RECONCILING INCONSISTENCY: NATIVE TITLE RIGHTS AND STATE AGREEMENT RATIFICATION

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The Western Australian Supreme Court of Appeal ('WA SCA') and the Federal Court's interpretation of Western Australia's State Agreement ratification provisions has diverged over the last decade resulting in conflicting decisions. Since 2003, the operation of these provisions and the Government Agreement Act 1979 *(WA) ('*GA Act*') was settled in the state context. However, in 2016, the issue became important in the Native Title jurisdiction, requiring the Federal Court to examine State Agreement ratification. In 2021, in a minority decision, Edelman J of the High Court provided a different approach to interpreting the* GA Act *and ratification provisions. Applying this interpretation would significantly affect future decisions that examine this aspect of State Agreements. It would mean that some WA SCA precedents must be overruled, and some Federal Court decisions were wrong. This article examines the jurisprudence of the High Court, the WA SCA and the Federal Court discussing State Agreement ratification and considers the effect of applying Edelman J's interpretation in the future. Justice Edelman's approach could provide new avenues and arguments for Native Title holders and other litigants challenging rights granted pursuant to State Agreements.*

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I INTRODUCTION

For many years after the enactment of the *Government Agreement Act 1979* (WA) ('*GA Act*'), the question of whether the ratification provision of an Act authorising a government agreement with a third party (the 'authorising Act') conferred sufficient authority on the attached scheduled agreement to modify state laws seemed settled in Western Australia ('WA'). The authorising Act could ratify the scheduled agreement as contract or legislation — both types of ratification ensured the operation of the agreement. These ratified agreements, whether authorised as legislation or contract, are commonly referred to as 'State Agreements'. However, the interpretation of the scheduled agreements as contract or legislation became once again important in the Native Title context. In the Federal Court of Appeal ('FCA') Full Court decision of *State of Western Australia v Graham on behalf of the Ngadju People* ('*Ngadju*')[1] the key issue before the Court was the effect of the *Nickel Refinery (Western Mining Corporation Limited) Act 1968* (WA) ('*WMC*') authorising Act's ratification provisions in relation to the source of statutory authority to grant a mining lease. The question was whether the source of statutory authority for the grant of the mining lease arose from the *WMC* scheduled agreement or the *Mining Act 1904* (WA) ('*Mining Act 1904*').[2] If the agreement was ratified as a contract, then the source of authority was the *Mining Act 1904*; if the agreement was ratified as legislation, then the *WMC* agreement was the source of authority.[3]

Of particular interest in the *Ngadju* decision is the FCA's interpretation of the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) ('*Goldsworthy*') authorising Act's ratification provisions applying *Brown (on behalf of the Ngarla People) v State of Western Australia* ('*Brown FCAFC*').[4] The Court distinguished the *Goldsworthy* ratification from the *WMC* ratification, stating that, in contrast to *WMC*, the

[1] *State of Western Australia v Graham on behalf of the Ngadju People* (2016) 330 ALR 534 ('*Ngadju*').
[2] Ibid [24]–[25].
[3] See below Part II for the explanation of contract and legislative State Agreement terms and the source of authority for a land or mineral grant.
[4] *Brown (on behalf of the Ngarla People) v Western Australia* (2012) 208 FCR 505 ('*Brown FCAFC*'). On a subsequent appeal to the High Court in *Western Australia v Brown* (2014) 253 CLR 507 ('*Brown HC*'), the issue of ratification was not discussed. Consequently, the Court in *Ngadju* followed the reasoning of the Federal Court in *Brown FCAFC.*

Goldsworthy scheduled agreement clause conferring the right to a mining lease provided statutory authority for the grant.

The Federal Court's interpretation in *Brown FCAFC* and *Ngadju* sits uneasily with the WA State Supreme Court of Appeal ('WA SCA') decisions of *Re Michael; Ex parte WMC Resources* ('*Re Michael*')[5] and *Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd* ('*Hancock*').[6] In *Re Michael,* Parker J determined that the ratification provisions, which were very similar to the *Goldsworthy* ratification provision as discussed in *Ngadju*, ratified the agreement terms as contract terms.[7] Notably in *Hancock,* the WA SCA interpreted the *Iron Ore (Mount Newman) Agreement Act 1964* (WA) ('*Newman'*) ratification, which is identical to the *Goldsworthy* ratification, as authorising the scheduled agreement as a contract.[8]

Justice Edelman recently called into question the veracity of the lower courts' interpretation of ratification provisions in his reasoning in the High Court of Australia decision of *Mineralogy Pty Ltd v Western Australia* ('*Mineralogy HC*').[9] His Honour stated that the WA SCA interpretation of s 3 of the *GA Act* in the *Re Michael* decision should be overruled, at least in part.[10] Justice Edelman's reasoning raises questions about WA SCA decisions following the *Re Michael* interpretation, particularly in relation to the *GA Act*, and the correctness of the *Ngadju* decision itself.

First, this article describes the operation of State Agreements and explains the *Ngadju* decision. Next, the various types of ratification provisions are examined. I then consider and compare the jurisprudence relating to State Agreement ratification and the *GA Act* s 3 in the WA SCA and the Federal Court and find that the reasoning diverges, before I examine Edelman J's alternative interpretation in *Mineralogy HC*. Lastly, I analyse the ramifications of overruling *Re Michael* and the application of Edelman J's interpretation of the *GA Act* s 3 in the future.

II How State Agreements Operate

The WA government uses State Agreements to facilitate major resource projects, particularly in remote areas that require the proponent to develop significant infrastructure. The statutory authorisation allows the agreement clauses to modify

[5] *Re Michael; Ex parte WMC Resources* [2003] WASCA 288 ('*Re Michael*').
[6] *Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd* [2003] WASCA 259 ('*Hancock*').
[7] *Re Michael* (n 5) [21].
[8] All early 1960s WA State Agreements have this type of ratification: see also *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) ('*Hamersley*').
[9] *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 ('*Mineralogy HC*').
[10] Ibid [136].

other state Acts or laws that may otherwise regulate and restrict large-scale mining projects, such as the size and duration of a mining lease, the construction of roads and railways, or rights to take water for mining purposes.[11] Important to the operation of State Agreements (and this discussion) is the source of the authority to dispose of land or minerals. The disposal of Crown land and minerals requires statutory authority because the United Kingdom ('UK') Parliament vested those rights by statute in the State's colonial legislature.[12] The UK Parliament vested authority in the WA Parliament as follows:

> The entire management and control of the waste lands of the Crown in the colony of Western Australia, and of the proceeds of sale, letting, and disposal thereof, including all royalties, mines and minerals, shall be vested in the legislature of that colony.[13]

The conferral of power from the UK legislature to the WA colony's legislature means statutory authority (legislation) is required to dispose of the State's land or minerals; in other words, it is not within the power of the executive to dispose of lands or minerals unless that authority is conferred by statute. Consequently, there must be a legislative source of power that authorises the grant of mineral rights or land, from either the mining legislation or the State Agreement depending on whether the agreement is ratified as a contract or legislation. For example, the *Mining Act 1978* (WA) ('*Mining Act 1978*') confers the authority on the executive to dispose of minerals by granting a mining lease.

A State Agreement has two parts: the 'authorising Act' that ratifies the agreement, and the agreement itself, which is scheduled to the authorising Act. After Parliament enacts the State Agreement, the authorising Act and the scheduled agreement are publicly available on the Parliament website.[14] The development proposal fleshes out the project in detail for approval by the Minister for Jobs, Tourism, Science and Innovation WA ('JTSI').[15] This document is part of the State Agreement,[16] but is not

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[11] Natalie Brown, 'Pilbara Iron Ore State Agreements and Mine Closure Regulation' (2023) 42(2) *Australian Resources and Energy Law Journal* 44, 46 [2] ('Brown 2023').
[12] *Western Australia Constitution Act 1890* (UK, 53 & 54 Vict c.26) s 3 ('*WA Constitution Act*'). See *Nicholas v Western Australia* [1972] WAR 168, 172, 174 ('*Nicholas*').
[13] *WA Constitution Act* (n 12) s 3.
[14] Department of Justice and Parliamentary Counsel's Office (WA), *Western Australian Legislation* (Web Page) <https://www.legislation.wa.gov.au/>.
[15] The executive government department, currently the Department of Jobs, Tourism, Science and Innovation ('JTSI'), has had many iterations such as the Department of State Development, and the Department of Industry Development. For reading ease, this article refers to the executive department as JTSI.
[16] *Government Agreements Act 1979* (WA) s 2 ('*GA Act*').

available to the public or Parliament.[17] The development proposal is an important document that details and confirms the parties' rights and obligations.[18] The main focus of this discussion is the effect of the authorising Act's ratification on the scheduled agreement provisions. I will touch on future research about the development proposal in the closing Part because the transparency of State Agreements and access to documents is a contentious issue.[19]

The authorising Act is sometimes amended to ratify subsequent additional scheduled agreements ('supplementary agreements'). Supplementary agreements can amend or modify the principal agreement and confer or impose additional rights or obligations, or enable entirely separate new projects. Like the primary agreement, the supplementary agreement is ratified by the authorising Act. For example, the *WMC* State Agreement has two supplementary agreements ratified in 1970 and 1974 respectively.[20]

The authorising Act's ratification provision allows the terms of the agreement to modify other state laws. The ratification provision may authorise the scheduled agreement as contract or legislation. The accepted position in WA, post the enactment of the *GA Act* and the decision of *Re Michael*, is that the scheduled agreement clauses, regardless of whether operating as contract or legislation, have the capacity to modify state Acts and laws.[21] The reasoning is as follows. The phrasing of the ratification provision will determine whether the scheduled agreement clause has the force of contract or statute. A statutory scheduled

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[17] Brown 2023 (n 11) 46 [2.1]; Natalie Brown, 'Regulation of Mine Closure Planning and Pilbara Agreements Case Study', *CRC Transformations in Mining Economies* (Project 1.3, May 2022) 7, 36 </https://crctime.com.au/macwp/wp-content/uploads/2022/06/Project-1.3-Report_Pilbara-Agreements-Case-Study-1.pdf> ('Brown CRC TiME').

[18] Ibid.

[19] Natalie Brown and Alex Gardner, 'Still Waters Run Deep: The 1963–64 Pilbara Iron Ore State Agreements and Rights to Mine Dewatering' (2016) 35(1) *Australian Resources and Energy Law Journal* 55, 58, 74; Natalie Brown, 'Still Waters Run Deep, Pilbara Iron Ore State Agreement Rights to Mine Dewatering and Water Law Reform' (PhD Thesis, University of Western Australia, 2018) 296–8 ('Brown 2018'); Office of the Auditor General (WA), *Ensuring Compliance with Conditions on Mining* (Report 8, September 2011) 7, 9, 21; Office of the Auditor General (WA), *Ensuring Compliance with Conditions on Mining: Follow-up* (Report 20, November 2014) 8, 10, 18–19; Office of the Auditor General (WA), *Compliance with Mining Conditions* (Performance Audit, Report 11 2022–2023, 20 December 2022) 15. See especially Standing Committee on Estimates and Financial Operations, Parliament of Western Australia, *Provision of Information to Parliament* (Report No 62, 19 May 2016).

