IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No. B26 of 2014**

BETWEEN: **Quandamooka Yoolooburrabee Aboriginal Corporation RNTBC**
Plaintiff

AND: **State of Queensland**
Defendant

PLAINTIFF'S ANNOTATED SUBMISSIONS

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ed on behalf of the plaintiff by:
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Part I: Certification

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

Part II: Issues presented by the Special Case

2. The questions stated for the opinion of the Full Court[1] present the following issues:

    1. Is s 109 of the Constitution capable of applying to inconsistencies between State law, and an Indigenous Land Use Agreement which has been registered on the Register of Indigenous Land Use Agreements as an area agreement under ss 24CA to 24CL of the *Native Title Act 1993* (Cth), and has the effect provided in s 24EA?

    2. If yes, insofar as the *North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013* (Qld) (**Amendment Act**) in ss 9 and 12:

        (a) allows the holders of certain mining leases (ML1105, ML1109, ML117 and ML1120) to apply for the renewal of those leases and for renewal periods, determined by the relevant Minister, longer than those provided in the *North Stradbroke Island Protection and Sustainability Act 2011* (Qld) (**Principal Act**), and

        (b) omits the conditions in Environmental Authority MIN100971509 issued to Stradbroke Rutile Pty Ltd with effect from 3 March 2010 under s 292(2)(j) of the *Environmental Protection Act 1994* (Qld) (**EPA Act**) (**the EA**), as amended by the Principal Act, restricting the *"winning of a mineral"* for ML1005 and ML1117 to be conducted only within the *"restricted mine path"* for those leases and to be conducted only until the end of 31 December 2019,

        is it inconsistent with the Indigenous Land Use Agreement entered into between the Quandamooka People, the plaintiff and the defendant on 15 June 2011, and registered on the Register of Indigenous Land Use Agreements on 8 December 2011 (**the ILUA**)?

    3. Is s 109 of the Constitution capable of applying to inconsistencies between State law, and a determination by the Federal Court under s 87 of the *Native Title Act* 1993 (Cth)?

    4. If yes, is the Amendment Act inconsistent with the determination by the Federal Court of the native title rights and interests, and other interests, of the Quandamooka people on 4 July 2011 in *Delaney on behalf of the Quandamooka People v State of Queensland* [2011] FCA 741.

Part III: Section 78B Notices

3. The plaintiff has given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth).[2]

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[1] Special Case Book (**SCB**), vol 1, pp 41-51 (**Special Case**), p 50.

Part IV: Relevant facts

4. The relevant facts are agreed, and set out in the Special Case.[3] The Special Case concerns a series of mining leases granted by the defendant pursuant to Queensland mining legislation authorising mining for mineral sands in various areas of North Stradbroke Island (Minjerribah) for various terms. The relevant leases are ML1105, ML1109, ML1117 and ML1120[4], each of which had on various occasions, prior to the commencement of the Principal Act, been renewed, and two of which had been the subject of applications for renewal.

5. The table at **Annexure A** summarises the commencement and renewal dates of each lease under relevant mining legislation, and the expiry dates and restrictions on mining stipulated under the Principal Act and the Amendment Act.

Part V: The plaintiff's argument

(a) Section 109 of the Commonwealth Constitution: applicable principles

6. The paramountcy of the Parliament of the Commonwealth under the Constitution resolves any conflict between Commonwealth and State law as set out in covering cl 5 and s 109 of the Constitution: *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 per the whole Court at [36] ('*Jemena Asset*'). In the context of the law-making powers of the State and Commonwealth Parliaments under their respective Constitutions, s 109 requires a comparison between any two laws which create rights, privileges or powers, and duties or obligations, and s 109 resolves conflict, if any exists, in favour of the Commonwealth: *Jemena Asset* per the whole Court at [37].

7. In *Victoria v The Commonwealth* ('*The Kakariki*') (1937) 58 CLR 618 at 630 Dixon J stated two propositions respecting s 109, the first of which is often associated with the description "*direct inconsistency*", and the second with the expressions "*covering the field*" and "*indirect inconsistency*": *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 per the whole Court at [28] ('*Worthing*'); also *Dickson v The Queen* (2010) 241 CLR 491 per the whole Court at [13]-[14] ('*Dickson*'). From the outset, the aspect of inconsistency associated with the expression "*covering the field*" has not been free from criticism: *Jemena Asset* per the Court at [40]; *Momcilovic v The Queen* (2011) 245 CLR 1 per Gummow J at [263]-[264]; Crennan and Kiefel JJ at [627]-[62] ('*Momcilovic*'). Further, it has been suggested that speaking of different classes of inconsistency tends to obscure the task at hand in s 109 cases, namely to apply that provision "*only after careful analysis of the particular laws in question to discern their true construction*": *Momcilovic* per Gummow J at [245]; also at [258]-[261]. In any event, as was recognised by Mason J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 260, different tests of inconsistency directed to the same end are interrelated and in any one case more than one test may be applied in order to establish inconsistency for the purposes of s 109: *Jemena Asset* per the Court at [42]; also *Momcilovic* per Crennan and Kiefel JJ at [630].

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2 SCB, vol 1, p 21.
3 SCB, vol 1, pp 41-51.
4 As to each, see Special Case, SCB, vol 1at 43-45.

8. In considering s 109 inconsistency, the fundamental question would appear to remain that identified by the Court in *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 339, namely whether the State law in question "*would qualify, impair and, in a significant respect, negate the essential legislative scheme*" of the Commonwealth Act: see *Worthing* at [28]; *Dickson* at [133]. Using the language of Dixon J in *The Kakariki*, the question is whether the operation of the State law is such as to "*alter, impair or detract from*" that of the federal law.

9. The "*crucial notions*" of "*altering*", "*impairing*" or "*detracting from*" the operation of a law of the Commonwealth have "*in common the idea that a State law conflicts with a Commonwealth law if the State law undermines the Commonwealth law*": *Jemena Asset* per the Court at [41]. It follows that "*any alteration or impairment of, or detraction from, a Commonwealth law must be significant and not trivial*": Id. All tests of inconsistency which have been applied by the Court for the purpose of s 109 are tests for discerning whether a "*real conflict*" exists between a Commonwealth law and a State law: *Jemena Asset* per the Court at [42]. The end is to determine whether there is a "*real conflict*" between the laws under consideration: *Momcilovic* per Crennan and Kiefel JJ at [630].[5]

10. Not only must any alteration or impairment of, or detraction from a Commonwealth law be "*significant and not trivial*", a different result will also obtain if the Commonwealth law operates within the setting of other laws so that it is "*supplementary to or cumulative upon the State law in question*": *Worthing* at [15]. The obverse would also be taken to obtain, namely a State law being (innocuously) supplementary to or cumulative upon the Commonwealth law in question.

11. With concurrent federal and State powers, the question of inconsistency involves the operation of both Acts, and "*depends on the text and operation of the respective laws*": *Western Australia v The Commonwealth* ('*Native Title Act Case*') (1995) 183 CLR 373 at 465 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ. The first task in any application of s 109 is to construe the federal law in question in accordance with the body of doctrine carried by the frequently used phrases "*upon its true construction*" and "*having regard to subject, scope and purpose*": *Momcilovic* per Gummow J at [258].[6] Only when that has been done is it appropriate to consider whether, upon its proper construction, the State law is "*inconsistent*" with the federal law: Gummow J at [258]. In the case of a State Act, a proper understanding of its policy and purpose underpins the task of construing it and identifying its operation: *Jemena Asset* at [45], citing *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ, quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

(b) Indigenous Land Use Agreements and the *Native Title Act*

12. Applying the identified principles in relation to s 109 of the Constitution, it arises first to consider the provisions in Division 3 of Part 2 of the Commonwealth *Native Title Act* in relation to Indigenous Land Use Agreements (**ILUAs**), in particular s 24EA.

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[5] Also Hayne J in *Momcilovic* at [317]-[318], at [339] (dissenting in the result). .
[6] Also Hayne J in *Momcilovic* at [315].

13. Division 3 of Part 2 of the *Native Title Act* creates a broad procedural framework for the doing of future acts.[7] A future act by definition is an act which, the NTA apart, validly affects native title in relation to the land or waters to any extent or is invalid because of the effect it would have on native title were it to be valid: s 233(1). The characterisation of an act as a future act is critical to the application of Division 3. For "[a]*cts that do not affect native title are not future acts; therefore this Division does not deal with them*": s 24AA(1), also s 227 for the meaning of acts that ***affect*** native title. "*Basically*", Division 3 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: s 24AA(2). Subdivisions E to N inclusive of Division 3 provide for the validity of various classes of future act, their consequences for native title and the rights of native title holders and registered native title claimants in relation to them.[8]

14. Section 24AA(3) provides that a future act "*will be valid if the parties to certain agreements (called indigenous land use agreements--see Subdivisions B, C and D) consent to it being done and, at the time it is done, details of the agreement are on the Register of Indigenous Land Use Agreements*", and that "*an indigenous land use agreement, details of which are on the Register, may also validate a future act (other than an intermediate period act) that has already been invalidly done*". Section 24AA(4) in paragraphs (a) to (k) specifies other bases for validity. Section 24AB(1) provides in relation to the order of application of provisions that 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 paragraphs 24AA(4)(a) to (k).

15. The introduction of measures to facilitate the negotiation of voluntary but binding agreements as an alternative to more formal native title machinery was one of the key features of the 1998 amendments to the *Native Title Act*[9], "*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.*"[10] Measures facilitating voluntary agreements were introduced in new Subdivisions B, C, D and E of Division 3 in Part 2, and a new Part 8A was introduced to provide for a Register of Indigenous Land Use Agreements. Subdivision B provides for body corporate agreements, Subdivision C for area agreements, and Subdivision D for alternative procedure agreements. Subdivision E applies to all three types of ILUAs, and provides for the effect of registration. Section 24EA(1) confers particular statutory consequences upon ILUAs, deeming in particular the following during any period when details of the agreement are entered on the Register[11]:

    (a) in addition to the effect it has apart from the NTA, the agreement has effect *as if it* were a contract among the parties to the agreement: para 24EA(1)(a); and

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7 *Lardil Peoples v State of Queensland* (2001) 108 FCR 453 per French J at [23].

8 Id.

9 Explanatory Memorandum for the *Native Title Amendment Bill 1997* at 18.

10 See Second Reading Speech for the *Native Title Amendment Bill 1997*, House of Representatives, 4 September 1997, Mr Williams at 7891 [44]. Also *QGC Pty Limited v Bygrave (No 2)* [2010] FCA 1019 per Reeves J at [59].

