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

QUANDAMOOKA YOOLOOBURRABEE ABORIGINAL CORPORATION RNTBC
Plaintiff

AND

10 **STATE OF QUEENSLAND**
Defendant

ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

20 2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Defendant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VI of the Plaintiff's submissions.

PART V: SUBMISSIONS

5. The Attorney-General for Western Australia intervenes to submit that; neither question in the Case Stated arises because the Plaintiff's contentions proceed on a misconception of the effect of Division 3 of Part 2 of the *Native Title Act 1993*.
30 The validity, or invalidity, of the impugned legislative provisions (and their affect on the four mining leases) is determined by the *Native Title Act 1993*.

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Division 3 of Part 2 of the *Native Title Act 1993*

6. Division 3 of Part 2 contains the future act validating mechanism of the *Native Title Act 1993*. The sub-divisions of Division 3 of Part 2 operate and interact as a complex whole, providing the means by which future acts, being acts that affect native title, can validly be done. An act which does not affect native title is not a future act and Division 3 of Part 2 does not deal with those acts[1].

7. The starting point of Division 3 of Part 2 is s.24OA in sub-division O; unless a provision of the *Native Title Act 1993* provides otherwise, a future act is invalid to the extent that it affects native title. This provision, in turn, introduces the key concepts of Division 3 of Part 2; *act, future act* and *affect* on native title.Before dealing with these, it is necessary to consider a little more of the operation of Division 3 of Part 2.

8. After sub-division O, one then goes to sub-division A. Sections 24AA(3)-(4) and 24AB(1) and (2) state an aspect of the operation of the sub-divisions of Division 3 of Part 2. Section 24AB(1) is to be understood as recognising that future acts that are "covered by" s.24EB do not exclude the operation of sub-division P, being the right to negotiate provisions, even though future acts that are "covered by" s.24EB exclude the operation of other sub-divisions (being those listed in s.24AA(4)(a)-(k)).

9. Section 24AB(1) also requires (relevantly) that the operation of s.24EB be considered before sub-division I and sub-division M.

So - sub-division E of Division 3 of Part 2 of the *Native Title Act 1993*

10. Section 24EB(1) deals with the effect of registration of an ILUA on proposed future acts covered by that ILUA. The section operates, broadly, as follows. Where a registered ILUA provides that the parties consent to the doing of a future act[2], the future act is valid, if the parties have stated in the ILUA that sub-division P is not intended to apply[3].

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[1] See, generally, *Native Title Act 1993* s.24AA, and in particular s.24AA(1) and (2).

[2] Or a future act within an expressed or stated class.

[3] It is well to set out the section. Section 24EB(1) provides:

(1) The consequences set out in this section [being validity of a future act] 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
  (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.

11. The ILUA in this matter contains a statement for the purpose of s.24EB(1)(b)[4] and s.24EB(1)(d)[5]. Clause 7 of the ILUA relates to s.24EB(1)(c) and makes plain that sub-division P does not apply to "Agreed Acts". So, to the extent that any future act is done within the geographical area to which the ILUA relates, and it is not an "Agreed Act" as defined in the ILUA, the parties have not expressly excluded sub-division P, and can be taken to intend that sub-division P would apply to such 'un-Agreed Act', future acts. As noted, sub-division P is only excluded if the parties expressly state that it is not intended to apply[6], and this ILUA does not state this, other than in respect of Agreed Acts.

12. Accordingly, in respect of the relevant claim area, *prima facie*, sub-division P is only excluded from applying to future acts that are Agreed Acts as defined in the ILUA. Agreed Acts are those future acts in Schedule 2 of the ILUA[7].

The character of the *acts* here

13. It is the Plaintiff's case, and for the purpose of this matter can be accepted that; the making and proclamation of ss.9 and 12 of the *Amendment Act* and ss.11A to 11J and 17 of the *Principal Act* and the repeal of ss.16-21 of the *Principal Act*, are not in Schedule 2 of the ILUA[8]. So, none are Agreed Acts.

