HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 03 Mar 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	D9/2022
File Title:	Harvey & Ors v. Minister for Primary Industry and Resources &
Registry:	Darwin
Document filed:	Form 27D - Respondent's submissions-Third Respondent's Su
Filing party:	Respondents
Date filed:	03 Mar 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY No. D9/2022

BETWEEN: **DAVID HARVEY**
First Appellant
THOMAS SIMON
Second Appellant
TOP END (DEFAULT PBC/CLA) ABORIGINAL CORPORATION RNTBC ICN 7848
Third Appellant
and
MINISTER FOR PRIMARY INDUSTRY AND RESOURCES
First Respondent
NORTHERN TERRITORY OF AUSTRALIA
Second Respondent
MOUNT ISA MINES LIMITED ACN 009 661 447
Third Respondent

THIRD RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The issue is whether the grant of MLA 29881 would be the "creation … of a right to mine for the sole purpose of the construction of an infrastructure facility … associated with mining" within the meaning of s 24MD(6B)(b) of the *Native Title Act* 1993 (Cth) (**NTA**).[1] The issue raises a number of questions concerning the proper meaning and effect of s 24MD(6B)(b).

3. The first question is the meaning of the phrase "right to mine". To date in these proceedings, this has evolved around a debate about the structure of the section. In a sense, that debate is secondary – the words must be given effect whatever the structure of the section. The structural issue is, however:

   (a) whether the section should be read as a "composite phrase" (as the appellants contend), such that there will be a right to mine where the grant is for the sole purpose of an infrastructure facility associated with mining; or

[1] FC [59] **CAB 129**. And see the appellants' sole ground of appeal. The issue as described by the appellants (AS [2]) is a gloss.

(b) whether the section involves two factual inquiries, that is, does the grant comprise "the creation of a right to mine" and, if so, was the creation of the right to mine "for the sole purpose of the construction of an infrastructure facility associated with mining" (as the respondents contend).

4. "Right to mine" on the latter approach, is to be construed by the application of the ordinary meaning of "mine" aided by the definition in s 253 and the text of s 24MD(6B)(b) and s 26(1)(c)(i). This was the approach adopted by the Full Court.

5. The second question is the meaning and effect of "infrastructure facility" as defined in s 253 of the NTA. The more particular question is whether the sub-paragraphs in the definition exhaustively define "infrastructure facility" (as the respondents contend), or whether the definition is "inclusive" (as the appellants contend).

6. There also remains the ultimate factual inquiry as to whether ML 29881 satisfies the section as properly construed.

Part III: Section 78B notice

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

Part IV: Facts

8. The McArthur River Mine (**Mine**) is a lead, silver, and zinc mine in the Northern Territory operated by the third respondent under five mineral leases (MLN 1121 to MLN 1125). The lead, silver, and zinc concentrates (**Product**) are transported some 120 kilometres from the Mine by road to a loading facility (**Loading Facility**) comprising a storage shed, barge loading system, swing basin and navigational channel located in the southern coastline of the **Gulf** of Carpentaria under mineral lease MLN 1126 (**AFM 46, 153-4, 256, 260**; FC [13]-[18] **CAB 108-112**).

9. Due to the shallow depth of the Gulf, the Product cannot be loaded directly onto ocean-going vessels. Instead, the Product is loaded onto a purpose-built bulk carrier vessel at the Loading Facility for transhipment to larger vessels situated off the coast. Sea access to the Loading Facility for the bulk carrier is provided by way of a dredged navigation channel and swing basin. Maintenance dredging is required to ensure the navigation channel and swing basin are safely navigable (**AFM 256-257 [15]-[23], 262**; FC [3], [18] **CAB 106, 111-2**).

10. The dredged sediment is pumped through a pipeline to a Dredge Spoil Emplacement Area (**DSEA**) contiguous with the southern boundary of MLN 1126. The DSEA comprises ponds

made from dried natural material; a retention basin; and an excavated open-air perimeter drain (**AFM 257-8 [29], [37]-[39], 264**; FC [18] **CAB 111-2**). The DSEA operates as follows:

(a) dredged sediment is deposited into the ponds and is passed between ponds using gravity (in a west to east direction) to separate the sediment within the spoil from the water; and

(b) the supernatant water is discharged onto adjacent tidal mud flats through a drain leaving residue sediment within the ponds, some of which is pushed up and redeposited as the walls of each pond.

11. The current DSEA has a limited capacity and requires expansion for future maintenance dredging to be undertaken for the remaining life of the Mine (**AFM 258 [40]**; FC [3] **CAB 106**). It was in that context that the third respondent applied for MLA 29881 for the purposes of the construction and operation of a new DSEA of similar size and design to the existing DSEA on an area contiguous with MLN 1126 (**AFM 185**; FC [3], [20] **CAB 106, 112-3**).

12. The third respondent otherwise accepts the appellants' facts and chronology.

Part V: Argument

(A) Introduction

13. The NTA was substantially amended in 1998. Prior to the amendments, s 26(2)(a) identified the "creation of a right to mine" as one future act which gave rise to the "right to negotiate" under (what was then) Subdiv B. The word "mine" was defined in s 253 in the same terms as it is now, but for the words following "but does not include …" in the present definition. That difference is not material for present purposes.

14. There is nothing in the NTA as first enacted which would suggest "right to mine" then had the breadth of meaning for which the appellants now contend.[2] Indeed, we submit it did not. A relevant consideration in this appeal is whether the amendments in 1998 were intended to effect a substantial change to the meaning of "right to mine" such that it should now, notwithstanding the definition of "mine" in s 253, extend to any grant for the sole purpose of any infrastructure facility associated with mining.

---

[2] The appellants submit there was "no settled understanding" of what was a "right to mine" before the 1998 amendments (AS [41]). That may not necessarily be correct. *Smith v Tenneco Energy Queensland Pty Ltd* (1996) 66 FCR 1 concerned a pipeline to carry gas **to consumers**. Conversely, *Re Tjupan Peoples* (1996) 134 FLR 462 concerned specific facilities **to and for the benefit of the mine** and the mining proponent did not produce evidence that such facilities were in fact subsequent or ancillary to extraction. Those cases are reconcilable and not inconsistent with the Full Court's construction. Irrespective, whether there was a settled understanding or not, there is no authority for the proposition that "right to mine" then extended to the grant here under consideration.