11 See the Explanatory Memorandum for the *Native Title Amendment Bill 1997* at [7.21] in relation to the deeming effect of s 24EA.

(b) all native title holders in relation to any of the land or waters covered by the agreement, but who are not parties to the agreement, are taken to be bound by the agreement: para 24EA(1)(b).[12]

16. Thus, whilst a registered ILUA has effect *as if it were a contract*, it is a creature of statute[13] which owes its existence to and enjoys the statutory protection of the *Native Title Act*. Section 24EA(3) confirms that the protection of Commonwealth legislation is conferred upon a registered ILUA, by providing that if the Commonwealth, a State or a Territory is a party to an indigenous land use agreement, "*this Act does not prevent the Commonwealth, the State or the Territory doing any legislative or other act* ***to give effect*** *to any of its obligations under the agreement.*"[14] This language strongly suggests that the *Native Title Act* **does** affect legislation etc by the Commonwealth, a State or a Territory which seeks not to give effect to, but rather to abandon, or significantly alter, impair or detract from, its obligations under the agreement. It would be a strange construction of s 24EA, and one at odds with the beneficial considerations identified in the Preamble to the Act and the purpose of ILUAs in promoting certainty, which permitted the Commonwealth, a State or Territory to legislate to walk away from their obligations under an ILUA, but which, by abrogating the common law doctrine of privity of contract, bound native title holders over the generations to the agreement. Such a construction would also be at odds with s 199C(2) and (3) of the Act, and the very limited circumstances in which the Federal Court can order the removal of an ILUA from the Register (fraud, duress and undue influence).[15]

17. Accordingly, the plaintiff submits that once registered, an ILUA is a regime or instrument which attracts the protection of the Commonwealth *Native Title Act*. It possesses unique features that do not apply to ordinary contracts. For the purposes of s 109 of the Constitution, while not itself a law of the Commonwealth, an ILUA has the force and effect of such a law. A relevant analogy is with industrial awards cases: see *Jemena Asset* at [11], citing *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 494-496, 499 per Isaacs J; *Ex parte McLean* (1930) 43 CLR 472 at 479 per Isaacs CJ and Starke J, 480 per Rich J, 484-485 per Dixon J; *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151 at 158 per Latham CJ; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 548-549. In *Jemena Asset* the Court at [38] confirmed that the expressions "*a law of the State*" and "*a law of the Commonwealth*" in s 109 are sufficiently general for s 109 to be capable of applying to inconsistencies which involve not only a statute or provisions in a statute, but also an industrial order or award[66], or other legislative instrument or regulation[67], made under a statute.[16] Likewise, the plaintiff submits, an ILUA.

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[12] As Reeves J observed in *QGC Pty Limited v Bygrave (No 2)* [2010] FCA 1019 at [63], this introduces concepts that are "*quite foreign to the common law, viz that certain indigenous persons are bound by the ILUA even though they are not parties to it*". See also at [64]-[65] in relation to "*the uniqueness of the Act within which the ILUA process operates*".

[13] *Kemp v Native Title Registrar* (2006) 153 FCR 38 per Branson J at [13]; *QGC Pty Limited v Bygrave* [2011] FCA 1457 per Reeves J at [139].

[14] As explained in the Explanatory Memorandum at [7.21]: "To avoid doubt, the Bill states that the NTA will not prevent the Commonwealth, a State or a Territory from enacting any legislation, or doing any other act, to give effect to its obligations under an ILUA. This applies where the Commonwealth, State or Territory is a party to the agreement ***[subsection 24EA(3)]***. An example of an act that a government may need to do is grant a lease to another party to the agreement."

[15] The explanatory statements accompanying the *Native Title (Indigenous Land Use Agreements) Regulations* (first made in 1998, repealed and remade in 1999, and amended in 2006) also confirm that an ILUA once registered attracts the "*statutory protection of the Act*".

[16] Referring at footnote 67 to *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 576, 591-594, 598. See

(c) Section 87 of the *Native Title Act*: nature and effect of power of Federal Court if parties reach agreement

18. Applying the identified principles in relation to s 109 of the Constitution, it also arises to consider the nature and effect of the Federal Court's power in s 87 of the *Native Title Act* where parties reach agreement.

19. Section 87 is in Division 1C of Part 4 of the Act. The provisions of Part 4 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: s 79A(b). Section 87 applies if (a) agreement is reached between the parties on the terms of an order of the Federal Court in relation to the proceedings, or a part of the proceedings, or a matter arising out of the proceedings; and (b) the terms of the agreement, in writing signed by or on behalf of the parties, are filed with the Court; and (c) the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court: s 87(1).

20. In accordance with s 87(1A), the Court may, if it appears to the Court to be appropriate to do so, act in accordance with whichever of subsection (2) or (3) is relevant, and if subsection (5) applies, that subsection. Subsection (2) applies where there is agreement on the terms of an order of the Court in relation to the proceedings (see also s 94A which deals with the requirements of native title determination orders). Subsection (3) applies if the agreement applies to a part of the proceedings or a matter arising out of the proceedings. Subsection (5) applies if the order under subsection (2) or (3) involves the Court making a determination of native title, to provide that the Court may also make an order that gives effect to terms of the agreement that involve matters other than native title.

21. In relation to the factors to be taken into account in exercising the Court's discretion under s 87(1), the Federal Court has identified *"the benefits of negotiated settlements of native title claims, which otherwise have the potential to be lengthy, costly and divisive in the community."*[17] The Court has also referred to the caution to be exercised where any declaratory order involving property rights is sought, a determination under the *Native Title Act* "*that native title exists, and perhaps even a determination that it does not exist,* [being] *a real action, in the sense that an order generally operates against the entire world*" and not one which only resolves an issue *inter partes*.[18]

(d) The Principal Act

22. The *North Stradbroke Island Protection and Sustainability Bill* was read a second time on 2 March 2011.[19] As stated in the Second Reading Speech:

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also *Co-operative Committee on Japanese Canadians v Attorney-General of Canada* [1947] AC 87 at 106. Cf *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431 per Knox CJ and Gavan Duffy J.

[17] *Congoo v State of Queensland* [2001] FCA 868 per Hely J at [17]; *Kelly on behalf of the Byron Bay Bundjalung People v NSW Aboriginal Land Council* [2001] FCA 1479 per Branson J at [23].

[18] *Munn for and on behalf of the Gunggari People v State of Queensland* (2001) 115 FCR 109 per Emmett J at [22], also at [28]-[29]; *Coulthard v State of South Australia* [2014] FCA 124 per White J at [16]; *Tilmouth v Northern Territory of Australia* [2014] FCA 422 per White J at [9]

[19] Section 14B of the *Acts Interpretation Act 1954* (Qld) makes provision in relation to the use of extrinsic

"This bill provides certainty about the phasing out of mining on North Stradbroke Island, mandates an end to large-scale sand mining on the island by 2019 and **all mining by 2025**, limits the path of the island's largest mine to minimise its environmental impact, establishes processes for dedicating national parks and other protected areas over freehold title under the Aboriginal Land Act 1991 and establishes a **joint management framework** between the state and the traditional owners, the Quandamooka people, in the management of those protected areas...

The **mine path of Enterprise will be restricted to a limited area to minimise impacts on areas of high environmental significance** both on and surrounding Enterprise. **The mine path will limit mining activities as much as possible to areas already disturbed by mining.** ...

The bill also provides **that no new mining interests can be applied for or granted** in the North Stradbroke Island region. ... On this basis, the bill enshrines the protection and restoration of environmental values on North Stradbroke Island. This will occur through the staged creation of protected areas on North Stradbroke Island as mining leases expire in accordance with this legislation. By the end of 2011, 50 per cent of the island will be national park; by 2021 this will increase to 75 per cent; and **by 2026, 80 per cent of the island will be protected.**

The bill gives direct effect to **those land tenure outcomes agreed by the state and the Quandamooka people by introducing a new model for tenure and protected area status.** ...[20] (emphasis added)

23. The Principal Act commenced on 14 April 2011.[21] In relation to mining leases, the Principal Act, amongst other things:

(a) left unaltered the expiry date of ML1105 (Enterprise Mine) of 30 November 2021 but provided that the lease was not to be renewed;[22]

(b) provided for the termination of ML1109 (Yarraman Mine) *"at the end of 31 December 2015"*, and that *"the lease cannot at any time be renewed"*;[23] and

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material in interpretation.

[20] On 22 March 2011, in the Second Reading Speech, the Minister for Environment and Resource Management the Hon KJ Jones also said:

"Mining on North Stradbroke Island will **end forever in 2025.** ...

To provide certainty to all stakeholders regarding this timetable, several mining leases not being used for active mining will be terminated prior to their current expiry date. However, no mining leases on which mining is actively occurring will be terminated in advance of the company's own intended cessation dates. ...

... this is a bill that provides certainty for the people of North Stradbroke Island and certainty for the Quandamooka people ..."

Also the Explanatory Notes for the *North Stradbroke Island Protection and Sustainability Bill 2011* **(Principal Act EN)** at 1-2 (*"Policy objectives and reasons for them"*) and at 2-5 (*"Achievement of policy objectives"*). Also the Statement *"North Stradbroke Island, Sandmining"* by the Hon AM Bligh (Premier and Minister for Reconstruction on 22 March 2011.

[21] The object of the Principal Act was stated in s 2: *"The object of this Act is to substantially end mining interests over land in the North Stradbroke Island Region by the end of 2019, and end mining in the region in 2025 – (a) to protect and restore environmental values of the region; and (b) to facilitate, under other Acts, the staged creation of areas to be jointly managed by the State and the traditional owners of the region."*

[22] Sections 10(2), (3); see also Principal Act EN at 11.

[23] Section 9(1).

