

# FEDERAL COURT OF AUSTRALIA

## Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia

[2026] FCAFC 7

Appeal from: *Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia* [2025] FCA 490

File number: WAD 157 of 2025

Judgment of: **MOSHINSKY, SARAH C DERRINGTON AND HILL JJ**

Date of judgment: 12 February 2026

Catchwords: **NATIVE TITLE** – future act regime – right to negotiate – expedited procedure – where the Government party gave notices pursuant to s 29 of the *Native Title Act 1993* (Cth) (NTA) of proposed grants of exploration licences – where each notice included a statement as referred to in s 29(7) of the NTA that the Government party considered that the act was an act attracting the expedited procedure – where native title parties applied for judicial review of alleged decision of the Government party to include that statement in the notice – where primary judge held that the alleged decision was not a reviewable decision within the meaning of the ADJR Act or otherwise amenable to judicial review and therefore granted a summary judgment application brought by the respondent – whether the alleged decision to include the expedited procedure statement was a reviewable decision within meaning of the ADJR Act or otherwise amenable to judicial review – application for leave to appeal granted but appeal dismissed

Legislation: *Administrative Decisions (Judicial Review) Act 1977* (Cth)  
*Federal Court of Australia Act 1976* (Cth), ss 21, 23, 31A  
*Judiciary Act 1903* (Cth), s 39B(1A)  
*Native Title Act 1993* (Cth), ss 24AA-44G, 24IC, 24OA, 25-44, 75-77, 85A, 141, 142, 143, 144, 145, 147-149A, 150-159, 162, 169, 226, 227, 233, 237  
*Racial Discrimination Act 1975* (Cth)  
*Federal Court Rules 2011*, r 26.01  
*Mining Act 1978* (WA)

Cases cited: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 70 CLR 321

*AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 26; 278 CLR 512  
*Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352  
*Charles v Sheffield Resources Ltd* [2017] FCAFC 218; 257 FCR 29  
*Durham Holdings Pty Ltd v New South Wales* [1999] NSWCA 324; 152 FLR 94  
*Edelsten v Health Insurance Commission* [1990] FCA 649; 27 FCR 56  
*Griffith University v Tang* [2005] HCA 7; 221 CLR 99  
*Holt v Manzie* [2001] FCA 627; 114 FCR 282  
*Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; 185 CLR 149  
*Makarov v Minister for Home Affairs (No 2)* [2020] FCA 1275  
*Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 275 CLR 582  
*Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; 244 CLR 144  
*Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; 264 CLR 1  
*Tickner v Chapman* [1995] FCA 987; 57 FCR 451  
*Unions NSW v New South Wales* [2023] HCA 4; 277 CLR 627  
*Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; 183 CLR 373  
*Wilkie v Commonwealth* [2017] HCA 40; 263 CLR 487

Division: General Division  
Registry: Western Australia  
National Practice Area: Native Title  
Number of paragraphs: 81  
Date of hearing: 20 November 2025  
Counsel for the Applicants: Mr E Nekvapil SC with Ms TJ Herrmann  
Solicitor for the Applicants: Kimberley Land Council Aboriginal Corporation  
Counsel for the Respondent: Ms CI Taggart SC  
Solicitor for the Respondent: State Solicitor's Office

Respondent:

# ORDERS

WAD 157 of 2025

**BETWEEN:**            **YANUNIJARRA ABORIGINAL CORPORATION RNTBC**  
First Applicant

**WALALAKOO ABORIGINAL CORPORATION RNTBC**  
Second Applicant

**MALARNGOWEM ABORIGINAL CORPORATION RNTBC**  
(and another named in the Schedule)  
Third Applicant

**AND:**                 **STATE OF WESTERN AUSTRALIA**  
Respondent

**ORDER MADE BY: MOSHINSKY, SARAH C DERRINGTON AND HILL JJ**

**DATE OF ORDER: 12 FEBRUARY 2026**

## THE COURT ORDERS THAT:

1. The applicants have leave to appeal from the judgment of the primary judge.
2. The draft notice of appeal attached to the application for leave to appeal stand as the notice of appeal.
3. The appeal be dismissed.
4. Each party bear its own costs of the application for leave to appeal and the appeal.

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

## REASONS FOR JUDGMENT

### THE COURT:

#### Introduction

- 1 This proceeding relates to the right to negotiate provisions of the future act regime in the *Native Title Act 1993* (Cth) (the **NTA**). The principal issue dealt with in this judgment can be stated as follows: where a Government party gives a notice of an act under s 29 of the NTA and includes in the notice a statement as referred to in s 29(7), that is, a statement that the Government party considers that the act is an act that attracts the expedited procedure (**expedited procedure statement**), is the inclusion of that statement a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**) or otherwise amenable to judicial review? Consistently with earlier authority, the primary judge answered that question “No”.
- 2 The background to the matter can be briefly stated as follows. In 2023, the respondent, the State of Western Australia (the **State**), gave several notices under s 29 of the NTA that it proposed to grant certain exploration licences under the *Mining Act 1978* (WA). In each notice, the State included a statement that the State considered that the grant of the licence was an act attracting the expedited procedure.
- 3 By the proceeding at first instance, certain native title parties sought judicial review of alleged decisions of the State to include the expedited procedure statement in each of the notices. In essence, the applicants contended that, in making a decision to include such a statement in each of the notices, the State was required by s 29(7) to consider and apply the definition of “act attracting the expedited procedure” in s 237 of the NTA, by giving active consideration to the criteria set out in paragraphs (a) to (c) of that definition. The applicants alleged that the State failed properly to perform the requisite statutory task, and that the expedited procedure statement in each of the notices therefore had no lawful or legal effect: see the primary judge’s reasons for judgment (the **Reasons**) at [3]. The applicants also alleged the existence of a policy of the State, commencing on 1 June 2022, in relation to the inclusion of expedited procedure statements in notices given under s 29 (the **2022 Policy**). The applicants claimed that the 2022 Policy was inconsistent with the applicable provisions of the NTA.
- 4 The State filed an interlocutory application seeking summary judgment against the applicants under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) and rr 26.01(1)(a) or (d) of

the *Federal Court Rules 2011*: see the Reasons, [31]. In particular, the State contended that the inclusion of an expedited procedure statement in a notice given under s 29 is not a reviewable decision under the ADJR Act or otherwise amenable to judicial review. In relation to this issue, the State relied on the judgment of Olney J in *Holt v Manzie* [2001] FCA 627; 114 FCR 282 (*Holt*).

