HIGH COURT OF AUSTRALIA

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Details of Filing

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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
(and Others named in the Schedule)
Respondents

NLC PARTIES' OUTLINE OF ORAL SUBMISSIONS

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

A. Ground 2: just terms required for native title

2. **The Yolngu relationship to their land**: Questions (**CAB17**) on the facts in the statement of claim **AFM7**: see [19]–[29], [517]–[530]; *Meneling Station* (1982) 158 CLR 327 at 356–7 **JBA14/107**. Those interests in land, rooted in traditional law and custom, survived the change in sovereignty: *Yanner v Eaton* (1999) 201 CLR 351 at [38] **JBA19/128**; *Yorta Yorta* (2002) 214 CLR 422 at [75]–[77] **JBA10/89**.

3. **The intersection of two sets of norms**: The metaphor is expressed as the radical title of the Crown being burdened by native title, but a radical title itself is not controlling: *Yorta Yorta* at [38]. What matters is that native title land was not the unburdened property of the body politic to be dealt with as if it were the owner: FC [444]–[451] **CAB151–3**; *Native Title Act Case* (1995) 183 CLR 373 at 480 **JBA16/122**.

4. **Section 51(xxxi) acquisition**: When native title interests are surrendered or extinguished there is a commensurate enlargement of the underlying interest (power) of the body politic upon being freed of that burden. This is an acquisition of property in the s 51(xxxi) sense: FC [459]–[463] **CAB156–7**; NLC [68]–[70], [81]–[82]; *Yarmirr* (2001) 208 CLR 1 at [44]–[45] **JBA6/70.** *Mabo (No 2)* (1992) 175 CLR 1 at 110–1 **JBA10/87** cf CR [49]. Accepting now that native title is property within s 51(xxxi) (CS [59] cf FC [294]–[297] **CAB115–6**), its different source and characteristics do not put it beyond the reach of s 51(xxxi). Its acquisition is congruent with just terms: NLC [51], [83]–[90]; FC [444]–[452] **CAB 151–4**; *Timber Creek* (2019) 269 CLR 1 at [23], [27], [75], [154] **JBA13/97**.

5. **No analogy with s 51(xxxi) inherent defeasibility cases**: The concept of statutory rights subject to adjustment by later statute because of the terms of their creation cannot be transposed to interests in land derived from pre-sovereignty norms and recognised by the general law. Native title rights are not a creature of the common law. Their continued recognition turns upon inconsistency or co-existence between those rights and the common law: *Yarmirr* at [40]–[42], [97]; NLC [72]–[74]; FC [318], [469] **CAB121**, **158–9**.

6. **Clear and plain intention**: The interests derived from pre-sovereignty (Indigenous) laws, inalienable otherwise by surrender, are, like interests derived from post sovereignty

(European) laws, defeasible by a valid exercise of the new sovereign power because they are accommodated and given effect by the new legal order. There is no lesser normative force in the clear and plain intention standard to take one set of interests, but not the other, outside s 51(xxxi): NLC [63]–[65]; FC [455] **CAB155**; *Mabo (No 2)* at 51, 60, 63–4, 67, 88–9, 111, 193–6; *Congoo* (2015) 256 CLR 239 at [34], [37], [158]–[159] **JBA14/103**.

7. **Radical title is a tool of analysis**: It speaks to the time of the change in sovereignty: NLC [60]–[61]; *Yarmirr* at [48]–[49], [97]. Thereafter, the continued existence of native title is determined by municipal constitutional law. The displacement of prerogative powers by legislative authority (since 1861) does matter (cf CR [28]) because both native title interests and interests derived from the Crown may be impaired by statute: NLC [53], [64]–[67]; *Native Title Act Case* at 422, 478; *Mabo (No 2)* at 63, 67, 70, 111, 193–4.

