HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA No D5 of 2023

DARWIN REGISTRY

BETWEEN: **COMMONWEALTH OF AUSTRALIA**

Appellant

and

YUNUPINGU ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP AND OTHERS NAMED IN THE SCHEDULE

Respondents

FIRST RESPONDENT'S SUBMISSIONS

Contents

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of Issues

2. The issues arising in this appeal are as follows:

   (a) Does the just terms requirement in s 51(xxxi) of the Constitution apply to a Commonwealth law that is supported by s 122 and no other head of power in s 51? (**Ground 1**)

   (b) Is a Commonwealth law that grants or asserts interests in land, such as to extinguish or impair native title rights in that land, a law with respect to an acquisition of property within the meaning of s 51(xxxi)? (**Ground 2**)

   (c) Did the grant of a pastoral lease by South Australia in 1903 that excepted and reserved timber, minerals and other substances extinguish a non-exclusive native title right to use the natural resources of the land insofar as that native title right relates to minerals? (**Ground 3**)

3. The Commonwealth (Appellant) urges that the issues in the appeal be approached under the spectre of a "vast but indeterminate number of grants of interests in land in the Territory" being invalid, a "vast but presently unquantifiable" liability of the Commonwealth arising, and corresponding "enormous financial ramifications", in the event that the judgment of the Full Court of the Federal Court (**J**) is affirmed (Appellant's Submissions filed on 28 March 2024 (**CS**) at **[3]**). The Commonwealth appears to invite this Court to treat such prophesied consequences as presumptively weighing in favour of the Commonwealth's contentions in relation to the construction of the Constitution.

4. It would be inappropriate for the Court to do so for two reasons.

5. First, there is no evidentiary foundation for the Commonwealth's submission as to the "vast" scale of liabilities that would arise beyond the present case. On the Full Court's reasoning, any entitlement to compensation in a given case will depend on, inter alia:

   (a) the extent and content of native title rights under particular claimant groups' traditional laws and customs;

(b) the extent of extinguishing historical acts of the States of South Australia and/or New South Wales (during those times when the land of what is now the Northern Territory formed part of those States); and

(c) the extent and content of grants of interests since the creation of the Northern Territory.

6. Insofar as historical acts of the States have extinguished whatever native title rights would otherwise exist over particular areas, no entitlement to compensation could arise.

7. Second, and more importantly, this Court would not be intimidated by the prospect that its function of interpreting and applying the Constitution in accordance with legal principle may occasion fiscal inconvenience to the Commonwealth. That is especially so in the case of the "great constitutional safeguard" that s 51(xxxi) represents.

8. If it be the case that a "vast" Commonwealth liability would arise under the Full Court's orthodox approach to ss 51(xxxi) and 122 of the Constitution, that could only be on account of a "vast" number of Indigenous peoples of the Northern Territory having been historically and unjustly dispossessed of their property, to the Commonwealth's countervailing benefit, in contravention of the limits on Commonwealth power under the Constitution. The profound loss and harm caused by such dispossession has previously been recognised and vindicated in this Court.[1] Insofar as the scale of such unconstitutional acquisition of property on other than just terms is "vast", that would only underscore the importance of the Court recognising the specific constitutional wrong underlying the present case.

9. In numerous important cases in this Court's history, the application of the Constitution in accordance with legal principle has occasioned substantial inconvenience, whether financial,[2] administrative,[3] or other. The Commonwealth has occasionally sought to

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1 *Northern Territory v Griffiths* (2019) 269 CLR 1 at [194], [230] (Kiefel CJ, Gageler, Keane, Nettle and Gordon JJ).

2 See, for example, *Vanderstock v Victoria* (2023) 98 ALJR 208; *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

3 See, for example, *Re Wakim; ex parte McNally* (1999) 198 CLR 511; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005; *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

sustain a position on the basis of what it urged would be the intolerable consequences of a contrary decision.[4]

10. In each such case, this Court has not eschewed its responsibility to enforce the Constitution, but has instead embraced it. No less would be true in the present appeal which at its heart involves a consideration as to whether Indigenous people should be denied the protection of a constitutional safeguard that applies to property owned by other Australians, based on a discriminatory denigration of native title as "inherently defeasible" for the purposes of s 51(xxxi).

Part III: Certification

11. Notice has been given under s 78B of the *Judiciary Act 1903* (Cth): **CAB 187-196**.

Part IV: Facts

12. The First Respondent does not contest the facts set out at CS [7]-[11].

Part V: Statement of Argument

A. <u>GROUND 1 – APPLICATION OF SECTION 51(xxxi) to SECTION 122</u>

13. In *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***), a majority of the members of this Court held that Commonwealth laws made pursuant to the legislative power conferred by s 122 of the Constitution are subject to the just terms requirement of s 51(xxxi) insofar as they effect acquisitions of property, overruling the prior contrary decision of *Teori Tau v Commonwealth* (1969) 119 CLR 564 (***Teori Tau***).

14. In *Teori Tau*, it had been held that laws supported by s 122 are not subject to the just terms requirement of s 51(xxxi). In the present appeal, the Commonwealth does not seek to fully support that position, implicitly (and correctly) recognising it to be untenable.[5] Instead, the Commonwealth advances only the 'hybrid' position that laws made pursuant to s 122 will be subject to the just terms requirement if also supported by another s 51 head of power, but not otherwise. That hybrid position has only ever commanded the

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4 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

5 Notably, no leave is sought by the Commonwealth to re-open and overrule *Newcrest Mining (WA) Pty Ltd v Commonwealth* (1997) 190 CLR 513.

support of a single justice of this Court, in a single decision: specifically, the judgment of Toohey J in *Newcrest Mining (WA) Pty Ltd v Commonwealth* (1997) 190 CLR 513 (***Newcrest***).[6]

15. The Full Court of the Federal Court was correct to find that *Wurridjal* overruled *Teori Tau*, such that the current state of the law is that s 51(xxxi) applies to all laws made under s 122.

16. Accordingly, for the Commonwealth's position to be countenanced, leave to re-open *Wurridjal* would be required. Such leave should be refused, as *Teori Tau* represents an anomaly in an otherwise consistent stream of authority favouring an integrationist approach to s 122. Alternatively, if *Teori Tau* has not been overruled by *Wurridjal*, leave should be granted to re-open *Teori Tau*.

17. To the extent that this Court elects now to re-visit its prior authorities on the interaction of s 51(xxxi) and s 122, the position of the majority in *Wurridjal* is clearly correct as a matter of constitutional principle and should now be upheld and affirmed.

A.1 Precedential status of Wurridjal and Teori Tau

18. The First Respondent adopts what is set out in the Second Respondent's (the Northern Territory's) Submissions (**TS**) at [70]-[77] as to *Wurridjal* presently controlling the interaction of s 51(xxxi) and s 122.

19. Since the delivery of the Full Court's judgment, the understanding that *Wurridjal* has overruled and displaced *Teori Tau* has been further reflected in observations made in a decision of this Court.

20. In *Vunilagi v The Queen* (2023) 97 ALJR 627 (***Vunilagi***), Gordon and Steward JJ cited those specific paragraphs of the judgments in *Wurridjal in* which French CJ, Gummow and Hayne JJ, and Kirby J expressly held that *Teori Tau* should be overruled.[7] This citation was made in support of the proposition that the legislative power conferred by s 122 is "subject to qualifications and limitations found elsewhere in the Constitution". In that context, the necessary implication is that those paragraphs (that is, as to the

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6 In *Wurridjal*, Kiefel J applied *Newcrest* to find that s 51(xxxi) applied to legislation supported by a s 51 head of power, without expressing a concluded view as to whether s 51(xxxi) also applied to laws supported solely by s 122: see at [456]-[457], [460].

7 *Vunilagi* (2023) 97 ALJR 627 at [100] and fn 109 (Gordon and Steward JJ).

overruling of *Teori Tau*, as opposed to merely aspects of the supporting analysis) represent an operative holding of the Court as to a particular qualification or limitation to which s 122 is subject.

A.2 Leave to re-open

21. The principles applicable to the grant of leave to re-open previous decisions of this Court have been the subject of recent consideration in *Vunilagi*, *Vanderstock v Victoria* (2023) 98 ALJR 208 (***Vanderstock***) and *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 (***NZYQ***). The correct approach is a "strongly conservative cautionary" one, in which re-opening "should not lightly be taken".[8] Relevant considerations include:

(a) whether re-opening of the earlier decision is necessary to resolve the case at hand;[9]

(b) whether arguments are raised that had not been advanced and fully taken into account in the earlier decision;[10]

(c) whether the earlier case rested upon a principle carefully worked out in a significant succession of cases, or whether instead it was anomalous;[11]

(d) whether the earlier case has been weakened by subsequent decisions or in the light of experience;[12]

(e) whether the earlier case has achieved no useful result but instead led to considerable inconvenience;[13]

(f) whether governments have organised their financial affairs in reliance on the earlier decision;[14]

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8 *NZYQ* (2023) 97 ALJR 1005 at [17]-[18]; see also *Wurridjal* at [70] (French CJ).
9 *Vunilagi* at [55] (Kiefel CJ, Gleeson and Jagot JJ), [98] (Gordon and Steward JJ)
10 *Vanderstock* at [8] (Kiefel CJ, Gageler and Gleeson JJ), [427] (Gordon J), [856] (Jagot J)
11 *Vanderstock* at [10], [128] (Kiefel CJ, Gageler and Gleeson JJ), [428], [433]-[435] (Gordon J), [782] (Steward J), [856], [935], [937] (Jagot J); *Vunilagi* at [160] (Edelman J)
12 *Vanderstock* at [115] (Kiefel CJ, Gageler and Gleeson JJ), [750]-[751] (Steward J), [934], [936] (Jagot J); *Wurridjal* at [71] (French CJ); *NZYQ* (2023) 97 ALJR 1005 at [35], [37].
13 *Vanderstock* at [428] (Gordon J), [783] (Steward J); *Vunilagi* at [160] (Edelman J)
14 *Vanderstock* at [8] (Kiefel CJ, Gageler and Gleeson JJ), [438] (Gordon J), [665] (Edelman J), [785], [810] (Steward J), [887], [939] (Jagot J); *Vunilagi* at [158] (Edelman J)

(g) whether the earlier decision has otherwise been independently acted upon in a manner that militates against reconsideration;[15]

(h) whether the decision is one of long standing;[16]

(i) whether there were differences in the reasoning in the earlier case.[17]

22. The totality of such considerations weighs decisively against re-opening *Wurridjal*.

23. Every argument now sought to be raised by the Commonwealth on ground 1 was canvassed at length in *Wurridjal*.[18] The majority position on ss 51(xxxi) and 122 in *Wurridjal* represented the logical and coherent development of the integrationist approach to s 122 worked out in the succession of cases beginning from at least *Lamshed v Lake* (1958) 99 CLR 132 (***Lamshed***) and proceeding through *Newcrest*.[19] That position has not since been doubted, but has instead been referred to with implicit or explicit approval.[20] Commonwealth legislation since *Wurridjal* has been enacted in accordance with the majority position representing the law.[21] Those judges in *Wurridjal* who found it necessary to determine the applicability of s 51(xxxi) to laws under s 122 were of one voice.[22]

24. Alternatively, if *Teori Tau* has not been overruled, the considerations weigh heavily in favour of leave being granted to re-open it. In *Wurridjal*, it was acknowledged that a cautionary approach was to be adopted.[23] Nevertheless, a majority of judges expressly found it appropriate to take the step of overruling *Teori Tau*, and the only basis on which *any* judges declined to do so was that it was not necessary for their resolution of the case.

25. Even if *Teori Tau* has not been formally overruled, it has been questioned, doubted and criticised.[24] It has been significantly qualified by *Newcrest*. It represents an anomaly in

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15 *Vanderstock* at [428] (Gordon J); *Vunilagi* at [160] (Edelman J)
16 *Vunilagi* at [55] (Gageler J)
17 *Vanderstock* at [428] (Gordon J), [783] (Steward J), [889] (Jagot J); *Vunilagi* at [160] (Edelman J)
18 See Transcript of Proceedings, *Wurridjal v Commonwealth* [2008] HCATrans 349, 5415-6040.
19 As explained at TS [78] and fn 108; see also below at [Part V:38]-[Part V:43].
20 *Vunilagi* (2023) 97 ALJR 627 at [100] and fn 109 (Gordon and Steward JJ); *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 (***ICM***) at [135] (Hayne, Kiefel and Bell JJ).
21 As explained at TS [78] and fn 110.
22 See especially *Wurridjal* (2009) 237 CLR 309 at [48]-[51], [58], [64], [73]-[75], [80], [85] (French CJ); [175]-[178], [183]-[186], [188] (Gummow and Hayne JJ); [284]-[286] (Kirby J).
23 *Wurridjal* (2009) 237 CLR 309 at [71] (French CJ).
24 *Newcrest* (1997) 190 CLR 513; *Wurridjal* (2009) 237 CLR 309.

a stream of authority extending before and after it.[25] Although a unanimous decision, it was decided *ex tempore* without the benefit of full argument on both sides,[26] and with only a very brief statement of reasons. What reasons were given have been undermined by other decisions.[27] There is no suggestion that it has been relied upon by the Commonwealth or other polities in arranging their affairs.