5 The applicants filed an interlocutory application seeking (among other things) leave to amend their originating application and concise statement: see the Reasons, [29]. By the proposed amendments, the applicants sought to include in their case an additional notice that had been given by the State under s 29, which also included an expedited procedure statement.

6 On 15 May 2025, the primary judge published reasons for judgment and made orders giving summary judgment for the State and dismissing the proceeding: *Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia* [2025] FCA 490. His Honour concluded that the inclusion of an expedited procedure statement in a notice given under s 29 is not reviewable under the ADJR Act or otherwise amenable to judicial review. The primary judge also concluded that the applicants' claim in relation to the 2022 Policy was not maintainable. In light of the conclusion in respect of the summary judgment application, it was unnecessary for the primary judge to determine the applicants' interlocutory application seeking leave to amend. However, the primary judge indicated that, had it been necessary to determine that application, he would have granted leave to amend.

7 The applicants filed an application for leave to appeal dated 27 May 2025, attaching a draft notice of appeal. The application for leave to appeal, and any appeal, were listed for hearing together before the Full Court.

8 At the outset of the hearing, we indicated our preliminary view that the application for leave to appeal should be granted. After hearing briefly from the parties on this issue, we indicated that we would grant the application for leave to appeal and would provide our reasons later. Our reasons are set out later in these reasons. In light of our decision that leave to appeal is to be granted, we will generally refer to the applicants as the "appellants" in these reasons (unless dealing with the proceeding at first instance).

9 The hearing of the appeal proceeded on the basis of the draft notice of appeal attached to the application for leave to appeal. It is appropriate to make an order that that document stand as the notice of appeal.

10 For the reasons set out below, we have concluded that the appeal should be dismissed.

**Further evidence on appeal**

11 The parties agree that the Full Court should receive the following evidence which was not before the primary judge:

- (a) affidavit of Madelene Wonders, Deputy Principal Lawyer of the Kimberley Land Council (KLC), dated 27 May 2025 (Appeal Book (AB), Pt C, tab 8); and
- (b) affidavit of Ms Wonders dated 16 October 2025 (AB, Pt C, tab 9).

12 We are content to receive this further evidence, which provides an update about certain facts and matters that have arisen since the hearing before the primary judge.

13 There was a dispute between the parties as to whether the Full Court should also receive an affidavit of Amy Jones, a lawyer employed by the KLC, dated 16 October 2025 (AB, Pt C, tab 10). In light of the Full Court’s indication that it would grant leave to appeal, the appellants did not press this affidavit (T40).

**Preliminary issue – whether there is a “matter”**

14 In the applicants’ originating application at first instance, they sought judicial review in respect of three notices that had been given by the State under s 29 of the NTA, each of which contained an expedited procedure statement. These notices were referred to by the primary judge as the Malarngowem notice, the Yanunijarra notice and the Walalakoo notice: see the Reasons at [13], [14]. The first notice related to the proposed grant of exploration licence E80/5754. The latter two notices related to a single proposed exploration licence, namely E04/2725.

15 In the Reasons at [17], the primary judge referred to the fact that the application for the exploration licence that was the subject of the Yanunijarra notice and the Walalakoo notice had been withdrawn and that, on 8 May 2024, the National Native Title Tribunal (NNTT) had notified the parties that the related objection was taken to be withdrawn “as there is no longer a future act proposed” and that all Tribunal records for the matter had been finalised. It follows that the Yanunijarra notice and the Walalakoo notice have no ongoing significance: see the Reasons, [175].

16 It appears from the further evidence before the Full Court that, while judgment at first instance was reserved, the application for the exploration licence that was the subject of the Malarngowem notice was also withdrawn and that, on 26 November 2024, the NNTT advised

the parties that the related objection was taken to be withdrawn “as there is no longer a future act proposed” and that the matter had been finalised: see the affidavit of Ms Wonders dated 27 May 2025 at [10]-[11]. It follows that the Malarngowem notice also has no ongoing significance.

17 Notwithstanding the facts and matters set out above, it was common ground between the parties at the hearing before us, and we accept, that there is a “matter” in the sense of a controversy over some immediate right, duty or liability: see *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 26; 278 CLR 512. This is because, by their interlocutory application dated 5 April 2024, the applicants sought leave to amend their originating application and concise statement to seek judicial review in respect of a further notice given by the State under s 29 of the NTA which contained an expedited procedure statement. The notice, which was dated 22 September 2023, gave notice to Yanunijarra Aboriginal Corporation RNTBC (YAC) of the State’s intention to grant exploration licence E80/5931 to Uro Western Pty Ltd over land or waters in respect of which YAC is the registered native title body corporate (RNTBC) (the **Second Yanunijarra notice**): Reasons, [18]. (Although the primary judge referred to *two* such notices, for ease of expression we will refer to this as a single notice.) That notice is still on foot: see the affidavit of Ms Wonders dated 27 May 2025 at [16]-[18] and the affidavit of Ms Wonders dated 16 October 2025 at [4]. The applicants’ interlocutory application seeking leave to amend has not yet been determined. As noted above, the primary judge indicated that, had it been necessary to determine that application, he would have granted the application: Reasons, [182]. If the appeal is allowed, the matter would be remitted to the primary judge to deal with the matter generally, including to determine the applicants’ interlocutory application. Unlike the position with respect to the earlier s 29 notices, YAC did not lodge an objection with the NNTT against the inclusion of the expedited procedure statement in the Second Yanunijarra notice within the four-month objection period: Reasons, [19]. However, the fact that an objection was not lodged does not affect the appellants’ contentions in the appeal. Indeed, it reinforces the utility of the proceeding: Reasons, [174]. In summary, there is a s 29 notice on foot which raises the issues that the appellants seek to agitate in the appeal; the appellants applied for leave to amend to bring that notice into their case; and the primary judge indicated that, had it been necessary to determine that application, he would have granted leave to amend. In these circumstances, we consider that there is a controversy over some immediate right, duty or liability.

## Statutory scheme

18 The following is a brief outline of the statutory scheme relating to future acts, with a focus on the right to negotiate and the expedited procedure. We will refer to the provisions of the NTA as in force on 22 September 2023, the date of the Second Yanunijarra notice.

19 The expression “future act” is defined in s 233 of the NTA. In summary, a future act is an act that, for non-legislative acts, takes place after 1 January 1994 and affects native title (or would affect native title if it were valid): see ss 233(1), 24AA(1). The term “act” is defined in s 226 and the expression “affects” (in relation to native title) is defined in s 227.

