IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B26 of 2014

BETWEEN: QUANDAMOOKA YOOLOOBURRABEE ABORIGINAL CORPORATION RNTBC
Plaintiff

and

STATE OF QUEENSLAND
Defendant

ANNOTATED SUBMISSIONS ON BEHALF OF THE DEFENDANT

Date of document:	6 March 2015
Filed on behalf of:	the Defendant, the State of Queensland
Prepared by:	Tel: (07) 3239 0885
Gregory Richard Cooper	Fax: (07) 3239 3456
Crown Solicitor	Ref: PL8/NRM199/139/NAF
11 Floor State Law Building	
50 Ann Street	
Brisbane Qld 4000	

Document No: 5649401

I. CERTIFICATION

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

II. THE ISSUES

2. The issues presented by the appeal are reflected in questions 1 and 2 of the special case. They are:

10

(a) Does the indigenous land use agreement between the plaintiff, the Quandamooka People and the defendant ('the QP ILUA'), properly construed, bind the defendant not to enact s 9 and s 12 of the *North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013* (Qld) ('the Amendment Act')?

(b) If the answer is yes, is the Amendment Act invalid under s 109 of the Commonwealth Constitution ('*Constitution*') by reason of inconsistency between the Amendment Act and ss 24EA and 87, or either of them, of the *Native Title Act 1993* (Cth) ('the *Native Title Act*')?

20

III. SECTION 78B NOTICES

3. The plaintiff has given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth). The defendant does not consider that any further notice is required.[1]

IV. FACTS

30 4. The facts are set out at paragraphs 3 to 32 of the special case.[2]

V. APPLICABLE LEGISLATION

5. The applicable legislation is:

(a) section 109 of the *Constitution*;

(b) the *Native Title Act*, Part 2 Division 3, ss 87 and 225;

(c) the *North Stradbroke Island Protection and Sustainability Act 2011* (Qld) ('the Principal Act'); and

40

(d) the Amendment Act, ss 9 and 12.

---

[1] This is on the assumption that the issue in relation to the *Racial Discrimination Act 1975* (Cth), raised at PS [57], is not pressed. See further [73] – [75] below.

[2] Special Case Book ('SCB'), Vol. 1, at p. 42-50.

VI. ARGUMENT

A. Summary

6. The plaintiff contends that the Amendment Act is inoperative as a result of s 109 of the *Constitution*, on the basis that the Amendment Act is inconsistent with s 24EA and/or s 87 of the *Native Title Act*.[3]

10 7. In response, the defendant submits that:

(a) The question of inconsistency under s 109 does not arise because, on its proper construction, the QP ILUA does not prevent the defendant from enacting legislation like ss 9 and 12 of the Amendment Act;

(b) In any event:

(i) Section 24EA of the *Native Title Act* does not give an ILUA the force and effect of a law of the Commonwealth because all s 24EA relevantly does is ensure that the parties to the ILUA are contractually
20 bound. Thus, no question of inconsistency under s 109 arises due to the operation of s 24EA;

(ii) Section 87 of the *Native Title* Act is not inconsistent with the Amendment Act. The order made under s 87 identifies the nature and extent of, and relationship between, native title and non-native title interests in the area covered by the determination, as at the determination date.[4] That order did not prevent non-native title interests being renewed and did not prevent the conditions applicable
30 to those interests being altered after the determination date.

8. Accordingly, the plaintiff's claim should be dismissed.

B. Does the ILUA bind the defendant not to enact s 9 and s 12 of the Amendment Act?

(i) Background – provisions of *Native Title Act* relating to ILUAs

9. Before turning to a consideration of the first question in the special case, it is
40 relevant to provide an overview of the provisions of the *Native Title Act* as they relate to indigenous land use agreements ('ILUA').

---

[3] Plaintiff's submissions ('PS') at [46]-[60].
[4] SCB, Vol. 3 at p. 609-729.

10. The *Native Title Amendment Act 1998* (Cth) inserted a new Part 2, Division 3 in the *Native Title Act*. Part 2, Division 3 is intended to provide a comprehensive regime to deal with the validity of 'future acts'[5] and their effect on native title.[6]

11. As part of that regime, Subdivisions B, C, D and E of Part 2, Division 3 deal with future acts done in accordance with ILUAs and provide for the making and registration of ILUAs.

12. An ILUA is defined by s 253 of the *Native Title Act* as having the meaning given by ss 24BA, s 24CA and s 24DA. These provisions correspond to the three different types of ILUAs – a body corporate agreement, an area agreement and an alternative procedure agreement. The QP ILUA is an area agreement.[7]

13. Section 24CA relates to area agreements and provides that '[a]n agreement meeting the requirements of sections 24CB to 24CE is an **indigenous land use agreement**'. Section 24CB sets out the permissible subject matter of an area agreement, which includes the doing of particular future acts and other matters concerning native title rights and interests in the area covered by the agreement.[8] Section 24CD sets out the requirements for the parties to the agreement, including that all persons in the 'native title group' must be parties to the agreement.[9]

14. Subdivision E of Part 2, Division 3 provides for the effect of ILUAs upon registration. In simple terms:

    (a) the ILUA takes effect as if it were a contract among the parties to the agreement;[10]

    (b) the ILUA also takes effect as if all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be;[11] and

    (c) if the ILUA includes a statement that the parties consent to the doing of a future act, then the act will be valid when it is done.[12]

---

[5] A future act is, essentially, a legislative act occurring on or after 1 July 1993, or a non-legislative act occurring on or after 1 January 1994, that is not a 'past act' and affects native title: see ss 233 (future act) and 228 (past act) of the *Native Title Act*.

[6] Explanatory Memorandum to the Native Title Amendment Bill 1997, at [6.1].

[7] Recital I to the QP ILUA: SCB, Vol. 2 at page 209.

