Federal Court of Australia

Harvey v Minister for Primary Industry and Resources [2022] FCAFC 66

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| Appeal from: | *Friday v Minister for Primary Industry and Resources* [2021] FCA 794 |
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| File number: | NTD 16 of 2021 |
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| Judgment of: | **JAGOT, CHARLESWORTH AND O'BRYAN JJ** |
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| Date of judgment: | 29 April 2022 |
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| Catchwords: | **NATIVE TITLE –** where the first respondent intends to grant a mineral lease (ML 29881) to the third respondent under the *Mineral Titles Act 2010* (NT) – where land subject to the proposed lease would be used for the construction of a “dredge spoil emplacement area” to deposit dredged material from a loading facility located on adjacent land subject to a mineral lease already held by the third respondent – where loading facility is used to load ore concentrate from the McArthur River Mine for transhipment to ocean going vessels for export – whether the proposed grant of ML 29881 is a future act within s 24MD(6B)(b) of the *Native Title Act 1993* (Cth), being the “creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining”  **STATUTORY INTERPRETATION** – interpretation of s 24MD(6B)(b) of the *Native Title Act* – meaning of “a right to mine” in the context of the *Native Title Act* – meaning of “infrastructure facility” as defined by s 253 of the *Native Title Act* |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) ss 13(1), 15AB(1)  *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3(1)  *Native Title Act 1993* (Cth) ss 3, 24AA, 24MB, 24MD(1), 24MD(6A), 24MD(6B), 24OA, 25, 26(1)(c)(i), 28, 29, 227, 233, 253  *Native Title Amendment Act 1998* (Cth)  *Native Title Amendment Bill 1993* (Cth)  *Native Title Amendment Bill 1997* (Cth)  *Native Title Amendment Bill (No 2) 1997* (Cth)  *Native Title Amendment Bill 1998* (Cth)  Explanatory Memorandum, *Native Title Amendment Bill 1993* (Cth)  Explanatory Memorandum, *Native Title Amendment Bill (No 2) 1997* (Cth)  Supplementary Explanatory Memorandum, *Native Title Amendment Bill (No 2) 1997* (Cth)  *McArthur River Project Agreement Ratification Act 1992* (NT)  *McArthur River Project Agreement Ratification Amendment Act 1993* (NT)  *Mineral Titles Act 2010* (NT) ss 4(1), 8, 12(1), 14, 40(1)(b)(ii), 44(1), 71, 72, 74(2)  *Mining Act 1980* (NT) |
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| Cases cited: | *Banjima People v State of Western Australia (No 2)* [2013] FCA 868; 305 ALR 1  *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384  *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579  *Commonwealth v Baume* (1905) 2 CLR 405  *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; 255 CLR 514  *Dilworth v Stamps Commissioner* [1899] AC 99  *Douglas v Tickner* (1994) 49 FCR 507  *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* (1969) 120 CLR 240  *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503  *Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96  *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49; 175 FCR 141  *Harrison v Melham* [2008] NSWCA 67; 72 NSWLR 380  *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633  *Ngajapa v Northern Territory of Australia* [2015] FCA 1249  *Nominal Defendant v GLG Aust Pty Ltd* [2006] HCA 11; 228 CLR 529  *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509  *Parker v Federal Commissioner of Taxation* (1953) 90 CLR 489  *Port of Newcastle* *v Australian Competition Tribunal* [2017] FCAFC 124;253 FCR 115  *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355  *R v McN* [1963] SR (NSW) 186  *Re Bolton; Ex parte Beane* (1987) 162 CLR 514  *Re Tjupan Peoples* [1996] NNTTA 40; 134 FLR 462  *Regional Director of Customs (WA) v Dampier Salt (Operations) Pty Ltd* [1996] FCA 452; 67 FCR 108  *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611  *Robert Bosch (Australia) Pty Ltd v Secretary, Department of Innovation, Industry, Science and Research* [2011] FCA 1133; 197 FCR 374  *Robinson v Local Board of Barton-Eccles* (1883) 8 App Cas 798  *Sherritt Gordon Mines Ltd v Federal Commissioner of Taxation* [1977] VR 342  *Smith obo Gunggari People v Tenneco Energy Queensland Pty Ltd* [1996] FCA 363; 66 FCR 1  *Smith v Western Australia* [2001] FCA 19; 108 FCR 442  *South Australia v Slipper* [2004] FCAFC 164; 136 FCR 259  *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362  *Transport Accident Commission v Hogan* [2013] VSCA 335; 41 VR 112  *Wade v New South Wales Rutile Mining Company Pty Ltd* (1969) 121 CLR 177  *Western Australia v Manado* [2020] HCA 9; 270 CLR 81  *Western Australia v Ward* [2002] HCA 28; 213 CLR 1  *YZ Finance Company Pty Ltd v Cummings* (1964) 109 CLR 395 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Native Title |
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| Number of paragraphs: | 165 |
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| Date of hearing: | 9 November 2021 |
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| Counsel for the Appellants: | Mr S Glacken QC with Mr R Kruse |
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| Solicitor for the Appellants: | Northern Land Council |
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| Counsel for the First and Second Respondents: | Mr S Lloyd SC with Mr L Peattie |
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| Solicitor for the First and Second Respondents: | Solicitor for the Northern Territory |
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| Counsel for the Third Respondent: | Mr R Traves QC with Mr M Eade |
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| Solicitor for the Third Respondent: | Ward Keller Lawyers |

ORDERS

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|  | | NTD 16 of 2021 |
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| BETWEEN: | DAVID HARVEY  First Appellant  THOMAS SIMON  Second Appellant  TOP END (DEFAULT PBC/CLA) ABORIGINAL CORPORATION RNTBC ICN 7848  Third Appellant | |
| AND: | MINISTER FOR PRIMARY INDUSTRY AND RESOURCES  First Respondent  NORTHERN TERRITORY OF AUSTRALIA  Second Respondent  MOUNT ISA MINES LIMITED ACN 009 661 447  Third Respondent | |

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| order made by: | JAGOT, CHARLESWORTH AND O'BRYAN JJ |
| DATE OF ORDER: | 29 APRIL 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. Within 14 days of the date of these orders, the parties are to file agreed proposed orders as to the costs of the appeal or, failing agreement, submissions on the issue of costs limited to 5 pages.
3. Any dispute on the question of the costs of the appeal will be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# Introduction

1. The first and second appellants, Mr David Harvey and Mr Thomas Simon, are native title holders in respect of the land and waters within the area known as NT Portion 4319, or “Perpetual Pastoral Lease No. 1051” (the **Borroloola PPL**), pursuant to a native title determination made on 26 November 2015: *Ngajapa v Northern Territory of Australia* [2015] FCA 1249. The third appellant, Top End (Default PBC/CLA) Aboriginal Corporation RNTBC ICN 7848 (**Top End PBC**), is the prescribed body corporate designated by that determination to perform the functions under s 57(3) of the *Native Title Act 1993* (Cth) (**NTA**).
2. The Borroloola PPL covers an area of land to the south, west and north-east of the town of Borroloola in the Northern Territory. The third respondent, Mount Isa Mines Limited (**Mount Isa Mines**), became the registered proprietor of the Borroloola PPL on 23 April 1993. Mount Isa Mines also owns and operates (through a related company, McArthur River Mining Pty Ltd) the McArthur River Mine which is located about 70 kilometres southwest of Borroloola.
3. The appellants (together with another native title holder who has since died) brought this proceeding seeking to prevent the first respondent, the Northern Territory Minister for Primary Industry and Resources (the **Minister**), from granting a mineral lease described as ML 29881 to Mount Isa Mines under the *Mineral Titles Act 2010* (NT) (**Mineral Titles Act**) without first complying with s 24MD(6B) of the NTA. If granted, ML 29881 would cover an area of land of approximately 786 hectares in the northern part of the Borroloola PPL and would be contiguous to mineral lease MLN 1126 held by Mount Isa Mines. Mount Isa Mines uses MLN 1126 as the location for a loading facility, called the Bing Bong Loading Facility, at which ore concentrate from the McArthur River Mine is loaded onto a barge and transhipped to ocean going vessels for export. The swing basin and navigation channel that form part of the Bing Bong Loading Facility require regular dredging to remove silt and mud from the channel to ensure that the barge has sufficient clearance to continue operating. An area on the southern boundary of MLN 1126 has been used as a “dredge spoil emplacement area” where dredged material can be deposited, however the capacity of that area has been reached. Mount Isa Mines made the application for ML 29881 to construct an additional dredge spoil emplacement area on the adjacent land.
4. It was uncontroversial that the grant of ML 29881 would be a future act within the meaning of the NTA. Section 24OA of the NTA provides that, unless a provision of the NTA provides otherwise, a future act is invalid to the extent that it affects native title.
5. At trial, the appellants alleged that the Minister intends to and has threatened to grant ML 29881 and that:
6. the proposed grant of ML 29881 is not authorised by s 40(1)(b)(ii) of the Mineral Titles Act because the stated purpose is to conduct activities ancillary to operations on MLN 1126 where mining is not conducted;
7. further or alternatively, if authorised, the grant is the creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining within s 24MD(6B)(b) of the NTA and there has been a failure to comply with the requirements of that section; and
8. further, if (which was not admitted) s 24MD(6B) of the NTA does not apply, there has been no compliance with the procedural rights that the appellants have under s 24MD(6A), being the same procedural rights as they would have if they instead held freehold title to the relevant land.
9. The appellants sought relief in the form of declarations to the effect that the proposed grant of ML 29881 is invalid and orders restraining the Minister from granting the application.
10. The primary judge made orders and delivered his reasons for judgment on 13 July 2021: *Friday v Minister for Primary Industry and Resources* [2021] FCA 794 (**PJ**). The primary judge concluded that the Minister was authorised by s 40(1)(b)(ii) of the Mineral Titles Act to grant ML 29881 and that s 24MD(6B) of the NTA does not apply to the proposed grant. The primary judge also considered that a substantive and final decision had not been made with respect to the grant of ML 29881 and, for this reason, the appellants’ alternative contention – that they had not been afforded the procedural rights prescribed by s 24MD(6A) of the NTA (being those referred to in the Mineral Titles Act) – could not be appropriately determined. For those reasons, the primary judge dismissed the appellants’ application.
11. The appellants appeal from the primary judge’s determination that the proposed grant of ML 29881 is not a future act to which s 24MD(6B)(b) of the NTA applies. The appellants contend that having found that the activities to be conducted under ML 29881 would “facilitate the transportation of zinc, lead and silver concentrates from the McArthur River Mine”, the primary judge erred in holding that the grant, if made, is not the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining within s 24MD(6B)(b) of the NTA.
12. By amended notice of contention filed on 12 October 2021, Mount Isa Mines contends that the dismissal of the application based on s 24MD(6B)(b) of the NTA should be affirmed on the further grounds that the grant of ML 29881 would not be (i) a creation or variation of a right to mine; and/or (ii) for the sole purpose of constructing an infrastructure facility (within the meaning of s 253 of the NTA) associated with mining.
13. For the reasons that follow, we dismiss the appeal. Mount Isa Mines’ contention that the grant of ML 29881 would not be the creation or variation of a right to mine is correct, with the consequence that s 24MD(6B)(b) is inapplicable to the grant of ML 29881.

# Background facts

1. The primary judge made detailed findings with respect to the process of advertising the proposed grant of ML 29881, being matters relevant to the issues before his Honour. The process of advertising was protracted and involved missteps. Those missteps, and related correspondence, are detailed by the primary judge at [11]-[51] of his judgment. Nothing in the appeal turns on those matters, and it is therefore unnecessary to refer to those findings. Similarly, it is not necessary to refer to the communications between the relevant parties, between 2016 and 2019, regarding the appropriate procedures under the NTA which apply to the proposed grant. It suffices for present purposes to provide an overview regarding the background to the application for ML 29881 and the purpose of the proposed mineral lease.
2. The following is a summary of the key background facts, drawn from the trial judgment, which are relevant to the disposition of the appeal. They are in relatively short compass.

## Mineral Leases held by Mount Isa Mines

1. The McArthur River Mine Project was established under the *McArthur River Project Agreement Ratification Act 1992* (NT) (the **Project Act**) for, amongst other things, the mining of zinc-lead-silver and the treatment, storage and transport of ore and concentrate. Pursuant to s 4 of the Project Act, the McArthur River Project Agreement (being an agreement between the Northern Territory and Mount Isa Mines entered into on 25 November 1992) was ratified and its implementation was authorised. The Project Act was amended by the *McArthur River Project Agreement Ratification Amendment Act 1993* (NT). Pursuant to s 4A of the amended Project Act, six mining leases and one exploration licence, which had been granted to Mount Isa Mines under the original Project Act and the *Mining Act 1980* (NT), were “re-granted” to it, being mining leases MLN 1121 to 1126 (inclusive) and EL 8078 (see Sch 2 of the amended Project Act). As shown on the map annexed to the trial judgment, mining leases MLN 1121 to 1125 (inclusive) are located at, or in the vicinity of, the McArthur River Mine site whereas MLN 1126 is located some distance north-east of the mine site on the southern coastline of the Gulf of Carpentaria.
2. The permitted uses of the area covered by MLN 1121 to 1125 (inclusive) were set out in cl 4 of those mineral leases. It is contextually relevant to have regard to those purposes which are stated as follows:

PURPOSE

The Company may use or permit to be used the Lease Area for the purposes of:

(a) Mining, processing, treatment and concentration of the Ore including the treatment of tailings or other mining material and removal of Ore, Concentrate, tailings or other mining material from the Lease Area;

(b) the erection of machinery, conveyor apparatus, plant, buildings or other structures, or use thereof;

(c) impounding and retaining of waste resulting from the Mining, treatment or processing operations;

(d) the erection and use of residential premises or recreational facilities for persons engaged in or connected with the McArthur River Project;

(e) the cutting and construction of water races, drains, dams and roads for use in connection with the McArthur River Project;

(f) the boring or sinking for, pumping or raising of, water for the use of that water for or in connection with the McArthur River Project;

(g) exploring for minerals on the Lease Area;

(h) the Mining and use of extractive minerals for or in connection with all or any of the purposes specified in paragraphs (a), (b), (c), (d), (e) and (f) of this clause; and

(i) such other purposes necessarily incidental to or in connection with paragraphs (a), (b), (c), (d), (e), (f), (g) and (h) of this clause, including the management, protection and rehabilitation of the Environment.

1. It can be observed that the permitted uses of the lease area include, amongst other things, mining, processing, treatment and concentration of the ore as well as the erection of machinery, conveyor apparatus, plant, buildings or other structures (things which might be described as infrastructure).
2. The permitted uses of the area covered by MLN 1126 were also set out in cl 4 of that mineral lease. While PJ [77] purports to record the terms of cl 4 of MLN 1126, it was common ground on the appeal that the primary judge erroneously reproduced cl 4 of MLN 1121 to 1125. Cl 4 of MLN 1126 stated as follows:

PURPOSE

The Company may use or permit to be used the Lease Area for the purposes of:

(a) receiving, handling, storage and removal of Concentrate and other material and such other purposes in connection with and necessarily incidental to the Mining and the development, construction and operation of the McArthur River Project;

(b) the dredging of a channel and swing basin for a barge loading facility;

(c) the erection of machinery, conveyor apparatus, plant, buildings or other structures, or use thereof;

(d) the use of trucks, barges and other means of transport for deliveries to and from the Lease Area;

(e) the erection and use of residential premises or recreational facilities for persons engaged in or connected with the McArthur River Project;

(f) the cutting and construction of water races, drains, dams and roads for use in connection with the McArthur River Project;

(g) the boring or sinking for, pumping or raising of, water for the use of that water for or in connection with the McArthur River Project;

(h) exploring for minerals on the Lease Area;

(i) the Mining and use of extractive minerals for or in connection with all or any of the purposes specified in paragraphs (a), (b), (c), (d), (e), (f) and (g) of this clause; and (j) such other purposes necessarily incidental to or in connection with paragraphs (a), (b), (c), (d), (e), (f), (g), (h) and (i) of this clause, including the management, protection and rehabilitation of the Environment.