15. As was observed by Barker J in *Banjima*,[3] the only indication in the NTA after the 1998 amendments that "right to mine" should extend beyond its ordinary meaning is s 24MD(6B)(b) (and its related s 26(1)(c)(ii)). The reason for that is the words "for the sole purpose of an infrastructure facility associated with mining", which demand the conclusion that "a right to mine" for the purposes of s 24MD(6B)(b) may be created for such a purpose.

16. It has been suggested that s 24MD(6B)(b) is a "stand-alone" provision and that "right to mine" in that provision has a meaning different from the same phrase elsewhere in the Act.[4] This is an unattractive proposition, not only because it is reasonable to start from the position that the phrase should mean the same wherever it should appear, but also because to treat s 24MD(6B) as "stand-alone" confronts contextual inconsistencies (see, for example, s 26(1A) and s 26D).

17. On the other hand, the meaning of "right to mine" in s 24MD(6B)(b) is heavily influenced by the presence of the words "for the sole purpose of an infrastructure facility associated with mining". Those words do not appear elsewhere in the context of a "right to mine" (save for s 26(1)(c)(i)).

18. In that circumstance it is a big jump, particularly in the face of the legislative history and the definition of "mine" in s 253, to construe "right to mine" everywhere it appears in the NTA as carrying the very broad meaning which the appellants contend it carries in s 24MD(6B)(b). While we recognise that in interpreting the NTA it may be necessary to determine a hierarchy of provisions to give effect to its purpose and language while maintaining the unity of the statutory scheme,[5] the better approach is to construe "right to mine" in s 24MD(6B) in a manner which adjusts the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all of those provisions.[6] That involves construing "right to mine" in a manner which gives effect, but not undue width, to s 24MD(6B), while permitting the application of "mine" in s 253 and the comfortable accommodation of the phrase elsewhere in the Act.

19. That approach to the meaning of "right to mine", which we submit is correct, is in effect the approach taken by the Full Court.

20. If, contrary to our submission, "right to mine" in s 24MD(6B)(b) is to be construed as broadly as the appellants suggest, that is, to include any grant for the sole purpose of an infrastructure

---

[3] *Banjima People v Western Australia (No 2)* [2013] FCA 868; 305 ALR 1 at 175 [1054].
[4] *Banjima People v Western Australia (No 2)* [2013] FCA 868; 305 ALR 1 at 175 [1055].
[5] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at 381-382 [70].
[6] See *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at 381-382 [69]-[71].

facility associated with mining, one would also expect the phrase to have the same meaning in s 26(1)(c)(i). Thus, subject to the exemption in s 26(1)(c)(i) "except one created for the sole purpose of the construction of an infrastructure facility associated with mining", the right to negotiate in Subdiv P would take effect in respect of a very broad range of rights associated with mining. That suggests (contrary to our primary submission) the definition of "infrastructure facility" would equally need to be construed broadly, as the appellants contend.

(B) Summary

21. The decision of the Full Court rested on two findings:

(a) s 24MD(6B)(b) of the NTA defines a future act that satisfies two elements: (i) the future act must be the creation or variation of a right to mine; and (ii) the sole purpose of the creation or variation must be the construction of an infrastructure facility associated with mining (FC [97] **CAB 137**); and

(b) as a fact, the grant of MLA 29881 under s 44(1)(b)(ii) of the *Mineral Titles Act 2010* (NT) (**MTA**) would not create a "right to mine" (FC [130]-[132] **CAB 150-1**).

22. The findings that the definition of infrastructure facility in s 253 was exhaustive and that the sole purpose of MLA 29881 was not an infrastructure facility (as defined) associated with mining (FC [157]-[158] **CAB 159-160**), formed another basis upon which the appeal was disposed.

23. At its heart, the appellants' case on appeal is two-fold. *First*, the DSEA, being an area to deposit sediment dredged from the ocean, creates a "right to mine" for s 24MD(6B)(b) because (and solely because) it is "ancillary to mining" under s 40(1)(b)(ii) of the MTA. *Second*, "infrastructure facility" is an inclusive definition, and extends to anything subordinate to or otherwise intended to serve or support an undertaking (i.e., the Mine).

24. Hence, the appellants contend:

(a) provided the grant is for the sole purpose of an infrastructure facility associated with mining, "no further factual inquiry beyond that characterisation is called for by the statutory text", that is, there is a "right to mine" (AS [42]); and

(b) "right to mine" and the defined term "mine" extend to and encompass any act "ancillary", "associated" or "incidental" to mining and ought to be read as synonymous to every type of mining lease or licence (howsoever described) in the differing State and Territory laws (AS [42]-[43]).

25. It follows that any new grant for the sole purpose of the construction of an infrastructure facility with any association with mining, no matter its factual circumstances, the level of its connection, and its impact on native title rights, should be subject to more than freehold procedural rights in s 24MD(6B).

26. The third respondent submits that the appellants' contentions are incorrect.

27. The Full Court was, in our respectful submission, correct to find that the creation of a "right to mine" is a separate element of s 24MD(6B)(b). The finding of the Full Court followed an orthodox application of statutory construction principles.[7] We are mindful that the exercise, ultimately, is one of interpreting the section, rather than labelling it (as "compendious" or otherwise). But the mischief in the appellants' approach is to construe the words of s 24MD(6B)(b) as a "compendious phrase" in such a way as leaves "right to mine" with no work to do, that is, a deduction to be made from satisfaction of the other words of the section.

28. If, as the Full Court found, the "creation of a right to mine" is a separate inquiry, whether a grant for the construction of infrastructure triggers s 24MD(6B)(b) is to be determined upon a resolution of two factual inquiries: (i) whether the act is a "right to mine"; and (ii) if it is, whether the act is for the "sole purpose of the construction of an infrastructure facility associated with mining".

29. The Full Court resolved both of those inquiries in the negative. It was correct to do so. The result was compelled by the text of the NTA construed in its context. That is because:

(a) the words "right to mine", as the Full Court found, cannot be given an unduly narrow construction as the text and context demonstrates that the phrase extends to a right to construct infrastructure necessary for the meaningful exercise of engaging in mining activities, but the relevant inquiry is always fact specific and dependent upon the mining activity being undertaken (FC [124], [127] **CAB 147, 149**);

(b) the DSEA, an area to place dredged sediment, necessary for a bulk carrier to access the Loading Facility, does not create a "right to mine" (FC [130] **CAB 150**); and

(c) "infrastructure facility" is an exhaustive definition, and the DSEA does not fall within any of the unambiguous enumerated categories (FC [157]-[161] **CAB 159-161**).

