctive relief or a declaration of invalidity), the answer must be 'no'.[39] In the Commonwealth's submission, s 24EA(1)(a) of the NTA in providing that an ILUA has effect as if it were a contract does not mean an ILUA could conceivably bind a State legislature. If the question asks whether the ILUA creates an enforceable obligation not to legislate, breach of which gives rise to an entitlement to damages, the answer may also be 'no',[40] but the issue need not be determined in this case.

52. Question 1 should be answered in the negative.

PROPER CONSTRUCTION OF THE CONSENT DETERMINATION

53. A determination of native title is comprised in an order of the Court in which the Court determines, declares and sets out details of the matters in s 225 in relation to a defined 'determination area' (s 94A). It is a judgment *in rem* in which the Court determines rights as against the whole world in respect of the determination area.[41] There may only be one approved determination in relation to any particular area (s 68).

54. The determination declares, as at the date of the determination (or the date it is expressed to take effect), the nature and extent of the native title. The Quandamooka Determinations are expressed to be subject to and exercisable in accordance with the laws of the State and the Commonwealth.[42] The Quandamooka Determinations also declare, as at their effective date, the

---

39 See *Magrath v Commonwealth* (1944) 69 CLR 156, 169-70 (Rich J), 175 (McTiernan J), 183 (Williams J); *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1, 16-18 (Latham CJ, McTiernan J agreeing) (***Perpetual Trustees***), 28 (Dixon J); *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203, 204-5 (Dixon CJ, McTiernan, Webb, Fullagar, Kitto and Taylor JJ agreeing); *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 71 (Mason J) (***Ansett v Commonwealth***), citing *William Cory & Son Ltd v London Corp* [1951] 2 KB 476; *Re Michael; Ex parte WMC Resources Ltd* (2003) 27 WAR 574, 586 [45] (Parker J, Templeman and Miller JJ agreeing) (***Re Michael***).

40 See *Ansett v Commonwealth* (1977) 139 CLR 54, 76-7 (Mason J); cf *Magrath v Commonwealth* (1944) 69 CLR 156, 169-70 (Rich J), 175 (McTiernan J), 183 (Williams J); *Perpetual Trustees* (1948) 77 CLR 1, 16-18 (Latham CJ, McTiernan J agreeing), 28 (Dixon J: expressing the view that a contract purporting to bind the legislature is either void or is discharged upon the passage of the later legislation without any actionable breach).

41 *Western Australia v Ward* (2000) 99 FCR 316, 369 [193] (Beaumont and von Doussa JJ); *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 491-2 [173] (Wilcox, French and Weinberg JJ); *Jango v Northern Territory* (2007) 159 FCR 531, 558 [85] (French, Finn and Mansfield JJ); *Gamogab v Akiba* (2007) 159 FCR 578, 594 [59] (Gyles J, Sundberg J agreeing).

42 The native title rights and interests are expressed to be subject to and exercisable in accordance with the Laws of the State and the Commonwealth, defined to mean the common law and the laws of the State and the Commonwealth of Australia, including legislation, regulations, statutory instruments, local planning instruments and local laws (Quandamooka Determinations cll 7(a), 13: SCB, 613, 614, 695, 696).

non-native title rights and interests[43] subsisting in the determination area, and list the rights and interests under the Quandamooka ILUA,[44] and the mining leases,[45] as other interests. This reference to the Quandamooka ILUA, and the mining leases, gives them no greater effect.

55. A determination is not required (by ss 94A or 225) to declare what might happen to the native title or the non-native title rights and interests in the future. Properly, the Determinations made by the Federal Court on 4 July 2011 do not purport to do so.[46]

56. A determination does not, by its terms, constrain what the native title holders may do with their determined native title rights, nor what the respondent parties (including the government parties) may do with their non-native title rights and interests. A determination does not, by its terms, constrain what new laws a State Parliament can make and what actions a State Executive can take under State laws which affect native title. The Quandamooka Determinations do not purport to do so, indeed they make it clear that the native title rights are subject to the laws of the State.[47] The operation of those laws and actions on native title are the province of the NTA (in particular ss 10, 11 and 24OA, which prescribe the circumstances in which native title is able to be extinguished or otherwise affected), particularly the future act regime, just as they were prior to the determination of native title.