Provided that pursuant to the Agreement the Company is entitled to permit the use of the facilities on the Lease Area by third parties for purposes other than the McArthur River Project.

1. The following terms, used in cl 4 of MLN 1126, were defined in cl 1:

“Agreement” means the McArthur River Project Agreement and includes that Agreement as varied from time to time in accordance with its provisions.

“Concentrate” means concentrate to be produced from the Ore.

“Lease Area” means the area of land being all that piece or parcel of land delineated in red in the plan contained in the Schedule.

“McArthur River Project” means the project to be developed by the Company in the Northern Territory of Australia relating to the mining of zinc-lead-silver from the mineral deposit known as the H.Y.C. deposit and the subsequent treatment, storage and transport of Ore and Concentrate within and between the mineral leases within the external boundaries of the northern portion of RO581 as at the date of the Agreement and any adjoining areas and the area of one mineral lease on the Bing Bong Pastoral Lease No. 686 and adjacent Territory waters. The project is for the purposes of:

(a) mining of Ore;

(b) processing, treatment and concentration of Ore;

(c) storing Ore or Concentrate;

(d) transporting Concentrate for sale, export or further processing;

(e) exploration for minerals; and

(f) for such other purposes in connection with the McArthur River Project as are necessarily incidental to paragraphs (a), (b), (c), (d) and (e).

“Mining” or “to Mine” means mining or to mine respectively as defined in the Mines Safety Control Act.

“Ore” means ore containing zinc, lead or silver together with any associated minerals which must necessarily be mined in conjunction with the minerals of zinc, lead or silver.

1. Within MLN 1126 is a barge loading facility to load the product from the mine on to barges for transhipment to larger vessels off the coast. This is referred to as the Bing Bong Loading Facility. The General Manager of the McArthur River Mine, Mr Steven Rooney, gave evidence about the operations at the Bing Bong Loading Facility within MLN 1126. The primary judge reproduced aspects of that evidence at PJ [92]-[95]. The relevant aspects of that evidence for the appeal are as follows:
2. Mount Isa Mines uses a bulk carrier to move product from the Bing Bong Loading Facility to ocean-going vessels because the Gulf of Carpentaria is very shallow. The bulk carrier enters a swing basin at the Bing Bong Loading Facility, is loaded by a barge loading conveyor system and then travels out to sea through the navigation channel. The product is then transferred from the bulk carrier to an ocean-going vessel.
3. It is necessary to monitor the depth and width of the navigation channel and swing basin and, if necessary, undertake maintenance dredging. Some weather events (particularly cyclones) can impact the depth and width of the navigation channel and/or swing basin. If the depth and/or width of the navigation channel or swing basin is sufficiently reduced, maintenance dredging will be immediately required.
4. Dredging of the swing basin and/or navigation channel removes silts and sands which come out in a slurry form which is commonly referred to as “dredge spoil”. The dredge spoil is pumped from the place of dredging by way of a pipeline that outlets to an area known as the Bing Bong Dredge Spoil Emplacement Area (**DSEA**) which is located within Perpetual Pastoral Lease 1051 (known as McArthur River Station) owned by Mount Isa Mines. The DSEA consists of ponds (commonly referred to as “cells”) and a retention basin.
5. As dredge spoil is deposited into the cells the silt within the dredge spoil begins to separate from the water and gravity is used to pass the dredge spoil between cells (going west to east) to drop out further silt and fine sediment from the water. This decantation of the water from the dredge spoil leaves a dry silt within the cells and supernatant water being released through the dredge spoil drain. The cells contain the residue dry silt and some of that dry silt is then pushed up and redeposited to be able to recreate the walls of each cell for subsequent lifts of the DSEA. The cell walls are created so that there is control of the deposition of the dredge spoil. The cells are monitored and maintained to ensure the operational integrity of the DSEA. The cell walls of the DSEA are made entirely from dried natural material (no building materials are used to construct or support these walls) and the cells are surrounded by a perimeter drain. The perimeter drain is an excavated and shaped open air drain and is in place to aid in the isolation and control of dredge spoil deposited in the DSEA. The perimeter drain extends around the DSEA, approximately 400 metres from the retention pond, to a discharge point on the tidal mud flats to the east of the Bing Bong Loading Facility.

## The application for ML 29881

1. On 14 March 2013, Mr Michael Williams, the Administration Manager of the McArthur River Mine, sent an email to the Department of Mines and Energy, now the Department of Primary Industry and Resources (**Department**), attaching an application dated 8 March 2013 seeking the grant of a mineral lease under the Mineral Titles Act. That application was given the file number ML 29881.
2. The application for ML 29881 was in a standard form. That form required, among other things, the identification of the “Commodity to be mined or associated purpose in conjunction with mining”. In response to that requirement, the application stated: “Loading facility for the export of Zinc / Lead / Silver concentrates”. The application had attached to it a **Summary of Proposed Works** which stated as follows:

McArthur River Mining (MRM) operates the Bing Bong Loading Facility through which concentrates produced at the Mine are loaded onto a self propelled barge and then transhipped onto Ocean Going Vessels for export throughout the world.

The loading Facility is predominately located on Mineral lease MLN 1126 and consists of a concentrate storage shed and barge loading conveyor system, a swing basin and navigation channel.

At the time of construction in 1994/95 an area on the southern boundary of the Mineral Lease was developed into a dredge spoil deposition area. The swing basin and navigation channel require regular dredging to remove silts and muds from the channel to ensure that sufficient under keel clearance is maintained to enable safe operations for the barge.

Dredged material has been deposited in the spoil area during the course of several dredging campaigns spanning 15 years, however the capacity of the spoil area has now been reached and as such an additional dredge spoil area needs to be constructed.

Works proposed will include the construction of a new dredge spoil area similar in size and design to the existing spoil area and will include engineered internal and external walls and internal and external drains to carry sea water to the existing drainage channel and back out to sea.

The new dredge spoil area will have sufficient capacity to cover anticipated dredging requirements out to the end of mine life.

## Notification of proposed grant

1. Section 71 of the Mineral Titles Act stipulates that, if the Minister is satisfied that there is no reason to refuse an application for the grant of a mineral title, the Minister must publish a notice in a newspaper circulating throughout the Territory stating that the application for a mineral title has been made. The notice must include information concerning the type of mineral title to which the application relates. Section 74(2) provides that, if the Minister is satisfied that the grant of a mineral title will be a future act (within the meaning of the NTA), the Minister may grant the mineral title only if satisfied that all procedures under the NTA relevant to the future act have been followed. As discussed further below, certain future acts associated with mining in respect of an area proposed to be done by the Commonwealth, a State or a Territory (the Government party) must be notified to native title holders and claimants (see ss 24MD(6B) and 29 of the NTA).
2. Following the receipt of the application for ML 29881, in 2014 the Minister notified the application in the *NT News* and *Koori Mail* newspapers, and copies were also provided to the National Native Title Tribunal and the Northern Land Council. There was some disconformity in the description of the acts proposed to be authorised by ML 29881. There was a protracted period of correspondence between Mount Isa Mines, the Northern Land Council and the Department about the form of the notices and whether ML 29881 would create a “right to mine”.
3. On 13 July 2016, the then Northern Territory Minister for Mines and Energy and the Chief Executive of the Department caused a new notice to be published in the *NT News* newspaper concerning the grant of ML 29881. Relevantly, that notice stated as follows:

**NOTICE OF PROPOSED GRANT OF MINERAL LEASE**

…

**Nature of act(s):** The grant of a mineral lease under section 78 of the *Mineral Titles Act* authorising the holder to conduct activities in the title area that are ancillary to mining conducted under another Mineral Lease granted to the title holder.

**Objection or Submission, Section 71 of the *Mineral Titles Act:*** The landowner(s) of land in respect of which the following application is made may lodge an objection to the grant of the application; any other persons may lodge a submission. …

**Purpose:** The grant of a mineral lease under s 78 of the Mineral Titles Act authorising the holder to conduct activities in the title area for ancillary purposes to construct, use, repair and maintain a dredge spoils area to support mining operations under another Mineral Lease granted to the title holder.

1. The Department also provided a copy of the notice to the Top End PBC and the Northern Land Council by letter dated 18 July 2016 which stated as follows:

**Re: Application by Mount Isa Mines Limited for Mineral Lease (ML 29881) – Native Title Act 1993 (NTA) future act processes – Section 24MD(6A) notice**

Please note that an application for Mineral Lease 29881 (“the Mount Isa Mines application”) has been made by Mount Isa Mines Limited for the purpose to construct, use, repair and maintain a dredge spoils area to support a mining operation on the adjacent Mineral Lease Northern (MLN) 1126, also held by Mount Isa Mines Limited.

A notice as required by section 24MD(6A) of the *Native Title Act 1993* is attached, together with a map of the proposed mineral lease area. The notice sets out in summary from [sic], the particular infrastructure or activities ancillary to mining that are required on the Mount Isa Mines application area, and provides the timeframe within which any objection by a Registered Native Title Body Corporate, or any comment by the Recognised Aboriginal/Torres Strait Islander Body for the area, must be provided.

Also attached is a copy of the public notice placed in the NT News on the 13 day of July 2016, in accordance with section 71 of the *Mineral Titles Act*.

1. As indicated, the letter enclosed a copy of the public notice that had appeared in the *NT News* on 13 July 2016 and also enclosed the “notice as required by s 24MD(6A)” (**Future Act Notice**). Part 4 of that notice was headed “Future Act”. Among other things, it repeated the purpose of the grant in similar terms to those above as follows:

**Background:**

Mount Isa Mines Limited, the holder of Mineral Lease 29881 (‘the ML’) has applied pursuant to section 41 *Mineral Titles Act* (NT) for the grant of a mineral lease for ancillary purposes, to enter the area of the proposed future act for the purpose to construct, use, repair and maintain a dredge spoils storage area to support mining activities conducted on adjacent Mineral Lease (MLN) 1126.

In summary, the particular infrastructure or activities ancillary to mining that are required on the Proposed Future Act are:

a) storage of dredge spoils waste rock

b) surface water management works to control the discharge of sea water run-off and sediment from the project site.

**Proposed Future Act/s**

The Minister proposes to grant the ancillary mineral lease to Mount Isa Mines Limited for the purposes sought by Mount Isa Mines Limited (the Proposed Future Act). The Proposed Future Act will not permit mining.

The Northern Territory has formed the view that Subdivision M of Division 3 of Part 2 NTA applies to the Proposed Future Act because it is an act passing the freehold test under s24MB NTA given that the act could be done in relation to the land concerned if the native title holders instead held ordinary title.

The Proposed Future Act will NOT extinguish native title rights and interests in the land affected as the non-extinguishment principle will apply.

1. After some initial correspondence between the Northern Land Council, the Department and Mount Isa Mines and its lawyers regarding the correct procedures applicable to the proposed grant, the Department sent an email to the Northern Land Council on 12 September 2016 indicating that a final decision by the Minister regarding whether to grant ML 29881 was to be deferred indefinitely. The Department indicated that it would provide the Northern Land Council at least 21 days’ notice of any decision to grant ML 29881, a procedure to which Mount Isa Mines agreed.

## Reactivation of ML 29881 in 2019

1. The application lay in abeyance for more than two and a half years. It was reactivated on 4 April 2019, when Mr Stephens of Ward Keller, lawyers for Mount Isa Mines, sent an email to the Department which stated:

I refer to my telephone conversation with Carla McConachy of the Mineral Titles Division of the Department of Primary Industry and Resources yesterday and confirm that I still act for Mount Isa Mines Limited (“MIM”) in relation to its application for ML 29881.

MIM requests the Department and Minister proceed with the grant of ML 29881 to MIM. In this regard I note the attached correspondence from the Department to the NLC dated 12 September 2016, in which the Department agreed not to proceed with the grant without first giving 21 days’ notice to the NLC.

I look forward to hearing from you in due course regarding the progress of the grant of ML 29881. If you have any queries, please contact me.

1. On 24 October 2019, the Department wrote to the Northern Land Council giving notice that it would proceed to grant the lease, in the following terms:

**Re: Issue of Notice of Intention to Grant – ML 29881**

I refer to the departments [sic] letter dated 12 September 2016 regarding an undertaking to provide the Northern Land Council (NLC) 21 days’ written notice prior to any final decision to grant Mineral Lease (ML) 29881 to Mount Isa Mines Limited.

All legislative requirements have now been satisfied and the department intends to issue the above notice on 18 November 2019. The ML will be granted upon payment of the prescribed rent outlined in the notice.

…

1. The originating application in the present proceeding was filed about three weeks later, on 19 November 2019.

# Legislative framework

1. The issues raised by the appeal require consideration of the provisions of both the Mineral Titles Act and the NTA and their intersection.

## The Mineral Titles Act

1. Part 3 of the Mineral Titles Act provides for the grant of different categories of mineral titles including a mineral exploration licence (see Div 1), a mineral exploration licence in retention (see Div 2) and, relevantly for the appeal, a mineral lease (see Div 3). Section 40, within Div 3, provides as follows:

**40 Mineral lease**

(1) A mineral lease is a mineral title that gives the title holder:

(a) the right to occupy the title area specified in the ML; and

(b) the exclusive right to:

(i) conduct mining for minerals in the title area and other activities specified in section 44(1) and (2); or

(ii) conduct activities in the title area that are ancillary to mining conducted under another ML granted to the title holder (for example, operating a treatment plant); or

(iii) ...

1. It can be seen that s 40(1) distinguishes between two types of mineral leases: one that gives the title holder the exclusive right to conduct mining for minerals in the title area and other activities specified in subss 44(1) and (2); and one that gives the title holder the exclusive right to “conduct activities in the title area that are ancillary to mining conducted under another mineral lease granted to the title holder”. The term “mining” is defined in s 12(1) as “the extraction of minerals or extractive minerals from land of the Territory” by one of the methods specified in that subsection. Section 44 provides, relevantly, as follows:

**44 Authorised activities under ML**

(1) An ML that gives the title holder the right to conduct mining in the title area also gives the title holder the right to conduct the following activities:

(a) exploration for minerals in the title area;

(b) the evaluation, processing or refining of minerals in the title area;

(c) the treatment of tailings and other material in the title area;

(d) the storage of waste and other material in the title area;

(e) the removal of minerals from the title area;

(f) other activities, as specified in the ML, in connection with an activity mentioned in this subsection.

(2) …

1. In the present case, ML 29881 would be a mineral lease granted under s 40(1)(b)(ii), conferring a right to conduct activities in the title area that are ancillary to mining conducted under another mineral lease granted to the title holder (being MLN 1121 to 1125).
2. Section 41(2)(c) requires an application for a mineral lease to include a summary of the work proposed to be carried out for conducting authorised activities under the mineral lease.
3. Division 2 of Pt 5 is titled “Decision process for mineral title applications”. As noted earlier, s 71 requires the Minister to publish a notice in a newspaper in relation to an application for a mineral title containing specified information including the title area and the type of mineral title to which the application relates. The notice must also include a statement that a landowner of land in or comprising the proposed title area may, in writing and within the period specified in the notice, object to the grant of the mineral title. The term “landowner” is defined in s 14 to include, if the land is native title land, the holder of the native title. The term “native title land” is defined in s 8 as land for which, under the NTA, there is an approved determination of native title that native title exists in the land. Section 72 makes provision for the applicant to respond to objections in respect of the grant of the mineral title. Section 74 concerns the grant of a mineral title in respect of Aboriginal land (as defined in s 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)) or “native title land”. In respect of the latter, it provides as follows:

**74 Grant relating to Aboriginal land or native title land**

…

(2) If the Minister is satisfied the grant of a mineral title will be a future act in relation to any of the proposed title area of the application for the grant, the Minister may grant the mineral title only if satisfied all procedures under the NTA relevant to the future act have been followed.