14. To appreciate the operation of the *Native Title Act 1993*, it is necessary to appreciate what ss.9 and 12 of the *Amendment Act* and ss.11A to 11J and 17 of the *Principal Act* do.

15. Section 9 of the *Amendment Act* inserted ss.11A to 11J into the *Principal Act* and s.12 of the *Amendment Act* repealed ss.16-21 of the *Principal Act* and inserted a new s.17.

Section 11A of the *Principal Act*

16. Section 11A of the *Principal Act* provides, in effect, that ML 1120 authorises the "winning of a mineral".

Sections 11B to 11J of the *Principal Act*

17. Sections 11B to 11J of the *Principal Act* provide for the "renewal"[9] of ML 1109[10] and ML 1105, 1117 and 1120[11]. By s.11C, the holder of each mining lease can apply for renewal of the lease within the "renewal period"[12]. The area of any

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[4] Clause 6.1(a), and see also clause 6.4 (SCB at 217).
[5] Clause 6.1(b), and see also clause 6.4. Clause 6.1(d) is expressed in clause 6.4 to be a clause for the purpose of s.24EBA(1)(a) (SCB at 217).
[6] Section 24EB(1)(c).
[7] See clause 1.1 (SCB at 209).
[8] See Plaintiff's Submissions at [32] and [36].
[9] See *Principal Act* s.11B(2).
[10] See *Principal Act* ss.11B(1)(b) and 11E(1); Special Case at [31(a)] (SCB at 50).
[11] See *Principal Act* ss.11B and 11E(2); Special Case at [31(b)] (SCB at 50).
[12] Defined in s.11C(3).

renewed mining lease cannot be greater than the current area of the mining leases[13]. If a renewal application is in terms of s.11C, the Minister must renew the lease[14]. The conditions stated in s.11E are mandatory and, in effect, extend the determining date of each of the mining leases[15].

Section 17 of the *Principal Act* and the repealed ss.16 to 21

18. The effect of s.17 and the repeal of ss.16 to 21 of the *Principal Act* are evident from s.17(1). In respect of ML 1105 and 1117 (but not ML 1109 or 1120) the prior environmental approval was replaced by terms stated in schedule 2A. For the purpose of this intervention, the changes effected by schedule 2A can be taken to be those stated by the Plaintiff[16].

Identification of the *acts* and *future acts* and their *affect* on native title *re* the *Native Title Act 1993*

19. As noted, none of s.9 of the *Amendment Act*, ss.11A to 11J of the *Principal Act* or the alteration of the rights attaching to ML 1109[17] and ML 1105, 1117 and 1120[18] which they effect, are in Schedule 2 of the ILUA.

20. It can similarly be accepted that, in terms of s.12 of the *Amendment Act*, and s.17 of the *Principal Act*, the alteration of the rights attaching to ML 1105 and 1117[19] are not in Schedule 2 of the ILUA.

21. So, none are Agreed Acts in terms of the ILUA[20].

Acts

22. The making and proclamation of ss.9 and 12 of the *Amendment Act* and the making and proclamation of ss.11A to 11J and 17 of the *Principal Act*, and the repeal of ss.16 to 21 of the *Principal Act*, are all *acts* in terms of s.226(2)(a) of the *Native Title Act 1993*.

23. The alteration of the rights attaching to ML 1109, 1105, 1117 and 1120, effected by ss.11A to 11J and 17 of the *Principal Act*, are also *acts* in terms of s.226(2)(b) and likely also s.226(2)(d) and (f) of the *Native Title Act 1993*[21].