[20] *Nickel Refinery (Western Mining Corporation Limited) Act 1968* (WA) schs 2, 3 ('*WMC*'). The authorising Act is amended to include a provision that ratifies the supplementary agreement. For example, the *WMC* sch 3 agreement is ratified by the *WMC* authorising Act s 3B (inserted by *Nickel Refinery (Western Mining Corporation Limited) Agreement Act Amendment Act 1974* (WA) s 3).

[21] *GA Act* (n 16) s 3. However, note *Re Michael* (n 5), holding that a term operating as contract may not modify subsequent legislation as intended by the parties because it lacks statutory force: see [45], [53]–[54].

agreement clause has statutory force so it can authorise the grant of leases or licences for lands or minerals. In contrast, a contract scheduled agreement clause requires the executive decision-maker who has authority under the relevant statute to grant a licence or lease 'as of right' in accordance with the agreement.[22] For example, a contract State Agreement clause provides that the proponent will be granted a mining lease grant of 300 square kilometres. The *Mining Act 1978*'s application provision provides that the Act applies consistently with State Agreement terms.[23] The State Agreement clause in conjunction with the application provision requires the Minister for Mines to exercise their authority and grant a lease in compliance with the clause. The source of the authority is the *Mining Act 1978*, but the State Agreement clause requires the Minister for Mines to grant the lease 'as a right' consistent with the clause. This distinction between the operation of contractual versus legislative State Agreement clauses was pivotal to the *Ngadju* decision.

III THE *NGADJU* DECISION: INTRODUCTION

In the *Ngadju* decision the central issue was whether the scheduled agreement or the *Mining Act 1904* was the source of the authority to grant the mining lease. The important question was whether the additional rights conferred by the *Mining Act 1978* accrued when that Act commenced in 1982, thus avoiding the future act provisions in the *Native Title Act 1993* (Cth) ('*Native Title Act*').[24] Consequently, the interpretation of the ratification provision in the authorising Act and its effect on scheduled agreement was the deciding factor.[25]

The Federal Court reasoned that if the *WMC* scheduled agreement clause permitting the mining lease had been ratified as statute the agreement itself would authorise the grant of the mining lease, but if the clause was ratified as contract the *Mining Act 1904* authorised the grant of the mining lease in accordance with the *WMC* agreement.[26] If the *WMC* agreement was the source of the authority, the proponent

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[22] Brown CRC TiME (n 17) 14.

[23] *Mining Act 1978* (WA) ('*Mining Act 1978*') s 5. The application provision also preserves State Agreement rights granted under the *Mining Act 1904* (WA) ('*Mining Act 1904*').

[24] *Native Title Act 1993* (Cth) ss 223, 24IB, 24IC ('*Native Title Act*'); *Ngadju* (n 1) [61], [107]–[112], [116], [128], [130], [137], [147], [150] regarding s 26DI, [152].

[25] *Ngadju* (n 1) [25].

[26] The *Mining Act 1978* (n 23) s 5(2) preserves State Agreement rights under the *Mining Act 1904* (n 23). The UK Parliament vested Western Australian State waste land and minerals in the legislature, which means statutory authority is required to dispose of the State's land or minerals: *WA Constitution Act* (n 12) s 3; see *Nicholas* (n 12) 172, 174. The importance of compliance with a statutory regime disposing of the State's land and resources is discussed in *Forrest & Forrest v Wilson* (2017) 262 CLR 510, [7], [64] ('*Forrest*'), citing *Nicholas* (n 12).

mining company ('proponent')[27] was constrained by the terms of the agreement. If the *Mining Act 1904* was the source, then the proponent could accumulate the additional rights available under the *Mining Act 1978* transition provisions.[28] The Court decided the leases in question were granted as a matter of contract pursuant to the *WMC* agreement, but the *Mining Act 1904* provided the necessary legislative authority.[29]

The *Mining Act 1904* separated resources such as gold and coal, and required minerals to be specified for each lease.[30] It also regulated the size and duration (two 21-year terms or 42 years) of the mineral lease.[31] The *WMC* agreement modified the *Mining Act 1904* by requiring the grant of a mining lease for nickel, copper, lead, cobalt, silver, zinc, and molybdenum, and by allowing a larger lease area and a right to apply for successive lease terms beyond the 42 years prescribed by that Act.[32]

The *Mining Act 1978* repealed the *Mining Act 1904*, but preserved the rights conferred by State Agreements by providing that any such mining tenements or rights of occupancy granted pursuant to a State Agreement continued 'as though the [the *Mining Act 1904*] had not been repealed'.[33]

Distinct from the *Mining Act 1904*, the *Mining Act 1978* did not distinguish between gold, coal or other minerals, or require the mining tenement to specify the mineral rights.[34] The proponent argued that because they held a current mining lease under the *Mining Act 1904* they had a priority right to apply for the lease under the *Mining Act 1978* transitional provisions,[35] and after transition the lease would be subject to the provisions of that Act, not the terms of the *WMC* agreement. Therefore, the mining lease grant could include additional minerals because the transitioned leases were now subject to the *Mining Act 1978*, and those leases were not subject to the limitation on minerals prescribed by the *WMC* agreement terms.[36] The Ngadju

[27] The proponents in this case were St Ives Goldmining Company Pty Ltd and BHP Billiton Nickel West Pty Ltd.
[28] *Ngadju* (n 1) [62]–[63], [74]–[79], [81]–[82]; *Mining Act 1978* (n 23) s 5(2). The section provides 'notwithstanding anything in schedule 2', sch 2 being the transitional provisions.
[29] *Ngadju* (n 1) [45].
[30] *Mining Act 1904* (n 23) s 51.
[31] Ibid ss 50, 53.
[32] *WMC* (n 20) sch 1 cl 5(3); see also the definitions of 'mining lease' and 'mining area' in sch 1 cl 1. See also *Ngadju* (n 1) [92].
[33] *Mining Act 1978* (n 23) s 5(2).
[34] Ibid s 110: the Minister retains the discretion in the public interest to restrict the lease rights and specify minerals.
[35] *Mining Act 1978* (n 23) sch 2 cl 2(2).
[36] *Ngadju* (n 1) [81]–[82], [91].

people argued that the mining leases continued to be subject to the mineral constraints imposed by the *WMC* agreement.

The Federal Court decided that the source of the power to grant the *WMC* lease was under the *Mining Act 1904* not the agreement itself, so transitioning the lease to the *Mining Act 1978* provided additional and cumulative rights to the *WMC* agreement proponents.[37] The Court stated as follows:

> Nevertheless, it seems to be common ground that the leases granted under the 1904 Act and subject to the [*WMC*] 1968 Agreement, as initially granted at least, were restricted to the mining of minerals consistent with those specified in the 1968 Agreement. On that basis, when the [*Mining Act*] 1978 Act came into force, cl 2(1) of the Second Schedule operated to remove that restriction.[38]

The Court stated that 'the leases were to be granted, as a matter of contract, pursuant to the contractual provisions of the [*WMC* scheduled agreement] but otherwise, as a matter of power, under and subject to the 1904 Act'.[39] In other words, if the clause conferring the mining lease had statutory force, then the *WMC* agreement conferred the lease on its own authority and the agreement terms would confine the mining lease rights to the specified minerals. Conversely, if the term was contract, the authority to grant the lease was an executive action under the *Mining Act 1904* in accordance with the *WMC* agreement terms. The Court decided the *WMC* authorising Act ratified the agreement as a contract. The *WMC* agreement was understood to have required the executive decision-maker (the Minister for Mines) to grant the mining lease under the *Mining Act 1904*. Therefore, the *Mining Act 1904* was the source of the legislative authority for the grant.

The *Mining Act 1904* was repealed by, and was subject to, the *Mining Act 1978* that allowed the proponent to transition the leases under the *Mining Act 1904* to the *Mining Act 1978.* Therefore, the *Mining Act 1978* applied to the *WMC* transitioned mining leases and the mineral restriction did not apply, providing the proponent with 'additional rights' to mine any minerals.

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[37] Ibid [92].
[38] Ibid [90].
[39] *Ngadju* (n 1) [45]. See also *WMC* agreement (n 20) sch 3 cl 3(2)(b)(i).

IV RATIFYING A SCHEDULED AGREEMENT: LEGISLATION OR CONTRACT

The WA Parliament has passed authorising Acts that ratify State Agreements in a variety of ways. To understand the divergent interpretation of ratification provisions in the WA SCA and the Federal Court, this Part explains and defines the distinct types of ratification phrasing, and the relevant sections of the *GA Act*.

What words of ratification determine the operation of the scheduled agreement clauses as legislation or contract? The courts agree that a ratification provision that provides that the agreement is 'as if enacted in this Act' gives the clauses of the agreement statutory force ('legislative ratification').[40] It is also not contentious that ratification that simply states 'this agreement is authorised' or 'ratified' ('bare approval') is a contract and will not validly modify state laws.[41] Post-1980, the ratification phrase commonly used in WA State Agreements states that without limiting the *GA Act* 'the agreement takes effect notwithstanding any other Act or Law' ('takes effect' ratification). This form of ratification was adopted from the *GA Act* s 3, which provides as follows:

> **3 Operation and effect of Government agreements**
>
> For the removal of doubt, it is hereby expressly declared that —
>
> (a) each provision of a Government agreement shall operate and take effect, and shall be deemed to have operated and taken effect from its inception, according to its terms notwithstanding any other Act or law; and
>
> (b) any purported modification of any other Act or law contained, or provided for, in such a provision shall operate and take effect so as to modify that other Act or law for the purposes of the Government agreement, and shall be deemed to have so operated and taken effect from its inception, according to its terms notwithstanding any other Act or law.

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[40] Eg *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA) s 3 ('*McCamey's*'); *Mineralogy HC* (n 9) [127]; *Brown FCAFC* (n 4) [128]; *Re Michael* (n 5) [21]. See also *Commonwealth Aluminium Corporation Ltd v Attorney-General* [1976] Qd R 231, 234; *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 402 ('*West Lakes*').

[41] *Mineralogy HC* (n 9) [124]; *Sankey v Whitlam* (1978) 142 CLR 1, 31, 76–77 ('*Sankey*'); *Re Michael* (n 5) [22], discussing *Sankey; Margetts v Campbell-Foulkes* [1979] WASC 250 ('*Margetts*'). See also *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353, 357, 368; *Davis & Sons Ltd v Taff Vale Railway Co* [1895] AC 542, 552–3. For full discussion of *Sankey* see Part V(B) below.

WA jurisprudence has consistently decided that 'takes effect' ratification in the authorising Act, or the *GA Act* s 3, authorises the agreement as a contract, albeit a contract with clauses that can validly modify state laws.[42]

The ratification provision analysed in this article is commonly used in State Agreements ratified in the 1960s ('1960s ratification'). It is in the interpretation of the 1960s ratification where we see a divergence between the reasoning of the WA SCA and the Federal Court. The WA SCA decided that 1960s ratification authorises the agreement as a contract. In contrast, the Federal Court decided that 1960s ratification provides statutory force to at least some of the agreement terms.

