CITATION:	*Australian Ilmenite Resources Pty Ltd v Silver & Ors* [2018] NTSC 72
PARTIES:	AUSTRALIAN ILMENITE RESOURCES PTY LD v SILVER, Moses; SANDY, Steven; SANDY, Leslie and SILVER, Moses; SANDY, Steven; SANDY, Leslie; WULUNJAWUN, Trevor; MUNUNGALA, William and MINISTER FOR PRIMARY INDUSTRY AND RESOURCES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	120 of 2017 (21758157)
DELIVERED:	18 October 2018
HEARING DATE:	26 June 2018
JUDGMENT OF:	Hiley J

CATCHWORDS:

ADMINISTRATIVE LAW – SUBORDINATE LEGISLATION – VALIDITY – power to make regulations - regulations 76(3) & (4) of *Mineral Titles Regulations 2010* (NT) not beyond the scope of the power to make regulations under *Mineral Titles Act 2010* (NT).

MINING LAW – granting and regulating mineral titles under *Mineral Titles Act 2010* (NT) and *Mineral Titles Regulations 2010* (NT) – application by holder of mineral lease for access authority under s 84 *Mineral Titles Act* to permit construction of infrastructure over adjoining land – consent of owners of adjoining land required before access authority can be applied for - adjoining land subject of native title claims – consent refused by registered native title claimants – no intention by parliament to confer veto powers upon landowners similar to those in s 40 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) - regulation 76(3) providing that consent not be unreasonably withheld valid - regulation 76(4) providing for disputes about reasonableness of the withholding of consent to be heard and determined by the Northern Territory Civil and Administrative Tribunal valid.

NATIVE TITLE – future act provisions in *Native Title Act 1993* (Cth) –– validity for native title purposes of regulations providing that consent for the grant of an access authority under s 84 *Mineral Titles Act 2010* (NT) over land subject of native title claims not be unreasonably withheld – the making of regulations 76(3) and (4) not future acts – even if they were future acts they would be valid under s 24MD *Native Title Act 1993* (Cth) – no requirement for Indigenous Land Use Agreement – no inconsistency.

STATUTORY INTERPRETATION – words and phrases – encroachment of statutory provisions upon common law where there is a constructional choice – grammar and evident purpose – whether parliament intended to confer veto powers upon landowners similar to those in s 40 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 3, s 40, s 41, s 45
Interpretation Act 1978 (NT) s 20, s 21, s 61, s 65
Local Government Act 1978 (NT) s 3

Northern Territory Aboriginal Sacred Sites Act 1989 (NT)
Northern Territory Civil and Administrative Tribunal Act 2014 (NT) s 28
Native Title Act 1993 (Cth) s 8, s 24MA, s 24MD, s 253
Mineral Titles Act 2010 (NT) s 4, s 8, s 17, s 21, s 25, s 41, s 62, s 63, s 64, s 80, s 81, s 82, s 83, s 84, s 94, s 95, s 105, s 121, s 139, s 140, s 144, s 162, s 168, s 171, s 191
Mineral Titles Regulations 2010 (NT) regs 2, 66, 67, 76
Mining Act 1980 (NT) s 181, s 182
Mining Management Act 2001 (NT)
Pastoral Land Act 1992 (NT)

Cooper Brookes (Wollongong) Pty Ltd v FCT (1981) 147 CLR 297; *Minister of Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565; *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402; *O'Connell v Nixon* (2007) 16 VR 440; *Plunkett v Smith* (1911-12) 14 CLR 76; *Shanahan v Scott* (1957) 96 CLR 245 – applied.

Bropho v Western Australia (1990) 171 CLR 1; *Carbines v Powell* (1925) 36 CLR 88; *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; *Deputy Federal Commissioner of Taxation (SA) v Ellis Clark Ltd* (1934) 52 CLR 85; *Evans v State of New South Wales* (2008)168 FCR 576; *Fejo v Northern Territory* (1998) 195 CLR 96; *Griffith v Minister for Lands* (2008) 235 CLR 232; *Hanlon v Law Society* [1980] 2 All ER 199; *Jones v White* (2005) 43 MVR 530; *Lardil Peoples v Queensland* (2001) 108 FCR 453; *Mabo v Queensland [No 1]* (1988) 166 CLR 186; *Mabo [No 2] v Queensland* (1992) 175 CLR 1; *Northern Territory of Australia v GPAO* (1999) 196 CLR 553; *Perry v Attorney General of the Northern Territory* [2014] NTSC 17; *Perry Park v City of Darwin* [2018] NTCA 5; *Potter v Minahan* (1908) 7 CLR 277; *Queensland Construction Materials Pty Ltd v Redland* (2010) 271 ALR 624; *Young v Tockassie* (1905) 2 CLR 470; *Willcocks v Anderson* (1971) 124 CLR 293; *R v Goreng-Goreng* (2008) 2 ACTLR 238; *Williams v Melbourne Corporation* (1933) 49 CLR 142 – referred to.

REPRESENTATION:

Counsel:

Applicant:	No Appearance
First Respondent:	Peter Willis SC
Second Respondent:	Peter Willis SC
Intervenor:	S Brownhill SC, T Moses

Solicitors:

Applicant:	Ward Keller
First respondent:	Northern Land Council
Second Respondent:	Northern Land Council
Intervenor:	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Australian Ilmenite Resources Pty Ltd v Silver & Ors [2018] NTSC 72
No. 120 of 2017 (21758157)

BETWEEN:

AUSTRALIAN ILMENITE RESOURCES PTY LD
Applicant

AND:

MOSES SILVER; STEVEN SANDY; LESLIE SANDY
First Respondent

AND:

MOSES SILVER; STEVEN SANDY; LESLIE SANDY; TREVOR WULUNJAWUN; WILLIAM MUNUNGALA
Second Respondent

AND:

MINISTER FOR PRIMARY INDUSTRY AND RESOURCES
Intervenor

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 18 October 2018)

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Introduction

[1] The Northern Territory Civil and Administrative Tribunal (**NTCAT**) referred four questions of law to the Court under s 28(2)(b) of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT).

[2] The questions arise in the context of an application by the applicant, Australian Ilmenite Resources Pty Ltd (**AIR**), the holder of mineral leases under the *Mineral Titles Act 2010* (NT) (**Act**) for access to nearby land, for the purpose of constructing, using, operating and maintaining a water pipeline on the nearby land. The nearby land is the subject of a pastoral lease held by the Namul-Namul Aboriginal Corporation. It is also the subject of native title claims brought under the *Native Title Act 1993* (Cth) (**NTA**) by the respondents, each of whom are the registered native title claimants.

[3] The questions are:

(1) Is the making of regulation 76(3) of the *Mineral Titles Regulations* (NT) beyond the scope of the power to make regulations under the *Mineral Titles Act* (NT)?

(2) Is the making of regulation 76(4) of the *Mineral Titles Regulations* beyond the scope of the power to make regulations under the *Mineral Titles Act* (NT)?

(3) If the answer to question 1 is 'no', is regulation 76(3) inconsistent with or repugnant to the applicable terms of Subdivisions B, C, D and M of Part 2 Division 3 [future act provisions] of the *Native Title Act 1993* (Cth)?

(4) If the answer to question 2 is 'no', is regulation 76(4) inconsistent with or repugnant to the applicable terms of the future act provisions of the *Native Title Act 1993* (Cth)?

[4] Questions 1 and 2 raise the administrative law issue whether sub-regulations 76(3) and (4) of the *Mineral Titles Regulations 2010* (**Regulations**) exceed the regulation-making power under the Act. To the extent that sub-regulations 76(3) and (4) exceed the limits of that power they are invalid and have no force or effect.[1]

[5] Questions 3 and 4 raise the conflict of laws issue whether sub-regulations 76(3) and (4) are inconsistent with, or repugnant to, the future act provisions of the NTA. To the extent that inconsistency is established between the NTA and the Act or the Regulations, the NTA prevails and any inconsistent provisions of Territory law are inoperative to the extent of the inconsistency.[2]

[6] The first and second respondents (**respondents**) contended that each of the questions should be answered "yes". The Minister for Primary

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1 *Young v Tockassie* [1905] HCA 17; (1905) 2 CLR 470 at 477 per Griffiths CJ.

2 *Commonwealth v Australian Capital Territory* [2013] HCA 55; (2013) 250 CLR 441; *Northern Territory of Australia v GPAO* [1999] HCA 8; (1999) 196 CLR 553.

Industry and Resources (**Intervenor**) contended that each of the questions should be answered "no".