(c) provided for each of ML1117 (Enterprise Mine) and ML1120 (Enterprise Mine) to be "*taken to have been renewed*" under the *Mineral Resources Act 1989* (Qld) (***Mineral Resources Act***) for a term ending at the end of 31 December 2019, for the renewals to "*have effect as if they were granted by the Governor in Council*" under the *Mineral Resources Act*, and that the holder of the leases may not apply for renewal and the interests cannot be renewed.[24]

24. The Principal Act also contained provisions in relation to the EA issued to Stradbroke Rutile Pty Ltd under s 292(2)(j) of the *Environmental Protection Act 1994* (Qld) with effect from 3 March 2010 in respect of carrying out the activity of mining for mineral sands authorised under various mining leases, including ML1105, ML1109, ML1117 and ML1120.[25] The Principal Act provided that the EA was taken to include conditions that mining activities that are the *"winning of a mineral"* may be conducted only within the *"restricted mine path"* for ML1105 and ML1117 (defined as the "*Enterprise Mine Lease*");[26] that the *"winning of a mineral"* within the *"restricted mine path"* for ML1105 and ML1117 may only be conducted until the end of 31 December 2019;[27] and that the holder of ML1105 and ML1117 may apply, within 2 months after commencement, to the Minister to amend the *"restricted mine path"* to add an area of land.[28]

25. Further, the Principal Act made amendments to the *Aboriginal Land Act 1991* (Qld) to provide for certain lots of land to become transferable land (s 24)[29], for an indigenous management agreement to be entered into prior to the granting of land (ss 26 and 27), and for the grant of prescribed protected areas in North Stradbroke Island Region, prior to which grant an indigenous management agreement must have been into and the land become an indigenous joint management area (s 28); as well as to the *Nature Conservation Act 1992* (Qld) to provide, *inter alia*, for the management of an indigenous joint management area in accordance with any indigenous land use agreement and the indigenous management agreement for the area (s 31), and for the declaration of prescribed protected areas in the North Stradbroke Island Region as indigenous joint management areas (s 44).

(e) The Quandamooka ILUA: its legal meaning and effect

26. On 14 June 2011, the ILUA was executed on behalf of, inter alia, the Quandamooka People and the plaintiff, and on 15 June 2011, by the defendant.[30] The Recitals to the ILUA record, *inter alia*, the claim by the "*Native Title Party*" and the Quandamooka

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[24] Sections 11(1), (2) and (6).

[25] SCB, vol 1, p 164.

[26] Sections 16 and 17(a). According to the Principal Act EN (at 14), the purpose of restricting the Enterprise Mine path was "*to minimise the impacts and potential impacts of mining activities on environmental values both on and surrounding the mine*", including internationally significant RAMSAR wetlands located only 300 metres from the Enterprise Mine.

[27] Sections 16 and 17(b).

[28] Sections 16 and 18(1). The "*restricted mine path*" was defined in s 16 of the Principal Act as the area shown on the map "*NSI 2*" approved by the Chief Executive on 18 March 2011 and held by the department: SCB, vol 1, p 201. On 8 July 2011, the Minister approved applications to amend the *"restricted mine path"* for ML 1105 and ML 1117. A map showing the approximate location of the "*restricted mine path*" and the *amended* "*restricted mine* path", as at 8 July 2011, is at SCB, vol 3, p 732.

[29] Land becoming transferrable being the first step in an ALA process towards the granting of freehold land: Principal Act EN at 17.

[30] Special Case at 21; SCB, vol 2, pp 605-608.

People to hold Native Title in relation to the *Agreement Area*" (RECITAL B); the agreement of the parties to the making of the "*Determination*" (RECITAL E), meaning a determination of the Quandamooka People #1 Claim and the Quandamooka People #2 Claim by the Federal Court[31]; the parties' intention in relation to parts of the "*Agreement Area*", including its declaration as Indigenous Joint Management Areas (RECITAL F(g)); the Native Title Party's agreement to surrender Native Title in relation to part of the "*Agreement Area*" (RECITAL G); and that the State and the plaintiff will enter into an "*IMA*" for the management of the Indigenous Joint Management Areas (RECITAL I).

10 27. The "*Agreement Area*" to which the ILUA applies includes the areas of the subject mining leases.[32] Clause 6 provides, subject to cl 13.2 and cl 16.1, for consent to and validation *of* "*Agreed Acts*" (meaning those acts specified in Schedule 2), as follows:

(a) for consent of the Quandamooka People to the doing of the "*Agreed Acts*", being a statement for the purpose of s 24EB(1)(b) of the *Native Title Act*;[33]

(b) for consent of the Quandamooka People to the extinguishment of any native title rights and interests on "*Surrender*", being a statement for the purpose of s 24EB(1)(d) of the *Native Title Act*;[34]

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(c) for agreement of the Quandamooka People to the validation of any acts by the defendant in the Agreement Area prior to the date of the ILUA "*to the extent they were invalidly done for Native Title purposes and can be validated by* [this ILUA]";[35]

(d) for agreement of the Quandamooka People to the validation of any invalid "*Agreed Acts*" (to the extent they are "*future acts*") done on the Agreement Area prior to registration of the ILUA, being a statement for the purpose of s 24EBA(1)(a) of the *Native Title Act.*[36]

30 28. In cl 1.1, "*Agreed Acts*" are defined to mean "*those acts specified in Schedule* 2". The exhaustive list of "*Agreed Acts*" specified in Schedule 2 includes:

1. "*Regulating the areas to be made Aboriginal land as Transferable Land from time to time in accordance with* [the ILUA]" (item 1);[37]

2. granting the "*Transferable Land*" as "*Aboriginal Land*" (item 2);

3. the plaintiff and the State "*entering into the IMA* [defined in cl 1.1 as Indigenous Management Agreement "*on substantially the same terms as the agreement in Schedule*
40 *9*"] *in relation to the management of the Indigenous Joint Management Areas"* [defined in cl.1 as having the meaning given in the *Nature Conservation Act 1992 (*Qld)] (item 3);

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[31] Clause 1.1: SCB, vol 2, p 210.
[32] Clause 1.1 and Schedule 1: SCB, vol 2, pp 209, 240-241.
[33] Clause 6.1(a), cl 1, Schedule 2; and cl 6.4: SCB, vol 2, pp 209, 217, 243-244.
[34] Clause 6.1(b), cl 1, Schedule 2; and cl 6.4: SCB, vol 2, pp 209, 217, 243-244.
[35] Clause 6.1(c), cl 1, Schedule 2: SCB, vol 2, pp 209, 217, 243-244.
[36] Clause 6.1(d), cl 1, Schedule 2; and cl 6.4: SCB, vol 2, pp 209, 217, 243-244.
[37] The expressions "*Aboriginal land*" and "*Transferrable Land*" are both defined in cl 1.1 to have the same meaning as in the *Aboriginal Land Act 1991* (Qld): SCB, vol 2, p 209.

4. the IMA being amended "*by deed of variation to apply to allow any Prescribed Protected Area to be declared or dedicated after the date of* [the ILUA] (item 4);

5. subject to items 1-4, the "*dedication, use and management of any Prescribed Protected Areas and the declaration of Indigenous Joint Management Areas*" in accordance with the *Nature Conservation Act* and the IMA (item 5).

29. In cl 13.1(f), the parties agree "*that it is intended that additional areas of the Agreement Area be dedicated as Prescribed Protected Areas from time to time after (i) the residential occupation of the Existing Residential sites has been resolved; and (ii) the Draw Down process under clause 20 has been completed*".[38] In cl 13.2 (to which cl 6 is expressed to be subject), the parties acknowledge that "*the consent under clause 6 in relation to the dedication of the Proposed Prescribed Areas is conditional on* [those areas] *being (a) granted as Aboriginal land; (b) dedicated as a Prescribed Protected Areas; and (c) declared as Indigenous Joint Management Areas*".[39]

30. Clause 13.3 of the ILUA provides that the plaintiff and the State will enter the IMA for the Stage 1 National Park, the Existing Prescribed Protected Areas and the Proposed Prescribed Protected Areas prior t379o the Stage 1 National Park, the Existing Prescribed Protected Areas and the Proposed Prescribed Protected Areas being granted as Aboriginal Land. In cl 1.1, "*IMA*" is defined to mean the Indigenous Management Agreement on substantially the same terms as the agreement in Schedule 9.[40] The IMA in Schedule 9 facilitates the staged creation of areas to be jointly managed by the State and the Quandamooka People. The IMA contains provisions relating to, *inter alia*, the Management of the Indigenous Joint Management Areas (cl 3), Joint Management Responsibilities and Commitments (cl 4), Use by Beneficiaries (including Exercise of Native Title Rights and Interests (cl 7.1), Camping (cl 7.2) and Use of Cultural Resources and Natural Resources (cl 7.7 and cl 7.8)), and in relation to Contracts for Works on Indigenous Joint Management Areas (cl 17).

31. In cl 13.10(a) of the ILUA, the Quandamooka People and the plaintiff acknowledge that the Environmental Authorities will continue in force. These are defined in cl 1.1 to include MIN100971509, a copy of which is attached at Schedule 14.[41] The notations in Schedule 14 include that "*The Act has included ... additional conditions*" in the EA, namely "*(a) mining activities that are the winning of a mineral ... may be conducted only within the restricted mine path for an Enterprise Mine lease; and (b) ... may only be conducted until the end of 31 December 2019*".[42] "*Act*" is defined in cl 1.1 to mean the Primary Act "*providing for the joint management of Prescribed Protected Areas in the North Stradbroke Island Region*".

32. The exhaustive list of "*Agreed Acts*" to the doing of which the Quandamooka People consented in clause 6.1(a) of the ILUA and which are specified in Schedule 2 does not include:

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[38] SCB, vol 2, p 220.
[39] SCB, vol 2, p 220.
[40] SCB, vol 2, pp 274-332.
[41] SCB, vol 2, pp 379-410.
[42] SCB, vol 2, p 355.

(a) an expiry date for a mining lease other than as provided in the Principal Act, or any provision for renewal; or

(b) any change to the conditions in the EA (as amended by the Principal Act) restricting the "*winning of a mineral*" to within the "*restricted mine path*" for an Enterprise Mine lease (ML 1105 and ML 1117), and to be conducted only until the end of 31 December 2019.

33. Nor would the parties' agreement to any such acts be implied in clause 6.1(a) of, or Schedule 2 to the ILUA. In particular, Item 15 of Schedule 2[43] is inconsistent with any such implication. The "*No Representations or Warranties*" clause in the ILUA, cl 29[44], similarly militates against any such implication.