The ratification provision of the 1960s *Goldsworthy* agreement is used as an example because the High Court and the Federal Court have considered this State Agreement. Section 4 of the *Goldsworthy* authorising Act ratifies the scheduled agreement as follows:

> **4 Agreement approved and provisions to take effect**
>
> (1) The Agreement is approved.
>
> (2) *Notwithstanding any other Act or law*, and without limiting the effect of subsection (1), —
>
> (a) the Joint Venturers shall be permitted to enter upon the lands mentioned in paragraph (c) of clause 2 of the Agreement, to the extent, and for the purposes, by that paragraph provided; and
>
> (b) the provision of *subclause (2) of clause 3 of the Agreement shall take effect*. [emphasis added]

The ratification phrase used in s 4(1), 'this agreement is approved', is a 'bare approval'.[43] Our focus is on s 4(2), which uses the same operational phrases as the 'takes effect' ratification. Section 4(2) states that 'not withstanding any Act or law' cl 3(2) of the scheduled agreement 'shall take effect' — effectively the same wording as the *GA Act* s 3, or post-1980s, 'takes effect' ratification.

[42] *Re Michael* (n 5) [28]–[30]; *Hancock* (n 6) [67], [71]–[75]. Cases confirming *Re Michael* and *Hancock* include: *Commissioner of State Revenue v Oz Minerals Ltd* [2013] WASCA 239; (2013) 46 WAR 156, [179] ('*Oz Minerals*'); *Kidd v Western Australia* [2014] WASC 99, [111]–[112], [120] ('*Kidd*'); *Mineralogy Pty Ltd v Western Australia* [2005] WASCA 69, [13]–[14] ('*Mineralogy 2005*').

[43] This type of approval received retrospective statutory support from the *GA Act* (n 16) s 3 in 1979.

Importantly, cl 3(2) is part of the scheduled agreement; it is not in the authorising Act. Clause 3(2) specifies other clauses in the agreement 'shall take effect as though …enacted by the ratifying Act'.[44] Because cl 3(2) purports to legislate I shall refer to this type of clause as an 'enacting clause'. However, cl 3(2) is not a section of the authorising Act, it is a clause of the scheduled agreement. Therefore, in my opinion, the capacity of cl 3(2) to designate the other agreement clauses as legislation is dependent on the effect given to it by the authorising Act's 'takes effect' ratification provision.

The 1960s ratification has 'takes effect' ratification in the authorising Act, with an 'enacting clause' in the scheduled agreement. The Federal Court and the WA SCA diverge when interpreting the 1960s ratification. The WA courts find these agreements are contracts, but the Federal Court's view is that the 'enacting clause' distinguishes the 1960s ratification from other agreements that have 'takes effect' ratification or incorporate or rely on the *GA Act* s 3 for support.

This raises the question: can an 'enacting clause' in a scheduled agreement authorise other clauses in the scheduled agreement to operate as legislation? Or must the phrasing of the ratification provision in the authorising Act confer that authority by providing that the 'enacting clause' is legislation? In my opinion, if an 'enacting clause' is ratified as contract it cannot by itself provide legislative force to the clauses it designates as 'enacted by the ratifying Act'. As a contract term, an 'enacting clause' cannot effectively insert additional sections into the authorising Act.[45] The 'enacting clause' (cl 3(2)) can only have that operation if the authorising Act has ratified the clause as legislation. So, this leads to a crucial question: what is the operation of 'takes effect' ratification with an 'enacting clause'? It is on this point the decisions of the lower courts are not easily reconciled.

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[44] *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) ('*Goldsworthy')* sch 1 cl 3(2) specifies that cls 8(2)(a), 9(3)(f)–(i), 9(3)(k), 10(m), 21, 23, 24, and 27 operate as legislation by providing as follows:
'3. Ratification and operation
(2) If the Bill to ratify this Agreement is passed as an Act before the date or later date if any referred to in sub-clause (1) of this clause the following provisions of this clause shall notwithstanding the provisions of any Act or law thereupon operate and take effect namely —
(a) the provisions of clause 8 the proviso to paragraph (a) of subclause (2) of clause 9 subclause (3) of clause 9 paragraphs (a) (f) (g) (h) (i) (k) and (m) of clause 10 and clauses 21, 23, 24, and 27 *shall take effect as though the same had been brought into force and had been enacted by the Ratifying Act*' (emphasis added).

[45] On this point see *Re Michael* (n 5) [52]–[54]. Justice Parker found the State Agreement contract term could not affect the operation of legislation, but the clause could have had effect if it had been ratified as legislation.

V THE CASE LAW INTERPRETING RATIFICATION PROVISIONS

To understand the *Ngadju* decision, and the divergence between the WA SCA and Federal Court jurisprudence, it is useful to review the cases and historical context of State Agreement decisions chronologically. Between 1973 and 2024, the High Court, the Federal Court, and the WA SCA have expressed inconsistent views on how to interpret 'takes effect' ratification with an 'enacting clause' and the *GA Act* s 3.

A *The* Dredging Lease Case *1973*

In 1973, Mason J considered the question regarding the validity of the *Goldsworthy* scheduled agreement clauses to grant a seabed lease by modifying the *Land Act 1933* (WA) s 116 in the decision of *Goldsworthy Mining Ltd v Commissioner for Taxation (Cth)* (commonly known as the '*Dredging Lease Case*').[46] Importantly, this decision occurred prior to the enactment of the *GA Act* in 1979.

Justice Mason proceeded on the basis that the *Goldsworthy* agreement had the authority to confer the right to the seabed lease because the *Goldsworthy* 1960s ratification provision in conjunction with the 'enacting clause' in the scheduled agreement provided statutory authority to cl 8 that modified the *Land Act 1933*.[47]

If Mason J had made this decision after the commencement of the *GA Act*, he may have been more definitive about the operation of 'takes effect' ratification because it would have applied to all the *Goldsworthy* scheduled agreement clauses. Arguably, if 'takes effect' ratification provides statutory force, the 'enacting clause', while not invalid, is redundant after 1979 because the *GA Act* s 3 would also provide statutory force to the *Goldsworthy* agreement cl 8 that modified the *Land Act 1933*.

In 1977, Mason J considered a ratified Commonwealth government contract in relation to airline permits.[48] However, a definitive answer to the question of what phrasing in State Agreement ratification provisions was sufficient to authorise the scheduled agreement clauses to modify other state Acts or laws remained.

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[46] *Goldsworthy Mining Ltd v Commissioner for Taxation (Cth)* (1973) 128 CLR 199, 205–206 ('*Dredging Lease Case*'); *Goldsworthy* (n 44) sch 1 cl 8(3)(b).

[47] *Dredging Lease Case* (n 46) 205–6; *Goldsworthy* (n 44) s 4(2), sch 1 cls 3(2)(a), 8(3)(b). Justice Mason also noted that cl 9(4), which is not nominated in the 'enacting clause', detailed the precise terms of the lease, but cl 8(2) provided the primary obligation: see *Dredging Lease Case* (n 46) 208.

[48] Mason J, in the case of *Ansett Transport Industries Pty Ltd v Commonwealth*, was of the opinion that in some circumstances all forms of State Agreement ratification provisions could validly authorise the scheduled agreement clauses to demise Crown land, but other members of the Court did not endorse this view: *Ansett Transport Industries Pty Ltd v Commonwealth* (1977) 139 CLR 54, 76–8. For discussion see Leigh Warnick, 'State Agreements: The Legal Effect of Statutory Endorsement' (1982) 4(1) *Australian Mining and Petroleum Law Journal* 1, 44, 46.

B Sankey v Whitlam *and* Margetts v Campbell-Foulkes *1978–1979*

In 1978, the High Court, in the decision of *Sankey v Whitlam*,[49] raised serious doubts about the capacity of 'bare approval' ratification provisions, which merely stated the scheduled agreement was 'approved' or 'ratified', to modify other state Acts.[50] In WA, the issue came to a head in 1979,[51] when environmental protestors disrupted work at the Wagerup refinery. The 'bare approval' ratification provision of the State Agreement authorising the refinery provided the scheduled agreement was 'hereby ratified'.[52] The protestors appealed their conviction under the *Police Act 1892* (WA) for obstructing an activity carried out pursuant to state law.[53] The appellants argued that the State Agreement was not a state law.[54] The WA SCA decided the case on an alternative point, but the case exposed the potential deficiency in State Agreements' authority to modify or vary other Acts or laws for the purposes of the agreement. The WA Government responded decisively to the dilemma by passing the *GA Act* in 1979. The Act rectified potentially invalid executive government actions and illegal proponent actions, carried out under the purported authority of the State Agreements, by retrospectively shoring up State Agreement ratification provisions.[55] The *GA Act* phrasing was adopted by post-1980s principal and supplementary agreements that use the 'take effect' ratification without limiting the operation of the *GA Act.* For example, '[w]ithout limiting or otherwise affecting the application of the *Government Agreements Act 1979*, the Agreement shall operate and take effect notwithstanding any other Act or law'.[56] After the enactment of the *GA Act,* the debate about the validity of State Agreements appeared settled, at least in WA.

C Western Australia v Ward *2002*

For the purposes of discussing the 1960s ratification, the next relevant case occurred two decades later when the High Court considered the grant of mining leases in *Western Australia v Ward* ('*Ward*').[57] In the case of *Ward*, the WA State Agreement 1960s ratification (of which the *Goldsworthy* agreement is our example) received some relevant obiter from the High Court. In *Ward*, the joint judgment, citing the

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[49] *Sankey* (n 41).
[50] Ibid 89–90.
[51] *Margetts* (n 41).
[52] *Alumina Refinery (Wagerup) Agreement and Acts Amendment Act 1978* (WA) s 2.
[53] *Police Act 1892* (WA) s 67(4): see 1978 reprint.
[54] *Margetts* (n 41).
[55] *GA Act* (n 16) s 3.
[56] *Iron Ore (Hope Downs) Agreement Act 1992* (WA) s 4(3).
[57] *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*').

Dredging Lease Case, refers to the 1960s State Agreements to distinguish the Ord River Irrigation project.

> The Project developed in a piecemeal fashion. It did not proceed by way of implementation of an agreement between the State and a [corporation]…for the development and operation of infrastructure, being an agreement to which statutory force was given by the Parliament of the State. Statutes such as the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA), the *Iron Ore (Mount Newman) Agreement Act 1964* (WA) and the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) gave statutory force to agreements of this description and specifically modified a range of general legislation so as to vest the land and mineral interests necessary for the particular project. In that sense, and in contrast to the development at the Ord River, expressions such as the "Mount Newman Project", the "Mount Goldsworthy Project" and the "Hamersley Project" had a defined statutory content, beyond the identification of a particular geographical area or particular economic activities conducted there.[58]

Unfortunately, the High Court did not need to extrapolate further on the operation of the 1960s agreement ratification provisions because the relevant State Agreement, the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA), clearly differentiates its legislative terms from its contract clauses — the legislative terms are in the Act and contract clauses are in the schedule.[59] The Court appears to endorse the view of Mason J by describing the 1960s State Agreement Acts (*Goldsworthy*, *Hamersley*, and *Newman*) as giving 'statutory force' to the agreements, but does not make a definitive statement about the operation of 'takes effect' ratification or differentiate between the general agreement terms and those specified by the 'enacting clause'.

