HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 27 May 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	D5/2023
File Title:	Commonwealth of Australia v. Yunupingu (on behalf of the Gu
Registry:	Darwin
Document filed:	Form 27D - 29th & 32nd Respondents' submissions
Filing party:	Respondents
Date filed:	27 May 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

SUBMISSIONS OF THE NLC PARTIES
(Twenty-Ninth Respondent, Northern Land Council,
Thirty-Second Respondent, Arnhem Land Aboriginal Land Trust)

Contents

Part I — Certification

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

Part II — Issues

2. The issues for determination are:

   (1) Does the requirement of just terms in s 51(xxxi) of the Constitution apply to a Commonwealth law if that law is supported only by the territories power in s 122? (Part V1 Ground 1)

   (2) Is a Commonwealth law that grants or asserts interests in land extinguishing[1] the rights of Indigenous peoples to the land recognised by the common law and possessed under traditional laws and customs connecting them to the land,[2] a law with respect to an acquisition of property within s 51(xxxi)? (Part V2 Ground 2)

   (3) Did the grant of a pastoral lease under 19th century South Australian Crown lands legislation that excepted and reserved timber, minerals and other substances extinguish a non-exclusive native title right to use the natural resources of the land in so far as it relates to minerals? (Part V3 Ground 3).

3. Also, the NLC Parties challenge the premise to Ground 1 that the laws effectuating the past compensable acts may be characterised *only* as laws supported by s 122. That issue was not decided by the Full Court: FC [57(c)], [279] **CAB53, 112**: see Part V1.3. To the extent needed, the NLC Parties have served a notice of contention.[3]

Part III — Section 78B

4. The Commonwealth and the NLC Parties have each given notices.

Part IV — Factual matters

5. There are no disputed factual issues as the matter proceeded on separate questions on the facts alleged in the statement of claim (**SOC**) **AFM7**: see FC [10]–[19] **CAB38–44** for the procedural history. The NLC parties refer to the following.

---

1 References to a law that grants or asserts interests in land includes a law authorising that action.
2 See *Native Title Act 1993* (Cth) s 223(1) definition of *native title*.
3 The NLC parties seek leave for the notice of contention to be filed out of time.

6. The First Respondent, Dr Yunupingu AM (deceased), claims that the Commonwealth is obliged under the *Native Title Act 1993* (Cth) (the **NTA**) to compensate Yolngu peoples for the extinguishment or impairment of their traditional title to land on the Gove Peninsula in North East Arnhem Land. He contends that the steps taken to establish the bauxite mining operations on the Gove Peninsula that his forebears sought to prevent in *Milirrpum v Nabalco*[4] are *past acts* attributable to the Commonwealth that are now taken to be valid in relation to which Yolngu are entitled to just compensation for the effects on their native title: NTA ss 14, 17, 51, 228: FC [1]–[8] **CAB36–9**.

7. A *past act* is an act that occurs at any time either before 1 July 1993 if it is a legislative act, or before 1 January 1994 if it is any other act, when native title existed in relation to particular land and waters[5] and, apart from the NTA, the act was invalid to any extent, but would have been valid to that extent if native title did not exist: NTA s 228. Dr Yunupingu contends that certain acts done by the Commonwealth are past acts because they were, apart from the NTA, invalid by operation of s 51(xxxi), but are now taken by the NTA to be valid on terms that the Commonwealth must pay compensation.

8. Dr Yunupingu pleads that when the claimed compensable acts occurred, the rights and interests to the land possessed under traditional Yolngu law and custom were non-exclusive native title rights to live on, and gain spiritual and material sustenance from, the land and its resources including (SOC [52(b)(iv)] **AFM17**):

> the right to access, take and use for any purpose the resources of the Claim Area (including resources below, on or above the surface of the Claim Area, such as minerals on or below the surface of the Claim Area …

9. Dr Yunupingu contends that each of the following is a past act attributable to the Commonwealth in relation to which Yolngu are entitled to just compensation:

   (1) The enactment of s 107 of the ***Mining Ordinance*** *1939* (NT) providing that minerals "shall be and be deemed to be the property of the Crown", which is said to be inconsistent with the non-exclusive native title right to resources "insofar as it relates to minerals": SOC [195] **AFM38**.

   (2) The grant of Special Mineral Lease 1 on 17 November 1958, and Special Mineral Leases 2, 3 and 4 on 11 March 1963, pursuant to the *Mining Ordinance*, which is

---

4 (1971) 17 FLR 141 (Blackburn J) disapproved in ***Mabo*** *v Queensland* ***(No 2)*** (1992) 175 CLR 1.

5 For simplicity, these submissions will refer to *land* which should be taken to mean land and waters.

said to be inconsistent with the continued enjoyment of the non-exclusive native title rights: SOC [243], [267] **AFM46–7**, **51–2**.

(3) The grant of Special Mineral Lease 11 on 22 February 1968 (SOC [293] **AFM56**) pursuant to the *Mining (**Gove Peninsula** Nabalco Agreement) **Ordinance** 1968* (NT) and the *Mining Ordinance*, which is said to be inconsistent with the continued enjoyment of the non-exclusive native title rights: SOC [304] **AFM59**.

10. At the time these acts occurred, the claim area lay within the Arnhem Land Reserve that had been set apart on 16 April 1931 "for the use and benefit of the Aboriginal inhabitants" as an Aboriginal reserve for the purposes of the ***Aboriginals Ordinance*** *1918* (NT) and continued under later laws:[6] SOC [75] **AFM 22**; FC [94]–[95] **CAB61**.

11. The Full Court determined Separate Questions (**CAB170**) deciding that:[7]

(1) The subsisting native title rights were not extinguished by the grant of a Mission Lease over the claim area under the *Aboriginals Ordinance*: Q1(a).

(2) The non-exclusive native title right to resources insofar as it relates to minerals was not extinguished by the grant of four pastoral leases over 1886 to 1903 that contained a reservation of minerals: Q2(a).

(3) The enactment of s 107 of the *Mining Ordinance* and the grant of the Special Mineral Leases were capable of amounting to an acquisition of property within s 51(xxxi) (Q2(c), 4(b)) as:

(a) s 122 of the Constitution is conditioned by s 51(xxxi);

(b) native title is not inherently defeasible in the sense that description has been used in the authorities on s 51(xxxi).

Part V — Argument

Short response to CS Part II: two contextual points

12. Part II of the Commonwealth's submissions (**CS**) makes (at [2]–[3]) what may be said to be an *in terrorem* submission on the constitutional issues, which are "question[s] …

---

6 Later the *Welfare Ordinance 1953* (NT) and *Social Welfare Ordinance 1964* (NT): SOC [164]-[170] **AFM 34**. For the history, see *Director of Fisheries (NT) v **Arnhem** Land Aboriginal **Land Trust*** (2001) 109 FCR 488 at [33]-[40] (Sackville J, Spender and Merkel JJ agreeing).