57. The utility of a determination of native title is that it is a final and conclusive declaration of rights in respect of the determination area by reference to which all acts to occur from that point in time forwards may be measured (ie as to whether or not they are future acts) and their validity determined as provided by the NTA.

58. Section 87 of the NTA simply confers power and jurisdiction on the Federal Court to make determinations of native title without holding or completing a hearing, and establishes the pre-conditions for the exercise of the power (principally an agreement between the parties as to the terms of the determination) and the mechanism by which this may occur (principally the filing of the agreement and possibly an agreed statement of facts).

59. It follows that there is nothing in the Quandamooka Determinations which binds the State, through the Quandamooka ILUA or otherwise, not to enact ss 9 and 12 of the Amendment Act.

---

43 Which are most commonly those granted or held pursuant to State and Commonwealth legislation.

44 Sch 7 of Determination 1 and Sch 6 of Determination 2 are headed 'Other Interests in the Determination Area': SCB 687, 725.

45 SCB, 687, 725.

46 SCB, 611 ff, 693 ff.

47 See above n 42.

QUESTION 2: INCONSISTENCY BETWEEN THE AMENDMENT ACT AND SECTION 24EA AND/OR SECTION 87 OF THE NTA

Section 109 is not engaged by the ILUA

60. The plaintiff apparently accepts that an ILUA is not itself a law of the Commonwealth within s 109 of the Constitution.[48] For the reasons which follow, the Commonwealth submits that an ILUA is not a law of the Commonwealth nor is it given the force and effect of a law of the Commonwealth by the NTA.[49]

Not a law of the Commonwealth

61. Aside from statutes or provisions in a statute, the expression 'a law of the Commonwealth' in s 109 is sufficiently general for s 109 to be capable of applying in relation to industrial awards, other legislative instruments and regulations.[50]

62. An ILUA is none of these things.[51] In particular, it is not a legislative instrument (see s 5 of the *Legislative Instruments Act 2003* (Cth)). It is not of a legislative character and it was not made in the exercise of a power delegated by the Parliament.[52] It is an agreement between parties, who may or may not include the Commonwealth or a State (ss 24BD, 24CD, 24DE), and who enter the agreement of their own volition and with a view to protecting or furthering their own interests. An ILUA does not create new rules of law having general application;[53] rather, it is binding only upon the parties to it, and to a limited class of others, namely other persons holding native title in relation to the area covered by the agreement (s 24EA(1)(b)). The NTA does give an ILUA some statutory effects, discussed at [71] and [74] below.

63. The Parliament has no control over the making or content of an ILUA; there is no power of parliamentary disallowance or scrutiny.

---

48 Plaintiff's Submissions, [17].

49 Cf Plaintiff's Submissions, [16]-[17], [46]-[47].

50 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 523 [38] (***Jemena v Coinvest***), citing *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 494-6, 499 (Isaacs J); *Ex parte McLean* (1930) 43 CLR 472, 479 (Isaacs CJ and Starke J), 480 (Rich J), 484-5 (Dixon J); *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151,158 (Latham CJ); *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 548-9 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ), which involved industrial awards under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (as amended); *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565, 591-4, 598 (Fullagar J, Dixon CJ agreeing), which involved regulations. See also *Co-operative Committee on Japanese Canadians v Attorney-General (Can)* [1947] AC 87, 106-7 (Lord Wright for the Board), which involved orders in council made by the Governor; *Blackley v Devondale Cream* (1968) 117 CLR 253, which also involved an industrial award; and *Airlines of New South Wales Pty Ltd v New South Wales (No 1)* (1964) 113 CLR 1, which involved regulations, aeronautical information publications and air navigation orders published, issued and prescribed under the regulations and the *Air Navigation Act 1920* (Cth).

51 The NTA does not describe an ILUA as a legislative instrument, or not a legislative instrument (*Acts Interpretation Act 1901* (Cth) s 15AE).

52 See, eg, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 495-6 (Isaacs J).

53 *Minister for Industry and Commerce v Tooheys Ltd* (1982) 42 ALR 260, 265 (Bowen CJ, Northrop and Lockhart JJ), quoting *Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ).