A.3 Approach to construction

26. As explained in the submissions of the Northern Territory, the starting point for the analysis is the text of the Constitution,[28] which falls to be construed as one coherent document.[29] Individual provisions are to be construed in the context of the document as a whole.[30]

27. It is in accordance with that approach that the principle explained in *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 (***Schmidt***) is engaged: "*that when you have, as you do in par. (xxxi), an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification*".[31]

28. Consistent with that principle, it is well-established that s 51(xxxi) not only confers legislative power to acquire property, but also "abstracts" the power to support a law for the compulsory acquisition of property from any other legislative power, subject to the indication of a contrary intention.[32]

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25 See TS [78] and fn 108; see also below at [Part V:38]-[Part V:43].
26 See *Teori Tau* (1969) 119 CLR 564 at 568-569.
27 *Newcrest* (1997) 190 CLR 513 at 611-612 (Gummow J).
28 *Wurridjal* (2009) 237 CLR 309 at [73] (French CJ); *New South Wales v Commonwealth* (2006) 229 CLR 1 at [120], [191] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
29 *New South Wales v Commonwealth* (2006) 229 CLR 1 at [52], [134] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
30 *Newcrest* (1997) 190 CLR 513 at 597 (Gummow J); *Wurridjal* (2009) 237 CLR 309 at [186] (Gummow and Hayne JJ); *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 185 (Latham CJ); *Spratt v Hermes* (1965) 114 CLR 226 at 278 (Windeyer J).
31 *Schmidt* (1961) 105 CLR 361 at 371-372 (Dixon CJ, with whom Fullagar, Kitto and Taylor JJ agreed).
32 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 (***Mutual Pools***) at 169 (Mason CJ), 177 (Brennan J); 186-187 (Deane and Gaudron JJ); *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ); *Newcrest* (1997) 190 CLR 513 at 595-596 (Gummow J).

29. For the reasons that follow, no contrary intention emerges from either the text or context of the Constitution, such as to displace or contraindicate the abstraction of power by s 51(xxxi) from s 122. On the contrary, the relevant textual and contextual considerations serve to reinforce the appropriateness of the interpretive principle identified in *Schmidt* for the specific interaction of s 51(xxxi) and s 122.

A.4 Textual considerations

30. First, s 5 of the Constitution refers to all laws made by the Commonwealth Parliament being "binding on the courts, judges and people of every State and of every part of the Commonwealth" (emphasis added). This provision makes clear – if there would otherwise be any doubt – that the Commonwealth includes the Territories and the laws made by the Commonwealth Parliament under any and every head of legislative power have force in not only the States but also the Territories.

31. Second, the chapeau to s 51 refers to Parliament having "power to make laws for the peace, order, and good government of the Commonwealth with respect to" the various matters enumerated in its subparagraphs. In view of the terms of s 5, the reference in this chapeau to the Commonwealth must be understood as embracing the Territories, and the legislative heads of power in s 51 must be understood as extending to the Territories in terms of their subject matter.[33] In combination with the first point, it follows that

(a) laws made under s 122 have force in (and may operate in) the States;[34] and

(b) laws made under s 51 heads of power have force in (and may operate in) the Territories,[35] and thus effect the acquisition of property in the territories,[36]

such that an abstraction of power from s 122 is coherent and consistent with the principle explained in *Schmidt*.

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33 *Wurridjal* (2009) 237 CLR 309 at [48], [74] (French CJ); *Newcrest* (1997) 190 CLR 513 at 597 (Gummow J).

34 *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492; *Lamshed v Lake* (1958) 99 CLR 132.

35 *Berwick Ltd v Gray* (1976) 133 CLR 603 at 608 (Mason J; Barwick CJ, McTiernan J, Jacobs and Murphy JJ agreeing); *Lamshed* (1958) 99 CLR 132 at 141-143 (Dixon CJ, with whom Webb J, Kitto J and Taylor J agreed).

36 See, for example, *Newcrest* (1997) 190 CLR 513.

32. Third, s 51(xxxi) itself refers to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws" (emphasis added). The breadth of this formulation may be contrasted with one in which the "purposes" embraced by the provision are confined to specific categories of Commonwealth legislative power. If it had been the intention to confine s 51(xxxi) to "purposes" under other s 51 heads of power (for example), it would have been trivial to do so expressly. The breadth of the formulation in s 51(xxxi) may also be contrasted with one in which the acquisitions of property embraced by the provision are confined to States and residents of those States, as opposed to "persons" at large.

33. Fourth, s 122 empowers the Commonwealth Parliament to "make laws for the government of any territory […]" (emphasis added). The use of the word "for", here as in other heads of legislative power, identifies the purpose of the laws in question.[37] Accordingly, "the government of any territory" is one of the many "purpose[s] in respect of which the Parliament has power to make laws" within the meaning of s 51(xxxi).[38]

34. The textual matters relied upon by the Commonwealth as supporting the isolation of s 122 from s 51(xxxi) are unpersuasive:

(a) The absence of the express words "subject to this Constitution" in s 122 (in contrast to the chapeau of s 51) could only be viewed as material if it were suggested that the absence signified that s 122 (unlike s 51) is not subject to other provisions of the Constitution (cf CS [46]). That proposition is not only contrary to fundamental principles of constitutional interpretation,39 but also contrary to longstanding authorities establishing various respects in which s 122 is subject to other provisions of the Constitution.40

(b) The breadth of the subject matter of s 122 (that is, "the government of any territory") in no way counts against the abstraction of power by s 51(xxxi) (cf CS [28], [47]). On the contrary, it is precisely the overlap of subject matter with s 51(xxxi) that engages the interpretive principles underlying that abstraction of power. Additionally, the words "with respect to" in s 51(xxxi) and "for" in s 122

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37 *Lamshed* (1958) 99 CLR 132 at 141 (Dixon CJ, with whom Webb J, Kitto J and Taylor J agreed).
38 *Newcrest* (1997) 190 CLR 513 at 597 (Gummow J); W*urridjal* (2009) 237 CLR 309 at [77] (French CJ).
39 *Newcrest* (1997) 190 CLR 513 at 606 (Gummow J); see also at [Part V:26] above.
40 For example, *Cole v Whitfield* (1988) 165 CLR 360 at 391; *Vanderstock* (2023) 98 ALJR 208 at [61]-[63] (Kiefel CJ, Gageler and Gleeson JJ).

are in every material respect synonymous; they identify the subject matter of the relevant legislative power. As Dixon CJ observed in Lamshed:41

> *To my mind s 122 is a power given to the national Parliament of Australia as such to make laws 'for', that is to say 'with respect to', the government of the Territory. The words 'the government of any territory' of course describe the subject matter of the power.*

Accordingly, it is wrong to suggest that the power conferred by s 122, unlike s 51, is entirely unlimited by subject matter (cf **CS [47]**).

(c) The location of s 122 in Chapter VI of the Constitution has no significance (cf **CS [30]**). The Convention Debates record that it was thought to sit equally logically either with what became s 52 in Chapter I, or where it does now sit. The isolation of s 122 from the effects of other provisions based on the chapter divisions of the Constitution is contrary to authority.[42]

A.5 Contextual considerations

35. A range of contextual matters strongly support the proposition that laws made under s 122 are subject to the just terms requirement of s 51(xxxi).

Just terms requirement as a protection of fundamental rights

36. First, the just terms requirement in s 51(xxxi) represents a "very great constitutional safeguard", the purpose of which is "to ensure that in no circumstances will a law of the Commonwealth provide for the acquisition of property except upon just terms".[43] It is now well settled that it serves the function of protecting fundamental individual property rights through a guarantee of just terms,[44] rather than being exclusively directed at federal distribution of legislative power.[45] It may of course be accepted that the just terms requirement represents a limit on Commonwealth legislative power, rather than some absolute freestanding private right (cf **CS [43]**). But an important function of that limit is to protect individual private rights in property.

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41 *Lamshed* (1958) 99 CLR 132 at 141 (Dixon CJ, with whom Webb J, Kitto J and Taylor J agreed).
42 *Spratt v Hermes* (1965) 114 CLR 226 at 246 (Barwick CJ).
43 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 403 (Barwick CJ).
44 *Theophanous v Commonwealth* (2006) 225 CLR 101 at [5] (Gleeson CJ); *ICM* (2009) 240 CLR 140 at [43] (French CJ, Gummow and Crennan JJ), [185] (Heydon J); *Newcrest* (1997) 190 CLR 513 at 613 (Gummow J); 654 and 661 (Kirby J); *Street v Queensland Bar Association* (1989) 168 CLR 461 at 527 (Deane J).
45 *Wurridjal* (2009) 237 CLR 309 at [79] (French CJ).

37. All of this favours a construction that applies the just terms requirement to laws made under s 122. The individual property rights of Australians living in the Territories are no less important or significant than those of Australians living in the States. Territorians not inherently second-class Australians entitled to lesser constitutional protection of rights on account of their postcodes. Moreover, a construction that immunises laws made under s 122 from the just terms requirement undermines the constitutional protection afforded by s 51(xxxi) even to residents of the States and in respect of property in the States. That is because s 122 undoubtedly supports laws with operation in the States (including acquisition of property in the States),[46] and also because the just terms requirement extends to numerous forms of incorporeal property lacking a fixed or clear physical location.[47]

The Commonwealth Parliament as the national legislature

38. The application of the just terms requirement to laws under s 122 is consistent with the nature of the Constitution as a single coherent instrument and its creation of the Commonwealth Parliament as "the national legislature of Australia".[48]

39. The Commonwealth submissions pay lip-service to that principle (cf **CS [15], [31]**), and disclaim reliance upon "the defunct disparate theory" of s 122 (cf **CS [32]**). However, as explained below, much of the substantive argument advanced by the Commonwealth necessarily entails a resuscitation of the "disparate" theory in ways that are intractably inconsistent with the status of the Commonwealth Parliament as a single national legislature of Australia and the consistent stream of authority in this Court.

40. It may be accepted that the interaction between s 51(xxxi) and s 122 depends on "a consideration of the text and purpose of the Constitution as a whole", that being the very approach that gives rise to the interpretive principle underlying s 51(xxxi)'s abstraction from other legislative powers in the absence of a manifestation of contrary intention.[49] But in its fervent search for traces of any such contrary intention, the Commonwealth ultimately places central reliance on a disparate theory of s 122: that the provision creates and engages a separate capacity of the Commonwealth Parliament that is divorced from,

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46 *Newcrest* (1997) 190 CLR 513 at 601-603 (Gummow J); *Lamshed* (1958) 99 CLR 131 at 141 (Dixon CJ, with whom Webb J, Kitto J and Taylor J agreed).
47 *Newcrest* (1997) 190 CLR 513 at 602 (Gummow J).
48 *Lamshed* (1958) 99 CLR 131 at 143 (Dixon CJ, with whom Webb J, Kitto J and Taylor J agreed).
49 See above at [Part V:27]-[Part V:28].

and sits in absolute contradistinction to, the Commonwealth Parliament's primary capacity as the national legislature.

41. The point is most readily demonstrated by examination of the terms of the Commonwealth Submissions themselves:

(a) **CS [17]** seeks to distinguish "laws made by the Commonwealth *qua* the Commonwealth" from laws made by "the Commonwealth *qua* a territory";

(b) **CS [17]** also seeks to distinguish the Commonwealth Parliament's "capacity as a legislature of the nation as a whole" from "act[ing] solely as the legislature for a territory";

(c) **CS [18]** seeks to distinguish laws enacted by the Commonwealth Parliament "for the nation as a whole" from laws enacted by the same Parliament "for the government of the local community [of a Territory]";

(d) **CS [29]** asserts that the legislative power under s 122 (by implied contrast to those under s 51) is "akin to that of the States *qua* the States";

(e) **CS [44]** seeks to distinguish laws made under s 122 from laws "made for the nation as a whole".

42. Those submissions embody precisely the concept that was rejected and discarded in *Lamshed* and the line of authorities that followed. For instance, the proposition that s 122's effect is akin to the Commonwealth Parliament being "appointed a local legislature in and for the Territory with a power territorially restricted to the Territory" has been emphatically rejected.[50] Correspondingly, the necessity of treating the Constitution as "one coherent instrument for the government of the federation, and not as two constitutions, one for the federation and the other for its territories" has been upheld.[51] It is in keeping with this integrationist approach that s 122 laws have force and application throughout the entire Commonwealth.[52]

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50 *Lamshed* (1958) 99 CLR 131 at 141 (Dixon CJ, with whom Webb J, Kitto J and Taylor J agreed); *Wurridjal* (2009) 237 CLR 309 at [48] (French CJ).

51 *Lamshed* (1958) 99 CLR 131 at 154 (Kitto J); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 272 (Brennan, Deane and Toohey JJ).

52 *Lamshed* (1958) 99 CLR 131; *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492.

43. Thus, all laws made by the Commonwealth Parliament are laws made "*qua* the Commonwealth", as opposed to "*qua* a territory". All laws made by the Commonwealth Parliament are made in its "capacity as a legislature of the nation as a whole" and "for the nation as a whole". The distinction that represents the linchpin of the Commonwealth's argument may therefore be seen to be illusory.

Incoherence of the Commonwealth's hybrid position

44. The Commonwealth's line of argument based on the Commonwealth Parliament possessing a separate "capacity" as the local legislature of a territory gives rise to further incoherence when combined with its hybrid position that s 51(xxxi) does apply to laws that are supported by both s 122 and another s 51 head of power.

45. If it were the case, contrary to the submissions above, that s 122 engages a separate capacity of the Commonwealth Parliament to act as the local legislature of a territory as opposed to the national legislature of Australia, then it is unclear why the boundaries of its power as the local legislature of a territory should *contract* as the boundaries of particular heads of power as the national legislature *expand*.