(3) In this section:

***future act***, see section 233 of the NTA.

1. It is also relevant to note s 4(1) which provides as follows:

**4 Application of Act may be affected by other legislation**

(1) This Act has effect subject to other Acts of the Territory and Commonwealth that may affect:

(a) rights and powers given under this Act; or

(b) obligations and functions imposed under this Act.

*Examples for subsection (1)*

*1 …*

*2 The ALRA and NTA.*

…

## The Native Title Act

1. As noted earlier, it was uncontroversial that the grant of ML 29881 would be a future act within the meaning of the NTA as it would affect the native title held by the appellants in the Borroloola PPL.
2. Division 3 of Pt 2 of the NTA deals with “future acts”. An overview of Div 3 is provided by s 24AA which relevantly provides as follows:

*…*

*Validity of future acts*

(2) Basically, this Division provides that, to the extent that a future act affects native title, it will be valid if covered by certain provisions of the Division, and invalid if not.

…

*Other bases for validity*

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

…

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

…

*Right to negotiate*

(5) In the case of certain acts covered by … section 24MD (acts that pass the freehold test), for the acts to be valid it is also necessary to satisfy the requirements of Subdivision P (which provides a “right to negotiate”).

*Extinguishment/non-extinguishment; procedural rights and compensation*

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

*Activities etc. prevail over native title*

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

…

1. Section 24OA reflects the statement in s 24AA(2). It provides that, unless a provision of the NTA provides otherwise, a future act is invalid to the extent that it affects native title. An act affects native title “if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise” (see s 227).
2. Subdivisions A to N of Div 3 contain various sections that provide that certain future acts are valid, notwithstanding their effect on native title. Relevantly for present purposes, Subdiv M contains the “freehold test” for future acts. Section 24MB sets out the circumstances in which Subdiv M applies to non-legislative future acts:

(1) This Subdivision applies to a future act if:

(a) it is an act other than the making, amendment or repeal of legislation; and

(b) either:

(i) the act could be done in relation to the land concerned if the native title holders concerned instead held ordinary title to it; or

(ii) the act could be done in relation to the waters concerned if the native title holders concerned held ordinary title to the land adjoining, or surrounding, the waters; and

(c) a law of the Commonwealth, a State or a Territory makes provision in relation to the preservation or protection of areas, or sites, that may be:

(i) in the area to which the act relates; and

(ii) of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.

1. It is uncontroversial that Subdiv M applies to the grant of ML 29881.
2. The non-discrimination principle underpinning the freehold test in Subdiv M is described in M Perry and S Lloyd, *Australian Native Title Law*, (2018, 2nd ed, Lawbook Co.) as follows (at 390-391):

Subdivision M is one of the core provisions of the NTA, and sets out the basic “freehold test” for future acts. Whilst many of the future act Subdivisions are focused on particular types of grants or actions, Subdiv M has a broad operation, and implements a principle of non-discrimination. In the Second Reading Speech for the *Native Title Bill 1993* (Cth), Prime Minister Keating explained the freehold test as follows:

Generally, governments may make grants over native title land only if those grants could be made over freehold title.

This test is founded directly on a principle of non-discrimination. A government may not make a freehold or leasehold grant to somebody else over your or my freehold. If our title is to be extinguished, a government must acquire it and only for the purposes set down in compulsory acquisition legislation, and you or I must be given the protections involved. By contrast, a mining grant can generally be made over your or my freehold. It will be exactly the same for native title.

…

1. Section 24MD(1) provides that, if Subdiv M applies to a future act, then, subject to Subdiv P (which deals with the right to negotiate), the act is valid. So far as is relevant to this appeal, s 24MD further provides as follows (with the disputed statutory text highlighted in bold):

*Consequences of certain acts*

(6) In the case of any future act to which this Subdivision applies, other than:

(a) an act to which Subdivision P (which deals with the right to negotiate) applies;

…

the consequences in subsections (6A) and (6B) apply.

*Procedural rights*

(6A) The native title holders, and any registered native title claimants in relation to the land or waters concerned, have the same procedural rights as they would have in relation to the act on the assumption that they instead held ordinary title to any land concerned and to the land adjoining, or surrounding, any waters concerned.

*Other consequences*

(6B) If the act is:

(a) the compulsory acquisition of native title rights and interests for the purpose of conferring rights or interests in relation to the land or waters concerned on persons other than the Commonwealth, the State or the Territory to which the act is attributable; or

(b) **the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining**;

the following consequences also apply:

(c) the Commonwealth, the State or the Territory to which the act is attributable must notify each of the following:

(i) any registered native title claimant (a ***claimant***) in relation to the land or waters; and

(ii) any registered native title body corporate (a ***body corporate***), in relation to the land or waters; and

(iii) any representative Aboriginal/Torres Strait Islander body in relation to the land or waters; and

(iv) the Registrar;

that the act is to be done; and

(d) any claimant or body corporate may object, within 2 months after the notification, to the doing of the act so far as it affects their registered native title rights and interests; and

(e) either:

(i) in a paragraph (a) case—the Commonwealth, the State or the Territory; or

(ii) in a paragraph (b) case—the person who requested or applied for the doing of the act;

must consult any claimants, and bodies corporate, who object, about ways of minimising the act’s impact on registered native title rights and interests in relation to the land or waters, and, if relevant, any access to the land or waters or the way in which any thing authorised by the act might be done; and

(f) if:

(i) a claimant or body corporate objects, as mentioned in paragraph (d), to the doing of the act; and

(ii) 8 months after the notification mentioned in paragraph (c), the objection has not been withdrawn;

the Commonwealth, the State or the Territory must ensure that the objection is heard by an independent person or body; and

(g) if the independent person or body hearing any objection as mentioned in paragraph (f) makes a determination upholding the objection, or that contains conditions about the doing of the act that relate to registered native title rights and interests, the determination must be complied with unless:

(i) the Minister of the Commonwealth, the State or the Territory responsible for indigenous affairs is consulted; and

(ii) the consultation is taken into account; and

(iii) it is in the interests of the Commonwealth, the State or the Territory not to comply with the determination.

*Meaning of* ***determination***

(6C) In paragraph (6B)(g):

***determination*** includes recommendation.

***in the interests of*** the Commonwealth, the State or the Territory includes:

(a) for the social or economic benefit of the Commonwealth, the State or the Territory (including of Aboriginal peoples and Torres Strait Islanders); and

(b) in the interests of the relevant region or locality in the Commonwealth, the State or the Territory.

1. Subdivision P is titled “Right to negotiate”. An overview of the subdivision is given by s 25 which provides, relevantly, as follows:

(1) In summary, this Subdivision applies to certain future acts done by the Commonwealth, a State or a Territory that are of any of the following kinds:

(aa) …;

(a) certain conferrals of mining rights;

(b) certain compulsory acquisitions of native title rights and interests;

(c) … .

(2) Before the future act is done, the parties must negotiate with a view to reaching an agreement about the act. However, in certain circumstances, the Commonwealth, State or Territory can limit its participation in negotiations if the other parties consent.

(3) If they do not reach agreement, an arbitral body, or a Minister, will make a determination about the act instead.

(4) If the procedures in this Subdivision are not complied with, the act will be invalid to the extent that it affects native title.

1. Section 26 defines the circumstances in which Subdiv P applies. Relevantly, s 26(1) provides as follows (with relevant statutory text also highlighted in bold):

(1) This Subdivision also applies to a future act if:

(a) Subdivision M (which deals with acts that pass the freehold test) applies to the act; and

(b) the act is done by the Commonwealth, a State or a Territory (the ***Government party***); and

(c) subject to this section, the act is:

(i) **the creation of a right to mine, whether by the grant of a mining lease or otherwise, except one created for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining**; or

Note: Rights to mine created for the sole purpose of the construction of an infrastructure facility associated with mining are dealt with in subsection 24MD(6B).

(ii) the variation of such a right, to extend the area to which it relates; or

(iii) the compulsory acquisition of native title rights and interests, unless:

(A) the purpose of the acquisition is to confer rights or interests in relation to the land or waters concerned on the Government party and the Government party makes a statement in writing to that effect before the acquisition takes place; or

(B) **the purpose of the acquisition is to provide an infrastructure facility**; or

Note: Certain compulsory acquisitions covered by sub-subparagraphs(iii)(A) and (B) are dealt with in subsection 24MD(6B).

(iv) any other act approved by the Commonwealth Minister, by legislative instrument, for the purposes of this paragraph, where, if the act is attributable to a State or Territory, the Commonwealth Minister consulted the State Minister or the Territory Minister about the approval before giving it.

…

1. By s 26(1)(c)(i), Subdiv P applies to the creation of a right to mine except one created “for the sole purpose of the construction of an infrastructure facility associated with mining”. That exception is mirrored by s 24MD(6B) which applies if the future act is “the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining”. It can be immediately observed that neither the procedures in Subdiv P nor those in s 24MD(6B) are applicable if the future act is not the creation or variation of a “right to mine”.
2. The NTA does not contain a definition of the phrase “right to mine”. However, the word “mine” is inclusively defined in s 253 as follows:

***mine*** includes:

(a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c)); or

(b) extract petroleum or gas from land or from the bed or subsoil under waters; or

(c) quarry;

but does not include extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or of the bed beneath waters, for a purpose other than:

(d) extracting, producing or refining minerals from the sand, gravel, rocks or soil; or

(e) processing the sand, gravel, rocks or soil by non-mechanical means.

1. The term “infrastructure facility” is defined in s 253 as follows:

***infrastructure facility*** includes any of the following:

(a) a road, railway, bridge or other transport facility;

(b) a jetty or port;

(c) an airport or landing strip;

(d) an electricity generation, transmission or distribution facility;

(e) a storage, distribution or gathering or other transmission facility for:

(i) oil or gas; or

(ii) derivatives of oil or gas;

(f) a storage or transportation facility for coal, any other mineral or any mineral concentrate;

(g) a dam, pipeline, channel or other water management, distribution or reticulation facility;

(h) a cable, antenna, tower or other communication facility;

(i) any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (h) and that the Commonwealth Minister determines, by legislative instrument, to be an infrastructure facility for the purposes of this paragraph.

1. The scheme of the foregoing provisions can be summarised as follows:
2. Under s 24MD, future acts that pass the freehold test are valid. However, the validity of those acts is subject to Subdiv P.
3. If Subdiv P applies (as per s 26), native title holders and claimants are given a right to negotiate in respect of the act. If the procedures in Subdiv P are not complied with, the act is invalid (see s 28).
4. Relevantly, Subdiv P applies to future acts to which Subdiv M applies, if the act is done by the Commonwealth, a State or a Territory (the **Government party**) and, subject to certain exceptions, the act is (i) the creation of a right to mine or the variation of such a right, to extend the area to which it relates or (ii) the compulsory acquisition of native title rights and interests.
5. Relevantly, by s 26(1)(c), Subdiv P is not applicable to (i) the creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining or the variation of such a right to extend the area to which it relates, or (ii) the compulsory acquisition of native title rights and interests where the purpose of the acquisition is to confer rights or interests on the Government party or is to provide an infrastructure facility.
6. If Subdiv P is not applicable, native title holders and claimants are given different (and more limited) rights under subss (6A) and (6B) of s 24MD.
7. Subsection (6B) of s 24MD applies in two circumstances: (i) the compulsory acquisition of native title rights and interests where the purpose of the acquisition is to confer rights or interests on persons other than the Government party, and (ii) the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining. If subs (6B) applies, native title holders and claimants are given the rights of notification, objection, consultation and independent assessment in that subsection.
8. Subsection (6A) is the “default” provision in respect of future acts that pass the freehold test, if neither Subdiv P nor subs (6B) is applicable. In those circumstances, native title holders and claimants have the same procedural rights as they would have if they instead held ordinary title.
9. On this appeal, the appellants contend that the grant of ML 29881 is the “creation … of a right to mine for the sole purpose of the construction of an infrastructure facility … associated with mining” within the terms of s 24MD(6B)(b) above. The respondents contend, first, that the grant of ML 29881 would not create a “right to mine” and, second, that the grant of ML 29881 would not create rights “for the sole purpose of the construction of an infrastructure facility”.

# Reasons of the primary judge

1. It is contextually relevant to note the findings of the primary judge with respect to the first issue raised at trial, whether the grant of ML 29881 is authorised by s 40(1)(b)(ii) of the Mineral Titles Act. As noted above, s 40(1)(b)(ii) provides for the grant of a mineral title that gives the title holder the right to occupy the title area and the exclusive right to “conduct activities in the title area that are ancillary to mining conducted under another [mineral lease]granted to the title holder”. In respect of that form of mineral title, the primary judge observed (at [89]) that:

… s 40(1)(b)(ii) defines a form of mineral title which gives the title holder the rights to occupy a specified area of land and conduct activities there that are supplementary or incidental to the mining for minerals that the title holder concerned is also conducting on another mineral lease it holds. The activities in question do not themselves constitute mining for minerals as defined in the MTA. Accordingly, while they may include some of them, they are not confined to the “authorised activities” described in s 44. Furthermore, the provision does not require the mineral lease where the ancillary activities are conducted to be adjacent to or even geographically close to the mineral lease where the mining is being conducted. This construction of s 40(1)(b)(ii) is, in my view, coherent with the other provisions of the MTA and advances the objects of the legislation as stated in s 3.

1. The primary judge went on to consider whether the activities proposed under ML 29881 are ancillary to mining in this sense. Having considered the evidence from Mr Rooney (summarised above), the primary judge concluded (at [96]) that this evidence broadly corresponded to the description of the proposed works set out in the Summary of Proposed Works in ML 29881, namely:

… the proposed ancillary activities to be conducted under MLA 29881, if granted, involved enlarging the Dredge Spoil Deposition Area to facilitate the transportation of zinc, lead and silver concentrates from the McArthur River Mine. Specifically to allow for the continued use of that area to deposit the dredge spoil produced as a result of the dredging that is required of the swing basin and navigation channel that provide access to the Bing Bong Loading Facility used to tranship those materials to ocean-going vessels …

1. There is no appeal from that finding of fact and, indeed, the appellants embrace the finding on the appeal.
2. In relation to the second issue raised at trial (being the issue raised on appeal), the primary judge rejected Mount Isa Mines’ contention that s 24MD(6B)(b) contains two limbs, the first being “a right to mine” and the second being “for the sole purpose of the construction of an infrastructure facility … associated with mining” (at [130]). After considering the decision of Barker J in *Banjima People v State of Western Australia (No 2)* [2013] FCA 868; 305 ALR 1 (***Banjima***), his Honour expounded his preferred construction of the statutory phrase as follows (at [130]-[134]):

130 … I respectfully agree with Barker J in *Banjima* at [1055] that the subject phrase should be read compendiously and that s 24MD(6B) should be treated as a standalone provision. I do not, therefore, agree with Mr Doyle that, in this instance, that part of *Banjima* is distinguishable.