Background and procedural history

[7] AIR holds Mineral Leases 27422 and 29042 granted under s 40 of the Act over an area of land in the Roper River region of the Northern Territory (**title area**). AIR operates an ilmenite mine pursuant to those leases. AIR has an agreement with the native title claimants granting it access to the title area. The title area lies approximately 14 kms from the Roper River.[3]

[8] The respondents claim native title over land lying outside the boundaries of the title area, between the title area and the Roper River (**native title claim area**). There has been no determination of the respondents' claims. AIR has no title or tenement over the native title claim area.

[9] AIR wishes to apply to the Minister for an access authority over part of the native title claim area under s 84(2) of the Act in order to construct and operate a water pipeline between the mine and the Roper River. AIR has not yet made that application.

[10] AIR has sought the consent of the respondents pursuant to s 84(3)(c) of the Act to construct and operate the pipeline. The respondents have

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3 Respondents' Outline of Submissions on Questions of Law filed 9 March 2018 (**Respondents' Submissions**) at [6].

not given their consent. The respondents have sought to resolve the issue through an Indigenous Land Use Agreement (**ILUA**) under the NTA.

[11] There is a dispute between AIR and the respondents as to whether or not the respondents have unreasonably refused to give consent. AIR commenced proceedings in the NTCAT pursuant to reg 76(4) seeking a determination of that question. This has given rise to the preliminary questions which have been referred to this Court. In short, the respondents have contended that the relevant regulations are invalid to the extent that they purport to impose restrictions upon the ability of the respondents to give or withhold their consent and jurisdiction upon the NTCAT to determine questions concerning the reasonableness of their refusal to give consent.

Mineral Titles Act and Regulations

[12] The Act and Regulations commenced operation together[4] on 7 November 2011, replacing the former *Mining Act 1980*. The Act expressly operates in conjunction with the *Mining Management Act 2001*[5] and has effect subject to other Acts of the Territory and the Commonwealth that may affect rights, powers, obligations and functions under the Act.[6] The Act establishes a framework for

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4 Reg 2.

5 S 4(2).

6 S 4(1). Examples are given including the NTA and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**).

granting and regulating mineral titles and authorises other activities relating to minerals to be conducted without mineral titles.[7]

[13] The main provisions in the Act, Parts 3 to 5, deal with mineral titles of various kinds. Part 3 deals with particular mineral titles including exploration licences (**"EL"s**) and mineral leases (**"ML"s**). Part 4 concerns extractive minerals. Part 5 contains provisions of general application.

[14] Part 3 Division 3 of the Act contains a number of provisions dealing with the rights and conditions of a mineral lease. The holder of a mineral lease has the right to occupy the title area specified in the ML and the exclusive right to conduct mining and other activities in the title area.[8] Such other activities include activities ancillary to the mining, exploration for minerals, processing or refining of minerals, treatment of tailings, removal of minerals from the title area, mining extractive minerals, tourist fossicking and other activities specified in the ML in connection with such activities.[9] Section 45 imposes a number of conditions upon the holder of an ML.

[15] Part 5 Division 3 of the Act contains a number of additional provisions applicable to all mineral titles and title holders, including mineral leases and their holders. These include rights to enter and occupy the

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7 S 3(a) and (c).

8 S 40.

9 S 44.

land with people, vehicles and equipment (s 80); rights to take or divert water or sink a well or bore and to use that water (s 81); rights of access across other land, including from the sea or a waterway, coupled with a right to construct or maintain a road and to do other work on that land for the purpose of such access (s 83); and the right to enter other land and construct, maintain and use infrastructure associated with conducting authorised activities under the mineral title (s 84).

[16] As one would expect, the ability to exercise these important rights is tempered with conditions, some contained in the title itself and others contained in the statute, designed to address any countervailing detriment that might flow to others such as landowners if those rights are being exercised.[10]

[17] Section 84 appears within Part 5 Division 3.

Section 84

[18] Section 84(1) of the Act confers upon the holder of a mineral title a right to enter and do various things on land outside the title area. That right is conditional on the title holder holding an access authority for the relevant land. Section 84(1) relevantly provides:

> The holder of a mineral title[11] has the right to enter land outside the title area (the *relevant land*) to construct, maintain and use

10 See for example s 45 in relation to MLs and Part 5 Division 4 regarding mineral titles generally.

11 'Mineral title' is defined in s 11 and includes a mineral lease (s 11(1)(c)) as held by AIR.

infrastructure[12] associated with conducting authorised activities[13] under the mineral title if the title holder also holds an access authority for the relevant land.

[19] It is common ground that AIR falls within the scope of s 84(1). It is the holder of a mineral title who has the right to enter the relevant land, namely the native title claim area, to construct, maintain and use infrastructure associated with conducting authorised activities under the mineral title if it also holds an access authority for that land.

[20] Sections 84(2) and (3) prescribe the procedure by which a title holder may apply for an access authority. They provide:

> (2) The holder of a mineral title may apply to the Minister for the grant of an access authority.
>
> (3) At least 14 days before making the application, the title holder must:
>
> (a) give written notice of the intention to apply for the access authority:
>
> (i) to each landowner of the relevant land; and
>
> (ii) if a mineral title is in force for any of the relevant land – to the title holder; and
>
> (b) publish a notice of the intention in a newspaper circulating in the area in which the relevant land is situated; and
>
> (c) obtain the consent of owners of classes of relevant land, as prescribed by regulation, to enter the land for the purposes mentioned in subsection (1).

[21] "Landowner" is defined in s 14 of the Act. Relevantly, it includes a person holding the fee simple or a lease from the Crown and, if the

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12 The term infrastructure includes pipelines: s 8.

13 The authorised activities for a mineral lease include mining for minerals and ancillary activities: ss 8, 11(3)(c), 40(1)(b)(i), (ii) and (iii).

land is subject to an approved determination of native title, the holder of native title. It does not include a registered native title claimant. It is not contended that the respondents are "landowners" or "owners of … relevant land" within the terms of the Act. However, the respondents are registered native title claimants and as such have the benefit of provisions of the NTA such as the future act provisions in Part 2 Division 2 of that Act. These include the same procedural rights under the Act as they would have if they held ordinary title to the native title claim area.[14]

[22] Subsection (4) deals with the grant of an access authority by the Minister. It provides:

> The Minister may grant an access authority to the title holder, subject to the conditions specified in the access authority, if the Minister is satisfied:
>
> (a) the infrastructure is to be constructed is necessary for conducting authorised activities under the mineral title; and
>
> (b) the applicant has complied with subsection (3).

[23] Section 84 replaced ss 181 and 182 of the *Mining Act*. The earlier provisions were restricted to applications over certain land and did not require landowner consent.

[24] Section 84(3)(c) is one of a number of provisions of the Act which are dependent for their operation on the enactment of concurrent regulations. Without the enactment of regulations, s 84(3)(c) would be

14 S 24MD(6A) NTA.

quiescent and without any legal effect because, at the very least, the identity of the persons from whom consent must be obtained is not otherwise legislated.

Regulation 76

[25] Regulation 76 came into force in its current form on 7 November 2011 when s 84(3)(c) of the Act commenced. Regulation 76 provides:

> **Access authority – consent of landowner**
>
> (1) This regulation applies to the holder of a mineral title who has the right mentioned in section 84(1) of the Act to enter land outside the title area to construct, maintain and use infrastructure associated with conducting authorised activities under the mineral title.
>
> (2) For section 84(3)(c) of the Act, the title holder is required to obtain consent to the entry from the owners of the following classes of land:
>
> (a) private land;
>
> (b) Aboriginal land;
>
> (c) an Aboriginal community living area.
>
> (3) The landowner of land prescribed under subregulation (2) must not unreasonably refuse to consent to the title holder's entry onto the land.
>
> (4) A dispute about a refusal may be decided by the Tribunal on application by the title holder.
>
> (5) The title holder must give the Minister a copy of a landowner's consent to the title holder's entry to prescribed land with the application under section 84(2) of the Act.

[26] "Private land" means land in relation to which a person is entitled to a fee simple interest or a lease from the Crown.[15] "Aboriginal land" means land held by a Land Trust for an estate in fee simple or land the

15 S 8. This definition also applies to reg 76(2) by force of the *Interpretation Act 1978* (NT) s 20(1).

subject of a deed of grant held in escrow by a Land Council.[16]

"Aboriginal community living area" means an area granted as an Aboriginal community living area under Part 8 of the *Pastoral Land Act 1992* (NT) or an area that the Minister designates by Gazette notice as an Aboriginal community living area.[17] It is not contended that the native title claim area falls within any of these classes of land.[18] However it is accepted that the respondents are entitled to the same procedural rights as an owner of private land pursuant to relevant provisions of the NTA.[19]

Questions 1 and 2 – validity of sub-regulations 76(3) & (4) under the Act

Making of regulations for the purposes of s 84

[27] Section 191(1) of the Act provides that: "The Administrator may make regulations under this Act." Section 191(2) provides that: "A regulation may provide for any of" a number of things thereinafter set out. Section 191(3) provides that: "A regulation may also do any of" a number of things including prescribing fees, providing for enforcement of a code of practice or standard and providing for offences and penalties therefor.