[8] Subsection 24CB(a) and (f) of the *Native Title Act*.

[9] Subsection 24CD(1) of the *Native Title Act*.

[10] Section 24EA(1)(a) of the *Native Title Act*.

[11] Section 24EA(1)(b) of the *Native Title Act*.

[12] Section 24EB(1)(a) and (b) and s 24EB(2) of the *Native Title Act*.

15. As this survey demonstrates, an ILUA is essentially a voluntary agreement between the parties, which meets the requirements of the *Native Title Act* and, in addition to being a contract, has certain consequences set out in the *Native Title Act*. To the extent that a future act may be covered by one of the other provisions of Part 2, Division 3 (which provides for its validity, the effect on native title, and relevant consequences), parties may freely elect not to deal with the act in an ILUA, and instead rely on the subsequent provision.[13] If the future act is validated in an ILUA, however, those later validating provisions do not apply.[14]

16. The significance of these matters will become apparent below.

(ii) Construction of the ILUA

17. The first question is whether, on its proper construction, the QP ILUA binds the defendant not to enact s 9 and s 12 of the Amendment Act. Unless the plaintiff can establish that it does, the only answer to the second question in the special case, insofar as it concerns s 24EA of the *Native Title Act*, must be 'no'.

18. In answering that question it is relevant to have regard to the following principles of contractual interpretation:

(a) the meaning of the terms of a contract is to be determined by what a reasonable person would have understood them to mean. That normally requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction;[15]

(b) the whole of the instrument must be considered, 'since the meaning of any one part may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another';[16]

(c) a court should adopt a businesslike interpretation of a commercial document;[17] and

(d) evidence of surrounding circumstances is not admissible to contradict the language of the contract when it has plain meaning.[18]

<u>The construction of the QP ILUA as a whole</u>

---

[13] Section 24AA(4) of the *Native Title Act*.
[14] Section 24AB(1) of the *Native Title Act*.
[15] *Toll (FGCT) Pty Ltd v Alphapharm* (2004) 219 CLR 165 at [40]. See also *Pacific Carriers Ltd v BNP Paribas* (2004) (2004) 218 CLR 451 at [22] (Gleeson, Gummow, Hayne, Callinan and Heydon JJ).
[16] *Australian Broadcasting Corporation v Australian Performing Rights Association* (1973) 129 CLR 99 at 109-110 (Gibbs J). See also *Chamber Colliery Ltd v Twyerould* (1915) 1 Ch 268.
[17] *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 (Gleeson CJ); *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [15] (Gleeson CJ, McHugh, Gummow and Kirby JJ).
[18] *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1981) 149 CLR 337 at 352 per Mason J.

19. The substantive provisions of the QP ILUA deal with two matters. The first concerns the grant of various tenures or interests in relation to North Stradbroke Island such as Aboriginal land under the *Aboriginal Land Act 1991* (Qld),[19] freehold land under the *Land Act 1994* (Qld),[20] reserves, roads, leases or permits under the *Land Act 1994* (Qld)[21] and permits under the *Nature Conservation Act 1992* (Qld).[22] The second concerns dedication or declaration of recreation areas under the *Recreation Areas Management Act 2006* (Qld) and national park and other types of protected areas under the *Nature Conservation Act 1992* (Qld). Into this category fall certain areas, which are to be jointly managed as indigenous joint management areas under an indigenous management agreement, but which do not include the areas of the mining leases in question.[23]

20. The QP ILUA sets out the parties' agreement as to these matters and, sets out the consent of the parties to the steps involved which may constitute future acts,[24] in order that those acts can be done validly under the *Native Title Act*. The QP ILUA also deals with compensation provided by the defendant to the Quandamooka People and the plaintiff.[25]

21. That compensation includes the grant of land to the Quandamooka People to 'regularise existing residential occupation and to provide future residential and economic opportunities for the Quandamooka People';[26] revenue sharing in relation to land sold in town expansion areas around Dunwich, Amity Point and Point Lookout;[27] and the transfer of certain State-owned housing;[28] and ex gratia payments in lieu of mining royalties.[29]

22. Importantly, the QP ILUA does not deal with mining and does not contain any substantive provisions concerning the mining leases, which then existed and currently exist over areas of North Stradbroke Island. It does not deal with the renewal of those mining leases or the creation of new mining leases. The QP ILUA certainly does not impose any obligation on the defendant not to renew or extend

---

[19] Recital F(a) and clauses 13.4(a)(i), 13.4(b)(i) and 17.2 of the QP ILUA: SCB, Vol. 2 at p. 208 and 220-221 and 223.

[20] Recital F(b) and clauses 20.14(b), 21.6(b), 22.7, 23.1 and 28.2(b) of the QP ILUA: SCB, Vol. 2 at p. 208, 225-226, 228 and 231.

[21] Recital F(d) and clauses 15.1, 25, 27 and 28.2(a), (c) and (d) of the QP ILUA: SCB, Vol. 2 at p. 208, 222-223, 230-231.

[22] Recital F(e) and clause 26 of the QP ILUA: SCB, Vol. 2 at p. 208 and 230.

[23] Recital F(c), F(f) and F(g) and clauses 13.6, 13.7, 14.1 and 16.3 of the QP ILUA: SCB, Vol. 2 at p. 208-209 and 221-223.

[24] Clause 6 of the QP ILUA and Schedule 2. The future acts consented to are referred to as 'Agreed Acts': SCB, Vol. 2 at p. 217 and 243-244.

[25] Clause 10 of the QP ILUA: SCB, Vol. 2 at p. 218.

[26] Clause 20.1 and see in general clauses 20 and 22 of the QP ILUA: SCB, Vol. 2 at p. 224-228.

[27] Clause 23 of the QP ILUA: SCB, Vol. 2 at p. 228-229.