7 See summary of conclusions at FC [56]-[64] **CAB52-4**.

of constitutional power, not political morality".[8] The submission may be answered shortly now by two contextual points. *First*, the position of the Commonwealth cannot be equated with that of South Australia before the surrender of the Northern Territory to the Commonwealth. "On federation, everything adjusted",[9] with the Commonwealth, but not the States,[10] being subject to the constitutional limitation to provide just terms. It would be anomalous if the constitutional guarantee with respect to property in what became the Territory (on surrender to the Commonwealth) was lost when this geographic area was, at federation, within a State.[11]

13. *Second*, the Commonwealth Parliament has long proceeded on the footing that those with property in the Territory are in no different position as regards the laws of the Commonwealth to property holders in the States.[12] That commenced with the application of the *Lands Acquisition Act 1906* (Cth) by force of s 9 of the *Northern Territory (**Administration**) **Act** 1910* (Cth) to "the acquisition by the Commonwealth, for any public purpose, of any land owned in the Territory by any person". It would depart from this legislative practice to find that (only) traditional titles to land held by Indigenous Australians can be acquired without just terms. The NTA assumes otherwise. If a Commonwealth past act affecting native title results from a s 51(xxxi) acquisition of property other than on just terms, native title holders are entitled to just terms compensation in accordance with the NTA: s 18 (also, s 53 for *future acts* (s 233)).

1 Ground 1: just terms required for s 122 laws

14. The NLC Parties adopt the submissions of the Northern Territory (**NTS**) on ground 1,[13] supplemented as follows. Both as a matter of principle and authority, a Commonwealth law supported solely by s 122 of the Constitution is subject to the just terms requirement in s 51(xxxi) for any acquisition of property by or under that law.[14] The NLC Parties also adopt the Rirratjingu submissions (at C.2) that ***Wurridjal** v Commonwealth* overruled ***Teori Tau** v Commonwealth*.

---

8 *Commonwealth v **WMC Resources** Ltd* (1998) 194 CLR 1 at [149] (McHugh J).
9 See, in the Ch III context, *Burns v Corbett* (2018) 265 CLR 304 at [72] (Gageler J).
10 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [14] (Gaudron, McHugh, Gummow and Hayne JJ).
11 Cf ***Newcrest Mining** (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 600-1 (Gummow J).
12 See *Newcrest Mining* (1997) 190 CLR 513 at 594, 612 (Gummow J).
13 Concerning Questions 1(b)(i), 2(c), 3(b), 4(b)(i) **CAB17-9**.
14 On that basis, the alternative at NTS [51]–[65] confining s 51(xxxi) to internal territories does not arise.

1.1 Principle: s 122 is not disjoined; "just terms" for s 122 acquisition is not anomalous

15. **Necessary to consider objects of s 51(xxxi) as well as s 122:** *First*, as to principle, it is common ground that the question of whether the power in s 122 is constrained by another provision of the Constitution is determined as a matter of construing the Constitution as a whole:[15] see CS [15], [32]; NTS [13]. The key matter in this construction exercise is the purpose of each provision, given that the textual considerations are inconclusive (see [26] below).

16. Construing the Constitution as a whole requires considering the purposes of both s 51(xxxi) and s 122. The Commonwealth arguments tend to focus only on whether the purposes of s 122 would be undermined if acquisitions of property under that section did require just terms: see CS [23]–[30], [47]. However, it is also necessary to consider whether the purposes of s 51(xxxi) would be frustrated or undermined if s 122 acquisitions of property did not require just terms: see NTS [21]–[26]; cf CS [42]–[49].

17. Reduced to essentials, there are two main arguments in support of the Commonwealth approach: (1) that s 51(xxxi) is a limit relevant only to the federal distribution of powers, whereas s 122 is a disparate non-federal matter: CS [37];[16] and (2) that requiring just terms for acquisitions of property made under s 122 would undermine the flexibility required by that provision: CS [47].[17] Both should be rejected.

18. **Section 51(xxxi) is not simply a federal limit:** Although the guarantee of just terms in s 51(xxxi) is in terms a qualification on the grant of legislative power in s 51, it does not follow that it is only relevant to the federal distribution of powers. Section 51(xxxi) relates to "any purpose" for which the Commonwealth may make laws (which on its face includes s 122), and concerns not only States but persons whose property is acquired.[18] This is a simple application of *Attorney-General (Cth) v Schmidt*.[19]

19. Further, the non-federal view of s 122 is totally at odds with the result in ***Lamshed*** *v*

---

15 See e.g. *Spratt v Hermes* (1965) 114 CLR 226 at 242 (Barwick CJ).

16 *Teori Tau v Commonwealth* (1969) 119 CLR 564 at 570 (the Court); *Newcrest Mining* (1997) 190 CLR 513 at 535, 536, 538-9 (Brennan CJ), 550 (Dawson J), 577, 583 (McHugh J), each dissenting.

17 *Newcrest Mining* (1997) 190 CLR 513 at 541-2 (Brennan CJ).

18 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [77], [79] (French CJ); see also the "true question" identified by Gummow J in *Newcrest Mining* (1997) 190 CLR 513 at 611.

19 (1961) 105 CLR 361 at 371-2 (Dixon CJ); *Wurridjal* (2009) 237 CLR 309 at [75] (French CJ), [185] (Gummow and Hayne JJ).

Lake[20] that a Commonwealth law enacted under s 122 may have extra-territorial operation, and is a "law of the Commonwealth" that will override an inconsistent State law under s 109 of the Constitution: NTS [48]. By contrast, the logic of the disparate non-federal power view of s 122 is that these laws would not engage s 109 of the Constitution because they have the character of local not national laws.[21] That view is contrary to the majority in *Lamshed*, which the Commonwealth does not challenge.

20. There is no textual difficulty in a limit expressed in s 51 applying, by implication, to the legislative power in s 122.[22] For example, s 51(iii) requires that bounties be uniform "throughout the Commonwealth". The reasoning in ***Capital Duplicators*** *Pty Ltd v Australian Capital Territory* ***(No 1)***[23] establishes that the Commonwealth could not rely on s 122 to impose non-uniform bounties, particularly in relation to the free trade area constituted by internal territories formed from the area of the original States.

21. Finally, it is simply assertion to say that the Commonwealth should be placed in the same position in relation to acquisitions of property in the territories as a State Parliament in relation to acquisitions in that State:[24] NTS [46]–[50]; cf CS [48]–[49]. The Parliament making laws under s 122 is the same national Parliament that makes laws under s 51,[25] and the just terms limit applies equally to s 122 laws.

22. **Flexibility does not condone an absence of just terms for s 122:** Applying the just terms requirement to s 122 of the Constitution does not frustrate the purposes of that provision. It may be accepted that a power to make laws for the government of a territory includes a power to acquire property compulsorily (cf CS [47]); however, that does not mean there must also be a power to acquire property without just terms. Providing just terms for an acquisition of property in a territory is neither anomalous

---

20 (1958) 99 CLR 132 at 143-4, 148 (Dixon CJ, Webb and Taylor JJ agreeing), 154 (Kitto J); Zines, "The Nature of the Commonwealth" (1998) 20 *Adelaide Law Review* 83 at 83.

