



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: D5/2023
File Title: Commonwealth of Australia v. Yunupingu (on behalf of the G
Registry: Darwin
Document filed: Form 27F - 25th - 28th Respondents' (Rirratjingu) Outline of c
Filing party: Respondents
Date filed: 09 Aug 2024

Important Information

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**IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY**

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Appellant

and

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

First Respondent and the others named in the Schedule

**OUTLINE OF ORAL SUBMISSIONS OF
THE TWENTY-FIFTH TO TWENTY-EIGHT RESPONDENTS
(THE RIRRATJINGU PARTIES)**

PART I INTERNET PUBLICATION

1 This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

GROUND 1: SECTION 51(xxxi) AND SECTION 122

2 Either s 51(xxxi) “abstracts” from s 122 (*Teori Tau*) or it does not (*Wurridjal*). The Commonwealth rejects both alternatives for a “middle” option (*Newcrest*): **Cth OOA [10]**. No such option exists: **RP [58], [117]-[121]**; *WMC* (1998) 194 CLR 1 at [131] (McHugh J) (**V 6, T 69**); *Newcrest* (1997) 190 CLR 513 at 533-534 (Brennan CJ) (**V 12, T 95**)

3 It is unresolved¹ whether, on an appeal under s 73 of the Constitution, it is possible for the
10 Court to receive evidence: (a) to support an application to re-open an existing authority; or (b) “constitutional facts”.² If it is possible:

3.1. the Loughton Affidavit may be admissible in relation “inconvenience” as a *John* factor (but it lacks any real probative value on that point);

3.2. the Commonwealth has not identified any basis on which the Loughton Affidavit could be relevant (and therefore admissible) in relation to: (a) the construction of s 122; (b) the construction of s 51(xxxi); or (c) the validity of any relevant statute or executive act.

GROUND 2: NATIVE TITLE AND SECTION 51(xxxi)

Native title rights are not “inherently susceptible” in any relevant sense

20 4 This case concerns the extinguishment of native title by an exercise of executive power conferred by legislation (statutory executive power), not any question about any exercise of prerogative power (non-statutory executive power). Viewed in that light, the key propositions to be drawn from Brennan J in *Mabo [No 2]* (**V 9, T 87**) are:

4.1. upon the acquisition of sovereignty, the Crown did not obtain beneficial ownership: at 25-26, 28-31, 43, 48, 50-52;

4.2. rather, upon acquisition of sovereignty in Australia, the common law treated the Crown as having “radical title” to all land in the territory: at 48, 69(3);

¹ See *Mickelberg v The Queen* (1989) 167 CLR 259 at 321 (Mason CJ).

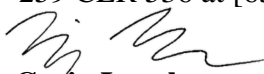
² That is, facts going to the constitutional validity of statutes, other enactments, or executive acts done under those statutes or enactments” or “facts going to the construction of constitutional statutes”: see *Thomas v Mowbray* (2007) 233 CLR 307 at [614] (Heydon J).

- 4.3. that treatment enabled the Crown to exercise “sovereign power” — legislative or executive (statutory or non-statutory) — to “to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne”: at 48, 69(3)-(5);
- 4.4. the mere *existence* of that power of the Crown did not extinguish native title rights: at 48, 63; see also *Brown* (2014) 253 CLR 507 at [37]-[38], [48]-[56] (**V 16, T 120**);
- 4.5. to the contrary, upon its reception into Australia, the common law “recognised” pre-existing native title rights notwithstanding the existence of that power: at 57, 61;
- 4.6. native title rights are capable of being “extinguished” by an exercise of *any* sovereign power (including any statutory executive power): at 63, 69[3]-[5]; see also *Wik* (1996) 187 CLR 1 at 84 (Brennan CJ) (**V 18, T 124**); cf **Cth OOA [2]**;
- 10 4.7. *for that reason*, native title rights may be described as “fragile”: *Yarmirr* (2001) 208 CLR 1 at [46]-[47] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (**V 6, T 70**); cf **Cth OOA [3]**.
- 4.8. in the absence of “extinguishment” by an exercise of *any* sovereign power, “native title survives and is legally enforceable”: at 50-51, 68.
- 5 Native title rights are no more or less “susceptible” to extinguishment by an exercise of statutory executive power than any other common law property right (including a Crown tenure): **RP [168]**. The *only* relevant difference between native title rights and other common law property rights relates to how the legislature must manifest the necessary
- 20 intention to extinguish those rights.
- 5.1. An exercise of statutory executive power will “extinguish” a native title right if it creates an “inconsistent” right: *Congoo* (2015) 256 CLR at [31]-[37] (French CJ and Keane J), [155]-[159] (Gageler J) (**V 14, T 103**).
- 5.2. An exercise of statutory executive power may extinguish other types of property rights, but the conferral of any such power will be construed having regard to the “principle of legality”:³ *Mabo [No 2]* at 64 (Brennan J), 110-111 (Deane and Gaudron JJ), 195 (Toohey J); see also *Clunies-Ross* (1984) 155 CLR 193 at 199-200 (**V 5, T 66**).