Numerous other cases before and after the *Ward* decision refer to the *Dredging Lease Case*, but not to interpret 1960s State Agreement ratification provisions.[60]

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[58] *Ward* (n 57) [144], Gleeson CJ, Gaudron, Gummow, and Hayne JJ. See *Ward* at n 251, citing the *Dredging Lease Case* (n 46) 205–7, and *Goldsworthy Mining Ltd v Commissioner for Taxation (Cth)* (1975) 132 CLR 463. The other references to the *Dredging Lease Case* in *Ward* discuss Mason J's interpretation of the reservations on the leases: see *Ward* at nn 625–627, 663, 878, 1013, 1048 and 1065. Note the Court also cites *Wik Peoples v Queensland* (1996) 187 CLR 1, 251–7, discussing the *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957* (Qld) s 3, which ratified the agreement as legislation. The Ord River Irrigation project should not be confused with the Ord River hydro-electricity project that is the subject of a State Agreement: *Ord River Hydro Energy Project Agreement Act 1994* (WA).

[59] *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA) ss 1–29.

[60] The case is usually discussed or cited in the context of leases (exclusive possession, covenants or reversions), the meaning of 'land', or taxes. See, in chronological order, *West Coast Council v Coverdale* [2014] TASSC 42, [16], [20], citing *Risk v Northern Territory* (2000) 105 FCR 109 [34]; *Goodwin v*

D Re Michael *2003 and Subsequent WA Cases*

In WA, the enactment of the *GA Act* in 1979 resolved any issues about the legal capacity of State Agreements to modify other legislation. However, there was speculation about the *GA Act*'s potential conferral of statutory status on the scheduled agreements. In 2003, the distinction between contract and statutory ratification and the operation of the *GA Act* s 3 was confirmed in the State jurisdiction in the case of *Re Michael*.

In the case of *Re Michael,* the WA SCA ruled on the effect of the *GA Act* s 3, and the 'takes effect' ratification provision in the *Goldfields Gas Pipeline Agreement Act 1994* (WA) s 4 ('*Pipeline Agreement Act*').[61] The Court decided that the *GA Act* s 3 and the *Pipeline Agreement Act* ratification s 4, separately or in combination, did not give the agreement clauses the force of law — the clauses were contract terms.[62] In the same year, one month after the *Re Michael* decision, in the case of *Hancock*, the Court construed the 1960s *Newman* scheduled agreement as a contract.[63] Importantly for our purposes, the *Newman* agreement has the 1960s ratification identical to the *Goldsworthy* ratification, that is, 'takes effect' ratification with an 'enacting clause'.[64]

Western Australian Sports Centre Trust [2014] WASC 138, [50]; *Re Pescott and Inspector-General in Bankruptcy* (2013) 137 ALD 128, [129] n 143; *Banjima People v State of Western Australia (No 2)* (2013) 305 ALR 1, [1046], [1059]; *Re Willmott Forests Ltd (receivers and managers appointed) (in liq)* (2012) 36 VR 472 [80] n 56; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [7] n 18; *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* (2007) 70 NSWLR 544, [75], citing *Risk v Northern Territory of Australia* (2002) 210 CLR 392, [31]–[32] (Gleeson CJ, Gaudron, Kirby, and Hayne JJ); *L & T (Sales) Pty Ltd v Chief Commissioner of State Revenue* (2007) 67 ATR 569, [30]–[31]; *Tolhurst Druce & Emmerson (a firm) v Maryvell Investments Pty Ltd (in liq)* (2007) VSC 271, [141] n 1; *Nashvying Pty Ltd v Giacomi* [2007] QSC 257, [23]; *Trust Co of Australia Ltd v Chief Commissioner of State Revenue* (2006) 66 NSWLR 551, [38]; *Equuscorp Pty Ltd v Belperio* [2006] VSC 14, [204]–[206]; *Gumana v Northern Territory of Australia* (2005) 141 FCR 457, [69]; *Reef Networks Pty Ltd v Deputy Commissioner of Taxation* [2003] FCA 1552, [23], [25]; *Wilson v Anderson* (2002) 213 CLR 401, [194] n 192; *Risk v Northern Territory of Australia* (2002) 210 CLR 392, [40], [42], [81], [120]; *Byrnes v Jokona Pty Ltd* [2002] FCA 41, [60]; *Bufalo Corp Pty Ltd v Leone* [2001] VSC 505, [45]–[46]; *City of Rockingham v PMR Quarries Pty Ltd* [2001] WASCA 317, [44], [47], [56], [68]–[69]; *Risk v Northern Territory of Australia* (2000) 180 ALR 705, [33]–[34], [44], [46]–[48], [52], [61]; *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185, [35]–[36]; *Wik Peoples v Queensland* (1996) 187 CLR 1, 37, 74, 78, 117, 152 nn 564–565, 728, 887; *Commonwealth v Newcrest Mining (WA) Ltd* (1995) 130 ALR 193, 234; *Lewis v Bell* (1985) 1 NSWLR 731, 734; *Dampier Mining Co Ltd v Federal Commissioner of Taxation* (1981) 35 ALR 335, 337; *Dampier Mining Co Ltd v Federal Commissioner of Taxation* (1979) 27 ALR 579, 584–586; *ICI Alkali (Australia) Pty Ltd (in vol liq) v Federal Commissioner of Taxation* (1976) 11 ALR 324, 396.

[61] *Re Michael* (n 5).

[62] Ibid [28]–[30].

[63] *Hancock* (n 6) [67], [71]–[75], considering *Iron Ore (Mount Newman) Agreement Act 1964* (WA) ('*Newman*').

[64] In *Hancock* (n 6), the Court did not directly apply *Re Michael* (n 5) but did find that both the *GA Act* (n 16) and the *Newman* agreement (n 63) ratification did not provide statutory force to the scheduled agreement, and contract interpretation applied [64]–[67]. The agreement was interpreted as a

The WA SCA and the WA Supreme Court have followed and approved the precedents of *Re Michael*,[65] and *Hancock,*[66] in subsequent decisions that required the interpretation of State Agreement ratification.[67]

The WA state courts have consistently decided that the post-1980 'takes effect' ratification, the *GA Act* s 3, and the *Goldsworthy* or 1960s 'takes effect' ratification with an 'enacting clause', do not ratify the scheduled agreement (or specific clauses of the agreement) as legislation. Consequently, in the State jurisdiction, only 'legislative ratification' — when the authorising Act states the scheduled agreement takes effect 'as though enacted in this Act' — provides statutory force to the scheduled agreement.[68] Notably, the decisions of *Re Michael* and *Hancock* do not refer to the *Dredging Lease Case* or the obiter in *Ward*. So, should the WA SCA have considered *Ward* and the *Dredging Lease Case* when deciding the operation of the *GA Act* s 3,[69] and the *Pipeline Agreement Act's* 'takes effect' ratification provision, or, at least, the *Newman* agreement 1960s ratification as considered in *Hancock*?

E *The Federal Court Cases of* Brown *2012 and* Ngadju *2016*

In contrast to the State decisions of *Re Michael* and *Hancock*, the FCA Full Court considered the *Dredging Lease Case* decision in the case of *Brown FCAFC*,[70] and distinguished that case in *Ngadju*. In the later appeal of the *Brown FCAFC* decision to the High Court the 1960s ratification was not discussed.[71] So, when deciding *Ngadju,* the Federal Court followed the interpretation in *Brown FCAFC.* In 2012, in the case of *Brown FCAFC,* the Federal Court deliberated on the *Goldsworthy* agreement in the Native Title rights context, and discussed the interpretation of the *Goldsworthy* ratification provision in the *Dredging Lease Case*. In 2016, in the case of *Ngadju*, the Court applied *Brown FCAFC* to distinguish the *WMC* agreement ratification from the *Goldsworthy* agreement 1960s ratification.

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contract, according to the rules of contract. The Court did not differentiate clauses nominated by the enacting clause (sch 1 cls 9(2), 9(3)) as having statutory force, or comment that the agreement had both contract and legislative terms. One of the relevant clauses discussed was cl 9(2), nominated by the enacting clause as 'enacted', see *Newman* sch 1 cl 3(2)(a). However, the whole agreement was interpreted as a contract.

[65] *Oz Minerals* (n 42) [179]; *Kidd* (n 42) [111]–[112]. See also *Ngadju* (n 1) [31]–[35].

[66] *Kidd* (n 42) [120]; *Mineralogy 2005* (n 42) [13]–[14].

[67] Ibid.

[68] See for example, *Re Michael* (n 5) [21], citing the *McCamey's* agreement (n 40) s 3.

[69] Note the contrary opinion of Heenan J discussed at *Re Michael* (n 5) [68], referring to *Southern Cross Pipelines Australia Pty Ltd & Ors v Kenneth Comninos Michael Western Australian Independent Gas Pipelines Access Regulator & Anor* [2002] WASC 149 [29]–[30]. Heenan J decided the issues on the well-established principle that a present parliament cannot bind a future parliament's legislative powers (at [56], also discussed in *Re Michael* (n 5) [45]–[47]).

[70] *Brown FCAFC* (n 4).

[71] *Brown HC* (n 4).

In the *Brown FCAFC* decision, the operation of the *Goldsworthy* scheduled agreement terms as legislation or contract was not a deciding factor. The issue was whether the *Goldsworthy* agreement mining leases conferred the right of exclusive possession and,[72] if the mining leases did not, were the competing rights of the proponent and the Native Title claimants inconsistent? In this context, the operation of the scheduled agreement clauses as legislation or contract was not pivotal to the proponents' State Agreement rights. The substantive question was the nature of the rights conferred by the leases, in particular, the proponents right to exclusive possession, not the source of the authority to grant the mining lease.[73] Accordingly, in the subsequent appeal to the High Court, the Court refers to the *Dredging Lease Case* in relation to the nature of lease rights, but does not discuss the *Goldsworthy* authorising Act's ratification provision.[74]

In *Brown FCAFC,* Greenwood J, under the heading 'Aspects of the agreement', discussed the passage in *Ward* quoted above, noting the 'bespoke' statutory arrangements of the 1960s State Agreements.[75] The Court considered the *Dredging Lease Case* because the respondent had raised this authority in their submissions. Justice Greenwood noted the operation of the *Goldsworthy* agreement ratification as follows:

> Section 4(1) of the 1964 Act gave general legislative approval to the agreement made by the executive and s 4(2)(b), without limiting the scope of that approval, gave immediate effect to cl 3(2) of the agreement. Clause 3(2)(a) provides that upon enactment of the 1964 Act ratifying the agreement cl 8 (which makes provision for the grant of mineral leases…among other things), and other nominated clauses of the agreement, shall take effect as though those clauses had been enacted by the ratifying 1964 Act.[76]

Justice Greenwood referred to Mason J's note that the *Goldsworthy* scheduled agreement's 'enacting clause' (cl 3(2)) in conjunction with the 'takes effect' ratification in the authorising Act (s 4(2)(b)) gave statutory force to cl 8.[77]

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[72] *Goldsworthy* (n 44) sch 1 cls 8(2)(a), 11(6).
[73] The deciding factor was that the lease rights were subject to a *Goldsworthy* agreement term that provided for third party access, thus, precluding the proponent's right to exclusive possession. See *Brown HC* (n 4) [8], [45].
[74] *Brown HC* (n 4) [43]. The Court did not discuss Mason J's interpretation of the *Goldsworthy* authorising Act's ratification provision that allowed the scheduled agreement cl 8 to operate as legislation as opposed to contract: see reference at n 64 citing the *Dredging Lease Case* (n 46) 212–9. The Court also cited *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 192–3 for the same purpose.
[75] *Brown FCAFC* (n 4) [132].
[76] Ibid [128].
[77] *Brown FCAFC* (n 4) [394].