64. The decision whether to register an ILUA or not is confined to whether or not the statutory conditions for registration are satisfied (essentially, whether registered bodies corporate and registered native title claimants are parties and whether native title holders have been identified and authorise the ILUA: ss 24BI, 24CK, 24CL, 24DL – only the latter section requires any consideration of the content of the ILUA and the benefits to native title holders). These registration procedures are principally designed to ensure processes have been undertaken to identify and obtain the consent of the native title holders (ss 24CI, 24CK and 24CL), in particular in light of the provision in s 24EA(1)(b) for native title holders who are not parties to nonetheless be bound.

65. ILUAs are not required to be published in full:

65.1. notice of an ILUA lodged for registration is to be given which only identifies the area covered by the ILUA, names each party and gives their contact address, and sets out any statements of the kind mentioned in ss 24EB(1)(b), (c), (d) or 24EBA(1)(a) or a summary thereof (ss 24BH(2), 24CH(2), 24DI(2));[54] and

65.2. details of a registered ILUA to be entered on the Register are only a description of the area covered, the name of each party and their contact address, any period during which the ILUA will operate, and a reference to the fact that the ILUA contains any of the statements in ss 24EB(1), 24EBA(1) or (4) (s 199B, see also s 199E).

Not given the effect of a law of the Commonwealth

66. In addition to being not a law of the Commonwealth, an ILUA is not given the effect of a law. Ultimately, what is to be determined is whether the Parliament intended that the NTA give an ILUA the force and effect of a law of the Commonwealth within s 109 of the Constitution. Labels like 'creatures of statute'[55] and 'statutory protection'[56] do not assist that inquiry, particularly where

---

54 In addition, such notice is for a specific purpose, namely to ensure that all persons who hold, or may hold, native title in the area have been identified and notified of an ILUA and have either authorised the making of it or successfully taken steps to formalise their claim to hold native title in relation to the area covered by the ILUA: *Murray v National Native Title Tribunal* (2003) 132 FCR 402, 409 [23] (Spender, Branson and North JJ).

55 Plaintiff's Submissions, [16]. The following have been described as 'creatures of statute': a right to appeal (eg *Eastman v R* (2000) 203 CLR 1, 11 [14] (Gleeson CJ), 81-2 [248], 85 [257], 89 [266]-[267] (Kirby J); *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124, 133 (Brennan CJ, Gaudron and McHugh JJ)); the Federal Court of Australia (*Eastman v R* (2000) 203 CLR 1, 57 [175] (Gummow J)); conditional purchases of land (*Davies v Littlejohn* (1923) 34 CLR 174, 187-8 (Isaacs J)); grazing licences (*R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 344 (Mason J)); pastoral leases (*Wik Peoples v Queensland* (1996) 187 CLR 1, 112, 115 (Toohey J), 225, 242 (Kirby J)); Torrens system mortgages (*English Scottish and Australian Bank Ltd v Phillips* (1937) 57 CLR 302, 323 (Dixon, Evatt and McTiernan JJ)); enterprise agreements (*Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339, 366 [72] (North, McKerracher and Reeves JJ)).

56 Plaintiff's Submissions, [16], [17]. The following have been said to give 'statutory protection': provisions about publication of defamatory matter under the *Freedom of Information Act 1989* (NSW) (*Ainsworth v Burden* (2003) 56 NSWLR 620, 623 [10]-[11] (Handley JA)); provisions giving immunity from action to persons discharging public functions (eg *Webster v Lampard* (1993) 177 CLR 598, 620-1, 624 (McHugh J)); provisions protecting confidentiality of commercial fishermen's logbooks (*Seeter Pty Ltd v Hester* [2004] FCAFC 39, [24] (Beaumont, Dowsett and Allsop JJ)); provisions to

an ILUA lacks a legislative character. The surest guide to the legislative intention is the language which has actually been employed in the text of the legislation.[57] As Professor Enid Campbell has noted, what 'seems to be required to translate contractual obligations into statutory obligations is a statutory provision which expressly declares that the agreement shall take effect as if enacted in the Act, repetition of the terms of the agreement in in the body of the statute, or a statutory direction that the terms of the agreement be carried out'.[58] None of these requirements are met here.

67. The factors set out above as to why an ILUA is not a law of the Commonwealth suggest it is unlikely it would have the effect of such a law. Significant legal and policy issues would arise if the specific terms of an ILUA which are not made in the exercise of a power delegated by the Commonwealth Parliament, indeed which can be made without any involvement of the Commonwealth, with no power of Parliamentary disallowance or scrutiny, and which are not published, or available, to the Australian parliaments, governments, courts and tribunals or the public, had effect as a law of the Commonwealth.