34. For the reasons given at [12] to [17] above, the plaintiff contends that an ILUA, entered on the Register of Indigenous Land Use Agreements, has statutory effect and enjoys statutory protection beyond that of a contract at common law. Accepting, however, that the principles for construing written contracts apply to the construction of an ILUA, it is uncontroversial that while it is essential to have regard to the language in which the parties have expressed their agreement, consideration of the surrounding circumstances known to the parties and the purpose and object of the transaction is also required.[45] By the expression "*surrounding circumstances known to the parties*" is meant "*all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*".[46] That knowledge may include matters of law: id. The "*surrounding circumstances known to the parties*" are not confined to the factual circumstances, but can include the legal context of the transaction.[47]

35. As Gleeson CJ opined of the agreement in *International Air Transport Association v Ansett Australia Holdings Limited* (2008) 234 CLR 151 at [8] ('*Ansett Australia Holdings*'): "*The Agreement has a history; and that history is part of the context in which the contract takes its meaning.*"[48] This is not to suggest the intention which the Court seeks to ascertain is what parties actually (subjectively) intend, but rather what is taken objectively to be their intention having regard to the language they used and the circumstances in which the agreement was made.[49] Moreover, if as here, facts are notorious, actual knowledge of them will be presumed.[50] In this case, the surrounding circumstances actually known to the parties must, at the very least, include the circumstances referred to in the Second Reading Speech for the Bill for the Principal Act,

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[43] SCB, vol 2, p 244.
[44] SCB, vol 2, pp 231-232.
[45] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at 179 [40]; *International Air Transport Association v Ansett Australia Holdings Limited* (2008) 234 CLR 151 at 174 [53] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ at 174 [53].
[46] *Maggbury Pty Ltd v Hafele Aust Pty Ltd* (2001) CLR 181 per Gleeson CJ, Gummow and Hayne JJ at 188 [11].
[47] *QBE Insurance Australia Ltd v Vasic* [2010] NSWCA 166 at [35] per Allsop P (Giles and Macfarlan JJA agreeing).
[48] Citing *Singh v The Commonwealth* (2004) 222 CLR 322 at 331-338 [8]-[23].
[49] *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22].
[50] *QBE Insurance Australia Ltd v Vasic* [2010] NSWCA 166 at [29] per Allsop P; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

and in the Statement by the then Premier upon the introduction of the Bill, as well as the provisions in the Principal Act itself in relation to the expiry and non-renewability of the relevant mining leases, and the "*restricted mine path*".

36. Having regard to the language in which the parties have expressed their agreement, as well as the surrounding circumstances, the plaintiff submits as follows in relation to the construction of the ILUA in this case. The Quandamooka ILUA provides an exhaustive list of "*Agreed Acts*". These do not include the renewal of any mining lease beyond other than as provided in the Principal Act, or any change to conditions in the Principal Act concerning the existence of a restricted mine path. Rather, the Quandamooka ILUA is premised upon the continued and unaltered existence of the Principal Act in relation to the expiry of (*inter alia*) ML1105, ML1109, ML1117 and ML1120, and the provision for a restricted mine path in the case of ML1105 and ML1117. Properly construed, the ILUA obliges the defendant not to remove the non-renewability of ML1105, ML1109, ML117, not to allow for their renewal for periods longer than those provided in the Principal Act, and not to change the conditions in the EA (as amended by the Principal Act) restricting the *"winning of a mineral"* to be conducted only within the *"restricted mine path"* for ML1105 and ML1117, and to be conducted only until the end of 31 December 2019. In relation to each of those matters, the ILUA reflects "*an adjustment of the questions in dispute between the parties* [which is] *complete and ... permanent*": cf *Clyde Engineering Co Ltd v Cowburn*: (1926) 37 CLR 466 per Knox CJ and Gavan Duffy J at 476.

(f) Legal meaning and effect of the Federal Court determination of native title

37. On 4 July 2011, the native title rights and interests of the Quandamooka People were the subject of determination by consent, pursuant to s 87 of the *Native Title Act*, in two native title claim proceedings: *Delaney on behalf of the Quandamooka People v State of Queensland* (***Delaney***).[51] In each of the two proceedings (Quandamooka People No 1 (QUD 6010 of 1998)[52] and Quandamooka People No 2 (QUD 6024 of 1999)),[53] the Court, being satisfied that an order in the terms set out was within the power of the Court and it appearing appropriate to the Court to do so, ordered that the determination take effect on registration of, *inter alia*, the ILUA on the Register of Indigenous Land Use Agreements.[54]

38. At [12] of the reasons for judgment, Dowsett J referred to admissions by the State of Queensland, for the purpose of both applications, that (*inter alia*) a pre-sovereignty society existed and that there has been continuity from sovereignty to the present day; and that the Quandamooka People have maintained their connection and have connection with North Stradbroke Island and the surrounding waters.[55] His Honour at [13] referred to the Court's decision in 2003 to become closely involved in the management of Queensland native title claims; and at [15] observed that when parties make admissions or concessions, the issues in dispute are narrowed, but that in some cases the Court may decline to act on such admissions or concessions. In this case, Dowsett J saw "*no reason to doubt the appropriateness of the parties' identification of the issues or of their consensual resolution*

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[51] [2011] FCA 741.
[52] SCB, vol 3, pp 611-692.
[53] SCB, vol 3, pp 693-729.
[54] Quandamooka No 1 - Order 2, Schedule 7, item 1(a): SCB, vol 3, p 687; Quandamooka People No 2 – Order 2, Schedule 6, item 1(a): SCB, vol 3, p 725.
[55] [2011] FCA 741 at [12].

of them" or that the proposed orders had been drafted with "*appropriate regard to the public interest, represented by the State and the local authorities*".

39. In each proceeding, the Court determined that native title exists in that part of the Determination Area identified in Part A of Schedule 2.[56] In relation to that part of the Determination Area identified in Schedule 4, the "*Exclusive Native Title Area*", the Court determined that the nature and extent of the native title rights and interests, other than in relation to Water, are "*rights to possession, occupation, use and enjoyment to the exclusion of all others*".[57] In relation to that part of the Determination Area identified in Schedule 5, the "*Non-Exclusive Native Title Area (Onshore)*", the Court determined that the nature and extent of the native title rights and interests, other than in relation to Water, are the non-exclusive rights to (i)live and be present on the area; (ii) take, use, share and exchange Traditional Natural Resources for personal, domestic and non-commercial communal purposes; (iii) conduct burial rites; (iv) conduct ceremonies; (v)teach on the area about the physical and spiritual attributes of the area;(vi) maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm; (vii) light fires for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation; and (viii) be accompanied into the area by non-Quandamooka people, being 1. people required by traditional law and custom for the performance of ceremonies or cultural activities; and 2. people required by the Quandamooka people to assist in observing or recording traditional activities on the area.[58] The part of the Determination Area identified in Schedule 5 includes the areas of ML1105, ML11109, ML1117 and ML1120.

40. The Court also determined that the "*nature and extent of other rights and interests in relation to the Determination Area*" are those set out in the Schedule "*Other Interests*"[59], including the rights and interests of the parties under the ILUA;[60] and the interests held by Stradbroke Rutile Pty Ltd under ML1105, ML 1109, ML1117, ML1120.[61] As to the relationship between the native title rights and interests, and the "*Other Interests*", the Court determined that "*to the extent that the Other Interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests in relation to any part of the Determination Area recognised* [*in* relevantly Schedule 5], *the native title continues to exist in its entirety but the native title rights and interests have no effect in relation to the Other Interests to the extent of the Inconsistency for so long as the Other Interests exist*".[62]

41. In making the orders and determination, Dowsett J observed at [21] that in making orders recognising the Quandamooka People's native title rights and interests within the Australian legal system, and extending the protection of that system to those rights and interests: " ... *I bind all people for all time. This includes the Commonwealth*

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[56] Order 1, Determination [1], Schedule 2 (Part A), also see Schedule 5: SCB, vol 3, pp 611-612, 618-623, 625-667, 680-685, 693-694, 699-716, 722-724.

[57] Determination [3(a)], Schedule 2 (Part A), Schedule 4: SCB, vol 3, pp 612, 618-623, 625, 677-679, 694, 699-716, 720-721.

[58] Order 1, Determination [3(b)(i)-(viii)]: SCB, vol 3, pp 612, 694.

[59] Order 1, Determination [9]: SCB, vol 3, pp 613 & 695.

[60] Quandamooka No 1 - Schedule 7 [1(a)]: SCB, vol 3, p 687; Quandamooka No 2 – Schedule 6 [1(a)]; SCB, vol 3, p 725.

[61] Quandamooka No 1 - Schedule 7 [2(a)]: SCB, vol 3, p 687; Quandamooka No 2 – Schedule 6 [2(a)]: SCB, vol 3, p 725.

[62] Order 1, Determination [10(b)]: SCB, vol 3, p 613 & 695.

of Australia, the State of Queensland, the Redlands City Council and the Brisbane City Council."

42. On 8 December 2011, the ILUA was registered as an area agreement under ss 24CA to 24CL of the NTA.[63] It follows that following the Federal Court determination and upon registration of the ILUA, the Quandamooka People have recognised native title rights and interests within the Determination Area. The effect of registration is that by operation of s 24EBA(4), the non-extinguishment principle in ss 238(2), (3), (6) and (8) of the *Native Title Act* applies to previous future acts, and the Quandamooka People's native title rights and interests have full effect in the areas of the subject mining leases upon their expiry. [64] As at December 2011, the expiry dates were as set out in the Principal Act, relevantly 31 October 2015 for ML1109, 31 December 2019 for ML1117 and ML1120, and 30 November 2021 for ML1105.

(g) The Amendment Act

43. On 27 November 2013, the Amendment Act was assented to. On 6 February 2014, the Amendment Act (other than part 3) commenced. By s 9 of the Amendment Act, ss 11A to 11J were inserted into the Principal Act to allow for the renewal of ML1105, ML1109, ML1117 and ML1120 and for periods longer than those provided in the Principal Act, namely:

    (a) for the holder of ML1109 to apply for renewal of that lease for a period expiring no later than the end of 31 December 2020, subject to the *"winning of a mineral"* not being an authorised activity for the lease after 31 December 2015: s 11B and 11E(1) (cf 31 December 2015 under the Principal Act); and

    (b) for the holder of ML1105, ML1117 and ML1120 to apply for renewal of ML 1105, ML 1117 or ML 1120 for a period expiring no later than the end of **31 December 2040**, subject to the *"winning of a mineral"* not being an authorised activity for the lease after 31 December 2035: ss 11B and 11E(2) (cf 31 December 2019 and 30 November 2021 under the Principal Act).