20 The regime governing future acts is located in Pt 2, Div 3, which is headed “Future acts etc. and native title” and comprises ss 24AA-44G. Section 24AA provides an overview of the Division. In broad terms, a future act is valid (in the sense that it validly affects native title) if it is covered by an applicable subdivision in Div 3 of Pt 2, but otherwise it is invalid. Section 24OA provides that, “[u]nless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title”.

21 The right to negotiate is dealt with in Subdiv P (ss 25-44) of Div 3 of Pt 2. Section 25(1) provides an overview of that Subdivision.

22 In summary, Subdiv P applies to future acts done by the Commonwealth, a State or a Territory that are of any of the following kinds (see ss 25(1), 26):

- (a) certain acts covered by section 24IC (which deals with permissible lease etc renewals);
- (b) certain conferrals of mining rights;
- (c) certain compulsory acquisitions of native title rights and interests;
- (d) other acts approved by the Commonwealth Minister.

23 The kinds of acts to which Subdiv P may apply include “the creation of a right to mine, whether by the grant of a mining lease or otherwise”: s 26(1)(c). The grant of an exploration licence falls within that expression and thus will ordinarily be an act to which Subdiv P applies. There is no issue between the parties about this.

24 Subdivision P refers to both a “normal negotiation procedure” and an “expedited procedure”. These concepts are defined in the sections set out below. In summary, the general or default position is that the normal negotiation procedure applies and the act cannot be done unless that

procedure has been undertaken. However, if the expedited procedure applies, the Government party may do the act without the normal negotiation procedure being undertaken.

25 Section 28(1) provides:

**28 Act invalid if done before negotiation or objection/appeal etc.**

- (1) Subject to this Act, an act to which this Subdivision applies is invalid to the extent that it affects native title unless, before it is done, the requirements of one of the following paragraphs are satisfied:
- (a) by the end of the period of 4 months after the notification day for the act (see subsection 29(4)), there is no native title party in relation to any of the land or waters that will be affected by the act;
  - (b) after the end of that period, but immediately before the act is done, there is no native title party in relation to any of the land or waters that will be affected by the act;
  - (c) **subsection 32(2) (which applies if no objection is made after the giving of a notice that the act attracts the expedited procedure) allows the act to be done;**
  - (d) **a determination is made under subsection 32(4) that the act is an act attracting the expedited procedure;**
  - (e) native title parties have lodged one or more objections in relation to the act under subsection 32(3), but all such objections are withdrawn under subsection 32(6);
  - (f) an agreement of the kind mentioned in paragraph 31(1)(b) is made;
  - (g) a determination is made under section 36A or 38 that the act may be done, or may be done subject to conditions being complied with;
  - (h) a determination that the act must not be done is declared to be overruled in accordance with section 42.

(Emphasis added.)

26 The expression “act attracting the expedited procedure” is defined in s 237:

**237 Act attracting the expedited procedure**

A future act is an *act attracting the expedited procedure* if:

- (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and
- (b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and
- (c) the act is not likely to involve major disturbance to any land or waters

concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

27 Section 29 provides in part:

**29 Notification of parties affected**

*Notice in accordance with section*

- (1) Before the act is done, the Government party must give notice of the act in accordance with this section.

*Persons to be given notice*

- (2) The Government party must give notice to:
- (a) any registered native title body corporate (a ***native title party***) in relation to any of the land or waters that will be affected by the act; and
  - (b) unless there are one or more registered native title bodies corporate in relation to all of the land or waters that will be affected by the act:
    - (i) any registered native title claimant (also a ***native title party***); and

Note: A registered native title claimant is a person or group of persons whose name or names appear on the Register of Native Title Claims as the applicant in relation to a claim to hold native title: see the definition of ***registered native title claimant*** in section 253.

- (ii) any representative Aboriginal/Torres Strait Islander body; in relation to any land or waters that will be affected by the act; and
- (c) if the doing of the act has been requested or applied for by a person (for example, where it is the issue of a licence or the grant of a lease for which the person has applied)—that person (a ***grantee party***); and
- (d) the registrar or other proper officer of the arbitral body in relation to the act.

*Public notification*

- (3) Before the act is done, the Government party or the grantee party must also notify the public in the determined way (see section 252) of the act, unless there is a registered native title body corporate in relation to all of the land or waters that will be affected by the act.

*Notice to specify day and include prescribed documents etc.*

- (4) The notice given under subsection (2) or (3) must:
- (a) specify a day as the ***notification day*** for the act; and
  - (b) contain a statement to the effect that, under section 30, persons have until 3 months after the notification day to take certain steps to become native title parties in relation to the notice; and

- (c) be accompanied by any prescribed documents and include any prescribed information.

*Each notice to specify the same day*

- (5) Each such notice in relation to the act must specify the same day as the notification day.

*Which days may be specified*

- (6) That day must be a day by which, in the Government party's opinion, it is reasonable to assume that all notices under subsections (2) and (3) in relation to the act will have been received by, or will otherwise have come to the attention of, the persons who must be notified under those subsections.

*Acts attracting the expedited procedure*

- (7) **The notices under this section may include a statement that the Government party considers the act is an act attracting the expedited procedure.**

...

(Emphasis added.)

28 “Arbitral body” (referred to in s 29(2)) is defined in s 27. In the circumstances that apply in the present case, the NNTT is the arbitral body in respect of the relevant acts.

29 The normal negotiation procedure is dealt with in several sections, including s 31, which provides in part:

### **31 Normal negotiation procedure**

- (1) Unless the notice includes a statement that the Government party considers the act attracts the expedited procedure:
  - (a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and
  - (b) the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:
    - (i) the doing of the act; or
    - (ii) the doing of the act subject to conditions to be complied with by any of the parties.

Note: The native title parties are set out in paragraphs 29(2)(a) and (b) and section 30. If they include a registered native title claimant, the agreement will bind all of the persons in the native title claim group concerned: see subsection 41(2).

...

*Negotiation in good faith*

- (2) If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the

registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of that paragraph.

*Arbitral body to assist in negotiations*

- (3) If any of the negotiation parties requests the arbitral body to do so, the arbitral body must mediate among the parties to assist in obtaining their agreement.

...

30 If at least six months have passed since the notification day without any agreement having been made in relation to the act, any negotiation party may apply to the arbitral body for a determination that the act must not be done, or may be done, or may be done subject to conditions to be complied with by any of the parties: ss 35(1), 38(1). The arbitral body must take all reasonable steps to make a determination in relation to the act as soon as practicable: s 36(1).