46. One implication of the Commonwealth's hybrid position is that the Commonwealth Parliament might enact a property-acquiring law supported only by s 122, in its separate capacity as the local legislature of a territory (and therefore not subject to just terms requirements), but that law might later become supportable by one or more s 51 heads of power based on factual developments relevant to the breadth of such heads of power (say, developments in foreign relations or treaties).[53] In that scenario, under the Commonwealth's hybrid position, the just terms requirement would come into effect so as to invalidate the law's continuing operation and preclude repeal and re-enactment in substantially identical terms. And yet, nothing would have changed to render inapplicable a characterisation of the law as a law for the government of a territory. The same features of the law that made it such a law at the time of its enactment, and engaged the Commonwealth Parliament's capacity as "the local legislature of a territory" at that time, would continue to be present. And the same features would be present if the law were repealed and re-enacted in substantially identical terms.

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[53] In relation to the variable scope of the defence power under s 51(vi), see for example *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. In relation to the external affairs power under s 51(xxix), see for example *Commonwealth v Tasmania* (1983) 158 CLR 1.

47. It is notable that in the only judgment in the history of this Court to adopt the hybrid position, Toohey J was comforted only by the assumption that it was "almost inevitable that any acquisition of property by the Commonwealth" would henceforth be supported not only by s 122 but also a 51 head of power, and therefore attract the just terms requirement. Under that assumption only, the latent incoherence in the hybrid position can be marginalised. And it was on the basis of that assumption that Toohey J surmised that overruling *Teori Tau* would likely have implications only for the past and not the future, such that his Honour was reluctant to overrule *Teori Tau* notwithstanding his acceptance of the force of the criticisms levelled against it. The assumption made by Toohey J must now be doubted in the face of the Commonwealth's submission as to the breadth of s 122 and comparative narrowness of the heads of power under s 51.

Breadth of power vs non-applicability of restrictions on power

48. Another contextual matter on which the Commonwealth places emphasis is the general breadth of the legislative power conferred by s 122. Drawing on that breadth, the Commonwealth invokes a characterisation of s 122 as a 'plenary' power.

49. As has been trenchantly observed in past decisions of this Court, attaching the label of 'plenary' to a power such as that conferred by s 122 adds little of value to the specific inquiry as to its interaction with s 51(xxxi).[54] The word itself has been used in a variety of historical contexts (including in relation to s 51 heads of power undoubtedly subject to s 51(xxxi)) to bear a variety of distinct meanings.[55] As a matter of principle, the use of the label must not distract from the substance of the constitutional text and context. What is important for present purposes, is that to whatever extent the label is to be applied to the power under s 122, it does not mean or imply the non-applicability of restrictions or limitations found elsewhere in the Constitution.[56]

50. The general breadth of s 122, or any other head of legislative power, has no significant bearing on whether the specific restriction in s 51(xxxi) applies. As traversed above at [27] and [34(b)] it is the *overlap* that would otherwise exist between the subject matter of s 51(xxxi) and the other head of legislative power that engages the interpretive

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54 *Newcrest* (1997) 190 CLR 513 at 604-605, 611-612 (Gummow J).

55 As discussed in *Newcrest* (1997) 190 CLR 513 at 604-605 (Gummow J).

56 See *Vunilagi* (2023) 97 ALJR 627 at [100] (Gordon and Steward JJ); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 272 (Brennan, Deane and Toohey JJ); *Spratt v Hermes* (1965) 114 CLR at 242 (Barwick CJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [55], [57], [58] (French CJ).

principle underlying s 51(xxxi)'s abstraction of power. In order for such an overlap to exist, plainly the relevant power must be of sufficient breadth to create it.

51. It is instructive to consider heads of legislative power from which s 51(xxxi) does not abstract power – that is, those powers for which there has been discerned a contrary intention. Prominent examples include exactions of tax under s 51(ii), sequestration of bankrupts' property under s 51(xvii), and the imposition of forfeitures or penalties for breach of laws under other powers.[57] In none of these instances has the contrary intention been discerned based on the *general breadth* of the power; rather, it has been discerned from the *specific nature* of the power being such that the concept of just terms being provided is "inconsistent or incongruous".[58]

52. It may be accepted that s 122 confers a legislative power of considerable breadth. It may also be said that the numerous heads of power in s 51 vary greatly in their breadth. For example, the taxation power under s 51(ii) could reasonably be described as a power of greater breadth and significance than the lighthouses power under s 51(vii). But the non-applicability of the just terms requirement to taxation laws is in no way based on that greater breadth; it is based instead upon the nature of taxation being fundamentally inconsistent with the notion of just terms and a quid pro quo interaction.[59]

53. Nothing in the nature of the legislative power conferred by s 122 renders "inconsistent or incongruous" the provision of just terms for acquisitions of property made thereunder. In fact, the very breadth of the power, and the many sorts of laws under s 122 which might effect an acquisition of property, count against there being something in the specific nature of the power that is inherently incompatible with provision of just terms. For instance, s 122 would support the establishment and regulation of a classical lands acquisition regime in a territory, either directly through primary legislation or through a law empowering the making of delegated legislation. To an extent, the latter has in fact

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57 *Mutual Pools* (1994) 179 CLR 155 at 169-170 (Mason CJ), 177-178 (Brennan J); *Australian Tape Manufactuers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 509-510 (Mason CJ, Brennan, Deane and Gaudron JJ); *Schmidt* (1961) 105 CLR 361 at 372-373 (Dixon CJ; Fullagar, Kitto, Taylor and Windeyer JJ agreeing).

58 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [77] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Theophanous v Commonwealth* (2006) 225 CLR 101 at [56] (Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ).

59 *Mutual Pools* (1994) 179 CLR 155 at 170-171 (Mason CJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [77] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

occurred in the Northern Territory in reliance on s 122.[60] Acquisitions of land under legislative regimes of that category are archetypal examples of acquisitions that naturally admit of just terms; the very opposite of a situation where provision of just terms is "inconsistent or incongruous" or would "render […] the legitimate use and operation" of the power "meaningless".[61]

Asserted need for "flexibility"

54. A further contextual matter raised in the Commonwealth Submissions is a suggestion that application of the just terms requirement to s 122 would deprive the Commonwealth of the "flexibility" required to make laws for the government of territories: **CS [19], [25]-[26], [47]**. In this respect, the Commonwealth observes that territories of the Commonwealth may vary in their size and political and economic development.

55. However, the application of the just terms requirement to s 122 would not limit the range of circumstances in which the Commonwealth Parliament could acquire property for the government of territories. It would alter only the terms on which such acquisition could occur (for those acquisitions which of their nature admit of just terms). On a governmental scale, it represents essentially a *fiscal* constraint – and in that respect, it must be observed that the Commonwealth Parliament has every possible tool it might need to manage the Commonwealth's fiscal affairs, including most importantly the taxation power under s 51(ii). The application of the just terms requirement to s 122 would not "deprive s 122 of significant content" (cf **CS [33]**).

56. Even if a power to compulsorily acquire property for public purposes is an "essential feature of government" (**CS [29]**), that says nothing as to the absence of any corresponding entitlement to compensation or just terms being similarly essential. It has not been the experience of the Northern Territory since self-government that the existence of such an entitlement (in accordance with s 50 of the *Northern Territory (Self-Government) Act 1978* (Cth)) has prevented the "construction of roads, schools and hospitals" or the process of governance generally (cf **CS [29]**). Nor has that been the experience of the United States at either the federal or state level, in which an entitlement

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60 *Northern Territory (Administration) Act 1910* (Cth), s 9; *Lands Acquisition Ordinance 1911* (NT), s 2, supported by the *Northern Territory (Administration) Act 1910* (Cth), s 13. Note also, in relation to the period after introduction of self-government, the lands acquisition regime established by the *Lands Acquisition Act 1978* (NT), Part V; ultimately supported by the *Northern Territory (Self-Government) Act 1978* (Cth), ss 5 and 6 (although not representing delegated legislation in the strict sense).

61 *Mutual Pools* (1994) 179 CLR 155 at 219 (McHugh J).

to just compensation arises under the Fifth and Fourteenth Amendments to the US Constitution.[62]

57. Nothing in the Convention Debates supports the proposition that the absence of a just terms requirement was regarded as essential for the governance of the territories. The passage extracted at **CS [27]** as to the "experiments in administration" was specifically directed at the question of representation that engages only the final limb of s 122 – ie, the power of the Commonwealth Parliament to "allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit".[63]

Suggested inconsistency with the position of the States

10 58. The final line of argument advanced by the Commonwealth is that the application of s 51(xxxi)'s just terms requirement to s 122 would give rise to an "anomalous" inconsistency between the legislative powers of the Commonwealth and the States: **CS [48]**. However, in terms of constitutional interpretation, there is no anomaly at all. The legislative powers of the States are unlimited by any constitutional guarantees of just terms first and foremost because the Constitutions of the States lack any provisions analogous to s 51(xxxi).[64] It is no way anomalous for the respective positions of the Commonwealth and the States to reflect the very different express terms of their foundational documents.

59. In asserting the anomalousness, the Commonwealth refers to the Commonwealth
20 Parliament "stand[ing] in an equivalent position to a State Parliament" when legislating under s 122: **CS [48]**. That submission represents yet another manifestation of the erroneous proposition that the Commonwealth Parliament, when enacting laws under s 122, operates otherwise than in its capacity as the national legislature: see at [38]-[43] above. In reality, the Commonwealth Parliament does <u>not</u> stand in an equivalent position to a State Parliament when legislating under s 122, precisely because it is and remains a

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62 The Takings Clause in the Fifth Amendment applies directly to the US Federal Government, and its application is extended to the States by the Fourteenth Amendment: *Chicago, Burlington & Quincy Railroad Co v City of Chicago* 166 US 226 (1897). Notably, its protection extends to the District of Columbia where there is no parallel State government: see for example *Berman v Parker* 348 US 26 (1954).

63 See *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, at p 1013-1014.

64 The States differ further in having the capacity to legislatively amend their Constitutions subject to applicable "manner and form" provisions, rather than requiring a referendum process as under s 128 of the Commonwealth Constitution: *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545.

national legislature created under the Constitution as a legislature of enumerated powers subject to constitutionally entrenched limits. The differing position of the States reflects their historical development as colonies of England into which the principles of responsible government were gradually introduced.[65]

60. The Commonwealth also contends that its proffered construction "achieves equality of treatment for people wherever they live": **CS [49]**. That is untrue in any sense that is germane, because in considering the scope of the Commonwealth's legislative power, the relevant equality is one between how the Commonwealth can treat people living in the territories and how the Commonwealth can treat people living in the States. Insofar as some difference may arise between the outcomes of Commonwealth legislation in the territories and State legislation in the States, on account of the absence of analogues to s 51(xxxi) in the Constitutions of the States, that is no principled basis to distort the construction of the Commonwealth Constitution as a single coherent instrument.

A.6 Conclusion

61. *Wurridjal* is controlling as a matter of current authority, and correct as a matter of principle, as to the just terms requirement of s 51(xxxi) applying to laws enacted by the Commonwealth Parliament under s 122. There is no basis for the Court to revisit and re-open *Wurridjal*. Ground 1 of the appeal should be dismissed.

B. GROUND 2 – EXTINGUISHMENT OR IMPAIRMENT OF NATIVE TITLE AS A S 51(xxxi) ACQUISITION OF PROPERTY

62. In the momentous decision of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (***Mabo (No 2)***), this Court found that the common law of Australia gave recognition to rights and interests in land and waters possessed under Aboriginal laws and customs since before the Crown's acquisition of sovereignty.

63. In so doing, the Court overturned the reasoning in prior judicial decisions such as *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (***Milirrpum***). In *Milirrpum*, despite the evidence establishing the existence of a "subtle and elaborate system of social rules and

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65 See generally Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 1st ed, 2006), [2.2]-[2.5].

customs" among the Yolngu peoples, Blackburn J concluded that there was no common law doctrine of native title in Australia.

64. As Brennan J observed in *Mabo (No 2)*, the historical denial of the pre-existing proprietary interest of Indigenous peoples of Australia "depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs", was "a fiction […] which has no place in the contemporary law of this country", and was "an unjust and discriminatory doctrine [that] can no longer be accepted".[66] The common law's recognition of native title rights represented a correction to the repugnant application of the *terra nullius* doctrine to the English settlement of Australia.[67]

10 65. Nevertheless, the Commonwealth now contends that the terms on which native title is recognised operate to deny native title rights the most fundamental constitutional protection afforded to other species of property: the requirement that the acquisition of such property pursuant to Commonwealth legislation be on just terms. If that contention is accepted by this Court, the effect will be to resurrect a legal "fiction" and "an unjust and discriminatory doctrine" in another form.

66. At the heart of the Commonwealth's argument on Ground 2 is a novel and radical extension of the concept of 'inherent defeasibility' in s 51(xxxi) jurisprudence – hitherto applied only to certain statutory rights – to cover native title rights in lands and waters. For the reasons that follow, that extension is inconsistent with the general principles
20 applicable to s 51(xxxi), the contours of the 'inherent defeasibility' concept in particular, and the underlying nature of native title rights.

B.1 Nature of compensable acts

67. As a preliminary point, attention should be focused on the nature of the compensable acts that are the subject of the dispute underlying Ground 2 and the present appeal: the vesting in the Crown of minerals in the Northern Territory by s 107 of the *Mining Ordinance 1939* (NT) (**1939 Ordinance**); and the granting of special mineral leases under the 1939 Ordinance or the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT) (**1968 Ordinance**).