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16 S 8 referring to s 3(1) of ALRA.

17 S 8 referring to s 3 of the *Local Government Act* (NT).

18 This result is qualified by the effect of the NTA. See below.

19 S 24MD(6A) NTA.

[28] Authority for the making of regulations is also to be found elsewhere in the Act. Counsel for the Intervenor provided a table listing specific conferrals of regulation-making power in various parts of the Act. Counsel contended that this demonstrates the extent of the interdependence between the Act and the Regulations and the extent of the reliance on the Regulations to achieve the objects of the Act.[20]

[29] Counsel for the respondents contended that the phrase 'under the Act' in s 191(1) indicates that this is not a freestanding power, but one directed to prescribing matters which the Act elsewhere authorises to be prescribed.[21]

[30] Section 191(1) therefore is to be read with, and works in conjunction with, other provisions in the Act which refer to matters being prescribed by regulation.[22] In this regard counsel noted and contended that:

(a) Sections 191(2) and (3) provide detail on a range of general matters for which regulations may provide. However, none of paragraphs 191(2)(a) – (l) or (3)(a) – (e) is relevant to the validity of reg 76.

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20 Submissions for the Minister for Primary Industry and Resources, Intervening filed 28 March 2018 (**Intervenor's Submissions**) at [22].

21 Respondents' Submissions at [19].

22 Respondents' Submissions at [20].

(b) In the same form as s 191(2) and (3) the Act makes other specific references to matters that may be provided for by regulation – ss 25, 94(2) and (3), 95(2), 121(6), 139(3), 140(3), 144 and 171(2). Although they are not directly relevant, their existence indicates that the legislature has set out in detail the bounds of regulating-making power and specified the matters which may be prescribed.

(c) Another group of sections refer to particular matters "prescribed by regulation" – ss 94(1), 95(1), 105(3), 139(1), 140(2), 141, and, relevantly, s 84(3)(c).

(d) Finally, s 162(a) provides that "regulations may provide for other matters under this Act in relation to which a person may make an application" to NTCAT.[23]

[31] Consequently, the scope of the regulation that can be made for the purposes of s 84(3)(c) is confined by the terms of that particular provision, which itself is confined to defining particular classes of land, the owners of which must be notified of the application and whose consent must first be obtained.[24]

[32] Counsel contended that where there is an express provision, such as in s 84(3)(c), a regulation making power such as that in s 191(1) does not

23 These are arguably additional to matters arising under ss 21(5)(b), 111 and 133: s 161(1).

24 Respondents' Submissions at [22].

permit the making of a regulation on the same topic which extends beyond the bounds of what the provision provides for.

[33] In support of that contention, counsel referred to *Plunkett v Smith*[25] where the High Court held invalid a by-law made in relation to a matter that was not dealt with in the relevant statute. The by-law purported to prohibit an owner from erecting a fascia or projecting eve constructed of inflammable materials within a certain distance from the boundary of an adjoining property. The relevant statute contained extensive provisions prohibiting and limiting other forms of building activity but none relating to this topic. At p 83 O'Connor J said:

> The legislature has thus indicated the limits of its interference with the liberty of persons within the municipality to build their houses of such material and in such manner as they may think fit. In my opinion no general words of the Act can empower the municipality to make by-laws extending that interference beyond those limits. The power which the municipality is claiming in this case must be found therefore, if it is to be found at all, either in sub-section 15 or in the series of sections in Part XV, which prohibit the use of certain building material and buildings in certain methods of construction as a precaution against fire.

[34] Counsel also referred to a passage in *Morton v Union Steamship Co of New Zealand Ltd*[26] to the effect that where a statute

> … deals specifically and in detail with the subject matter to which the statute is addressed … an incidental power [relevantly analogous to the regulation making power in s 191(1) of the Act] cannot be supposed to express an intention that [regulations] should deal with the same matters in another way.

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25 [1911] HCA 58; (1911-12) 14 CLR 76.

26 [1951] HCA 42; (1951) 83 CLR 402 at 410 ***(Morton)***.

[35] In order to put that passage into context it is appropriate to quote from other parts of the reasons leading up to that passage. At 410:

> There is no provision in the Act prescribing any matter or expressly permitting any matter to be prescribed to which the regulation would be relevant. The validity of the regulation, therefore, depend upon the words "all matters … as may be necessary or convenient to be prescribed for giving effect to this Act or for the conduct of any business relating to the Excise". …
>
> A power expressed in such terms to make regulations enables the Governor-General in Council to make regulations incidental to the administration of the Act. Regulations may be adopted for the more effective administration of the provisions actually contained in the Act, but not regulations which vary or depart from the positive provisions made by the Act or regulations which go outside the field of operation which the Act marks out for itself. The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains. An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned.
>
> In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor–General to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in detail with the subject matter to which the statute is addressed. In the case of a statute of the latter kind an incidental power of the description contained in s 164 cannot be supposed to express an intention that the Governor-General should deal with the same matters in another way.
>
> (Emphasis added by me)

[36] Counsel for both parties also referred to well-established authority regarding the need to consider what Parliament intended when empowering a subordinate authority to make certain laws. See for

example *Minister of Resources v Dover Fisheries Pty Ltd*[27] where Gummow J said:

> The fundamental question is whether the delegated legislation is within the scope of what Parliament intended when enacting the statute which empowers the subordinate authority to make certain laws.
>
> … In the joint judgement … in *Shanahan v Scott* … the following was propounded. A power such as that in s 25(1) of the Act does not authorise the making of regulations which vary or depart from the positive provisions of the Act, or which go outside the field of operation which the Act marks out; such a power does not support attempts to widen the purposes of the Act, to add new and different means of carrying them into effect, or to depart from or vary the plan which the legislature has adopted to obtain its ends. These are indicia which assist in deciding the general question of whether the regulations in question are a reasonable means of attaining the ends of the legislative delegation of power.
>
> (Emphasis added by me)

[37] Attention must be paid to the language of the authorising Act, considered as a whole, to determine the true nature and purpose of the relevant regulation-making power.[28]

[38] Counsel for the Intervenor disagreed with the respondents' contentions to the effect that the power conferred by s 191(1) is confined to matters which the Act elsewhere authorises to be prescribed by regulation and is limited to the matters identified in such other provision, relevantly s 84(3)(c). The terms of s 191(1) are picked up by the *Interpretation*

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27 [1993] FCA 366; (1993) 43 FCR 565 (***Dover***) at 577 per Gummow J. See too *Melbourne Corporation v Barry* [1922] HCA 56; (1922) 31 CLR 174 at 209.

28 *Williams v Melbourne Corporation* [1933] HCA 56; (1933) 49 CLR 142 at 155; *South Australia v Tanner* [1989] HCA 3; (1989) 166 CLR 161 at 164 per Wilson, Dawson, Toohey and Gaudron JJ, and 175 – 8 per Brennan J; *Attorney-General (SA) v Adelaide City Corporation* [2013] HCA 3; 249 CLR 1 at 59 [122] per Hayne J.

Act, s 65(1). Independently of any other source of regulation-making authority under the Act, s 191(1) authorises the making of regulations with respect to any matter that is required or permitted to be prescribed by the Act or is "necessary or convenient to be prescribed for carrying out or giving effect to" the Act.

[39] I agree with these contentions on behalf of the Intervenor. Section 191(1) is a familiar formulation of regulatory power.[29] It authorises: "the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions"[30] and "an elaboration, a filling in or a fulfilment of the plan or purpose which the main provisions of the Act have laid down".[31] The outer limits of the scope of necessary or convenient regulation-making authority are sometimes expressed as a power to complement but not supplement the statute,[32] or alternatively as "confined to the same field of operations as that marked out by the Act itself".[33]

[40] Moreover, I do not consider the passages in *Plunkett v Smith* and *Morton* referred to paragraphs [33] and [34] above are relevant in the

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29 See D C Pearce and S Argument, *Delegated Legislation in Australia* (2017, 5th ed) at [14.2] – [14.16]. See the discussion of authorities in *R v Goreng-Goreng* [2008] ACTSC 74; (2008) 2 ACTLR 238 at [57] – [79] per Refshauge J.

30 *Shanahan v Scott* [1957] HCA 4; (1957) 96 CLR 245 at 250.

31 *Shanahan v Scott* [1957] HCA 4; (1957) 96 CLR 245 at 254.

32 *Carbines v Powell* [1925] HCA 16; (1925) 36 CLR 88 at 92 per Isaacs J.