68. Further, absent from the NTA is any express provision that an ILUA will prevail over inconsistent State laws.[59] The NTA expressly provides that it is not intended to affect the operation of any law of a State or Territory that is capable of operating concurrently with the NTA (s 8). This limitation on the effect of the NTA extends to delegated legislation under the NTA, but as noted an ILUA is not such delegated legislation. Also absent is any provision that an ILUA has the force of law.[60]

69. Also absent is any express provision prescribing compliance with the terms of an ILUA, eg by imposing a penalty for non-compliance or expressly prohibiting non-compliance.[61]

---

protect parties in a weak bargaining position (eg *Caltex Oil v Best* (1990) 170 CLR 516, 525 (Mason CJ, Gaudron and McHugh JJ)).

57 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 388 [23] (French CJ and Hayne J), 405 [70] (Crennan and Bell JJ); *Kline v Secretary to Governor-General* (2013) 249 CLR 645, 659-60 [32] (French CJ, Crennan, Kiefel and Bell JJ); *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 314 ALR 192, 192 [39], 193 [42] (Crennan, Bell and Gageler JJ), 207 [104] (Kiefel and Keane JJ).

58 Enid Campbell, 'Legislative Approval of Government Contracts' (1972) 46 *Australian Law Journal* 217, 218.

59 This is a recognised and effective means of excluding inconsistent State law: see *Momcilovic v The Queen* (2011) 245 CLR 1, 115-16 [260] (Gummow J). Such a provision was identified in the federal legislation in *Metal Trades Industry Association of Australia v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632, 648-9 (Mason, Brennan and Deane JJ), cf 641 (Gibbs CJ, Wilson and Dawson JJ); *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 549 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ); *TA Robinson & Sons Pty Ltd v Haylor* (1957) 97 CLR 177, 182-3; and *Jemena v Coinvest* (2011) 244 CLR 508, 516-17 [11].

60 Unlike s 3 of the *Commonwealth Aluminium Corporation Pty Ltd Agreement Act 1957* (Qld), which provided that the provisions of the agreement scheduled to the Act were to have the force of law as though the agreement were an enactment of the Act, with the effect that the agreement had the force of law: *Wik Peoples v Queensland* (1996) 187 CLR 1, 99 (Brennan J), 258 (Kirby J), cf 131 (Toohey J), 135 (Gaudron J) and 170 (Gummow J).

61 Unlike ss 44 and 49 of the *Commonwealth Conciliation and Arbitration Act 1904-1921* (Cth) and subsequent provisions to similar effect, as to which see n 65 below.

70. Commonwealth industrial legislation has provided, since the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) was first enacted, that a Commonwealth award prevails over inconsistent State laws or awards,[62] that it is 'binding on' (or words to that effect) a range of persons,[63] and binding not merely in a contractual sense but in a way that is enforceable by the imposition by a court of pecuniary penalties (and ultimately, until 1930, imprisonment)[64] for non-observance.[65] Further, award hearings have generally been held in public,[66] and determinations have been publicly available.[67] It is within these legislative contexts that such awards have been held to have effect as laws of the Commonwealth.[68] Such a legislative context is absent for ILUAs.

71. The NTA does give an ILUA some statutory effect. One effect is that a registered ILUA 'has effect as if it were a contract among the parties' (s 24EA(1)(a)). This makes clear that the terms of the Quandamooka ILUA are not a law of the Commonwealth, but rather that any failure by the State to comply with a term prohibiting the doing of acts, if there were any, needs to be enforced only by and against the parties (and the limited additional class prescribed in s 24EA(1)(b)) by contractual remedies.[69]

72. In *Sankey v Whitlam* (1978) 142 CLR 1 (***Sankey***), the High Court held that a purpose prohibited by cl 4(4) of the Financial Agreement 1927 was not 'unlawful under a law of the Commonwealth' within the meaning of s 86(1)(c) of the *Crimes Act 1914* (Cth). Although *Sankey* did not involve any issue of s 109 inconsistency, the Court unanimously held that the Financial Agreement was

---

62 See, eg, s 30 of the *Commonwealth Conciliation and Arbitration Act 1904-1921* (Cth), considered in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466; s 152 (and later, s 17) of the *Workplace Relations Act 1996* (Cth), considered in *Jemena v Coinvest* (2011) 244 CLR 508.