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66 *Mabo (No 2)* (1992) 175 CLR 1 at 40, 42 (Brennan J).
67 *Mabo (No 2)* (1992) 175 CLR 1 at 41, 58 (Brennan J); 109 (Deane and Gaudron JJ); 180-182 (Toohey J).

68. The Commonwealth frames these acts as simply the exercise of the Crown's radical title to the land: **CS [4], [61], [70], [80]**. However, that description must not distract attention from the fact that these acts represented exercises of the legislative power of the Commonwealth, as opposed to any executive or prerogative powers that might also engage the concept of radical title. That legislative power cannot properly be subsumed with prerogative powers that may have existed at the time British sovereignty was first claimed, into an undifferentiated concept of "exercis[ing] the Crown's radical title", for the purposes of the present analysis.

69. It is common ground that no executive or prerogative power was engaged in the present case: **J [283]** (**CAB 113)**. From at least 1872 onwards, the power to grant interests in land in what is now the Northern Territory was exclusively legislative.[68] Any pre-existing prerogative power to make such grants had been abrogated.[69] Where a prerogative power is abrogated and replaced by a statutory power that is subject to restrictions or conditions that did not apply to the prerogative power, those restrictions and conditions cannot be circumvented by reliance on the former unrestricted prerogative power.[70]

70. As discussed further below, the salience of the legislative nature of the power underlying the compensable acts in the present case is underscored by the following observation of Brennan J in *Mabo (No 2)* (at 63, emphasis added):

> *Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. […] However, under the constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise it: municipal constitutional law determines the scope of authority to exercise a sovereign power over matters governed by municipal law, including rights and interests in land.*

B.2 Section 51(xxxi) – general principles

71. The Commonwealth's argument falls to be considered having regard to the following general principles applicable to s 51(xxxi).

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68 See, eg, *Waste Lands Act 1857* (SA), ss 1-2, 5-6 and 12; *Northern Territory Act 1863* (SA), s 2; *Northern Territory Land Act 1872* (SA), s 6; *Northern Territory Crown Lands Consolidation Act 1882* (SA), s 6; *Northern Territory Crown Lands Act 1890* (SA), s 6; *Northern Territory Land Act 1899* (SA), s 7; *Northern Territory Acceptance Act 1910* (Cth), s 7; *Northern Territory (Administration) Act 1910* (Cth), s 5; *Crown Lands Ordinance 1912* (NT), s 6.

69 Cf *Ruddock v Vadarlis* (2001) 110 FCR 491 at [33]-[34] (Black CJ); [181]-[182] (French J).

70 *Attorney-General v De Keyser's Royal Hotel Limited* [1920] AC 508.

72. First, as traversed at [36] above, s 51(xxxi) is "a very great constitutional safeguard" that serves to protect individual property rights, not merely the federal balance of power. Consistent with its status as a constitutional guarantee of rights:

(a) the terms "property" and "acquisition", and the guarantee overall, should be given a broad construction and a wide application;[71]

(b) an approach should be favoured that looks to substance and practical effect, rather than focusing on matters of form;[72] and

(c) a construction that would allow the legislature to "achieve by indirect means what s 51[(xxxi) does] not allow to be done directly" should be rejected.[73]

10 73. Second, "property" for s 51(xxxi) purposes extends to "every species of valuable right and interest", including "innominate and anomalous interests".[74]

74. Third, "acquisition" for s 51(xxxi) purposes does not require a precise correspondence between the property taken from a person and the advantage or benefit obtained by the Commonwealth or other party.[75] The relief of a burden on a title to land by the sterilisation of other rights or interests in the land is sufficient to amount to an acquisition.[76]

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71 *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *JT International SA v Commonwealth* (2012) 250 CLR 1 at [263] (Crennan J); *ICM* (2009) 240 CLR 140 at [43] (French CJ, Gummow and Crennan JJ), [185] (Heydon J); *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J).

72 *ICM* (2009) 240 CLR 140 at [44] (French CJ, Gummow and Crennan JJ), [189] (Heydon J); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 (***Georgiaidis***) at 305 (Mason CJ, Deane and Gaudron JJ); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 (***WMC***) at [128] (McHugh J).

73 *ICM* (2009) 240 CLR 140 at [192] (Heydon J); *The Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 283 (Deane J); *Georgiadis* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and Gaudron JJ), 320 (Toohey J); *Mutual Pools* (1994) 179 CLR 155 at 173 (Mason CJ); *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J); *WMC* (1998) 194 CLR 1 at [237(2)] (Kirby J).

74 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 190 (Starke J); *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J); *JT International SA v Commonwealth* (2012) 250 CLR 1 at [263], [366] (Kiefel J); *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 (***Telstra***) at [49] (the Court); *ICM* (2009) 240 CLR 140 at [131] (Heydon J).

75 *Georgiadis* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and Gaudron JJ).

76 *Newcrest* (1997) 190 CLR 513 at 530 (Brennan CJ), 634 (Gummow J).

B.3 Section 51(xxxi) – inherent defeasibility of statutory rights

75. Underpinning the Commonwealth's appeal on ground 2 is a line of authorities in which it has been found that legislative alteration of certain statutory rights did not have the character of an acquisition of property within the meaning of s 51(xxxi).

76. Labels such as "inherently defeasible" or "inherently susceptible to variation" have occasionally (though not uniformly) been used to describe the statutory rights in such cases.[77] However, the use of such labels is apt to mislead if not approached with caution, and must not obscure the underlying question of whether what is done has the character of an acquisition of property, having regard to the "practical and legal operation of the legislative provisions that are in issue" and the statutory and historical context of the entitlements in question.[78]

77. It is well-established that "the contingency of subsequent legislative modification or extinguishment", which is in one sense inherent in all statutory rights,[79] does not deny s 51(xxxi) just terms protection to all statutory rights.[80] Accordingly, it is not the existence of a power to vary or extinguish the rights in question that makes them "inherently defeasible" for s 51(xxxi) purposes. This invites inquiry as to what distinguishes those statutory rights which are "inherently defeasible" in the relevant sense from those which are not.

Indicia that statutory rights are inherently defeasible for s 51(xxxi) purposes

78. It is instructive to consider the features of statutory rights in the preceding authorities which have been identified as supporting a conclusion that they are inherently susceptible to variation or defeasance in a manner that negatives just terms protection:

(a) Where the statutory right relates to ownership or use of land, and its extinguishment relieves a reciprocal burden on another party (including a reciprocal burden on the Crown's radical title), the concept is not applicable.[81]

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77 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 (***Peverill***) at 237 (Mason CJ, Deane and Gaudron JJ); *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [49] (Kirby J), [59] (Heydon J); *Georgiadis* (1994) 179 CLR 297) at 305-306 (Mason CJ, Deane and Gaudron JJ).

78 *Telstra* (2008) 234 CLR 210 at [49]-[50] (the Court).

79 See *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

80 *Telstra* (2008) 234 CLR 210 at [49] (the Court); *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [24] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

81 *WMC* (1998) 194 CLR 1 at [16]-[17], [20], (Brennan CJ), [84] (Gaudron J); *Newcrest Mining (WA) Limited v Commonwealth* (1997) 190 CLR 513 at 529-530 (Brennan CJ), 634-635 (Gummow J).

Accordingly, s 51(xxxi) protection has extended to statutory mining rights and statutory land interests under Aboriginal land rights legislation.[82]

(b) By contrast, the concept has found application where the statutory right is "not based on antecedent proprietary rights recognised by the general law",[83] where the statutory right lacks *even by way of analogy* the familiar features of valuable property interests long recognised by the common law,[84] and where the form of "property" involved is "dependent upon federal law for its substance, recognition and protection".[85]

(c) Equally, the concept has found application in circumstances where the statutory rights in question can properly be described as "slight or insubstantial",[86] "ephemeral",[87] or "transient" (such as a permit in effect for a specified finite period);[88] as opposed to having a "degree of permanence or stability",[89] or being "susceptible of some form of repetitive or continuing enjoyment".[90]

(d) The concept has found application where the variation of the statutory rights reflects a genuine adjustment of competing claims, rights or obligations between multiple parties in a pre-existing relationship,[91] or the deployment of public funds to maximum advantage in a domain calling for assessment of numerous factors and policy considerations that are subject to change over time (such as regulatory schemes for welfare benefits).[92] In this respect, the flexibility of the relevant statutory scheme is material, as is explicit reference in the supporting legislation to the prospect of the relevant statutory right being varied.[93] A further factor supporting application of the concept is that the effect of the impugned

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82 *Newcrest* (1997) 190 CLR 513; *Wurridjal* (2009) 237 CLR 309.
83 *Peverill* (1994) 179 CLR 226 at 237 (Mason CJ, Deane and Gaudron JJ); *Georgiadis* (1994) 179 CLR 297 at 305-306 (Mason CJ, Deane and Gaudron JJ).
84 *WMC* (1998) 194 CLR 1 at [253] (Kirby J).
85 *Peverill* (1994) 179 CLR 226 at 266 (McHugh J).
86 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 165 (Black CJ and Gummow J).
87 *WMC* (1998) 194 CLR 1 at [253] (Kirby J).
88 *WMC* (1998) 194 CLR 1 at [53]-[54] (Toohey J).
89 *Peverill* (1994) 179 CLR 226 at 244 (Brennan J).
90 *Peverill* (1994) 179 CLR 226 at 243 (Brennan J).
91 *Peverill* (1994) 179 CLR 226 at 236 (Mason CJ, Deane and Gaudron JJ); cf *WMC* (1998) 194 CLR 1 at [254] (Kirby J).
92 *Peverill* (1994) 179 CLR 226 at 236-237 (Mason CJ, Deane and Gaudron JJ).
93 *WMC* (1998) 194 CLR 1 at [181], [198]-[203] (Gummow J).

legislation on the relevant rights was incidental to a purpose of adjusting the broader statutory scheme.[94]

B.4 S 51(xxxi) concept of inherent defeasibility applies only to statutory rights

79. The Full Court was correct to find that the concept of "inherent defeasibility" or "inherent susceptibility to variation" in relation to s 51(xxxi)'s operation is confined to statutory rights: cf **CS [71]-[73]**. That is so *irrespective* of whether the concept is to be applied under the rubric of identifying "property", or also under the rubric of identifying "acquisition" (cf **CS [70]**).

80. The Full Court did not fall into the error asserted at **CS [71]** of misapprehending that the "inherent susceptibility" concept applied to all statutory rights. What the Full Court correctly observed was that the concept has never previously been extended beyond statutory rights.[95] Contrary to the misconceived submissions of the Commonwealth, there are sound reasons of principle as to why there should not be such an extension: cf **CS [73], [107]**.

81. First, in the case of statutory rights, the nature and substantive content of the rights is exclusively a function of the terms and context of the relevant legislation. As identified in the prior authorities, the statutory framework may in some cases reveal a clear legislative policy and intention – objectively determined – that the rights be subject to subsequent variation or extinguishment without compensation. That being so in a particular case,[96] an entitlement to just terms/compensation for such variation or extinguishment would be incoherent and inconsistent with the nature and conferral of the rights themselves. It would entail a logical antimony: relying on the legislative conferral of a right to establish an entitlement to just terms that is denied by that very same legislative conferral. The same is never true of non-statutory rights, because the nature and content of those rights is not a matter of exclusively legislative definition.

82. Second, in the case of statutory rights, s 51(xxxi)'s status and function as a guarantee of individual rights assumes a somewhat different quality. That is because extinguishment or variation of statutory rights entails no more than the Commonwealth taking back from

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94 *Peverill* (1994) 179 CLR 226 at 237 (Mason CJ, Deane and Gaudron JJ).
95 With the exception of the dictum of Gummow J in *Newcrest*, addressed further below.
96 Which is not every case involving statutory rights: see at [Part V:77]-[Part V:78] above.

a person what the Commonwealth had itself previously given. Where the statutory right was specifically conferred on qualified terms (whether express or implied) that admit of later re-appropriation without compensation,[97] giving effect to those terms does not implicate fundamental rights in the same manner as taking property existing under the general law.

83. Third, in the case of statutory rights, unique considerations arise as to constitutional entrenchment of particular exercises of Commonwealth legislative power. Too broad an application of s 51(xxxi) to statutory rights may be constitutionally problematic as it would allow an earlier Parliament's exercise of legislative heads of power to fetter a future Parliament's exercise of the same heads of power and incrementally reduce their scope. It is axiomatic that some statutory schemes established in relation to the subject matter of the Commonwealth Parliament's various heads of legislative power may need to be modified from time to time in response to shifting conditions and policy considerations (the medical benefits in *Peverill* representing a paradigm example).

84. The various meanings of the term "defeasible" in other contexts do not govern the breadth of the "inherent defeasibility" concept in s 51(xxxi) jurisprudence. The Commonwealth's reliance on private law definitions framed in terms of contingency of termination is misplaced (cf **CS [105]**), because it is well established that the s 51(xxxi) concept is not engaged merely by "the contingency of subsequent legislative modification or extinguishment": see at [77] above.

85. In *WMC*, Gummow J did not indicate that the s 51(xxxi) "inherent defeasibility" concept extended to non-statutory rights: cf **CS [110]-[111]**. His Honour merely referred to a revocable trust *by way of analogy* to demonstrate why an inherently defeasible statutory right might still have "the attribute of 'property' in the 'traditional' sense of the general law" (at [196]). At most, this might reflect an analysis of the s 51(xxxi) "inherent defeasibility" of statutory rights as sometimes operating at the level of "acquisition" rather than "property". The same is true of what is said at **CS [112]-[118]** in relation to *Chaffey*. It says nothing as to the concept extending to non-statutory rights.