33 *Carbines v Powell* [1925] HCA 16; (1925) 36 CLR 88 at 91 per Isaacs J applied in *Willcocks v Anderson* [1971] HCA 28; (1971) 124 CLR 293 at 299.

present matter. Regulation 76(3) does not purport to limit the rights of any person, relevantly a landowner, in a manner different to that specifically dealt with in or contemplated by the Act. Nor does it "vary or depart from the positive provisions made by the Act" or "go outside the field of operation which the Act marks out for itself."[34]

[41] Counsel for the respondents also referred to the references in the authorities such as *Morton* and *Dovey* to the "positive provisions of the Act" and contended that the "positive provisions" relevant for present purposes are those that relate to the landowner's right to be notified and to refuse consent. Regulation 76(3) purports to qualify or constrain that right and therefore is an invalid variation or departure from the positive provisions of the Act.

[42] However that contention assumes that the "consent" referred to in s 84(3)(c) entails an unqualified right to withhold consent, including unreasonably. For reasons which I will later give, I do not consider that Parliament intended to confer such an unqualified right, effectively a right of veto, upon the landowner. This provision is not a "positive provision" of the kind referred to in the authorities.

[43] Rather, I consider that the "positive provisions made by the Act" of relevance here are those provisions designed to facilitate the ability of the holder of a mineral title to exercise its rights to conduct authorised

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34 Counsel's Submissions at Transcript p 37.4.

activities on the land the subject of the title. These include the substantive rights referred to in [15] above.

[44] *Morton* is also distinguishable from the present matter in at least two other respects. The main reason that the regulation was invalid was that although the *Excise Act 1901* (Cth) itself gave specific attention to matters including who would be liable to pay excise duty the regulation purported to impose a liability upon another set of persons.[35] Further, the *Excise Act* did not contain additional regulation making powers such as those in s 191(2)(g) or (k) of the Act or a s 84(3)(c) type provision.

Meaning and effect of s 84(3)(c)

Respondents' contentions

[45] The primary focus of the respondents' submissions was the wording of s 84(3)(c), relevantly the requirement that the applicant "**obtain the consent of owners of classes of relevant land**, as prescribed by regulation", to enter the land (emphasis in respondents' submissions).

[46] Counsel contended[36] that the terms of s 84(3)(c) define the scope of the regulation: the regulation is confined to defining the *classes of land,* the owners of which must be notified of an application for an access authority and whose consent must first be obtained.

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35 *Morton* at p 412.

36 Respondents' Submissions at [22 – 29].

[47] In broad terms counsel's contentions involved:

(a) the meaning and purpose of s 84(3)(c);

(b) comparisons with and consistency with the drafting of other provisions in the Act where consent is required, such as s 21(5); and

(c) interpretation of statutory provisions so as not to encroach upon the common law in circumstances where there is a constructional choice in the interpretation of an Act.

[48] Counsel contended that as a matter of grammar and evident purpose, the words 'as prescribed by regulation' are in apposition to and qualify 'classes of relevant land'. The power is to identify the land by class. Regulation 76(2) does this and is valid.

[49] The power to prescribe by regulation in s 84(3) does not extend to regulating the conduct of owners of prescribed classes of land or the terms on which those owners may give or refuse consent. That is, the terms of s 84(3) do not authorise constraints or conditions on which owners of the selected classes of land engage with a mineral title holder, nor does any other head of regulation-making power in the Act. Thus reg 76(3) is not authorised.

[50] When the Act intends to place conditions on the granting of consent, it does so expressly in the Act itself: see s 21(5)(a) (consent for

preliminary exploration not to be unreasonably withheld) and s 168 (constructive consent where land owner does not respond); cf. s 62(2) (consent by the Minister for a person to enter into negotiations for the grant of an exploration licence for Aboriginal land). The omission in s 84 of any provision expressed in the terms of s 21(5)(a) tells against a power to impose such a condition by regulation.

[51] In relation to reg 76(4), counsel contended that it must fall with reg 76(3). If there is no legislative criterion by which a landowner's consent is conditioned, there is no 'dispute' that can be adjudicated and no standard by which to determine 'a dispute about a refusal'. Section 162 does not support reg 76(4), as the regulation is wider than the terms of s 162. There needs to be a substantive basis in the Act to support an exercise of power by the NTCAT. That is, the reference in s 162(a) to 'other matters under the Act' for which an application can be made, must refer to a 'matter' specifically referred to in the principal Act.

[52] Regulation 76(4) in substance confers jurisdiction on the NTCAT and by itself purports to grant the Tribunal power to decide a 'dispute about a refusal' by a landowner of consent to the grant of an access authority. However, the Act does not refer to any such dispute. Further, the purported conferral of jurisdiction is uncertain. Neither the Act nor the *Regulations* provide any criterion by which the existence of a dispute is to be ascertained; nor any criterion by which to 'decide' any 'dispute'

which the Tribunal might find to exist. The absence of such criteria is explained by the fact that the Act does not set any condition on the power of a landowner to refuse its consent.

[53] Again, the contrast with express terms elsewhere in the Act is telling. Section 21(5) is an example of the legislature identifying a condition or criterion for consent (s 21(5)(a)) and then providing (in s 21(5)(b)) that a dispute about the withholding of consent (measured against that criterion) may be decided by the Tribunal.

[54] In truth, reg 76(4) is adding to the Act, and is attempting to import qualifications and conditions on the grant of consent which are not authorised by s 84, s 162 or any other provision of the Act. Regulation 76(4) thereby exceeds the legislative authority.

[55] After referring to the principles (noted in [36] and [37] above) requiring a court to consider Parliament's intention when empowering a subordinate authority to make laws, counsel for the respondents contended[37] that the relevant question here is whether regulations 76(3)& (4) are properly connected and adapted to give effect to the express terms and defined purpose of the regulation making power. Counsel contended that as a regulation making provision, s 84(3) had limitations similar to those in s 25(1) of the

37 Respondents' Submissions at [30 – 33].

statute referred to in the second paragraph of the passage from *Dover* quoted in [36] above.

[56] Counsel also contended that where Parliament deals specifically and in detail with subject matter in the body of an enactment, a generally expressed regulation-making power "cannot be supposed to express an intention that the [regulations] should deal with the same matter in another way".[38]

[57] Counsel contended that:

(a) Section 84(3)(c) supports only reg 76(2). It does not authorise regs 76(3) or (4), which add new and different provisions from those set out in the Act.

(b) Accordingly, regs 76(3) and (4) trespass beyond the proper bounds laid out by the Act.

(c) Regulation 76(4) necessarily falls with reg 76(3): reg 76(4) assumes the existence and validity of reg 76(3).

(d) Section 162 does not authorise reg 76(4) as the regulation does not deal with a 'matter under the Act' within the meaning of s 162(a) – there is no reference in the Act to disputes about a refusal of consent to the grant of an access authority. To use a regulation to grant the Tribunal general power to 'decide a dispute' about the

38 *Morton* at 410.

refusal of consent, when the Act expresses no qualification or condition on the grant of consent, would be inconsistent with the Act – it imports new and different terms.

(e) Regulation 76 should be read down on the basis that regs 76(3) and 76(4) are beyond power and severable.[39]

[58] During oral submissions counsel for the respondents also referred to principles that apply where there are "constructional choices" available when interpreting the provisions of a statute. Counsel referred to the following passage in *Evans v State of New South Wales*[40] at [68]:

> It is an important principle that Acts be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms.

[59] Counsel referred to that and other cases where courts have emphasised the need for clear and unambiguous language to be used in a statute before it should be interpreted as interfering with fundamental rights.[41] However those cases are more directed at the extinguishment or modification of such rights as distinct from the detriment if any that might flow from the mere granting of access to the holder of a mineral title for the purpose of exercising its right conferred under s 84(1).

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39 S 61 of *Interpretation Act 1978* (NT).

40 [2008] FCAFC 130; (2008) 168 FCR 576.

41 See for example *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277 at 304; *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1 at 18; *Coco v The Queen* [1994] HCA 15; 179 CLR 427 at 437 and *Mabo [No 2] v Queensland* [1992] HCA 23; (1992) 175 CLR 1 at 111.

Intervenor's contentions and consideration

[60] Counsel for the Intervenor provided a number of responses to the respondents' contentions that the terms of s 84(3)(c) confine the scope of the regulation making power to "defining the classes of land" in respect of which the consent of owners is required.[42]

[61] First, as a matter of grammar and sentence structure, the scope of the regulations authorised under s 84(3)(c) is, on the view most favourable to the respondents, ambiguous, and on the better view, against them. The words which require close attention appear within the parenthetical commas: "as prescribed by regulation". As a matter of grammar and sentence structure, those words qualify all or part of what appears before them. Whether they qualify merely the "classes of relevant land" (the narrower construction adopted by the respondents) or "the consent of owners of classes of relevant land" (the broader construction advanced by the Intervenor) is not determined conclusively as a matter of grammar alone.