131 The need to read that phrase compendiously means that one looks to the “construction” that is pivotal to that phrase and determines whether it meets all of the elements necessary to bring that construction within the exception to which s 24MD(6B) is directed. That is to say, one asks whether it:

* meets the sole purpose test;
* involves an infrastructure facility of the kind defined in s 253 of the NTA; and
* is associated with mining.

If there is an affirmative answer to all of those questions, then the grant to build that construction is treated as the creation of a right to mine of that exceptional kind to which the rights prescribed by s 24MD(6B) attach. That grant will not, however, be treated as the creation of a right to mine falling within the terms of Subdivision P.

132 This last conclusion concerns the latter. There are at least three reasons why s 24MD(6B) is to be treated as a standalone provision. First and foremost, focusing on the constituent phrase “creation… of a right to mine” leads inevitably to the paradoxical result of destroying the exception that underpins that section’s very existence. That, all the more so, when it is clear from the Explanatory Memorandum above and s 26(1)(c)(i) itself that a grant to construct an infrastructure facility associated with mining was deliberately excluded from Subdivision P by the 1998 amendments. I interpose to record that, in this respect, I agree with Mr Glacken [senior counsel for the applicants] that, since the judgment of Drummond J in *Smith* pre-dates those amendments, it provides no assistance in the construction of s 24MD(6B)(b).

133 Secondly, that focus also creates a tension between the words “right to mine” at the beginning of the subject phrase and the words “associated with mining” at the end of it. That tension will be exacerbated if the word “mine” is constructed narrowly. In this respect, it is also important to note that the Explanatory Memorandum makes it clear that s 24MD(6B)(b) was intended to provide protection for the rights of native title holders where the infrastructure facility concerned was, while not involving mining per se, associated with it.

134 Thirdly and relatedly, I respectfully agree with the observations of Barker J in *Banjima* at [1055] that s 24MD(6B)(b) “is not a provision … which, in the overall context of the NTA, suggests that every time an infrastructure facility can be shown to be solely or primarily associated with mining that the tenure pursuant to which it is constructed should also be treated as a ‘right to mine’ or indeed ‘mining’ itself and so involve the grant of a ‘mining lease’”.

1. Applying that construction, the primary judge observed (at [135]) that since the works proposed to be conducted under ML 29881 are ancillary to mining at the McArthur River Mine, they could be said to be “associated with mining” within s 24MD(6B). His Honour observed that the remaining question was one of fact: whether the proposed works under ML 29881 are, in fact, for the sole purpose of the construction of an infrastructure facility as defined in paras (f) and/or (g) of the definition in s 253 of the NTA.
2. In that regard, his Honour made five key observations concerning the definition of “infrastructure facility” in s 253 of the NTA (at [136]-[139]):
3. First, it was common ground that the word “includes” should be construed as “means and includes”.
4. Second, since the “sole purpose” test under s 24MD(6B)(b) is applied by reference to that definition, that suggests the need for specificity in respect of the infrastructure facility to which it is to be applied.
5. Third, while the words in para (i) (“any other thing that is similar to any or all of the things mentioned in paragraph (a) to (h)”) may tend to reinforce the inclusiveness of the definition, the fact that the provision exists suggests the opposite. If the legislature has provided a process whereby other items can be added to the definition, that suggests a degree of exclusiveness with respect to the items that are already included.
6. Fourth, there are two types of transport facility referred to in the definition: the “transport” facility in para (a); and the “transportation” facility in para (f). Even recognising the caution to be applied with respect to the *expressio unius* rule, in this instance the rule suggests that the latter paragraph is to be given a more confined meaning than the former (by confining the latter exclusively to the transportation of the materials described: coal, any other mineral or any mineral concentrate).
7. Fifth, while the terminology used in para (g) is broad enough to include waste or excess water, it is difficult to see how that paragraph would apply to characterise a drain to disperse waste or excess water as a water management facility.
8. Based on the Summary of Proposed Works attached to the original application for ML 29881, and the evidence given by Mr Rooney describing the works proposed, the primary judge concluded that the proposed works are not for the sole purpose of constructing an infrastructure facility as defined in paras (f) or (g) of the definition of “infrastructure facility” in s 253 of the NTA (at [140]). Specifically, the primary judge considered that, in respect of (f), while the expanded DSEA will allow for the storage of dredge spoils, those spoils do not fall within the description of “coal, any other mineral or any mineral concentrate” (at [140]). In respect of (g), his Honour considered that the process of constructing a drain to remove excess sea water from the DSEA does not fall within the description of a “water management distribution or reticulation facility” (at [141]). Instead, his Honour considered that, at its highest, it involves a peripheral element of the expansion works that are proposed for that area. Finally, the primary judge observed for completeness that he did not consider that a spoils dump facility of the kind proposed falls within the description of any of the other infrastructure facilities mentioned in the various paragraphs of the definition of that expression in s 253, even if the most expansive meaning were to be given to the language used in them. In this regard, his Honour observed (at [141]):

This highlights the important distinction that exists on the facts of this matter between the “activities … ancillary to mining” which the grant of MLA 29881 will permit Mount Isa Mines to conduct, namely to expand the Dredge Spoil Emplacement Area to enhance the operation of the Bing Bong Loading Facility, and the more closely confined conduct “associated with mining” to which the exception in s 24MD(6B) applies, namely a construction having both a sole purpose and a particular object, to wit the construction of an “infrastructure facility” of the kind defined in one or more of the paragraphs of the definition of that expression in s 253 of the NTA.

1. On that basis, the primary judge concluded that the grant of ML 29881 is not the “creation … of a right to mine for the sole purpose of the construction of an infrastructure facility … associated with mining” within the terms of s 24MD(6B)(b).

# The parties’ submissions

1. The relatively short question raised in the appeal is whether the grant of ML 29881 is the “creation … of a right to mine for the sole purpose of the construction of an infrastructure facility … associated with mining” within the meaning of s 24MD(6B)(b). By the appellant’s supplementary notice of appeal and Mount Isa Mines’ amended notice of contention, all aspects of the construction of that statutory phrase are in issue, as well as its application to ML 29881.
2. It is convenient to set out the parties’ principal submissions in a comprehensive manner on the above questions, rather than by reference to particular grounds raised by the notice of appeal and notice of contention.

## Submissions of the appellants

### Right to mine

1. The appellants submitted that, textually, the phrase “a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining” bespeaks an intention that “a right to mine” in s 24MD(6B)(b) is not confined to a right to extract minerals. That is because the “right” that is the subject of the statutory provision is a right that is for the sole purpose of constructing an infrastructure facility which is associated with mining. The statutory text speaks to the range of mining tenements. At one end are those that confer rights to extract minerals and carry out associated works on the title area (for example, MLN 1121 to 1125); at the other end are those that confer rights to carry out associated works on other land (such as MLN 1126 and proposed ML 29881). Subdivision P applies to the former whereas the procedural rights in s 24MD(6B) apply to the latter (where the sole purpose is to construct an infrastructure facility associated with mining).
2. The appellants argued that the notion of “mining” is a flexible one that can embrace activities beyond the extraction of minerals and that, as illustrated by ss 40(1)(b)(i) and 44 of the Mineral Titles Act, the grant of a right to mine encompasses rights necessary for its meaningful exercise: see *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 (***Ward***) at [308] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
3. In respect of statutory purpose, the appellants submitted that Pt 2 Div 3 implements the main objects in s 3(a)-(b) of the NTA to provide for the protection of native title and sets the standards for future acts that affect native title. Its protection of native title is not to be construed narrowly: *Smith v Western Australia* [2001] FCA 19; 108 FCR 442 at [23] per French J, referred to with approval in *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49; 175 FCR 141 at [18]. The appellants submitted that the procedure for objection, consultation and independent determination in s 24MD(6B) is an element of that protection, which weighs in favour of the interpretation adopted by the primary judge.

### Infrastructure facility

1. The appellants submitted that, contrary to the primary judge’s statement at [136], it was not “common ground” in the hearing below that, in the definition of “infrastructure” in s 253, the word “includes” should be read as “means and includes”. The appellants had not accepted that construction.
2. The appellants submitted that the primary judge’s conclusion that “infrastructure facility” only has the meaning given by the enumerated paragraphs of the definition in s 253 is contrary to reasoning in *South Australia v Slipper* [2004] FCAFC 164; 136 FCR 259 (***Slipper***) (which the appellants characterised as considered *obiter dicta*). The appellants further submitted that the construction in *Slipper* is confirmed by the extrinsic material. The Explanatory Memorandum to the *Native Title Amendment Bill (No 2) 1997* (Cth)(**1997 EM**) states (at [19.7]) that the “term has its ordinary meaning but also includes a number of listed facilities” and (at [19.8]) that:

Within its ordinary meaning, an infrastructure facility is a facility (generally a fixture) necessary for the provision of services or to support the development and operation of major developments. The infrastructure can be provided by a government or the private sector.

1. The appellants observed that the use of the word “includes” in the definition of “infrastructure facility” in s 253 can be contrasted with first, many definitions in s 253 that use the word “means” and second, with the definition of “facilities” in s 24KA(2) which adopts an exhaustive enumerated list (by the use of the words “the things are as follows”). The appellants contend that the difference in statutory language is a strong indication that the legislature intended the definition of “infrastructure facility” to be an inclusive definition.
2. The appellants submitted that, adopting the correct construction of “infrastructure facility”, the primary judge’s finding regarding the expansion of the dredge spoil operations at [96] answers the description of an infrastructure facility in ordinary usage, as it would be a facility that serves or supports the McArthur River Project for the mining of zinc-lead-silver and the treatment, storage and transport of ore and concentrate. In the alternative, the appellants submitted that the DSEA would come within para (f) or (g) of the definition of “infrastructure facility”. In relation to para (f), the appellants argued that the primary judge’s finding at [96] that the DSEA would “facilitate the transportation” of mineral concentrates engages the text of para (f) – “transportation facility for … any mineral concentrate”. Further, the Summary of Proposed Works for ML 29881 refers to walls, drains and a channel “to carry sea water” and the Future Act Notice states that the particular infrastructure or activities ancillary to mining include “surface water management works to control the discharge of sea water run-off and sediment from the project site”. Thus, the DSEA would be a water management facility within para (g). The appellants observed that this conclusion is reinforced by the use of the definition of “infrastructure facility” in the operative provision, s 24MD(6B)(b), where the composite phrase is “infrastructure facility associated with mining”.

## Submissions of the Territory

1. As noted earlier, the first respondent to the proceeding below was the Minister responsible for determining the grant of ML 29881 (the Minister for Primary Industry and Resources) and the second respondent was the Northern Territory. At first instance, the Minister and the Territory took a limited role, restricting their submissions to matters of power and procedure. The Minister and the Territory took a similar approach on appeal by confining their submissions to construction issues, primarily in respect of the points raised by Mount Isa Mines’ notice of contention. The Minister and the Territory were jointly represented at trial and on appeal and it is convenient to refer to them collectively as the Territory.

### Right to mine

1. The Territory submitted that s 24MD(6B)(b) is concerned with a specific subcategory of future acts that create a right to mine. The Territory submitted that this conclusion is supported by the legislative history, referring to the amendments made to the NTA by the *Native Title Amendment Act 1998* (Cth) (**1998 Amendment Act**).
2. The Territory argued that the word “mine” is defined inclusively in s 253 and focuses attention on the physical, primary acts involved in the extraction of minerals which is consistent with the ordinary meaning of the word. The extrinsic material confirms that the concept of a “right to mine” is to be understood by reference to the definition of “mine” in s 253. The Territory submitted that understood in this way, it is clear that the proposed grant of ML 29881 does not create or vary any *right to mine*.
3. The Territory submitted that the primary judge erred in his approach to construing s 24MD(6B)(b) by treating the section as a “standalone provision” and ignoring the link between that section and s 26. Further, the Territory submitted that, by this approach, the primary judge ignored key words in the phrase being construed (namely “creation … of a right to mine”) and read the provision out of its proper context, structurally and historically.
4. The Territory argued that the definition of “mine” includes physical, primary acts involved in the extraction of minerals and may extend to some activities up to the point where a saleable product is produced. So understood, a right to mine may include a right to extract and treat minerals and to construct infrastructure that is supplemental to that purpose, so as to create a saleable product. However, an act that authorises the construction of infrastructure facilities that are subsequent to or apart from that process of recovery of minerals, such as transport facilities, is not the creation of a “right to mine”.

### Infrastructure facility

1. The Territory supported the appellants’ contention that the definition of “infrastructure facility” is not exhaustive. Nonetheless, the Territory submitted that this does not mean that the meaning of infrastructure facility is ambulatory or broad; rather, it has a narrow ordinary meaning in the scheme of the NTA for the following reasons.
2. First, the question posed by s 24MD(6B)(b) is not what is meant merely by the word “infrastructure” but what is meant by the phrase “infrastructure facility”. The meaning of that composite phrase cannot be reduced to the dictionary definition of its first word.
3. Second, the categories of facility are expressed with generality (for example, “road, railway, bridge *or other transport facility*” and “cable, antenna, tower *or other communication facility*”). The Territory submitted that it would have been unnecessary to set out those catch-all terms if the ordinary meaning of the phrase was intended to be broad.
4. Third, a broad approach would frustrate the limitations expressly contained in the definition. The Territory referred to the appellants’ submission that, because the primary judge found the deposition area would “facilitate the transportation” of mineral concentrates, it would be a “transportation facility for … any mineral concentrate” within the meaning of s 253(f). The Territory submitted that, contrary to the appellants’ submission, s 253(f) is plainly directed at a facility through which minerals are transported, in the same way that a “storage … facility for … any mineral concentrate” is a place where mineral concentrate is stored.
5. Fourth, a broad approach would be inconsistent with the limited power in s 253(i) for the Minister to determine other forms of infrastructure facility, but only if they are “similar to any or all of the things mentioned in paragraphs (a)-(h)”. The Territory submitted that if a broader meaning was intended, that capacity would not be included or would be expressed by reference to some more general criteria.

## Submissions of Mount Isa Mines

### Right to mine

1. In respect of the phrase “right to mine”, Mount Isa Mines submitted that the primary judge erred in finding that s 24MD(6B)(b) was a composite phrase (at [130]-[131]) and that, provided the future act is a grant for the sole purpose of the construction of an infrastructure facility associated with mining, then the grant can be seen to be the “creation or variation of a right to mine”. Mount Isa Mines argued that this approach was contrary to the plain and ordinary meaning of the provision and that an application of orthodox principles of statutory interpretation demonstrates that, properly construed, s 24MD(6B)(b) comprises two constituent elements: (1) the creation or variation of a right to mine; and (2) the right is granted for the sole purpose of the construction of an infrastructure facility associated with mining. Mount Isa Mines advanced the following submissions in support of that construction.
2. First, on a plain and natural reading of the provision, there is a distinction drawn between the “right”, being the right to mine, and the “purpose” of the right, being the purpose of construction of an infrastructure facility associated with mining. To focus solely on the “purpose” of the right leads impermissibly to ignoring the opening words of the provision and affording the provision an identical construction as if the words “the creation or variation of a right to mine” were absent.
3. Second, the same bifurcation is seen in s 26(1)(c)(i) of the NTA, a provision that operates as complementary to s 24MD(6B)(b). Section 26(1)(c)(i) contemplates various types of “rights to mine”, one of which is for the sole purpose of the construction of an infrastructure facility associated with mining. Mount Isa Mines submitted that s 24MD(6B)(b) cannot be construed in isolation from s 26(1)(c)(i).
4. Third, focusing on the constituent phrase “creation … of a right to mine” does not destroy the exception that underpins the section’s existence (cf PJ at [132]).
5. Fourth, the broader context does not dictate a different result. In particular, the extrinsic material does not employ the language of the provision. Appeals to the broad objects of the NTA do not assist. The purpose of the NTA was not to achieve a single objective at any cost, but instead was the result of a political compromise between competing objectives: *Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96 at [76]; *Western Australia v Manado* [2020] HCA 9; 270 CLR 81 at [46]. The plain words of s 24MD(6B)(b) and s 26(1)(c)(i) reflect the extent to which the legislature determined it appropriate to afford procedural rights additional to those afforded to freehold owners (as provided for in s 24MD(6A)).
6. Mount Isa Mines’ submissions concerning the meaning of the phrase “right to mine” were largely consistent with those of the Territory. Mount Isa Mines submitted that the type of grants caught by s 24MD(6B)(b) are those for infrastructure directly involved in the primary exploration, extraction, or production activities, as opposed to something more indirect or incidental to those activities. Mount Isa Mines argued that ML 29881, if granted, authorises the use of an area of land not itself part of the mining operation to deposit dredge spoil; an act, at its highest, incidental to the transportation of the mined product. Thus, the nature of the mineral title falls outside the terms of s 24MD(6B)(b).