44. By s 12 of the Amendment Act, ss 16 to 21 of the Principal Act were omitted and a new s 17 was inserted. The new s 17 replaced the EA with an environmental authority which no longer applied the conditions in the Principal Act in relation to ML1105 and ML1117 permitting the "*winning of a mineral*" to be conducted only within the "*restricted mine path*", and only until 31 December 2019.

45. The Explanatory Notes for the *North Stradbroke Island Protection and Sustainability and Another Act Amendment Bill 2013* noted the provision made in the Principal Act for the phase-out of mining, as well as the restricted mine path imposed for Sibelco's Enterprise mine "*to ensure that future mining avoids areas of high conservation value as*

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[63] Special Case at [29]; SCB, vol 1, p 49; vol 3, pp 741-753.

[64] See *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) 300 ALR 1; 87 ALJR 916 at [26] per French CJ and Crennan J observing at [26] that the "*non-extinguishment*" principle is "*underpinned by a logical proposition of general application: that a particular use of a native title right can be restricted or prohibited by legislation without that right or interest itself being extinguished.*"

much as possible". In addition, the Principal Act "*sought to protect and restore the environmental values of the island and facilitate the staged creation of areas to be jointly managed by the State and the traditional owners of the land*", to which end "*the then Queensland Government declared new national park over 20 per cent of the land on NSI in 2011, **with the stated ultimate goal of 80 per cent of NSI being protected as national park, and jointly managed by the State and the Quandamooka People, who are the recognised native title holders***". The Explanatory Notes identified problems with the NSIPS Act, including:

> "The government made an election commitment to deliver a framework to extend mining on NSI, recognising that the NSIPS Act did not allow sufficient time for the economy of NSI to transition to one which is not dependent on mining.
>
> In addition, the NSIPS Act was passed on the assumption that alternative industries would be established on NSI. However, the proposal that 80 per cent of NSI would become national park presented a significant barrier to the establishment of such alternative industries."

(h) Section 109 inconsistency: does the State Amendment Act undermine the ILUA and the Federal Court determination, or either of them?

46. The inconsistency arises between the State Amendment Act and applicable provisions of the Commonwealth *Native Title Act*, as embodied in the federal ILUA and the determination of the Federal Court.

47. The *Native Title Act* provides in Division 3 of Part 2 and Part 8A for the negotiation and registration of voluntary agreements, upon which the protection of Commonwealth legislation is conferred, and which for the purpose of s 109 of the Constitution has the force and effect of a law of the Commonwealth: s 24EA. Likewise, the *Native Title Act* provides in s 87 for the making of orders by the Federal Court where parties reach agreement, including declaratory orders in relation to the existence of native title rights and interests.

48. The ILUA, and through it the IMA, makes detailed provision for the granting of land in the "*Agreement Area*" as Aboriginal land, the dedication of that land as Prescribed Protected Areas, and its declaration as Indigenous Joint Management Areas to be jointly managed by the State and the Quandamooka People. As contemplated by s 24EB(1)(b) of the *Native Title Act*, the ILUA provides in clause 6 and Schedule 2 for the consent of the Quandamooka People to and validation of "*Agreed Acts*". These do not include an expiry date for a mining lease other than as provided in the Principal Act, or any provision for renewal, or any change to the conditions in the EA (as amended by the Principal Act) restricting the "*winning of a mineral*" to within the "*restricted mine path*" for an Enterprise Mine lease (ML 1105 and ML 1117), and to be conducted only until the end of 31 December 2019. As submitted above at [34]-[36], in construing the ILUA, the surrounding circumstances actually known to the parties must, at the very least, include the circumstances referred to in the Second Reading Speech and in the Statement by the then Premier upon the introduction of the Bill for the Principal Act, and the provisions in the Principal Act itself in relation to the expiry and non-renewability of the relevant mining leases, and the "*restricted mine path*".

49. In relation to the "*restricted mine path*", in particular, the Quandamooka People and the plaintiff expressly acknowledge in cl 13.10(a) of the ILUA that the Environmental Authorities will continue in force, and the notations in Schedule 17 include that the Principal Act has included additional conditions in the EA, namely *"(a) mining activities that are the winning of a mineral ... may be conducted only within the restricted mine path for an Enterprise Mine lease; and (b) ... may only be conducted until the end of 31 December 2019"*.[65]

50. In the Federal Court determinations, the Court made orders pursuant to s 87 of the *Native Title Act* that in the part of each of the Determination Areas identified in Schedule 5, non-exclusive native title rights and interests exists. Those non-exclusive native title rights and interests are subject to "*Other Interests*", including those of Stradbroke Rutile under ML1105, ML1109, ML1117 and ML1120[66], but have full effect upon the expiry of the leases.

51. Both the ILUA read as a whole, and the determinations of the Federal Court, are premised upon the continued and unaltered existence of the Principal Act which provided for the expiry of the mining leases by 30 November 2021 at the latest (in the case of ML1105), for their non-renewability, and in the case of ML1105 and ML1117 for the confinement of mining within a restricted mine path to avoid areas of high conservation value and limit mining activities as much as possible to areas already disturbed by mining. The object of the Principal Act, stated in s 2, was *"to substantially end mining over land in the North Stradbroke Region by the end of 2019, and end mining in the region in 2025 – (a) to facilitate, under other Acts, the staged creation of areas to be jointly managed by the State and the traditional owners of the region."* The Second Reading Speech confirmed that by the end of 2011, 50% of North Stradbroke Island would be national park, by 2021 75%, and that by 2026, 80% of North Stradbroke Island would be protected. The Bill gave "*direct effect to* ***those land tenure outcomes agreed by the State and the Quandamooka people*** *by introducing a new model for tenure and protected area status*".

52. Subsequent to the registration of the ILUA and the determination by the Federal Court, the State Amendment Act gave effect to "*an election commitment to deliver a framework to extend mining*", and a view that 80% of North Stradbroke Island becoming national park "*presented a significant barrier to the establishment of ... alternative industries*". Whilst it is true that statements of legislative intention made by a Minister do not overcome the need to consider the text of a statute to ascertain its meaning[67], it is also that a proper understanding of the policy and purpose of the State Act underpins the task of construing it and identifying its operation: *Jemena Asset* at [50].

53. In this case, the State law does not just come in and say things will be different in some insignificant or trivial way. The State Amendment Act, read as a whole and with a proper understanding of its policy and purpose, alters, impairs and detracts from the operation of a law of the Commonwealth in the sense of undermining the Commonwealth law. The State law negates the essential legislative scheme for the negotiation and registration of ILUAs, and the exercise of power by the Federal Court to make orders recognising native

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[65] SCB, vol 2, p 355.

[66] Quandamooka No 1 - Schedule 7 [2(a)]: SCB, vol 3, p 687; Quandamooka No 2 – Schedule 6 [2(a)]; SCB, vol 3, p 725.

[67] *Jemena Asset* at [50], and cases there cited.

title rights and interests. The alteration and impairment of, and detraction from Commonwealth law in these respects is significant and not trivial: *Jemena Asset Management*: joint judgment at [41].

54. Critical provisions of the ILUA and orders of the Federal Court are rendered largely ineffective for a further period of up to 21 years, and undermined by the removal of a restriction on the mine path of the Island's largest mine intended to minimise its environmental impact, by subsequent State legislation which was not negotiated in accordance with the mechanism agreed in the ILUA.[68] There exists a very "*real conflict*" between a Commonwealth law and a State law.

55. Further, in relation to the Court's declaration as to the existence of the non-exclusive native title rights and interests of the Quandamooka People in the area of the subject mining leases, the Amendment Act effects substantial changes to, and imposes new limitations upon the native title rights and interests of the Quandamooka people, and their rights and interests under the ILUA[69], which were recognised in the determinations. In particular, the Quandamooka People cannot:

(a) exercise or fully exercise their native title rights and interests, or obtain the benefits of joint management in the area of ML1109 for a further period of up to 5 years;

(b) exercise or fully exercise their native title rights and interests, or obtain the benefits of joint management, in the area of ML1105, ML1117 and ML1120 for a further period of up to 21 years; or

(c) exercise their native title rights and interests on land within the area of ML1105 and ML1117 that would otherwise have been protected by the restricted mine path in the EA (as amended by and in accordance with the Principal Act) in the same manner as if the leases had remained subject to the restricted mine path.

56. The resulting inconsistency is as described by Gaudron J in *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 186 [54] as follows:

> "In the case of a Federal Court order made within jurisdiction, a State law providing that the rights and liabilities of the parties were other than as contained in that order ... would be inconsistent with a law of the Commonwealth conferring jurisdiction on the Federal Court in the matter in which the order was made. A State law of [that] kind would be invalid for direct inconsistency because it would 'alter, impair or detract from' the operation of the law conferring jurisdiction on the Federal Court ..."

57. Further, the effect of the Amendment Act, following the Court's recognition of the Quandamooka People's native title rights and interests, constitutes discrimination against the holders of native title which adversely affects their enjoyment of their title in comparison with the enjoyment by other title holders of their title. As the Court held in *Western Australia v The Commonwealth* (1995) 183 CLR 373 (*The Native Title Act Case*) at 418, by force of s 109 of the Constitution, the *Racial Discrimination Act 1975*

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[68] See cl 42 concerning "*Variation*": SCB, vol 2, p 238.

[69] Recognised as "*Other Interests*" in the Determination Area: Quandamooka No 1 – Order 1, Determination [9], Schedule 7 [1(a)]: SCB, vol 3, pp 611, 613, 687; Quandamooka No 2 – Order 1, Determination [9], Schedule 6 [1(a)]; SCB, vol 3, pp 693, 695, 725.

(Cth) precludes both a bare legislative extinguishment of native title and any discrimination against the holders of native title which adversely affects their enjoyment of their title in comparison with the enjoyment by other title holders of their title. That was the effect of *Mabo v Queensland* (1988) 166 CLR 186. The two-fold operation of s 10(1) of the RDA ensures that Aborigines who are holders of native title have the same security of enjoyment of their traditional rights over or in respect of land as others who are holders of title granted by the Crown and that a State law which purports to diminish that security of enjoyment is, by virtue of s 109 of the Constitution, inoperative: *Native Title Act Case* at 438.