[28] Clause 30 of the QP ILUA: SCB, Vol. 2 at p. 232-233.

[29] Clause 24 of the QP ILUA: SCB, Vol. 2 at p. 229-230.

existing mining leases, or grant new mining leases. Under clause 44, moreover, the QP ILUA constitutes the entire agreement between the parties.[30]

23. Contrary to what is implied in the plaintiff's submissions,[31] nothing in clause 13.10 of the QP ILUA supports its construction of the QP ILUA. That clause provides that the plaintiff and the Quandamooka People acknowledge that the 'Environmental Authorities' will continue in force and that the holders of those 'Environmental Authorities' will need access to the 'Agreement Area' to fulfil their obligations under those authorities.

24. The term 'Environmental Authorities' is defined to include certain environmental authorities issued to holders of a mining interest over North Stradbroke Island, including environmental authority MIN100971509, which relates to mining leases ML1105 and ML1117.[32] These environmental authorities are attached at Schedule 14 to the QP ILUA,[33] which also notes that the Principal Act inserted additional conditions in environmental authority MIN100971509 applicable to ML1105 and ML1117.[34]

25. Clause 13.10 contains no promise by the defendant that the Environmental Authorities will continue in force, or that the conditions of the Environmental Authorities will not be altered. As its terms make clear, it is no more than an acknowledgment by the the plaintiff and the Quandamooka People that the Environmental Authorities will continue in force and that the holders will need access to the area of the ILUA in order to fulfil certain obligations under those authorities. That access is provided by the grant of permits to occupy referred to in clause 13.10 and identified in Schedule 15,[35] which are granted in accordance with clause 25.[36]

26. None of the other references in the QP ILUA to either the Principal Act or mining stipulate, or are consistent with a construction that, the defendant must not take steps to permit the renewal of the mining leases, or to amend the conditions applicable to those leases. In summary:

    (a) The Principal Act is referred to in the definition of 'Act' in clause 1.1.[37] However, this definition is only used in Schedule 14 as outlined in paragraph 24 above, and in the definition of 'North Stradbroke Island Region' in clause 1.1[38] to define the 'North Stradbroke Island Region' by reference to that term as it is

---

[30] SCB, Vol. 2 at p. 238.
[31] PS at [31] and [49].
[32] Clause 1.1 of the QP ILUA: SCB, Vol. 2 at p. 210.
[33] SCB, Vol. 2 at p. 354-410.
[34] SCB, Vol. 2 at p. 355.
[35] SCB, Vol. 2 at p. 412-419.
[36] SCB, Vol. 2 at p. 230.
[37] SCB, Vol. 2 at p. 209.
[38] SCB, Vol. 2 at p. 213.

used in the Principal Act.[39] The references to the Principal Act in the QP ILUA are therefore only incidental and do not amount to any agreement by or obligation on the defendant not to alter or amend the Principal Act;

(b) Several expired mining leases, and a mine access road, are referred to in Schedule 15 of the QP ILUA[40] in order to identify the location of areas over which, pursuant to clause 25 of the QP ILUA,[41] permits to occupy under the *Land Act 1994* (Qld) are to be granted to Sibelco, in order to allow Sibelco to fulfil rehabilitation obligations under environmental authorities in relation to mining leases formerly held by related entities of Sibelco; and

(c) Clause 24 of the QP ILUA[42] provides for the defendant to make an ex gratia payment to the plaintiff from the total mining royalties that the State receives each year under the *Mineral Resources Act 1989* (Qld) in relation to North Stradbroke Island.

27. Although these clauses refer, in an incidental way, to mining on North Stradbroke Island, nothing therein stipulates, or is consistent with a construction that, the defendant must not take steps to permit the renewal of the mining leases and must not amend the conditions applicable to those leases.

28. The contrary is true. There is no temporal limit on the obligation in clause 24 to make the ex gratia payment from mining royalties. That obligation will apply so long as the QP ILUA remains in force and the defendant continues to receive royalty payments under the *Mineral Resources Act 1989* (Qld). The fact that the obligation would continue beyond the expiry date of leases contemplated under the Principal Act supports a construction that the QP ILUA does not, by implication, prohibit extending the term of those leases.

Aspects of the context ignored by the plaintiff

29. The plaintiff's contention that the ILUA prohibits the defendant from renewing the leases or removing the non-winning conditions appears to be based largely on the one aspect of the surrounding circumstances of the ILUA, namely the policy of the Queensland Government of the time, as gleaned from the Second Reading Speech of the Principal Act, that mining on North Stradbroke Island would end by 2025 ('the policy').[43]

30. The emphasis placed by the plaintiff on the policy gives an unwarranted emphasis to one aspect of the surrounding circumstances. It also ignores other aspects of the context, which are relevant to the construction of the QP ILUA.

---

[39] See s 5(1) of the Principal Act.
[40] SCB, Vol. 2 at p. 411-419.
[41] SCB, Vol. 2 at p. 230.
[42] SCB, Vol. 2 at p. 229-230.
[43] PS at [22] and [35].

Executive cannot bind Parliament in contract

31. The first aspect of the context ignored by the plaintiff is the principle that a government cannot bind itself by contract to legislate, or not to legislate, in a particular manner. That principle is well established in Australia and elsewhere. In *Re Michael; Ex parte WMC Resources Ltd* (2003) WAR 574, for example, the Court of Appeal of Western Australia observed:[44]

> 'As a matter of fundamental constitutional principle, no parties, not even the State acting by its Executive Government, can purport to bind the Parliament in respect of legislative action.'