21 ***Kruger*** *v Commonwealth* (1997) 190 CLR 1 at 58 (Dawson J); *Newcrest Mining* (1997) 190 CLR 513 at 557-8 (Dawson J). A law enacted by a self-governing Territory does not engage s 109: ***Vunilagi*** *v The Queen* (2023) 97 ALJR 627 at [52] (Kiefel CJ, Gleeson and Jagot JJ), [127] (Gordon and Steward JJ).

22 *Wurridjal* (2009) 237 CLR 309 at [185]-[186] (Gummow and Hayne JJ).

23 (1992) 177 CLR 248 at 289-90 (Gaudron J); see also at 276-7 (Brennan, Deane and Toohey JJ); *Newcrest Mining* (1997) 190 CLR 513 at 598 (Gummow J).

24 Zines, "The Nature of the Commonwealth" (1998) 20 *Adelaide Law Review* 83 at 88.

25 *Lamshed* (1958) 99 CLR 132 at 141, 143-4 (Dixon CJ), 153, 154 (Kitto J).

nor inconsistent with the purposes of the s 122 power.[26] The most that could be said is that it would be more convenient to the Commonwealth if it could acquire property in a territory without providing just terms. But that is not sufficient.

23. Indeed, the Commonwealth's legislative practice in the internal territories is to provide just terms;[27] section 9 of the *Administration Act* applied the Commonwealth's usual land acquisition legislation to acquisitions in the Territory from the outset.[28] The self-government legislation of both the NT and ACT requires just terms to be provided for any acquisitions of property under territory laws.[29]

24. *Absence of just terms only for internal territories?* Nor can this legislative flexibility argument be justified by pointing to the position in external territories. To the contrary, on the Commonwealth's argument the just terms requirement would apply in external territories, even though those would be the very territories where there is the most need for the supposed legislative flexibility. That anomalous result follows because the Commonwealth accepts that just terms are required if a law can be supported by another head of power (CS [18]), and because a law with respect to acquisitions of property in an external territory concerns matters geographically external to Australia, which is supported by the external affairs power.[30] An external territory (whether or not it is part of "the Commonwealth") is not part of "Australia" for these purposes, which consists of the continent of Australia and the island of Tasmania.[31]

---

26 See *Theophanous v Commonwealth* (2006) 225 CLR 101 at [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [77] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) on which acquisitions of property fall outside s 51(xxxi).

27 *Newcrest Mining* (1997) 190 CLR 513 at 612 (Gummow J).

28 Section 9 of the *Administration Act* applied to both "Territory" and "non-Territory" purposes: ***Milirrpum** v Nabalco* (1971) 17 FLR 141 at 289 (Blackburn J); for another example of the legislative practice of compensatory acquisition, see *Darwin Lands Acquisition Act 1945* (Cth).

29 *Northern Territory (Self-Government) Act 1978* (Cth) s 50; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a).

30 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 528 (Mason CJ), 602 (Deane J), 634 (Dawson J), 696 (Gaudron J), 714 (McHugh J); ***XYZ** v Commonwealth* (2006) 227 CLR 532 at [10] (Gleeson CJ), [30], [38] (Gummow, Hayne and Crennan JJ); cf [206] (Callinan and Heydon JJ).

31 *New South Wales v Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337 at 360 (Barwick CJ), 470, 471 (Mason J); see also 379 (McTiernan J); *XYZ* (2006) 227 CLR 532 at [87] (Kirby J). Norfolk Island is outside Australia, but has been held to be part of "the Commonwealth": *Berwick v Gray* (1976) 133 CLR 603 at 605 (Barwick CJ), 608-9 (Mason J); cf ***Bennett** v Commonwealth* (2007) 231 CLR 91 at [36] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). Mere acquisition of an external territory does not necessarily make it part of "the Commonwealth": *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 285-6 (Gaudron J), cited in *Bennett* (2007) 231 CLR 91 at [35] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

25. For example, the territory of New Guinea (relevant to *Teori Tau*) was and is outside Australia. (Indeed, it is arguable that it was never part of "the Commonwealth" either, being placed under Commonwealth control by a mandate issued by the League of Nations in 1920, and later a trust territory administered under an agreement approved by the United Nations.[32]) Accordingly, following *Newcrest Mining*, the result in *Teori Tau* itself is incorrect, because it concerned acquisitions of property pursuant to a Commonwealth law that could be supported by s 51(xxix).[33]

26. **Textual arguments are inconclusive:** Finally, the textual arguments referred to in CS [46] are inconclusive.[34] The purpose of making s 51 of the Constitution "subject to [the] Constitution" is to make clear that the grants of legislative power are subject to limits contained elsewhere. That purpose is not directed to limits contained within s 51 itself, such as the just terms requirement in s 51(xxxi). Accordingly, it does not render those words otiose for the limit in s 51(xxxi) to apply to s 122, particularly when s 51(xxxi) applies to <u>any</u> purpose for which the Parliament may make laws.

1.2 Authority: Teori Tau *is contrary to principle and has been weakened by later cases*

27. *Second*, the argument that the just terms requirement in s 51(xxxi) qualifies the power in s 122 of the Constitution better reflects the existing state of authority. The reasoning in *Teori Tau* rests solely on the supposedly disparate, non-federal nature of s 122:[35] cf CS [37], [55]. This holding was always difficult to reconcile with *Lamshed* and *Spratt v Hermes*, decided on either side of *Teori Tau*.[36] No member of this Court in *Wurridjal* sought to support the correctness of *Teori Tau*, and statements in later decisions such as *Vunilagi*[37] have only weakened the non-federal, disparate view of s 122 further.

28. **Inconvenience does not overcome principle:** A large part of the Commonwealth's argument is the inconvenience that would follow from overruling *Teori Tau*, especially

---

32 See *Re Minister for Immigration; Ex parte Ame* (2005) 222 CLR 439 at [5] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); recitals to the *New Guinea Act 1920* (Cth). Consistent with the *Acts Interpretation Act 1901* (Cth), external territories including New Guinea were not part of "Australia" for the purposes of the *Migration Act 1958* (Cth): *Ame* at [22].

33 Jackson and Lloyd, "Compulsory Acquisition of Property" (1998) *AMPLA Yearbook* 75 at 81.

34 Zines, "The Nature of the Commonwealth" (1998) 20 *Adelaide Law Review* 83 at 85.

35 The sole reasoning is set out in *Teori Tau* (1969) 119 CLR 564 at 570 (the Court).

36 Grant, "Teori Tau, Wurridjal: Just Terms and the Integration of the Territories into the Federal Structure" (2009) 2 *Balance: Journal of the Law Society of the Northern Territory* 18 at 21.

37 (2023) 97 ALJR 627 at [96] (Gordon and Steward JJ), [177]-[178], [186] (Edelman J) (doubting *R v Bernasconi* (1915) 19 CLR 629 and noting that four justices in *Wurridjal* rejected *Teori Tau*).

once it is recognised (as discussed in section V2 below) that native title is "property" for the purposes of s 51(xxxi): CS [3], [54]. One complete response is that any inconvenience of this sort could not overcome the need to apply fundamental constitutional principle correctly.[38] So much was recognized by McHugh J in *Newcrest Mining*, while Dawson J stated (correctly with respect) that the correctness of *Teori Tau* was more important than any consequences that may follow from overruling it.[39]

29. A second response is that the Commonwealth's legislative practice has generally been to provide just terms for acquisitions of property in the Northern Territory: see [23] above. That reduces the extent to which overruling *Teori Tau* will cause inconvenience. Further, that legislative practice would mean that Indigenous native title holders are among the few persons in the Territory whose property has been taken away without just terms being provided. There is no conceivable reason for that result to continue.