31 The expedited procedure is dealt with in s 32, which provides:

**32 Expedited procedure**

- (1) This section applies if the notice given under section 29 includes a statement that the Government party considers the act is an act attracting the expedited procedure (see section 237).

*Act may be done if no objection*

- (2) **If the native title parties do not lodge an objection with the arbitral body in accordance with subsection (3), the Government party may do the act.**

*Kinds of objection*

- (3) **A native title party may, within the period of 4 months after the notification day (see subsection 29(4)), lodge an objection with the arbitral body against the inclusion of the statement.**

*Objections against inclusion of statement*

- (4) **If one or more native title parties object against the inclusion of the statement, the arbitral body must determine whether the act is an act attracting the expedited procedure. If the arbitral body determines that it is, the Government party may do the act.**

*Act not attracting expedited procedure*

- (5) **If the arbitral body determines that the act is not an act attracting the expedited procedure, subsection 31(1) applies as if the notice did not include a statement that the Government party considers the act attracts the expedited procedure.**

*Withdrawal of objection*

- (6) At any time before the arbitral body makes a determination under subsection (4), a native title party may withdraw his or her objection. If all such objections

are withdrawn, the Government party may do the act.

*Withdrawal of statement about expedited procedure*

- (7) At any time before the arbitral body makes a determination under subsection (4), the Government party may, by giving written notice to the negotiation parties, withdraw its statement that it considers the act is an act attracting the expedited procedure. If it does so, subsection 31(1) applies as if the notice did not include such a statement.

(Emphasis added.)

32 The effect of the provisions set out above can be summarised as follows:

- (a) In a case where a Government party proposes to do an act to which Subdiv P applies, the Government party must give notice of the act in accordance with s 29.
- (b) The notice may include a statement that the Government party considers that the act is an act attracting the expedited procedure (s 29(7)) (referred to in these reasons as an “expedited procedure statement”).
- (c) In a case where the notice includes an expedited procedure statement, the native title party may (within the period of four months after the notification day) lodge an objection with the arbitral body (here, the NNTT) against the inclusion of the statement: s 32(3).
- (d) If no such objection is lodged within time, subject to the appellants’ contentions in this appeal, the Government party may do the act: s 32(2). In other words, the normal negotiation procedure does not need to be undertaken.
- (e) If one or more native title parties object against the inclusion of the expedited procedure statement, the NNTT must determine whether the act is an act attracting the expedited procedure: s 32(4).
- (f) If the NNTT determines that the act *is* an act attracting the expedited procedure, subject to the appellants’ contentions in this appeal, the Government party may do the act: s 32(4). In other words, the normal negotiation procedure does not need to be undertaken.
- (g) If the NNTT determines that the act *is not* an act attracting the expedited procedure, s 31(1) applies as if the notice did not include the expedited procedure statement: s 32(5). In other words, the normal negotiation procedure needs to be undertaken.

33 Applications to the NNTT in relation to the right to negotiation are dealt with in Pt 3, Div 2 (ss 75-77). Section 75 identifies the types of applications that may be made to the NNTT under

the Division. These include an “[a]pplication objecting as mentioned in subsection 32(3) against the inclusion of a statement that an act is an act attracting the expedited procedure”. Such an application may be made by a native title party: s 75.

34 Section 139 (located in Pt 6, Div 5) provides that the Tribunal must hold an inquiry into (relevantly) an application covered by s 75 (defined as a “right to negotiate application”). The parties to such an inquiry are the Government party; the grantee parties; and (for an expedited procedure objection application) any native title party that has lodged an objection in accordance with s 32(3) and has not withdrawn the objection: s 141(2). Division 5 of Pt 6 governs the conduct of inquiries by the NNTT, and includes provisions dealing with the opportunity of parties to present their case and to make submissions in relation to evidence (s 142), representation of parties (s 143), the determination of questions of law arising in an inquiry (s 144), the reference of questions of law to the Federal Court (s 145), powers to dismiss applications (ss 147-149A), and the holding of conferences and hearings (ss 150-159). The Tribunal is required to make a determination about the matters covered by a right to negotiate application, and must state in the determination any findings of fact upon which it is based: s 162. A party to an inquiry in a right to negotiate application has a right of appeal to the Federal Court on a question of law from any decision or determination of the NNTT in that proceeding: s 169.

### **Background facts**

35 Each of the first to third appellants is a RNTBC in relation to land or waters in respect of which there are determinations of native title under the NTA: Reasons, [11].

36 The fourth appellant, the KLC, is the native title representative body for the Kimberley area in Western Australia: Reasons, [12].

37 Given the matters discussed at [14]-[17] above, we will focus on the Second Yanunijarra notice.

38 The Second Yanunijarra notice, which is dated 22 September 2023, gave notice to YAC of the State’s intention to grant exploration licence E80/5931 to Uro Western Pty Ltd over land or waters in respect of which YAC is the RNTBC: Reasons, [18]. The notice included an expedited procedure statement in the following terms:

[The Department of Mines, Industry Regulation and Safety] considers that the grant of the lease/licence is a future act that attracts the expedited procedure pursuant to section 32(1) of the NTA. The expedited procedure applies if the grant of the lease/licence in

relation to land or waters concerned is an act not likely to:

- interfere directly with the carrying on of the community or social activities of the persons who are holders of native title;
- interfere with areas or sites of particular significance, in accordance with the traditions of the persons who are holders of native title; and
- involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance.

...

If no objection is lodged then the lease/licence application/s can be granted. If an objection is lodged the NNTT will hold an inquiry to determine whether the act is an act attracting the expedited procedure. In the latter event the NNTT will advise you of the procedures that must be followed by the parties.

39 YAC did not lodge an objection with the NNTT against the inclusion of the expedited procedure statement in the Second Yanunijarra notice within the four-month objection period: Reasons, [19].

#### **Proceeding at first instance**

40 The proceeding at first instance was described by the primary judge at [20]-[25] of the Reasons and has been outlined in the Introduction to these reasons.

#### **Reasons of the primary judge**

41 After setting out the factual background, describing the proceeding and outlining the legislative framework, the primary judge set out the applicable principles regarding an application for summary judgment at [66]-[82]. At [82], his Honour stated that, in the circumstances of this case, he was satisfied that it was appropriate to resolve the questions of law as to the proper construction of s 29(7) of the NTA for the purposes of determining the application for summary judgment.