[62] As counsel pointed out in response to the respondents' contention that the words "'as prescribed by regulation' are in apposition to and qualify 'classes of relevant land'"[43], so too are those words in apposition to and so may qualify the previous words "obtain" and

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42 Intervenor's Submissions at [39 – 47]. The Intervenor also notes that the persons to whom notice must be given under s 84(3)(a) form a wider class than those from whom consent is required under reg 76(2).

43 Respondents' Submissions at [22].

"consent". It would be appropriate for the regulations, rather than s 84 itself, to provide the detail as to how consent was to be obtained and to indicate whether or not consent could be unreasonably withheld, as well as prescribing which classes of owner should have the opportunity of giving or withholding consent.

[63] Moreover, if the legislature had intended the narrower construction it could have achieved that result unambiguously in fewer words. The provision could simply have said: "obtain the consent of owners of prescribed classes of land". In conjunction with s 191(1) of the Act and s 65(1)(a) of the *Interpretation Act* that would have authorised regulations prescribing those classes.

[64] It is necessary to give effect to the deliberate inclusion of the punctuation and the word "as" which provides some indication that the broader construction is intended. The terms of s 84(3)(c) support a power to enact regulations prescribing the circumstances in which consent is required (including in respect of which classes of land), the scope or effect of that consent, the manner in which that consent may be obtained or given, and the means of determining or establishing whether such consent has been obtained.

[65] Secondly, that broader construction is supported by reference to the way in which s 84(3)(c) operates. It is a dependent provision. Without regulations giving content to the obligation, the provision has no

operation or work to do. The regulations give content to the obligation. Regulations dealing with when, how and what, consent is obtained, accord with "the plan which the legislature has adopted to obtain its ends".[44] There can be no room for a contention that the regulations "depart from the positive provisions of the Act"[45] since it is the regulations which carry the provision into effect.

[66] Thirdly and as to purpose, neither the Second Reading Speech, the Explanatory Statement, nor the legislative history provide any significant guidance as to which of the above constructional choices reflects the purpose of the provision. However, this is a situation where it is appropriate to have regard to the terms of the contemporaneously enacted regulations to determine the proper construction of s 84(3)(c).[46] It is appropriate because the Act and Regulations were enacted contemporaneously, form a single legislative scheme, and the operation of the section is contingent upon the making of regulations thereunder.[47]

[67] The terms of reg 76(3) provide support for the broader construction of s 84(3)(c) as authorising full regulatory prescription of the requirement

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44 *Dover* at 578 per Gummow J.

45 *Dover* at 578 per Gummow J.

46 *O'Connell v Nixon* [2007] VSCA 131; (2007) 16 VR 440 at [28] per Nettle JA, Chernov and Redlich JJA agreeing.

47 See *Deputy Federal Commissioner of Taxation (SA) v Ellis Clark Ltd* [1934] HCA 54; (1934) 52 CLR 85 at 89 per Dixon J. See also *Hanlon v Law Society* [1980] 2 All ER 199 at 218 per Lowry LJ; *Jones v White* [2005] WASC 40; (2005) 43 MVR 530 at [40] per Simmons J; *O'Connell v Nixon* [2007] VSCA 131; (2007) 16 VR 440 at [28] per Nettle JA, Chernov and Redlich JJA agreeing.

to obtain consent from owners of classes of land because that is the effect of the sub-regulation.

[68] Fourthly, where a provision presents two constructional choices, the one which produces "the greatest harmony and the least inconsistency" should generally be preferred.[48] A construction of s 84(3)(c) leading to regulatory invalidity should not be adopted where there is an alternative construction which would not.[49] This constructional principle is an incident of construing a statute by its consequences. Per Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v FCT*[50] at 321:

> If the choice is between two strongly competing interpretations … the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

[69] In the application of that principle, it should be observed that the language – "as prescribed by regulation" – used in s 84(3)(c) appears in the same or similar form in a number of other provisions of the Act.[51] In particular, it is used in the context of notice and consent

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48 *Australian Alliance Assurance Co Ltd v Attorney-General (Qld)* [1916] St R Qd 135 at 161 per Cooper CJ. See D C Pearce and S Argument, *Delegated Legislation in Australia* (2017, 5th ed) at [19.16].

49 The learned authors, DC Pearce and S Argument observe that "the courts must be convinced that there is an inconsistency before they will be persuaded to act. This is, of course, but an example of the general approach adopted by courts that every endeavour is to be made to save legislation from invalidity".

50 [1981] HCA 26; (1981) 147 CLR 297.

51 Ss 20(a), 22(1), 22(2)(b), 65(3), 76(4)(b), (5), 80(2), 95(1), 104(1), 105(3), 135(2)(b), 141, 171(1), 199(3)(c)(i), 200(2)(a), 201(3)(a), 203(3)(c)(v), 204(4)(d).

requirements under s 20(a) (given effect to by regs 16 and 17), s 104(1) (given effect to by reg 66), s 105(3) (given effect to by reg 67), and ss 139(1) and 141 (given effect to by regs 99 and 100). In each case, the regulations conform to the broader construction of these words in the Act.

[70] Further, the broader construction of the scope of regulation-making power authorised under s 84(3)(c) better accords with the character and subject-matter of the legislative scheme as a whole. The Act operates in close association with the regulations. The Act expressly provides for the regulations to alter the operation of the Act in certain significant respects.[52] The scope of regulations permitted under s 191(1) and (2) of the Act is extremely broad, particularly so in respect of matters of process and procedure. The matters identified for regulatory control in s 191(2)(a), (g), (k) and (l) of the Act demonstrate the clear intention that matters of process and procedure generally should be available to be dealt with by regulation as required. Further, incorporation of such matters by way of regulation, which may be more conveniently varied from time to time, accords with the aim of a regime having "the necessary flexibility … to accommodate the rapidly changing landscape in which the resource industry operates".[53]

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52 See for example s 191(3)(e).

53 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 August 2010 (Second reading speech).

[71] Finally, ss 21(5)(a) and 168 of the Act do not suggest that a different construction of s 84(3)(c) should be preferred.[54] Section 21, which deals with the requirement to obtain consent before conducting preliminary exploration, reflects a different legislative approach. Unlike s 84(3)(c), s 21 identifies the land to which it applies in subsection (1) and the persons from whom consent is required in subsection (2), in some cases the Minister, and in other cases the landowner. Also unlike s 84(3)(c), the obligation is effective without coexisting regulations. It makes no reference to matters prescribed by regulation, which is unsurprising where the obligation being dealt with exclusively by the provision, any qualification or elaboration of the obligation would similarly be dealt with in the provision. That aside, s 21 expressly confirms that the Act contemplates that consent may not be unreasonably withheld, and that any dispute about that may be determined by the NTCAT.

[72] Counsel for the Intervenors also pointed out that there are other provisions in the Act which, unlike s 21, leave questions of consent to be dealt with by regulation in much the same way as it does in s 84(3). Section 139 provides that a person may fossick on private land "with the written consent of the land owner or occupier as specified by regulation." It is then left to the regulations, relevantly regs 100 – 105, to provide the detail in regard to notice and consent, which provisions

54 Cf Respondents' Submissions at [24] and [28].

include requirements that consent not be unreasonably refused. Clearly Parliament has contemplated that such details concerning notice and consent may be dealt with in the Regulations. Further, in all cases, whether it be the Act or the Regulations, the same kind of regime appears, providing that a landowner cannot unreasonably refuse or withhold consent and setting up a mechanism for having any dispute about that determined.

[73] Equally, s 168 operates upon an obligation to obtain consent under a provision of the Act. Neither provision (nor others in the Act relating to consent[55]) tells against a broad construction of s 84(3)(c) which reflects a different policy choice, used frequently in the Act, effectively transferring the creation of the obligation to the regulations. If anything, the existence of both provisions confirms that where the Act speaks of an obligation to obtain consent, it anticipates or allows for reasonable consent. That is, reg 76(3) does not introduce into the scheme an alien concept of consent.