1.3 Laws effectuating the past acts also supported by s 51(xxvi)

30. The NLC Parties' primary case is that s 122 is conditioned by s 51(xxxi). However, the laws effectuating the past acts in issue could also be supported by the races power (s 51(xxvi) of the Constitution[40]), not just s 122. Applying *Newcrest Mining*, the acquisitions of property effected by those past acts would require "just terms". As noted, this was left open by the Full Court, and the NLC Parties have, if needed, filed a notice of contention: see [3] above. That said, it is appropriate for this Court to determine the issue of principle as to the interaction of ss 51(xxxi) and 122, and not defer that issue any longer.[41] The following analysis also indicates that there can be haphazard results if s 122 is not so conditioned by s 51(xxxi).

31. **Characterisation exercise may be undertaken at Ordinance level:** The NLC Parties adopt the Rirratjingu submissions (at C.6) that the characterisation exercise (whether the law could be supported by another head of power, other than s 122) may be

---

38 See, in relation to financial consequences, *Ha v New South Wales* (1997) 189 CLR 465 at 503 (Brennan CJ, McHugh, Gummow and Kirby JJ). Inconvenience does not relieve the Court of the duty to proceed according to law: *NZYQ v Minister for Immigration* (2023) 97 ALJR 1005 at [36] (the Court).

39 *Newcrest Mining* (1997) 190 CLR 513 at 552 (Dawson J), 576 (McHugh J), albeit that both found that *Teori Tau* was correctly decided.

40 Before its amendment in 1967, s 51(xxvi) of the Constitution excluded "the Aboriginal people in any State", and accordingly did not prevent Commonwealth laws enacted under that provision applying to Aboriginal people in a Territory.

41 *Private R v Cowen* (2020) 271 CLR 316 at [107] (Gageler J) (considering Ch III and military tribunals).

undertaken at the level of the particular Ordinance: contra CS [22]. The statutory power to make Ordinances under the *Administration Act* was supported by any and all heads of Commonwealth legislative power that authorise a particular Ordinance.

32. ***Special Mineral Leases 1–4 and 11:*** The analysis for these acts proceeds in these steps.

33. *Arnhem Land Reserve established (1931):* First, the Arnhem Land Reserve was established on 16 April 1931 "for the use and benefit of Aboriginal native inhabitants" under s 102 of the *Crown Lands Ordinance 1927* (NT), being a reserve for the purposes of the *Aboriginals Ordinance*:[42] SOC [74] **AFM22**; FC [94]–[95] **CAB61**. The *Aboriginals Ordinance* prohibited entry (ss 19–19A)[43] and mining (s 21),[44] and Crown lands legislation precluded the grant of other interests.[45] Read together, these laws produced a "composite legal meaning"[46] that "reserves should be used solely by [Aboriginal people]": FC [153] **CAB79**.[47] The reservation was *protective* of the continued enjoyment native title[48] and occurred under laws with respect to a particular race that (according to the values of the time[49]) conferred a benefit especially on the people of that race.[50] These provisions were thus supported by s 51(xxvi).

34. *Laws providing for mining on Aboriginal reserves (1952–1953):* Second, in 1953 the *Aboriginals Ordinance* and the *Mining Ordinance* were amended to permit mining in Aboriginal reserves. The *Mining Ordinance* made provision for a mining tenement to

---

42 And later, the ***Welfare Ordinance*** *1953* (NT) (commencing 13 May 1957) and ***Social Welfare Ordinance*** *1964* (NT) (commencing 15 September 1964).

43 And later, the *Welfare Ordinance* s 45 and *Social Welfare Ordinance* s 17.

44 As amended by the *Aboriginals Ordinance 1924* (NT) s 5 and *Aboriginals Ordinance 1933* (NT) s 2.

45 *Crown Lands Ordinance 1931* (NT) ss 69, 107, 109 (miscellaneous leases, grazing licences and miscellaneous licences could be granted over reserves other than Aboriginal reserves).

46 See *Wurridjal* (2009) 237 CLR 309 at [162] (Gummow and Hayne JJ).

47 Quoting *Arnhem Land Trust* (2001) 109 FCR 488 at [41] referring to the *Report of the Select Committee on Grievances of Yirrkala Aborigines, Arnhem Land Reserve* (1963) (***Yirrkala Report***) at [26].

48 See *Mabo (No 2)* (1992) 175 CLR 1 at 66-7, 71 (Brennan J), 111, 118 (Deane and Gaudron JJ); see also *Pareroultja v Tickner* (1993) 42 FCR 32 at 41-4 (Lockhart J, O'Loughlin and Whitlam JJ agreeing). It is not presently relevant whether the step of reserving land for use may be inconsistent with an exclusive native title: cf *Western Australia v* ***Ward*** (2002) 213 CLR 1 at [219]-[220] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) [further references are to the plurality].

49 In relation to the *Aboriginals Ordinance*, see *Kruger* (1997) 190 CLR 1 at 35-6 (Brennan CJ), 51-2 (Dawson J), 74-6, 93, 97 (Toohey J), 149-51, 158-9 (Gummow J) cf 129-30 (Gaudron J); *Waters v Commonwealth* (1951) 82 CLR 188 at 194-5 (Fullagar J); FC [142]. See also *Namatjira v Raabe* (1959) 100 CLR 664 at 669 (the Court) in relation to the *Welfare Ordinance*).

50 See *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 460-1 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) [further references are to the joint reasons]; ***Kartinyeri*** *v Commonwealth* (1998) 195 CLR 337 at [83]-[84] (Gummow and Hayne JJ). It is for Parliament to determine that the special laws are "necessary": *Native Title Act Case* at 460.

include conditions protective of Aboriginal welfare and for the payment of royalties (new Part VIIA)[51] to an Aboriginal Trust Fund (established on amendment of the *Administration Act* in 1952) to be applied for the benefit of Aboriginal people (new s 21).[52] The extrinsic material referred to aims to "safeguard the interests of [Aboriginal people], and that some form of compensatory benefit should be given."[53] These amended provisions were also supported by s 51(xxvi), either on the basis that they provided for new benefits especially for Aboriginal people (recompense), or because they qualified the benefit to Aboriginal people of the Aboriginal reserve by permitting entry and exploitation of that land by others.[54]

10 35. *Grant of SML 1–4 (1958, 1963[55]):* Third, Special Mineral Leases 1 to 4 were granted in accordance with Part VIIA of the *Mining Ordinance* in 1958 (SML 1 on 17 November 1958) and 1963 (SMLs 2 to 4 on 11 March 1963): SOC [232], [255] **AFM45**, **49**.[56] That is, these acts were done pursuant to laws supported by s 51(xxvi). On the *Newcrest Mining* approach, just terms were required for any acquisition of property.