42 At [83]-[101] and following the primary judge summarised key aspects of the evidence. However, his Honour noted at [83] that he considered that the threshold questions of law concerning the construction and application of s 29(7) of the NTA could be resolved independently of that evidence and without determining any contested issues of fact. At [86], the primary judge stated that the 2022 Policy, as alleged by the applicants, comprised a number of documents published by the Department of Mines, Industry Regulation and Safety (**DMIRS**), as it was then known, on behalf of the State. After setting out or describing aspects of those documents, the primary judge stated at [89] that the documents “provide evidence of a case management process which is followed by the State when deciding whether an expedited

procedure statement is to be included in a notice given under s 29 of the NTA for the proposed grant of an exploratory tenement, such as an exploration licence, a prospecting licence, or a retention licence under the Mining Act”. The primary judge set out, at [89], the steps in that case management process. The primary judge referred at [90] to the affidavits relied on by the State about the processes and procedures followed by the State in determining whether or not to include an expedited procedure statement in a s 29 notice. The primary judge observed that “[t]hose processes and procedures are broadly consistent with those set out in the documents addressed above”.

43 The primary judge referred at [92] to a letter from the KLC to the State setting out the KLC’s concerns with the State’s approach, which included that it required the State “to focus upon the risk of a s 29(7) decision being overturned by the [NNTT], rather than the s 237 criteria”. The State’s letter in response is summarised by the primary judge at [93]. His Honour then stated at [94]-[96]:

94 For the purposes of the present application, it is unnecessary to make any findings of fact regarding the content or implementation of the State’s policy regarding the inclusion of the expedited procedure statement in notices given under s 29 of the NTA. The evidence adduced on the interlocutory applications has not been tested, and might be supplemented by further evidence if the matter were to progress to a final hearing.

95 Nevertheless, there is at least a prima facie case that, while the State had previously adopted a “blanket” approach to the inclusion of s 29(7) statements in notices for the proposed grant of exploratory tenements, such statements have not been included as a matter of course in s 29 notices given after 1 June 2022. In so far as the inclusion of expedited procedure statements from 1 June 2022 is based on a risk assessment by reference to available information about “hot spots”, this arguably involves some direct or indirect consideration of the criteria in s 237 of the NTA, even if only by reference to past NNTT determinations or the existence of circumstances (such as proximate heritage sites or Aboriginal communities) which may be relevant to those criteria. Nevertheless, there might be a real question for determination as to whether this amounts to “active consideration” of the statutory definition in s 237, if it were to be assumed that such consideration is required as a matter of law on the proper construction of s 29(7) of the NTA.

96 The evidence adduced on the interlocutory application is consistent with a conclusion that the State does engage in a decision-making process in relation to the inclusion of an expedited procedure statement in s 29 notices. That is, at least since 1 June 2022, the Department determines or decides whether or not it will include an expedited procedure statement in each s 29 notice that is given in relation to the proposed grant of an exploratory tenement, and may subsequently make a further decision under s 32(6) of the NTA to withdraw such a statement in relation to a particular notice.

44 After summarising the parties' submissions (at [102]-[120]), the primary judge considered the construction of Subdiv P of Div 3 of Pt 2 of the NTA at [121]-[158]. His Honour first undertook (at [121]-[130]) a close analysis of the judgment in *Holt*. The primary judge then considered the issue of whether there was a reviewable decision (at [131]-[158]). His Honour stated at [131] that while, ordinarily, a previous decision by a single Justice should be followed unless it is plainly wrong, in the present case (having regard to the context of an application by the State for summary judgment against the applicants) he considered it appropriate to consider the proper construction of s 29(7) of the NTA for himself. Having done so, the primary judge concluded (consistently with *Holt*) that the inclusion of an expedited procedure statement in a s 29 notice is not amenable to judicial review under the ADJR Act or otherwise: Reasons, [154]-[155], [157]. His Honour's reasoning can be summarised as follows:

- (a) On a natural reading of s 29(7) (which provides that a notice "may" include an expedited procedure statement), there is no obligation on the Government party to include, or even to consider including, an expedited procedure statement in the notice: Reasons, [133].
- (b) While the inclusion of an expedited procedure statement has important practical consequences, the inclusion of such a statement in a s 29 notice does not determine whether or not the act is an "act attracting the expedited procedure"; it is not a substantive determination in that sense: Reasons [133]-[134].
- (c) Section 29(7) does not expressly condition the inclusion of an expedited procedure statement on any decision being made or any state of satisfaction being formed by the Government party: Reasons, [135].
- (d) The critical question is whether the provisions operate on the fact that the notice includes an expedited procedure statement, as opposed to the formation of a state of mind by the Government party, however that state of mind might be described or characterised: Reasons, [139].
- (e) On their proper construction, ss 29(7), 31 and 32 of the NTA operate on *the fact* that the notice given by the Government party includes an expedited procedure statement, and not on any anterior consideration or the formation of any opinion by the Government party that the act is an act attracting the expedited procedure within the meaning of s 237 of the NTA: Reasons, [145]; see also [146]-[153], [156].

- (f) The decision by the Government party to include an expedited procedure statement lacks “the character or quality of finality” in the nature of a determination resolving a substantive issue, and is therefore not a “decision” for the purposes of the ADJR Act, applying *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 (*Bond*) at 336 per Mason CJ: Reasons, [154].
- (g) Nor can the Government party’s decision to include an expedited statement be regarded as an essential preliminary or a condition precedent to the making of an ultimate decision that will affect legal rights and interests, referring to *Bond* at 339-340 per Mason CJ, 377 per Toohey and Gaudron JJ, and *Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; 185 CLR 149 at 159-160, 165, 170 per Brennan CJ, Gaudron and Gummow JJ: Reasons, [155].
- (h) The inclusion of an expedited procedure statement in a s 29 notice does not have any discernible or apparent legal effect on the rights of native title parties that is capable of being quashed or removed by an order in the nature of certiorari, referring to *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; 264 CLR 1 at [28] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ: Reasons, [157].
- (i) Declaratory relief is not available because s 29(7) is not conditioned on a valid decision by the Government party that it considers that the act is an act attracting the expedited procedure on a correct understanding of the law and based on some material; rather, ss 29(7), 31 and 32 operate on *the fact* that the notice given under s 29 includes an expedited procedure statement: Reasons, [157].

45 The primary judge considered the applicants’ claims in relation to the 2022 Policy at [159]-[166]. His Honour stated at [161] that he was not satisfied that the applicants had no reasonable prospect of successfully proving the existence of the alleged 2022 Policy and its application in making decisions under s 29(7) of the NTA including in relation to (among other things) the Second Yanunijarra notice. However, in circumstances where he had not accepted the applicants’ submissions regarding the construction of s 29(7) and other relevant provisions in Subdiv P, his Honour concluded that the NTA did not impose the requirements that the applicants alleged were inconsistent with the 2022 Policy: Reasons, [162]. His Honour gave additional reasons for dismissing this aspect of the applicants’ case at [163]-[166].