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58. The plaintiff does not contend that the federal law in this case evinces a legislative intention to deal completely and thus exclusively with the law governing a particular subject matter[70] or to be exclusive and exhaustive in respect of those subject matters.[71] Nor does the plaintiff contend that the Commonwealth law expressly excludes the rights or duties which it creates from qualification by State laws of a particular kind: *Momcilovic* per Gummow J at [260]. The plaintiff could not so contend having regard to s 8 of the *Native Title Act*.[72] It is plainly possible to infer from the beneficial nature of the *Native Title Act* that the Commonwealth Parliament did not intend to exclude a compatible State law: *Jemena Asset* at [57]. However, the present case is readily
20 distinguishable from *Jemena Asset* in which the Court concluded at [59] that the federal instruments "*did not deal with or even mention, portable long service leave benefits, for workers in continuous service within the construction industry*". In that case, the State Act was held not to conflict with the Commonwealth law embodied in the federal instruments because the State Act operated "*in a manner complementary to the operation of the federal instruments*".

59. The question in this case is whether the State law is on the same subject matter and, if so, whether it is inconsistent with it because it detracts from or impairs that negative implication: *Momcilovic* per Gummow J at [261]. In this case, the federal law cannot be
30 said to be compatible with or aided by the coexistence of the State law: cf *The Kakariki* per Dixon J at 630. Nor can it be said that the State law attempts to deal with a matter not addressed in the ILUA or Federal Court determination. Each of the ILUA and determination has everything to say about the very same topic dealt with by the State law. The ILUA and determination, and the State Amendment Act, are directed to the same subject matter: *Momcilovic* per Hayne J at [330]-[338] (albeit dissenting in the result); cf *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211; and *McWaters v Day* (1989) 168 CLR 289. In relation to that subject matter, the State law is in very real conflict with the ILUA and determination: cf *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 553 per Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ; *T*
40 *A Robinson & Sons Pty Ltd v Haylor* (1957) 97 CLR 177 at 183 per Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ.

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[70] *Momcilovic* per Gummow J at [260].

[71] See *Momcilovic* per Crennan and Kiefel JJ at [642]-[644], citing inter alia *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 per Mason J at 347; also at [654], [656].

[72] Section 8 provides in relation to the effect of the 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.*"

60. Finally, this is not a case where less than the whole of the State Act is invalid for inconsistency. There is no occasion for the application of the principles of severance discussed, for example, in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [246]-[252], [389]-[393].

Part VI: Applicable Constitutional provisions, statutes and regulations

61. A copy of applicable constitutional provisions, statutes and regulations as in force at relevant times is contained at **Annexure B**.

Part VII: Answers to Special Case, and orders sought

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62. The Special Case should be answered as follows:

Question 1
Yes.

Question 2
The Amendment Act is invalid under s 109 of the Commonwealth Constitution by reason of inconsistency between the Amendment Act and ss 24EA and 87, and each of them, of the *Native Title Act*.

Question 3
20 The defendant should pay the costs of the special case.

Part VIII: Orders sought

1. A declaration that the Amendment Act is invalid.

2. Costs.

Part VIII: Time estimate for oral argument

63. The plaintiff estimates some 2.5 hours will be sufficient to present its oral argument.

Dated: 6 February 2015

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ANNEXURE A

	Legislation	Commencement and renewals
ML1105 (originally ML 931 BRIS)	*Mining Act 1898*, s 30	Term of 21 years commencing 1 December 1958, expiring 30 November 1979.
	Mining Act 1968, s 26	On 24 February 1983, renewed for further period of 21 years commencing 1 December 1979, expiring 30 November 2000.
	Mineral Resources Act 1989, s 286	On 25 September 2003, renewed for further period of 21 years commencing 1 December 2000, expiring 30 November 2021.
	Principal Act, ss 10(2)-(3), 16-17	Expiry 30 November 2021 left unaltered. Not otherwise renewable. "[W]*inning of a mineral*" only within "*restricted mine path*", and only until 31 December 2019.
	Amendment Act, s 9 (inserting ss 11B and 11E(2) in Principal Act), s 12 (inserting a new s 17 in Principal Act)	Renewable for a period expiring no later than 31 December 2040. No longer restriction permitting "*winning of a mineral*" to be conducted only within "*restricted mine path*".
ML1109 (originally ML 974 BRIS)	*Mining Act 1898*, s 30	Term of 21 years commencing 1 March 1963, expiring 29 February 1984.
	Mining Act 1968, s 26	On 5 April 1988 renewed for further period of 21 years commencing 1 March 1984, expiring 28 February 2005.
	Mineral Resources Act 1989, s 286	On 6 April 2006, renewed for further period of 21 years commencing 1 March 2005, expiring 28 February 2026.
	Principal Act, s 9(1)-(2)	Expiry 31 December 2015. Not otherwise renewable.
	Amendment Act, s 9 (inserting ss 11B and 11E(1) in Principal Act)	Renewable for a period expiring no later than 31 December 2020.
ML1117 (originally ML 1001 BRIS)	*Mining Act 1968*, s 26	Term of 13 years commencing 1 November 1973, expiring 31 October 1986.
	Mining Act 1968, s 26	On 5 April 1988, renewed for further period of 21 years commencing 1 November 1986, expiring 31 October 2007.
	Mineral Resources Act 1989, s 286	On 2 May 2007, subject of application for renewal.
	Principal Act, ss 11(1) and (2)(a), Sch 1,	Expiry 31 December 2019. Not otherwise renewable.

	column 2, ss 16-17	"[W]*inning of a mineral*" only within "*restricted mine path*", and only until 31 December 2019.
	Amendment Act, s 9 (inserting ss 11B and 11E(2) in Principal Act), s 12 (inserting a new s 17 in Principal Act)	Renewable for a period expiring no later than 31 December 2040. No longer restriction permitting "*winning of a mineral*" to be conducted only within "*restricted mine path*".
ML1120 (originally ML 1026 BRIS)	*Mining Act 1968*, s 26	Term of 14 years commencing 1 November 1973, expiring 31 October 1987.
	Mining Act 1968, 26	On 5 April 1988, renewed for further period of 21 years commencing 1 November 1987, expiring 31 October 2008.
	Mineral Resources Act 1989, s286	On 29 April 2008, subject of application for renewal.
	Principal Act, ss 11(1) and 11(2)(a), Sch 1, column 2, ss 11(5)-(6)	Expiry 31 December 2019. Not otherwise renewable.
	Amendment Act, s 9 (inserting ss 11B and 11E(2) in Principal Act)	Renewable for a period expiring no later than 31 December 2040.

ANNEXURE B

PART VI: APPLICABLE CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS

The Constitution

Covering cl 5

5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

Section 109

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Native Title Act 1993 (Cth)

(as at date of Federal Court determination (4 July 2011), registration of Indigenous Land Use Agreement (8 December 2011), and commencement of Amendment Act (6 February 2014))

Part 2, Division 3, Subdivision A - Preliminary

24AA Overview

Future acts

(1) This Division deals mainly with future acts, which are defined in section 233. Acts that do not affect native title are not *future acts*; therefore this Division does not deal with them (see section 227 for the meaning of acts that *affect* native title).

Validity of future acts

(2) Basically, this Division 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.

Validity under indigenous land use agreements

(3) A future act will be valid if the parties to certain agreements (called indigenous land use agreements—see Subdivisions B, C and D) consent to it being done and, at the time it is done, details of the agreement are on the Register of Indigenous Land Use Agreements. An indigenous land use agreement, details of which are on the Register, may also validate a future act (other than an intermediate period act) that has already been invalidly done.

Other bases for validity

(4) A future act will also be valid to the extent covered by any of the following:

(a) section 24FA (future acts where procedures indicate absence of native title);

(b) section 24GB (acts permitting primary production on non-exclusive agricultural or pastoral leases);

(c) section 24GD (acts permitting off-farm activities directly connected to primary production activities);

(d) section 24GE (granting rights to third parties etc. on non-exclusive agricultural or pastoral leases);

(e) section 24HA (management of water and airspace);

(f) section 24IA (acts involving renewals and extensions etc. of acts);

(g) section 24JAA (public housing etc.);

(h) section 24JA (acts involving reservations, leases etc.);

(i) section 24KA (acts involving facilities for services to the public);

(j) section 24LA (low impact future acts);

(k) section 24MD (acts that pass the freehold test—but see subsection (5));

(l) section 24NA (acts affecting offshore places).

Right to negotiate

(5) In the case of certain acts covered by section 24IC (permissible lease etc. renewals) or section 24MD (acts that pass the freehold test), for the acts to be valid it is also necessary to satisfy the requirements of Subdivision P (which provides a "right to negotiate").

Extinguishment/non-extinguishment; procedural rights and compensation

(6) This Division provides that, in general, valid future acts are subject to the non- extinguishment principle. The Division also deals with procedural rights and compensation for the acts.

Activities etc. prevail over native title

(7) To avoid doubt, section 44H provides that a valid lease, licence, permit or authority, and any activity done under it, prevail over any native title rights and interests and their exercise.

Statutory access rights

(8) This Division confers access rights in respect of non-exclusive agricultural and non-exclusive pastoral leases on certain persons covered by registered native title claims (see Subdivision Q).

24AB Order of application of provisions

Indigenous land use agreement provisions

(1) To the extent that a future act is covered by section 24EB (which deals with the effect of indigenous land use agreements on future acts), it is not covered by any of the sections listed in paragraphs 24AA(4)(a) to (k).

Other provisions

(2) To the extent that a future act is covered by a particular section in the list in paragraphs 24AA(4)(a) to (k), it is not covered by a section that is lower in the list.

Note: It is important to know under which particular provision a future act is valid because the consequences in terms of compensation and procedural rights may be different.

(3) However, if, apart from subsection (2), a future act could be covered, to any extent, by both section 24JAA and section 24KA, then:

(a) if the act is notified in accordance with subsections 24JAA(10) to (12), it is not covered, to that extent, by section 24KA; and

(b) if the act is not notified in accordance with subsections 24JAA(10) to (12), it is not covered, to that extent, by section 24JAA.

Note: This allows for things, such as the construction of roads and electricity transmission or distribution facilities, to be done under either Subdivision JA or Subdivision K when done in connection with housing or facilities covered by Subdivision JA.

Part 2, Division 3, Subdivision E – Effect of registration of indigenous land use agreements

24EA Contractual effect of registered agreement

(1) While details of an agreement are entered on the Register of Indigenous Land Use

Agreements, the agreement has effect, in addition to any effect that it may have apart from this subsection, as if:

(a) it were a contract among the parties to the agreement; and

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

Note: Section 199B specifies the details of the agreement that are required to be entered on the Register.