36. *Grant of SML 11 (1968):* Fourth, a similar analysis applies to Special Mineral Lease 11, granted on 22 February 1968 (SOC [293] **AFM56**) pursuant to the *Gove Peninsula Ordinance* and the *Mining Ordinance*. By then Part VIIA of the *Mining Ordinance* was repealed,[57] but the provisions for mining in reserves with conditions protective of

---

51 Inserted by s 5 of the *Mining Ordinance 1953* (NT). Similar provision was made in Pt III Div 5 of the *Petroleum (Prospecting and Mining) Ordinance 1954* (NT). Part VIIA of the *Mining Ordinance* was later amended by the *Mining Ordinance 1957* (NT) s 6 to refer to reserves within the *Welfare Ordinance* and the *Mining Ordinance 1958* (NT) s 7 later inserted Pt V Div 2A dealing with special mineral leases with s 54B enabling application within a reserve covered by Pt VIIA, and s 35 amended Pt VIIA to add references to a special mineral lease. The *Aboriginals Ordinance 1953* (NT) (s 3) separately repealed s 21 of the *Aboriginals Ordinance*. See later, *Welfare Ordinance* s 45(e) entry by the holder of a permit under the *Mining Ordinance* added by the *Welfare Ordinance 1961* (NT) (s 19).

52 Inserted by s 3 of the *Northern Territory (Administration) Act 1952* (Cth).

53 Minister Hasluck, statement on Native Welfare in House of Representatives, Hansard 6 August 1952 at 47; see also Second Reading Speech to the Northern Territory (Administration) Bill 1952 (Cth), House of Representatives, Hansard 9 October 1952 at 2850-1.

54 A reduction in a benefit provided to Aboriginal people is supported by s 51(xxvi): *Kartinyeri* (1998) 195 CLR 337 at [17]-[19] (Brennan CJ), [49] (Gaudron J), [72], [83]-[84] (Gummow and Hayne JJ).

55 The relevant provisions at those times are reproduced in the reprint *Mining Ordinance 1939-1960* (NT).

56 On 15 March 1963, an area of 140 square miles within which lay SMLs 1 to 4 was excised: Commonwealth Gazette No 29, 28 March 1963 at 1087; *Yirrkala Report* at [34]-[39]. This is not specifically pleaded but see SOC [164]-[170] **AFM34** citing the various proclamations and *Arnhem Land Trust* (2001) 109 FCR 488 at [38] that the reconstitution of the Reserve on 28 October 1963 (Commonwealth Gazette No 95, 7 November 1963 at 3871-2; Northern Territory Gazette No 48, 27 November 1963 at 225) appeared to be done in response to the Report. Nothing turns on that history.

57 By the *Mining Ordinance (No 2) 1964* (NT) s 15 continuing existing permits etc.

Aboriginal welfare and the payment of royalties were re-enacted and continued,[58] and payment to the Aboriginal Trust Fund to be applied to the benefit of Aboriginal people continued. Again, SML 11 was granted pursuant to laws that provided for a benefit to Aboriginal people especially by those payments, or qualified the benefit to Aboriginal people of their use of the reserve, supported by s 51(xxvi). Just terms were required for any consequential acquisition of property.

37. ***Mining Ordinance 1939 s 107:*** Section s 107 of the *Mining Ordinance*, which commenced on 1 August 1940, provided that minerals in any land in the Territory "shall be and be deemed to be the property of the Crown", except in the case of land granted in fee simple in which case the ownership of minerals shall depend upon the terms of any reservation of minerals. The Questions below proceeded on the basis that s 107 extinguished the non-exclusive native title right to resources "insofar as it relates to minerals": FC [486] **CAB163** (see [92] below).

38. As explained in Part V3 below, South Australian laws in force in the Territory before then had long prohibited the taking of minerals from Crown land other than by licence, but those laws did not apply to the lawful taking of minerals as of right under native title. Those earlier laws had abrogated rights, if any, of others to take minerals from Crown land.[59] Accordingly, on the premise of extinguishment, the enactment of s 107 in 1939 affected *only* the rights of Aboriginal people to those resources held under their traditional laws and customs (the "people of any race")[60] and left unaffected the rights of the holder of fee simple land under Crown grant without a reservation of minerals that may be held by persons of any race.[61]

39. On current authority, a law which imposes an especial *disadvantage* on the people of a race is capable of being supported by s 51(xxvi), just as much as a law that imposes an

---

58 The *Mining Ordinance (No 2) 1964* (NT) ss 4, 10 (inserting new ss 38A, 38J, 38M-38P) made provision within Part IVA for prospecting in reserves and the grant of a mining tenement with conditions to protect the interests of Aboriginals and that a tenement authorised presence in a reserve. Section 14 amended s 54B dealing with special mineral leases to refer to a reserve covered by Pt IVA (instead of Pt VIIA).

59 See *Margarula v Northern Territory* (2016) 257 FCR 226 at [83] (Mansfield J) (no general common law right to traverse, access or occupy Crown land); see also *Northern Territory v Trust (Blue Mud Bay Case)* (2008) 236 CLR 24 at [27] (Gleeson CJ, Gummow, Hayne and Crennan JJ) (any common law public right to fish was abrogated by Territory fishing laws).

60 *Native Title Act Case* (1995) 183 CLR 373 at 462.

61 Compare in the context of s 10 of the *Racial Discrimination Act 1975* (Cth), ***Mabo** v Queensland **(No 1)*** (1988) 166 CLR 185 at 218 (Brennan, Toohey and Gaudron JJ); see also ***Koowarta** v Bjelke-Petersen* (1982) 153 CLR 168 at 261 (Brennan J).

especial *benefit* on those people.[62] On its face, the law may not discriminate, but it may do so in its application to the circumstances in which it operates.[63] If s 107 of the *Mining Ordinance* operated so that the only rights to take mineral resources affected adversely were those held by Aboriginal peoples under their laws and customs and who, by the *Aboriginals Ordinance*, had been secure in the enjoyment of those rights within the Arnhem Land Reserve, then s 107 reduced the ambit of that protection, and may thus properly be characterised as a law supported by s 51(xxvi).[64] Any acquisition of property effected by s 107 would therefore require "just terms".

2 Ground 2: just terms required for native title

2.1 No error; misconceptions in Commonwealth argument

40. Ground 2 contends that neither the enactment of s 107 of the *Mining Ordinance* deeming minerals to be the property of the Crown,[65] nor the grant of the special mineral leases pursuant to that Ordinance and the *Gove Peninsula Ordinance*,[66] and consequential extinguishment of native title, can amount to a s 51(xxxi) acquisition of property on the supposition that "native title was inherently susceptible to a valid exercise of the Crown's sovereign power, derived from its radical title, to grant interests in land and to appropriate to itself unalienated land for Crown purposes": **CAB182**.

41. ***No error by Full Court:*** The Commonwealth alleges four errors by the Full Court: CS [69]–[96]. The summary response of the NLC Parties, *seriatim*, is this.

42. *First*, the Full Court did note that the concept of inherent defeasibility in s 51(xxxi) case law assists in deciding if a right is proprietary in nature, which is a correct enough reading of the cases, but they also noted that where rights may be proprietary in nature, there will still be further analysis of whether the rights have been acquired: FC [318] **CAB121**. That analysis was undertaken, concluding that a law that grants or asserts interests in land extinguishing native title rights to the land does occasion a s 51(xxxi) *acquisition* of property: FC [411], [460]–[461] **CAB144**, **156–7**: see section 2.4 below.