46 Accordingly, his Honour concluded that the applicants had no reasonable prospect of successfully prosecuting the proceeding within the meaning of s 31A(2) of the *Federal Court*

*of Australia Act*. His Honour therefore gave summary judgment for the respondent against the applicants in relation to the whole of the proceeding, and dismissed the proceeding.

47 His Honour stated at [176] that, in light of the outcome of the summary judgment application, it was unnecessary to determine the applicants' application for leave to amend. However, his Honour considered the application for completeness and indicated that, had it been necessary to determine the application, he would have granted leave to amend: Reasons, [182].

### **Application for leave to appeal**

48 Our reasons for granting leave to appeal may be stated briefly. In our view, the proposed appeal raises an important issue of statutory construction of the NTA. The issue has practical ramifications for the operation of the future act regime (in particular, the right to negotiate provisions). We consider it appropriate in these circumstances to grant leave to appeal so that the issue can be dealt with at the appellate level.

### **Appeal**

49 The notice of appeal contains seven grounds. Grounds 1 to 3 relate to the issue of construction relating to s 29(7) outlined in the Introduction to these reasons and are as follows:

1. The primary judge's conclusion that the decision by a Government party to include a statement under s 29(7) of the *Native Title Act 1993* (Cth) (the **NT Act**) for the purposes of a notice issued under s 29 is not a decision with sufficient effect to attract:
  - (a) relief under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**);
  - (b) certiorari under s 23 of the *Federal Court of Australia [Act] 1976* (Cth) (the **FCA Act**); or
  - (c) declaratory relief,was affected by error.
2. The primary judge's conclusion that s 29(7) does not require the Government party to have made a decision, given consideration or done some other thing with respect to whether the act is an act attracting the expedited procedure was affected by error.
3. The primary judge's conclusion that ss 29(7), 31(1) and 32(1) of the NT Act do not condition the legal efficacy of a statement included in a notice under s 29(7) by reference to a decision, consideration or other thing done by the Government party with respect to whether the act is an act attracting the expedited procedure was affected by error.

50 Ground 4 relates to the 2022 Policy and contends that the primary judge erred in law in finding that the question whether the 2022 Policy was inconsistent with the requirements of Subdiv P

of Div 3 of Pt 2 did not constitute a “matter” arising under the NTA. This was one of the additional points made by the primary judge in relation to the claim based on the 2022 Policy (at [165]-[166]).

51 Grounds 5 and 6 are consequential upon grounds 1 to 4. They were not dealt with separately in the appellants’ written submissions, and need not be set out.

52 By ground 7, the appellants contend that, in any event, the primary judge erred by not granting the applicants’ application for leave to amend before summarily dismissing the proceeding.

### **Consideration**

53 It is convenient to deal with grounds 1 to 3 together as they raise essentially the same issue, which can be stated as follows: where a Government party gives a notice of an act under s 29 of the NTA and includes an expedited procedure statement in the notice, is the inclusion of such a statement a reviewable decision under the ADJR Act or otherwise amenable to judicial review?

54 The appellants’ submissions can be summarised as follows. First, they submit that the inclusion of an expedited procedure statement in a s 29 notice has important *statutory consequences*, in that it disapplies the normal negotiation procedure under s 31 of the NTA. That effect is plainly evident in the terms of s 28(1)(c) (see [25] above). Olney J’s conclusion in *Holt* that inclusion of an expedited procedure statement is “determinative of nothing” was, they submit, incorrect, as was the primary judge’s agreement with that conclusion at [134]. From the point in time that a s 29 notice including an expedited procedure statement is issued, a statutory effect arises: the process under s 32 is enlivened and, unless objection is made and succeeds, s 32(2) applies. Including an expedited procedure statement thereby entitles the Government party to validly grant certain kinds of interests (such as an exploration licence) without s 31 negotiation. The appellants submit that the possibility of reversal by the NNTT does not mean the decision lacks the “quality of finality” (*Bond* at 337 per Mason CJ) for the ADJR Act: contra Reasons, [154]. The appellants submit that the inclusion of an expedited procedure statement has a real impact upon rights and obligations, referring to *Edelsten v Health Insurance Commission* [1990] FCA 649; 27 FCR 56 at 68 and *Griffith University v Tang* [2005] HCA 7; 221 CLR 99 at [89]. As to certiorari, the appellants submit that the inclusion of an expedited procedure statement has a discernible or apparent legal effect on rights: contra Reasons, [157]. As to declaratory relief, the appellants submit that they need only establish a real controversy about a legal issue in respect of which a declaration would

have foreseeable consequences: *Unions NSW v New South Wales* [2023] HCA 4; 277 CLR 627 at [13]-[17].

55 Secondly, they refer to the text, context and purpose of the provisions to submit that the inclusion of an expedited procedure statement is *conditioned* on the Government party forming an opinion that the act meets the criteria in s 237. They submit that his Honour erred in concluding that ss 29(7), 31 and 32 operate on the *fact* of a notice including an expedited procedure statement, and not on the formation of any opinion or the decision to include the statement: Reasons, [145]. The appellants rely on the use of the word “considers” in s 29(7) and dictionary definitions and case law standing for the proposition that “considers” refers to a state of mind involving an active intellectual process (*Tickner v Chapman* [1995] FCA 987; 57 FCR 451 at 462, 476-477, 495-496; *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 at [32]-[35], [44]-[48]) subject to the bounds of reasonableness (*Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 275 CLR 582 at [25]-[26]). They submit that conferral of governmental power, or the provision of a function which if performed has a statutory effect, by reference to the repository holding a specified state of mind, very often indicates that the holding of that state of mind is a precondition to the exercise of that power or function: *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; 244 CLR 144 at [57]; *Wilkie v Commonwealth* [2017] HCA 40; 263 CLR 487 at [98]; *Makarov v Minister for Home Affairs (No 2)* [2020] FCA 1275 at [19]. The appellants rely on the use of the verbs “believes” and “thinks”, referring to this aspect of s 29(7), in the Explanatory Memorandum (Part B), Native Title Bill 1993, p 21 (relating to cl 28(4) of the Bill); and the Explanatory Memorandum, Native Title Amendment Bill 1997, [20.24]; cf. Reasons, [149].