Consideration

[74] I accept and agree with those contentions made on behalf of the Intervenor. I take the point made by counsel for the respondents in relation to the third point referred to in [66] above that there are some

55 See for example ss 88, 138 and 139. All of these provisions disclose that various legislative approaches to issues of consent are taken in the Act, some of which involve the Regulations and some of which do not, and even those that do take different approaches.

differences between the present regime and that which was considered in *O'Connell v Nixon*[56], in particular that the Regulations were enacted and notified a considerable time after the enactment and assent of the Act. However they both commenced on the same date, 7 November 2011.[57] They did form a single legislative scheme, which, as counsel for the respondents pointed out, followed an eight year process of review of the previous scheme and extensive consultation with stakeholders.[58]

[75] Section 84(1) confers a right upon the holder of a mineral title to enter land outside the title area and to construct, maintain and use infrastructure on that land, conditional upon it holding an access authority. The balance of the section, understandably, sets up a mechanism designed to ensure that the title holder provides notice of its proposal to other people with a relevant legal interest in the relevant land and seeks and obtains the consent of some of those people to an access authority being granted. Section 84(1)(a) imposes the additional requirement that the Minister be satisfied that the infrastructure to be constructed is necessary for conducting authorised activities under the mineral title.

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56 [2007] VSCA 131; (2007) 16 VR 440.

57 Government Gazette G41, 12 October 2011 p 5.

58 See too recent consideration this topic in relation to Northern Territory legislation in *Perry v Attorney General of the Northern Territory & Ors* [2014] NTSC 17 at [18] – [27].

[76] This right conferred by s 84(1) supplements the other important rights conferred upon a title holder by ss 80 to 83 of the Act, some of which involve activities over land belonging to others. For example, s 83 entitles a title holder to enter land outside its title area and to construct or maintain a road or to do other work to enable the title holder to have access to its title area. Notwithstanding that the exercise of such rights could interfere with or detrimentally affect the existing rights of landowners or others with a relevant legal interest in that land, there is no express requirement in those sections for notice to be given or for consent to be sought and obtained.[59]

[77] Counsel for the respondents readily acknowledged that his contentions are in effect that s 84 confers a right of veto upon particular "owners of classes of relevant land", namely those specified in reg 76(2).

[78] I do not consider that Parliament intended to confer such a right of veto when enacting s 84 (and the rest of the Act, particularly Part 5 Division 3). If there was such a right of veto, the landowner would have the absolute, unfettered and arbitrary right to deprive the holder of a mining title from exercising its statutory rights, in particular the important right conferred upon it by s 84(1).

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59 Note however that there may well be particular and relevant conditions or requirements identified in the relevant grant itself or elsewhere in the Act, for example in Part 5 Division 4. For example s 88 prohibits the holder of a mineral title from damaging or otherwise disturbing improvements on land in the title area without the written consent of the landowner.

[79] Parliament left it to the maker of the Regulations to identify the particular landowners whose consent is required, and thus those particular landowners who would hold a right of veto.[60] Had Parliament intended to confer such a right of veto upon a landowner in derogation of the rights of the holder of a mineral title, one would expect Parliament to have said so by using clear words to that effect in the Act itself. Parliament would not have left it to the regulation-making authority to determine who would have the benefit of the veto. One would also have expected Parliament to have provided a remedy for a person aggrieved by any improper or unreasonable exercise of the right of veto.

[80] During the hearing there was discussion between counsel for the respondents and the bench concerning the "veto provisions" in s 40 of ALRA which effectively confer upon the traditional Aboriginal owners of Aboriginal land a right of veto in relation to an application for the grant of an exploration licence in respect of Aboriginal land.[61] Counsel contended that the Northern Territory Parliament would have had these provisions in mind when passing s 84 and would have intended to give landowners the same kind of absolute right by enacting s 84(4).

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60 Regulation 76(2) makes no provision for any input by some people whose interests might be detrimentally affected following the granting of an access authority, for example other holders of mineral titles in the area. However s 84(3)(a)(ii) requires that such a person be notified of the application for the grant of an access authority.

61 Such a right did not exist where the Governor-General has declared that the national interest requires that the licence be granted. In that event ss 43 – 44A set up procedures for consultation and for determining what terms and conditions should be attached to the licence.

[81] I reject the latter part of that contention.

(a) Section 40 of ALRA only applies to applications for the grant of an exploration licence. No such veto is conferred in relation to applications for the grant of a "mining interest"[62] such as for a mineral lease under (s 41 of) the Act. Rather ss 45 and 46 of ALRA provide mechanisms for the imposition of terms and conditions which have regard to the interests of the traditional Aboriginal owners.

(b) A second important distinction between the veto provisions in ALRA and the right conferred under Part 5 Division 3 of the Act is that the former only apply to applications (for an exploration licence), not to rights of a person who is already the holder of a mineral title.

(c) If the Northern Territory Parliament had intended to confer such a right in relation to mineral titles already granted, it could and would have expressed that right clearly and unambiguously, as the Commonwealth Parliament did in s 40 in relation to applications for the grant of exploration licences.

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62 The definition of "mining interest" in s 3 ALRA would include a mining lease but not an exploration licence.

[82] Further, it is clear that the drafters of the Act did pay careful attention to the provisions of ALRA to ensure consistency with those provisions, in particular the veto provisions.

[83] Part 5 Division 1 of the Act, which relates to applications for mineral titles, imposes particular requirements in relation to applications for titles over Aboriginal land – see ss 62 – 64.

(a) With some exceptions not relevant for present purposes, s 63 prohibits a person from applying for the grant of a mineral lease for Aboriginal land unless the person holds an exploration licence. This provision is consistent with s 45 of ALRA which, as I have noted, does not purport to impose a veto at the point of application for such a mining interest.

(b) The veto provisions in ALRA only apply where one is applying for an exploration licence, and not when applying for a mineral lease or for the ability to exercise rights once the mineral lease has been granted.

[84] Other parts of the Act also reflect the need to have regard to Aboriginal land. One such part is Part 2, which contains s 21, a provision relied upon heavily by counsel for the respondents. Part 2 deals with "preliminary exploration of land" by a person for the purpose of assessing the potential of the land for future exploration for minerals or

extractive minerals under a mineral title.[63] Presumably this would involve less intrusive activities than would be carried out under a mineral title, even an exploration licence.

(a) As one would expect, the Act provides for notice of any proposal to conduct preliminary exploration to be given to persons with an interest in the land including native title holders, traditional Aboriginal owners of Aboriginal land, pastoralists, the Crown and some occupiers of the land. In relation to most land, including Aboriginal land, the written consent of the landowner is required before the person may conduct preliminary exploration.[64]

(b) The landowner is not permitted to unreasonably withhold such consent[65] but may impose reasonable conditions on the entry and use of the land for conducting the preliminary exploration.[66] Again, the drafters of the Act have taken care to safeguard the interests of landowners, including traditional Aboriginal owners of Aboriginal land, but have not considered it necessary or appropriate to confer a right of veto.

[85] In most cases where Parliament has had to balance between rights conferred under the Act and the rights of a landowner whose interests

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63 S 17(2).

64 S 21(2).

65 S 21(5).

66 S 21(3).

may be affected upon the grant of an authority or title under the Act, Parliament has set up mechanisms for the landowner to be consulted and to refuse consent if there are reasonable grounds for such refusal. Understandably, in some circumstances such as those stated in s 88 of the Act, the landowner is clearly provided with such a veto.

[86] Parliament did not intend to confer a power of veto when it enacted s 84. It left to the makers of the regulations the power to prescribe all of the matters referred to in s 84(3)(c), namely the identity of the particular owners whose consent was required, how such consent could be obtained, and the nature of the consent required. There is no basis for inferring that such consent could be unreasonably withheld.

[87] In my opinion reg 76(3) was the kind of regulation contemplated by Parliament when enacting s 84, in particular s 84(3). There is nothing to indicate that Parliament intended to confer a right of veto or contemplated that consent could be withheld unreasonably. Regulation 76(3) is the kind of regulation contemplated by s 191(1) of the Act, coupled with 65(1)(b) of the *Interpretation Ac*t, as being necessary or convenient for the purposes of the consent contemplated and required under s 84 of the Act, and enabling the title holder to exercise its conditional right of access subject to the Minister's satisfaction under s 84(5).

[88] I reject the respondent's contentions and conclude that reg 76(3) is valid.

Other sources of power

[89] Counsel for the Intervenor contended that, contrary to the respondent's contentions, sub-regulations 76(3) and (4) were also authorised by other provisions within s 191(2), in particular ss 191(2)(g) and (k) of the Act. These sources of regulation-making power under the Act are overlapping and do not detract from one another. This follows as a result of s 65(2) – (3) of the *Interpretation Act*, the language of s 191(2) and (3), "may", "may also", and the very nature of the different subject matters.

[90] Section 191(2) provides that a regulation may provide for any of the following:

> (g) the way in which a holder of a mineral title may exercise a right or entitlement under the title, which may include limiting that exercise in relation to:
>
> (i) other holders of mineral titles; or
>
> (ii) landholders or occupiers of land; or
>
> (iii) other persons using land in the title area;
>
> …
>
> (k) the way in which something required or permitted to be done under this Act must, or may, be done.