---

62 *Native Title Act Case* (1995) 183 CLR 373 at 461; *Koowarta* (1982) 153 CLR 168 at 186 (Gibbs CJ), 209 (Stephen J), 244 (Wilson J).

63 *Native Title Act Case* (1995) 183 CLR 373 at 461 quoting *Commonwealth v Tasmania* (1983) 158 CLR 1 at 244-5 (Brennan J).

64 See footnote 54 above (*Kartinyeri* (1998) 195 CLR 337).

65 Question 2(c) **CAB18**; SOC [190]-[202] **AFM37-9**.

66 Question 4(b)(ii) **CAB19**; SOC [232]-[278], [293]-[315] **AFM45-62**.

43. *Second*, statutory rights may be susceptible to such variation, adjustment, or abrogation, and be outside s 51(xxxi), where that susceptibility is inherent at the time of their creation by the terms of the legislation creating the rights in issue. The Full Court's conclusions from their review of the s 51(xxxi) case law did not turn on any broad view that statutory rights are always outside s 51(xxxi): FC [320]–[423] **CAB122–47**: see section 2.4 below.

44. *Third*, it is appropriate to compare the nature of statutory rights found on the case law to be outside s 51(xxxi) with the nature of a native title to land, comprising rights and interests in land recognised (enforceable) by the common law that are derived from traditional laws and customs that connect the holders of the (communal) title to the land. Comparison assists in answering the s 51(xxxi) questions of what is property and when is property acquired: FC [407], [409], [440], [451] **CAB143, 150, 153**: see sections 2.3–2.4 below.

45. *Fourth*, the Full Court did engage with the substance of the Commonwealth's argument about the recognition of native title. It was rejected upon a proper appreciation of the nature of a native title to land recognised by the common law: FC [285]–[297], [444]–[476] **CAB113–6, 151–61**. That did include reference to cases on the position of native title after the NTA and the *Racial Discrimination Act 1975* (Cth) (the **RDA**), but that does not bespeak error. The cases assist in the s 51(xxxi) questions of what is property and when is property acquired: FC [463] **CAB157**: see section 2.4 below.

46. ***Misconceptions in Commonwealth argument:*** The Commonwealth's argument that native title is inherently defeasible to "an exercise of radical title" invokes (CS [61] fn (83)) only part of the language used by French CJ, Kiefel, Bell and Keane JJ in the *NSWALC Case* when noting the effect of the *Constitution Act 1855* (Imp) was to bring all lands under the control of the colonial legislature so that "the radical title of the Crown could be exercised only in conformity with the statutes of the colony".[67] As French J had earlier said in *Lansen v Olney*:[68]

> ... the concept of radical title has little if any relevance to the grant of interests in land in post-federation Australia. Indeed it has little relevance to the grant of interests in any of the self-governing colonies prior to federation. It was invoked in *Mabo* to support the

---

67 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at [55].

68 (1999) 100 FCR 7 at [47]-[48] [emphasis added].

> conclusion of the majority that the assumption of sovereignty by the Crown upon its annexation of the various Australian colonies did not give rise to an absolute beneficial ownership in the land inconsistent with indigenous rights which ownership would extinguish native title. But the authority of the colonies, when they became self-governing, to make laws related to the disposal of Crown lands, was derived from Imperial statutes and was not an incident of the radical title of the Crown therein.
>
> …
>
> The constitutional supremacy of Australia Parliaments and the Crown over all Australian lands, as much as the feudal doctrines of the common law, is the origin of most of the incidents of Australian land tenure[.][69]

This immediately exposes the flaw in the Commonwealth's case, illustrated by its submission that s 51(xxxi) would be engaged by land acquisition laws on the hypothesis that the extinguishment or impairment of native title "pursuant to such laws does not result from an exercise of the Crown's radical title": CS [129]. The case is flawed because powers to grant or assert interests in Crown land are wholly statutory and are not (or are no longer) an incident of radical title. (So too is ground 3 flawed).

47. The questions posed by s 51(xxxi) are: (1) whether native title, comprising rights and interests in land recognised by the common law that are derived from traditional laws and customs, is *property* within s 51(xxxi), and; (2) whether a law that diminishes a native title to land confers an identifiable proprietary benefit on others so as to occasion an *acquisition* of that property within s 51(xxxi). The questions are not answered by a contention that native title may be affected by the "exercise of radical title" abstracted from the constitutional and legislative framework that defines that governmental power: cf CS [4], [70], [91], [94], [104], [106], [126]–[127], [129].

48. Here, the s 51(xxxi) questions turn on the intersection of rights to land recognised by the common law that owe their existence to traditional laws and customs with the assertion of powers over land that owe their existence to statute. There are therefore three key misconceptions in the Commonwealth's argument.

49. *First*, the Commonwealth's argument misapprehends the concept of radical title. It is a tool of analysis that explains why the acquisition of sovereignty over territory by a prerogative act is *not inconsistent* with existing native title to land. It speaks to the time of the change in sovereignty. Thereafter, the *validity and effect* of an act that *is*

---

[69] Fry, "Land Tenures in Australian Law" (1947) 3 *Res Judicatae* 158 at 161 cited with approval in ***Wik*** *Peoples v Queensland* (1996) 187 CLR 1 at 111 (Toohey J) and 188-9 (Gummow J).

inconsistent with the continued existence of native title is determined by municipal constitutional law: see section 2.3 below and FC [452]–[459] **CAB153–6**.

50. *Second*, the limb of radical title as a postulate of the doctrines of tenure and estates was displaced long ago by statutory powers to create rights and interests in land, with power to recall and impair those rights and interests, in a manner unknown to the common law. The Commonwealth acquired sovereignty over the geographic area of the Northern Territory by statute, not by prerogative act, on terms continuing those statutory powers: see section 2.2 below and FC [162]–[183] **CAB81–7**. No issue of prerogative (or non-statutory executive) power[70] is involved: FC [283] **CAB113**

10 51. *Third*, the Commonwealth now concedes (cf FC [444] **CAB151**) that native is *property* within s 51(xxxi) but contends that its extinguishment does not occasion a s 51(xxxi) *acquisition*: CS [59], [70]. That does not come to terms with the nature of native title as property and the significance of the "linkage between the concepts of property and acquisition in s 51(xxxi)".[71] First, native title is understood as "a perception of socially constituted fact" as well as "comprising various assortments of artificially defined jural right", and "an important aspect of the socially constituted fact of native title … that is recognised by the common law is the spiritual, cultural and social connection with the land".[72] This is reflected in the element of *connection* in the description of native title in s 223(1)(b) of the NTA.[73] For that reason, many native title rights to use land are not
20 susceptible to defeasance when non-native title rights of use are freely amenable to abrogation.[74] That quality denies the alleged inherent defeasibility. Second, the necessary implication of native title as property within s 51(xxxi), that is, as a title to land comprising a "legally endorsed concentration of power" over resources, is that a law diminishing that title confers on others countervailing power over those resources.[75] That relationship to land (property) reveals why a law that grants or asserts

---

70 The expression "non-statutory executive power" is used in the *NSWALC Case* (2016) 260 CLR 232.

71 *Wurridjal* (2009) 237 CLR 309 at [88] (French CJ) [emphasis added].