---

[7] FC [96] **CAB 137**: "As is well understood, the task of statutory construction begins with the text of the provision in question, understood in its context (including legislative history and extrinsic materials) and with regard to its purpose" (citations omitted).

(B) Statutory provisions

30. The following additional provisions bear relevance to the appeal.

31. The definition of "infrastructure facility" in s 253 applies to only three provisions:

(a) s 26(1)(c)(i): "the creation of a right to mine, whether by the grant of a mining lease or otherwise, except one created for the sole purpose of the construction of an infrastructure facility associated with mining" and its corollary, s 24MD(6B); and

(b) s 26(1)(c)(iii): "the compulsory acquisition of native title rights and interests, unless: … (B) the purpose of the acquisition is to provide an infrastructure facility".

32. It will immediately be noted that an inclusive interpretation of "infrastructure facility", for which the appellants contend, would significantly broaden what would otherwise be a limited carve out from the right to negotiate for compulsory acquisitions (s 26(1)(c)(iii)).

33. The phrase "right to mine" is referred to in several additional provisions of the NTA:

(a) ss 22EA and 22H: certain "intermediate acts" that consisted of the "creation of a right to mine", the "variation of such a right", or "the extension of the period for which such a right has effect" required the Commonwealth or a State or Territory (as the case may be) to give notice of the "kind of mining" involved;

(b) s 24MB: "the creation or variation of a right to mine for opals or gems";

(c) s 26(1A): "the renewal, re-grant, re-making or extension of the term of the lease, licence, permit or authority concerned creates a right to mine";

(d) ss 26A: "the creation or variation of a right to mine, where the right as so created or varied is a right to explore, a right to prospect or a right to fossick":

(e) s 26B: "the creation or variation of rights to mine, where the rights as so created or varied are rights to mine gold, or tin, in surface alluvium";

(f) s 26C: the "creation or variation of a right to mine" pertaining to opal or gem mining, exploration or prospecting;

(g) s 26D: the creation of a "right to mine" if the "creation of the right is done" by the renewal, re-grant, re-making or extension of the term "of an earlier right to mine";

(h) s 40 which prohibits the reopening of a decision of an arbitral body made in relation to a future act consisting of the "creation of a right to mine"; and

(i) s 43B which deals with the "creation or variation of a right to mine" in certain areas.

(C) Section 24MD(6B) comprises two limbs, each of which must be satisfied

34. As reasoned by the Full Court (FC [98]-[101] **CAB 137-8**) and explained below, the statutory text and context demonstrate that: (i) it is necessary[8] to construe both s 24MD(6B) and s 26(1)(c)(i) as comprising two elements; and (ii) the legislature intended a particular category of a "right to mine", being one for the sole purpose of an infrastructure facility associated with mining, to be dealt separately by s 24MD(6B)(b) and outside the right to negotiate regime.

35. For a provision to operate as a composite phrase, it must be clear that is how the legislative expression is intended to function when construed in accordance with orthodox principles.[9] When orthodox principles were applied here, the appellants' contention that the phrase was compendious, and therefore satisfied by the mere association between the purpose of the infrastructure facility and mining, could not sensibly stand.

36. The appellants contend that provided the future act extends to the construction of an infrastructure facility associated with mining then it necessarily involves the creation of a "right to mine" (AS [42]). As the Full Court correctly found, that approach is erroneous (FC [97]-[98] **CAB 137**). It involves reading the statutory provision as if the introductory words (the "creation or variation of a right to mine") were absent. Those words may not be disregarded if, by any other construction, they may be made useful.[10] The Full Court identified such a purposive construction by reference to the statutory text and context (FC [102], [127] **CAB 139, 149**). In that respect, it is not a matter of deciding in favour of a constructional choice available on the text (AS [37]), but a finding in favour of the only construction which gives effect to each of the words employed.

37. That s 24MD(6B) comprises two limbs is compelled by the wording of s 26(1)(c)(i) of the NTA, a complementary provision to s 24MD(6B) (FC [99] **CAB 138**). Section 24MD only applies to a future act if Subdiv P (the right to negotiate) does not apply.[11] Section 26(1)(c)(i), in Subdiv P, provides that it applies to any future act that is the "creation of a right to mine, whether by the grant of a mining lease or otherwise, **except one** [i.e., a right to mine] created for the sole purpose of the construction of an infrastructure facility … associated with mining".

---

8 *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; 254 CLR 247 at 271-272 [61]; *XYZ v Commonwealth* [2006] HCA 25; 227 CLR 532 at 592-593 [176].

9 *Commissioner of Taxation v BHP Billiton Ltd* [2019] FCAFC 4; 263 FCR 334 at 354 [85].

10 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at 382 [71] quoting with approval *Commonwealth v Baume* (1905) 2 CLR 405 at 414.

11 *Native Title Act 1993* (Cth) s 24MD(1).

The legislative note (a part of the Act[12]) states that rights to mine of the stated kind are dealt with by s 24MD(6B)(b).

38. On a plain and natural reading, s 26(1)(c)(i) requires, as a prerequisite before considering whether the exemption applies, the existence of a "right to mine".[13] The words "except one" necessitates that result (FC [97] **CAB 137**). The provision cannot function as a "composite, single test" (AS [30]). If the future act creates a "right to mine", the next inquiry is whether the category of future act is a right to mine of the stated kind, *viz*. one that satisfies the sole purpose test. If it is, the right to negotiate provisions do not apply and, in their stead, s 24MD(6B)(b) prescribes the procedural steps. Section 26(1)(c)(i) thus contemplates various categories of "rights to mine", one of which is for the sole purpose of the construction of an infrastructure facility associated with mining (**Excluded Category**) (FC [100] **CAB 138**).

39. That interrelationship between s 26(1)(c)(i) and s 24MD(6B)(b) requires the provisions be construed harmoniously and given the same meaning (FC [101], [117] **CAB 138, 145**).[14] The provisions cannot sensibly operate if a different construction is ascribed to each of them.