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[13] This is confirmed, if it needed it, by s.11J(1) and the reference to reduction of area.
[14] See *Principal Act* s.11D.
[15] The relevant dates, 'before and after', are stated in the Plaintiff's Submissions at [43].
[16] See Plaintiff's Submissions at [44].
[17] See *Principal Act* ss.11B and 11E(1); Special Case at [31(a)] (SCB at 50).
[18] See *Principal Act* ss.11B and 11E(2); Special Case at [31(b)] (SCB at 50).
[19] See *Amendment Act* s.12; Special Case at [32] (SCB at 50).
[20] A point is made in the Plaintiff's submissions that might conveniently be dealt with here. The Plaintiff contends that the Agreed Acts defined in the ILUA are an exhaustive description of the future acts which can be validly done in the ILUA area; see Plaintiff's submissions at [32] – [34] and [51]. For reasons advanced by the Defendant (See Defendant's submissions at [19] – [25]) this is plainly wrong as a matter of construction of the ILUA.
[21] It is unnecessary to consider s.226(2)(c).

***Future acts* and *affect* on native title**

24. Less obvious is whether the making and proclamation of ss.9 and 12 of the *Amendment Act* and ss.11A to 11J and 17 of the *Principal Act* are all, or whether some are, *future acts* in terms of s.233 of the *Native Title Act 1993*.

25. The principal issue in this respect is whether what is done by the legislation *affects* native title.

26. As noted above, ss.11B to 11J of the *Principal Act* obliges the Minister to renew mining leases for the periods specified, if applications for renewal are made. On one view, the legislation does not *affect* native title in that any *affect* would not arise until a renewal takes effect. This is because the rights exercisable under the renewed mining lease could not be inconsistent with the enjoyment or exercise of native title rights until renewed.

27. Section 11A has the effect of removing the condition stated in Schedule 1 Column 3 of the *Principal Act* as it relates to ML 1120. In effect, the "winning of a mineral" was an authorised activity upon the commencement of s.11A. It is a question of fact whether the change to the terms of ML 1120 which s.11A effected *affects* native title.

28. The issue in respect of s.17 of the *Principal Act* is different. It changed the terms of the environmental approval by providing for the conditions set out in schedule 2A, in the manner explained at [32] of the Special Case (SCB at 50). Although facts are a little scant, and it is a question of fact, it is likely that these immediate changes to the terms of ML 1105 and ML 1117 *affected* native title, in terms of s.227 of the *Native Title Act 1993*.

29. There is a consequence to whether various of the things done by, or arising from[22] the impugned legislation are or are not *future acts*. To avoid endless iterations, it is convenient to first consider how Division 3 of Part 2 operates, on an assumption that what has been done by the legislation *affects* native title.

<u>The first assumption</u> – that native title is *affected* - what this means

30. Sections 11A to 11J and 17 of the *Principal Act* satisfy s.233(1)(a)(i). None are *past acts* in terms of s.233(1)(b). In respect of all, s.233(1)(c)(ii) is likely satisfied (if they *affect* native title).

31. Likewise, the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120, effected by ss.11A to 11J and 17 of the *Principal Act*, are all future acts for the same reason as the statutory provisions, but rather than s.233(1)(a)(i) being satisfied, s.233(1)(a)(ii) is.

32. So, the making and proclamation of ss.9 and 12 of the *Amendment Act*, the enactment of ss.11A to 11J and 17, the repeal of ss.16-21, of the *Principal Act* and the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which each

[22] See [26] above.

effects are; not Agreed Acts in terms of the ILUA, but, on this analysis are all future acts in terms of the *Native Title Act 1993*.

The consequence for sub-division E of Division 3 of Part 2 of the *Native Title Act 1993* of acts being future acts

33. It follows from this that none of the making and proclamation of ss.9 and 12 of the *Amendment Act* or ss.11A to 11J and 17 of the *Principal Act* or the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect, are valid future acts by reason of the provisions of sub-division E of Division 3 of Part 2 of the *Native Title Act 1993*. This is because s.24EB(1)(b) is not satisfied.

