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

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

AND: **State of Queensland**
Defendant

PLAINTIFF'S ANNOTATED REPLY

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Contact: Wati Qalotaki

Filed on behalf of the plaintiff by:
Wati Taraivini Qalotaki, Solicitor
Queensland South Native Title Services Ltd
Level 10, 307 Queen Street
Brisbane QLD 4000

File ref: D14/10898
Telephone: 07 3224 1200
Facsimile: 07 3229 9880
Email: wati.qalotaki@qsnts.com.au

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Reply to the arguments of the defendant and the Interveners

2. These submissions are in reply to those of the defendant filed 6 March 2015 (**DS**), the Attorney General of the Commonwealth of Australia (Intervening) filed 13 March 2015 (**CthS**), the Attorney General for New South Wales (Intervening) filed 13 March 2015 (**NSWS**), the Attorney General for South Australia (Intervening) filed 13 March 2015 (**SAS**), and the Attorney General for Western Australia (Intervening) filed 13 March 2015 (**WAS**).

3. **DS[17]ff: *Construction of the ILUA*:** It appears uncontroversial that in construing the ILUA, consideration of the surrounding circumstances known to the parties, and the purpose and object of the transaction, is permissible if not required: DS[18(a)].[1] But the obligation in clause 24 of the ILUA[2] to make ex gratia payments to the plaintiff from mining royalties does not bear upon the question of whether the ILUA contains a promise by the defendant, and the consent of the plaintiff, as to the expiry of ML1105, ML1109, ML117 and ML1120 on the dates determined by the Principal Act, and as to the *"winning of a mineral"* for ML1105 and ML1117 to be conducted only within the *"restricted mine path"* for those leases and only until the end of 31 December 2019: cf DS[28].

4. DS[31]ff: Proposition that a registered ILUA cannot restrain State legislative power and would not be interpreted to include an effective promise not to legislate in a particular manner: Central to the defendant's submissions in relation to s 24EA of the Native Title Act is the proposition that a registered ILUA, as a contract, cannot restrain State legislative power, and would not be interpreted to include an effective promise not to legislate or not to legislate in a particular manner: for example, DS[31]-[35], [59].[3] The defendant's argument is, in effect, that an ILUA is just a contract with some add-ons to overcome the common law of privity, and that when a polity is a party to an ILUA, the ILUA would not be construed to bind the polity not to enact certain legislation.

5. The plaintiff does not shy away from contending that a registered ILUA does bind Queensland Parliament and thus have an effect on its Parliament's capacity to enact legislation with impunity (eg free of remedies such as damages). However, it is travesty of the plaintiff's position to contend that it is seeking a determination that the State of Queensland has contractually bound the Parliament of Queensland not to enact the Amendment Act. It is Commonwealth legislation, and not the law of contract, which constrains the power of the Queensland Parliament to enact valid State legislation which renders critical provisions of the ILUA ineffective. In this case, the ILUA was given statutory effect by two means: (a) section 24EA of the *Native Title Act*; and (b) the Federal Court's determination that the "*nature and extent of other rights and interests in relation to the Determination Area*" are those set out in Schedule 7 ("*Other Interests*")[4] including the rights and interests of the parties under the ILUA.[5]

6. In relation to s 24EA, the question is not whether the ILUA has any force or effect beyond a contractual effect under common law: cf DS[50]. The question is whether, in this case, the defendant has contracted in such a way as to give the plaintiff rights

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1 Also CthS[39].
2 SCB, vol 2, pp 229-230.
3 To similar effect NSWS[6]-[12]; CthS[8], [51]; SAS[38].
4 Order 1, Determination [9]: SCB, vol 3, pp 613 & 695.
5 Quandamooka No 1 - Schedule 7 [1(a)]: SCB, vol 3, p 687; Quandamooka No 2 – Schedule 6 [1(a)]; SCB, vol 3, p 725.

recognised and protected by Commonwealth legislation. It is the Commonwealth regime which regulates the effect of the ILUA. That is why by s 109 of the Constitution, the State is prevented from legislating inconsistently with the ILUA (other than in accordance with Subdivision M of Division 3 of Part 2 of the *Native Title Act*). Indeed, the State's agreement to the ILUA in this case highlights the inconsistency posed by the Amendment Act. The content of the contract, so-called, enables the inconsistency in s 109 terms to be clear.