Greenwood J commented on a number of occasions that the leases were not granted under the *Mining Act 1904*, and that the leases were granted under the *Goldsworthy* State Agreement.[78] However, Greenwood J did not differentiate between the operation of contract and legislative clauses, as prescribed by the 'enacting clause'.[79]

Under the subsequent heading '[t]he provisions of the agreement, the Mining Act 1904 (WA) and the Mining Act 1978 (WA)', Greenwood J observed:

> It is important to remember that the Mount Goldsworthy leases were not granted under the *Mining Act 1904*. They were granted, as appears later in these reasons, under cls 8(2)(a) and 11(6) of the agreement (together with renewal entitlements) given force by the 1964 [State Agreement] Act.[80]

In my opinion this observation is not strictly accurate, even when proceeding on the *Dredging Lease Case* precedent, because the 'enacting clause' does not specify cl 11(6) as legislation.[81] The *Goldsworthy* agreement mining leases (ML 235, ML 249) were conferred by cls 8(2)(a) and 11(6).[82] ML 235 is conferred by cl 8, which is nominated by the 'enacting clause'. In contrast, ML 249 is conferred by cl 11(6), which is not nominated by the enacting clause as legislation. In addition, cl 1 defines a mineral lease granted pursuant to cl 11(6) as a cl 8 lease,[83] but cl 1 is also not specified in the 'enacting clause'. So where does the authority for cl 11(6) to operate as legislation originate?

If the definition (cl 1) is a contract term, its capacity to assert cl 11(6) is a legislative cl 8 lease is questionable. Greenwood J discussed mining lease clauses (cls 1, 8, 11(6)), and the mineral leases (ML235 and ML 246) together.[84] The Court did not

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[78] Ibid [266], [338], [341], [349], [394].
[79] *Goldsworthy* (n 44) sch 1 cl 3(2)(a).
[80] *Brown FCAFC* (n 4) [153].
[81] *Goldsworthy* (n 44) sch 1 cl 3(2)(a).
[82] *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* (2010) 268 ALR 149 [10]–[12].
[83] *Goldsworthy* (n 44), cl 1 defines a mineral lease as follows: '"mineral lease" means the mineral lease referred to in cl 8(1) hereof or 8(2)(a) hereof and includes any renewal thereof and where the context so permits shall extend to and be deemed to include a mineral lease granted under the provisions of clause 11(6) hereof and any renewal thereof'.
[84] *Brown FCAFC* (n 4). See for example, the discussion of *Goldsworthy* (n 44) cl 9(2)(a), a statutory clause, and cl 9(2)(b), a contract clause, at [383]–[384], or the discussion of cl 8, a statutory clause, and cl 11(6), a contract clause, at [153]; or the discussion of ML 235 and ML 249 at [184]–[197]. On appeal to the High Court the leases are also discussed together, however, the issue of the terms ratification as legislation or contract is not raised by the proponent or respondent and thus not an issue. See *Brown HC* (n 4) [22], [46], see also [5]–[8] nn 27–33.

refer to the distinction between cls 8 and 11(6) or explain how cls 1 and 8 operate to confer statutory force on cl 11(6).[85]

Importantly on this point, Greenwood J did not consider that at the time Mason J decided the *Dredging Lease Case* the *GA Act* was not in force. In 1973, the 'enacting clause' of the agreement was authorised by 'takes effect' ratification and other clauses were only approved.[86] So Mason J had to determine whether the agreement itself provided statutory authority for the lease grant. In *Brown FCAFC*, Greenwood J discussed the *GA Act* s 4 (which creates an offence for trespass on State Agreement lands)[87] but not s 3, which validates State Agreements by providing they 'take effect' not withstanding any other Act or law. So, the effect of the *GA Act* 'takes effect' ratification support on the clauses not nominated by the enacting clause (such as cls 1 and 11(6)) was not discussed or compared to the ratifying provision in the authorising Act.

Justice Greenwood concluded that the sea-bed land issue decided in the *Dredging Lease Case* did not 'provide, ultimately, any determinative guidance'.[88] While Greenwood J took on the task of explaining the ratification provisions in the *Goldsworthy* State Agreement, Mansfield and Barker JJ did not challenge or comment on this interpretation.

On appeal, the High Court did not need to examine the source of the authority to grant the leases so did not discuss the *Goldsworthy* 1960s ratification, or the *Dredging Lease Case*, or the *GA Act*.[89] In the subsequent case of *Ngadju,* in a unanimous decision (Mansfield and Dowsett JJ concurring with the reasons of Jagot J), the FCA Full Court relied on *Brown FCAFC* and the *Dredging Lease Case* as authorities to distinguish the *WMC* agreement ratification from the *Goldsworthy* agreement 1960s ratification.

In contrast to *Brown FCAFC*, in the case of *Ngadju*, the central issue was the source of the authority to grant the mining lease, and the deciding factor was whether the scheduled agreement clause conferring the mining lease operated as contract or legislation.[90] The authorising Act in the *WMC* agreement ratifies the agreement by

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[85] Note Justice Mason had a similar dilemma in the *Dredging Lease Case* (n 46) that he resolved. See the explanation at n 47 above.
[86] *Goldsworthy* (n 44) ss 4(1), 4(2)(b).
[87] *Brown FCAFC* (n 4) [198]–[202]. This provision was to prevent protestors entering lands subject to State Agreement rights, such as those at the Wagerup refinery (the subject of the *Margetts* (n 41) case).
[88] *Brown FCAFC* (n 4) [404] (Greenwood J).
[89] *Brown HC* (n 4).
[90] *Ngadju* (n 1) [25].

providing '[t]he Agreement is approved, and subject to its provisions shall operate and take effect'. It is unlikely this form of ratification is sufficient to validly modify other legislation because it lacks the words that indicate the agreement operates 'not withstanding any other Act or law' common to 'takes effect' ratification. Therefore, the *WMC* agreement would rely on the *GA Act* s 3 to support its ratification. The *Ngadju* decision cited with approval *Re Michael* and the other relevant State authorities (except for *Hancock*) for the propositions that 'takes effect' ratification authorises the scheduled agreement as a contract, and the *GA Act* does not elevate the State Agreements to legislation.[91] The reason given was that 'takes effect' ratification lacks the vital words 'as if enacted'.[92] The Court distinguished the *Goldsworthy* 1960s ratification by applying the reasoning of Greenwood J in the *Brown FCAFC* decision, stating that 'the ratifying statute in *Brown*, as explained at [127] and [128], included a provision that the agreement took effect "as though those clauses had been enacted by the ratifying 1964 [State Agreement] Act"'.[93] In my opinion this statement is not accurate. The *Goldsworthy '*ratifying statute' (the authorising Act) does not contain the phrase 'as though those clauses had been enacted'; that phrase is in the 'enacting clause' of the scheduled agreement.

The Court quoted Greenwood J in *Brown FCAFC* to distinguish the *Goldsworthy* leases from the *WMC* leases. In *Brown FCAFC* Greenwood J stated that the *Goldsworthy* leases fell into the category of special leases described in *Ward* and 'were granted under the Agreement itself with the authority of the [*Goldsworthy*] 1964 adopting Act'.[94] The Court in *Ngadju* then reconciled the *Brown* decision with the WA authorities, as follows:

> The reasoning in Brown is thus consistent with that in the other cases referred to above. In particular, there is a critical difference between a government agreement which, by statute, is approved and operates and takes effect according to its terms, notwithstanding any other Act or law and a government agreement which, by statute, is itself enacted. In the former case, the government agreement is of contractual force and effect only. The State cannot, by contract, give to itself a right to alienate Crown land. Accordingly, the government agreement in such a case cannot be the source of power to grant a mining lease. The source of power remains the 1904 [Mining] Act.[95]

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[91] *Ngadju* (n 1) [31]–[35], citing (in this order) *Oz Minerals* (n 42) [179], *Re Michael* (n 5) [20]; *Kidd* (n 42) [110]–[112]. See also the discussion of the *GA Act* (n 16) at [40]–[41].
[92] *Ngadju* (n 1) [37]–[39].
[93] Ibid [37].
[94] *Ngadju* (n 1) [37], quoting *Brown FCAFC* (n 4) [349].
[95] *Ngadju* (n 1) [38].

This reasoning is not consistent with WA court decisions, which have maintained that only agreements which ratify the agreement 'as though enacted' in the authorising Act confer legislative force on the scheduled agreement.[96] Further, the Court in *Ngadju* assumed the enacting phrase is in the ratifying Act, which it is not. This leaves an uneasy dichotomy; if 'takes effect' ratification or the *GA Act* 'takes effect' ratification support does not authorise the 'enacting clause' as legislation, but merely contract, where does the authority of the 'enacting clause' to legislate come from?

The case of *Hancock* illustrates the divergence between the State and Federal Court decisions. The WA SCA considered the *Newman* agreement 1960s ratification that has an identical ratification and 'enacting clause' to the *Goldsworthy* agreement. One of the relevant clauses discussed was cl 9, specified in the 'enacting clause'.[97] The Court did not differentiate the specified clauses as having statutory force or comment that the agreement had both contract and legislative terms.[98] The agreement was interpreted as a contract.

F *Justice Edelman's Interpretation*

The decisions of lower courts did not go unnoticed by Edelman J. The *Mineralogy HC* case mostly discussed constitutional issues and manner and form;[99] however, at least impliedly, the parties' arguments allowed Edelman J to comment at length on State Agreement ratification and the *GA Act* s 3.[100]

In this case the High Court considered the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ('*Mineralogy*'). The *Mineralogy* authorising Act ratified the scheduled agreement with a 'takes effect' provision as follows:

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[96] *Re Michael* (n 5) [21], citing *McCamey's* (n 40) s 3.
[97] *Newman* (n 63) sch 1 cl 3(2)(a).
[98] *Newman* (n 63) sch 1 cll 9(2), 9(3); *Hancock* (n 6) [7], [67].
[99] The key issue was whether the *Iron Ore Processing Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) could validly amend the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ('*Mineralogy*'). For further discussion see Murray Wesson et al, 'How Clive Palmer could challenge the Act designed to stop him getting $30 billion', *The Conversation* (online, 2 September 2020) <https://theconversation.com/how-clive-palmer-could-challenge-the-act-designed-to-stop-him-getting-30-billion-145098>; Natalie Brown, 'Clive Palmer takes a Sovereign Risk challenging the authority of WA Parliament', *AUSPUBLAW* (online, 9 September 2020) <https://auspublaw.org/2020/09/clive-palmer-takes-a-sovereign-risk-challenging-the-authority-of-wa-parliament/> ('Brown 2020').
[100] *Mineralogy HC* (n 9) [119]–[120]. The State proceeded on the basis the agreement clauses were contract. The plaintiffs argued that the authorising Act imbued at least some of the agreement provisions as statute law.