63 See, eg, s 29 of the *Commonwealth Conciliation and Arbitration Act 1904-1921* (Cth), considered in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466. Although not expressly mentioned in the judgment, equivalent provisions (s 149 and later, s 543 of the *Workplace Relations Act 1996* (Cth)) formed part of the legislative schemes considered in *Jemena v Coinvest* (2011) 244 CLR 508.

64 Section 5 of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (as amended) was repealed by the *Conciliation and Arbitration Act 1930* (Cth) (No 43 of 1930).

65 See eg, ss 44 and 49 of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (as amended), being provisions in force at the time of *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, *HV McKay Pty Ltd v Hunt* (1926) 38 CLR 308, and *Ex parte Mclean* (1930) 43 CLR 472, all cases in which a State law was held invalid by reason of s 109 inconsistency with a Commonwealth award as given effect by Commonwealth statute. Similar provisions (s 149 and later, s 543 of the *Workplace Relations Act 1996* (Cth)) formed part of the legislative schemes considered in *Jemena v Coinvest* (2011) 244 CLR 508.

66 *Qantas Empire Airways Ltd v Australian Air Pilots Association* (1954) 80 CAR 108, 111 ff.

67 See, eg, s 25B of the *Commonwealth Conciliation and Arbitration Act 1904-1921* (Cth); s 567(3)(b) (from 27 March 2006) of the *Workplace Relations Act 1996* (Cth). Many awards were also published in the volumes of the Commonwealth Arbitration Reports.

68 See the references at n 50 above.

69 Section 24EA(1) makes clear that:

(a) formal defects or other matters which would prevent an agreement (as required by s 24EA(1)) being a binding contract at common law will not prevent an ILUA binding the parties as if it were a contract; and

(b) all persons who hold native title in the area are bound by the ILUA as parties, including those who may not be included in or represented by the formal parties, and may not have authorised the making of the ILUA (s 24CG(3)(b)(ii)).

not a law of the Commonwealth.[70] The Court further held that neither s 105A of the Constitution nor the *Constitution Alteration (State Debts) 1928*, the *Financial Agreement Act 1928* (Cth), the *Financial Agreement Validation Act 1929* (Cth) or the *Financial Agreement Act 1944* (Cth) gave the Financial Agreement the force of law.[71] This was because the Constitution and the Acts did not impose any separate statutory obligation on the Commonwealth and the States to carry out the provisions of the Agreement; they merely approved the making of the Agreement or made it binding on the parties or both. The Agreement was therefore 'not converted from a contract into a law with each of its clauses having the character of a statutory provision'.[72] Justice Mason explained:[73]

> To say, even in a statute, that an agreement is binding on the parties, is to do no more than give the agreement validity and efficacy as a contract, more especially when in the absence of statute the contract would have been invalid.[74]

73. Of course, a State law which provided that an ILUA did not have an effect as if it were a contract would be inconsistent with s 24EA(1) of the NTA itself. But s 24EA(1) not only does not convert an ILUA into a Commonwealth law, it reveals an intention that the NTA not do so.

74. Another statutory effect is to enable legislative and other acts which affect native title to be valid under the NTA (s 24EB(2), as outlined above at [14]-[29]). But while this gives an ILUA a broader legal effect, it does not suggest any intention to make the terms of an ILUA a law of the Commonwealth.

75. Further, as noted above at [45], the NTA does not enable ILUAs to make future acts invalid. The function of an ILUA is to expand the circumstances in which a future act will be valid (s 24EB(2)). There is nothing in the text of the provisions, their context, or their purpose that suggests that the effect of an ILUA can be to contract the circumstances in which a future act will be valid. Only the NTA itself provides for such invalidity, in 24OA.[75] An ILUA may contain a promise by one party not to take particular action. But there is nothing in the NTA which gives such a promise a statutory effect, apart from as a contract. Any suggestion of an implication to this effect would run contrary to the express terms of 24EB(2), and the structure and purpose of Pt 2, Div 3 of the NTA, as evidenced by s 24AA and 24OA. Section 24EA(1) makes it clear that such a promise is contractual, but only contractual, in effect.

---

70 (1978) 142 CLR 1, 30-1 (Gibbs ACJ), 75-6 (Stephen J), 91 (Mason J), 102 (Jacobs J agreeing), 106 (Aickin J).