40. The appellants' construction appears to suggest that s 24MD(6B)(b) and possibly s 26(1)(c)(i) ought to be treated differently to the other provisions that contain the phrase "right to mine". There is no warrant to do so. Those provisions reinforce the existence of two limbs in ss 24MD(6B) and 26(1)(c)(i), and reveal the legislative intention that there are various categories of "rights to mine", namely:

(a) ss 26A and 26C refer to the creation of a right to mine where the right is of a stated kind, i.e., a "right to explore", a "right to prospect" or (for s 26A) a "right to fossick";

(b) ss 22EA and 22H and (in part) s 26D govern the effect of **past** "rights to mine" and ss 24MD and 26 govern **future** "rights to mine". Inconvenient and incongruous consequences would follow if the provisions were construed differently; and

(c) ss 26A, 26B, 26C and 26D are exemptions to s 26(1)(c)(i) for certain "rights to mine". They operate if s 26(1)(c)(i) would have otherwise been engaged. That necessarily

---

[12] *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; 255 CLR 514 at 533 [24]; *Acts Interpretation Act 1901* (Cth) s 13(1). FC [100] (**CAB 138**).

[13] That approach was (correctly) adopted by Barker J in *Banjima People v Western Australia (No 2)* [2013] FCA 868; 305 ALR 1 at 164 [982]. This is the ratio. His Honour's subsequent remarks at 174 [1054]-[1055] were *obiter*, contradictory to his earlier remarks at 164 [982], and were made without reference to relevant context, in particular s 26(1)(c)(i).

[14] *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at 385 [80].

requires a prior determination that the relevant grant creates a "right to mine", but not one of the Excluded Category.

41. In that respect, the Full Court's criticism of *Banjima* (FC [103], [104] **CAB 139-140**) was correct (*cf* AS [33]). It is not permissible to treat s 24MD(6B) as "standing alone". The NTA contemplates and regulates a suite of categories of "rights to mine" in various ways.

42. The legislative history (FC [107]-[118] **CAB 141-5**), confirms that a "right to mine" is a separate element within s 24MD(6B)(b).[15] Historically, what was s 26(2)(a) of the NTA established a right to negotiate in respect of the creation of a "right to mine" (FC [108] **CAB 141**). It was without exclusion. At that point in time, it could not seriously have been suggested that "right to mine" had the broad meaning which the appellants now seek to ascribe to it. Neither the common law, nor the definition of "mine", would have lent any support to that. Instead, those future acts now captured by s 24MD(6B)(b) were subject to the right to negotiate on the footing they created or varied a right to mine. Section 26(2)(a) was repealed by the *Native Title Amendment Act 1998* (Cth) and re-enacted as s 26(1)(c)(i), subject to the proviso addressed to a particular kind of rights to mine being the Excluded Category. In that respect, the Excluded Category was a subset of rights carved out of, not engrafted upon, "rights to mine" (FC [115] **CAB 144**). Section 24MD(6B)(b) was inserted in mirror terms to prescribe the procedural rights to that kind of a right to mine. In doing so, the legislature altered (and lessened) the procedural rights available to native title holders and claimants in respect of "rights to mine" of the stated kind (FC [118] **CAB 145**).

43. The existence of two limbs in s 24MD(6B)(b) and s 26(1)(c) does not destroy the exception that underpins the section's existence, nor does it ignore the context in which the words are used (*cf* AS [31] and [35]). As the Full Court correctly found, a "right to mine" must extend to the creation of a right to construct an infrastructure facility associated with mining for the provisions to operate at all (FC [102], [124] **CAB 139, 147**). What types of grants for the construction of infrastructure facilities associated with mining create a "right to mine" and satisfy the first limb is a separate question. But that is no reason to deny the bifurcation.

44. The proposition that the Full Court's approach does not cohere with a statutory structure (AS [35]) should not be accepted. It presupposes a binary structure. But, as the Full Court correctly found (FC [101], [129] **CAB 138, 150**), Parliament chose to enact different levels of protection

[15] That legislative history legitimately bears on the construction of s 24MD(6B)(b) and s 26(1)(c)(i): *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCA 24; 255 CLR 179 at 186 [25].

for native title holders and claimants for different forms of activities associated with mining that pass the "freehold test" under s 24MB, *viz*:

(a) the creation of a "right to mine" not within the Excluded Category engages the right to negotiate provisions (Subdiv P);

(b) the creation of a "right to mine" for the Excluded Category engages the lesser protections afforded by s 24MD(6B); and

(c) those acts which do not involve the creation of a "right to mine", grant the same rights as holders of ordinary freehold title would have by reason of s 24MD(6A).[16] Those rights protect native title and meet the principle of non-discrimination.

10 45. That represents the balance struck by the legislature in determining the types of grants that import additional procedural requirements and those that do not.[17]

46. Finally, that the NTA is to be construed beneficially "is a manifestation of the more general principle that all legislation is to be construed purposively".[18] The construction that would best achieve the purpose of the Act is to be preferred when the text raises a constructional choice.[19] For the reasons outlined above, there is no constructional choice.

47. In any event, appeals to the broad objects of the NTA, and the statutory rights afforded by s 26MD(6B)(b) (AS [37]) do not greatly assist in determining the scope of the provision. The purpose of the NTA was not to achieve a single objective at any cost. It was the result of political compromise between competing objectives.[20] The relevant objects of the NTA –
20 relevantly here: to establish ways in which future dealings affecting native title may proceed – are achieved in accordance with the text of the NTA. That wording leads naturally to different levels of procedural rights, reflecting the legislature's treatment of the expected impact on native title rights (FC [129] **CAB 150**). Those that create a "right to mine" are treated as of such significance to warrant additional procedural rights.

48. If, contrary to those submissions, s 24MD(6B)(b) is to be read as a composite phrase, the relevant issue on appeal remains the effect and thus the breadth of the phrase "right to mine"

---

[16] It is not correct to say that native title parties **might** have freehold equivalent procedural rights under State or Territory law (AS [37]). Native title parties have freehold equivalent rights. Further, the non-extinguishment principle applies to the act (s 24MD(3)(a)) and compensation is payable (s 24MD(3)(b)).

[17] *Carr v Western Australia* [2007] HCA 47; 232 CLR 138 at 142-143 [5]-[7]; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; 260 CLR 232 at 270-271 [92]-[93].

[18] *Tjungarrayi v Western Australia* [2019] HCA 12; 269 CLR 150 at 166 [44].