32. In the same vein, in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, Mason J stated that a covenant 'not to introduce, initiate or support' particular legislation could not be implied into a contract between the Commonwealth and an airline operator.[45] His Honour explained:[46]

> 'The decision of the Court of Appeal in *William Cory & Son Ltd. v London Corporation* appears to suggest that such a covenant would be invalid because it constitutes an attempt to fetter the future exercise of a power to make regulations in the public interest.
>
> ... it would be strange indeed if by a process of implication alone the Commonwealth was to become subject to an obligation not to make or support an alteration in the law no matter that the alteration was conceived to be in the public interest...'[47]

33. In *Pacific National Investments Ltd v Corporation of the City of Victoria* (2000) SCC 64, moreover, the Supreme Court of Canada refused to imply a term into a contract that would have had the effect of fettering the legislative powers of a municipality. It did so because implying such a term would have been an illegal fetter on those powers and would have been inconsistent with public policy.[48] Justice LeBel, who delivered the judgment of the majority, described the policy in these terms:[49]

---

[44] (2003) WAR 574 at 586; [2003] WASCA 288 at [45] (Parker J, with whom Templeman and Miller JJ agreed).

[45] (1977) 139 CLR 54 at 71; [1977] HCA 71 at [18].

[46] (1977) 139 CLR 54 at 71; [1977] HCA 71 at [18]-[19]. See also *Perpetual Executors & Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 16-19 (Latham CJ) and at 28 (Dixon J); [1948] HCA 24 at [18]-[27] (Latham CJ) and at [14] (Dixon J); *Magrath v Commonwealth* (1944) 69 CLR 156 at 169-170 (Rich J).

[47] Footnote omitted.

[48] At [56], [65]-[66].

[49] At [71].

> '[A] very important policy consideration militates against municipalities being bound in ways that constrain their legislative powers. This is the policy consideration that runs through the jurisprudence in this area. Municipal governments are governments exercising powers delegated by the provincial legislatures, and they must be able to govern based on the best interests of their residents and based on conceptions of the public good.'

34. Similar considerations apply to the construction of the QP ILUA. It would undercut the freedom of a State legislature to determine what legislation is in the public good if an ILUA—an agreement executed by the State executive alone—could bind the State legislature not to enact certain legislation.[50] This principle at least forms part of the surrounding circumstances, of which the parties can be taken to have been aware of this.

35. Thus, the principle above, both as a matter of construction and context, requires that the QP ILUA not be construed as constraining the State to enact ss 9 and 12 of the Amendment Act.

Commercial context

36. The second aspect of the context ignored by the plaintiff is the commercial context in which the QP ILUA was made.

37. In the present case, there were three parties, all legally represented,[51] who entered into an agreement of considerable significance for each of them, to be of an enduring character. This agreement was made in a context in which there had been a resolution of the claim that native title existed and sand mining had been occurring and was continuing on North Stradbroke Island. By the QP ILUA, the parties compromised rights, in exchange for certain things. In the case of the plaintiff, this included compromising native title rights and interests in exchange for compensation[52] and ex gratia payments[53] amongst other matters.

38. In those circumstances, and assuming for the sake of argument that an ILUA can be as broad or as narrow as desired, it could be expected that if the QP ILUA was intended to have the effect for which the plaintiff contends, then it would have said so expressly. The absence of any statement that the list of 'Agreed Acts' consented to under the QP ILUA (and identified in Schedule 2) was intended to be exhaustive is therefore telling. So is the fact that clause 24 of the QP ILUA, as explained earlier, provides for the making of ex gratia payments from mining royalties but does not contain a sunset clause.

---

[50] Indeed, to construe s 24EA as purporting to allow a State executive to fetter the State's legislative capacity would raise a serious question about whether that section infringed the *Melbourne Corporation* principle.

[51] See clauses 4.2(d) and 38 of the QP ILUA; SCB Vol. 2 at p. 217 and p. 237.

[52] Clause 10 of the QP ILUA; SCB, Vol. 2 at 165.

[53] Clause 24 of the QP ILUA; SCB, Vol. 2 at p. 229-230.

39. There is nothing else in the QP ILUA that supports the view that the list of future acts consented to was objectively intended by the parties to be 'exhaustive'. Clause 6 of the QP ILUA provides consent to certain specified future acts, but it does so in terms that echo s 24EB(1) of the *Native Title Act.*[54] That suggests that it does not preclude other future acts being done within the area of the QP ILUA which are not consented to in the QP ILUA but which are validated by other Subdivisions of Part 2, Division 3 of the *Native Title Act.*

10

40. The absence of a statement that the list of 'Agreed Acts' was intended to be exhaustive is particularly significant given the other types of future acts also not listed in Schedule 2. If the plaintiff's construction were correct, the defendant would be unable to do future acts in the area of the QP ILUA, which covers the whole of North Stradbroke Island, other than those specifically agreed in the QP ILUA. This would include acts such as the provision of facilities or services for the public (such as the dedication of roads) under Subdivision K, or future acts passing the freehold test under Subdivision M (such as compulsory acquisition of native title). For the defendant to compromise its ability to carry out future acts on North Stradbroke Island in this manner would require clear and unambiguous language not found in the QP ILUA.

20

41. Given these matters, there is no basis for treating clause 6 of the QP ILUA, and the list of 'Agreed Acts' as exhaustive. Nor is there a basis to imply a term to that effect or a term to the effect that the defendant is otherwise prohibited from renewing or altering the conditions of the mining leases. Such terms would not satisfy the requirement of necessity to give business efficacy to the QP ILUA.[55]

30

42. The plaintiff's reliance on s 24AB of the *Native Title Act* is also misplaced.[56] That section merely provides that if a future act is covered by the validating provision in Subdivision E (s 24EB), it is not covered by any of the validating provisions in Subdivisions F to N (listed in ss 24AA(4)(a) to (k)). 'Covered' in s 24AB refers to a future act being valid under the relevant section. Thus, if a future act is valid because it has been consented to in a registered ILUA, it is valid under s 24EB and validity need not be considered under Subdivisions F to N.[57] Section 24AB does not have the effect that a future act **not** consented to in an ILUA cannot be valid

40

[54] Where it speaks of validating invalid acts, clause 6 echoes s 24EBA(1) of the *Native Title Act.*

[55] *Codelfa* (1982) 149 CLR 337 at 347; [1982] HCA 24 at [20] (Mason J) citing *B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283 (Lord Simon of Glaisdale, Viscount Dilhorne and Lord Keith of Kinkel).