56 The appellants note that the right to negotiate conferred by Subdiv P is a special measure under the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (**ICERD**) and the *Racial Discrimination Act 1975* (Cth): Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth), [18.23]-[18.27]; *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; 183 CLR 373 at 483; *Durham Holdings Pty Ltd v New South Wales* [1999] NSWCA 324; 152 FLR 94 at [74]-[85]. They submit that any qualification on the right to negotiate provisions ought to be construed narrowly, so far as the statutory language permits: *Charles v Sheffield Resources Ltd* [2017] FCAFC 218; 257 FCR 29 at [54]; contra Reasons, [146]. The appellants submit that ss 29(7), 32 and 237 enable a Government party to

disapply the normal negotiation procedure by reference to the matters specified in s 237. As such, they submit, the provisions constitute a qualification on the special measure by reference to the s 237 criteria. They submit that construing Subdiv P as requiring the Government party to make its decision by reference to the s 237 criteria better conforms with the statutory purpose: contra Reasons, [148].

57 The appellants contend that, if a Government party fails to comply with the (contended-for) condition that it consider whether the act is an act attracting the expedited procedure when the Government party includes an expedited procedure statement in a s 29 notice, s 32 would not be engaged and the NNTT would lack jurisdiction to determine whether the act is an act attracting the expedited procedure. That this is the appellants' position was clarified in the appellants' reply submissions at [22] and the appellants' oral submissions at T39, T78.

58 The appellants do not contend that the primary judge identified the wrong overarching principles for determining whether a decision is a "decision under an enactment" for the purposes of the ADJR Act, or the test for effect on rights for the purposes of certiorari or declaratory relief. The appellants' contention is that, in applying those principles, the primary judge reached the wrong conclusion: see the appellants' reply submissions at [18].

59 We will start by considering the question whether the inclusion of an expedited procedure statement in a notice given under s 29 of the NTA is reviewable under the ADJR Act. In our opinion, the primary judge was correct to conclude that it is not.

60 It is common ground that the applicable principles for determining whether something is a reviewable decision for the purposes of the ADJR Act are those stated by Mason CJ in *Bond* at 336-337. After discussing textual and policy considerations, his Honour stated at 337:

The policy arguments do not, in my opinion, call for an answer different from that dictated by the textual and contextual considerations. That answer is that a reviewable "decision" is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.

Another essential quality of a reviewable decision is that it be a substantive determination. ...

61 We accept that, as the primary judge stated at [140], where a Government party includes an expedited procedure statement in a s 29 notice, the Government party has made a decision of

some kind. However, the question is whether that is a reviewable decision for the purposes of the ADJR Act. The answer to that question depends on a close analysis of the statutory scheme.

62 In our view, a close analysis of the statutory scheme (outlined at [18]-[34] above) demonstrates that the inclusion of an expedited procedure statement in a s 29 notice is a procedural step that triggers certain statutory consequences, and does not involve or depend on a substantive determination of whether the proposed act is one that attracts the expedited procedure. That s 29(7) triggers certain statutory consequences is not in dispute. If a Government party includes an expedited procedure statement in a s 29 notice, this has the effect of disapplying the normal negotiation procedure under s 31; instead, the expedited procedure under s 32 will apply. Importantly, in practical and legal terms, if no objection is lodged within four months, the Government party may do the act which is the subject of the s 29 notice: s 28(1)(c), s 32(2).

63 While the inclusion of an expedited procedure statement has those statutory consequences, the text, context and purpose of s 29(7) do not suggest that the inclusion of an expedited procedure statement involves or depends on a substantive determination. Section 29(7) is not expressed in terms that are conditional upon the formation of an opinion by the Government party. The provision does not, for example, state that “if the Government party is satisfied” that an act is one attracting the expedited procedure, it may include a statement to that effect in the s 29 notice. Section 29(7) uses the word “considers”, which may be contrasted with the use of “determine” in s 32(4). Section 32(4) provides that, if one or more native title parties object against the inclusion of the expedited procedure statement, the arbitral body must “determine” whether the act is an act attracting the expedited procedure. It is clear from this language that the arbitral body is to make a substantive determination of whether the act is an act attracting the expedited procedure (in the sense that it meets the criteria set out in s 237). The contrast in language suggests that the task of the Government party under s 29(7) is different from that of the arbitral body under s 32(4), and that s 29(7) does not involve or depend on a substantive determination.

64 As has been noted, the inclusion of an expedited procedure statement triggers certain statutory consequences. It is significant that the relevant provisions refer to, and depend upon, the *inclusion of the statement* as distinct from (for example) *a decision* of the Government party to include the statement or the *formation of an opinion* by the Government party. For example, s 32(1) provides that s 32 applies if the notice given under s 29 “includes a statement” that the Government party considers the act to be an act attracting the expedited procedure. Similarly,

s 32(4) provides for an objection against “the inclusion of the statement”. These matters support the view that s 29(7) provides for a procedural step rather than a substantive determination. We note that the primary judge made a similar point at [136] of the Reasons.

65 We also agree with the primary judge’s analysis of certain additional contextual considerations at [137]:

Other provisions elsewhere in the NTA refer to the expedited procedure statement without referring to any opinion formed or held by the Government party — for example, s 75 describes an expedited procedure objection application as an “[a]pplication objecting as mentioned in subsection 32(3) against the inclusion of a statement that an act is an act attracting the expedited procedure” (emphasis added). This is consistent with the nature of the proceedings on any such objection application, which are not directed to demonstrating any error in the view formed by the Government party that the act is an act attracting the expedited procedure. Similarly, in setting out the pathways to validity of a future act to which Subdiv P applies, s 28(1)(c) describes s 32(2) as applying “if no objection is made after *the giving of notice that the act attracts the expedited procedure*” (emphasis added). These provisions do not suggest that any effect is attached by the NTA to the state of mind formed by the Government party in relation to the inclusion of an expedited procedure statement in a s 29 notice.

66 The appellants take issue with the statement of Olney J in *Holt* at [25] that the inclusion of an expedited procedure statement is “determinative of nothing”, and with the primary judge’s agreement with that statement at [134]. Taken in isolation, the statement may appear to overstate the position. However, read in context, all Olney J was saying was that the inclusion of an expedited statement in a s 29 notice was procedural in nature rather than determinative of the question whether the proposed act was one attracting the expedited procedure (which was a matter for the arbitral body to determine).