86. The emphasis in *Cunningham v The Commonwealth* (2016) 259 CLR 536 of the usefulness of the dichotomy between "rights recognised by the general law" and statutory

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[97] Which again is not every case involving statutory rights.

rights weighs against the Commonwealth's argument, not in favour of it: cf **CS [119]-[120]**. It is not implicit in the plurality's references to statutory rights as "more liable to variation" that any non-statutory rights are sufficiently "liable to variation" in the necessary sense to engage the s 51(xxxi) inherent defeasibility concept. Similarly, the plurality's identification that the statutory nature of a right is not a sufficient condition to engage the concept, says nothing as to that not being a necessary condition: cf **CS [121]-[122]**.

B.5 Nature of native title rights

General nature of native title rights

10 87. Native title rights, as identified in s 223(1) of the *Native Title Act 1993* (Cth) (***NTA***), are rights rooted in the pre-existing and enduring traditional laws and customs of Indigenous peoples and the connection of those peoples with land or waters.[98] While recognised by the common law, they are not a creation of the common law.[99] Native title rights, as rights in lands and waters, have a proprietary character,[100] albeit that native title also has a spiritual dimension, is in that respect *sui generis*, and does not necessarily conform to the contours of common law titles and estates.[101]

88. The recognition afforded to native title rights by the common law does not represent an instantiation of a new common law right whose content is determined by reference to the relevant Indigenous laws and customs. Instead, it represents pre-existing "rights and
20 interests relating to land, and rooted in traditional law and custom" surviving the "intersection between legal systems" that occurred at the time of sovereignty, and being capable of enforcement and protection "by resort to the processes of the new legal order".[102] It follows that native title rights, as recognised by the common law, were not "created" at the time of sovereignty; rather, they subsisted after sovereignty.[103]

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98 *NTA* s 223(1)(a)-(b); cf *Mabo (No 2)* (1992) 175 CLR 1 at 58 (Brennan J), 110 (Deane and Gaudron JJ).

99 *NTA* s 223(1)(c); *Fejo v Northern Territory* (1998) 195 CLR 96 at [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Yanner v Eaton* (1999) 201 CLR 351 at [76] (Gummow J); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (***Yorta Yorta***) at [75]-[76] (Gleeson CJ, Gummow and Hayne JJ).

100 *Mabo (No 2)* (1992) 175 CLR 1 at 51 (Brennan J); *Northern Territory v Griffiths* (2019) 269 CLR 1 at [23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

101 *Ward* at [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Northern Territory v Griffiths* (2019) 269 CLR 1 at [23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Love v Commonwealth* (2020) 270 CLR 152 (***Love***) at [290], [339] (Gordon J), [451] (Edelman J).

102 *Yorta Yorta* (2002) 214 CLR 422 at [75]-[77] (Gleeson CJ, Gummow and Hayne JJ).

103 *Love* (2020) 270 CLR 152 at [340] (Gordon J).

89. The profound significance and value of native title rights, as recognised by the common law, is reflected in numerous authorities of this Court. Notably, in *Northern Territory v Griffiths* (2019) 269 CLR 1 (***Griffiths 2019***), the Court approached the assessment of economic loss from extinguishment and impairment of native title rights in a manner analogous to common law proprietary rights and interests.[104] That approach was taken notwithstanding the acknowledgment that native title rights and interests were not the same as common law proprietary rights and interests. As the joint judgment observed (at [75]):

> *[A]lthough native title rights and interests have different characteristics from common law land title rights and interests, and derive from a different source, native title holders are not to be deprived of their native title rights and interests without the payment of just compensation any more than the holders of common law land title are not to be deprived of their rights and interests without the payment of just compensation.*

90. In *Griffiths 2019* the Court also recognised the value of the deep spiritual connection underlying native title in upholding a substantial award of compensation in respect of the cultural loss occasioned by various extinguishment and impairment of native title rights. In that respect, the Court accepted findings that the cultural loss occasioned by interference with the relevant native title rights was "permanent and intergenerational" and entailed "emotional, gut-wrenching pain".[105]

Extinguishment of native title - Mabo (No 2)

91. The Commonwealth places central reliance on the analysis of native title rights in the judgment of Brennan J in *Mabo (No 2)*. In particular, the Commonwealth emphasises the following elements of that analysis:

(a) First, that recognition of native title cannot occur in a way that "fractures the skeleton of principle", including a way that overturns the doctrine of tenure and replaces it with an allodial system of land ownership: **CS [81]-[84]**.

(b) Second, that radical title is a logical postulate of the doctrine of tenure and a concomitant of sovereignty, which enabled the Crown to exercise a sovereign

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104 *Griffiths* (2019) 269 CLR 1 at [63], [68], [70], [74]-[75], [85] (Kiefel CJ, Gageler, Keane, Nettle and Gordon JJ).

105 *Griffiths* (2019) 269 CLR 1 at [194], [230] (Kiefel CJ, Gageler, Keane, Nettle and Gordon JJ).

power to grant interest in land to be held of the Crown or acquire land to become absolute beneficial owner: **CS [86]-[87]**.

(c) Third, that as a matter of statutory construction there is a rebuttable presumption against authorising impairment of previous Crown grants of land, but no comparable presumption against authorising extinguishment of native title: **CS [92], [94]**.

92. None of these elements is inconsistent with the power to grant or acquire interests in land being subject to constraints, including a constitutional constraint that just terms compensation be provided for pre-existing interests that are extinguished by the relevant grant. On the contrary, Brennan J expressly observed that the legality and validity of exercises of such power depends upon "the authority vested in the organ of government purporting to exercise it", the scope of which in turn depends upon "municipal constitutional law".[106]

93. That observation has direct application to the present case. It is essential to note that in the present case – unlike many other cases and unlike all cases of extinguishment prior to 1900:

(a) the "organ of government" purporting to exercise the power is the Commonwealth;

(b) the relevant "authority" vested in the Commonwealth is the legislative power under s 122; and

(c) the scope of the authority conferred by s 122 is qualified by s 51(xxxi), for the reasons explained in relation to Ground 1.

94. Thus, whatever may be said generally about a sovereign power to grant or acquire interests in land, the scope of the Commonwealth legislature to exercise such a power is circumscribed by s 51(xxxi). The Commonwealth's argument to the contrary here has

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[106] *Mabo (No 2)* (1992) 175 CLR 1 at 63, 70-71 (Brennan J). There is no principled basis to read down Brennan J's reference to "municipal constitutional law" to mean that only the specific statute conferring power to grant or acquire interests in land need be complied with: cf **CS [92], fn 103.** The expression "municipal constitutional law" is apt to describe the full range of constitutional law, including constitutional limitations on power. Moreover, it would be incoherent to require conformity with the terms of a specific ordinary statute, but not with the terms of the Constitution from which the force of that statute derives. The stream cannot run higher than the source.

echoes of its argument under Ground 1 that seeks to sever s 122 from the constitutional limitations on Commonwealth legislative power found elsewhere in the Constitution.

95. Consistent with Brennan J's observation, Deane and Gaudron JJ in *Mabo (No 2)* expressly affirmed the applicability of s 51(xxxi) to legislative extinguishment of native title by the Commonwealth (at 111, emphasis added):

> *There are, however, some important constraints on the legislative power of Commonwealth, State or Territory Parliaments to extinguish or diminish the common law native titles which survive in this country. In so far as the Commonwealth is concerned, there is the requirement of s. 51(xxxi) of the Constitution that a law with respect to the acquisition of property provide "just terms". Our conclusion that rights under common law native title are true legal rights which are recognized and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s. 51(xxxi).*

96. None of the other members of the Court in *Mabo (No 2)* disagreed with that conclusion. Brennan J's analysis (as traversed at [70] and [92]-[93] above) supports it. So too does that of Toohey J (at 193-194). The conclusion cannot sensibly be read down as applying only to "future extinguishment of native title" under lands acquisition legislation: cf **CS [63]**. Such a reading would not only fly in the face of the express reference to "any legislative extinguishment" (emphasis added), but also be incoherent as a matter of principle. The observation made by Deane and Gaudron JJ as to the *Racial Discrimination Act 1975* (Cth) (***RDA***) representing "an even more important restriction" on legislative powers is consistent with both the fact that the *RDA* restriction, unlike s 51(xxxi), applies to the States, and the fact that discrimination based on race has no place in contemporary Australian law.

97. The differences in reasoning in *Mabo (No 2)* between Brennan J on the one hand, and Deane and Gaudron JJ on the other, are in some respects overstated by the Commonwealth (cf **CS [90]**). Deane and Gaudron JJ were in agreement with Brennan J that recognition of native title could not overturn the English system of land law under which titles are held of the Crown, and that the Crown acquired a radical title to the land upon settlement.[107] Their Honours were also in agreement that native title was "susceptible of being extinguished" by an inconsistent Crown grant or dealing.[108] The

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107 *Mabo (No 2)* (1992) 175 CLR 1 at 81, 86 (Deane and Gaudron JJ); cf [Part V:91(a)-(b)] above.
108 *Mabo (No 2)* (1992) 175 CLR 1 at 89-90 (Deane and Gaudron JJ); cf [Part V:91(b)] above.

difference was that Deane and Gaudron JJ characterised such extinguishment as "wrongful" at common law, albeit legally effective and not affording a suit against the Crown at common law for compensation.[109]

98. It is unnecessary for the Court in the present appeal to determine whether that characterisation is correct, or what if any remedies lay at common law for extinguishment of native title under prerogative powers. It is only the applicability of s 51(xxxi) to Commonwealth legislative extinguishment of native title that is in issue. In that respect, the conclusion of Deane and Gaudron JJ in *Mabo (No 2)* (consistent with Brennan J's reasoning) that s 51(xxxi) applies to Commonwealth legislative extinguishment of native title, notwithstanding native title being otherwise "susceptible of being extinguished", is highly significant.

99. The other difference in reasoning identified by the Commonwealth between Brennan J and Deane and Gaudron JJ relates to the statutory construction of legislation authorising Crown grants of land – in particular, whether "clear and unambiguous words" were required in order for Crown lands legislation to be construed as applying in a way that would extinguish native title rights: **CS [94]-[95]**. That is another issue that is unnecessary for the Court to decide in the present appeal. There is no question of construction of the 1939 Ordinance or 1968 Ordinance, and no question of whether the compensable acts fell beyond the scope of the 1939 Ordinance or 1968 Ordinance. The question is one of constitutional validity.

100. A separate element of the reasoning in *Mabo (No 2)* that warrants attention is that native title rights were identified as a *burden* on the Crown's radical title.[110] The necessary concomitant is that extinguishment of native title rights represents the relief of that burden on the Crown's radical title. The extinguishment of rights to land, and relief of the underlying title from a reciprocal burden, is a paradigmatic example of an acquisition of property under s 51(xxxi): see above at [74], [78(a)].

Extinguishment of native title - Newcrest

101. The only authority in this Court that runs at all contrary to the applicability of s 51(xxxi) to extinguishment of native title is one isolated passage from the judgment of Gummow

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109 *Mabo (No 2)* (1992) 175 CLR 1 at 93-95, 100-101 (Deane and Gaudron JJ).
110 *Mabo (No 2)* (1992) 175 CLR 1 at 50-52 (Brennan J), 90, 100, 109 (Deane and Gaudron JJ).

J in *Newcrest*. As traversed above in relation to Ground 1, that case concerned the interaction of ss 51(xxxi) and 122. It was not a case involving any native title rights or interests.

102. At the end of a lengthy analysis of the many reasons why s 122 was subject to s 51(xxxi), Gummow J briefly addressed an *in terrorem* argument of the Commonwealth that overruling *Teori Tau* would "potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the Territory since 1911 to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law". His Honour described the Commonwealth's "apprehensions" as "not well founded", by reference to native title having "an inherent susceptibility to extinguishment or defeasance by the grant of freehold or of some lesser estate which is inconsistent with native title rights" (at 613).

103. The Full Court correctly found that this reasoning was not adopted by any of the other judges in the majority in *Newcrest*: **J [414]-[419]** (**CAB 144-146)**. It is unsurprising that the other judges in the majority did not address the issue at length, because it was peripheral to the questions that needed to be decided in *Newcrest* (cf **CS [67]**). The only rights that were substantively considered in *Newcrest* in the context of s 51(xxxi) were statutory mining rights. Gummow J himself did not refer to or address the conclusion expressed by Deane and Gaudron JJ in *Mabo (No 2)* that s 51(xxxi) applies to any Commonwealth legislative extinguishment of native title rights.

Extinguishment of native title – other cases subsequent to Mabo (No 2)

104. The Commonwealth points to four subsequent decisions as demonstrating that Brennan J's judgment in *Mabo (No 2)* reflects the correct understanding of the basis of common law recognition of native title. However, as discussed above, nothing in Brennan J's judgment in *Mabo (No 2)* in any way cuts against the specific conclusion of Deane and Gaudron JJ that s 51(xxxi) applies to legislative extinguishment of native title. None of the subsequent decisions relied on by the Commonwealth actually advance its case on the question that needs to be decided in this appeal.