Only certain persons bound by agreement

(2) To avoid doubt, a person is not bound by the agreement unless the person is a party to the agreement or a person to whom paragraph (1)(b) applies.

Legislation etc. to give effect to agreement not affected

(3) If the Commonwealth, a State or a Territory is a party to an indigenous land use agreement whose details are entered in the Register of Indigenous Land Use Agreements, this Act does not prevent the Commonwealth, the State or the Territory doing any legislative or other act to give effect to any of its obligations under the agreement.

24EB Effect of registration on proposed acts covered by indigenous land use agreements

Coverage of section

(1) The consequences set out in this section apply if:

(a) a future act is done; and

(b) when it is done, there are on the Register of Indigenous Land Use Agreements details of an agreement that includes a statement to the effect that the parties consent to:

(i) the doing of the act or class of act in which the act is included; or

(ii) the doing of the act, or class of act in which the act is included, subject to conditions; and

(c) if the act is, apart from this Subdivision, an act to which Subdivision P (which deals with the right to negotiate) applies—the agreement also includes a statement to the effect that Subdivision P is not intended to apply; and

Note: The fact that, under the "right to negotiate" provisions in Subdivision P,

agreements can be made after notice of an act is given as mentioned in section 29 does not prevent an indigenous land use agreement being made that consents to the doing of the act.

(d) if the act is the surrender of native title under an agreement covered by Subdivision B or C—the agreement also includes a statement to the effect that the surrender is intended to extinguish the native title rights and interests.

Validation of act

(2) The act is valid to the extent that it affects native title in relation to land or waters in the area covered by the agreement.

Non-extinguishment principle

(3) Unless a statement of the kind mentioned in paragraph (1)(d) in relation to the act is included in the agreement, the non- extinguishment principle applies to the act.

24EBA Effect of registration on previous acts covered by indigenous land use agreements

Coverage of section

(1) The consequences set out in this section apply if:

(a) details are on the Register of Indigenous Land Use Agreements of an agreement that includes a statement to the effect that the parties agree to:

(i) the validating of a particular future act (other than an intermediate period act), or future acts (other than intermediate period acts) included in classes, that have already been done invalidly; or

Note: Intermediate period acts are or can be validated only under Division 2A.

(ii) the validating, subject to conditions, of a particular future act (other than an intermediate period act), or of future acts (other than intermediate period acts) included in classes, that have already been done invalidly; or

(iii) changing the effects, that are provided for by section 22B (which relates to native title rights and interests) or by a law of a State or Territory that contains provisions to the same effect, of an intermediate period act or of intermediate period acts included in classes; and

(b) whichever of the Commonwealth, the State or the Territory to which the act or class of acts is attributable is a party to the agreement; and

(c) where, whether under the agreement or otherwise, a person other than the Crown in right of the Commonwealth, a State or a Territory is or may

become liable to pay compensation in relation to the act or class of acts—that person is a party to the agreement.

Commonwealth future acts valid

(2) If subparagraph (1)(a)(i) or (ii) applies and the future act or class of future acts is attributable to the Commonwealth, the act or class of acts is valid, and is taken always to have been valid.

State or Territory laws may validate their future acts

(3) If subparagraph (1)(a)(i) or (ii) applies and the future act or class of future acts is attributable to a State or Territory, a law of the State or the Territory may provide that the act or class of acts is valid, and is taken always to have been valid. The law may do so by applying to all acts, to classes of acts, or to particular acts, to which subparagraph (1)(a)(i) or (ii) applies in respect of which the requirements of subsection (1) are or become satisfied.

Non-extinguishment principle applies to future acts

(4) If subsection (2) applies or a law makes provision in accordance with subsection (3), the non- extinguishment principle applies to the act or class of acts unless:

(a) the act or class of acts is the surrender of native title; and

(b) the agreement includes a statement to the effect that the surrender is intended to have extinguished the native title rights and interests.

Compensation consequences of future acts

(5) If subsection (2) applies or a law makes provision in accordance with subsection (3), the consequences set out in subsection 24EB(4), (5) or (6), and the consequences set out in subsection 24EB(7), apply to the act or to each of the acts in the class.

Changing the effects of validated acts

(6) If subparagraph (1)(a)(iii) applies, the effects mentioned in that subparagraph are changed in accordance with the agreement.

Part 4, Division 1C – Agreements and unopposed applications

87 Power of Federal Court if parties reach agreement

Application

(1) This section applies if, at any stage of proceedings after the end of the period

specified in the notice given under section 66:

(a) agreement is reached between the parties on the terms of an order of the Federal Court in relation to:

(i) the proceedings; or

(ii) a part of the proceedings; or

(iii) a matter arising out of the proceedings; and

(b) the terms of the agreement, in writing signed by or on behalf of the parties, are filed with the Court; and

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

Power of Court

(1A) The Court may, if it appears to the Court to be appropriate to do so, act in accordance with:

(a) whichever of subsection (2) or (3) is relevant in the particular case; and

(b) if subsection (5) applies in the particular case—that subsection.

Agreement as to order

(2) If the agreement is on the terms of an order of the Court in relation to the proceedings, the Court may make an order in, or consistent with, those terms without holding a hearing or, if a hearing has started, without completing the hearing.

Note: If the application involves making a determination of native title, the Court's order would need to comply with section 94A (which deals with the requirements of native title determination orders).

Agreement as to part of proceedings

(3) If the agreement relates to a part of the proceedings or a matter arising out of the proceedings, the Court may in its order give effect to the terms of the agreement without, if it has not already done so, dealing at the hearing with the part of the proceedings or the matter arising out of the proceedings, as the case may be, to which the agreement relates.

Orders about matters other than native title

(4) Without limiting subsection (2) or (3), if the order under that subsection does not involve the Court making a determination of native title, the order may give effect to terms of the agreement that involve matters other than native title.

(5) Without limiting subsection (2) or (3), if the order under that subsection involves the Court making a determination of native title, the Court may also make an order under this subsection that gives effect to terms of the agreement that involve matters other than native title.

(6) The jurisdiction conferred on the Court by this Act extends to:

(a) making an order under subsection (2) or (3) that gives effect to terms of the agreement that involve matters other than native title; and

(b) making an order under subsection (5).

(7) The regulations may specify the kinds of matters other than native title that an order under subsection (2), (3) or (5) may give effect to.

Agreed statement of facts

(8) If some or all of the parties to the proceeding have reached agreement on a statement of facts, one of those parties may file a copy of the statement with the Court.

(9) Within 7 days after a statement of facts agreed to by some of the parties to the proceeding is filed, the Registrar of the Court must give notice to the other parties to the proceeding that the statement has been filed with the Court.

(10) In considering whether to make an order under subsection (2), (3) or (5), the Court may accept a statement of facts that has been agreed to by some or all of the parties to the proceedings but only if those parties include:

(a) the applicant; and

(b) the party that the Court considers was the principal government respondent in relation to the proceedings at the time the agreement was reached.

(11) In considering whether to accept under subsection (10) a statement of facts agreed to by some of the parties to the proceedings, the Court must take into account any objections that are made by the other parties to the proceedings within 21 days after the notice is given under subsection (9).

North Stradbroke Island Protection and Sustainability Act 2011 (Qld)

(as commenced on 14 April 2011)

Part 1 Preliminary

Division 1 Introduction and object of Act

2 Object of Act

The object of this Act is to substantially end mining interests over land in the North Stradbroke Island Region by the end of 2019, and end mining in the region in 2025—

(a) to protect and restore environmental values of the region; and

(b) to facilitate, under other Acts, the staged creation of areas to be jointly managed by the State and the traditional owners of the region.

Division 2 Interpretation

5 Meaning of *North Stradbroke Island Region*

(1) The ***North Stradbroke Island Region*** is the part of the State shown as 'Area A' and 'Area B' on the map titled 'NSI 1' approved by the chief executive on 18 March 2011 and held by the department.

Editor's note—The map titled 'NSI 1' may be viewed on the department's website at <www.derm.qld.gov.au>.

(2) The exact location of the boundary of the North Stradbroke Island Region is held in digital electronic form by the department.

(3) The information held in digital electronic form can be reduced or enlarged to show the details of the boundary.

Part 2 Dealing with mining interests in the North Stradbroke Island Region

Division 2 Provisions about mining interests

8 Termination of particular NSI mining interests

(1) This section applies to an NSI mining interest if, under the Mineral Resources Act, the term of the mining interest would, apart from this section, and unless ended sooner for any reason, end after 31 December 2019.

(2) This section does not apply to the following mining leases—

(a) 1105;
(b) 1108;
(c) 1109;
(d) 1124;
(e) 7064.

(3) The term of the NSI mining interest, unless ended sooner for any reason, ends at the end of 31 December 2019, and the mining interest can not at any time be renewed.

(4) The holder of the NSI mining interest may not at any time apply for a renewal of the mining interest under the Mineral Resources Act after the commencement.

9 Termination of mining lease 1109

(2) The term of mining lease 1109, unless ended sooner for any reason, ends at the end of 31 December 2015, and the lease can not at any time be renewed.

(3) The holder of mining lease 1109 may not at any time apply for a renewal of the mining lease under the Mineral Resources Act after the commencement.

10 Particular NSI mining interests not to be renewed

(1) An application for renewal of a relevant NSI mining interest made under the Mineral Resources Act but not decided before the commencement—

(a) can not be further dealt with under that Act; and
(b) is taken to have been withdrawn by the applicant on the commencement.

(2) The holder of a relevant NSI mining interest may not apply for a renewal of the mining interest under the Mineral Resources Act after the commencement.

(3) A renewal of a relevant NSI mining interest can not be granted under the Mineral Resources Act.

(4) In this section—

(a) ***holder***, of a relevant NSI mining interest, means the holder of the mining interest under the Mineral Resources Act.

(b) ***relevant NSI mining interest*** means an NSI mining interest in force on the commencement other than the following—

(a) an NSI mining interest mentioned in schedule 1, column 1;
(b) an NSI mining interest mentioned in schedule 2, column 1;
(b) a mining interest to which section 8 or 9 applies.

11 Renewal of particular NSI mining leases

(1) On the commencement, each mining lease mentioned in schedule 1, column 1 is taken to have been renewed under the Mineral Resources Act.

(2) The mining lease is renewed—

(a) for the term stated opposite the mining lease in schedule 1, column 2; and

(b) subject to—

(i) each condition stated opposite the mining lease in schedule 1, column 3; and

(ii) any condition to which the mining lease was subject immediately before the renewal.