### Infrastructure facility

1. Mount Isa Mines submitted that ML 29881 (if granted) is not for the sole purpose of construction of an infrastructure facility associated with mining because:
2. the definition of “infrastructure facility” is exhaustive and the works contemplated by the grant do not fall within any enumerated paragraph of the definition;
3. alternatively, if the definition of “infrastructure facility” is not exhaustive, the works contemplated by the grant are not within the ordinary meaning of the phrase “infrastructure facility”;
4. to the extent that some of the works contemplated by the grant could be seen to be an “infrastructure facility”, those works are not the sole purpose of the grant; and
5. the grant authorises both the construction and operation of the DSEA.
6. Mount Isa Mines argued that it is an orthodox principle of statutory interpretation that the meaning of “includes” with respect to a particular definition is to be determined in the context of the statutory instrument as a whole. That context may demonstrate that the word “includes” was not employed to enlarge the ordinary meaning of the word or phrase but instead prescribes an exhaustive explanation of the meaning to be ascribed. Construed in its context, “infrastructure facility” as defined in s 253 of the NTA prescribes an exhaustive explanation of the meaning to be ascribed for the following reasons.
7. First, the phrase employed by the legislature is not “includes” but “includes any of the following”, a phrase which suggests a level of exclusivity.
8. Second, each of the enumerated categories from (a) to (h) in the definition of the expression fall within the ordinary connotation of the phrase “infrastructure facility”. That suggests the legislature listed categories of infrastructure facilities not to expand the natural significance of the phrase, but to provide an exhaustive explanation of its meaning for the purposes of the NTA.
9. Third, most of the enumerated categories in the definition of the expression are themselves expansive and expressly contemplate various genera. To define each category in such a generalised manner would be unnecessary if the definition was not exhaustive.
10. Fourth, para (i) extends the definition of “infrastructure facility” to any other thing provided the thing is “similar” to the other enumerated categories and provided it is determined by legislative instrument to be an infrastructure facility. Mount Isa Mines argued that this subsection is otiose if the definition is inclusive.
11. In relation to the conclusions expressed in *Slipper*, Mount Isa Mines’ primary argument was that Branson J wrongly assumed that the definition was inclusive rather than exhaustive. Further, the reasoning was *obiter* and subject to her Honour’s observations that the issue was not free from doubt (at [70], [84]).
12. Mount Isa Mines submitted that the works contemplated by the grant of ML 29881 do not fall within paras (f) and (g) of the definition of “infrastructure” facility”. In respect of para (f), Mount Isa Mines submitted that the works provide for the storage of dredge spoil, not any mineral or mineral concentrate. Mount Isa Mines further submitted that it is contrived to construe a “transportation or storage facility for mineral concentrate” as encompassing a thing that broadly facilitates the transportation of a mineral concentrate occurring elsewhere. In respect of the application of para (g), Mount Isa Mines submitted that, whilst the DSEA will provide drainage for supernatant wastewater, that arises because of the natural separation process following the depositing of dredge spoil. Mount Isa Mines argued that it is artificial to construe that peripheral aspect as transforming the nature of the grant (a spoils dump) as a water management facility.
13. Mount Isa Mines submitted in the alternative that, if the definition of “infrastructure facility” is not exhaustive, the approach of Branson J in *Slipper* should be applied and the phrase “infrastructure facility” should be construed as a subordinate part of an undertaking or a facility intended to service or support the undertaking (*Slipper* at [80]-[84]). Mount Isa Mines further submitted that, within its ordinary meaning, an infrastructure facility has the features of a physical structure that has been constructed, such as a building or equipment of ongoing use, roads, railways, jetties, pipelines and channels, and which has some level of permanent installation. The DSEA is not subordinate to, and does not support, the extraction, recovery or processing of the mined product. Nor does the DSEA have the features of an infrastructure facility – it is made from deposited material and involves no building or construction.
14. Mount Isa Mines submitted that if, contrary to its other submissions, the drain for supernatant wastewater (which is part of the DSEA) can be characterised as a water management facility and therefore an “infrastructure facility”, the construction of the necessary drainage is not the “sole purpose” of ML 29881. The dominant purpose of ML 29881 is to provide an area to deposit dredge spoil.
15. Finally, Mount Isa Mines argued that, even if the entirety of the DSEA is an “infrastructure facility”, the sole purpose of ML 29881 is not to construct the DSEA, but to operate the DSEA in order to undertake maintenance dredging until the end of the life of the mine. According to its plain and ordinary meaning, s 24MD(6B)(b) captures a different kind of grant, namely one for the purposes of construction.

# Consideration

1. The question raised on the appeal is whether the grant of ML 29881 would be the creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining within the meaning of s 24MD(6B)(b) of the NTA.
2. As the parties’ submissions demonstrate, the words chosen by Parliament in s 24MD(6B)(b) to express the legislative intention present a range of possible meanings. As is well understood, the task of statutory construction begins with the text of the provision in question, understood in its context (including legislative history and extrinsic materials) and with regard to its purpose: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34;262 CLR 362 at [14] per Kiefel CJ, Nettle and Gordon JJ and at [37]-[39] per Gageler J; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at [39]; *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 (***Project Blue Sky***) at [69]-[71].

## The elements of s 24MD(6B)(b)

1. Although there are difficulties with ascribing a meaning to the statutory language (including the phrases “right to mine” and “infrastructure facility”), there can be no doubt that s 24MD(6B)(b) defines a future act that satisfies two elements: (i) the future act must be the creation or variation of a right to mine, and (ii) the sole purpose of the creation or variation must be the construction of an infrastructure facility associated with mining. We disagree with the primary judge’s conclusion that, if the relevant act meets the sole purpose test, involves an infrastructure facility as defined in s 253 and is associated with mining, the act is treated as the creation or variation of a right to mine (PJ at [131]). The conclusion that s 24MD(6B)(b) defines a future act that satisfies two elements is required by the statutory text and is confirmed by the statutory context, including the legislative history.
2. As to the statutory text, it is axiomatic that a court construing a statutory provision must strive to give meaning to every word of the provision: *Project Blue Sky* at [71], quoting with approval *Commonwealth v Baume* (1905) 2 CLR 405 at 414. The approach adopted by the primary judge involves reading the statutory provision as if the first element (the creation or variation of a right to mine) were absent. Neither the text nor the context requires such a reading.
3. The meaning that is apparent from the statutory text is confirmed by the statutory context. As outlined earlier, the provisions of Subdiv M of Div 3 of Pt 2 are interconnected with Subdiv P. By s 24MD(1), acts that pass the freehold test are valid, subject to Subdiv P. Where Subdiv P applies, native title holders are given a right to negotiate in respect of the future act. If the procedures in Subdiv P are not complied with, the act is invalid. Relevantly for present purposes, s 26(1) stipulates that Subdiv P applies to a future act if:
4. Subdiv M applies to it;
5. the act is done by the Commonwealth, a State or a Territory; and
6. the act is the creation of a right to mine whether by the grant of a mining lease or otherwise, except one created for the sole purpose of the construction of an infrastructure facility associated with mining, or the variation of such a right, to extend the area to which it relates.
7. Thus, s 26(1) applies to a future act if it is the creation of a right to mine whether by the grant of a mining lease or otherwise, subject to an exclusion in respect of “one” (ie a right to mine) created for the sole purpose of the construction of an infrastructure facility associated with mining. The future act that is excluded by s 26(1)(c) is a particular category of a right to mine, being one that satisfies that stated sole purpose test. Section 26(1) also applies to the variation of such a right, but limited to a variation that extends the area to which it relates. The note to s 26(1)(c) states that rights to mine of the excluded category, those created for the sole purpose of the construction of an infrastructure facility associated with mining, are dealt with in subs 24MD(6B). The note, being part of the material in the Act, is part of the Act: *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; 255 CLR 514 at [24] citing s 13(1) of the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**).
8. The interrelationship between s 26(1)(c) and s 24MD(6B) requires that the provisions be construed harmoniously and be given the same meaning: *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 (***Franzon***) at 618 per Mason J; *Project Blue Sky* at [70]. The result is that s 26(1)(c)(i) applies to the creation of a right to mine (whether by the grant of a mining lease or otherwise) other than a right to mine in the excluded category, while s 24MD(6B)(b) applies to the creation of a right to mine within the excluded category. If the right created is not a right to mine then neither s 26(1)(c)(i) nor s 24MD(6B) apply. Rather, s 24MD(6A) applies so that native title holders have the same procedural rights as if they held ordinary title to the land. That conclusion is further confirmed by the legislative history, discussed below.
9. The primary judge reached the opposite conclusion from an apparent concern that the grant of a right for the sole purpose of the construction of an infrastructure facility associated with mining could not be the grant of a “right to mine”. His Honour considered that “focusing on the constituent phrase ‘creation… of a right to mine’ leads inevitably to the paradoxical result of destroying the exception that underpins that section’s very existence” (PJ at [132]). His Honour perceived that there was tension between a “right to mine” and a right to construct an infrastructure facility associated with mining (PJ at [133]). Undoubtedly, such a tension exists if the phrase “right to mine” is construed narrowly as the right to engage in mining activities limited to the extraction of minerals from the ground. If the phrase were construed in that manner, it is difficult to imagine a circumstance in which the right would be for the sole purpose of the construction of an infrastructure facility. As discussed below, while there are difficulties in ascribing a clear meaning to the phrase “right to mine”, an available meaning for the phrase would include a right to engage in activities necessarily associated with mining such as the processing or refining of minerals, the treatment of tailings, the storage of waste and the removal of minerals from the mining area (adopting the description of common mining activities used in s 44 of the Mineral Titles Act). Adopting that broader meaning of the phrase “right to mine” removes the tension in the provision. Further, and in any event, reading s 24MD(6B)(b) with s 26(1)(c)(i), it is apparent that the statutory scheme assumes that the creation of a right to construct an infrastructure facility associated with mining is capable of being encompassed by the creation of a right to mine.
10. The primary judge also placed reliance (at PJ [130] and [134]) on certain observations of Barker J in *Banjima* at [1055]. In that section of *Banjima*, Barker J considered the validity of certain rail leases issued by the State of WA in accordance with a state agreement governing a mining project (see *Banjima* at [994]). A question that arose was whether the rail leases were mining leases as defined in s 245 of the NTA. In that context, Barker J observed (at [1053]-[1055]):

[1053] I accept, therefore, that the expression “mining lease” is limited in the context of the NTA and should reflect the meaning given to the verb “mine” in s 253 of the NTA. That definition is not comprehensive but simply provides that mine “includes” certain exploration, prospecting, extraction and quarrying activities. That may mean that other activities can be drawn in, but in the circumstances I do not consider that a lease granted in respect of the railway should be included within the concept in this case. The focus of the definition of mine is the physical, primary acts and not associated with activities that facilitate the conduct of a broader “mining operation”.

[1054] The only respect in which the NTA suggests the meaning of “mine” which goes beyond the physical, primary act, is in the use of the compendious phrase, “the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility … associated with mining” found in s 24MD(6B)(b) and discussed above in relation to L45/147.

[1055] While this particular provision—which as noted above is a difficult one to grapple with — might suggest that where an infrastructure facility is associated with mining, then the creation of a right in respect of such construction should be seen as the creation (or variation) of a “right to mine” where that is the sole purpose of the infrastructure, I am rather inclined to treat a provision such as s 24MD(6B)(b) as standing alone and to be interpreted in the particular circumstances of the subdivision of the NTA in which it appears.It is not a provision, in my view, which, in the overall context of the NTA, suggests that every time an infrastructure facility can be shown to be solely or primarily associated with mining that the tenure pursuant to which it is constructed should also be treated as a “right to mine” or indeed “mining” itself and so involve the grant of a “mining lease”.

1. Four aspects of Barker J’s observations should be noted. First, the observations are not directly concerned with the meaning of s 24MD(6B)(b); they are concerned with the meaning of the statutory term “mining lease”. Second, and in any event, the observations do not support the primary judge’s construction of s 24MD(6B)(b). Indeed, the final sentence of [1055] is to the opposite effect, that a right to construct an infrastructure facility that is solely or primarily associated with mining is not for that reason a “right to mine”. Third, the observations recognise that the language of s 24MD(6B)(b) suggests that the meaning of the word “mine” in the NTA goes beyond the physical, primary acts of exploration and extraction. Fourth, it is not permissible to treat any statutory provision as “standing alone”, particularly not s 24MD(6B)(b), given its relationship to s 26(1)(c)(i).
2. Earlier in his reasons in *Banjima*, Barker J considered whether Subdiv P (specifically s 26(1)(c)) applied to the grant of a miscellaneous licence under the *Mining Act 1978* (WA) (L45/147) associated with regrading a rail line used to transport iron ore from mine to port. His Honour concluded as follows (at [981]–[982]):

[981] … Does L45/147 create a right to mine? On the face of it, as the respondents contend, it does not. Undoubtedly it is a tenure that is granted to facilitate the transportation of product to port for sale, and may be part of a mining operation as defined generally or for the purposes of the NTA. It may also be an “infrastructure facility … associated with mining”. In that regard, “infrastructure facility” is defined by s 253 of the NTA to include “a road, railway, bridge or other transport facility”. The railway falls within that definition and would appear to be associated with mining on any view. The tenure would also appear to have been granted for the “sole purpose” of the construction of the railway associated with mining.

[982] In the result, however, it seems to me to involve impermissible reasoning to say that, because the grant of the right to construct the railway is associated with mining, it is therefore “mining”. Unless one can contend the words of subs (1)(c)(i) are to be taken to mean that a grant not for the sole purposes of construction of a tenure infrastructure associated with mining, involves “the creation of a right to mine”, which I do not think one can in the overall context of the NTA, then the claimants’ argument must fail.

1. Barker J went on to observe that, if he were wrong about the meaning of “right to mine” in s 26(1)(c)(i), the grant of L45/147 would have fallen within s 24MD(6B)(b) (at [985]). Again, that conclusion provides no support for the primary judge’s construction as it proceeds from the premise (not accepted by Barker J) that the grant is the creation of a “right to mine”.