10 34. As sub-division E of Division 3 of Part 2 does not apply, then, in accordance with s.24AB(1) and (2) of the *Native Title Act 1993*, other sub-divisions of Division 3 of Part 2 of the Act are then to be considered. The sub-divisions, other than P, that might be thought relevant are sub-divisions I and M.

Sub-division I of Division 3 of Part 2 of the *Native Title Act 1993*

35. None of the making and proclamation of ss.9 and 12 of the *Amendment Act* or ss.11A to 11J and 17 of the *Principal Act* or the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect are "*pre-existing rights based acts*" in terms of s.24IB of the *Native Title Act 1993*. The question is whether any or all of them are "*permissible lease etc. renewals*" in terms of s.24IC.

20 36. Sections 11A and 17 of the *Principal Act* and the changes they effect to the various mining leases do not fall within the scope of s.24IC. Nothing that they do falls within the description of s.24IC(1)(a)(i)-(iii).

37. In terms of s.24IC, there is an initial question; whether ML 1109, 1105, 1117 and 1120 were valid prior the *Amendment Act*. This question arises because of s.24IC(1)(a). The detail of the initial grants and renewals or re-grants of each are set out in the Special Case at [4]-[7] (SCB at 43-44). The Plaintiff's case appears to be that each of what are now ML 1109, 1105, 1117 and 1120 were valid prior to the making and proclamation of ss.9 and 12 of the *Amendment Act*, which triggered the other acts[23].

30 38. It is assumed (and seems not to be contested) that s.24IC(b)(i) applies to each of ML 1109, 1105, 1117 and 1120.

39. The next question is in terms of s.24IC(1)(a)(i)-(iii); whether the making and proclamation of ss.9 and 12 of the *Amendment Act* and ss.11B to 11J of the *Principal Act* and/or the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect are themselves any of the matters stated in s.24IC(1)(a)(i)-(iii). As explained above, ss.11B to 11J do not *per se* renew or extend the term of any of the leases. Each provides a mechanism by which each of the leases can be renewed, if renewal is applied for.

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[23] So much is confirmed by the inclusion of those mining leases as "Other Interests" within the determinations of native title; see SCB at 613, 687.

40. For the purpose of explication, it is to be assumed that what the legislation does satisfies one or other of s.24IC(1)(a)(i)-(iii)[24] and that ML 1109, 1105, 1117 and 1120 are each a lease, license, permit or authority that is valid, in terms of s.24IC(1)(a). In respect of s.9 of the *Amendment Act*, ss.11B to 11J of the *Principal Act* and the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect - if considered together, the aggregation of them could be understood to constitute satisfaction of s.24IC(1)(a)(i) and likely (iii). This is on the basis that s.11D of the *Principal Act* requires renewal upon application.

41. It is not entirely clear on the facts of this matter as they are understood, though unlikely, that what is effected by s.17 of the *Principal Act* could be similarly characterised as falling within any of s.24IC(1)(a)(i)-(iii). The consequence of such a characterisation not being available is explained below.

42. Reverting to ss.11B to 11J of the *Principal Act*; in respect of s.24IC(1)(c) – none of the provisions or the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect - do any of the matters set out in s.24IC(1)(c)(i)-(iv). In respect of s.24IC(1)(d), no issue arises and s.24IC(1)(e) does not arise.

43. In respect of s.17 of the *Principal Act*; if what it effects can be characterised as falling within any of s.24IC(1)(a)(i)-(iii) (which is unlikely), then in terms of s.24IC(1)(c), neither the section or the changes to rights which it effects, do any of the matters set out in s.24IC(1)(c)(i)-(iv), and no issue arises with either of s.24IC(1)(d) or (e).

44. If these various hoops are jumped through, and sub-division I *prima facie* then applies, the consequence is set out in s.24ID. One such consequence is that, the relevant acts are valid subject to sub-division P. This role of sub-division P is also confirmed in s.24AA(5).