³ See generally *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at [41]-[44] (French CJ).

Extinguishment of native title rights effects an “acquisition of property”

- 6 **Property.** Where an underlying native title right is “recognised” the common law, the common law makes that right *enforceable* by giving “remedies” in support of that right to those who hold it “by the ordinary processes of law and equity”: *Yarmirr* (2001) 208 CLR 1 at [42] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); see also *Yorta Yorta* (2002) 214 CLR 422 at [77] (Gleeson CJ, Gummow and Hayne JJ) (**V 10, T 89**).
- 7 In those circumstances, the native title holders have “property” for the purposes of s 51(xxxi) because they have: (a) a right to enforce the underlying native title; and/or (b) something analogous to a “chose in action” (in the sense that the underlying native title right has become a “right enforceable by an action”): *Smith* (2000) 204 CLR 493 at [20]-10 [22] (Gaudron and Gummow JJ) (**V 15, T 111**); *Georgiadis* (1994) 179 CLR 297 at 305-306 (Mason CJ, Deane and Gaudron JJ) (**V 7, T 75**).
- 8 **Taking.** If a native title right is “extinguished”, it ceases to be recognised by the common law: *Congoo* at [31] (French CJ and Keane J), [155] (Gageler J). Thus, the practical effect of an “extinguishment” of a native title right by an exercise of statutory executive power is that native title holders can no longer enforce their underlying native title rights. In those circumstances, native title holders will be deprived of the “property” identified in paragraph 7 above. That is a “taking” for the purpose of s 51(xxxi): **RP [32], [164.1]**.
- 9 **Acquisition.** That taking will result in a corresponding benefit in relation to property being 20 conferred upon either the Commonwealth or a third party because: (a) any person against whom the underlying native title right was previously enforceable is released from any existing or future liability relating to that right; and/or (b) the land previously subject to the exercise of an enforceable native title right is enhanced because it is no longer liable to the exercise of that right: *Mabo [No 2]* at 111 (Deane and Gaudron JJ); see also *JT International* (2012) 250 CLR 1 at [136] (Gummow J), [174] (Hayne and Bell JJ) (**V 8, T 82**). That is an “acquisition” for the purpose of s 51(xxxi): **RP [33], [164.2]**.
- 10 **No analogy with statutory rights.** Once the nature of the “property” is recognised, the s 51(xxxi) cases that concern purely statutory rights are of little assistance: *Mutual Pools* (1994) 179 CLR 155 at 187-189 (Deane and Gaudron JJ) (**V 10, T 90**); *Peverill* (1994) 179 30 CLR 226 at 235-237 (Mason CJ, Deane and Gaudron JJ) (**V 7, T 78**); *Cunningham* (2016) 259 CLR 536 at [63]-[69] (Gageler J) (**V 6, T 71**).


Craig Lenehan

Thomas Wood

Dated: 9 August 2024

Schedule

Northern Territory of Australia
Second Respondent
East Arnhem Regional Council
Third Respondent
Layilayi Burarrwanga
Fourth Respondent
Milminyina Valerie Dhamarrandji
Fifth Respondent
Lipaki Jenny Dhamarrandji (nee Burarrwanga)
Sixth Respondent
Bandinga Wirrpanda (nee Gumana)
Seventh Respondent
Genda Donald Malcolm Campbell
Eighth Respondent
Naypirri Billy Gumana
Ninth Respondent
Maratja Alan Dhamarrandji
Tenth Respondent
Rilmuwurr Rosina Dhamarrandji
Twelfth Respondent
Wurawuy Jerome Dhamarrandji
Thirteenth Respondent
Manydjarri Wilson Ganambarr
Fourteenth Respondent
Wankal Djiniyini Gondarra
Fifteenth Respondent
Marrpalawuy Marika (nee Gumana)
Sixteenth Respondent
Guwanbal Jason Gurruwiwi
Eighteenth Respondent
Gambarrak Kevin Mununggur
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 Gilngilngma Marika
Twenty Seventh Respondent
Wityana Matpupuyngu Marika

Twenty Eighth Respondent

Northern Land Council

Twenty Ninth Respondent

Swiss Aluminium Australia Limited (ACN 008 589 099)

Thirtieth Respondent

Telstra Corporation Limited (ABN 33 051 775 556)

Thirty First Respondent

Arnhem Land Aboriginal Land Trust

Thirty Second Respondent

Amplitel Pty Ltd

Thirty Third Respondent

Attorney-General for the State of Queensland

Thirty Fourth Respondent