## Legislative history

1. As noted above, the conclusion that s 24MD(6B)(b) defines a future act that satisfies two elements is confirmed by the legislative history.
2. When enacted in 1993, the NTA had a simpler regime governing future acts in Div 3 of Pt 2. Relevantly, s 23(2) stipulated that “permissible future acts” were valid, subject to Subdiv B. Permissible acts were defined in s 235 and included a form of the freehold test (the act applies in the same way to the native title holders concerned as it would if they instead held ordinary title to the land). Section 23(6) stipulated that, other than in respect of a low impact future act or one to which Subdiv B applied, native title holders have the same procedural rights as they would have in relation to the act on the assumption that they instead held ordinary title. Subdivision B, and specifically s 26, established a right to negotiate in respect of certain permissible future acts. Relevantly, s 26(2) stipulated that the right to negotiate applied to:
3. the creation of a right to mine, whether by the grant of a mining lease or otherwise; and
4. the variation of such a right, to extend the area to which it relates.
5. The Explanatory Memorandum to the *Native Title Amendment Bill 1993* (Cth) (**1993 EM**) explained the purpose of those provisions as follows (at p 5):

**THE FUTURE REGIME**

It is crucial that there be a process to allow for grants and actions over native title land and land that could be native title land to continue in the future. To provide for such a process it is necessary for native title to be accommodated into the national land management system.

The Bill provides for future acts to take place providing that they are ‘permissible future acts’, which is defined in clause 220. In essence, the Bill provides that where an act can be done over ordinary title land then that act will be permitted over native title land. …

An example of a permissible future act is the grant of a mining interest. Such grants can be made over freehold land so they can also be made over native title land. Other future permissible acts are those carried out under general Compulsory Acquisition Acts.

…

Registered native title holders and registered claimants will receive special rights of negotiation for some permissible future acts, as described below. Otherwise native title holders will be entitled to the same procedural rights as holders of ordinary title, such as the right to be notified and to object (clauses 22(6) and 238).

In recognition of the special attachment that Aboriginal peoples and Torres Strait Islanders have to their land, the Bill provides that for certain permissible future acts registered native title holders and registered native title claimants will have a right to negotiate before those acts take place.

Subdivision B of Division 3 of Part 2 sets out the detailed provisions relating to the right to negotiate. Clause 25 sets out the acts to which the right to negotiate will apply. They are essentially acts relating to mining, the compulsory acquisition of native title for the purpose of making a grant to a third party, and any other acts approved by the Commonwealth Minister.

1. The following matters can be noted from the 1993 EM. First, the original purpose of the provisions in Div 3 of Pt 2 was to establish a process to allow for grants and actions over native title land and land that could be native title land to continue in the future. Second, the NTA allowed permissible future acts to take place, such acts being ones that could be done over ordinary title land, including the grant of a mining interest. Third, registered native title holders and registered claimants were given special rights of negotiation for some permissible future acts, being acts relating to mining and the compulsory acquisition of native title for the purpose of making a grant to a third party. This was in recognition of the special attachment that Aboriginal peoples and Torres Strait Islanders have to their land.
2. It can be seen that the right to negotiate in Subdiv B of Div 3 of the NTA as enacted applied to the creation of a right to mine, whether by the grant of a mining lease or otherwise. The word “mine” was defined in similar terms to the present, being an inclusive definition. The 1993 EM does not greatly assist in affixing a meaning to the phrase “right to mine”, merely referring to mining interests.
3. In *Smith obo Gunggari People v Tenneco Energy Queensland Pty Ltd* [1996] FCA 363; 66 FCR 1 (***Tenneco***), Drummond J concluded (at [24]) that a licence to construct and operate a pipeline, which was for the purpose of conveying gas (the finished product of a mining operation) to consumers, was not “the creation of a right to mine” within the meaning of the original s 26(2). In contrast, in *Re Tjupan Peoples* [1996] NNTTA 40; 134 FLR 462, the Native Title Tribunal (Member O’Neil) (at 473) distinguished the circumstances before her from *Tenneco*, finding that a miscellaneous licence for the construction of a pipeline designed to carry water for use on the site of mining operations could be covered by the original s 26(2).
4. The future act regime was significantly amended by the 1998 Amendment Act. The path to that enactment was lengthy. The *Native Title Amendment Bill 1997* (Cth) (**1997 Bill (No 1)**) was introduced into the House of Representatives on 4 September 1997. The 1997 Bill (No 1) passed the House of Representatives on 29 October 1997 and subsequently passed the Senate on 5 December 1997 with numerous amendments. On 6 December 1997, the House of Representatives laid the 1997 Bill (No 1) aside after agreeing to the majority of the Senate’s amendments. A second version of the Bill, the *Native Title Amendment Bill (No 2) 1997* (Cth) (**1997 Bill (No 2)**), incorporating many of the agreed amendments, was re-introduced into the House of Representatives on 9 March 1998. An amended version of the explanatory memorandum that had been released in respect of the first Bill was circulated. Unless otherwise stated, all references to the “**1997 EM**” in these reasons are a reference to this amended explanatory memorandum released in respect of the 1997 Bill (No 2). Further changes were made to the 1997 Bill (No 2), including the provisions the subject of this appeal, and a supplementary explanatory memorandum in respect of those changes was also published (**1997 Supplementary EM**). The 1998 Amendment Act was ultimately passed by the Parliament in July 1998 and most of the amendments came into force from 30 September 1998.
5. As explained in the 1997 EM (at [1.6]), the 1998 amendments established “a much more comprehensive regime for the validity of acts occurring in the future which affect native title”. Division 3 of Pt 2 was repealed in its entirety and replaced by a new Div 3 in similar form to the present. The new Div 3 contained many Subdivisions addressing different types of future acts which affect native title and their consequences. Subdivisions M and P were inserted, including the provisions the subject of this appeal. The relevant features of the amendments were that:
6. the right to negotiate conferred by s 26 in respect of the creation of a right to mine (and the variation of such a right to extend the area to which it relates) was made subject to an exclusion in respect of “one created for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining”; and
7. new procedural rights were conferred by s 24MD(6B) in respect of “the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining”.
8. In respect of the amendment to the right to negotiate in s 26, the 1997 Supplementary EM explained as follows (at p 23):

Government amendment (H46) is to paragraph 26(1)(c)(i) which, subject to the exclusions contained in subsection 26(2), provides that the creation of a right to mine is subject to the right to negotiate. The amendment removes the creation of a right to mine from the operation of that paragraph (and thereby from the right to negotiate) if it is one created for the *sole purpose* of constructing an infrastructure facility (which is defined in section 253) associated with mining. The words ‘sole purpose’ have been used to make it clear that the creation of the right to mine with which the infrastructure facility is associated is not removed from the right to negotiate by this amendment. The fact that an infrastructure facility may, when constructed, also provide services to the local community will not prevent the relevant grant being for the sole purpose of constructing the infrastructure.

This amendment will remove an anomaly in the Bill namely, that the grant of a mining lease that permits the construction of an infrastructure facility associated with mining must go through the right to negotiate but a compulsory acquisition for the purpose of constructing an infrastructure facility associated with mining need not. Grants of this kind, like compulsory acquisitions that are for the purpose of enabling a non-Government party to construct an infrastructure facility, will be subject to the additional procedural rights set out in subsection 24MD(6B) … .

1. In respect of the corresponding amendment to s 24MD(6B)(b), the 1997 Supplementary EM explained (at p 19):

The purpose of these amendments is to provide procedural rights to registered native title claimants, native title bodies corporate and representative bodies in relation to future acts that consist of any of the following:

...

* the grant of a mining lease for the sole purpose of permitting the construction of an infrastructure facility associated with mining.

Future acts of this kind are generally valid since they pass the freehold test, but are not subject to the right to negotiate (see subparagraph 26(1)(c)(i) amended by Government amendment (H46) and paragraph 26(1)(c)(iii)). The Government believes that it is not appropriate to subject future acts of this kind to the right to negotiate. They include the provision of infrastructure, such as roads, gas pipelines and the like. Such infrastructure is increasingly being provided by non-Government entities, especially in remote and regional Australia. It is appropriate however that in relation to acts of this kind, which may have the result of extinguishing native title altogether, native title holders be given procedural rights essentially the same as others but which ensure that the special nature of their rights can be taken into account.

Subsection 24MD(6) in the Bill currently provides that in relation to future acts that pass the freehold test but are not subject to the right to negotiate, or are not acts to which sections 26A, 26B or 26C apply (which already give native title holders special procedural rights in relation to the acts to which those sections apply), native title holders have the same procedural rights as a freeholder. New subsection 24MD(6A) gives the procedural rights of a freeholder in relation to future acts of this kind to native title holders and registered native title claimants for the area concerned.

…

New subsection 24MD(6B) will also apply to the grant of a mining lease for the sole purpose of the construction of an infrastructure facility associated with mining (paragraph 24MD(6B)(b)). The grant of a mining lease of this kind is exempt from the right to negotiate (see subparagraph 26(1)(c)(i) which is amended by Government amendment (H46)) but the consequences set out in new subsection 24MD(6B) will apply to grants of this kind in addition to the procedural rights provided in subsection 26MD(6A). The sole purpose test applies to the grant of the right. The fact that an infrastructure facility may, when constructed, also provide services to the local community or others, will not prevent the relevant grant being for the sole purpose of constructing the infrastructure. However if the grant allows both mining and construction of infrastructure, it will not pass the sole purpose test.

1. It is clear from the legislative history that ss 26(1)(c)(i) and 24MD(6B)(b) are interrelated provisions and must be read in a complementary manner. The right to negotiate in Subdiv P applies to the creation of a right to mine, other than a right to mine created for the sole purpose of the construction of an infrastructure facility associated with mining. In respect of the latter, excluded right, the procedures in s 24MD(6B) are applicable. It follows that, in each case, those provisions are applicable to the creation of a right to mine of a particular kind.
2. As explained in the 1997 Supplementary EM, the purpose of those amendments was to alter (and lessen) the procedural rights available to native title holders and claimants in respect of rights to mine of the stated kind. The Government considered that it was not appropriate to subject future acts of that kind (which include the provision of infrastructure, such as roads, gas pipelines and the like) to the right to negotiate because infrastructure of that kind is increasingly being provided by non-Government entities, especially in remote and regional Australia. Instead, the Government considered it appropriate that native title holders and claimants be given procedural rights essentially the same as others (who hold freehold title) but which ensure that the special nature of their rights can be taken into account. Those are the rights provided for in s 24MD(6B)(c)-(g).

## Right to mine

1. It is therefore necessary to determine whether the grant of ML 29881 would be the creation of a right to mine within the meaning of s 24MD(6B)(b).
2. As noted earlier, the phrase “right to mine” is not defined in the NTA. The word “mine”, as a verb, is inclusively defined in s 253. There is no reason to doubt that the definition is intended to be applied to the phrase “right to mine”. So much is confirmed by the 1997 EM which stated (at [19.6]):

To mine is to extract any natural resource for commercial exploitation. Section 253 of the NTA already defines the term 'mine' to include exploration or prospecting, extraction of gas or petroleum and quarrying. This definition applies to the derivative terms ‘mining’ and ‘mined’.

1. In statutes, an inclusive definition is commonly used if the definition is intended to enlarge the ordinary meaning of the defined word or phrase: see for example *Sherritt Gordon Mines Ltd v Federal Commissioner of Taxation* [1977] VR 342 at 353; *Douglas v Tickner* (1994) 49 FCR 507 at 519; *Transport Accident Commission v Hogan* [2013] VSCA 335; 41 VR 112 at [47]. That is the apparent role of the definition of “mine” in the NTA. The definition is stated to include:
2. explore or prospect for things that may be mined; or
3. extract petroleum or gas from land or from the bed or subsoil under waters; or
4. quarry,

and is stated to exclude extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or of the bed beneath waters, for a purpose other than extracting, producing or refining minerals from the sand, gravel, rocks or soil or processing the sand, gravel, rocks or soil by non-mechanical means. The definition does not make reference to the core conception of mining which, as defined by the Macquarie Dictionary, is to dig in the earth for the purpose of extracting, and to extract, ores, coal, etc (ie minerals) (to similar effect is the definition of mining in s 12 of the Mineral Titles Act, being the extraction of minerals or extractive minerals from land). Instead, the definition includes activities that might not come within the ordinary meaning of the term. The express reference to exploration can be assumed to be included to avoid doubt that exploration is also encompassed within the statutory term. The extraction of petroleum or gas from beneath land or under water subsoil is not usually described as mining and is typically governed by separate legislation to mining statutes, but is to be regarded as mining for the purposes of the NTA. Similarly, quarrying is not usually described as mining, but is included for the purposes of the NTA subject to certain exclusions referred to in the definition.

1. It was common ground between the parties that the word “mine” as used in the NTA incorporates its ordinary meaning, being the extraction of minerals from the ground, and that the definition in s 253 extends that ordinary meaning. The area of dispute is the range of activities that is intended to be encompassed within the phrase “to mine”. As courts have observed on many occasions, the word “mine” is ambiguous: *Wade v New South Wales Rutile Mining Company Pty Ltd* (1969) 121 CLR 177 at 194 per Windeyer J. Its meaning must be determined by the statutory context and subject matter: *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509 at 522 per Dixon CJ, Williams and Taylor JJ, observing that the meaning of “mine” and “mining” is “by no means fixed and is readily controlled by context and subject matter” and that the word “mine” seems “always to have been somewhat indefinite in its application”.
2. The phrase “right to mine” is used frequently in the NTA. As referred to above, the phrase was included in the original form of s 26 conferring a right to negotiate. By the 1998 amendments, the phrase was also included in the new Div 2A (concerning the validation of intermediate period acts). Section 26(1)(c)(i) indicates that the right need not be conferred by a mining lease, which is defined in s 245(1) as “a lease (other than an agricultural lease, a pastoral lease or a residential lease) that permits the lessee to use the land or waters covered by the lease solely or primarily for mining”.
3. The immediate statutory context of ss 24MD(6B)(b) and 26(1)(c)(i) indicates that the phrase “right to mine” cannot be given an unduly narrow construction limited to the primary act of extraction of minerals (or petroleum or gas). The legislature contemplated that a right to mine might be created for the sole purpose of the construction of an infrastructure facility associated with mining. It can be assumed that the legislature had in mind rights of the kind able to be conferred under s 40(1)(b)(i) of the Mineral Titles Act, which enables the grant of a mineral lease that gives the holder the right to conduct mining for minerals and which, by s 44, includes activities such as exploration for minerals, evaluation, processing or refining of minerals, the treatment of tailings, the storage of waste or the removal of minerals from the title area. Each of those activities may require infrastructure facilities for the performance of the activity, and a mineral lease may be granted to permit the holder to construct an infrastructure facility for those purposes. That conclusion is consistent with the observation of the majority in *Ward* (at [308] per Gleeson CJ, Gaudron, Gummow and Hayne JJ) that the grant of a right to mine encompasses rights necessary for its meaningful exercise. While that observation was made in the context of considering mining leases granted under the *Mining Act 1978* (WA), the statement has general application to mining statutes of the States and Territories.
4. Considerable caution is required in considering cases that have construed the words “mine” and “mining” in other contexts. The revenue cases involve the construction and application of specific statutory phrases that have changed over time, and it is difficult to extract definitions of general application from the cases. For example, *Parker v Federal Commissioner of Taxation* (1953) 90 CLR 489 considered the difference in meaning of the phrases “mining operations” and “the working of a mining property”. In *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* (1969) 120 CLR 240, the majority (Barwick CJ, McTiernan and Menzies JJ) concluded that neither expenditure on a railway track that transported ore to a port nor expenditure on the shipping facilities at the port were deductible as expenditure incurred in connection with mining operations. However, that conclusion followed from the statutory requirement that the expenditure must be “in connexion with mining operations carried on by the taxpayer upon its mining property” (at 275 and 277). Conversely, the majority found that expenditure on an off-shore survey at Groote Eylandt for the purpose of constructing a port was deductible because it was in connection with the taxpayer’s mining operations upon its mining property in Groote Eylandt (at 278). In *Regional Director of Customs (WA) v Dampier Salt (Operations) Pty Ltd* [1996] FCA 452; 67 FCR 108 (***Dampier Salt***), the Full Federal Court considered provisions of the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth) which allowed a rebate of duty in respect of the purchase of diesel fuel for use in mining operations. The mining operations in that case involved the extraction of salt from sea water and from a subsurface brine aquifer. In that context, the Full Court stated a number of propositions concerning the meaning and extent of a mining operation (at 120):

(1) The point where a mining operation starts and finishes will be a question of fact to be decided in each case. However, the Court should not adopt a narrow view of the extent of "mining operations" so as to frustrate the legislative intent of providing a concession to the mining industry.