7. **DS[36]ff:** ***Commercial context, and proposition that plaintiff's construction of ILUA compromises ability of defendant to carry out future acts on North Stradbroke Island*:**[6] At DS[40],[7] it is contended that on the plaintiff's construction of the ILUA, the defendant would be unable to do future acts in the area of the ILUA other than those specifically agreed, including acts such as the provision of facilities or services for the public (such as the dedication of roads) under Subdivision K of Division 3 of Part 2, or future acts passing the freehold test (such as compulsory acquisition of native title) under Subdivision M. There is nothing in the plaintiff's construction of the ILUA[8] which compromises the ability of the defendant to carry out future acts on North Stradbroke Island in the manner contended.

8. First, the ILUA itself provides in Schedule 2 that the "*Agreed Acts*" include "*3. The PBC and the State entering into the* [Indigenous Management Agreement] *in relation to the management of the Indigenous Joint Management Area*".[9] See also the "*Agreed Acts*" in Items 4 and 5. The IMA, which is Schedule 9 to the ILUA, makes provision in clause 6.3 for "*Routine Activities*", in clause 6.4 for "*Procedural Activities*", and in clause 6.5 for "*Significant Activities*" to be conducted by the Department within the Indigenous Joint Management Area (subject in the case of "*Procedural Activities*" and "*Significant Activities*" to the notice requirements in clause 6.6).[10] "*Routine Activities*", *Procedural Activities*" and "*Significant Activities*" are defined in Schedules 4, 5 and 6 to the IMA."

9. Second, there is nothing in the plaintiff's construction of the ILUA which suggests that the entirety of the future act provisions in Division 3 of Part 2 of the *Native Title Act* are somehow displaced. Rather, the plaintiff's contention is that in the ILUA, on its proper construction, the defendant agreed that ML1105, ML1109, ML1117 and ML1120 would expire on the dates determined by the Principal Act, and be non-renewable; and the conditions in Environmental Authority MIN100971509, as amended by the Principal Act, would restrict the "*winning of a mineral*" for ML1105 and ML1117 to be conducted only within the "*restricted mine path*" for those leases and to be conducted only until the end of 31 December 2019. That agreement was given effect under s 24EA of the *Native Title Act*, as well as in the Federal Court's determination that the "*nature and extent of other rights and interests in relation to the Determination Area*" include the rights and interests of the parties under the ILUA.

10. **DS[42]:** ***Relevance of s 24AB*:**[11] As to DS[42], the plaintiff does not contend that a future act ***not*** consented to in an ILUA cannot be valid under Subdivisions F to N. Rather, the plaintiff's contention is that, in this case, the defendant agreed that certain leases would expire on certain dates and be non-renewable, and that mining within

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6 Also NSWS[22]-[24].
7 See also SAS[36].
8 Cf. WAS[10]-[12].
9 SCB, vol 2, p 243.
10 SCB, vol 2, pp 288-289.
11 See also CthS[26]-[28], [48]; NSWS[18]-[20]; SAS[6(i)(b)], [7], [28], [30]; WAS[6]-[9].

certain lease areas would only be conducted within restricted mine paths. In this case, therefore, the Amendment Act is invalid because the defendant's agreement was given effect under Commonwealth law, and by operation of s 109 of the Constitution the State's capacity to enact legislation inconsistent with that agreement was constrained.

11. **DS[68]ff: *Proposition that the order under s 87 of the Native Title Act was a determination of rights and liabilities "as at the determination date"*:** At DS[68], the defendant contends that the order under s 87 of the *Native Title Act* was a determination of rights and liabilities *"as at the determination date"*.[12] The plaintiff does not accept that a judicial determination of native title, which has statutory effect and status *in rem*, speaks in the instantaneous and evanescent way suggested by the defendant.[13] An order *in rem* is not good only for a legal instant. Rather than simply providing a snapshot of native title rights and interests as at the instant of the Federal Court's determination, an *in rem* order under s 87 speaks to the future, providing in effect that from that instant, the recognised native title rights and interests will endure and can only be affected by acts covered by the future acts provisions in Division 3 of Part 2.