> **4 Agreement ratified and implementation authorised**
>
> The Agreement is ratified.
>
> The implementation of the Agreement is authorised.
>
> Without limiting or otherwise affecting the application of the Government Agreements Act 1979, the Agreement operates and takes effect despite any other Act or law.

Justice Edelman considered the jurisprudence on State Agreement ratification and explained the two approaches that imbued the clauses with either contractual or statutory force.[101] The first approach is that the clauses only have contractual force and are only enforceable as a matter of contract law.[102] His Honour commented that State Agreements with bare approval (for example, the agreement is merely authorised or ratified) plainly intended to adopt the first approach.[103] Justice Edelman stated that legislative ratification that provides the agreement is 'as if enacted' in the authorising Act clearly intends all of the agreement clauses to have contractual and statutory force (the second approach).[104] The second approach also includes 'takes effect' ratification or the *GA Act* s 3 (or both), which provides that some (or all) of the agreement clauses have statutory force in addition to contractual force.[105]

His Honour then examined the *GA Act* s 3, stating that the 'overarching purpose…was to give statutory effect, where it was needed, to the provisions of Government agreements',[106] and noting that the WA Legislative Council stated the Act's purpose was to '"put…beyond legal doubt" that a Government agreement would become the law of the State'.[107] Consequently, the *GA Act* s 3, which provides the agreement 'takes effect' not withstanding any other Act or law, gives statutory effect to a State Agreement clause to the extent that it modifies another Act or law.[108] In a nutshell, the modification of other Acts or laws is only possible if the clause has statutory force.[109]

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[101] Ibid [123]–[125].
[102] Ibid [123]–[124]. His Honour commented that '[t]he legislative effect [the ratification of the contract] is only the removal of any common law or statutory obstacles to the enforceability of the agreement, such as a lack of power of a contracting party or the illegality of any of the contractual provisions'.
[103] Ibid [124].
[104] Ibid [127].
[105] Ibid [125].
[106] Ibid [132].
[107] Ibid.
[108] Ibid [134].
[109] Ibid.

In my opinion, it is difficult to refute the plain logic of this argument. Justice Edelman applies the principle that only legislation can modify legislation, therefore a contract term cannot modify legislation. Consequently, any terms of the scheduled agreement that purport to modify Acts or laws must be given statutory force by the ratifying Act or the *GA Act* s 3. His Honour finds support for his opinion in Parliament's intention, as stated by the Legislative Council, that after the enactment of the *GA Act*, a State Agreement would 'become a law of the State'.

His Honour disagreed with the proposition that the authorising Act (in this case referred to as the State Act) merely modified laws to provide contractual effect to clauses in the agreement that were inconsistent with other laws.[110] His Honour explained '[t]he intention of Parliament to give effect to [the scheduled agreement clauses that] expressly or impliedly modify other laws must include an intention to give those [clauses] the force of law'.[111] Justice Edelman stated it would be 'a verbal nonsense' to speak of the authorising Act (or the *GA Act*) as merely removing or modifying inconsistent laws to give contractual effect to the agreement provisions.[112]

His Honour commented that for the purposes of interpretation there 'is rarely any magic in statutory interpretation in the use of particular words': simply interpret the words in context, having regard to Parliament's purpose.[113] Justice Edelman interpreted s 3 by applying the standard principles of statutory interpretation and drawing on the Hansard debate to determine the objective intention of the WA Parliament.

In short, Edelman J was of the opinion that only clauses with statutory force can modify other Acts or laws. This opinion reflects the rule that Parliament's power cannot be fettered by the executive,[114] or a previous parliament, and only legislation

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[110] Ibid [142]; *Mineralogy* (n 99). See ibid [141]–[142] (Edelman J): 'there are numerous provisions of the State Agreement that cannot "operate[] and take[] effect" merely by removal of statutory obstacles: those provisions modify other laws and require the force of statute law to take effect according to their terms. The intention of Parliament to give effect to those contractual provisions which expressly or impliedly modify other laws must include an intention to give those contractual provisions the force of law. Numerous examples can be given of provisions in the State Agreement which expressly or impliedly modify other laws and as to which it would be a verbal nonsense to speak of the State Act as merely removing inconsistent State laws to give contractual effect to the provisions'. His Honour then noted a number of *Mineralogy* agreement clauses and the Acts the clauses expressly or impliedly modify, including the *Mining Act 1978* (n 23)*, Land Administration Act 1997* (WA) and the *Aboriginal Heritage Act 1972* (WA).

[111] *Mineralogy HC* (n 9) [141] (Edelman J).

[112] Ibid [142].

[113] Ibid [138].

[114] For discussion of the separation of powers between the executive and legislature, see Brown 2020 (n 99); Michael Crommelin, 'State Agreements: Australian Trends and Experience' (1996) 16

has the capacity to amend or modify legislation.[115] Hence, State Agreements that are hybrids of contract and legislation present challenges to straightforward statutory interpretation because the contract terms rely on the authority of the ratifying Act and do not have statutory force in themselves.[116] Agreement terms ratified as contract do not always operate as the parties intended because the term lacks statutory force.[117] Justice Edelman resolved these conflicts by interpreting the plain words of the *GA Act* s 3 — the phrase 'takes effect despite any other Act or law'[118] provides statutory authority to State Agreement terms that modify other Acts or laws.

Justice Edelman concluded that 'context, purpose and ordinary meaning' of the *GA Act* s 3 ratification support reflects the second approach (legislative ratification).[119] His Honour stated that the decisions in *Re Michael, Ngadju,* and other cited authorities, were incorrect in relation to the capacity of the *GA Act* to provide statutory force to agreement clauses.[120] His Honour stated that 'neither in *Re Michael* nor in the cases that followed it, did the courts closely consider the context purpose or ordinary meaning of the words'.[121] The authorities were correct in finding that

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Australian Mining and Petroleum Law Yearbook 328, 331; Nicholas Seddon, *Government Contracts: Federal, State and Local* (5th ed, 2013) [5.16]; Warnick (n 48); Murray Wesson and Ian Murray, 'Explainer: why did the High Court rule against Clive Palmer and what does the judgment mean?', *The Conversation* (online, 13 October 2021) <https://theconversation.com/explainer-why-did-the-high-court-rule-against-clive-palmer-and-what-does- he-judgment-mean-169633>; *Mineralogy HC* (n 9); *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 [153]–[156]; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 355 [13]; *McCawley v The King* (1920) 28 CLR 106, 107, 122–5. See also *South Eastern Drainage Board (South Australia) v Savings Bank of New South Wales* (1939) 62 CLR 603, 618, 623, 625, 636; *Nicholas* (n 12). See, for an example of a State Agreement term attempting to fetter Parliament, *Alumina Refinery (Mitchel/Plateau) Agreement Act 1971* (WA) sch 1 cl 3(3)(f): 'no future Act of the said State will operate to increase the Company's liabilities or obligations'. On sovereign risk, see Brown 2018 (n 19) 58–9.

[115] For discussion on the point that only legislation can modify legislation, see *Sankey* (n 41) and the discussion in Part V(B) above. As a further example, Parliament may provide in legislation executive powers to make subsidiary legislation such as rules or regulations, but this subsidiary legislation must conform with the authorising Act and is subject to Parliamentary disallowance. See *Interpretation Act 1984* (WA) ss 42, 43. Statutory provisions that purport to provide the executive with legislative authority are known as Henry VIII clauses, which are beyond the scope of this discussion.

[116] *Hancock* (n 6); *Re Michael* (n 5).

[117] *Re Michael* (n 5) [45]–[47], [52]–[54] (Parker J).

[118] For this paraphrase of the *GA Act* (n 16) s 3, see *Mineralogy HC* (n 9) [120] (Edelman J).

[119] *Mineralogy HC* (n 9) [136].

[120] Ibid [136]. The *Ngadju* case (n 1) [41] is cited at n 151. In this paragraph the Court states the *GA Act* (n 16) s 3 does not provide the agreement is enacted and thus does not give the agreement statutory force. See also n 151, Justice Edelman citing the following authorities that had followed this interpretation: *Oz Minerals* (n 42) 189–190 [179], 204 [275]; *Western Australia v Graham* (2016) 242 FCR 231, 240 [41]. Cf *West Lakes* (n 40) 398.

[121] *Mineralogy HC* (n 9) [136].

clauses continue to have contractual effect, but incorrect when finding that s 3 cannot imbue State Agreement clauses with additional statutory force, and on that point should be overruled.[122]

In a nutshell, Edelman J decided the effect of the *GA Act* and 'takes effect' ratification is that the clauses in the scheduled agreement that expressly or impliedly modify other Acts or laws must have statutory force.[123] Ipso facto, if the clause does not modify other Acts or laws, it will not attract s 3, and remains a contract term.[124] This is a significantly different interpretation to both the WA SCA and Federal Court. The WA SCA has followed the principle that the *GA Act* and 'takes effect' ratification created contract clauses that had the capacity to modify inconsistent laws; the Federal Court distinguished State Agreement 1960s ratification that had an 'enacting clause' but followed the same reasoning as *Re Michael* in relation to the *GA Act.* In the light of Edelman J's reasoning, an 'enacting clause' (at least after the enactment of the *GA Act*) is redundant because any clause that modifies other Acts or laws will have statutory force as per the *GA Act.* State Agreements prior to the *GA Act* are subject to that Act because it retrospectively applies to the earlier State Agreement Acts,[125] and State Agreement ratification provisions post the *GA Act* include the words 'without limiting the operation' of the *GA Act* and adopt the 'takes effect' ratification. Therefore, all WA State Agreements have 'takes effect' ratification or attract the operation of the *GA Act* and,[126] applying Edelman J's interpretation, all clauses that modify Acts or laws would have statutory force in addition to contractual force.

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[122] Ibid [136].
[123] Ibid [141].
[124] Ibid [143]–[145]. In this case Edelman J found that the relevant clause (cl 32) did have statutory force because it altered the manner in which a provision can 'have effect'. The clause allowed for variation by Parliamentary disallowance.
[125] In accordance with statutory interpretation principles, it also prevails over earlier State Agreement Acts.
[126] There may be some query about the prospective operation of the *GA Act* (n 16). In my opinion the statutory interpretation presumption that legislation applies prospectively (only retrospective legislation needs to be express) is the natural interpretation. In any event, for the purposes of this article it is not necessary to explore this aspect because post-1980s State Agreements adopted the *GA Act* 'takes effect' ratification.