[56] PS at [14].

[57] The Subdivision under which a future act is valid has consequences for compensation and procedural rights to be afforded to native title holders. For example, under s 24EB(4) and (5), compensation for future acts consented to in an ILUA is limited to the compensation provided for in the ILUA, notwithstanding that the act may have been able to have been validly done under another Subdivision which attracts compensation such as Subdivision M (see s 24MD(3)).

under Subdivisions F to N. In fact, s 24AB has nothing to say about a future act not covered under s 24EB, or acts which are not future acts.[58]

43. The QP ILUA therefore does not prevent the defendant from enacting the Amendment Act in order to allow for future renewal of the mining leases and to alter the conditions of the mining leases.[59]

C. Is the Amendment Act invalid under s 109 of the Constitution by reason of inconsistency between the Amendment Act and s 24EA and s 87 of the *Native Title Act*?

44. Even if the defendant's submissions on the construction of the QP ILUA are not accepted, and the QP ILUA does bind the defendant not to enact ss 9 and 12 of the Amendment Act, this would not give rise to any inconsistency with s 24EA or s 87 of the *Native Title Act* which would attract the operation of s 109.

(i) Section 24EA

Does an ILUA have the force of law of the Commonwealth due to s 24EA?

45. According to the plaintiff, s 109 is said to apply because s 24EA of the *Native Title Act* gives an ILUA the force of a law of the Commonwealth, if the ILUA is registered.[60] The defendant submits that this mischaracterises the effect of s 24EA.

46. Subsection 24EA(1) provides:[61]

> 'While details of an agreement are entered on the Register of Indigenous Land Use Agreements, **the agreement has effect**, in addition to any effect that it may have apart from this subsection **as if**:
>
> (a) **it were a contract among the parties to the agreement; and**
>
> (b) **all persons holding native title** in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the agreement, **were bound by the agreement in the same way** as the registered native title bodies corporate, or the native title group, as the case may be.'

---

[58] Section 24AA(1) provides that Division 3 does not deal with acts that are not future acts.

[59] Although the Amendment Act would need to comply with the future act provisions Subdivisions F to N to the extent (if any) that the Amendment Act constitutes a future act, the plaintiff has not sought to challenge the validity of the Amendment Act on that basis and the special case has not been framed with that point in mind.

[60] PS [12]-[17].

[61] Emphasis added.

47. An ILUA is an agreement between the parties to the ILUA. Under the common law it will constitute a contract. The phrase 'in addition to any effect that it may have apart from this subsection' refers to this contractual effect of an ILUA at common law. Subsection 1(a) of 24EA confirms this effect and also has the effect of creating a contract between the parties to the ILUA in cases where the agreement does not do so.[62]

48. Subsection 1(b) of 24EA expands the contractual effect of a registered ILUA so that all persons holding native title in relation to the land or waters in the area covered by the ILUA, who are not already parties, are also contractually bound. Those persons are bound 'in the same way' as the native title parties to the ILUA. That is, they are bound as if they were a party to the ILUA and the ILUA were a contract.

49. The proper construction of s 24EA is therefore that it expands the binding effect of a registered ILUA beyond that which would otherwise apply under the common law of contract. It does so in two respects. First, by providing that the ILUA binds the parties to it as a contract, even where the ILUA does not have that effect under the common law. Second, it expands this binding contractual effect to all native title holders over the land or waters concerned, despite all native title holders not being a party to the ILUA.

50. Other than in these two respects, there is nothing in s 24EA that provides that an ILUA has any force or effect beyond a contractual effect under the common law. In particular, there is nothing in the text of s 24EA that suggests that an ILUA has the force of a law of the Commonwealth.

51. This interpretation of s 24EA is supported by the extrinsic material.[63] Paragraph 7.21 of the Explanatory Memorandum to the Native Title Amendment Bill 1997 is headed 'Registered ILUAs have contractual effect'. It goes on to state:[64]

> 'The Bill provides that registered ILUAs have **contractual** effect during any period when details of the agreement are entered on the Register ... Specifically the Bill deems the following to be the case:
>
> - In addition to the effect it has apart from the [*Native Title Act*], the agreement has effect **as if it were a contract** among the parties to the agreement ...

---

[62] There may be rare cases where an ILUA does not have effect as a contract under common law, for example if an ILUA is terminated but remains on the Register.

[63] See also Justice Robert French, "A Moment of Change – Personal Reflections on the National Native Title Tribunal 1994-98" (2003) *Melbourne University Law Review*, Vol 27, 488 at 504 with respect to a proposal, ultimately rejected, that the 1998 amendments in relation to ILUAs contain 'a further mechanism under which such agreements, once registered, could be treated as statutory instruments so as to be effective in rem'.

[64] Emphasis added.

- All native title holders in relation to any of the land or waters covered by the agreement, but who are not parties to the agreement, are taken to be bound by the agreement. They are bound **in the same manner** as the registered native title bodies corporate (in the case of a body corporate agreement) and the native title group (in the case of an area agreement or an alternative procedure agreement) ... '

52. The plaintiff relies on *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 ('*Jemena*') as authority for the proposition that a registered ILUA has the force of a law of the Commonwealth.[65] But *Jemena* concerned the effect of industrial awards under legislation that bore no resemblance to s 24EA.