[91] Counsel for the Intervenor contended that s 191(2)(g) authorises regulations "provid[ing] for … the way in which a holder of a mineral title may exercise a right or entitlement under the title". Section 84(1)

articulates a right exercisable by the holder of a mineral title under the title. The right is contingent on a process being followed requiring notification, consent and an application being successfully made. That process, as articulated across s 84(2) – (4) of the Act and reg 76, provides the way in which the title holder may exercise the right. The whole of reg 76, including the impugned sub-regulations, is authorised by s 191(2)(g).

[92] Counsel for the respondents contended for a narrower construction of this provision, contending that it only enables the limiting of the way in which the mineral title holder may exercise a right or entitlement, not the way in which a landowner may exercise its right to withhold consent. It concerns accommodating the interests of landowners and holders of other titles by limiting the ways in which the miner can exercise its rights.

[93] I accept the point made in reply by counsel for the Intervenor that the provision is not confined to regulations that limit the way in which the holder of the mining title may exercise its rights. Regulation 76(1) states that the regulation applies to the holder of a mineral title who has the right mentioned in s 84(1) of the Act. It does "provide for" "the way in which [such] a holder … may exercise [that] right." It was authorised by s 191(2)(g).

[94] In relation to s 191(2)(k) counsel for the Intervenor submitted that regulations 76(3) and (4) together provide the way in which the obtaining of consent for the purposes of s 84(3) may be done. It may be done by obtaining a determination from the NTCAT that consent has been unreasonably withheld and an order requiring that consent be given or deeming it to have been given. The impugned sub-regulations are authorised by s 191(2)(k).

[95] Counsel for the respondents contended that this power applies to the Minister, a decision-maker, a mining title holder or applicant, but not to a landholder whose consent is required. The landholder's consent is not something which is "required or permitted to be done under the Act". I disagree with that contention. Section 84(3) clearly requires that a landowner's consent is obtained before the title holder can apply for the grant of an access authority. That is "something required … to be done under [the] Act". Regulation 76, in particular regulations 76(2), (3) and (4), "provides for" "the way in which" that "must, or may, be done."

[96] Accordingly, I agree with these additional contentions on behalf of the Intervenor based upon the powers conferred by s 191(2)(g) and (k).

Regulation 76(4)

[97] I agree that if reg 76(3) was invalid, so too would be reg 76(4). That provision could only apply in circumstances where there may be a

refusal of the kind contemplated by reg 76(3), and hence a dispute about the reasonableness of such a refusal.

[98] Where, as I have held, reg 76(3) is valid, the respondents' other contentions concerning the invalidity of reg 76(4) fall away. There will be a criterion, namely reasonableness, by which the NTCAT will determine such a dispute. Such a matter is commonly the subject of a dispute which may properly be determined by a court or tribunal.[67] Indeed, s 21(5)(b) of the Act uses language very similar to that in reg 76(4) when conferring jurisdiction upon the NTCAT.

[99] Nor do I accept the respondents' contention that reg 76(4) is invalid because it does not provide for specific reference to the NTCAT "under this Act", as required by s 162(a). References to matters "under this Act" include matters done by way of regulation or other delegated legislation made pursuant to an Act.[68] The conferral of jurisdiction on NTCAT under reg 76(4) is expressly authorised by s 162 of the Act – the existence of a dispute about whether or not the requisite consent has been obtained, withheld, or unreasonably withheld, is clearly an "other matter under this Act".

[100] It follows that I conclude that both sub-regulations are valid and thus the answers to questions 1 and 2 are "no".

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67 See for example the principles and numerous authorities in the context of landlord and tenant disputes recently considered by the Court of Appeal in *Perry Park v City of Darwin* [2018] NTCA 5.

68 S 21 *Interpretation Act 1978.*

Questions 3 and 4 – Inconsistency with the Native Title Act

[101] At the commencement of the hearing of the appeal counsel for the respondents stated that he relied upon his written submissions and did not propose to say any more about them. However he did not abandon those submissions. Nor did counsel respond to the written or oral submissions made on behalf of the Intervenor. Accordingly it is necessary for me to address both sets of submissions.

[102] The respondents' submissions about this[69] are as follows:

> 34. Questions 3 and 4 only arise if the question 1 or 2 is resolved in the negative. Questions 3 and 4 raise, in the alternative that if regs 76(3) and (4) are validly made under the Act, because they are nonetheless inconsistent with the future act provisions of the NTA, they do not displace the requirement for AIR to enter into an ILUA in order to validly construct its proposed pipeline. To the extent that a future act affects native title, it is valid if covered by Part 2 Div 3 of the NTA and invalid if not: s 24AA(2) NTA
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> 35. For the grant of an access authority under s 84(4) of the Act to be valid as a future act (an acting affecting native title, as defined under the NTA) the grant must be covered by a provision in Part 2 Div 3 of the NTA. The grant of an access authority is not covered by any of the provisions dealing with classes of acts in subdivisions G to L or N. That being so, unless Subdiv M applies, the only way that access authority for the proposed pipeline can be granted validly is by an ILUA.
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> 36. Subdiv M of Part 2 Div 3 of the NTA contains the 'freehold test'. It applies to:
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> a. legislative acts (s 24MA NTA); and
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> b. non-legislative acts (s 24MB NTA).
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> 37. The making of reg 76 in 2011, to the extent it was a future act, did not satisfy s 24MA of the NTA. By making no reference to native title land (or land which is subject to

69 Respondents' Submissions [34] – [41].

claim by registered native title claimants), the legislation does not apply in the same way to native title holders concerned as if they held instead held ordinary title to the land: s 24MA(a). Nor does it satisfy s 24MA(b).

38. Further, grant of an access authority under s 84(4) of the Act is not an act that passes the freehold test under s 24MB of the NTA.

39. Whether or not the grant of an access authority under s 84 of the Act passes the freehold test depends on reg 76(2). To satisfy the freehold test the regulation needed to treat the holders of native title in the same way as the holders of other title, and require their consent to the grant of an authority (s 24MB(1)(b)).[70] Reg 76(2) does not do so.

40. Although the Act defines "landowner" to include the holder of native title where there is a determination under the NTA that native title exists in the land (s 14(1)(d)), reg 76 makes no reference to native title holders or indeed to registered native title claimants. Because s 84(3)(c) and reg 76(2) together require consent from the holders of ordinary title but not from the holders of native title or registered native title claimants, the necessary equality of treatment between native title and non-native title rights that underlies Subdiv M is not accorded.[71]

41. The consequence is that Subdiv M of Part 2 Div 3 of the NTA does not apply to the grant of access authorities under the Act. Reg 76(3) is inconsistent with the freedom of negotiation for ILUAs. Under the NTA, there is no role for decision by the NTCAT (reg 76(4)). The construction of the works proposed under the access authority accordingly requires an ILUA. The respondents stand ready to negotiate such an agreement with AIR.

[103] There are a number of fundamental difficulties with those submissions. Much of the submissions, and consequently the Intervenor's submissions in reply, focus upon the validity (for native title purposes)

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70 The *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) satisfies the condition in s 24MB(1)(c) NTA.

71 That equality of treatment is made clear in ss 24MA and 24MD: cf *Griffith v Minister for Lands* [2008] HCA 20; (2008) 235 CLR 232 at 238 [7] on s 24MD(2): 'The comparisons required by paras (a), (b) and (ba) [of s 24MD(2)] respectively are different, but all are directed to the same ultimate question: whether … there is equality of treatment between native title and non-native title rights and interests.'

of a grant of an access authority under s 84.[72] Questions 3 and 4 concern the validity (for native title purposes) of regulations 76(3) and (4), not the validity of a grant, which may or may not happen if and after AIR makes an application under s 84(2). The former are "legislative acts" and are dealt with in provisions such as s 24MA of the NTA, whereas the latter are "non-legislative acts" dealt with in other provisions such as s 24MB of the NTA.

[104] Secondly, the essential complaint appears to be that s 84 of the Act requires that the mineral title holder must give notice and obtain the consent of landowners of private land in respect of proposed conduct that is to be the subject of an access authority in circumstances where the definitions of landowner and private land do not include registered native title claimants. And so, s 84(3)(c) and the Regulations do not apply to them. That construction is incompatible with the manner in which these questions arise for determination on the very assumption that, by reason of s 24MD(6) and (6A) of the NTA and s 4(1) of the Act, native title holders and claimants have the same procedural rights as landowners of private land. The complaint misses entirely the purpose and effect of Subdivision M, which is to afford native title holders and claimants those same procedural rights. Any "discrimination" arising because s 84 and/or reg 76 do not apply to

72 Respondents' Submissions [38] – [41].

native title rights and interests is remedied by the terms of the NTA itself. That is its point.