[19] *Tjungarrayi v Western Australia* [2019] HCA 12; 269 CLR 150 at 166 [44]-[45]; *Acts Interpretation Act 1901* (Cth) s 15AA.

[20] *Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96 at 138 [76]; *Western Australia v Manado* [2020] HCA 9; 270 CLR 81 at 102-103 [46].

in s 24MD(6B)(b). The principles are uncontroversial: (i) each aspect of the phrase should be given work to do;[21] and (ii) no part of the composite phrase can be pulled apart, determined in a manner divorced from the context in which it appears, and then the phrase reassembled.[22]

49. Those principles are not applied by the appellants. What is contended for is a construction that "right to mine" is a deduction to be made from satisfaction of the other words of the section. That impermissibly segregates the provision into more than one component and compels an inquiry divorced from its context (FC [98] **CAB 137**).

50. If s 24MD(6B)(b) is properly construed as a composite phrase, the words, "creation or variation of a right to mine" can be seen to limit the types of grants caught by it. That is:

10 (a) if the section was to include all infrastructure facilities "associated with mining", there would have been no need for the introductory words; and

(b) the introductory words confine those infrastructure facilities associated with mining to which the section refers and necessarily carries with them the inference that there are infrastructure facilities associated with mining **not** caught by s 24MD(6B)(b).

(D) MLA 29881, if made, does not create a "right to mine"

51. The Full Court's construction as to what constitutes a "right to mine" within the meaning of the NTA was expressly stated to be "non-exhaustive", dependent "upon the nature of the mining activity being undertaken", and "always … fact specific". In that context, and subject to those provisos, their Honours found (FC [127] **CAB 149**):

20 > … the statutory text, context and purpose indicates that the expression "right to mine" in the NTA refers to a future act that confers a right to engage in mining activities, which typically involve the exploration for and extraction of a mineral (or petroleum or gas) from the ground, and encompasses rights necessary for its meaningful exercise.

52. The examples given by the Full Court were expressed to be "typical" activities necessary for the meaningful exercise of mining activities and thus were appropriately described as a "right to mine" (FC [127] **CAB 149**). The Full Court did not limit the breadth of those infrastructure facilities that create a right to mine to those "directly associated with" and "form[ing] part of the mining activity" or those "in the title area" (*cf* AS [34], [40]). Rather, the Full Court observed that it was not the case that an ancillary mineral lease granted under s 40(1)(b)(ii) of

---

[21] *National Disability Insurance Agency v WRMF* [2020] FCAFC 79; 276 FCR 415 at 449 [149].

[22] *XYZ v Commonwealth* [2006] HCA 25; 227 CLR 532 at 543-544 [19]; *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; 254 CLR 247 at 271-272 [61]; *Sea Shepherd Australia Ltd v Commissioner of Taxation* [2013] FCAFC 68; 212 FCR 252 at 261 [34].

the MTA "can never be a right to mine" as the "question will always turn on the nature of the activities authorised by the mineral lease in question" (FC [131] **CAB 150-1**).

53. As the Full Court correctly identified, "considerable caution" is required when considering cases that have construed the words "mine" and "mining" in other statutory contexts, (FC [122], [125] **CAB 146-7**). Those different statutory contexts were not applied by Full Court to the construction of s 24MD(6B)(b), but were highlighted to demonstrate the point that it is the "statutory text, context and purpose"[23] that is controlling (FC [127] **CAB 149**; *cf* AS [31]). It is the application of those orthodox principles of construction which underpinned and support the Full Court's interpretation.

10 54. The Full Court was correct in its construction, for the reasons below. Contextually construed, the phrase "right to mine" requires a factual interrogation into the nature of the activities sought to be authorised. Typically, a right to mine will involve exploration and extraction of minerals (or petroleum or gas) from the ground and will encompass those rights necessary for its meaningful exercise. What is "necessary" will differ from case to case.

55. *First*, the word "mine" is ambiguous.[24] But it is defined in s 253 of the NTA, and is required to be woven into the phrase "right to mine" for the purposes of s 24MD(6B)(b) and s 26(1)(c)(i) (FC [120] **CAB 145-6**). As an inclusive definition, it will incorporate its ordinary meaning (the extraction of minerals from the ground (FC [122] **CAB 146-7**)) as well as the enlarged range of activities prescribed by the definition,[25] being exploration, prospecting,
20 quarrying and the extraction of petroleum or gas (FC [121] **CAB 146**). Each draws attention to the physical primary acts of exploring for and extracting minerals, petroleum or gas. There is no express or implied reference within the definition that "mine" extends to infrastructure. *A fortiori* to infrastructure "convenient" to a mining project (*cf* AS [34], [43]).

56. *Second*, the phrase "right to mine" is used frequently in the NTA (FC [123] **CAB 147**). When all such provisions are read in their totality (see [40] above), the phrase "right to mine" can be seen to be (and intended to be) categorised into different rights.

57. *Third*, a "right to mine" under the NTA is a right created (or varied) under a State or Territory Act. How "mine" is defined in those Acts is relevant and can be taken into account when construing "right to mine" in the NTA as that "must itself have an influence upon the 'common

---

[23] *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509 at 522.
[24] *Wade v New South Wales Rutile Mining Company Pty Ltd* (1969) 121 CLR 177 at 194.
[25] See *Sherritt Gordon Mines Ltd v Federal Commissioner of Taxation* [1977] VR 342 at 353; *Douglas v Tickner* (1994) 49 FCR 507 at 519; *Transport Accident Commission v Hogan* [2013] VSCA 335; 41 VR 112 at 122 [47].

understanding' of that term".[26] Those legislative provisions[27] confirm that mining is primarily directed to the extraction of minerals and, in some instances, expressly extends to the processing, treatment and disposal of such minerals.[28] In no State or Territory does "mine" extend to a facility of the nature under consideration here.[29] Paradoxically, the appellants contend that a "right to mine" is created within the contemplation of s 24MD(6B)(b) (and, it seems, under other provisions of the NTA) when it would not be a "right to mine" under the statute which creates it.

58. *Fourth*, as the majority observed in *Western Australia v Ward*,[30] the grant of any such right to mine encompasses those rights necessary for its meaningful exercise (FC [124] **CAB 147**). Thus, a right to extract minerals is capable of extending to the right to process, treat, store, and dispose of such minerals and to construct infrastructure for each of those activities.

