



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

**ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF
AUSTRALIA**

No. D5 of 2023

BETWEEN

COMMONWEALTH OF AUSTRALIA

Appellant

10

AND

**YUNUPINGU ON BEHALF OF THE
GUMATJ CLAN OR ESTATE
GROUP**

First Respondent and others named in the
Schedule

**OUTLINE OF ORAL ARGUMENT BY FIRST
RESPONDENT**

Part I: Certification

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

Part II: Outline of Propositions

Introduction

1. The nature of the native title rights which are the subject of the claim by Mr Yunupingu on behalf of the Gumatj clan in his words: *Our Land is Our Life, Land Rights – Past, Present and Future*. (**Additional Materials Tab 1**)
- 10 2. The pleaded native title rights in the Statement of Claim: SOC [49], [52], [6]-[14], [19]-[43], [499]-[530]. (**Appellant’s Book of Further Materials Tab 1**)

Ground 2 – Extinguishment of native title as acquisition of property (GS [62]-[127])

3. Native title rights are rights rooted in the traditional laws and customs of indigenous peoples. They are recognised under the general law independent of statute. Native title rights were not created by the common law at the time that sovereignty was asserted by the Crown: rather, they *survived* the acquisition of sovereignty. (GS [87]-[90]; *Yorta Yorta* (2002) 214 CLR 422 at [75]-[77] (**Vol 10 Tab 89**; *Mabo (No 2)* (1992) 175 CLR 1 at 58 (**Vol 9 Tab 87**))
- 20 4. *Mabo (No 2)* held that (a) recognition of native title could not occur in a manner that overturns the doctrine of tenure; and (b) the common law recognised native title in a manner that did not immunise native title from valid exercises of sovereign power to grant interests in land. In that sense, native title is subject at common law to a contingency of extinguishment. However, *Mabo (No 2)* did not hold, and did not support the proposition, that the exercise of such power to extinguish native title would lack the character of an acquisition of property. (GS [91]-[100]; *Mabo (No 2)* (1992) 175 CLR 1 at 15, 29-30, 43, 48, 63, 94, 111 (**Vol 9 Tab 87**))
- 30 5. Section 51(xxxi) operates as a constitutional guarantee that serves to protect individual property rights. “Property”, “acquisition”, and the guarantee overall, are construed liberally, with a focus on substance and practical effect over form. (GS [36], [72]; *Theophanous* (2006) 225 CLR 101 at [5]; *ICM* (2009) 240 CLR 140 at [43]-[44], [185]-[186], [189], [192] (**Vol 7 Tab 79**;

Georgiadis (1994) 179 CLR 297 at 303, 305, 320 (**Vol 7 Tab 75**); *Dalziel* (1944) 68 CLR 261 at 285 (**Additional Materials Tab 9**)

6. It is correctly conceded by the Commonwealth that native title rights are “property” for the purposes of s 51(xxxi). The relief of a reciprocal burden on the Crown’s radical title by sterilisation of rights or interests in land falls comfortably within the scope of “acquisition” for the purposes of s 51(xxxi). (GS [73]-[74]; *Newcrest* (1997) 190 CLR 513 at 530, 634 (**Vol 12 Tab 95**))
7. The s 51(xxxi) concept of “inherent defeasibility” is limited to statutory rights. (GS [79]-[86])
- 10 8. The mere contingency of extinguishment of a right does not mean that the right is “inherently defeasible” in the s 51(xxxi) sense, such that extinguishment by that contingency lacks the character of an acquisition of property. Other characteristics must also be present, such as the right being transient, slight or insubstantial, not susceptible of repetitive enjoyment, not based on antecedent property rights recognised by the general law, or being part of a flexible regulatory scheme. (GS [75]-[78]; *Peeverill* (1994) 179 CLR 226 at 237, 243-244, 266 (**Vol 7 Tab 78**); *Georgiadis* (1994) 179 CLR 297 at 305-306 (**Vol 7 Tab 75**); *WMC* (1998) 194 CLR 1 at [53]-[54], [253] (**Vol 6 Tab 69**); *Davey* (1993) 47 FCR 151 at 165)
- 20 9. Even if the s 51(xxxi) concept of “inherent defeasibility” is capable of extending to some non-statutory rights, it does not extend to native title rights. Native title rights lack the characteristics (beyond mere contingency of extinguishment) that engage the concept. (GS [88]-[90], [122]-[124]; *Yorta Yorta* (2002) 214 CLR 422 at [75]-[77] (**Vol 10 Tab 89**); *Love* (2020) 270 CLR 152 at [290], [336], [339]-[340], [451] (**Vol 9 Tab 86**); *Griffiths* (2019) 269 CLR 1 at [23], [75] (**Vol 13 Tab 97**))

Ground 1 – Interaction of s 122 and s 51(xxxi) (GS [13]-[61])