72 ***Yanner** v Eaton* (1999) 201 CLR 351 at [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) quoting S Gray & K Gray, "The Idea of Property in Land" in Bright and Dewer (eds), *Land Law: Themes and Perspectives* (1998) 15 at 27.

73 *Northern Territory v **Griffiths*** (2019) 269 CLR 1 at [44] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

74 ***Akiba** v Commonwealth* (2013) 250 CLR 209 at [37]-[38] (French CJ and Crennan J), [74] (Hayne, Kiefel and Bell JJ).

75 ***Telstra Corporation** v Commonwealth* (2008) 234 CLR 210 at [44], [52] (the Court) quoting Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 299 as cited in *Yanner* (1999) 201 CLR 351 at [18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

interests in land in diminution of existing native title rights to the land occasions an acquisition in the relevant constitutional sense: see section 2.4.

2.2 Surrender and acceptance of the Northern Territory

52. The claim area was within the western limit of the territory forming the Colony of New South Wales established in 1788[76] and in 1863 the geographic area of the Northern Territory became part of South Australia.[77] The alienation of land in South Australia was, from the start, effected under statute, with the *South Australian Colonisation Act 1834* (Imp) (s 6) vesting powers to deal with land in the Colonial Commissioners.[78] Further, the Commonwealth's powers do not point to the existence of Commonwealth prerogative rights of a proprietary nature over lands, royal metals or the foreshore, unless the Commonwealth were to acquire such rights of a State in the course of exercising powers under ss 51(xxxi), 85 and 111 of the Constitution.[79]

53. Any non-statutory executive power to deal in Crown land within the claim area was displaced by the *Crown Lands Alienation Act 1861 (NSW)* (s 3) and, in relation to the wider geographic area of the Northern Territory, by the *Northern Territory Act 1863* (SA) incorporating the *Waste Lands Act 1857* (SA) (s 1). Those laws provided for how Crown land could be dealt with, and "not otherwise".[80]

54. Successive laws continued that state of affairs[81] when, in conformity with s 111 of the Constitution, the Northern Territory was declared by s 6(1) of the *Northern Territory* ***Acceptance Act*** *1910* (Cth) to be accepted and "under the authority of the Commonwealth" and, by s 6(2), "the acceptance include[d] … all the State's right, title, interest in, and control of, all State real and personal property and privileges in the said

---

76 SOC [44]-[45] **AFM16**; *Milirrpum* (1971) 17 FLR 141 at 147 (Blackburn J).

77 McLelland, "Colonial and State Boundaries in Australia" (1971) 45 *Australian Law Journal* 671.

78 ***Fejo*** *v Northern Territory* (1998) 195 CLR 96 at [91] (Kirby J); *Milirrpum* (1971) 17 FLR 141 at 274-83 (Blackburn J). Indeed, South Australia was established under that parliamentary authority, not by prerogative act, and the Northern Territory was added by the powers conferred by s 2 of the *Australian Colonies Act 1861* (Imp): *South Australia v Victoria* (1911) 12 CLR 667 at 715-6 (O'Connor J); Selway, *The Constitution of South Australia* (1997) at 5-6, 19.

79 Evatt, *The Royal Prerogative* (1987) at 205-9, 217-9 (and C16 commentary by Zines); Renfree, *The Executive Power of the Commonwealth of Australia* (1984) at 576-80; *Commonwealth v New South Wales (Royal Metals Case)* (1923) 33 CLR 1 at 19-20 (Knox CJ and Starke J), 37-8 (Isaacs J), 60-1 (Higgins J save for inclusion of royal metals); ***Cadia Holdings*** *Pty Ltd v New South Wales* (2010) 242 CLR 195 at [30]-[33] (French CJ), [85]-[89] (Gummow, Hayne, Heydon and Crennan JJ).

80 *NSWALC Case* (2016) 260 CLR 232 at [121] and cases cited fn (210)-(212) (Gageler J).

81 *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.

Territory". All laws in force in the Territory at the time of acceptance continued to be in force, subject to alteration by any law of the Commonwealth (s 7).[82]

55. It was by those steps under s 111 of the Constitution that the Commonwealth acquired sovereignty over the Territory[83] and, as Gummow J remarked in *Newcrest Mining*, "[r]adical title over the land in the Territory was an attribute of that sovereignty".[84] That, however, does not imply some different view of what his Honour essayed in *Wik* on statute displacing proprietary prerogative powers: see [62] below.[85] As Gummow J went on to say in *Newcrest Mining*, the Commonwealth, acquired a radical title and dealt with the subject land and "[th]is involved the use of statute to carve out interests from the particular species of ownership enjoyed by the Commonwealth."[86]

2.3 The intersection of two normative systems

Flawed premises about the recognition of native title

56. The Commonwealth's arguments about the recognition of native title rest upon two flawed premises. The *first* is that the decision in *Mabo (No 2)* involved "the common law conferring recognition [of native title] on terms" (CS [57], [83]) from which it then seeks to make an analogy with the situation of a statutory right being created on terms that it is liable to abrogation: CS [72], [106]. The premise is flawed for three reasons.

57. First, the common law is declaratory.[87] The recognition of native title did not confer rights to property — it recognised pre-existing rights to land that owe their existence to traditional laws and customs: FC [288], [469] **CAB114, 158**, and cases cited. Second, as was said in the *Native Title Act Case*, "[t]he common law relating to native

---

82 See later the *Crown Lands Ordinance 1912* (NT) that Crown land not be alienated "otherwise than by way of lease" under that law (s 5), repeated in the *Crown Lands Ordinance 1924* (NT) (s 6) that repealed earlier Ordinances and South Australian Crown land laws. That was followed by the *Crown Lands Ordinance 1927* (NT) that first made provision for grants in fee simple (Part IV), providing that Crown lands "not be alienated otherwise than in pursuance of this Ordinance" (s 6).

83 *Newcrest Mining* (1997) 190 CLR 513 at 615 (Gummow J) citing *Svikart v Stewart* (1994) 181 CLR 548 at 566 (Mason CJ, Deane, Dawson and McHugh JJ).

84 (1997) 190 CLR 513 at 615 citing *Mabo (No 2)* (1992) 175 CLR 1 at 48 (Brennan J) and *Native Title Act Case* (1995) 183 CLR 373.

85 (1996) 187 CLR 1 at 187-9; see also *Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392 at [114] (Gummow J).

86 (1997) 190 CLR 513 at 635 echoing *R v Toohey; ex parte* ***Meneling Station*** *Pty Ltd* (1982) 158 CLR 327 at 355 (Brennan J) referring to a grant of fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) as "proprietary rights … carved out of the Crown's radical title."