59. *Fifth*, the legislative history confirms that pre-1998 "rights to mine", then caught by s 26(2), included infrastructure facilities associated with mining (FC [107]-[118] **CAB 141-5**). Those "rights to mine" have now been carved out and afforded lesser procedural rights.

60. *Sixth*, the only express reference to a "right to mine" extending beyond the extraction, exploration, prospecting, quarrying, fossicking of minerals (and as relevant, petroleum or gas), is in s 24MD(6B)(b) and s 26(1)(c)(i). It follows that "right to mine" can include an "infrastructure facility associated with mining" (FC [124] **CAB 147**).

61. *Seventh*, the words "associated with mining" in ss 24MD(6B) and 26(1)(c)(i) provide context to the phrase "right to mine". The words "associated with mining" direct one back to the definition of "mine" and require, for a "right to mine", that a connection exist between the "infrastructure facility" and "mine" being, as the Full Court found (without attempting to be exhaustive) mining activities, which typically involve the exploration for, and extraction of, a mineral (or petroleum or gas) from the ground, and those rights necessary for their meaningful exercise. (FC [127] **CAB 149**).

---

[26] *Federal Commissioner of Taxation v ICI Australia Ltd* (1972) 127 CLR 529 at 541, 581.

[27] *Mining Act 1992* (NSW) (definition of "*mine*"); *Mineral Resources Development Act 1995* (Tas) s 3 (definition of "mining" and "mineral"); *Mineral Titles Act 2010* (NT) s 12 (definition of "mining"); *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 4(1) (definition of "mining"); *Mining Act 1978* (WA) s 8 (definition of "mine" and "mining operations"); *Mineral Resources Act 1989* (Qld) s 6A (definition of "mine").

[28] South Australia also extends "mining" to include prospecting, exploring, and on-site operations that make minerals a commercially viable product: *Mining Act 1971* (SA) s 6 ("mining" and "mining operations").

[29] The MTA distinguishes between rights to mine and rights ancillary to mining (s 40). Indeed, it is doubtful whether the New South Wales, Victorian and Western Australian statutes would authorise the grant of MLA 29881 under any type of tenure: see *Mining Act 1992* (NSW) s 73 and *Mining Regulation 2016* (NSW) r 7 ("ancillary mining activity"); *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 4 ("infrastructure mining licence"); *Mining Act 1978* (WA) s 8 ("mine" and "mining operations").

[30] [2002] HCA 28; 213 CLR 1 at 165-166 [308].

62. Thus, the text and statutory context leads to the conclusion that the phrase "right to mine" properly construed comprises various categories of activities, for example, a right to explore, a right to extract, or a right to quarry, with which infrastructure facilities can be associated. It is those infrastructure facilities which create a "right to mine". D9/2022

63. In an appropriate factual circumstance, those infrastructure facilities necessary for the **meaningful** exercise of (for example) the extraction of the minerals might include not only those facilities recognised by the Full Court, such as a processing or treatment plant (FC [102], [124], [127] **CAB 139, 147, 149**), but also any of the enumerated categories of infrastructure facilities defined in s 253, for example storage or transportation facilities for minerals, electricity facilities, water management facilities; and communications facilities.

64. As found by the Full Court, as a question of fact, the grant of MLA 29881 would not constitute the creation of a "right to mine" because the activities authorised by it, the construction and operation of a DSEA, were too remote from the mining activities and not necessary for the meaningful exercise of them (FC [130] **CAB 150**). That was principally because the activities to be authorised are associated only with the shipment of Product (that has been transported to and stored at a separate mining lease) to ocean-going vessels (FC [132] **CAB 151**). Another matter was that the DSEA was to be constructed on land separate to the mining activities, but as noted, the question will always turn on the nature of the authorised activities (FC [131] **CAB 150-1**). It was not determinative, nor will it necessary bear relevance in any given case.

65. The appellants' contrary contentions, which we will now address, should not be accepted.

66. It is quite wrong to submit that the Full Court simply stated the effect of a mining lease *stricto senso* in FC [127] **CAB 149** (*cf* AS [39]). As the Full Court found was common ground between the parties, "the word 'mine' as used in the NTA incorporates its ordinary meaning, being the extraction of minerals from the ground, and that the definition of s 253 extends that ordinary meaning" (FC [122] **CAB 146**). The area of dispute was, in effect, by how much (FC [122] **CAB 146**). That MLA 29881 does not create a "right to mine" does not imply no other ancillary mining lease would create a "right to mine". The Full Court expressly disavowed that construction (FC [131] **CAB 150-1**).

67. In that respect, the Full Court's interpretation did not gloss the statutory text in the manner advanced, or at all (*cf* AS [34], [36]). It was expressed to be non-exhaustive (FC [127] **CAB 149**). It prescribed no conditions nor mandatory factors. It calls for a factual inquiry as to all of the circumstances of the relationship between the mining activities and the infrastructure

facility. Each example postulated by the appellants at AS [34], [36], [40] may grant a "right to mine" in accordance with the Full Court's construction.

68. The appellants' contentions (AS [32]-[34]) necessarily proceed from assumptions unsupported by the statutory text and context: (i) the creation of a "right to mine" extends to **all** infrastructure facilities associated with mining; and (ii) "the incorporation of the definition treats certain things as having that association, including a road, jetty, port etc" (AS [34]).

69. It is true the definition of "infrastructure facility" must be construed as part of the substantive enactment (AS [34]). But that does not mean each enumerated type of infrastructure facility is deemed to create a "right to mine" and have the requisite "association" with mining. That ignores not only the words "right to mine" but also "associated with mining". It also creates a strained and unnatural extension to the meaning of "right to mine" by construing it as including anything "associated with mining", no matter how peripheral the nexus to the primary mining activities. The correct approach involves reading into the section the definition of "infrastructure facility",[31] and asking whether the infrastructure is "associated with mining". If it is, provided it creates a "right to mine", it will be within the Excluded Category.

70. The "sole purpose" criterion of s 24MD(6B) is not only whether the infrastructure facility is "associated with mining" (*cf* AS [43]), but rather whether the "right to mine" is for the sole purpose of the construction of an infrastructure facility associated with mining. The appellants' focus on the sole purpose of the "infrastructure facility":

    (a) omits that act (the "creation or variation of a right to mine") which controls whether s 24MD(6B)(b) is engaged in any given circumstance; and

    (b) is apt to lead to a misconstruction of s 24MD(6B) as it acts as though the precondition (a "right to mine") has been met by anything "associated with mining".