10. *Wurridjal* controls the interaction of ss 51(xxxi) and 122, and should not be reopened. (GS [13]-[23]; *Wurridjal* (2009) 237 CLR 309 (**Vol 19 Tab 126**))
- 30 11. In determining whether s 122 is subject to the constraints of s 51(xxxi), the text and purpose of the Constitution as a whole must be considered. Constitutional guarantees, such as the guarantee of just terms in s 51(xxxi), need to be given

due weight in an interpretation approach that strives for coherence across different provisions of the Constitution: see, for example, *Lamshed* (1958) 99 CLR 132 at 154 (**Vol 9, Tab 85**); *Newcrest* (1997) 190 CLR 513 at 653-654 (**Vol 12 Tab 95**). There is no warrant for regarding s 51(xxxi)'s function of protecting individual property rights as being less important for Territorians. (GS [26], [36]-[37])

12. In exercising any and all of its legislative powers, the Commonwealth Parliament acts in its capacity as the national legislature of Australia rather than a local legislature for a territory: *Lamshed* (1958) 99 CLR 132 at 141 and 154 (**Vol 9, Tab 85**). Labelling s 51 heads of power as “federal” and s 122 as “non-federal” does not displace the interpretive principle explained in *Schmidt* (1961) 105 CLR 361. (GS [27]-[28], [38]-[43])
13. Section 122 is constrained by s 51(xxxi) for reasons set out in *Newcrest* (1997) 190 CLR 513 at 594–606 (Gummow J) and 568 (**Vol 12 Tab 95**), largely adopted in *Wurridjal* (2009) 237 CLR 309 (**Vol 19 Tab 126**). (GS [30]-[37])
14. Section 51(xxxi) constraining s 122 produces no incongruity. It represents only a fiscal constraint and does not obstruct effective governance. (GS [54]-[57])

Ground 3 – Minerals reservation (GS [128]-[161])

15. The minerals reservation in the 1903 pastoral lease did not create or assert any new rights to minerals in the Crown, but merely excepted minerals from what was conferred upon the lessee. (GS [128]-[155])
16. *Alternative argument*: To the extent that the minerals reservation did create or assert some positive rights to minerals in the Crown, it was in the nature of a non-exclusive profit à prendre which was not inconsistent with the continued existence of non-exclusive native title rights to minerals. (GS [156]-[160]; *Bayview Properties Pty Ltd v Attorney-General for Victoria* [1960] VR 214 at 215-216 (**Additional Materials Tab 10**); *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 484-485 (**Additional Materials Tab 11**))

Date: 8 August 2024

Arthur Moses

Kim Anderson

Jaye Alderson

IN THE HIGH COURT OF AUSTRALIA No D5 of 2023
DARWIN REGISTRY
ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF
AUSTRALIA

SCHEDULE

Northern Territory of Australia
Second Respondent

East Arnhem Regional Council
Third Respondent

Layilayi Burarrwanga
Fourth Respondent

Milminyina Valerie Dhamarrandji
Fifth Respondent

Lipaki Jenny Dhamarrandji (nee Burarrwanga)
Sixth Respondent

Bandinga Wirrpanda (nee Gumana)
Seventh Respondent

Genda Donald Malcolm Campbell
Eighth Respondent

Naypirri Billy Gumana
Ninth Respondent

Maratja Alan Dhamarrandji
Tenth Respondent

Rilmuwurr Rosina Dhamarrandji
Twelfth Respondent

Wurawuy Jerome Dhamarrandji
Thirteenth Respondent

Manydjarri Wilson Ganambarr
Fourteenth Respondent

Wankal Djiniyini Gondarra

Fifteenth Respondent

Marrpalawuy Marika (nee Gumana)

Sixteenth Respondent

Guwanbal Jason Gurruwiwi

Eighteenth Respondent

Gambarrak Kevin Mununggurr

Nineteenth Respondent

Dongga Mununggurritj

Twentieth Respondent

Gawura John Wanambi

Twenty First Respondent

Mangutu Bruce Wangurra

Twenty Second Respondent

Gayili Banunydji Julie Marika (nee Yunupingu)

Twenty Third Respondent

Bakamumu Alan Marika

Twenty Fifth Respondent

Wanyubi Marika

Twenty Sixth Respondent

Wurrulnga Mandaka Gilnggilngma Marika

Twenty Seventh Respondent

Witiyana Matpupuyngu Marika

Twenty Eighth Respondent

Northern Land Council

Twenty Ninth Respondent

Swiss Aluminium Australia Limited (ACN 008 589 099)

Thirtieth Respondent

Telstra Corporation Limited (ABN 33 051 775 556)

Thirty First Respondent

Arnhem Land Aboriginal Land Trust

Thirty Second Respondent

Amplitel Pty Ltd

Thirty Third Respondent

Attorney-General for the State of Queensland

Thirty Fourth Respondent

Attorney-General for the State of Western Australia

Intervener

Attorney-General for the Australian Capital Territory

Intervener