If sub-division I of Division 3 of Part 2 of the *Native Title Act 1993* does not apply

45. If this analysis as to satisfaction of one or other of s.24IC(1)(a)(i)-(iii) is misplaced, then the consequence as regards sub-division I is clear enough; it does not apply.

Before sub-division P - other sub-divisions of Division 3 of Part 2 of the *Native Title Act 1993*

46. None of sub-divisions F, G, H, J, K, L or N are relevant.

Sub-division P of Division 3 of Part 2 of the *Native Title Act 1993*

47. It is necessary to note an aspect of sub-division P before considering its detailed operation and relevance to this matter.

Sub-division P - if sub-division M applies

48. Sub-division P is invoked by s.24ID, but can also be invoked by other sub-divisions of Division 3 of Part 2 of the *Native Title Act 1993*. This is clarified in s.25(1).

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[24] At [40] the result of this assumption being wrong is explained.

Sub-division P applies to certain future acts that constitute conferrals of mining rights (in terms of s.25(1)(b)) even if such conferrals are not permissible lease etc. renewals (in terms of s.24IC). If such conferrals are permissible lease etc. renewals then sub-division P is invoked by s.24ID(1)(a) and s.25(1)(aa).

49. An example of a future act in terms of s.25(1)(a) is that to which s.26(1) applies. There are insufficient facts to determine whether any of the impugned legislation or alteration to mining leases at issue in this matter satisfies s.26(1)(a), which, in turn, would require consideration of s.24MA and s.24MB(1).

50. Of course, if the impugned legislation and mining titles in this matter fall within s.24MA or s.24MB(1), then sub-division P is attracted and pre-conditions validity.

Sub-division P - if sub-division I applies – or not

51. If s.9 of the *Amendment Act*, ss.11B to 11J of the *Principal Act* or the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 fall within s.24IC and are future acts and permissible lease etc. renewals, s.26(1A) is attracted and sub-division P applies. Before considering the consequence of the application of sub-division P, it is necessary to consider s.26(2)(e) and s.26D. These provisions are to be understood as removing certain future acts from the operation of sub-division P. So, even if a future act is a permissible lease etc. renewal in terms of s.24IC, and s.24ID invokes sub-division P, the requirements of sub-division P are excluded and need not be satisfied - if the future act is one to which s.26D applies. In short, a future act to which s.26D applies is valid.

52. So, before considering the detailed operation of the substantive provisions of sub-division P, it must be determined whether any of the future acts in this matter fall within s.26D.

Section 26D of the *Native Title Act 1993*

53. Consideration of the application of s.26D is first to be gone through in respect of s.9 of the *Amendment Act*, ss.11B to 11J of the *Principal Act* and the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect. If these statutory provisions and changes to the leases which they effect could be treated holistically, the whole might be thought to satisfy s.26D(1)(a)(i) and perhaps (iii). "Creation of a right to mine" is not defined but likely includes the renewal or extension of the term of a mining lease. Whether s.26D(1)(b) is satisfied requires identification of the "earlier right", in respect of the each of ML 1109, 1105, 1117 and 1120. The prior titles are explained in the Special Case at [4]-[7] (SCB at 43-44). In terms of s.26D(1)(b), the Plaintiff seemingly accepts that the earlier right in respect of each mining lease was valid. Section 26D(1)(c) is satisfied for each; that is the area is not extended.

54. Section 26D(1)(d) is satisfied in respect of ML 1109 and 1105. It cannot be known whether s.26D(1)(d) is satisfied in respect of ML 1117 and 1120.

55. Prior to the enactment of the *Principal Act*, ML 1109 was granted and subsequently renewed for 21 year terms[25]. Section 9(1) of the *Principal Act* amended the term of ML 1109 from, in effect, 21 years to 10.83 years[26]. Pursuant to s.11E, ML 1109 (if renewed) must end by the end of 31 December 2020 and cannot be renewed beyond that date. If for present purposes the term of "the original lease" should be understood as 10.83 years, ML 1109 as renewed by s.11E of the *Amendment Act*, cannot be for a term longer than 9 years, 8 months and a balance of days[27].