53. The relevant provision considered by the Court in *Jemena* was s 17(1) of the *Workplace Relations Act 1996* (Cth), which after 27 March 2006 provided that '[a]n award or workplace agreement prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency'. Likewise, the provisions that applied prior to 27 March 2006 also clearly referred to an award or certified agreement prevailing over State law.[66] In light of these provisions, the High Court held that for the purposes of s 109, an industrial award made under the *Workplace Relations Act 1996* (Cth), 'whilst not of itself a law of the Commonwealth, has the force and effect of such a law where so provided by the machinery of a Commonwealth statute'.[67] The Court held that the expressions 'a law of a State' and 'a law of the Commonwealth' in s 109 were 'sufficiently general for s 109 to be capable of applying to inconsistencies which involve not only a statute or provisions in a statute, but also, as mentioned, an industrial order or award'.[68]

54. By contrast with the legislation in *Jemena*, there is nothing in s 24EA, or the remainder of the *Native Title Act*, which shows any statutory intention that a registered ILUA should have the force of a Commonwealth law or should operate to the exclusion of a State law.

55. The Plaintiff's construction of s 24EA would also generate consequences that Parliament could not have intended. It would mean that the legislative powers of the States could be constrained by an agreement made between native title holders and a third party such as a landowner.

56. The operation of s 109 in the industrial relations context provides a precedent for s 109 operating in respect of an agreement between private parties, which has the force of Commonwealth law. In *Ansett Transport Industries (Operations) Pty Ltd v*

---

[65] PS at [17].

[66] Sections 152(1) and 170LZ(2) of the *Workplace Relations Act 1996* (Cth). *Jemena* (2011) 244 CLR 508 at 517 [12]; [2011] HCA 33 at [12] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

[67] *Jemena* (2011) 244 CLR 508 at 516 [11]; [2011] HCA 33 at [11] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

[68] *Jemena* (2011) 244 CLR 508 at 523 [38]; [2011] HCA 33 at [38] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

Wardley (1980) 142 CLR 237, for example, the Court considered an inconsistency between a State law and an industrial agreement made in settlement of an industrial dispute between Ansett and the Australian Federation of Air Pilots under the *Conciliation and Arbitration Act 1904* (Cth). Although the agreement was between two non-governmental bodies, by reason of the *Conciliation and Arbitration Act 1904* (Cth) once the agreement was certified it had the same effect as an award of the Commission.[69] It therefore prevailed over a State law to the extent of any inconsistency.[70]

10

57. The Commonwealth statute in that case allowed for an agreement between two third parties to effectively have the force of a law of the Commonwealth, and to prevail over any inconsistent State law under s 109 of the *Constitution*. But at least the subject matter of any such agreement was narrowly defined, limited to terms that the Commission could itself include in an industrial award, and the agreement was scrutinised by a member of the Commission prior to being certified and therefore having the force of Commonwealth law.[71]

58. An ILUA may, however, deal with a wide range of subject matter to do with native title, including 'any other matter concerning native title rights and interests' in relation to the area covered by the agreement.[72] Additionally, an ILUA may be entered into without its substantive content ever being reviewed by the Commonwealth or an instrumentality of the Commonwealth.[73] Although certain requirements of the *Native Title Act* must be met before an ILUA is accepted for registration by the Registrar of the National Native Title Tribunal, these requirements are intended to ensure that the proper native title parties are party to the agreement, the agreement was properly authorised, and other technical requirements of the *Native Title Act* are met.[74] Other than ensuring that the subject matter falls within the broad scope of permissible subject matter in ss 24BC, 24CC and 24DC, the *Native Title Act* does not contemplate that the Tribunal will review the substantive content of an ILUA. There is, moreover, no requirement in the *Native Title Act* for the National Native Title Tribunal to keep a copy of a registered ILUA, but only to record certain details on the register.[75] The detailed provisions of ILUAs are therefore known only to the parties and not a matter of public record.

20

30

59. Accepting the plaintiff's contention that a registered ILUA has the force of a law of the Commonwealth would lead to the situation where the content of

40

[69] Section 28(3) of the *Conciliation and Arbitration Act 1904* (Cth).
[70] Section 65 of the *Conciliation and Arbitration Act 1904* (Cth).
[71] Section 28 of the *Conciliation and Arbitration Act 1904* (Cth).
[72] Sections 24BB(f), 24CB(f) and 24DB(f) of the *Native Title Act*.
[73] Notice of an ILUA must be given to the Commonwealth Minister under s 24CH(1)(a)(i) of the *Native Title Act*, but the content of the notice is limited to certain matters set out in s 24CH(2), and the Commonwealth would not receive notice of all provisions in an ILUA which, under the plaintiff's contention, could have the force of a law of the Commonwealth.
[74] See sections 24CK and 24CL of the *Native Title Act*.
[75] Section 199B of the *Native Title Act*.

Commonwealth law, and therefore possible restraints on State legislative power due to s 109, could be determined by a private agreement between the State and native title holders, or potentially other parties and native title holders, which is neither publicly available nor scrutinised by the Commonwealth. Such an incongruous result could not have been intended by the Parliament. It follows that the plaintiff's submission that the Amendment Act is invalid under s 109 of the *Constitution* by reason of inconsistency between the Amendment Act and s 24EA of the *Native Title Act* should be rejected.

10

60. Subsection 24EA(3) of the *Native Title Act* does not alter this analysis. The plaintiff asserts that that provision 'confirms that the protection of Commonwealth legislation is conferred upon a registered ILUA'.[76] However, s 24EA(3), which was designed '[t]o avoid doubt',[77] merely clarifies that nothing in the *Native Title Act* prevents the State from 'doing any legislative or other act' to give effect to its obligations under an ILUA. For example, 'if the agreement is to be supported by legislation so that it can be fully implemented, the relevant parliament can pass that legislation despite any other provision in the [*Native Title Act*].'[78] In other words, any legislation passed to give effect to the terms of the agreement need not comply with Part 2, Division 3 of the *Native Title Act* in order to achieve native title validity. Subsection 24EA(3) therefore does not advance the plaintiff's argument.