71. The appellants repeat their submission (AS [35], [42]-[43]), rejected by the Full Court (FC [128] **CAB 149-150**), that one can categorise the range of possible mining tenements into those that confer rights to extract minerals and carry out associated works on the title area and those that confer rights to carry out associated works on other land. So, the argument goes, s 26(1)(c)(i) applies to the former, and s 26MD(6B)(b) to the latter. In essence, the words "right to mine" are equal to any of the activities for which a "mineral lease" or "licence" could be granted under the MTA or its analogues. That contention turns the focus away from the statutory text and context and is tantamount to reading the words "right to mine" as equivalent

---

[31] *Kelly v The Queen* [2004] HCA 12; 218 CLR 216 at 253 [103].

to "mineral lease or licence" (howsoever described) within various mining statutes. Those were not the words adopted. A distinction was drawn between infrastructure facilities ancillary to mining and infrastructure facilities ancillary to mining that create a "right to mine".

72. Even if one accepts that Parliament can be taken to have known of mining tenements like those granted under s 40(1)(b)(ii) of the MTA (AS [40]), it does not follow that all such activities create a "right to mine", nor that each such activity is the "construction of an infrastructure facility". Some grants (mining or otherwise) may do so. Others may not.

73. Whether a "right to mine" is created has always been the factual gateway to a right to negotiate under Subdiv P of the NTA (see s 26 of the Act as passed in 1993). That factual inquiry remains under s 26(1)(c)(i) and s 24MD(6B)(b). The further factual inquiry, going to the purpose of the creation of the right, is a factual inquiry common to the approach of both the appellants and the respondents (AS [42]). It is therefore unconvincing to suggest that the approach of the Full Court is "likely to produce inconvenience" because it is "fact specific" and will turn on the nature of the activities authorised by the tenement (AS [42]). Such "inconvenience" as might arise has always been.

74. The test propounded by the Full Court is uniform in approach: does the future act grant rights to engage in mining activities, or rights necessary for their meaningful exercise. If it does, it creates a "right to mine". It matters not whether the grant is under mining legislation, or any other statutory enactment. How that construction produces inconvenient and improbable consequences or introduces uncertainty (AS [42]-[43]) is not said. It should be rejected. A factual inquiry into the activities to be authorised and whether those activities amount to a "right to mine" produces homogeneity in operation across the various State and Territory laws and accommodates linguistic differences and varied land regimes presently and in the future.

(E) The infrastructure facility definition is exhaustive

75. The Full Court found that the definition of "infrastructure facility" in s 253 of the NTA was exhaustive (FC [157] **CAB 159-160**) after a thorough consideration of the statutory text and context and the *obiter* in *South Australia v* ***Slipper***[32] (FC [137]-[156] **CAB 152-9**). That finding is correct. Whether the definition was exhaustive was not argued in *Slipper* and the relevant text, context, and statutory purpose for an exhaustive definition demonstrate the correctness of the Full Court's conclusion and any departure from *Slipper*.

[32] [2004] FCAFC 164; 136 FCR 259.

76. It is an orthodox principle of statutory interpretation that the meaning of "includes" with respect to a particular definition is to be determined in the context of the statutory instrument as a whole. That context may demonstrate the word "includes" was not employed to enlarge the ordinary meaning of the word or phrase but instead prescribes an exhaustive explanation of the meaning to be ascribed.[33] When construed in its context, "infrastructure facility", as defined in s 253 of the NTA, is such a definition.

77. *First*, the Full Court commenced with the proposition that the word "includes" is a strong indicator that the definition of "infrastructure facility" was intended to be non-exhaustive (FC [145]-[146] **CAB 155-6**). It was only after a thorough consideration of the opposing indications exhibited in the text and context that the Full Court found to the contrary.

78. *Second*, as reasoned by the Full Court at FC [147]-[148] **CAB 156**, each of the things in subparagraphs (a) to (h) of the definition fall squarely within the ordinary meaning of infrastructure facility. That suggests the legislature sought not to expand the ordinary meaning but to provide an exhaustive explanation.[34] This is not a case where some of the categories are on the edge of the ordinary meaning such that the definition is inclusive to avoid uncertainty.[35]

79. *Third*, their Honours correctly found the definition adopted by Branson J in *Slipper* was unduly narrow and not reflective of ordinary usage in Australia (FC [147] **CAB 156**). Further, the definition sought to be ascribed by the appellants (AS [46]) – being that adopted in *Slipper* – is the dictionary definition of "infrastructure". That is not the wording of the legislature. The composite phrase "infrastructure facility" was selected. It is not appropriate to focus upon one word (infrastructure), define it (narrowly) in a manner divorced from its context, and attribute the narrow meaning of that word to the phrase.[36] Moreover, dictionary definitions are not conclusive and must be used with caution.[37] They do not assist in ascertaining the precise meaning a word bears in a particular context.[38] Respectfully, the approach in *Slipper* made a "fortress out of the dictionary"[39] and overlooked the meaning the phrase bears in context.

---

33 *YZ Finance Company Pty Ltd v Cummings* (1964) 109 CLR 395 at 402-403; *Dilworth v Stamps Commissioner* [1899] AC 99 at 106.

34 *YZ Finance Company Pty Ltd v Cummings* (1964) 109 CLR 395 at 399, 403, 405, 406

35 *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 at 206-207; *R v Novakovic* [2007] VSCA 145; 17 VR 21 at 22-23 [5]-[6]; *MacFarlane v Burke*; *ex parte Burke* [1983] 2 Qd R 584 at 589; *Federal Commissioner of Taxation v St Hubert's Island Pty Ltd* (1978) 138 CLR 210 at 216.

36 *XYZ v Commonwealth* [2006] HCA 25; 227 CLR 532 at 543-544 [19]; *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; 254 CLR 247 at 271-272 [61]; *Sea Shepherd Australia Ltd v Commissioner of Taxation* [2013] FCAFC 68; 212 FCR 252 at 261 [34].

37 See *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44; 48 NSWLR 498 at 505 [28], quoted with approval in *Polo/Lauren Co LP v Ziliani Holdings Pty Ltd* [2008] FCAFC 195; 173 FCR 266 at 273 [24]-[25].