105. *Western Australia v Commonwealth* (1995) 183 CLR 373 (the ***Native Title Act Case***) confirms that a valid exercise of sovereign power inconsistent with native title rights may extinguish those rights: **CS [98]**. That proposition was accepted not only by Brennan J but also by Deane and Gaudron JJ in *Mabo (No 2)*, and is uncontroversial. It redirects

attention to Brennan J's observation as to the validity of such exercises of power depending on municipal constitutional law.

106. *Fejo v Northern Territory* (1998) 195 CLR 96 (***Fejo***) confirms that a (valid) grant of fee simple in land extinguishes native title rights in that land, rather than merely suspending such rights. That too is now uncontroversial. In arriving at that conclusion, the joint judgment quoted from numerous prior authorities, including *Mabo (No 2),* the *Native Title Act Case*, and *Wik Peoples v Queensland* (1996) 187 CLR 1 (***Wik***), but not *Newcrest*. The Commonwealth's contention that the joint judgment gave "tacit approval" to Gummow J's response to the *in terrorem* argument in *Newcrest* is not sustainable: cf **CS [100]**. The joint judgment did no more than cite in a footnote pages 612-613 of Gummow J's judgment in support of the proposition that a grant of fee simple had the effect of extinguishing native title. No issue relating to s 51(xxxi) arose or was discussed in *Fejo* at all. Insofar as *Fejo* or the *Native Title Act Case* address the question of statutory construction referred to at [99] above, they have no bearing on the present appeal: see at [99] above.

107. *Commonwealth v Yarmirr* (2001) 208 CLR 1 (***Yarmirr***) determined that recognition of exclusive native title rights over territorial waters would be inconsistent with the common law, due to the long established common law public rights to navigate and fish in such waters.[111] It represents one manifestation of the broader principle (again accepted not only by Brennan J but also by Deane and Gaudron JJ in *Mabo (No 2)*) that native title could not be recognised in a way that was inconsistent with sovereignty and the English system of land law.[112] However, as Brennan J and Deane and Gaudron JJ all recognised in *Mabo (No 2),* it is not inconsistent with sovereignty for the exercise of a legislative power to grant interests in land to be the subject of constitutional constraints and limitations.[113]

108. *Yarmirr* is, in fact, significant in a manner that is adverse to the Commonwealth's argument. It was held in *Yarmirr* that the concept of radical title does not have a "controlling role" in relation to native title rights, but is instead no more than "a tool of

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111 *Yarmirr* (2001) 208 CLR 1 at [94] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
112 See also *Yorta Yorta* at [77] (Gleeson CJ, Gunnow and Hayne JJ).
113 *Mabo (No 2)* (1992) 175 CLR 1 at 63 (Brennan J), 110-111 (Deane and Gaudron JJ).

legal analysis" that explains how native title rights can co-exist with the Crown's acquisition of sovereignty.[114]

109. Finally, *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***) again confirmed the uncontroversial proposition that native title at common law is capable of being extinguished by the valid exercise of a power to grant or assert interests in land. The language of "inherent fragility" was used in the specific context of distinguishing that common law position from the position obtaining under the *NTA*. Nothing in *Ward* denied the applicability of constitutional constraints to the exercise of Commonwealth powers to grant or assert interests in land, as contemplated by Brennan J and expressly affirmed by Deane and Gaudron JJ in *Mabo (No 2)*.

110. Two further authorities subsequent to *Mabo (No 2)* merit attention here. First, in *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, three members of this Court directly quoted Deane and Gaudron JJ's conclusion in *Mabo (No 2)* as to the applicability of s 51(xxxi) to legislative extinguishment of native title, without any criticism or suggestion of disagreement.[115] The First Respondent accepts that the question of s 51(xxxi)'s applicability to native title rights did not arise for determination in that case.

111. Second, in *Griffiths 2019*, the Court implicitly accepted that the extinguishment of native title represented the release of underlying title to land from a reciprocal burden.[116] In those circumstances, the Court had no difficulty in describing the extinguishment and impairment of native title rights as an "acquisition" of those rights.[117] That is consistent with the general principles applicable to s 51(xxxi) acquisitions: see at [74] above.

Reliance on authorities involving RDA and NTA

112. The Commonwealth asserts that the Full Court improperly relied on authorities describing the "position" of native title after the commencement of the *RDA* and *NTA*: **CS [76]**. That criticism is baseless.

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114 *Yarmirr* at [47]-[49] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

115 *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at [36] (Gummow, Hayne and Heydon JJ).

116 *Northern Territory v Griffiths* (2019) 269 CLR 1 at [32], [85], [103]-[104] (Kiefel CJ, Gageler, Keane, Nettle and Gordon JJ).

117 *Northern Territory v Griffiths* (2019) 269 CLR 1 at [53] (Kiefel CJ, Gageler, Keane, Nettle and Gordon JJ).

113. The Full Court did not suggest that the *RDA* had application in the present case. The Full Court instead had regard to what past decisions of this Court have said as to the nature of native title rights. The enactment of the *RDA* did not fundamentally change the nature of native title rights, such as to render inapplicable the Court's discussion of their nature in cases such as *Mabo v Queensland* (1988) 166 CLR 186 and the *Native Title Act Case*. It introduced an additional legislative restriction upon extinguishment of such rights (that applied equally to the States by virtue of s 109 of the Constitution). But importantly, it did so on the basis that lesser security of native title rights as compared to common law property rights would entail Indigenous Australians not enjoying the right to own or inherit property to the same extent (engaging s 10 of the *RDA*).[118] That reasoning necessarily embodies a premise that native title rights have a proprietary character, and the Full Court was correct to have regard to it for that purpose: **J [465]-[467]** (**CAB 157-158)**.

114. Equally, the Full Court did not suggest that the statutory restriction on extinguishment of native title under s 11 of the *NTA* directly operated in relation to the compensable acts in the present case. Instead, the Full Court had regard to the observations in *Griffiths 2019* as to the extinguishment of native title rights clearing a burden on the title to the land and thus conferring a corresponding benefit to the Territory: **J [462]-[463]** (**CAB 157**). Those observations underlay this Court's description of extinguishment and impairment of native title rights as an "acquisition" and the assessment of just terms compensation.[119]

Significance of Native Title Act

115. In any event, while it is not an essential plank in the First Respondent's argument in this appeal, this Court is entitled to have regard to the terms of the *NTA* in considering whether native title rights are "inherently defeasible" in the s 51(xxxi) sense.

116. In this appeal, the Commonwealth essentially invites the Court to develop the common law relating to native title, and the constitutional jurisprudence on s 51(xxxi), in a novel way so as to deny to native title rights a status that would support their extinguishment being characterised as an acquisition of property.[120] The Court would properly take into account the pattern of legislative developments in the field of native title law as one (of

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118 *Native Title Act Case* (1995) 183 CLR 373 at 437.
119 See at [Part V:89], [Part V:111] above.
120 Contrary to the views of Deane and Gaudron JJ in *Mabo (No 2)* (1992) 175 CLR 1 at 110-111.

several) reasons not to do so.[121] That is consistent with the general principle favouring development of the common law in a manner that is harmonious with legislation and lends coherence to the law overall.[122]

117. Viewed from that perspective, the following features of the *NTA* are salient:

(a) The Preamble to the *NTA* traverses the progressive dispossession of Aboriginal peoples and Torres Strait Islanders of their lands, "largely without compensation", and notes the unique disadvantage suffered by those peoples as a result. It refers to the protection of universal human rights and fundamental freedoms, including through ratification of instruments relating to economic, social and cultural rights and the elimination of racial discrimination. It expressly recognises the principle that justice requires compensation on just terms where acts extinguishing native title are validated or allowed.

(b) The *NTA*'s framework for validation of past acts and determination of compensation is framed by reference to "acquisition" of native title rights and entitlement to "just terms" compensation. Section 18 expressly contemplates past acts amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution, and therefore being invalid for want of just terms (but for the *NTA*'s validation provisions). To remedy that position, s 18 provides for an entitlement to just terms compensation. Section 53 is to similar effect, contemplating that the *NTA* might result in s 51(xxxi) acquisitions of property, and providing for sufficient compensation (to supplement any other compensation otherwise available) to ensure that acquisitions are made on s 51(xxxi) just terms.[123]

118. In the context of these features of the *NTA*, it would be an incongruity for the common law relating to native title to be developed in a manner that negatives a characterisation of extinguishment by legislative grant as a s 51(xxxi) acquisition of property.[124] Such an

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121 Cf *Love* (2020) 270 CLR 152 at [365] (Gordon J), [452], [454] (Edelman J), in relation to s 51(xix) and the concept of alienage.

122 See *Sullivan v Moody* (2001) 207 CLR 562 at [42], [55], [60] (the Court); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at [41] (Gummow, Heydon and Crennan JJ); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [31] (Gleeson CJ); *Love* (2020) 270 CLR 152 at [454] (Edelman J).

123 See also *NTA* ss 22E, 51(2).

124 Cf *Love* (2020) 270 CLR 152 at [71] (Bell J).

outcome would fundamentally undermine the purpose of the *NTA*, which is directed at providing legal recognition and protection of native title, ensuring that any extinguishment or impairment of native title rights is accompanied by just terms compensation.

B.6 Commonwealth legislative extinguishment of native title rights is subject to s 51(xxxi)

119. Having regard to the preceding analysis, the extinguishment or impairment of native title by inconsistent grant or assertion of rights pursuant to Commonwealth legislation does not fall outside the scope of s 51(xxxi) just terms protection. That is so for the following four reasons.

120. First, such extinguishment or impairment satisfies the requirements for an acquisition of property under the general principles applicable to s 51(xxxi) (as traversed at [71]-[74] above):

(a) In view of the breadth of the term "property" in s 51(xxxi), extending to "every species of valuable right and interest" including "innominate and anomalous interests", it cannot be doubted that native title rights qualify as "property".

(b) The extinguishment or impairment of native title rights by grant or assertion of inconsistent rights gives rise to a reciprocal benefit in the form of relief of a burden on the underlying radical title to the land. It therefore comfortably falls within the concept of an "acquisition" within the meaning of s 51(xxxi).

(c) The "substance and practical effect" of extinguishment or impairment of native title, which is no less significant than appropriation of common law property rights, supports a characterisation as an acquisition of property, particularly having regard to the status of s 51(xxxi) as an important constitutional guarantee of rights.

121. Second, for the reasons traversed at [79]-[86] above, the concept of "inherent defeasibility" in s 51(xxxi) jurisprudence has no application beyond statutory rights.

122. Third, even if the concept of "inherent defeasibility" in s 51(xxxi) jurisprudence is capable of application to some non-statutory rights, the contours of the concept preclude its application to native title. As discussed above, the concept does not apply to all

statutory rights, and is not engaged by the "mere contingency of subsequent legislative modification or extinguishment". It is therefore insufficient to point – as the Commonwealth does – to the "mere contingency" of extinguishment of native title rights by legislative grant or assertion of inconsistent interests in land. It is instead necessary to consider the nature, substance and origin of the rights in question. The question is not the existence of a power to modify or extinguish the rights, but rather, whether the nature of the rights is such that the exercise of that power has the character of an acquisition of property.

123. The characteristics that attract the operation of the s 51(xxxi) inherent defeasibility concept for some statutory rights, as traversed at [78] above, are wholly absent from native title rights:

(a) Native title rights operate as a burden on the radical title to the land. Extinguishment or impairment of native title by grant of inconsistent interests in land relieves that burden and therefore entails the derivation of a countervailing benefit of a proprietary character that directly relates to ownership or use of land.

(b) Native title rights have the quality of "antecedent proprietary rights" that are "recognised by the general law", even though they are *sui generis* and not common law estates in land: see at [87] above. Native title rights have been accepted as having, by way of analogy, features of valuable property interests long recognised by the common law, as manifested in the equivalence drawn between the proper assessment of economic loss in respect of common law estates and native title rights: see at [89] above. The content of native title rights is not dependent on federal law for its substance and recognition, albeit that the *NTA* extends additional protection to such rights.

(c) Native title rights are plainly "susceptible to some form of repetitive and continuing enjoyment", as much as (and perhaps more so than) any right known to the common law. While capable of being extinguished by *valid* inconsistent grant (just as all statutory rights are capable of being extinguished by valid amending legislation), they nonetheless enjoy a considerable degree of permanence.

(d) The contingency of extinguishment is neither inherent at the time of native title rights' creation not integral to the rights themselves: cf **CS [106(b)].** It is not inherent at the time of native title rights' creation because it is incorrect to speak of the intersection of legal systems at sovereignty as having "created" native title rights: see at [88] above. And it is not integral to the rights themselves because the very existence of native title rights is rooted in the enduring traditions and customs of Indigenous peoples extending back to times preceding British sovereignty, in many cases by thousands of years.[125] If the contingency of extinguishment were truly integral to native title rights themselves, it would follow that rights under traditional laws and customs "to hunt, fish and forage" (for example) could more appropriately be framed as rights under traditional laws and customs "to hunt, fish or forage unless the Crown makes an inconsistent grant of land". The absurdity of that formulation is patent.[126]

(e) Native title rights are not "slight or insubstantial", "ephemeral" or "transient". Any suggestion to that effect would run contrary not only to the recognition of their proprietary dimension and economic value, but also to the recognition of their profound spiritual and cultural significance: see at [89]-[90] above.

(f) Recognition of native title rights does not sit within a dynamic regulatory scheme involving the deployment of public funds based on competing multifaceted policy considerations. Similarly, extinguishment of native title rights by inconsistent grant does not represent a genuine adjustment of competing claims within such a scheme.

124. The inherent qualities of native title rights better correspond with those statutory rights for which the s 51(xxxi) "inherent defeasibility" concept is not applicable.