20

61. Accordingly, no inconsistency arises merely because State law purports to authorise an action in breach of an ILUA.

(ii) Section 87 of the *Native Title Act*

62. Section 87 of the *Native Title Act* confers jurisdiction on the Federal Court to make an order where the parties have reached agreement in an application for a determination of native title. On 4 July 2011, Dowsett J made an order pursuant to s 87 that there be a determination of native title.

30

63. Under s 94A, an order in which the Federal Court makes a determination of native title must set out details of the matters mentioned in s 225, which include:

(a) 'the nature and extent of the native title rights and interests in relation to the determination area' (s 225(b)); and

(b) 'the nature and extent of any other interests in relation to the determination area' (s 225(c)); and

40

(c) 'the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act) ....' (s 225(d)).

---

[76] PS at [16].
[77] Explanatory Memorandum to the Native Title Amendment Bill 1997, at [7.22].
[78] Explanatory Memorandum to the Native Title Amendment Bill 1997 at [7.6].

64. Once made, a determination of native title is 'declaratory of the rights and interests of all parties holding rights or interests in the area' and 'the determination operates as a judgment in rem binding the whole world'.[79]

65. The plaintiff submits that the Amendment Act is inconsistent with the order of Dowsett J and the inconsistency attracts the operation of s 109.

66. This submission should be rejected.

10 67. While it may be true that 'a State law providing that the rights and liabilities of the parties were other than as contained in that order ... would be inconsistent with a law of the Commonwealth conferring jurisdiction on the Federal Court',[80] the Amendment Act did not have that effect.

68. The order of Dowsett J was a determination of rights and liabilities as at the date of the determination. It was a determination that, as at 4 July 2011, native title existed in part of the determination area. It was not an order that native title rights must or will continue to exist after that date, or that native title rights could not subsequently be extinguished or affected by a future act which complied with one
20 of the Subdivisions in Part 2, Division 3 of the *Native Title Act*, with compensation payable to native title holders if provided by the relevant Subdivision.

69. It is clear that the future act regime in Part 2, Division 3 of the *Native Title Act* continues to operate after a determination. This is implicit in provisions affording procedural rights to registered native title bodies corporate in relation to future acts (such as s 24MD(6B)(c)(iii)) because a registered native title body corporate will only exist once a determination of native title has been made.[81] For example, a compulsory acquisition of native title which met the requirements of Subdivision M, Division 3, Part 2 of the *Native Title Act*, including s 24MD(2), would result in
30 the extinguishment of the native title which was acquired.[82]

70. Likewise, the determination set out the nature and extent of other, non-native title rights and interests in the determination area. These include the mining leases in question. However, as stated in the introductory paragraph to Schedule 7 of the determination, the nature and extent of 'other interests' are interests that were 'current at the date of this determination'.[83] Nothing in the determination purported to prevent new interests being created or the existing interests being renewed. Of course, if the creation or renewal of any such interests affected native title

40

---

[79] *Western Australia v Ward* (2000) 99 FCR 316 at 368-369 [190]; [2000] FCA 191 at [190] (Beaumont and von Doussa JJ).

[80] *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 186 [54]; [2000] HCA 62 at [54] as cited in PS at [56].

[81] This has been the approach adopted by the National Native Title Tribunal – see for example *WMC Resources v Evans* (1999) 163 FLR 333; [1999] NNTTA 522 where Member Sumner stated at 340 [29] '[i]n my view parliament intended to place determined and claimed native title on the same footing for the purposes of considering the effect of a future act on it'.

[82] Section 24MD(2)(c) of the *Native Title Act*.

[83] SCB, Vol. 3, 687.

recognised in the determination,[84] that creation or renewal would be a future act[85] and would need to be valid under one of the Subdivisions in Division 3, Part 2 of the *Native Title Act* in order to validly affect native title.[86]

71. The determination made by the order of Dowsett J on 4 July 2011 was a determination by the Federal Court as to the rights and liabilities of the native title holders, and the holders of other interests in the determination area, as at 4 July 2011. Nothing in the order prevents subsequent actions that may alter, impair or detract from those rights and liabilities in accordance with the *Native Title Act*. To accept the plaintiff's submissions would mean that no new interests could be granted in the area of the native title determination (or other determinations made across Australia). This would give native title determinations an effect which could not possibly be intended and which would be beyond the scope of the Federal Court's jurisdiction as reflected in s 225 of the *Native Title Act*.

72. The plaintiff has also contended that the Amendment Act 'effects substantial changes to, and imposes new limitations upon the native title rights and interests of the Quandamooka people, and their rights and interests under the [QP] ILUA which were recognised in the determination'[87] and that this gives rise to an inconsistency with the Federal Court determination of native title.[88] The alleged limitations are that the Quandamooka People cannot exercise or fully exercise their native title rights or obtain the benefits of joint management in areas which will potentially be covered by the renewals of the mining leases or the removal of conditions on the mining leases.

73. These submissions are baseless. As set out in paragraphs 68 to 70 above, notwithstanding the determination, native title can be affected by a future act done in compliance with one of the Subdivisions in Part 2, Division 3 of the *Native Title Act*, with compensation payable if applicable. Alternatively, if a 'limitation' imposed on native title rights does not affect native title, it will not be a future act and nothing in the determination or the *Native Title Act* will prevent that limitation being imposed.