71 Ibid, 30-2 (Gibbs ACJ), 76-7 (Stephen J), 90-1 (Mason J), 102 (Jacobs J agreeing), 106 (Aickin J).

72 Ibid, 90.

73 Ibid, 89. See also at 29-31 (Gibbs ACJ), 74-5 (Stephen J), 105-106 (Aickin J).

74 See generally Campbell, above n 58. See also *Re Michael* (2003) 27 WAR 574, 579-81 [22]-[26] (Parker J, Templeman and Miller JJ agreeing); *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 402 (Latham CJ), 410, 412 (Dixon J), 421 (Williams J); *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353 at 357 (Kitto J), 364 (Menzies J), 368 (Windeyer J); *Taylor v Ansett Transport Industries Ltd* (1987) 18 FCR 342, 362 (Ryan J, Northrop and Fisher JJ agreeing).

75 The NTA could include a regime for ILUAs to have a role of this nature, but does not do so at present.

76. Section 24EA(3) is directed to ensuring that the future act regime does not operate to impede the Commonwealth, a State or a Territory from giving effect to their obligations under an ILUA.[76] Legislative steps to give effect to those obligations could be future acts, to which the future act regime would apply. This sub-section confirms that future acts affecting native title subsisting in a particular area, which are not described and consented to in an ILUA in respect of that area, will be the subject of the future act regime unless they are done to give effect to obligations under that ILUA. If they are not done to give effect to obligations under that ILUA, the future act regime will operate and the validity of those acts will fall to be determined in accordance with its provisions, including by operation of s 109 to the extent that State legislation purported to give effect to a future act inconsistently with the future act provisions in the NTA.

77. As s 24EB does not confer on ILUAs the force and effect of a law of the Commonwealth, there can be no inconsistency between s 24EB and the Amendment Act.

Section 109 is not engaged by the Determination

78. The plaintiff asserts, in reliance upon the observations of Gaudron J in *Re Macks; Ex parte Saint*, that the Amendment Act is inconsistent with the Quandamooka Determinations.[77] This submission ignores the nature of a determination of native title, and the future act provisions of the NTA.

79. The Quandamooka Determinations make it clear that the native title rights are subject to the laws of the State.[78] The law which conferred the jurisdiction on the Federal Court to make the Determinations (s 87) must also be construed in light of the future act provisions which prescribe the way in which acts which affect the determined native title may validly proceed. A determination of native title does not deny the ongoing operation of those provisions. Hence, its operation as a declaration of rights and interests is at a particular point in time.

80. The Amendment Act must be interpreted in that context, since doing so ensures its constitutional validity.[79] The Amendment Act does not seek to alter, impair or detract from the operation of the law that conferred jurisdiction to make the Determinations[80] (s 87) because any impact which the Amendment Act has upon the determined rights and interests is resolved via the future act provisions, with the effect that the Amendment Act cannot validly affect the native title rights and interests except as prescribed by the NTA (ss 10, 11 and 24OA).

---

76 Cf Plaintiff's Submissions, [16]; and above at [24].

77 (2000) 204 CLR 158 at 186 [54]. Cf Plaintiff's Submissions, [46]-[47], [56].

78 See cl 7(a): SCB, 613, 695.

79 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 226-7 [97] (Gummow, Hayne, Crennan and Bell JJ).

80 *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 186 [54] (Gaudron J).

81. It is this future act regime rather than the RDA[81] which determines the validity of ss 9 and 12 of the Amendment Act. The plaintiff has indicated by letter dated 10 March 2015 that it will not be pressing the arguments outlined at [57] of its submissions in relation to the RDA.

Inconsistency

82. Given that s 109 is not engaged by the Quandamooka ILUA or the Determinations, Question 2 should be answered in the negative.

83. In addition, on the construction of the Quandamooka ILUA and the Determinations as set out above, they do not have 'everything to say' about the same subject matter as the Amendment Act.[82]

Concluding comment

84. This is not to say that the renewal of the mining leases and other future acts provided for in ss 9 and 12 of the Amendment Act will be valid under the NTA. As discussed at [32] above, the renewals and other future acts will need to comply with the provisions of the NTA to avoid invalidity under s 24OA, and relevant procedural requirements.

PART VI ESTIMATED HOURS

It is estimated that 45 minutes will be required for the presentation of the oral argument of the intervener.