(2) Relevant to this factual conclusion will be the ascertainment of the object of the particular taxpayer's operations.

(3) Generally the mining operation will continue until there has been produced that which is the object of the particular taxpayer's operation of mining.

(4) The mining operation will not necessarily be complete when a mineral has been extracted from ore, or where salt is produced, immediately there has been a recognisable salt product, be that brine or crystallised salt. It will be necessary that the mineral (salt) produced be saleable.

(5) The mere fact that a mineral is saleable will not necessarily be determinative, if the production of that mineral at that place by that taxpayer would be uneconomic. Perhaps everything can be said to be saleable for a price, but what is necessary is that the mineral in question be economically saleable at least by a person in the position of the particular taxpayer.

(6) Activities directed to improving that which is extracted, for example pelletising, may fall outside the ambit of the "mining operation". However, they may form part of the mining operation where the activity is closely associated with the actual extraction of the mineral. Normally this close association may be indicated by physical proximity, but lack of physical proximity will not necessitate the conclusion that the mining operation has concluded: *Northwest Iron*. The degree of integration of the activity with the actual mining process will, obviously, thus be relevant.

1. In *Banjima,* Barker J noted that in particular statutory contexts the concept of “mining” may mean more than the singular physical act of winning a mineral from the ground, but the expression “mining operations” which was the subject of consideration in *Dampier Salt* differs from the expression “right to mine” (at [981]).
2. Without attempting an exhaustive definition, the statutory text, context and purpose indicates that the expression “right to mine” in the NTA refers to a future act that confers a right to engage in mining activities, which typically involve the exploration for and extraction of a mineral (or petroleum or gas) from the ground, and encompasses rights necessary for its meaningful exercise. The rights necessary for its meaningful exercise will depend upon the nature of the mining activity being undertaken, but will typically include activities of the kind referred to in s 44(1) of the Mineral Titles Act such as: the evaluation, processing or refining of minerals in the title area; the treatment of tailings and other material in the title area; the storage of waste and other material in the title area; and the removal of minerals from the title area. Rights to undertake those activities are ordinarily necessary for the meaningful exercise of a right to mine. Typically, each of those categories of activities will be directly associated with and form part of the mining activity on a given parcel of land. Rights permitting such activities can be appropriately described as a right to mine. However, the application of the statutory phrase “right to mine” will always be fact specific.
3. The construction propounded by the appellants would read the words “right to mine” as equivalent to “mineral lease or licence”. As illustrated by the provisions of the Mineral Titles Act, a mineral lease or licence may confer a right to conduct mining for minerals in the title area (as per s 40(1)(b)(i)), and may also confer a right to conduct activities that are ancillary to mining and in a different area to the mining activities (as per s 40(1)(b)(ii)). In our view, the construction propounded by the appellants is not an available construction having regard to the statutory text and context. The phrase “mineral lease” is used elsewhere in the NTA (see for example s 46 which concerns the McArthur River Project) and the legislature’s choice of the phrase “right to mine” instead of “mineral lease” must be taken to be deliberate. As can be seen from the extracts reproduced above, the 1997 Supplementary EM used the phrase “mining lease” in substitution for the statutory phrase “right to mine”. However, even the phrase “mining lease” cannot be equated with the phrase “mineral lease” as the former phrase is defined in the NTA as a lease that permits the lessee to use the land or waters solely or primarily for mining. So too, the 1993 EM explained permissible future acts as including the grant of “mining interests”.
4. The appellants supported their broader construction by reference to the objects of the NTA which include to provide for the recognition and protection of native title and to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings. Those objects are to be read in light of the Preamble to the NTA, which records the historical fact that Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement and have been progressively dispossessed of their lands largely without compensation. This may be accepted, but Parliament chose to enact different levels of protection for native title holders and claimants for different forms of activities authorised by mining legislation. In respect of acts that meet the description “right to mine” but are not for the sole purpose of the construction of an infrastructure facility associated with mining, native title holders and claimants have the protection of the right to negotiate provisions in Subdiv P. In respect of acts that are rights to mine for the sole purpose of constructing an infrastructure facility associated with mining, lesser protections are afforded by s 24MD(6B). In respect of other acts that may be authorised under a mineral lease or licence which do not involve the creation of a right to mine at all, native title holders and claimants have the same rights as holders of ordinary title by operation of s 24MD(6A). While each category may involve substantial interference with the land and therefore with the enjoyment of the native title rights and interests, the statutory scheme reflects the legislature’s balance between advancing the interests of Aboriginal peoples and Torres Strait Islanders through the recognition and protection of native title and what is described in the Preamble as “the needs of the broader Australian community”. Having regard to the statutory text and context, it is not possible to accept the appellants’ construction of s 24MD(6B)(b).
5. In the present case, the grant of ML 29881 would not constitute the creation of a “right to mine” within the meaning of s 24MD(6B)(b). This is because the activities authorised by ML 29881 are too remote from mining activities and cannot be regarded as necessary for the meaningful exercise of a right to mine. Cumulatively, the following two matters of fact require that conclusion.
6. First, ML 29881 is proposed to be issued under s 40(1)(b)(ii) of the Mineral Titles Act to permit Mount Isa Mines to construct and operate the DSEA on land that is separate to the land on which its mining activities occur (under MLN 1121 to 1125). That is not to suggest that a mineral lease granted under s 40(1)(b)(ii) can never be a right to mine within the meaning of s 24MD(6B)(b) of the NTA. The question will always turn on the nature of the activities authorised by the mineral lease in question. However, the fact that the mineral lease authorises activities on separate land is a factor to be taken into account, notwithstanding the activities satisfy the description in s 40(1)(b)(ii) of being “ancillary to mining conducted under another [mineral lease] granted to the title holder”.
7. Second, the activity authorised by ML 29881, the construction and operation of the DSEA, is concerned with the shipment of the ore mined on the land the subject of MLN 1121 to 1125, not the mining of the ore. The purpose of the DSEA is to hold dredge spoil to enable vessels to ship ore from the Bing Bong Loading Facility to ocean going vessels. The ordinary meaning of mining does not encompass the transportation of mined ore to customers. Clear statutory language would be required for the phrase “right to mine” to encompass activities associated only with the transportation of mined ore. Nothing in the NTA suggests that the legislature intended ss 26(1)(c)(i) or 24MD(6B)(b) to apply to future acts that confer rights of that kind.
8. It follows that the grant of ML 29881 is not subject to the requirements of s 24MD(6B). Rather, it is subject to the requirements of s 24MD(6A) which gives the appellants the same procedural rights as they would have in relation to the act on the assumption that they instead held ordinary title to the land concerned.
9. Given the extensive arguments advanced, it is appropriate to also determine the “infrastructure facility” issue.

## Sole purpose of constructing an infrastructure facility

1. Two questions arise on the appeal: whether the DSEA to be constructed pursuant to ML 29881 would be an infrastructure facility within the meaning of the NTA and whether the sole purpose of the rights conferred by ML 29881 is the construction of the DSEA. The respondents do not dispute that the DSEA is associated with mining.
2. It is convenient to address the second question first as it admits of a short answer. Mount Isa Mines advanced an argument that ML 29881 did not satisfy s 24MD(6B)(b) because the sole purpose of ML 29881 is not to construct the DSEA but to operate the DSEA in order to undertake dredging. That argument should be rejected as it is contradicted by the evidence. The Summary of Proposed Works which formed part of the application for ML 29881 stated that the capacity of the existing spoil area (within MLN 1126) had been reached and “an additional dredge spoil area needs to be constructed”. The Summary stated that the proposed works would “include the construction of a new dredge spoil area similar in size and design to the existing spoil area and will include engineered internal and external walls and internal and external drains to carry sea water to the existing drainage channel and back out to sea”. It is clear from the application that the purpose of the proposed mineral lease is to construct the DSEA. As submitted by the appellants, the fact that a facility constructed pursuant to a mineral lease will then be used and operated is not inconsistent with the conclusion that the sole purpose of the mineral lease is the construction of the facility. A contrary conclusion would render s 24MD(6B)(b) inutile, as the mining industry would not seek a mineral lease to construct a facility that is not intended for use.
3. The more difficult question is whether the DSEA to be constructed pursuant to ML 29881 would be an infrastructure facility within the meaning of the NTA. The difficulty arises from the form of the definition of “infrastructure facility” in s 253 of the NTA, which is expressed to include “any of the following” things listed in paras (a) to (i) of the definition, and where (i) is “any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (h) and that the Commonwealth Minister determines, by legislative instrument, to be an infrastructure facility for the purposes of this paragraph”. The appeal raises the question whether the definition is intended to be inclusive, such that the statutory phrase “infrastructure facility” will encompass things within the ordinary meaning of that phrase, or whether the definition is intended to be exhaustive. The difficulties in interpreting a definition in this form is discussed by Prof Pearce in *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th Ed, 2019), where he observes (at[6.7]):

… The orthodox and, it is submitted, the correct approach to the understanding of the effect of these expressions is that ‘means’ is used if the definition is intended to be exhaustive while ‘includes’ is used if it is intended to enlarge the ordinary meaning of the word.

…

Unfortunately, this neat distinction has not always been adhered to by either drafters or judges. Particular confusion has arisen where the word ‘includes’ has been used in a definition and then one or more items that would usually fall within the accepted meaning of the word have been specified together with some items that would not. The problem that then arises is whether the definition, notwithstanding the use of the word ‘includes’, is intended to be exhaustive. …

1. The ordinary meaning of the word “includes” is that the object of the clause is part of the subject; for that reason, the use of the word “includes” in a statutory definition ordinarily indicates that the definition is not intended to be exhaustive. In approaching such a definition, it is reasonable to start with the presumption that the word “includes” takes it ordinary meaning. As observed by Lord Selborne LC in *Robinson v Local Board of Barton-Eccles* (1883) 8 App Cas 798 at 801:

An interpretation clause of this kind [ie, one which uses the word ‘includes’] is not meant to prevent the word from receiving its ordinary, popular, and natural sense whenever that would be properly applicable; but to enable the word as used in the Act, when there is nothing in the context or the subject matter to the contrary, to be applied to some things to which it would not ordinarily be applicable.

1. However, a number of cases illustrate circumstances in which contrary indications may arise from the statutory text, context and purpose. As explained by Lord Watson in *Dilworth v Stamps Commissioner* [1899] AC 99 at 106:

… the word ‘include’ is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expression defined. It may be equivalent to ‘mean and include’, and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.

1. In *YZ Finance Company Pty Ltd v Cummings* (1964) 109 CLR 395(***YZ Finance***), the High Court considered whether a promissory note fell within the definition of “security” in s 24 of the *Moneylenders and Infants Loans Act 1941* (NSW), which provided that “‘security’ includes bill of sale, mortgage, lien and charge of any real or personal property, and any assignment, conveyance, transfer or dealing with any real or personal property to secure the repayment of any loan”. It was accepted that if “security” were to be given its ordinary meaning, then the promissory note would fall within the definition. Justices McTiernan, Kitto, Taylor and Windeyer concluded that the list of matters in the definition was intended to be exhaustive, notwithstanding the use of the word “includes”, principally because each of the enumerated items were within the ordinary meaning of the word “security”, thus indicating a legislative intention to define the term exhaustively (McTiernan J at 399, and Taylor and Windeyer JJ agreeing at 404 and 406 respectively, and Kitto J at 403). Justice Kitto discerned a drafting pattern by which the word “means” was used where the purpose was to impose upon an expression an artificial meaning to the exclusion of any other, while the word “includes” was used where the purpose was to choose one out of two or more otherwise possible meanings by specifying the intended coverage (at 404).
2. A contrary conclusion was reached in *R v McN* [1963] SR (NSW) 186 where the New South Wales Court of Criminal Appeal considered the following definition of “vehicle” in the *Crimes Act 1900* (NSW): “vehicle” includes any cart, wagon, cab, carriage, aeroplane or other aircraft, motor car, caravan trailer, motor lorry, motor or other bicycle. Unlike the definition under consideration in *YZ Finance*, in which all of the items listed fell within the ordinary meaning of the definition of “security”, the items listed within the definition of “vehicles” included items that would not normally fall within the ordinary meaning of that word. Herron CJ and Manning J concluded that the definition was not exhaustive (while Brereton J considered that it was). Taking into consideration “the nature of the legislation, the language used, the evil sought to be remedied and the nature of the offences specified”, their Honours found that the word “includes” was “capable of being read literally, and the circumstances do not justify it being read in any other way” (at 188).
3. The definition of “infrastructure facility” in s 253 of the NTA was considered by the Full Federal Court in *Slipper*. The case concerned the proposed compulsory acquisition of land in South Australia by the Commonwealth for the purpose of establishing a national repository for the disposal of radioactive waste under the *Lands Acquisition Act* *1989* (Cth) (**Lands Acquisition Act**). The case raised a number of issues. South Australia was successful in the appeal on the basis that the Commonwealth Minister exercised power under s 24(1) of the Lands Acquisition Act for an improper purpose and obtained orders quashing various decisions of the Commonwealth (at [70] per Branson J, with whom Finn and Finkelstein JJ agreed). Nevertheless, Branson J went on to consider a number of other issues raised on the appeal, including the question whether the proposed national radioactive waste repository was an infrastructure facility within the meaning of s 253 of the NTA. Her Honour concluded that it was not (at [85]), reasoning as follows:

80 The Oxford English Dictionary defines “infrastructure” as follows:

A collective term for the subordinate parts of an undertaking; substructure, foundation; spec. the permanent installations forming a basis for military operations, as airfields, naval bases, training establishments etc.

81 The Macquarie Dictionary contains the following, it would seem wider, definitions:

1. the basic framework or underlying foundation (as of an organisation or a system) 2. the roads, railways, schools, and other capital equipment which comprise such an underlying system within a country or region. 3. the buildings or permanent installations associated with any organisation, operation etc.

82 If the drafter of s 253 proceeded on the basis that the ordinary meaning of the word “infrastructure” was the meaning indicated by the Oxford English Dictionary, the reason for expanding that meaning of the expression “infrastructure facility” for the purpose of the Lands Acquisition Act is readily identified. The ordinary meaning would be too narrow to achieve the purpose behind the exclusion from Subdiv P of compulsory acquisition of native title rights and interests where the purpose of the acquisition is to provide an infrastructure facility. The purpose behind the exclusion may be presumed to be to exclude the right to negotiate where the acquisition is to provide a facility for the economic benefit of the nation or a region of the nation.

83 However, if the drafter of s 253 proceeded on the basis that the ordinary meaning of the term “infrastructure” was the wider meaning reflected in the second Macquarie Dictionary definition, nothing would seem to be achieved by the provisions of s 253 touching on the meaning of “infrastructure facility”. In particular, para (i) would, on this assumption, appear to be unnecessary as any thing “similar to any or all of the things mentioned in paragraphs (a) to (h)” would almost certainly fall within the ordinary meaning of the words “infrastructure facility”.