38 *Tal Life Ltd v Shuetrim* [2016] NSWCA 68; 91 NSWLR 439 at 457-458 [80].

39 *Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664 at 672 [23].

80. *Fourth*, some types of "infrastructure facilities" are of a specific nature and qualify the ordinary meaning of the phrase (FC [149] **CAB 156-7**). For example, a "storage or transportation facility for coal, any other mineral or any mineral concentrate" (para (g)) affords a strong indication that any **other** kind of storage or transportation facility is excluded. To define each category in such a generalised manner would be unnecessary if the definition was not exhaustive.

81. *Fifth*, subparagraph (i) of the definition empowers the Minister to determine, by legislative instrument, that "any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (h)" is an infrastructure facility for the purposes of the definition. If the definition was inclusive, that would be unnecessary (FC [150] **CAB 157**).

82. *Sixth*, the phrase employed is not "includes" but "includes any of the following". That suggests a level of exclusivity (FC [151] **CAB 157**).[40]

83. *Seventh*, there is a discernible textual and statutory purpose to limit the definition to those things enumerated (FC [152] **CAB 157**). The phrase "infrastructure facility" is only used in one other respect in the NTA, *viz*. to **exclude** the right to negotiate when the future act comprises a compulsory acquisition for the purpose of providing an infrastructure facility (s 26(c)(iii)). All other compulsory acquisitions are subject to the right to negotiate. Thus, an inclusive definition of "infrastructure facility" would curtail the right to negotiate in the event of a compulsory acquisition and in large part deny native title holders the rights the legislature intended to ascribe to them. This is not addressed by the appellants.

84. *Eighth*, recourse to extrinsic material (AS [50]) does not deny that construction because: (i) the extrinsic material cannot displace the clear meaning of the text employed and the context in which it appears;[41] (ii) the material relied upon by the appellants does not determine the provision's meaning (FC [154] **CAB 158**);[42] and (iii) the extrinsic material comprised an explanatory memorandum published at the inception of a long legislative process prior to extensive amendment (FC [155] **CAB 158-9**).

85. *Ninth*, that processing and treatment plants would only constitute infrastructure facilities if the definition were non-exhaustive is not an anomaly (AS [49]). Such facilities "create a right to mine" but will not be exempt from the right to negotiate process. That is not an odd result, but

---

[40] On each other occasion the words "any of the following" are used in s 253, the definition is exhaustive*: cf Cohns Industries Pty Ltd v Deputy Federal Commissioner of Taxation* (1979) 37 FLR 508 at 510-511.

[41] *Baini v The Queen* [2012] HCA 59; 246 CLR 469 at 476 [14]; *Alcan (NT) Aluminia Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; 239 CLR 27 at 46-47 [47].

[42] *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 518. See also *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11; 228 CLR 529 at 538 [22], 555-556 [82].

is reflective of the types of infrastructure facilities for which Parliament ascribed lesser procedural rights. It is explicable why processing and treatment plants, facilities intrinsically connected with the winning of minerals, ought to be subject to the right to negotiate.

(F) MLA 29881 does not authorise the construction of an infrastructure facility

86. The Full Court correctly found the proposed grant of MLA 29881 did not meet any of the paragraphs of the definition of "infrastructure facility" (FC [158] **CAB 160**). The focus of the subparagraphs of the definition is the function or purpose of thing to be constructed (FC [159] **CAB 160**). That is a DSEA. It is not the enlargement of MLN 1126 (*cf* AS [51], [52]).

87. MLA 29881 did not concern the construction of a "storage or transportation facility for coal, any other mineral or any mineral concentrate" within subparagraph (f) because the DSEA was for the storage of dredge spoil, not for minerals or mineral concentrate. That the DSEA broadly "facilitates" transportation does not render it a transportation facility (FC [159] **CAB 160**). That construction is too much at variance with the language used.[43]

88. MLA 29881 was not for the sole purpose of the construction of a "dam, pipeline, channel or other water management, distribution or reticulation facility" within subparagraph (g). The test is not whether there is a "dam, pipeline, channel or other water management … facility" (*cf* AS [51]) but whether the sole purpose of the grant is for the construction of a facility of the stated kind. The function of the DSEA is to store dredge spoil. The drainage for supernatant wastewater arises because of the natural separation process. It is artificial to construe that peripheral aspect as converting the nature of the grant into a water management facility (FC [160] **CAB 160**) or the construction of a "drain or dam". That is not its sole purpose.

Part VI: Notice of Contention or Notice of Cross-Appeal

89. Not applicable.

Part VII: Time estimate

90. The third respondent estimates that one (1) hour will be required for its oral argument.

Dated: 3 March 2023

Roger N Traves KC
T: (07) 3229 6077
E: traves@level27chambers.com.au

Mark A Eade
T: (07) 3008 3957
E: mark.eade@level27chambers.com.au

[43] *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9; 253 CLR 531 at 548-549 [37]-[40].

ANNEXURE

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the particular statutes and statutory instruments referred to in the third respondent's submissions are as follows:

No	Description	Version	Provisions
1.	*Acts Interpretation Act 1901* (Cth)	Current (Compilation No 36, 20 December 2018 to present)	Sections 13, 15AA.
2.	*Native Title Act 1993* (Cth)	As enacted	Section 26.
3.	*Native Title Act 1993* (Cth)	Current (Compilation No 47, 25 September 2021 to present)	Sections 3, 4, 24AA, 22EA, 22H, 24MB, 24MD, 25, 26, 26A, 26B, 26C, 26D, 40, 43B, 245, 253.
4.	*Mineral Titles Act 2010* (NT)	Current (1 July 2021)	Sections 12, 40, 44.
5.	*Mining Act 1992* (NSW)	Current (13 January 2023)	Section 73, Dictionary.
6.	*Mining Regulation 2016* (NSW)	Current (13 January 2023)	Regulation 7.
7.	*Mineral Resources (Sustainable Development) Act 1990* (Vic)	Current (1 July 2021)	Section 4.
8.	*Mineral Resources Act 1989* (Qld)	Current (21 November 2022)	Section 6A.
9.	*Mining Act 1978* (WA)	Current (2 November 2022)	Section 8.
10.	*Mining Act 1971* (SA)	Current (25 February 2021)	Section 6.
11.	*Mineral Resources Development Act 1995* (Tas)	Current (1 July 2019)	Section 3