Dated: 13 March 2015

.....
Justin Gleeson SC
Solicitor-General of the Commonwealth
Telephone: 02 6141 4145
Facsimile: 02 6141 4149
Email: justin.gleeson@ag.gov.au

.....
Robert Orr QC
Telephone: 02 6253 7129
Facsimile: 02 6253 7303
Email: robert.orr@ags.gov.au

.....
Sonia Brownhill
Telephone: 08 8982 4700
Facsimile: 08 8941 1541
Email: sbrownhill@williamforster.com

Counsel for the Attorney-General of the Commonwealth of Australia (Intervening)

81 Plaintiff's Submissions, [57].

82 Cf Plaintiff's Submissions, [59].

Annexure A – Legislative Provisions

Native Title Act 1993

No. 110, 1993 as amended

Compilation start date: 1 July 2014

Includes amendments up to: Act No. 62, 2014

Prepared by the Office of Parliamentary Counsel, Canberra

(c) deals with other matters such as the keeping of registers and the role of representative Aboriginal/Torres Strait Islander bodies.

5 Act binds Crown

This Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island. However, nothing in this Act renders the Crown liable to be prosecuted for an offence.

6 Application to external Territories, coastal sea and other waters

This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*.

7 Racial Discrimination Act

(1) This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*.

(2) Subsection (1) means only that:

(a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and

(b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.

(3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.

8 Effect of this Act on State or Territory laws

This Act is not intended to affect the operation of any law of a State or a Territory that is capable of operating concurrently with this Act.

Part 2—Native Title

Division 1—Recognition and protection of native title

10 Recognition and protection of native title

Native title is recognised, and protected, in accordance with this Act.

11 Extinguishment of native title

(1) Native title is not able to be extinguished contrary to this Act.

Effect of subsection (1)

(2) An act that consists of the making, amendment or repeal of legislation on or after 1 July 1993 by the Commonwealth, a State or a Territory is only able to extinguish native title:

(a) in accordance with Division 2B (which deals with confirmation of past extinguishment of native title) or Division 3 (which deals with future acts etc. and native title) of Part 2; or

(b) by validating past acts, or intermediate period acts, in relation to the native title.

13 Approved determinations of native title

Applications to Federal Court

(1) An application may be made to the Federal Court under Part 3:

(a) for a determination of native title in relation to an area for which there is no approved determination of native title; or

(b) to revoke or vary an approved determination of native title on the grounds set out in subsection (5).

Division 3—Orders

94 Order that compensation is payable

If the Federal Court makes an order that compensation is payable, the order must set out:

(a) the name of the person or persons entitled to the compensation or the method for determining the person or persons; and

(b) the method (if any) for determining the amount or kind of compensation to be given to each person; and

(c) the method for determining any dispute regarding the entitlement of a person to an amount of the compensation.

94A Order containing determination of native title

An order in which the Federal Court makes a determination of native title must set out details of the matters mentioned in section 225 (which defines ***determination of native title***).

94B Order relating to an application that has been referred for mediation

If an application under section 61 is referred for mediation under section 86B, the Federal Court must take into account:

(a) any report relating to the mediation that is provided to the Court under subsection 94N(1), (2) or (4); and

(b) any regional mediation progress report and any regional work plan that is provided to the Court under subsection 94N(3) that covers a State, Territory or region that includes the area covered by the application;

when it decides whether to make an order relating to the application.

Part 8A—Register of Indigenous Land Use Agreements

199A Register of Indigenous Land Use Agreements

Establishment

(1) There is to be a Register known as the Register of Indigenous Land Use Agreements.

Registrar to establish and keep

(2) The Register must be established and kept by the Registrar.

Register may be kept by computer

(3) The Register may be kept by use of a computer.

199B Contents of the Register etc.

Information to be included

(1) If the Registrar is required by Subdivision B, C or D of Division 3 of Part 2 to register an agreement, the Registrar must enter in the Register the following details of the agreement:

(a) a description of the area covered by the agreement; and

(b) the name of each party to the agreement and the address at which the party can be contacted; and

(c) if the agreement specifies the period during which it will operate—that period; and

(d) if the agreement includes any of the statements mentioned in subsection 24EB(1) or 24EBA(1) or (4)—a reference to the fact, setting out any such statement.

Other information

(2) The Registrar may also enter in the Register any other details of the agreement that the Registrar considers appropriate.