(3) The renewals have effect as if they were granted by the Governor in Council under the Mineral Resources Act.

(4) If there is an inconsistency between a condition mentioned in subsection (2)(b)(i) and a condition mentioned in subsection (2)(b)(ii), the condition mentioned in subsection (2)(b)(i) prevails to the extent of the inconsistency.

(5) A mining lease mentioned in schedule 1, column 1 can not at any time be renewed after the end of the term stated opposite the mining lease in schedule 1, column 2.

(6) The holder of a mining lease mentioned in schedule 1, column 1 may not at any time apply for a renewal of the mining lease under the Mineral Resources Act after the commencement.

(7) This section does not limit the application of any provisions of the Mineral Resources Act to the renewed mining lease including, for example, provisions about cancelling a mining lease or reducing its area.

(8) The renewal of each lease does not create any rights in addition to the rights created in the initial granting of the relevant lease.

14 Prohibition on grant of NSI mining interest

An NSI mining interest can not be granted.

Division 3 Provisions about particular environmental authority

15 Purpose of div 3

The purpose of this division is to provide for the amendment of a particular environmental authority for mining activities on North Stradbroke Island.

16 Definitions for div 3

In this division—

amendment application see the Environmental Protection Act, section 238(1).

Enterprise Mine lease means mining lease 1105 or mining lease 1117 under the Mineral Resources Act.

restricted mine path, for an Enterprise Mine lease, means the area shown on the map titled 'NSI 2' approved by the chief executive on 18 March 2011 and held by the department.

Editor's note—
The map titled 'NSI 2' may be viewed on the department's website at <www.derm.qld.gov.au>.

17 Statutory conditions of the environmental authority for Enterprise Mine

Environmental authority MIN100971509 is taken to include the following conditions—

(a) mining activities that are the winning of a mineral from the place where it occurs may be conducted only within the restricted mine path for an Enterprise Mine lease; and

(b) mining activities that are the winning of a mineral from the place where it occurs within the restricted mine path for an Enterprise Mine lease may only be conducted until the end of 31 December 2019.

18 Application by Enterprise Mine lease holder to amend restricted mine path

(1) A holder of an Enterprise Mine lease may apply, within 2 months after commencement, to the Minister to amend the restricted mine path of an Enterprise Mine lease to add an area of land to the restricted mine path.

(2) The application must be—

(a) made in the approved form for an amendment application; and

(b) supported by enough information to allow the Minister to decide the application.

19 Minister to decide application

(1) The Minister must, within the period prescribed under the *Environmental Protection Regulation 2008* for an amendment application, decide either to grant or refuse the application.

(2) However, the Minister may amend the restricted mine path of an Enterprise Mine lease to add an area of land to the restricted mine path only if—

(a) the area proposed to be added to the mine path (the ***added area***) is not, or does not include, a threatened ecosystem; and

(b) the Minister is satisfied that the addition of the added area is reasonably necessary to facilitate mining at the same rate of production, until 31 December 2019, as the average rate for the Enterprise Mine lease over the two years immediately before commencement; and

(c) the mine path, after addition of the added area, is consistent with the conditions applying under environmental authority MIN100971509.

(3) In this section—

threatened ecosystem means an ecosystem identified in the database known as the 'Regional ecosystem description database' kept by the department as one of the following—

(a) an endangered dominant ecosystem;

(b) an endangered sub-dominant ecosystem;

(c) an of concern dominant ecosystem;

(d) an of concern sub-dominant ecosystem.

Editor's note—

The Regional ecosystem description database is available for inspection—

(a) during office hours, at the Queensland Herbarium, Brisbane Botanic Gardens, Mt Coot-tha Road, Toowong and each regional office of the department; and

(b) on the department's website.

20 Steps after making decision

(1) If the Minister decides to grant the application, the Minister must, within 10 business days after the decision is made—

(a) amend the environmental authority to give effect to the amendment; and

(b) record particulars of the amendment in the appropriate register as if the authority had been amended under the Environmental Protection Act; and

(c) give the applicant a copy of the amended environmental authority.

(2) The amendment takes effect on the day of the amendment or a later day stated in the amended environmental authority.

(3) If the Minister decides to refuse the application, the Minister must, within 10 business days after the decision is made, give the applicant a written notice about the decision.

21 Applications to amend restricted mine path of Enterprise Mine lease under the Environmental Protection Act

(1) Sections 17 and 18 do not stop the holder of environmental authority MIN100971509, whether or not amended under section 19, from applying to amend the environmental authority under the Environmental Protection Act, chapter 5, part 8.

(2) However, an amendment of the environmental authority under the Environmental Protection Act, chapter 5, part 8 can not be made if the amendment would—

(a) result in the total area of the restricted mine path being increased in size—

(i) if the restricted mine path is amended under section 19—to an area more than 5% larger than the restricted mine path as amended under the section; or

(ii) otherwise—to an area more than 5% larger than the restricted mine path as defined in section 16; or

(b) amend the condition of the environmental authority stated in section 17(b).

(3) This section applies despite any provision of the Environmental Protection Act or any other Act or law.

Schedule 1 Conditions of renewal for particular mining leases

Column 1	Column 2	Column 3
Mining lease	**Term of renewal**	**Conditions for renewal**
Mining lease 1117	The term of renewal ends at the end of 31 December 2019.	
Mining leases 1103, 1118, 1119, 1120, 1121, 1129 and 1130	The term of renewal ends at the end of 31 December 2019.	The winning of a mineral from the place where it occurs in the area of land over which the lease is granted is not permitted under the lease.
Mining lease 1122	The term of renewal ends at the end of 31 December 2015.	The winning of a mineral from the place where it occurs in the area of land over which the lease is granted is not permitted under the lease.
Mining lease 1124	The term of renewal ends at the end of 31 October 2025.	The winning of a mineral from the place where it occurs in the area of land

		over which the lease is granted is not permitted under the lease.

North Stradbroke Island Protection and Sustainability and Another Amendment Act 2013 (Qld)

(as commenced on 6 February 2014)

Part 2 Amendment of North Stradbroke Island Protection and Sustainability Act 2011

3 Act amended

This part amends the *North Stradbroke Island Protection and Sustainability Act 2011.*

4 Amendment of s 2 (Object of Act)

(1) Section 2, from 'substantially' to '2025'—

omit, insert—

manage the duration of mining interests over land in the North Stradbroke Island Region, and end mining in the region by the end of 2035 (but allow for rehabilitation of land in the region to happen up until the end of 2040)

(2) Section 2—

insert—

(c) to assist the transition of the economy of the region from reliance on the mining industry to other industries.

9 Insertion of new ss 11A–11J

After section 11—

insert—

11A Mining lease 1120 no longer subject to particular condition for renewal

(1) On the commencement of this section, mining lease 1120 is no longer subject to the condition stated opposite the mining lease in schedule 1, column 3.

(2) Subsection (1) applies despite section 11(2)(b)(i) and anything to the contrary in the Mineral Resources Act that applies to the mining lease in relation to that condition.

11B Mining leases 1105, 1109, 1117 and 1120 can be renewed

(1) This section applies to each of the following mining leases—
(a) 1105;

(b) 1109;
(c) 1117;
(d) 1120.

(2) The mining lease can, under sections 11C to 11E, be renewed.

(3) Subsection (2) applies—

(a) for mining lease 1105—despite section 10(2) and (3); and

(b) for mining lease 1109—despite section 9(2); and

(c) for mining leases 1117 and 1120—despite section 11(5) and (6); and

(d) despite anything to the contrary in the Mineral Resources Act that applies to the mining lease in relation to that condition.

(4) Also, to remove any doubt, it is declared subsection (2) applies to mining leases 1117 and 1120 despite section 8(3) and (4).

11C Application for renewal of mining leases

(1) The holder of mining lease 1105, 1109, 1117 or 1120 may, within the renewal period, apply to the Minister for renewal of the mining lease.

(2) The application must be—

(a) made in the approved form; and

(b) accompanied by the fee prescribed under a regulation; and

(c) accompanied by a statement about the following matters—

(i) the term for which the mining lease is sought to be renewed;

(ii) for parcels of land the whole or part of which are the subject of the application—

(A) a description of the parcels; and

(B) the current use of the land; and

(C) the name and address of the owner of the land and the name and address of any other land that may be used to access the land.

(3) In this section—

renewal period means the period that is—

(a) at least 6 months, or any shorter period allowed by the Minister, before the current term of the lease expires; and

(b) not more than 1 year before the current term expires.

11D Decision on application

(1) If the Minister considers that an application under section 11C has been properly made the Minister must renew the relevant mining lease.

(2) The renewed lease is subject to—

(a) the conditions stated in section 11E; and

(b) any conditions prescribed under a regulation; and

(c) any conditions decided by the Minister.

(3) As soon as practicable after renewing the lease, the Minister must give the holder a written notice stating—

(a) when the renewal starts; and

(b) any conditions decided by the Minister to which the renewed lease is subject.

11E Provisions about particular leases if renewed

(1) The following apply for any renewal of mining lease 1109—

(a) after 31 December 2015, the winning of a mineral from the place where it occurs in the area of the lease is not an authorised activity for the lease;

(b) the mining lease ends at the end of 31 December 2020 and can not be renewed beyond that date.

(2) The following apply for any renewal of mining lease 1105, 1117 or 1120—

(a) the winning of a mineral from the place where it occurs in the area of the lease is an authorised activity for the lease;

(b) if, because of the renewal, the lease ends after 31 December 2035—

(i) after 31 December 2035, the winning of a mineral from the place where it occurs in the area of the lease is not an authorised activity for the lease; and

(ii) (ii) the mining lease ends at the end of 31 December 2040 and can not be renewed beyond that date.

(3) In this section—

authorised activity, for a lease, see the Mineral Resources Act, schedule 2.

12 Replacement of ss 16 to 21

Sections 16 to 21—

omit, insert—

17 Replacement of environmental authority MIN100971509

(1) On the commencement of this section, environmental authority MIN100971509, issued under the Environmental Protection Act, is replaced by the environmental authority shown in schedule 2A (the ***new authority***).The new authority is taken to be an environmental authority for the Environmental Protection Act.

(2) The new authority is taken to be an environmental authority for the Environmental Protection Act.

(3) The replacement does not limit the application of any provisions of the Environmental Protection Act to the new authority.