84 Although the issue is not, as it seems to me, free from doubt, I conclude that the better view is that the Native Title Act has been drafted on the basis that the ordinary meaning of the words “infrastructure facility” is relatively narrow. It is, I consider, in accordance with ordinary usage for “infrastructure facility” to be used to describe a subordinate part of a particular undertaking or a facility intended to serve or support a particular undertaking. If this view is the correct view, a national radioactive waste repository not designed as a subordinate part of any particular undertaking or facility would not be an “infrastructure facility”.

1. Each of Finn J (at [88]) and Finkelstein J (at [148]) agreed with Branson J on that issue.
2. While the Full Court’s consideration of the definition of “infrastructure facility” was *obiter*, it was considered reasoning and therefore should be accorded considerable weight: *Port of Newcastle* *v Australian Competition Tribunal* [2017] FCAFC 124; 253 FCR 115 at [111]. However, it does not appear from the reasons that any party in *Slipper* advanced the contention that the definition is exhaustive, rather than inclusive, and the Full Court’s reasons do not advert to that possibility. That is the contention advanced in this appeal. It is therefore necessary to consider the reasons in *Slipper* in conjunction with the arguments advanced by the parties in this appeal.
3. The use of the word “includes” in the definition of “infrastructure facility” in s 253 is a strong indicator that the definition is intended to be non-exhaustive. It should also be noted that each of the words “means” and “includes” is used in other definitions in s 253 of the NTA in accordance with the orthodox usage of those terms as explained by Prof Pearce. By way of example, and as discussed above, it was common ground that the definition of “mine” in s 253 of the NTA is intended to be a non-exhaustive definition. There is a statutory presumption that words in legislation are used consistently: *Franzon* at 618 per Mason J. However, this presumption is readily rebuttable if the context compels a different construction: *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579 at 590 per Higgins J; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 643 per Gibbs ACJ. Further, the presumption is less strong in respect of words within large and frequently amended statutes: *Robert Bosch (Australia) Pty Ltd v Secretary, Department of Innovation, Industry, Science and Research* [2011] FCA 1133; 197 FCR 374 at [35] per Murphy J. In this case, the presumption that the word “includes” is used consistently in s 253 is weakened by the fact that the definition of “infrastructure facility” was inserted into the NTA by the 1998 amendments, whereas most of the other definitions, such as “mine”, were part of the NTA from its inception.
4. Accepting that the use of the word “includes” is a strong indicator that the definition of “infrastructure facility” is intended to be non-exhaustive, it is necessary to consider whether contrary indications arise from the statutory text, context and purpose. In this case, there are a number of strong indicators in favour of an exhaustive construction of the definition.
5. First, each of the things enumerated in paras (a) to (h) of the definition appears to fall within the ordinary meaning of the phrase “infrastructure facility”. As observed by Branson J in *Slipper*, the definition of “infrastructure” given by the Oxford Dictionary is narrow in comparison to the Macquarie Dictionary. In our view, the latter definition reflects ordinary usage in Australia. That definition is:

1. the basic framework or underlying foundation (as of an organisation or a system)

2. the roads, railways, schools, and other capital equipment which comprise such an underlying system within a country or region.

3. the buildings or permanent installations associated with any organisation, operation etc.

1. This suggests, as was the case in *YZ Finance*, that the legislature sought not to expand the ordinary meaning of the term, but to provide an exhaustive explanation of its meaning for the purpose of the Act.
2. Second, the highly specific nature of some of the types of “infrastructure facilities” enumerated in the definition appear to qualify the ordinary meaning of the phrase. By including specific qualifying words within those categories, for example by specifying “a storage or transportation facility *for coal, any other mineral or any mineral concentrate*” (para (g)), the legislation affords a strong indication that any *other* kind of storage or transportation facility is to be excluded from the statutory meaning of the phrase. It is difficult to reconcile this drafting style with a non-exhaustive understanding of the definition, which would mean, for instance, that other kinds of storage or transportation facilities might still be covered by the definition because they fall within the ordinary meaning of the term.
3. Third, para (i) empowers the Minister to determine, by legislative instrument, that “any other thing that is similar to any or all of the things mentioned in paras (a) to (h)” is an infrastructure facility for the purpose of the definition. It is significant that the Minister’s power is constrained to expanding the list only in respect of things that are similar to the things in paras (a) to (h). If the definition were intended to be inclusive, para (i) would be unnecessary. As the things mentioned in paras (a) to (h) fall within the ordinary meaning of the phrase “infrastructure facility”, anything similar to those things would also fall within the ordinary meaning of the phrase (as observed by Branson J in *Slipper*). The inclusion of para (i) affords a strong indication that the definition is intended to be exhaustive, and the Minister is empowered to expand the list but only in respect of “similar things”.
4. Fourth, although perhaps a lesser indicator, the use of the phrase “includes any of the following” is consistent with a legislative intention to enumerate an exhaustive list.
5. Fifth, there is a discernible statutory purpose for limiting the definition to the enumerated things. The phrase “infrastructure facility” was introduced into the NTA with the 1998 amendments and is used in only three operative provisions: ss 24MD(6B)(b), 26(1)(c)(i) and 26(1)(c)(iii). In ss 26(1)(c)(i) and 26(1)(c)(iii), the phrase is used in a provision that excludes the right to negotiate from two categories of future act. In s 26(1)(c)(i), the creation of a right to mine is a future act to which the right to negotiate applies, but not if it is for the sole purpose of the construction of an infrastructure facility. Similarly, in s 26(1)(c)(iii), the compulsory acquisition of native title rights and interests is a future act to which the right to negotiate applies, but not if the purpose of the acquisition is to provide an infrastructure facility. Future acts in those excluded categories are addressed in s 24MD(6B), with paragraph (a) applying to compulsory acquisitions of the requisite kind (through the operation of s 24MD(6)(a)) and paragraph (b) applying to rights to mine of the requisite kind. As explained in the 1997 Supplementary EM, the foregoing provisions were enacted because the Government considered that it was not appropriate to subject future acts of that kind to the right to negotiate, being the provision of infrastructure, such as roads, gas pipelines and the like, as such infrastructure was increasingly being provided by non-Government entities, especially in remote and regional Australia. Having regard to that statutory context and purpose, it is understandable that Parliament defined the categories of infrastructure facility to be excluded from the right to negotiate in exhaustive terms.
6. Against those textual and contextual indications in favour of an exhaustive meaning, the appellants placed reliance on statements in the 1997 EM that the term “infrastructure facility” has its ordinary meaning, but also includes a number of listed facilities, and that, within its ordinary meaning, an infrastructure facility is a facility (generally a fixture) necessary for the provision of services or to support the development and operation of major developments (at [19.7]-[19.8]).
7. The meaning of the definition of “infrastructure facility” is ambiguous, which permits recourse to the 1997 EM as an aid to construction: s 15AB(1) of the Acts Interpretation Act. However, statements made in an explanatory memorandum or in the course of a second reading speech have never been regarded as determinative of the legal meaning of statutory enactments: *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ. While statements explaining the background to the enactment, the mischief being addressed and the legislative purpose will usually inform the process of construction undertaken by the court, statements as to the legal meaning or effect of particular words of the enactment are usually given less weight in that process: see for example *Nominal Defendant v GLG Aust Pty Ltd* [2006] HCA 11; 228 CLR 529 at [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ and at [82] per Kirby J; *Harrison v Melham* [2008] NSWCA 67; 72 NSWLR 380 at [12] per Spigelman CJ and at [168]-[173] per Mason P (with whom Beazley and Giles JJA agreed).
8. In the present case, we consider that little weight should be accorded the statements in the 1997 EM in the construction of the phrase “infrastructure facility”. The statements first appeared in the original explanatory memorandum released in respect of the 1997 Bill (No 1). Relevantly, that Bill differed from the 1998 amendments in a significant respect. In the proposed amended s 26, the infrastructure facility exclusion only applied to future acts that were compulsory acquisitions, not rights to mine. Thus, the work of the definition of “infrastructure facility” in that Bill was more limited than the final enactment. That remained the case in respect of the first version of the 1997 Bill (No 2) (and paras 19.7 and 19.8 of the explanatory memorandum in respect of that Bill were not altered). The 1997 Bill (No 2) was subsequently revised to apply the infrastructure facility exclusion to future acts that were rights to mine, and that change was referred to in the 1997 Supplementary EM. That document did not, though, refer to the definition of “infrastructure facility”. The 1998 amendments were extensive and the legislative process was lengthy. In that context, statements that appeared in an early version of an explanatory memorandum expressing a conclusion as to the legal effect of a statutory definition, where the substantive provisions that deploy the definition are subsequently amended in a material way, cannot be given significant weight in ascertaining the meaning and effect of the resulting enactment.
9. The appellants also placed reliance on the difference in statutory drafting used in s 24KA(2), which was inserted into the NTA at the same time as the definition of “infrastructure facility” in s 253. Section 24KA concerns future acts that permit or require the construction, operation, use, maintenance or repair of any of the things listed in s 26KA(2), or consist of the construction, operation, use, maintenance or repair of any of those things by or on behalf of the Crown, or a local government body or other statutory authority of the Crown. There is considerable overlap between the list of things in s 26KA(2) and the things listed in the definition of “infrastructure facility” in s 253. The appellants drew attention to the chapeau to s 26KA(2) which states: “[f]or the purposes of paragraph (1)(b), the things are as follows”. The appellants submitted that, by those words, the legislature clearly indicated that the list was exhaustive. So much may be accepted, but the statutory language used in s 24KA(2) provides little if any assistance in construing the definition of “infrastructure facility” in s 253. Section 24KA uses a different style of drafting. The legislature chose not to use a descriptive term, such as infrastructure facility, in the substantive provision and then define that term. Instead, the legislature chose to refer to a list of things in a different subsection. Further, at the conclusion of the list in para (m), the legislature included an omnibus category being “any other thing that is similar to any one or more of the things mentioned in the paragraphs above”. It is not possible to draw any conclusions about the intended meaning of the definition of “infrastructure facility” in s 253 based on the different form of drafting used in s 24KA.
10. What emerges from an analysis of the statutory text, context and purpose are strong indications that the definition of “infrastructure facility” is an exhaustive definition. Although (like many questions of statutory construction) the question is arguable, the better view is that the use of the word “includes” in the definition of “infrastructure facility” indicates specific enumeration of the items covered by the definition, and the definition should be read as exhaustive. This conclusion involves something of a departure from the reasoning of the Full Court in *Slipper*. However, as noted earlier, the Full Court did not hear argument on the question raised by this appeal: whether the definition is exhaustive. We also note that the conclusion that the definition is exhaustive would not have altered the Full Court’s finding in *Slipper* that the proposed national radioactive waste repository was not an infrastructure facility within the meaning of the NTA.
11. The appellants contend that the DSEA, proposed to be constructed pursuant to ML 29881, is an infrastructure facility within the meaning of paras (f) or (g) of the definition. We do not accept those contentions and agree with the primary judge that the DSEA does not meet the definition in para (f) or para (g) (PJ at [140]).
12. Paragraph (f) of the definition refers to a storage or transportation facility for coal, any other mineral or any mineral concentrate. The appellants argued that the primary judge’s finding (at [96]) that the DSEA would “facilitate the transportation” of mineral concentrates supports the conclusion that it is a transportation facility. We do not accept that argument. In certain contexts, the noun “facility” can take the meaning of something that makes possible the easier performance of an action, being a meaning that is reflective of the verb “facilitate”. However, in the context of the definition of “infrastructure facility”, and in the phrase “storage or transportation facility”, the word “facility” simply means a physical structure of some kind, whether a building or piece of equipment. The words “storage” and “transportation” describe the function or purpose of the physical structure. In the present case, the function or purpose of the DSEA is properly characterised as the storage of dredge spoil. As such, it is neither a storage facility for minerals or any mineral concentrate nor a transportation facility.
13. Paragraph (g) refers to a dam, pipeline, channel or other water management, distribution or reticulation facility. The appellants argued that the Summary of Proposed Works for ML 29881 refers to walls, drains and a channel “to carry sea water” and the Future Act Notice states that the particular infrastructure or activities ancillary to mining include “surface water management works to control the discharge of sea water run-off and sediment from the project site”. On that basis, the appellants argued that the DSEA would be a water management facility within para (g). Again, we do not accept the appellants’ argument. Paragraph (g) describes facilities the function or purpose of which is water management, distribution or reticulation (of which dams, pipelines and channels are the primary examples). That is not the function or purpose of the DSEA which, as already noted, is to store dredge spoil. The mere fact that the DSEA has a pipe or drain to enable the escape of excess sea water does not convert it into a water management, distribution or reticulation facility. As Mount Isa Mines submitted, even if the pipe or drain could itself be described as such, the construction of that pipe or drain is not the sole purpose of ML 29881.
14. It follows that the DSEA to be constructed pursuant to ML 29881 would not be an infrastructure facility within the meaning of the NTA.
15. Given our conclusion as to the proper construction of the definition of “infrastructure facility”, it is unnecessary to determine whether the DSEA would be an infrastructure facility within the ordinary meaning of that term. Nevertheless, as the matter was fully argued, we will briefly express our conclusion that the DSEA would be an infrastructure facility within the ordinary meaning of the term. The mere fact that the DSEA is to be constructed from natural material does not prevent it from being a facility. The Summary of Proposed Works states that the DSEA will include engineered internal and external walls and internal and external drains. The function or purpose of the DSEA is to manage the relocation and deposition of dredge spoil. The evidence of Mr Rooney described the operation of Mount Isa Mine’s current dredge spoil emplacement area on MLN 1126, and the primary judge found that that description broadly corresponded to the description of the proposed works set out in the Summary of Proposed Works. Mr Rooney’s evidence was that the DSEA consists of ponds (commonly referred to as “cells”) and a retention basin and that, as dredge spoil is deposited into the cells the silt within the dredge spoil begins to separate from the water and gravity is used to pass the dredge spoil between cells to drop out further silt and fine sediment from the water. This decantation of the water from the dredge spoil leaves a dry silt within the cells and supernatant water being released through the dredge spoil drain. The cells contain the residue dry silt and some of that dry silt is then pushed up and redeposited to be able to recreate the walls of each cell for subsequent lifts of the DSEA. The cell walls are created so that there is control of the deposition of the dredge spoil and the cells are monitored and maintained to ensure the operational integrity of the DSEA. In our view, the sophistication of the construction of the DSEA is sufficient to satisfy the requirements of being a facility. The function or purpose of the DSEA is to support the operation and functioning of the barge channel and thereby the Bing Bong Loading Facility. The DSEA is therefore an infrastructure facility (within the ordinary meaning of that term) within Mount Isa Mine’s port operations.

# Conclusion

1. In conclusion, the primary judge was correct to conclude that the proposed grant of ML 29881 under the Mineral Titles Act is not a future act within s 24MD(6B)(b) of the NTA, both for the reason given by his Honour, that the DSEA would not be an infrastructure facility within the meaning of the NTA, and for the further reason that the grant of ML 29881 would not constitute the creation or variation of a right to mine.
2. We therefore dismiss the appeal.
3. In relation to costs, the parties requested an opportunity to confer following the delivery of reasons for judgment. It is therefore appropriate to make orders that would enable such conferral and the subsequent filing of agreed proposed orders or, failing agreement, short submissions on that issue.

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| I certify that the preceding one hundred and sixty-five (165) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Jagot, Charlesworth and O'Bryan. |

Associate:

Dated: 29 April 2022