Table 1: Interpretation of ratification provisions and the GA Act *s 3*

Ratification provision	**Bare approval 'approved' or 'ratified'**	**'As if enacted in this Act'**	**'Takes effect despite any other Act or Law'**	**'Takes effect' ratification with an 'enacting clause'**	**GA Act s 3 'takes effect' ratification support**
WA SCA	Contract only cannot modify other Acts or laws — needs *GA Act* support	Legislation	Contract	Contract	Contract
Federal Court	Contract only cannot modify other Acts or laws — needs *GA Act* support	Legislation	Contract	Legislation (at least some clauses)	Contract
Edelman J	Contract only cannot modify other Acts or laws — needs *GA Act* support	Legislation	*GA Act* s 3 applies — legislation if the clause is modifying another Act or law[127]	*GA Act* s 3 applies — legislation if the term is modifying another Act or law	Legislation if the clause is modifying another Act or law

[127] Edelman J does not engage in a lengthy discussion of the meaning of 'takes effect' ratification in the State Agreement authorising Act, or those with an the 'enacting clause', as his interpretation of the *GA Act* (n 16) s 3 makes the discussion redundant. The retrospective application of the *GA Act* and its preservation in later State Agreements means that all State agreements are subject to the *GA Act* s 3. In any event, it is reasonable to assume Edelman J would endorse the view that 'takes effect' ratification in the authorising Act would have the same effect as the *GA Act* s 3. For Edelman J's discussion of bare approval and 'as though enacted' ratification see *Mineralogy HC* (n 9) [124], [127]–[129].

VI RECONCILIATION OF THE INCONSISTENT DECISIONS OF THE LOWER COURTS

Justice Edelman reconciled the inconsistency between the state and federal courts' interpretation of State Agreement ratification by finding that both incorrectly interpreted the *GA Act* s 3. In addition, his reasoning does not disturb the *Dredging Lease Case* decision that was made prior to the enactment of the *GA Act*. While the application of State Agreement clauses as potentially only contractual (if the law is not modified) or a contract clause with additional statutory force (if the law is modified) may seem complex, it is preferable to the current inconsistencies in the lower courts' decisions. If we apply the Federal Court's interpretation of the 1960s ratification, there are some agreements where clauses with purported statutory force have been amended by clauses in supplementary agreements that only have contractual force. Justice Edelman's interpretation resolves the issue of clauses enacted by 'enacting clauses' being amended by clauses ratified as contract — any clause that modifies Acts or laws will have statutory force.

In the Native Title jurisdiction, this interpretation almost certainly means the pivotal issue in the *Ngadju* case was wrongly decided. The *WMC* authorising Act's ratification provision did not include the important phrase 'notwithstanding any other Acts or laws'. Consequently, this agreement cannot validly modify other Acts or laws without the support of the *GA Act* s 3. The clause under consideration modified the grant of the mining lease under the *Mining Act 1904.* Therefore, on Edelman J's reasoning the clause must have statutory force. The Federal Court reasoned that if the agreement clause had statutory force, then the agreement was the source of the authority, ipso facto additional rights available under the *Mining Act 1978* would be a future act under the *Native Title Act*. Applying Edelman J's reasoning, the Federal Court's decision that the clause did not have statutory force is wrong.

A further consideration resulting from Edelman J's interpretation is the issue of judicial review. Only legislative provisions attract judicial review. The question is: would the scheduled agreements be interpreted in accordance with contract or statutory interpretation? In WA the precedent in *Re Michael* has potentially precluded judicial review of many State Agreement clauses because most agreements are interpreted as contract,[128] while only the 1970s and some late 1960s State Agreements are legislative.[129] Applying Edelman J's interpretation, judicial

[128] The application of judicial review is as yet untested even for legislative WA State Agreements that provide all the clauses are 'as if enacted' in the ratifying Act.

[129] Two significant 1972 agreements are the *McCamey's* agreement (n 40) and *Iron Ore (Rhodes Ridge) Agreement Authorisation Act 1972* (WA). Mines under other 1972 agreements have either ceased operation, or the rights have been transferred to other agreements: Brown 2018 (n 19) 138–140.

review could apply to scheduled agreement clauses that modify other Acts or laws. So, the question arises, are clauses that have statutory force subject to judicial review? That is, for the purposes of judicial review are the clauses interpreted as contract, or statute, or contract *and* statute? If a clause is subject to statutory interpretation, can third parties with standing apply for judicial review for a breach of the clause? Or does the clause's characteristic as contract continue to prevent applications for judicial review?

Let us reconsider the *Ngadju* case in light of Edelman J's interpretation in relation to judicial review and whether the grant of the mining lease was valid. The High Court refused the *Ngadju* applicants special leave for appeal,[130] and now time limitations could preclude judicial review.[131] However, the incapacity to take an action will not resolve or cure an invalid grant.

Native Title rights claimants or holders would have standing to commence a judicial review action. The case of *Forrest & Forrest v Wilson* may provide judicial support.[132] In that case, the High Court found that the *Mining Act 1978* must be strictly construed because it provided for the disposal of interests in the State's resources, therefore failure to observe the regime was apt to disadvantage the public interest and individuals.[133] The error was the failure to attach the mineralisation report to the mining lease application, which the Court deemed invalidated the grant because the executive acted outside of its statutory authority.[134] The Court interpreted the words 'accompanied by' as requiring the proponent to submit the documentation contemporaneously with the application.[135] On receipt of a valid application the decision-maker could grant the tenement. Consequently, the decision-maker had considered an invalid application, resulting in a jurisdictional error. The *WMC* application for mining leases under the *Mining Act 1978* and the transition and grant of those leases were potentially invalid because the *Mining Act 1978* is subject to the *Native Title Act*.[136] Applying Edelman J's approach, the leases should not have been transitioned or granted under the *Mining Act 1978* until after the provisions of the

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[130] *Graham & Ors on Behalf of the Ngadju People v St Ives Gold Mining Company Pty Ltd & Ors* [2016] HCATrans 241 (14 October 2016) ('*Ngadju* HCATrans'). The main ground argued in the *Ngadju* leave to appeal application in the High Court was the interpretation of the *Mining Acts 1904* and *1978* (n 23) in relation to the *WMC* agreement (n 20).

[131] *Rules of the Supreme Court 1971* (WA) ord 56 r 1(1)(a).

[132] *Forrest* (n 26).

[133] Ibid [64]–[65], [82], [84].

[134] Ibid [26], [67], [83], [88].

[135] Ibid [67].

[136] *Commonwealth Constitution* s 109. In addition, the *Mining Act 1978* (n 23) s 125A expressly includes a term recognising 'liability for payment of compensation to native title holders'. Native Title holders has the same meaning as in the *Native Title Act 1993* (n 24): see s 125A(3).

Native Title Act were satisfied because the transition and grant provided new and additional rights that the proponent intended to exploit. Alternatively, the mining lease grant should have been subject to the restrictions imposed by the *WMC* agreement that authorised the original lease under the *Mining Act 1904*. Arguably, the consideration of the application, or the grant of the leases, by the decision-maker under the *Mining Act 1978* may be invalid because the applicant had not satisfied the *Native Title Act* requirements and thus the decision to grant would be subject to judicial review. The incapacity of Ngadju Native Title holders to challenge an invalid grant does not mean the grant is somehow valid. Nor can the WA Parliament rectify the potentially invalid grant, because the *Native Title Act* is Commonwealth legislation.[137] If the lease grant is invalid so are the actions of the proponent's mining activities in relation to the lease.

If, in the future, Edelman J's interpretation is successfully argued by a litigant and adopted by the lower courts and the High Court, this would mean that the WMC proponents' continued reliance on an invalid mining lease grant could be challenged. For example, in *Re Wakim; Ex parte McNally*,[138] while the High Court would not grant certiorari to quash the grant of a cross-vesting power to the Federal Court because of the effect on third parties,[139] the Court issued a writ of prohibition to prevent further actions based on that authorisation.[140] There is no general immunity for persons relying on invalid decisions,[141] so other common law actions are not precluded.[142] Simply because a decision has not been quashed does not mean it has the effect it purports to have.[143] The assessment of whether continuing mining based on a potentially invalid grant of a mining lease under the *Mining Act 1978* could give rise to an action for the Ngadju people is not within the scope of this discussion. However, even the potential grant of such a remedy may open the door for the Ngadju people to negotiate with the *WMC* proponents.

In WA the potential of judicial review opens the door for third parties, such as Native Title holders or claimants, or environmental groups to challenge breaches of State Agreement clauses. To the author's knowledge, a third party has not attempted a judicial review action for breach of a legislative scheduled agreement clause. Such actions may require JTSI or the proponent to reveal the details of mysterious

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[137] *Commonwealth Constitution* s 109.
[138] (1999) 198 CLR 511.
[139] Ibid [165].
[140] Ibid 513(3). For the prohibition order see [313] under 'Re Brown Ex parte Amann' order 3.
[141] Benjamin Cole, 'Beyond "Validity": The Effect of Legally Infirm Administrative and Judicial Decisions' (2017) 24(3) *Australian Journal of Administrative Law* 158, 176.
[142] Ibid 167. For example, equity or property law actions.
[143] Ibid.

development proposals, or other documents currently publicly unavailable. The public and even Parliament cannot access development proposals (and other State Agreement-related documentation) because the agreements are commercially confidential.[144] Commentators and the WA Auditor General have noted the difficulties caused by the State Agreement regime's lack of transparency.[145] The *GA Act* includes the development proposals (among other documents) as part of the State Agreement.[146] Future actions challenging breaches of State Agreement clauses raise the potential for the disclosure of previously confidential contract-related documents, at least in part, to a third party taking an action if the disclosure is necessary for evidence of compliance with the State Agreement clause. Future research could explore judicial review in the State Agreement context, and the potential exposure of currently unavailable documents. The environmental concerns about Alcoa's rehabilitation or clearing of native jarrah forests under their State Agreement may provide an interesting and topical case-study for this research.[147] The question is, what rules of interpretation will apply? If statutory interpretation applies to the State Agreement clause, it is likely judicial review is available.

VII CONCLUSION

The next question is, will litigants pursue Edelman J's interpretation as a line of argument in the future? Justice Edelman's reasoning should now be on the radar of litigants as a potential argument in State Agreement actions. How soon that will occur depends on when a party raises the issue of State Agreement ratification as legislation or contract. While it is impossible to say when, it is likely that the interpretation of ratification provisions will eventually come before the Federal Court or a state Supreme Court and may find its way to the High Court.

The High Court has not considered State Agreement ratification provisions in-depth since *Sankey v Whitlam* in 1978. Since that decision the WA Parliament enacted the *GA Act* and adopted the 'takes effect' ratification in later State Agreements. In my opinion, some definitive guidance from the High Court is overdue. The *Ngadju*

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[144] Brown CRC TiME (n 17) 37; Brown 2018 (n 19) 248–9, 296–7.

[145] See the Auditor General reports cited at n 20 above.

[146] The *GA Act* (n 16) s 2(c) definition of Government agreement includes 'any document or instrument, including any grant, lease, licence, permit, approval, authorisation, right, concession, or exemption, or any other thing made, executed, issued, or obtained for the purposes of that agreement or its implementation'.

[147] 'The Leeuwin Group of scientists slams Alcoa for mining in Western Australia's jarrah forests', *ABC News* (online, 17 November 2023) <https://www.abc.net.au/news/2023-11-27/the-leeuwin-group-scientists-stop-alcoa-mining-wa-jarrah-forests/103155496>.

special leave to appeal hearing was an opportunity to see whether the High Court would hear the argument because the central and deciding issue was whether the State Agreement clause was contract or legislation. Justice Gordon during the *Ngadju* special leave to appeal hearing had the following exchange with the appellant. The appellant referred to the agreement as 'something given effect by statute', to which Gordon J responded, '[but] it is not given statutory force by the *Government Agreements Act*'. The appellant responded, 'it depends on what one means by "not given statutory force"'. Her Honour responded, 'Section 3 says that, does it not?'.[148] The appellant did not argue the interpretation of s 3,[149] so whether Gordon J is stating an opinion, asking a question, or opening the door for argument on the point is unclear.