56. Prior to the enactment of the *Principal Act*, ML 1105 was granted and subsequently renewed for 21 year terms[28]. The term of ML 1105 was not amended by the *Principal Act*. Unless renewed, the term of that lease will end on 30 November 2021[29]. Any renewal must commence on 1 December 2021[30] and end at the end of 31 December 2040 and cannot be renewed beyond that date[31], so that any renewal of the lease cannot be for a term longer than 19 years 1 month and a balance of days.

57. By the *Principal Act* ML 1117 was renewed for a term of 12.16 years[32]. Unless renewed, the term of that lease will end on 31 December 2019[33]. Any renewal must commence on 1 January 2020[34] and end at the end of 31 December 2040 and cannot be renewed beyond that date[35], so that any renewal of the lease cannot be for a term longer than 21 years. If for present purposes the term of "the original lease" should be understood as 12.16 years, it may be that any renewal made pursuant to the *Amendment Act* will be for a term in excess of that term. Until the renewal term is known, if ever, the satisfaction of s.26D(1)(d) of the *Native Title Act 1993* is not known.

58. Save that by the *Principal Act* that ML 1120 was renewed for a term of 11.16 years[36], the same reasoning as for ML 1117 applies here.

59. It remains to consider s.26D(1)(e). For present purposes the "original lease" is understood to be each of the mining leases in their respective terms immediately prior to the enactment of the *Amendment Act*. Although the facts are scant, it is most likely that s.26D(1)(e) is not satisfied in respect of ML 1120. This is because

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[25] Special Case at [4] (SCB at 43).

[26] There is some ambiguity as to whether the renewal of the "original lease" is to be taken as having occurred upon the commencement of the *Principal Act* or on 1 March 2005. It is not clear from the Special Case or facts provided which is to apply so that it is assumed for present purposes the relevant date is 1 March 2005 (as to which see Special Case at [5] (SCB at 43) and SCB at 94).

[27] That time is calculated based on the renewal date commencing upon the enactment of the *Amendment Act* rather than the time prescribed by ss.11C and 11D of the *Principal Act* for the renewal of the mining lease.

[28] Special Case at [5] (SCB at 43).

[29] Special Case at [4] (SCB at 43).

[30] See *Principal Act* s.11H.

[31] See *Principal Act* s.11E(2)(b)(ii).

[32] See *Principal Act* s.11(1); for similar reasons as explained at footnote 28 above, it is assumed that the "original lease" commenced on 1 November 2007 (as to which see SCB at 132).

[33] Schedule 1 Column 2 of the *Principal Act*.

[34] Section 11H.

[35] Section 11E(2)(b)(ii).

[36] See *Principal Act* s.11(1); for similar reasons as explained at footnotes 26 and 32 above, it is assumed that the "original lease" commenced on 1 November 2008 (as to which see SCB at 157).

of s.11A(1) of the *Principal Act* which, in effect, conferred the right to "win a mineral" *qua* ML 1120 where that right had been earlier excluded (by Schedule 1, Column 3 of the *Principal Act*). It is also likely that s.26D(1)(e) is not satisfied in respect of ML 1105 and 1117. This is because of the change made to the environmental approval of each mining lease by s.17 of the *Principal Act*. Of course this analysis all depends upon what is encompassed by "rights created in connection with" other rights, in terms of s.26D(1)(e).

60. No conclusion can be arrived at in respect of the application of s.26D.

61. Even though no final conclusion can be made about the application of s.26D, this much can be said. If s.9 of the *Amendment Act*, ss.11B to 11J of the *Principal Act* and the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect are future acts and attract s.26D, then they are valid. Likewise, if (though unlikely) ss.11A and 17 of the *Principal Act* and the alteration of rights which they effect fall within s.26D they are valid.