74. Furthermore, in relation to joint management, the defendant made no commitment in the QP ILUA that any additional areas would necessarily be dedicated as indigenous joint management areas, beyond the 'Proposed Stage 2 Prescribed Protected Area'.[89] That has already been dedicated. The QP ILUA provides that any additional areas to be subject to joint management are additional areas

---

[84] Section 227 of the *Native Title Act*.
[85] Section 233 of the *Native Title Act*.
[86] Section 24AA(2) of the *Native Title Act*.
[87] Footnote omitted.
[88] PS at [55].
[89] See s 13.1(b) of the QP ILUA: SCB, Vol. 2 at p. 219. The Proposed Stage 2 Prescribed Protected Area is set out in Schedule 10 of the QP ILUA: SCB, Vol. 2 at p. 333-335.

'proposed to be dedicated ... from time to time'[90] or 'intended [to be] dedicated from time to time'.[91] It also provides that the indigenous management agreement entered into by the plaintiff and the defendant is to be varied to apply to any such further areas 'by deeds of variation executed by the parties'.[92] This indicates that any further areas to be subject to joint management are to be agreed by the parties. There is nothing in the ILUA which requires the lands currently covered by the mining leases to be dedicated as joint management areas by a certain time or indeed at all.

10

75. The plaintiff also appears to give some weight to the Federal Court's recognition of the QP ILUA as an 'other interest' in the determination.[93] However, the recognition of the QP ILUA as an 'other interest' in the determination means only that the rights and interests under the QP ILUA prevail over native title.[94] It does not afford the QP ILUA any force or effect under Commonwealth law. Likewise, the fact that the determination takes effect upon registration of the ILUA (and another ILUA with the Redland City Council)[95] does nothing more than reflect the agreement of the parties in settlement of the Quandamooka People's native title claim, that the registration of the ILUA, and the consent to the future acts provided in the ILUA, should occur upon the determination coming into effect.

20

(iii) *Racial Discrimination Act 1975* (Cth)

76. The plaintiff briefly contends that the enactment of the Amendment Act offends the *Racial Discrimination Act 1975* (Cth) (*'Racial Discrimination Act'*). It claims that that 'the effect of the Amendment Act, following the Court's recognition of the Quandamooka People's native title rights and interests, constitutes discrimination against the holders of native title which adversely affects their enjoyment of their title in comparison with the enjoyment by other title holders of their title'.[96]

30

77. The plaintiff's submissions on this point should not be entertained. A challenge based on the *Racial Discrimination Act* forms no part of the plaintiff's pleadings or the special case.

78. Even if it were appropriate to consider the Plaintiff's submissions, however, they should be rejected. The plaintiff relies largely on *Western Australia v The Commonwealth* (1995) 183 CLR 373 (*'The Native Title Act Case'*).[97] That case considered legislation that purported to extinguish native title rights in Western

---

40

[90] See the definition of 'Proposed Prescribed Protected Areas' in clause 1.1 of the ILUA: SCB, Vol. 2 at p. 213.

[91] Clause 13.1(f) of the QP ILUA: SCB, Vol. 2 at p. 220.

[92] See clause 2.3 of the indigenous management agreement attached as Schedule 9 to the QP ILUA: SCB, Vol. 2 at p. 282.

[93] PS at [40]. The QP ILUA is listed as an 'other interest' at item 1(a) of Schedule 7: SCB, Vol. 3 at p. 687.

[94] See clause 10 of the determination at SCB, Vol. 3, p. 613-614.

[95] See Order 2 of the determination at SCB, Vol. 3, p. 611.

[96] PS at [57].

[97] PS at [57].

Australia and replace those rights with statutory rights of traditional usage.[98] The Court held that the statutory rights were more liable to extinguishment or impairment and that therefore the holders of the statutory rights suffered a diminution in their human rights, which was inconsistent with s 10(1) of the *Racial Discrimination Act*.[99] The same reasoning does not apply to the Amendment Act, which is of a completely different nature, and does not purport to extinguish native title rights or to replace those rights with statutory rights. In any event, to the extent that any extinguishment or impairment of native title is brought about by legislation, the validity of that legislation is now determined by the future act provisions of the *Native Title Act*, and not the *Racial Discrimination Act*.[100]

10

D. Conclusion

79. The defendant submits that the questions in the special case should be answered as follows:

1. Does the ILUA, properly construed, bind the defendant not to enact s 9 and s 12 of the Amendment Act?

20

No.

2. If the answer is yes, is the Amendment Act invalid under s 109 of the Commonwealth Constitution by reason of inconsistency between the Amendment Act and ss 24EA and 87, or either of them, of the *Native Title Act*?

Does not arise as the answer to question 1 was 'no', but in any event no.

3. Who should pay the costs of the special case?

30

The plaintiff.

VII. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

80. The defendant estimates that 2.5 hours should be sufficient to present its oral argument.

Dated: 6 March 2015

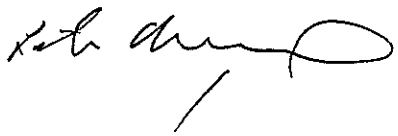
40

---

[98] (1995) 183 CLR 373 at 418; [1995] HCA 47 at [2]-[3] (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[99] (1995) 183 CLR 373 at 442; [1995] HCA 47 at [54] (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[100] *The Native Title Act Case* (1995) 183 CLR 373 at 462-463 and 483-484; [1995] HCA 47 at [100]-[101] and [143]-[145] (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), see also *State of Queensland v Central Queensland Land Council Aboriginal Corporation* (2002) 125 FCR 89 at 121-122 [150]; [2002] FCAFC 371 at [150] (Kiefel J).



PETER DUNNING QC
Solicitor-General for Queensland
Tel: (07) 3218 0630
Fax: (07) 3218 0632
Email: solicitor.general@justice.qld.gov.au

ERIN LONGBOTTOM
Murray Gleeson Chambers
Tel: (07) 3012 8221
Fax: (07) 3175 4666
Email: elongbottom@qldbar.asn.au

GIM DEL VILLAR
Murray Gleeson Chambers
Tel: (07) 3175 4650
Fax: (07) 3175 4666
Email: gdelvillar@qldbar.asn.au