The majority in *Mineralogy HC* did not endorse or comment on Edelman J's reasons.[150] This may be because the parties did not squarely put the interpretation of the ratification provision or the *GA Act* s 3 before the Court,[151] or because consideration of the issue was not appropriate for the 'special case procedure' invoking the original jurisdiction of the High Court.[152] The plaintiff's argument was that the relevant clause was a 'law' that had both contractual force (because it was a contract) and statutory force (flowing from the authorising Act).[153] The authority of 'legislative' or 'contract' type ratification provisions to modify other laws was not

[148] *Ngadju* HCATrans (n 130) [125]–[130].
[149] Ibid [130]–[135]. The exchange continued with the plaintiff replying, 'No, what it is given effect to and, in our submission, when a statute gives effect to a contract it is not superfluously doing that which the common law had already done'. Justice Gageler responded, 'Recognising the importance of the issue, you really need to convince us that there is an arguable case that the Full Court was wrong on the construction of the Second Schedule of the 1978 Act'.
[150] On this point see Edelman J's comments at *Mineralogy HC* (n 9) [106].
[151] Ibid 223. The *Mineralogy HC* Commonwealth Law Report summary states, 'The plaintiffs' principal allegation was that the Amending Act was invalid in its entirety on the basis that its enactment contravened s 6 of the *Australia Act 1986* (Cth) because the requirements of cl 32 of the State Agreement, which it was alleged prescribed a requirement as to the "manner and form" in which a law was to be made by the Parliament of Western Australia, was not complied with. The plaintiffs challenged the validity of the Amending Act on the additional basis that it exceeded limitations on the legislative power of the Parliament of Western Australia arising from "the rule of law and deeply rooted common law rights". The plaintiffs also alleged that various provisions in pt 3 of the State Act, including ss 9(1)–(2) and 10(4)–(7), were incompatible with Ch III of the *Constitution* because they involved an exercise of judicial power. The plaintiffs further alleged that ss 9(1)–(2) and 10(4)–(7) of the State Act were incompatible with s 118 of the *Constitution* because they conflicted with s 35(1) of the *Commercial Arbitration Act* in force in each of New South Wales, Queensland, South Australia, Tasmania and Victoria'.
[152] *Mineralogy HC* (n 9) [51]–[62]. For the 'questions appropriate to determine' see [62]–[71] (the operation of the State Act (the authorising Act) and the amending Act (that was standard legislation)).
[153] Ibid [125].

expressly raised as a key issue.[154] The Commonwealth Solicitor-General, acting as intervener, submitted that the issues before the Court were the State legislature's right to abrogate the plaintiff's rights, whether the Act abrogating those rights contravened Chapter III of the *Constitution*, and the manner and form required in a state Act to fetter the right of the State Parliament to legislate.[155] Members of the Court invited the parties to explain the effect of, or comment on, the *GA Act* during submissions.[156] However, ultimately, the majority took a prudential approach to avoid 'the risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation', recognising that the Court's opinion is 'not advisory but adjudicative'.[157] The majority decided it was unnecessary to examine the question of whether the clause of the scheduled agreement was a law made by Parliament because the clause did not prescribe a manner and form requirement.[158] This may explain why the other members of the Court did not disagree, endorse, or comment on Edelman J's reasons, and why his opinion was not included in the

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[154] Ibid [9]–[11]. The majority of the Court noted that the relief was framed to focus on the amending Act and the State Agreement's authorising Act (called the State Act). The plaintiffs were confined to the identified challenges: see [5].

[155] Ibid 228–231.

[156] Ibid 224. For example, the plaintiff submitted that the relevant clause of the State Agreement 'is a law made by the Parliament which is given the force of law by the [authorising Act]'. The ratification sections 'provide that the State Agreement operates and takes effect despite any other Act or law'. Chief Justice Kiefel responded, '[t]he form that is adopted here says that it operates despite any other Act or law, which suggests that its purpose is to overcome any obstacles posed by other statutes. That inevitably means amendment of a law. What the provisions are saying is that, in the areas covered by the State Agreement, the result is that the law is as provided for by the Agreement. That is accentuated by the terms of s 3 of the [*GA Act*]'. See also the exchange between the WA Solicitor General and Gageler J at 226. Gageler J asks, 'What work do you give the *Government Agreements Act*?'. The Solicitor General replies, 'Section 3 of the *Government Agreements Act* is no different in substance from the operation of the type of [ratification seen in the State Agreement]. The operation of the [*GA Act*] or the State [Agreement] prevents a statute that would otherwise impede the performance of the contractual obligations of the State Agreement from having that effect.'

[157] Ibid [57]–[58]. The majority further stated in relation to the prudential approach, '[u]nderlying it also is recognition that performance of an adjudicative function in an adversary setting "proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in the controversy"': at [58].

[158] Ibid. It was unnecessary to consider whether the clause (cl 32) was a law (at [75]–[76]); the clause, the State Act and the *GA Act* (n 16) did not prescribe a limit on the legislature's freedom to legislate (at [79]–[80]). On cl 32, the majority (at [80]) quoting and discussing *West Lakes* (n 40) 398 stated: 'Adapting language used by King CJ in *West Lakes Ltd v South Australia* to describe the operation of a provision of a contract entered into by the Government of South Australia which was required by a South Australian statute to "be carried out and have effect as if the provisions thereof…were agreed to between the parties thereto and expressly enacted", cl 32 of the State Agreement "is a provision controlling the amendment of the [contract] by agreement", making "no reference, either expressly or impliedly, to the amendment by parliament of the [statute] itself"'. The clause in *West Lakes* was ratified as legislation, so the majority is potentially pointing out that whether cl 32 is contract or legislation it does not fetter Parliament.

Commonwealth Law Report headnote as a dissent or a 'per' and remains only interesting obiter.

Justice Edelman took the opportunity presented to express his opinion on ratification provisions, and the reasoning in *Re Michael* and *Ngadju.* Edelman J agreed with the restrained approach of the majority,[159] but noted members of the Court may have different views on the practice of adjudication in particular cases.[160] His Honour listed several considerations that may require broader adjudication:

> One consideration that can weigh powerfully in favour of broader adjudication is whether a decision upon an otherwise undecided ground could have a significant effect upon the interests of a party.…A second consideration is whether there is a division within the Court leaving a minority of Justices for whom "it is necessary to deal with a range of issues to dispose of the appeal". It would be desirable in those circumstances for the range of issues to be considered by the whole Court. A third consideration concerns the role of this Court. Whilst the primary role of this Court is to resolve disputes between the parties, this Court does so by developing the law in a principled way that aims to guide both the public and lower courts.[161]

Justice Edelman further commented on minority and majority reasoning, stating that '[j]ust as it can be undesirable for a majority of Justices to avoid adjudication of a point that it is necessary for a minority of Justices to decide, so too it can be undesirable for a minority of Justices to express views on a point that is not necessary for their decision'.[162] However, for Edelman J the question of whether the scheduled agreement clause (cl 32) was a law that could prescribe a manner and form requirement could not be decided until it was determined that the operation of cl 32 was either contract or legislation.[163] In that sense, the majority had avoided adjudicating a point that Edelman J considered necessary to disposing of the appeal, and it would have been desirable for the whole Court to have considered the issue.

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[159] *Mineralogy HC* (n 9) [96].
[160] Ibid [100], citing *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216, 230 [23].
[161] *Mineralogy HC* (n 9) [101]–[103], quoting *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1, 20 [34]. Edelman J further notes: 'A fourth consideration is the sense of injustice to the parties that could be engendered by the feeling that this Court's decision has not matched the procedure in which they participated, particularly if the decisive ground in the Court's reasons is only peripheral to the submissions made by the parties': at [104].
[162] *Mineralogy HC* (n 9) [106] (Edelman J).
[163] Ibid [118]–[120].

Adopting Edelman J's interpretation of State Agreement ratification and the *GA Act*, s 3 resolves the inconsistency in the lower court decisions and provides a logical application of statutory interpretation principles. However, the lower courts are likely to resile from overruling significant decisions such as *Re Michael* and *Ngadju.* So, it will require a litigant with determination to test the argument in the High Court. In my opinion, Edelman J's interpretation should be adopted, and if adopted, may lead to greater transparency of the regime and fairness to Native Title holders and claimants, and third parties. The WA courts have noted that State Agreements confer significant rights and concessions on the proponent that are not available to the general public and for that reason should be subject to strict interpretation.[164] In addition, the High Court has significantly broadened its view in relation to Native Title rights over the last decade.[165] The *Ngadju* decision appears to be a case of having your cake and eating it too, in that the proponent, after enjoying significant bespoke rights under the *WMC* agreement not available to other members of the public, could also take advantage of additional rights under the *Mining Act 1978* without previously complying with the requirements of that regime (such as higher rents and royalties), or recognising the underlying Native Title holders' rights.

A future action in the High Court based on Edelman J's interpretation of 'takes effect' ratification and the *GA Act* s 3 would, at minimum, provide definitive guidance about the operation of State Agreement clauses to enable the lower courts to apply a cohesive and consistent approach. The *Ngadju* decision severely disadvantaged the Ngadju people and the impact of the case on future Native Title decisions could be significant. If Edelman J's approach is adopted, it would provide greater recognition of Native Title rights in the State Agreement mining context moving forward, and it would raise serious questions about the veracity of the *Ngadju* decision and thus the proponent's failure to acknowledge the Ngadju people's Native Title rights or comply with the *Native Title Act* (because the Federal Court's *Ngadju* decision should be overruled).[166] Furthermore, this interpretation could provide increased transparency of the regime by removing some aspects of commercial confidentiality and by allowing affected third parties to challenge the scope of the State Agreement clauses via judicial review.

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[164] *Mineralogy 2005* (n 42) [68] (McLure J); *Mount Margaret Nickel Pty Ltd v WMC Resources Ltd* [2001] WAMW 6, [57].
[165] *Akiba (on behalf of the Torres Strait Regional Seas Claim Group) v Commonwealth* (2013) 250 CLR 209; *Karpany v Dietman* (2013) 252 CLR 507; *Brown HC* (n 4); *Northern Territory v Griffiths* (2019) 269 CLR 1; *Commonwealth of Australia v Yunupingu* [2025] HCA 6.
[166] *Mineralogy HC* (n 9), *Ngadju* cited at n 151.

In my opinion, the High Court majority should have taken the opportunity presented in *Mineralogy HC* to join Edelman J and provide essential guidance on this complicated and confused area of the law that is now affecting Native Title decisions. In the words of Edelman J, '[t]he greater the magnitude of the issue involved, and the more pressing the matters that it raises, the more compelling will be the case for this Court to consider the issue rather than to leave it in the shadows to await future adjudication'.[167]

[167] Ibid [103] (Edelman J).