Notification of Commonwealth, State or Territory

(3) If the agreement relates to any future act, as soon as reasonably practicable after entering the details, the Registrar must give notice in writing:

(a) advising that the details have been entered; and

(b) setting out the details;

to any person or body to which the Registrar gave notice of the agreement under subsection 24BH(1) or paragraph 24CH(1)(a) or 24DI(1)(a).

Updating parties' contact details

(4) If a party to an agreement notifies the Registrar of a change in the address at which the party can be contacted, the Registrar must update the Register to reflect the change.

199C Removal of details of agreement from Register

Cases requiring removal

(1) Subject to subsection (1A), the Registrar must remove the details of an agreement from the Register if:

(a) in the case of an agreement under Subdivision B of Division 3 of Part 2—an approved determination of native title is made in relation to any of the area covered by the agreement, and the persons who, under the determination, hold native title in relation to the area are not the same as those who had previously been determined to hold it; or

(b) in the case of an agreement under Subdivision C of Division 3 of Part 2—an approved determination of native title is made in relation to any of the area covered by the agreement, and any of the persons who, under the determination, hold native title in relation to the area is not a person who authorised the making of the agreement as mentioned in:

(i) if the application relating to the agreement was certified by representative Aboriginal/Torres Strait Islander

bodies as mentioned in paragraph 24CG(3)(a)—paragraph 203BE(5)(b); or

(ii) if the application relating to the agreement included a statement as mentioned in paragraph 24CG(3)(b) to the effect that certain requirements have been met—that paragraph; or

(c) in any case:

(i) a party advises the Registrar in writing that the agreement has expired, and the Registrar believes, on reasonable grounds, that the agreement has expired; or

(ii) all the parties advise the Registrar in writing that they wish to terminate the agreement; or

(iii) the Federal Court, under subsection (2), orders the details to be removed.

Note: If the details of an agreement are removed from the Register, the agreement will cease to have effect under this Act from the time the details are removed: see subsection 24EA(1) and paragraph 24EB(1)(b).

Federal Court order not to remove details

(1A) If:

(a) the Registrar is or will be required to remove the details of an agreement from the Register in a case covered by paragraph (1)(a) or (b); and

(b) the persons who, under the approved determination of native title mentioned in that paragraph, hold native title apply to the Federal Court for an order under this subsection; and

(c) the Federal Court is satisfied that those persons accept the terms of the agreement, in accordance with the process by which they would authorise the making of such an agreement;

the Federal Court may order the Registrar not to remove the details of the agreement from the Register.

Federal Court order to remove details

(2) The Federal Court may, if it is satisfied on application by a party to the agreement, or by a representative Aboriginal/Torres Strait

Islander body for the area covered by the agreement, that the ground in subsection (3) has been made out, order the Registrar to remove the details of the agreement from the Register.

Ground for order

(3) The ground is that a party would not have entered into the agreement but for fraud, undue influence or duress by any person (whether or not a party to the agreement).

Compensation order

(4) If the Court orders the Registrar to remove the details, the Court may also order the person who committed the fraud, exerted the influence or applied the duress to pay compensation to any party to the agreement who will suffer loss or damage as a result of the removal of the details.

199D Inspection of the Register

Register to be available during business hours

(1) Subject to section 199E, the Registrar must ensure that the Register is available for inspection by any member of the public during normal business hours.

If register kept on computer

(3) If the Register is kept wholly or partly by use of a computer, subsection (1) is taken to be complied with, so far as the Register is kept in that way, by giving members of the public access to a computer terminal that they can use to inspect the Register, either by viewing a screen display or by obtaining a computer print-out.

199E Parts of the Register to be kept confidential

(1) If the parties to an agreement whose details are entered on the Register advise the Registrar in writing that they do not wish some or all of the details to be available for inspection by the public, section 199D does not apply to the part of the Register containing the details concerned.

Exception for basic information

(2) Subsection (1) does not apply to details required to be entered in the Register under subsection 199B(1).

199F Delegation by Registrar

The Registrar may, by signed instrument, delegate all or any of his or her powers under:

(a) this Part; or

(b) Subdivision B, C or D of Division 3 of Part 2 (which also deals with indigenous land use agreements);

to the holder of an office, or to a body, established by or under a law of a State or Territory, if the State or Territory agrees to the delegation.