8. **Artificial**: Legislation diminishing native title confers an identifiable proprietary benefit on others. To place it outside s 51(xxxi) by reference to the common law concept of radical title when Great Britain acquired sovereignty (1788) by prerogative is an artificial refinement distorting the principles upon which s 51(xxxi) depends: FC [476] **CAB160**.

B. Ground 1: just terms required for s 122 laws

9. **External territory anomaly**: A law for the acquisition of property in an external territory will operate on matters outside Australia, and will be supported by s 51(xxix): NLC [24]; cf CR [17]. "Australia" in this context means the continent of Australia and the island of Tasmania: *Polyukhovich* (1991) 172 CLR 501 at 600 **JBA 14/101**. CR [18] cites cases on different questions — whether an external territory is part of "the Commonwealth" (*Berwick*, *Bennett*) or what are "Australian waters beyond territorial limits" (*Bonser*). The statement that "[o]n the whole it seems preferable" to source the *PNG Act 1949* (Cth) to s 122 (*Fishwick* (1960) 106 CLR 186 at 197 **JBA7/74**) pre-dates recognition of geographic externality as a separate aspect of s 51(xxix). On usual principles, s 51(xxix) would apply.

10. **Notice of contention**: The Ordinances (including ss 54B, 54D of the *Mining Ordinance*) can be supported by s 51(xxvi): NLC [32]–[39]. It is necessary to look at the Ordinances, not just the *NT Administration Act*: cf CR [15]. The Ordinances were made under a subordinate power (cf laws made under Self-Government): a subordinate could not have a greater power to acquire property without just terms than the repository. The Ordinances, not the ordinance-making power, created rights, duties and liabilities: RR [123].

C. Ground 3: reserving minerals from PL 2229 had no relevant effect on native title

11. **No clear and plain intention**: Excepting and reserving from the grant of a pastoral lease (PL 2229 **AFM155** 19,250 sqm) timber, minerals and other substances does not manifest an intention to extinguish native title rights to use the land and its natural resources. The existence of the reservations is a key reason why that is so: NLC [98]–[101]; FC [99]–[100], [108] **CAB62–3**, **67**, **86–8**.

12. **Statutory purpose**: The reservation aided powers to confer rights to go onto the land and take those substances from the land: *Ward* (2001) 213 CLR 1 at [285] **JBA17/123**; *NT Land Act 1899* (SA) ss 24–25, Sch A **JBA2/43**; *NT Mineral Act 1888* (SA) ss 3–4, 9 **JBA2/44**; *NT Crown Lands Amendment Act 1896* (SA) s 2 **JBA2/38**; *NT Crown Lands Act 1890* (SA) ss 77, 81 **JBA2/37**. As those provisions left unaffected the lawful taking of those substances by native title holders, the ancillary reservation hardly expresses an intention to extinguish: NLC [102]–[104]; *Ward* at [169], [179]–[187], [400]–[402], [416]–[417].

13. **Intrusion**: Apart from [12], the Commonwealth hypothesis is without foundation: NLC [119]–[121] cf CS [140]–[142], CR [57]. Whether or not an action in ejectment was available (*Anderson* (1960) 105 CLR 303 **JBA5/67**), statutory provision prohibited unlawful use: 1890 Act ss 96–97, 106; 1899 Act ss 1, 3*; *Ward* at [174]. The dicta in *NSWALC* (2016) 260 CLR 232 **JBA10/92** concerned non-statutory executive powers to deal in land, and possession against someone without good title (not native title holders): NLC [122]–[125]; FC [117] **CAB70**.

14. **It holds back rights**: *Mabo (No 2)* does not usurp that understanding: FC [107], [109] **CAB67**; NLC [112]–[116]. Given the later specific provision that all minerals shall become the property of the Crown (unless granted in fee without reservation), it would be strange if the earlier pastoral reservation achieved that result already: NLC [112], [129]–[131]; *Mining Ordinance 1939* (NT) s 107 **JBA2/30**; *Ward* at [378], [383]–[385].

8 August 2024 **Sturt Glacken** **Graeme Hill** **Julia Wang**