125. Fourth, denial of s 51(xxxi) just terms protection to extinguishment or impairment of native title rights by Commonwealth legislative grant would be incongruent with the common law's recognition of the unique connection between the Indigenous peoples of Australia and their traditional lands. The Court may have regard to that recognition in

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125 *Yorta Yorta* (2002) 214 CLR 422 at [75] (Gleeson CJ, Gummow and Hayne JJ); *Love* (2020) 270 CLR 152 at [336] (Gordon J).

126 By way of contrast, a formulation of the entitlement in *Peverill* as a right to receive the prescribed statutory medical benefit amount unless and as amended from time to time would be reasonable on its face.

determining the scope of heads of Commonwealth legislative power.[127] In *Love*, Gordon J observed (at [289]) that the "fundamental premise" and "deeper truth" from which *Mabo (No 2)* proceeds "is that the Indigenous peoples of Australia are the first peoples of this country, and the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was *not* severed or extinguished by European 'settlement'".

126. That "deeper truth" does not deny the possibility of extinguishment of native title. But it would not be consonant with that "deeper truth" to characterise such extinguishment as being in the nature of an inconsequential administrative adjustment, as opposed to an acquisition of property that engages the just terms protection afforded by s 51(xxxi) to the other peoples of Australia. Doing so would perpetuate the social and racial injustice effected by the historical dispossession of Aboriginal peoples and Torres Strait Islanders. It would further – to adopt the formulation of Brennan J in *Mabo (No 2)* – "seriously offend" the value of equality before the law[128] and would reduce native title to mere flotsam and jetsam which can be swept to one side when applying safeguards which arise from the Constitution.

B.7 Conclusion

127. The legislative extinguishment and impairment of native title rights by the pleaded compensable acts does not fall outside the scope of the just terms protection afforded by s 51(xxxi) of the Constitution. Ground 2 should be dismissed.

C. GROUND 3 – RESERVATION OF MINERALS IN PASTORAL LEASE

128. The Full Court correctly found that the grant of pastoral lease no 2229 dated 21 September 1903 (**Pastoral Lease**) under the *Northern Territory Land Act 1899* (SA) (**1899 Land Act**) did not extinguish any claimed non-exclusive native title right to minerals. That Pastoral Lease contained a reservation of minerals in terms that are reproduced in the judgment of the Full Court at [98] (the **Reservation**).

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127 *Love* (2020) 270 CLR 152 at [71], [73] (Bell J), [269]-[272] (Nettle J), [289]-[290], [331], [337]-[340], [350], [360], [364], [369] (Gordon J), [391], [451] (Edelman J).

128 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 30 (Brennan J).

129. Resolution of that issue turned on whether the rights in minerals created by the grant of the Pastoral Lease (if any) were inconsistent with the claimed non-exclusive native title right to minerals.

130. The question of what rights in minerals were conferred by the Pastoral Lease is one question, not two: cf **TS [85]-[86]**. One possible *answer* to that question is that exclusive rights to minerals were vested in the Crown. That is the answer contended for by the Commonwealth and Territory. Another possible answer is that no rights to minerals were conferred. That is the answer adopted by the Full Court, and contended for by the First Respondent. Yet another possible answer, that would not avail the Commonwealth or Territory, is that non-exclusive rights to minerals were conferred on the Crown.[129]

C.1 The proper approach to construction

131. The question of what rights in minerals, if any, were created by the Pastoral Lease turns upon a construction of the Reservation in the context of the full terms of the Pastoral Lease and the supporting statutory framework under which the Pastoral Lease was granted. That is the approach that was adopted by the Full Court.

132. Importantly, the process of construction is an objective one directed at what *rights* were (or were not) created by the grant of the Pastoral Lease, as opposed to what ultimate consequences it might have been thought or desired would follow from the creation (or non-creation) of such rights.[130]

133. Accordingly, it is not permissible to distort the process of construction by reference to what creation of rights might *now* be seen as better achieving the ultimate consequences that a government in 1903 is speculated to have wanted, in light of subsequent factual or legal developments that could not have been in contemplation. The role of the Court is not to retrospectively correct or adjust for possible miscalculations of the legislature or executive of South Australia in 1903.

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129 No notice of contention by the First Respondent is required to make this point, as the Full Court did determine the question of what rights in minerals were conferred by the Pastoral Lease, and the First Respondent does not contend that the Full Court's decision on this point was erroneous – cf *High Court Rules 2004* r 42.08.5 and TS [86], fn 124.

130 See *Ward* (2002) 213 CLR 1 at [78], [214], [306] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [619] (Callinan J); *Queensland v Congoo* (2015) 256 CLR 239 at [34]-[36] (French CJ and Keane J), [60] (Hayne J), [108]-[109] (Kiefel J), [139] (Bell J).

134. This represents a critical error in approach underlying portions of the Commonwealth and Territory submissions. In effect, it is submitted that even if the language employed in the Pastoral Lease was objectively apt in 1903 to describe a mere "holding back" of minerals from what was conferred on the lessee (in accordance with then-contemporaneous use of terminology in Australian land law), that construction should now be rejected on account of the development of the common law 89 years later in *Mabo (No 2)*, and an entirely different construction should instead be adopted to secure the ultimate consequences that would have obtained if native title had never been recognised: **CS [147]-[149]; TS [90], [110].**[131]

10 135. Such an approach is productive of incoherence, in that it implies that the correct construction of the Reservation is in a state of perpetual flux according to subsequent factual or legal developments (and in particular, was radically transmuted from a mere preservation of rights to a positive conferral of rights, on the day that judgment in *Mabo (No 2)* was delivered).

C.2 Text of the Pastoral Lease and Reservation

Ordinary meaning of 'reservation'

136. As one aspect of its textual analysis, the Full Court had regard to the prevailing understanding and use of the terms "reservation" and "reserving" in the Australian law of real property, as explained by Windeyer J in *Wade v New South Wales Rutile Mining*
20 *Co Pty Ltd* (1969) 121 CLR 177 (***Wade***) and Gummow J in *Wik*.[132] The attacks made on this analysis by the Commonwealth and Territory in the present appeal lack merit.

137. The Commonwealth contends that analysis of reservations as exceptions in cases such as *Wade* should actually be understood as entailing an assertion by the Crown of beneficial ownership, on the basis that under a pre-*Mabo (No 2)* understanding, a mere exception of something from what was granted under a lease had the *consequence* that the Crown retained beneficial ownership: **CS [147]-[149]**, see also **TS [93]**. In this respect it is said that a reservation or exception being a "holding back" is no more than a "characterisation" that is no longer applicable: **CS [149]**.

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131 See also **TS [108]** invoking what is asserted to have been a "colonial policy" of reserving minerals for the public good.

132 *Wade* (1969) 121 CLR 177 at 194 (Windeyer J); *Wik* (1996) 187 CLR 1 at 200-201 (Gummow J).

138. That argument is not sustainable upon a consideration of the authorities. It is entirely inconsistent with the decision of the High Court in *Yandama Pastoral Company v Mundi Mundi Pastoral Company* (1925) 36 CLR 340 (***Yandama***), in which it was held that a reservation "to all persons [of] the rights of crossing the said lands with travelling stock subject to [any legislation for the time being regulating travelling stock]" did not create any new rights, but instead preserved whatever such rights might otherwise exist from time to time.[133] This reflects a substantive meaning of 'reservation' as a "holding back" that is not contingent upon pre- or post-*Mabo (No 2)* understandings of the Crown's interests in land. It would not be coherent to assert that the common understood meaning of 'reservation' or 'exception' as a mere "holding back" was a matter of substance in the case of most reservations, but only a matter of metaphysical characterisation in the case of minerals. The understanding of the common meaning of 'reservation' reflected in *Yandama* and *Wade* was also adopted in *Ward v Western Australia* (1998) 159 ALR 483.[134]

139. It may be accepted that the generally understood meaning of "reservation" in Australian law is not absolutely determinative, and that the effect of the Reservation remains a matter of construction: cf **TS [95]**. It is clear that the Full Court did not treat it as determinative. It was one textual consideration to which the Full Court had regard, amongst many: **J [107], [109]** (**CAB 67**).

140. The words "out of this lease under His Majesty His Heirs and Successors" in the Reservation carry no significance: cf **CS [152]**. They represent nothing more than the fact that the Pastoral Lease was being granted by the Crown, such that the lease was "under His Majesty His Heirs and Successors". There is also no significance in the Reservation using both the words "reserving" and "excepting" in relation to minerals as opposed to one or other alone: cf **TS [95], [97]**.[135]

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133 *Yandama* (1925) 36 CLR 340 at 347-348 (Knox CJ), 376-377 (Higgins J), 377-378 (Rich J).

134 *Ward v Western Australia* (1998) 159 ALR 483 at 556. See also *Wik* (1996) 187 CLR 1 at 86 and fn 342 (Brennan CJ).

135 The only Australian authority cited by the Territory as supporting the contrary view is a footnote in the dissenting judgment of Callinan J in *Ward* (2002) 213 CLR 1. His Honour's judgment cannot be taken as authoritative, as His Honour's analysis of the effect of the reservation in *Ward* was diametrically opposed to that of the majority: compare at [219]-[221] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) and [778]-[779] (Callinan J). Moreover, the footnote itself says nothing as the salience of use of both words 'reserving' and 'excepting' in a reservation.

141. The inclusion in the Reservation of a "full and free liberty of access … to dig try search for and work" minerals also says nothing about whether the Reservations is positively creating such "liberty of access" or instead merely limiting the grant so that any such liberty otherwise existing from time to time is not lost: cf **CS [153], TS [96]**. The inclusion of the "liberty of access" serves to make clear that not only is the grantee of the Pastoral Lease not obtaining interests in minerals, but also may not rely on the Pastoral Lease to exclude access to persons otherwise enjoying such rights from time to time. The fact that a particular right or "liberty" in isolation may have the character of a "positive" right, does not mean that the reservation of that right or liberty is a conferral of a new positive right. So much is clear from *Yandama*: a right of crossing land with travelling stock is undoubtedly a "positive" right, but the reservation of that right did not create or assert any positive rights.

142. Conversely, the fact that the "liberty of access" was reserved not only to the Minister and his agents and persons authorised by the Minister, but also to all other persons with "other lawful authority" points strongly towards a mere preservation of rights: **J [109]** (**CAB 67)**. It does not cohere with an assertion of beneficial title and exclusive possession by the Crown, because that title and possession would be inconsistent with a liberty of access being enjoyed by "other persons" having "other lawful authority": cf **CS [154]**.

C.3 Statutory context of Pastoral Lease and Reservation

143. The Full Court had careful and proper regard to the statutory framework under which the Pastoral Lease was granted: **J [111]-[115]** (**CAB 68-70)**. That framework consisted of the *Northern Territory Land Act 1899* (SA) (**1899 Act**) together with the *Northern Territory Crown Lands Act 1890* (SA) (**1890 Act**). The contextual matters raised by the Commonwealth and Territory do not establish error and do not support a conclusion contrary to that reached by the Full Court.

144. First, the existence of a power under s 6 of the 1890 Act to reserve Crown lands for specified purposes is consistent with the Full Court's characterisation of the legislation as a whole as being "directed at the grant of interests in land to third parties and the preservation of land for particular purposes": cf **CS [138]**. The power under s 6 has no operation in the present case.

145. Second, the fact that s 24 of the 1899 Act required pastoral leases to include a reservation of minerals such as the Reservation in the present case says nothing about whether such reservation, properly construed, confers or asserts new rights to minerals in the Crown: cf **CS [138], [152]**. Contrary to the selective quotation at **CS [152]**, the reservation required by the 1899 Act is one "in favour of the Crown, and all persons authorised" (emphasis added). That is entirely consistent with a legislative intention to hold back mineral rights from what is granted to lessees, preserving whatever rights in minerals otherwise exist from time to time. The inclusion in the reservation of "all necessary rights of access, search, procuration, and removal, and all incidental rights and powers" serves to indicate that the rights conferred on the lessee do not include rights to exclude persons authorised from time to time from exercising these "necessary" and "incidental" rights: cf **TS [99]-[100]**.

146. Third, the existence of a power under s 77 of the 1890 Act to grant leases to discoverers of certain substances (not including metals or metallic ores) does not cut against the Full Court's observations that the 1890 Act and 1899 Act are not primarily directed at mining and mineral rights. Equally, the power under s 2 of the *Northern Territory Crown Lands Amendment Act 1896* (SA) to grant to holders of pastoral leases a permit to search for minerals is indicative of no more than the "holding back" of mineral rights in the pastoral leases themselves: cf **CS [138]**)

147. Fourth, irrespective of the scope of direct statutory penalties that were created in respect of unauthorised mining, ss 53 and 54 of the 1899 Act created a power of resumption in the event that land subject to a pastoral lease "shall be required […] for mining" purposes. Additionally, the provisions required to be included in pastoral leases by force of s 24 of the 1899 Act included a provision allowing cancellation of the lease if there was breach or non-performance of any of the lessee's "covenants or conditions" (which would include the required reservation of minerals).[136] These represented practical mechanisms by which unauthorised mining could be prevented: cf **CS [138]**.

148. Fifth, the provisions of the 1890 Act relating to estates in fee simple and leases under Part II of that Act have no bearing on pastoral leases granted under the 1890 Act or 1899

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[136] See *Northern Territory Land Act 1899* (SA), s 24 and Schedule A paragraph (o). This is reflected in the Pastoral Lease itself, the terms of which allow for cancellation of the lease if there has been a failure to observe or breach of any covenant or condition contained in the lease: Appellant's Book of Further Materials at p 156.