12. Concretely, this means that as from the date of a determination of native title under federal legislation by the Federal Court, the regime in relation to valid future acts is to be found in Division 3 of Part 2 of the Commonwealth *Native Title Act*, and not in State legislation, unless the State legislative act is covered by Subdivision M of Division 3 of Part 2: ss 24MA and 24MD(1). The future acts regime in the *Native Title Act* explicitly contemplates State legislation that affects native title: ss 24AA(1), 233, 24MA. If done in accordance with an ILUA or Subdivisions M and P (if not excluded by s 26(2)), the legislative act is valid: s 24MD(1). If not, it is invalid: ss 24AA(2) and 24OA. It follows that as from the date of a determination of native title by the Federal Court, any State legislation done other than in accordance with Subdivisions M and P (if not excluded by s 26(2)) is such as to alter, impair or detract from the operation of the federal law, and hence invalid under s 109 of the Constitution. In its submissions in relation to s 87 of the *Native Title Act* at DS[62]-[75], the defendant provides no explanation of how the Amendment Act can be said not to alter, impair or detract from the native title of the plaintiff previously determined by an order of the Federal Court.

13. **DS[76]-[78]: *Racial Discrimination Act 1975* (Cth)**: As to DS[76]-[78], as notified to the defendant and the Interveners, the plaintiff does not press [57] of its submissions filed 6 February 2015 in relation to s 10 of the *Racial Discrimination Act 1975* (Cth).[14]

14. **CthS[6]-10], [38]-[52]: *Proper construction of the ILUA***: It is not to the point, as contended at CthS[41], that the ILUA contains no express statement that no other future acts will be done by the State in respect of the land or waters the subject of the ILUA. It is not controversial that an ILUA is to be read against s 24OA and in light of s 24EB. The plaintiff does not contend that the ILUA should be construed to provide that no other future acts will be done by the State. The plaintiff's contention is that it would be construed to require any future act to be done validly. Under the ILUA, the defendant agreed that certain leases would expire on particular dates and be non-renewable, and that mining within certain lease areas would only be conducted within a restricted mine path. The Amendment Act defies the ILUA, and by operation of s 109 of the Constitution is invalid.

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12 Also DS [7(b)(ii)], [70].
13 See also CthS[53]-[58].
14 See also CthS[12] and NSWS[59].

15. The submissions at CthS[42]-[50] do not meet the plaintiff's case. The plaintiff does not argue for an implied term prohibiting any other future act. The plaintiff's case is directed to the meaning of the agreed terms. As to CthS[51],[15] the plaintiff does not say that the ILUA contractually binds the State legislature from legislating. Rather, as noted above in relation to DS[31]ff, by operation of s 109 of the Constitution a registered ILUA has an effect on the capacity of a State Parliament to enact valid legislation. Further in relation to CthS[51], in any event, as observed by Mason J in *Ansett v Commonwealth* (1997) 139 CLR 56 at 74, public confidence in government dealings and contracts would be greatly disturbed if all contracts which affect public welfare or fetter future executive action were held not to be binding on the government or on public authorities.[16]

16. **CthS[53]-[59]:** ***Proper construction of the consent determination*****:** Like the defendant, the Commonwealth also focuses on the effect of the determination of the Federal Court as at the date of the determination; see above in relation to DS[68]ff. As submitted above, the plaintiff contends that an *in rem* order under s 87 constrains the State's **future** conduct from the date of the determination.

17. **CthS[60]-[84]:** ***Inconsistency*****:** In support of its submission that an ILUA is not given the effect of a law of the Commonwealth, the Commonwealth at CthS[66] refers to a 1972 article in which Professor Enid Campbell noted that "*what seems to be required to translate contractual obligations into statutory obligations is a statutory provision which expressly declares that the agreement shall take effect as if enacted in the Act, repetition of the terms of the agreement in the body of the statute, or* ***a statutory direction that the terms of the agreement be carried out***" (emphasis added). In the plaintiff's submission, s 24EA of the *Native Title Act* readily fits the description of "*a statutory direction that the terms of the agreement be carried out*".