62. If the acts are valid, they are valid solely because the *Native Title Act 1993* declares them to be.

63. If ss.9 and 12 of the *Amendment Act*, ss.11A to 11J and 17 of the *Principal Act* and the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect do not attract s.26D, but are permissible lease etc. renewal in terms of s.24IC - then to be valid, the requirements of s.28, and the provisions of sub-division P following s.28, had to have been met. If they were not met, then they are invalid.

64. As explained below, if this is so, they are invalid simply and only because of s.24OA of the *Native Title Act 1993*.

Whether sub-division P was satisfied

65. It is unclear from the Special Case whether the requirements of sub-division P, summarised in s.28(1), if applicable, were met in respect of any of the making of ss.9 and 12 of the *Amendment Act*, ss.11A to 11J and 17 of the *Principal Act* and the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect.

66. If compliance with requirements of sub-division P was required and not met, the relevant future acts are invalid to the extent they affect native title. Again, they would be invalid by reason of s.28(1) of the *Native Title Act 1993*.

The point of all of this

67. Those acts (in amongst the making of ss.9 and 12 of the *Amendment Act*, ss.11A to 11J and 17 of the *Principal Act* and the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect) that are future acts are either valid or invalid to the extent they affect native title by reason of Division 3 of Part 2 of the *Native Title Act 1993*. In respect of acts that are future acts, the first question of the Special Case cannot arise.

<u>The second assumption</u> - what if the impugned legislation and the changes which they effect are not future acts?

68. As noted, the analysis at [29]-[67] proceeds on an assumption that all or some of the making of ss.9 and 12 of the *Amendment Act*, ss.11A to 11J and 17 of the *Principal Act* and the alteration of the rights attaching to ML 1109, 1105, 1117 and 1120 which they effect are future acts.

69. Because the Plaintiff's questions in the Special Case cannot arise if the relevant acts are future acts, it is assumed that the Plaintiff proceeds on an assumption that all are not future acts. Why they are not is not stated.

10 70. If none are future acts then the first question in the Special Case might logically arise.

71. If, as observed above, the only basis upon which the relevant matters could not be future acts is because they do not affect native title, this observation compels an answer of no to the first question in the Special Case, as explained below.

What this all means to the Questions in the Special Case

***First* – if the acts are future acts**

72. So, if any or all, or parts in combination of the impugned legislation and the changes which they make to the relevant mining leases are future acts, they are either valid or invalid by reason of the operation of Division 3 of Part 2 of the
20 *Native Title Act 1993*.

73. With respect, the first question in the Special Case does not arise because it is misconceived. If the ILUA here is an ILUA in terms of the *Native Title Act 1993*, which it plainly is, then - having regard to Division 3 of Part 2 of the *Native Title Act 1993* - Agreed Acts (as defined) are valid and future acts that are not Agreed Acts are not validated by sub-division E. The agreement permits of no other operation, and it is (with respect) absurd to contend that it has an implied or inferred operation upon future acts that are not Agreed Acts. This is because the instrument derives its effect and legal consequence from Division 3 of Part 2 of the *Native Title Act 1993*.

30 74. Being future acts, if the impugned legislation and the changes which they make to the relevant mining leases are not validated by other provisions of Division 3 of Part 2 they are invalid. No other question of construction of the ILUA arises.

75. In respect of any of the impugned legislation that comprise future acts, the second question does not arise, but, in any event could never arise. The legislation, if a future act, is either valid by reason of one of the provisions of Division 3 of Part 2 or it is not; in which event it is invalid. No question of inconsistency of the legislation with anything arises.

***Second* – if the acts are not future acts**

76. More difficult issues arise if some or all of the impugned legislation and the changes which they make to the relevant mining leases are not future acts[37].

77. If any or all are not future acts, then none can be validated by Division 3 of Part 2 of the *Native Title Act 1993*.