Act: cf **TS [101]-[102]**. Leases under Part II of the 1890 Act are perpetual leases or leases with a right of purchase; they do not include pastoral leases. The structure of the 1890 Act treats pastoral leases as an entirely separate category, governed by a distinct set of provisions (ie, Part V). To the extent that s 8 of the 1890 Act has any present significance, it could only be in highlighting the absence of any express assertion of rights in minerals by the Crown in the case of pastoral leases.

C.4 The Commonwealth's historical argument based on ejection and intrusion

149. The Commonwealth places considerable reliance on what is said to have been the "function" of mineral reservations in around 1903. This function is identified as being to allow the Crown to bring an action for intrusion so as to prevent persons from taking reserved minerals without lawful authority (**CS [131]**).

150. The argument involves the following sequential propositions, each of which is essential to the argument as a whole:

(a) Under the law of South Australia as at 1903, the Crown could not bring an action for ejectment (**CS [136]**).

(b) Therefore, the Crown's only recourse against unauthorised taking of minerals was an action of intrusion (**CS [137]**).

(c) Therefore, a function of mineral reservations was to ensure that the Crown was in a position to bring an action for intrusion (**CS [131], [141]**).

(d) An action for intrusion required that the Crown have exclusive possession (**CS [137]**).

(e) Therefore, to serve the function referred to at (c) above, a mineral reservation needed to produce the ultimate result that the Crown had exclusive possession of minerals (**CS [142]**).

151. The argument is flawed for at least two distinct reasons.

152. First, the propositions at [150(a)] and [150(b)] above are false. While they *might* have reflected the state of the law in South Australia (and New South Wales) prior to 1854, they were certainly no longer correct following the enactment of the *Supreme Court Act*

1853 (SA) (cf **CS [136]**). So much is clear from the decision of this Court in *Commonwealth v Anderson* (1960) 105 CLR 303 (***Anderson***). In that case, it was held that the Commonwealth could bring an action for ejectment and was not confined to an information for intrusion. The following aspects of the reasoning are significant for present purposes:

(a) The "whole basis" of the action of ejectment, and the fictions on which it was based, were changed by the enactment of the *Common Law Procedure Acts*: in England, by the *Common Law Procedure Act 1852* (Imp); and in New South Wales by the *Common Law Procedure Act 1853* (NSW) which mirrored the terms of the Imperial Act.[137] The *Common Law Procedure Acts 1899-1957* (NSW) maintained the position under the *Common Law Procedure Act 1853* (NSW).[138]

(b) Following the changes effected by the *Common Law Procedure Acts*, the Crown was able to bring an action of ejectment.[139]

(c) Some doubts were also expressed as to whether the Crown was unable to bring an action in ejectment even *before* the introduction of the *Common Law Procedure Acts*.[140]

153. The analysis in *Commonwealth v Anderson* of the development of the action of ejectment in New South Wales applies equally to South Australia, as the *Supreme Court Act 1853* (SA) (which came into effect on 1 January 1854) substantively mirrored the terms of the *Common Law Procedure Act 1853* (NSW) and *Common Law Procedure Act 1852* (Imp).[141] That same analysis provides an explanation for:

(a) the use of the action of intrusion in the earlier 1847 case of *Attorney-General v Brown* (1847) 1 Legge 312; and

(b) to the extent necessary, the suggestion of Gageler J in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016)

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137 *Anderson* (1960) 105 CLR 303 at 311-313 (Dixon CJ, with whom McTiernan J agreed), 318-325, especially at 324 (Windeyer J). See also at 318 (Menzies J) as to the position from Federation onwards.
138 *Anderson* (1960) 105 CLR 303 at 324 (Windeyer J).
139 *Anderson* (1960) 105 CLR 303 at 313 (Dixon CJ, with whom McTiernan J agreed), 324-325 (Windeyer J).
140 *Anderson* (1960) 105 CLR 303 at 314 (Dixon CJ, with whom McTiernan J agreed), 323 (Windeyer J).
141 See *Supreme Court Act 1853* (SA) ss 123-173; *Common Law Procedure Act 1853* (NSW) ss 119-171; *Common Law Procedure Act 1852* (Imp) ss CLXVIII – CCXXI.

260 CLR 232 (***NSWALC***) that the decision in *Attorney-General v Brown* would have been the same if decided under a post-*Mabo (No 2)* view of the effect of the Crown taking sovereignty: cf **CS [143]-[145]**.[142] This suggestion was, in any event, made in a very different context, and without consideration of *Wade*, *Yandama* or the ordinary meaning of "reservation" in Australian law.

154. Accordingly, the foundation for the proposition at [150(c)] above and the Commonwealth's submission as to the "function" of the Reservation evaporates.

155. Second, the Commonwealth's argument entails recourse to the process of construction by reference to what might now be seen in hindsight as better producing particular ultimate consequences, as discussed at [132]-[135] above. Insofar as it was thought in 1903 that a mere excision of mineral rights from what was conferred upon the lessee would lead to the Crown having absolute beneficial title and exclusive possession of minerals, that misconception is not to be retrospectively remedied today.

C.5 Further considerations negativing inconsistency with pleaded native title right

156. Even if, contrary to the submissions above, the Reservation is found to have created some positive rights in the Crown in respect of minerals, it does not follow that those rights were exclusive in nature. Insofar as the Reservation can sensibly be construed as creating *any* positive rights to minerals (which is disputed as above), it is more consistent with a position in which the Crown's "liberty of access" to dig, search and take minerals is non-exclusive. That is so on account of that "liberty" being reserved not only to the Minister and his servants, but also to any person with "other lawful authority": see above at [142].

157. Under that view, exclusive possession and beneficial interest in minerals would only be obtained in those portions of minerals that are actually severed from the land (and only at the time of severance), consistent with the position at common law in relation to mining leases and profits à prendre.[143] It is well established that rights of this nature can be non-exclusive and held concurrently by multiple independent parties.[144]

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142 Gageler J's counterfactual involved a post-*Mabo (No 2)* view as to the effect of sovereignty, but not any other reforms such as the statutory reforms to the action of ejectment discussed in *Commonwealth v Anderson*: see *NSWALC* (2016) 260 CLR 232 at [111]-[112].

143 See *Ex parte Henry; Re Commissioner of Stamp Duties* [1963] SR (NSW) 298 at 303-305 (Herron ACJ and Manning J); *Commissioner of Stamp Duties (NSW) v Henry* (1964) 114 CLR 322 at 330 (Kitto J).

144 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 352 (Wilson J); *Vanstone v Malura Pty Ltd* (1988) 50 SASR 110 at 124-126; *Nicholls v Lovell* [1923] SASR 542.

158. If the Court were to find that this was the effect of the Reservation, it would not avail the Commonwealth or Territory on this appeal. It is well established that inconsistency of rights of the sort giving rise to extinguishment of native title will only be shown where "the existence of one right necessarily implies the non-existence of the other", that is, where "a statement asserting the existence of one right cannot, without logical contradiction, stand at the same time as a statement asserting the existence of the other right".[145] The inquiry is directed at inconsistency of *rights*, not inconsistency of *use*,[146] such that the mere circumstance that the two rights cannot be *exercised* simultaneously is insufficient to establish inconsistency.[147]

159. A non-exclusive right to minerals of the sort described at [157] above is not inconsistent with the pleaded non-exclusive native title right to minerals in the sense necessary to effect extinguishment. That is so for much the same reasons as why two profits à prendre may co-exist over the same land and in respect of the same resources: exclusive rights are obtained only in respect of those portions of resources that are seized and severed from the land. The non-exclusive rights of accessing the land and searching or digging for minerals can *logically co-exist*, even if they cannot be *simultaneously exercised* over precisely the same tract of land.

160. In this respect, the position is analogous to the recognition that native title rights to forage may co-exist with pastoral leases, notwithstanding that both foraging rights and pastoral rights may involve an element of "exclusivity" in respect of particular physical portions of vegetation that may be consumed by persons or livestock respectively. There is no principled basis for a distinction on the basis that minerals are a "finite" resource: cf **TS [115]-[116]**. Flora, fauna and aquatic resources are also finite; a reality that underlies much government legislation.[148] Minerals replenish – in some cases, relatively rapidly – through processes such as sedimentation and alluvial deposit. Moreover, the possibility for co-existence of the rights is not dependent on the resources being infinitely or rapidly

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145 *Western Australia v Brown* (2014) 253 CLR 507 at [38] (the Court).

146 *Ward* (2002) 213 CLR 1 at [215] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Western Australia v Brown* (2014) 253 CLR 507 at [34] (the Court).

147 *Queensland v Congoo* (2015) 256 CLR 239 at [27], [23]-[25], [38]-[39] (French CJ and Keane J), [156] (Gageler J); cf at [87] (Kiefel J).

148 For example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 3, 3A, 18, 178, 528; *Fisheries Management Act 1991* (Cth), ss 3, 3A, 14, 15.

replenishable but rather the absence of exclusive rights in anyone to the resources while they remain on or under the land.[149]

C.6 Conclusion

161. The Reservation in the Pastoral Lease did no more than hold back from the lessee rights in minerals (and rights to exclude persons otherwise authorised from accessing the land to take minerals). No rights to minerals were conferred upon or asserted by the Crown that were inconsistent with the pleaded non-exclusive native title right to minerals, such as to effect extinguishment. Ground 3 of the appeal should be dismissed.

D. ORDERS AND COSTS

10 162. The appeal should be dismissed. Irrespective of the outcome of the appeal, the costs orders made below should not be disturbed, and an order should be made that the Commonwealth pay the First Respondent's costs of the special leave application and this appeal.[150]

Part VI: Not Applicable

Part VII: Estimate of Time

163. The First Respondent estimates that he will require 2.5 hours to present oral argument.

Dated 27 May 2024

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149 At common law, profits à prendre may involve a right to take a portion of the soil from land, and yet be non-exclusive: *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 352 (Wilson J). Any "finite" qualities of minerals are also shared by soil.

150 The First Respondent sought that an undertaking from the Commonwealth to this effect be a condition on any grant of special leave to appeal, and the Commonwealth agreed to make that undertaking: Commonwealth's Reply at [30] in the special leave Application Book at p 284; cf First Respondent's Response at [27], Application Book p 240.

IN THE HIGH COURT OF AUSTRALIA No D5 of 2023
DARWIN REGISTRY

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

and

10 **YUNUPINGU ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP AND OTHERS NAMED IN THE SCHEDULE**
Respondents

ANNEXURE TO FIRST RESPONDENT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the First Respondent sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Commonwealth			
1.	*Commonwealth Constitution*	Current	ss 5, 51 (chapeau), 51(ii), 51(vi), 51(vii), 51(xvii), 51(xix), 51(xxix), 51(xxxi), 52, 109, 122, 128
2.	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)	Current	ss 3, 3A, 18 178, 528
3.	*Fisheries Management Act 1991* (Cth)	Current	ss 3, 3A, 14, 15
4.	*Judiciary Act 1903* (Cth)	Current	s 78B

5.	*Native Title Act 1993* (Cth)	Current	Preamble; ss 11, 18, 22E, 51, 53, 223
6.	*Northern Territory Acceptance Act 1910* (Cth)	As made	s 7
7.	*Northern Territory (Administration) Act 1910* (Cth)	As made	ss 5, 9, 13
8.	*Northern Territory (Self-Government) Act 1978* (Cth)	As made	ss 5, 6, 50
9.	*Racial Discrimination Act 1975* (Cth)	Current	s 10
State and Territory			
10.	*Common Law Procedure Act 1852* (Imp)	As made	ss CLXVIII - CCXXI
11.	*Common Law Procedure Act 1853* (NSW)	As made	ss 119-171
12.	*Common Law Procedure Act 1899* (NSW)	As made	ss 209-251
13.	*Crown Lands Ordinance 1912* (NT)	As made	s 6
14.	*Lands Acquisition Act 1978* (NT)	Current	Part V (ss 43-53)
15.	*Lands Acquisition Ordinance 1911* (NT)	As made	Whole
16.	*Mining Ordinance 1939* (NT)	As made	s 107
17.	*Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT)	As made	Whole
18.	*Northern Territory Act 1863* (SA)	As made	s 2

19.	*Northern Territory Crown Lands Act 1890* (SA)	As made	s 6, 8, 77, Part II, Part V
20.	*Northern Territory Crown Lands Amendment Act 1896* (SA)	As made	s 2
21.	*Northern Territory Crown Lands Consolidation Act 1882* (SA)	As made	s 6
22.	*Northern Territory Land Act 1872* (SA)	As made	s 6
23.	*Northern Territory Land Act 1899* (SA)	As made	s 7, 24, 53, 54, Schedule A
24.	*Supreme Court Act 1853* (SA)	As made	ss 123-173
25.	*Waste Lands Act 1857* (SA)	As made	ss 1, 2, 5, 6, 12
Other			
26.	*Constitution of the United States*	Current	Fifth Amendment, Fourteenth Amendment

IN THE HIGH COURT OF AUSTRALIA No D5 of 2023

DARWIN REGISTRY

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

Rilmuwmurr 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

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Arnhem Land Aboriginal Land Trust
Thirty Second Respondent

Amplitel Pty Ltd
Thirty Third Respondent

Attorney-General for the State of Queensland
Intervener

20 **Attorney-General for the State of Western Australia**
Intervener