[105] Another difficulty with the respondents' submissions is that they misunderstand the future act provisions of the NTA. The provisions regarding ILUAs are directed at the the doing of non-legislative acts, rather than the making and validity of legislation. In any event, there would normally be no need to resort to an ILUA if a particular future act is valid by some other relevant provision of the NTA. The provisions of the NTA which allow for interference with native title rights and interests through agreement by ILUA do not, on any view, purport to prohibit interference with native title by acts validated elsewhere under the NTA, including Subdivision M, relevantly s 24MD(1).[73] Thus, there is no inconsistency between sub-regulation 76(3), validated under Subdivision M, and "the freedom of negotiation" for ILUA's. Moreover, there is nothing in the Act or Regulations, relevantly s 76(3), that "is inconsistent with the freedom of negotiation for ILUAs".[74] Parties are at liberty to negotiate ILUAs if they wish, even if there are other courses open to one or other of them.

[106] Fourthly, the respondents' misunderstand the notion of invalidity as it is used in the NTA and the effect of compliance or non-compliance

73 See ss 24AA and 24AB NTA.

74 Cf Respondents' Submissions [41].

with the procedural provisions upon validity. Arguments of this kind were rejected by the High Court in *Fejo v Northern Territory*,[75] by the Full Court of the Federal Court in *Lardil Peoples v Queensland*[76] and by the Queensland Court of Appeal in *Queensland Construction Materials Pty Ltd v Redland*.[77] Invalidity in the sense used in the NTA does not mean invalidity for all purposes. It simply means having no affect in relation to native title. Thus, a non-legislative act otherwise valid, remains valid for other purposes but, by operation of the NTA, does not have the consequence of diminishing or extinguishing native title rights and interests.[78]

[107] Equally, a legislative act is not inconsistent with the NTA in a conflict of laws sense. If the legislative act did not pass the freehold test in s 24MA, the NTA would simply operate to qualify the consequences or effect of the legislation: whether to validate or invalidate the law in its application to native title. Where the legislative act does pass the freehold test in s 24MA, Subdivision M applies to the act and removes any inconsistency by supplanting the procedural rights.

[108] Fifthly, counsel for the respondents has not attempted to answer the fundamental point made by counsel for the Intervenor: the making of

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75 [1998] HCA 58; (1998) 195 CLR 96.

76 [2001] FCA 414; (2001) 108 FCR 453.

77 [2010] QCA 182; (2010) 271 ALR 624.

78 *Queensland Construction Materials Pty Ltd v Redland* [2010] QCA 182; (2010) 271 ALR 624 at [87].

the regulations is not a "future act". Consequently, no question of invalidity arises.

[109] It is common ground that the Act has effect subject to other acts of the Commonwealth, including the NTA, which affect rights, powers, obligations and functions under the Act.[79]

[110] As counsel for the Intervenor pointed out, although there has been no determination that native title exists, for the purpose of these proceedings, the applicant has conceded that the respondents should be treated as holding native title[80] in the native title claim area. If that were not so, there would be no reason to have sought their consent and no jurisdiction for the NTCAT to exercise. That is an election which has, but need not have, been made by the applicant.[81]

[111] Both parties particularly referred to Subdivision M which, subject to Subdivision P, validates future acts that pass the freehold test.[82] It is common ground that Subdivision P is not relevant for present purposes.[83]

[112] Two questions arose from the respondents' written submissions:

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79 S 4(1).

80 "native title" is defined in s 223 of the NTA.

81 Cf *Queensland Construction Materials Pty Ltd v Redland City Council* [2010] QCA 182; (2010) 271 ALR 624 at [75] – [84] applying the decision in *Lardil Peoples v Queensland* [2001] FCA 414; (2001) 108 FCR 453.

82 S 24MD(1) NTA.

83 See s 26(1)(c) and the definition of "infrastructure facility" in s 253 of the NTA.

(a) whether the making of regulations 76(3) and (4) were future acts and if so whether they have been validated under s 24MD(1) of the NTA;

(b) whether the grant of an access authority under s 84(4) of the Act would be a future act validated under 24MD(1) of the NTA.

[113] In short, counsel for the Intervenor contended that:

(a) the making of regulations 76(3) and (4) were not future acts; and

(b) the grant of an access authority under s 84(4) of the Act would be a future act validated under s 24MD of the NTA because it would pass the freehold test.

[114] I agree with the Intervenor's contention that the making of regulations 76(3) and (4) were not future acts.

[115] The word "act" is defined broadly in the NTA[84] and includes the making of (delegated) legislation and the grant of an authority. For an act to be a "future act" it must be an act which affects, or would if valid affect, native title.[85] An act "affects native title" if it extinguishes or if it is otherwise wholly or partly inconsistent with the

84 S 226 NTA.

85 S 233(1) NTA. See too s 24AA(1).

continued existence, enjoyment or exercise of native title rights and interests.[86]

[116] Regulations 76(3) and (4) do not affect native title. Unlike the legislation that was the subject of the successful challenge in *Mabo v Queensland [No 1]*[87] or the kind of legislation referred to by way of examples under s 24MA, those regulations do not purport to, and do not, affect native title in any way. Regulation 76 is a provision of general application prescribing a process to be followed if and when a person wishes to be granted an access authority. Of itself, it can have no impact upon the exercise or enjoyment of any particular native title right or interest. It does not relate to any particular land or waters. All it does is require the holder of a mineral title who wishes to exercise its rights under s 84 to obtain the consent of various people before doing so.[88] More relevantly, neither reg 76(3) nor reg 76(4) are inconsistent with the existence enjoyment or exercise of native title rights and interests.

[117] Even if, contrary to those conclusions, regs 76(3) and (4) were future acts, s 24MA would apply to them. Consequently they would be valid by force of s 24MD(1).[89] The regulations apply in the same way to any

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86 S 227 NTA.

87 [1988] HCA 69; (1988) 166 CLR 186.

88 It is uncontroversial that although regulation 76(2) does not expressly refer to native title holders they are to be accorded the same procedural rights as holders of ordinary title.

89 As I have said it is common ground that Subdivision P is not relevant.

native title holders as they would if they instead held ordinary title to the land.[90] Further, the effect of the regulations on any native title is not such as to cause the native title holders to be in a more disadvantageous position at law than they would be if they instead held ordinary title the land.[91] "Ordinary title" is defined in s 253 of the NTA to mean, relevantly, a freehold estate in fee simple in the land. Regulations 76(3) and (4) may be made in relation to land held under a freehold estate in fee simple. The freehold test in s 24MA is satisfied.

[118] Finally, while the respondents' contention that there is no role under the NTA for a decision by the NTCAT under reg 76(4) is no doubt correct, that is because both the role of the decision and the authority for NTCAT to make such a decision derive from the Act and Regulations, not the NTA. Again, the respondents' submissions miss the point that the effect of Subdivision M is to place native title holders in the same procedural position (including in relation to a decision by NTCAT) as the holder of a fee simple estate. This is not a question of inconsistency between laws.

[119] This result is supported by s 8 of the NTA which displaces any intention that the NTA covers the field.

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90 S 24MA(a) NTA.

91 S 24MA(b) NTA.

[120] Accordingly there is no inconsistency between regulations 76(3) and (4) and the NTA. The answers to each of questions 3 and 4 is "no".

Grant of access authority

[121] Although not necessary for me to decide, I add the following out of deference to the parties and their submissions. As I have mentioned, a grant under s 84 would be a non-legislative act and thus may require consideration of ss 24MB and 24MD of the NTA.

[122] Section 24MB deals with the application of the freehold test to non-legislative acts. Section s 24MB(1) relevantly provides that Subdivision M applies to a future act if:

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

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

(c) a law of the Commonwealth or Territory makes provision in relation to the preservation or protection of areas or sites of particular significance to Aboriginal peoples.

[123] An access authority may be granted under the Act in relation to land held under a freehold estate in fee simple. The *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) is a law of the Territory which

satisfies s 24MB(1)(c). Accordingly the grant of an access authority satisfies the freehold test in s 24MB(1).

[124] Consequently the grant of an access authority which affects native title is validated under Subdivision M of the future acts regime provided for in the NTA, in particular s 24MD(1). Section 24MD also attaches certain consequences to the act which relevantly include that the native title holders and any registered native title claimants have the same procedural rights as they would have in relation to the act on the assumption that they instead held ordinary title.[92] Accordingly, the respondents are afforded the right to receive notification under s 84(3)(a) of the Act and the qualified right to withhold consent to the application under s 84(3)(c) and reg 76. In addition, the NTA imposes further notification and objection provisions not otherwise required in the absence of determined native title rights and interests.[93]

Disposition

[125] I answer each of the 4 questions: "No." I will hear the parties on costs.

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92 S 24MD(6) and (6A).

93 S 24MD(6) and (6B)(b) – (g).