78. If the impugned legislation and the changes which they make to the relevant mining leases are not future acts because they do not affect native title, then on no basis can it be contended that the ILUA, properly construed, or by reason of an implied or inferred term, precludes the Defendant from doing what the impugned legislation does. If the impugned legislation does not affect native title, this is the end of the matter. ILUA's generally operate in respect of future acts. Although s.24CB(b), (c) and (d) of the *Native Title Act 1993*, might be thought to provide that an ILUA can include terms dealing with phenomenon that are not future acts, if an ILUA were to do so, such terms would necessarily have to be express.

79. The Plaintiff's contention must be that although the ILUA permits the valid doing of Agreed Acts (that are all future acts), by reason of Division 3 of Part 2 of the *Native Title Act 1993*, it prohibits the doing of certain other phenomenon that are not future acts and which do not fall within the operation of the *Native Title Act 1993*. Such a proposition cannot be made out because the instrument – the ILUA – derives its legal effect from the *Native Title Act 1993*.

80. Because the answer to the first question must be no, the second question does not arise.

81. Even if the second question arose, there is no inconsistency between anything that the *Amendment Act* does and s.87 of the *Native Title Act 1993*. A determination of native title is simply a determination whether or not native title exists in relation to a particular area[38]. A determination does not operate to prevent any future act being done in the determination area or otherwise invalidate such a future act[39]. Validity is determined solely by Division 3 of Part 2. Of course, Division 3 of Part 2 recognises that the validity of certain future acts depends upon the making of a determination that native title exists[40], but these circumstances are simply those where notice is to be given in respect of particular future acts to particular

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[37] As noted, it is difficult to contend that s.17 of the *Principal Act* is not a future act.

[38] See s.225 of the *Native Title Act 1993*.

[39] It is unnecessary to consider s.87(4) to (7) of the *Native Title Act 1993*; firstly, no such order was made by the relevant determinations and secondly those sub-sections are concerned with orders which "give effect to terms of [an] agreement that involve matters other than native title". Future acts are clearly matters concerning native title so that an agreement about the doing (or not doing) of future acts would not be a relevant agreement for the purposes of s.87 (4) and (7).

[40] See s.24BC (dealing with body corporate (ILUA) agreements that can *only* be made where there are registered native title bodies corporate in respect of the ILUA area); s.24CD(2)(b); s.34DE(2)(a); s.24GB(9)(c); s.24GD(1)(f) and (6); s.24GE(1)(f); s.24IA(7); s.24ID(3)(a); s.24JAA(10)(a)(ii); s.24JB(6)(a); s.24KA(8); s.24MD(6B), (7) and (8); s.24NA(9); s.26A(6)(a)(ii); s.26B(7)(a)(ii); s.26C(5); and s.29(2)(a). Each of the cited provisions (other than s.24BC) provide for the giving of notice to, or undertaking of other steps concerning registered native title bodies corporate; such bodies can only exist where a determination of native title has been made and associated orders pursuant to ss. 56 and 57 of the *Native Title Act 1993* made: s.55 and s.253 of the *Native Title Act 1993*.

representative bodies that only come into existence after a determination of native title is made[41].

82. The only theoretical manner in which "inconsistency" could occur between the impugned legislation and the *Native Title Act 1993* is if the impugned legislation affected native title rights and interests. The *Native Title Act 1993* is only concerned with things that affect native title[42].

PART VI: LENGTH OF ORAL ARGUMENT

83. It is estimated that the oral argument for the Attorney General for Western Australia will take no more than 30 minutes.

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[41] Further to this, one future act validating mechanism in Division 3 of Part 2 (s.24LA) only operates where there has not been an a determination of native title; see *Native Title Act 1993* s.24LA(1)(a).
[42] The only exception this this might be thought to be s.24EC, but it is not contended here that the ILUA here is an agreement of this type.