18. In relation to CthS[67], and the plaintiff's analogy with industrial awards, nor is it the case that industrial awards (which have the effect of a law of the Commonwealth for the purpose of s 109 of the Constitution) are made with any involvement of the Commonwealth or subject to disallowance by Parliament. In reply to CthS[71], it must be uncontroversial that the effect of s 24EA(1)(a) is conferred by Commonwealth statute and not by the common law. The statutory effect is independent and irrespective of any anterior effect at common law. The words "*as if*" in s 24EA(1)(a) are not the same as "*because of*". That s 24EA(1)(a) provides for an ILUA to have effect "*as if*" a contract must have at its core the principle *pacta sunt servanda*; that is, that promises are required to be performed. In relation to CthS[73], if the first sentence is correct (which it is), then there is no difference in principle or substance where what the State law does is to act oppositely from the content of the ILUA given effect to by Commonwealth law.

19. As to CthS[80], the plaintiff embraces the proposition that the Amendment Act ought be read to conform with ss 10, 11 and 24OA of the *Native Title Act*.[17] The difficulty, however, is that in terms of the operation of the Amendment Act, it is not possible to see how this can be done. In CthS[84] (also CthS[32]), the Commonwealth acknowledges that the renewal of the mining leases will need to comply with the future act provisions of the *Native Title Act* to avoid invalidity under s 24OA and s 109 of the Constitution,

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15 See also DS[31]-[35], [39]; NSWS[6]-[12]; SAS[38].

16 See also the discussion by Mason J at 76 of cases in which it has been suggested that the free and unfettered exercise of a statutory discretion in relation to the grant of a licence or privilege is sufficiently preserved if the validity of the contract is upheld, provided that it is enforceable only by way of action for damages and not by order or injunction. Likewise, in relation to section 96 of the Constitution, agreements to which polities are a party affecting their future legislative conduct are not unusual.

17 Cf. WAS[14]-[67]; SAS[28]-[30].

there are two problems. The Amendment Act as a legislative act was covered by Subdivision M of Division 3 of Part 2, and the right to negotiate process in Subdivision P: see s 24MD(1). There has been no compliance with the right to negotiate in making the Amendment Act.

20. **NSWS[15]-[21]:** ***The scheme of the NTA*:** The submissions of NSW at [19]-[21] in relation to the "*hierarchical cascade*" assume that the only question is whether in the ILUA the plaintiff consented to the the Amendment Act as a future act "*covered by*" s 24EB(1). This ignores the nature of an ILUA as if a contract, and the promises and consents contained therein. NSWS[20]-[21] (also [38]) refer to other protections yet to be played out. In this case, those other protections have been played out.

21. **NSWS[22]-[33]:** ***Section 24EA***: As to NSWS[22]-[24], the plaintiff's submissions have no such truncating effect. The plaintiff's argument is simply giving effect to the ILUA "*as if … it were a contract*". As to *Sankey v Whitlam* (1978) 142 CLR 1 at 89 (NSWS[26]-[27] and [36]), s 24EA is not just "*overcoming some obstacle*" (such as binding non-privies), but lending statutory effect to ILUAs. **NSWS[34]-[41]**: It is correct of course that a State may legislate in a way that alters its contractual obligations: NSWS[38]. However, where the State purported to do so in the face of Commonwealth law giving effect to the State's prior promise not to do so, the legislation would be undermining the Commonwealth law. The short answer to NSWS[42]-[51] is *Jemena*. The plaintiff does not contend that the *Native Title Act* covers the field.

22. **NSWS[52]-[58]**: ***Federal Court determinations:*** The submissions of the New South Wales Attorney General in relation to s 87 of the *Native Title Act*, like those of the defendant (DS[68]ff), focus on the determination being directed to "*rights and liabilities as they exist at a particular point in time*". The plaintiff repeats its submissions *supra* in relation to the effect of the Federal Court's determination beyond the legal instant of the order.

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Bret Walker
Fifth Floor, St James' Hall
T: (02) 82572527 F: (02) 92217974
E: maggie.dalton@stjames.net.au Bret Walker

Sarah Pritchard
11th Floor, Selborne Wentworth Chambers
T: (02) 9223 8594 F: (02) 92327626
E: s.pritchard@selbornechambers.com.au

Anthony McAvoy
Fredrick Jordan Chambers
T: (02) 9229 7395 F: (02) 9221 6944
E: mcavoy@fjc.net.au

Counsel for the Plaintiff