67 One of the difficulties with the appellants’ contention is that it would be productive of fragmentation. If the appellants’ construction or characterisation were correct, there would be two avenues of review – a native title party could bring (a) an application to a court for judicial review of the Government party’s decision to include the expedited procedure statement in the s 29 notice; and/or (b) an application to the Tribunal objecting to the inclusion of the expedited procedure statement (being a process that is specifically provided for in ss 32(3), 75, 139). The inconvenience of this fragmentation is obvious. This makes it unlikely that Parliament intended s 29(7) to involve or depend on a substantive determination. The primary judge referred to “fragmentation, uncertainty and delay” at [148]. We agree with his Honour’s observations in that paragraph.

68 The appellants’ contention would give rise to uncertainty, which is contrary to an important purpose of the statutory scheme: see the Preamble (“It is also important that the broader Australian community be provided with certainty that such acts may be validly done”). If the appellants’ contention is correct, it would give rise to uncertainty as to whether the arbitral body had jurisdiction to determine whether the act is one that attracts the expedited procedure. It could also give rise to uncertainty as to the validity of future acts. For example, in a case where an expedited procedure statement is included in the s 29 notice and no objection is lodged within the required time, there could later be a challenge to the validity of the act on the basis that the Government party had not given proper consideration to the s 237 criteria before including the expedited procedure statement.

69 It is true that the right to negotiate provisions constitute a special measure and that the expedited procedure represents a qualification on the right to negotiate. However, we do not consider this to be of any real assistance in resolving the issue presently before the Court. We agree with the primary judge’s analysis at [146]:

... The applicants emphasised that the right to negotiate was a special measure for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders, and submitted that the expedited procedure was directed to ensuring that this special measure was proportionate to that purpose and consistent with Art 1(4) of the ICERD. However, that does not assist in determining the balance that was ultimately struck by the provisions contained in Subdiv P, including the balance between the statutory objects of providing for the recognition and protection of native title, and establishing ways in which future dealings may proceed and setting standards for those dealings: see NTA, s 3(a) and (b). As Carr J observed in *Cheinmora [v Striker Resources NL]* [1996] FCA 1147; 142 ALR 21] (at 35), the object stated in s 3(a) should not be given precedence over the object in s 3(b), and “[t]he extent of parliament’s protective intent should ... be discerned from the language used by parliament rather than any presumption taken from the particular constitutional source” (i.e. as a law enacted under the power conferred by s 51(xxvi) of the *Constitution*).

70 Insofar as the appellants rely on extrinsic materials, we agree with and adopt the primary judge’s analysis at [149]-[153] of the Reasons. As the primary judge stated at [149], “[t]he applicants’ construction of s 29(7) of the NTA finds no support in the extrinsic material”.

71 For these reasons, we conclude that s 29(7) does not involve or depend on a substantive determination by the Government party of whether the act is an act attracting the expedited procedure. Accordingly, in our view, the inclusion of an expedited procedure statement in a s 29 notice is not reviewable under the ADJR Act.

72 We will now consider whether the inclusion of an expedited procedure statement in a s 29 notice is amenable to judicial review under the *general law* (as distinct from the ADJR Act).

In addition to relying on the ADJR Act, the originating application at first instance invoked the jurisdiction of the Court under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) and sought certiorari under s 23 of the *Federal Court of Australia Act* and declaratory relief under s 21 of the *Federal Court of Australia Act*.

73 The legal premise of these claims is the same as for the ADJR Act claims. In summary, the appellants contend that the inclusion of an expedited procedure statement in a s 29 notice is *conditioned* on the Government party forming an opinion that the act meets the criteria in s 237. On this basis, the appellants contend that the inclusion of the expedited procedure statement in each of the s 29 notices was invalid (because the State failed to form an opinion that the proposed act met the criteria in s 237 and therefore failed to carry out the statutory task).

74 In our opinion, the legal premise of these claims is incorrect. For substantially the same reasons as set out above, we consider that the inclusion of an expedited procedure statement in a s 29 notice is not conditioned on the Government party forming an opinion that the criteria in s 237 are met. It follows that the appellants' claims based on the general law are not maintainable. The primary judge's conclusion to this effect was correct.

75 It is unnecessary for present purposes to reach a conclusion as to whether the inclusion of an expedited procedure statement in a s 29 notice can *ever* be amenable to judicial review under the general law. It is sufficient for present purposes to conclude that the appellants' claims in the present case are not maintainable.

76 For these reasons, grounds 1 to 3 in the notice of appeal are not made out.

77 Ground 4 relates to the 2022 Policy and contends that the primary judge erred in law in finding that the question whether the 2022 Policy was inconsistent with the requirements of Subdiv P of Div 3 of Pt 2 did not constitute a "matter" arising under the NTA. This ground relates to an additional point relied on by the primary judge (at [165]-[166]). However, this ground does not arise if the primary judge's conclusion in relation to the 2022 Policy is otherwise correct. For the reasons given above, the primary judge was correct to conclude (at [162]) that the NTA does not impose requirements that are inconsistent with the 2022 Policy. Accordingly, ground 4 does not arise.

78 Grounds 5 and 6 are consequential on the earlier grounds and therefore do not need to be dealt with.

79 By ground 7, the appellants contend that, in any event, the primary judge erred by not granting the applicants' application for leave to amend before summarily dismissing the proceeding. We do not see any error in the primary judge's approach. In light of his conclusion in relation to the summary judgment application, it was unnecessary to determine the leave to amend application. This was not a case where, for example, the proposed amendments would have overcome the deficiencies that were the subject of the summary judgment application. Ground 7 is not made out.

### **Conclusion**

80 For these reasons, the appeal is to be dismissed.

81 In relation to costs, the State submitted that the appeal should be dismissed "with costs", presumably on the basis that costs are to follow the event. In response, the appellants submitted that each party should bear its own costs, relying on the reasons given by the primary judge for making such an order below: see the Reasons at [183]-[189]. For substantially the same reasons as given by the primary judge, we consider it appropriate that each party bear its own costs of the application for leave to appeal and the appeal. In particular, while s 85A of the NTA is not directly applicable, it is appropriate to take into account the policy underlying s 85A in this case. While the State has been successful in the appeal, there has been no unreasonable conduct on the part of the appellants. Further, there is a public interest in resolving at an appellate level the issue raised by the appeal.

I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Moshinsky, Sarah C Derrington and Hill.

Associate:

Dated: 12 February 2026

## **SCHEDULE OF PARTIES**

**WAD 157 of 2025**

### **Applicants**

Fourth Applicant:

**KIMBERLEY LAND COUNCIL ABORIGINAL  
CORPORATION**