87 *Wik* (1996) 187 CLR 1 at 179 (Gummow J).

title is not regulatory: it is … declared from time to time by the courts".[88] That includes what was decided in *Wik* about when native title may be extinguished, which was not decided in *Mabo (No 2)*. Third, it is an error to speak of common law requirements or terms. Native title is what is defined and described in s 223(1) of the NTA. The reference in par (c) to rights recognised by the common law does not incorporate some pre-existing body of common law defining those rights:[89] FC [452]–[453] **CAB153–4**.

58. The *second* flawed premise is to treat the concept of radical title as controlling the question of when an act by the new sovereign order validly affects its continued existence: CS [81]–[94] "guiding principle": cf FC [456] **CAB155**. The metaphor of an *intersection* of two sets of normative systems is expressed by saying that the radical title of the Crown was "burdened" by native title rights. But radical title is a tool of analysis and should not be given some controlling role in working out the consequences of that intersection.[90] While the acquisition of sovereignty by a prerogative act of State is not justiciable, the courts determine its consequences under municipal law. Recognition of the assumption of a radical title of the Crown upon sovereignty is consistent with recognition of native title to land because sovereignty and ownership of land are not to be equated.[91]

59. As to the part of *recognition* in that intersection, in *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ observed of s 223(1)(c) of the NTA:[92]

> ... recognition by the common law is a requirement that emphasises the fact that there is an intersection between legal systems and that the intersection occurred at the time of sovereignty. The native title rights and interests which are the subject of the [NTA] are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are "recognised" in the common law.

60. As to the part of *radical title* in that intersection, in *Commonwealth v* ***Yarmirr***, Gleeson CJ, Gaudron, Gummow and Hayne JJ had explained that:[93]

> Again, however, it is of the very first importance to bear steadily in mind that native title rights and interests are not created by and do not derive from the common law. The

---

88 (1995) 183 CLR 373 at 486.
89 ***Yorta Yorta*** *v Victoria* (2002) 214 CLR 422 at [75]-[76] (Gleeson CJ, Gummow and Hayne JJ).
90 *Yorta Yorta* (2002) 214 CLR 422 at [37]-[38] (Gleeson CJ, Gummow and Hayne JJ).
91 *Mabo (No 2)* (1992) 175 CLR 1 at 31-2, 48-51 (Brennan J), 78-9, 86-7 (Deane and Gaudron JJ), 179-84 (Toohey J).
92 (2002) 214 CLR 422 at [77].
93 (2001) 208 CLR 1 at [48] emphasis in original.

> reference to radical title is, therefore, not a necessary pre-requisite to the conclusion that native title rights and interests *exist*. The concept of radical title provides an explanation in legal theory of how the two concepts of sovereignty over land and existing native title rights and interests *co-exist*. To adopt the words of Brennan J in *Mabo [No 2]*, it explains *how* "[n]ative title to land survived the Crown's acquisition of sovereignty" over a particular part of Australia.[94]

Yarmirr concerned whether there was any necessary inconsistency between the assertion of sovereignty over the territorial sea where the Crown has no radical title and the recognition of native title to that area. The plurality explained that to resort to a metaphor of a "skeletal principle" of radical title supporting doctrines of tenure and estates, as done here (CS [81]–[82]), obscured the underlying principles.[95]

61. As Toohey J remarked in *Mabo (No 2)*, the position of the Crown as the holder of a radical title was not in issue: "What is in issue is the consequences that flow from that radical title."[96] The majority conclusion was that on the acquisition of sovereignty, land continued to be subject to native title for there was no inconsistency between recognition of the radical title of the Crown and recognition of native title to land.[97] Brennan J characterised radical title as "a postulate of the doctrine of tenure and a concomitant of sovereignty,"[98] noting that it was a "political power".[99] To similar effect, Deane and Gaudron JJ noted that the "practical effect" of radical title was "merely to enable the English system of private ownership of estates held of the Crown to be observed in the Colony".[100]

62. *Mabo (No 2)* did not decide questions of extinguishment,[101] that is, where recognition is withheld or withdrawn.[102] They were first squarely raised in *Wik*,[103] where the criterion of inconsistency was established,[104] and where (as later in *Yarmirr*) the recognition or extinguishment of native title was not controlled by the notion that

---

94 (1992) 175 CLR 1 at 69; also citing 48, 50 and *Wik* (1996) 187 CLR 1 at 186 (Gummow J) and 234 (Kirby J).
95 (2001) 208 CLR 1 at [61], [94], [97] (Gleeson CJ, Gaudron, Gummow and Hayne J).
96 (1992) 175 CLR 1 at 180.
97 (1992) 175 CLR 1 at 50 (Brennan J), 86-7 (Deane and Gaudron JJ), 182-3 (Toohey J).
98 (1992) 175 CLR 1 at 48 [emphasis added].
99 (1992) 175 CLR 1 at 53.
100 (1992) 175 CLR 1 at 81; also 212 (Toohey J) re "operation of feudal land law".
101 See (1992) 175 CLR 1 at 16 (Mason CJ and McHugh J) and par 2 of the declaration at 217.
102 *Queensland v* ***Congoo*** (2015) 256 CLR 239 at [31] (French CJ and Keane J).
103 See (1996) 187 CLR 1 at 125 (Toohey J).
104 (1996) 187 CLR 1 at 132-3 Toohey J "post-script" with Gaudron, Gummow and Kirby JJ.

radical title supported the doctrines of tenure and estates: cf CS [81]–[84]. *Wik* turned on the significance of the displacement of that notion in the late nineteenth century on exercise of legislative power over Crown lands. The difference between the majority and the minority was whether a pastoral lease was an estate creating a reversionary interest expanding radical title to beneficial ownership.[105] Brennan CJ decried the majority view as attributing to the Crown "no more than a radical title (that is essentially a power of alienation controlled by statute)" and treating the interests granted "as a bundle of statutory rights to which the doctrines of tenure and estates had no necessary application".[106] Thus, on the prevailing majority view, Gummow J explained that reliance upon those common law conceptions "breaks down" because it was by legislation that interests in Crown land were to be granted and Crown land was to be reserved or dedicated to public purposes.[107]

The normative force of the clear and plain intention standard

63. A clear and plain intention is necessary to effectuate the extinguishment of native title, whether directly by legislation or by executive act done under legislative authority. The settled criterion for its satisfaction is inconsistency between the rights created or asserted by or under legislation and the relevant native title rights.[108] The existence of one must necessarily imply the non-existence of the other, that is, there must be a "logical antimony" between the two sets of rights.[109]

64. Contra CS [95], there was not any difference of consequence in *Mabo (No 2)* on the standard by which one assesses if acts extinguish native title. Each of the majority judgments considered that a clear and plain intention is necessary.[110] That standard, derived from cases such as *Clissold v Perry* dealing with possessory title, applies equally to native title and non-native title interests in land, consistent with the

---

105 (1996) 187 CLR 1 at 127-9 (Toohey J), 155-6 (Gaudron J), 188-90 (Gummow J), 244-5 (Kirby J); contra 88-9 (Brennan CJ, Dawson and McHugh JJ agreeing).

106 (1996) 187 CLR 1 at 94.

107 (1996) 187 CLR 1 at 187, 189.

108 *Congoo* (2015) 256 CLR 239 at [32]-[34] (French CJ and Keane J).

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

110 (1992) 175 CLR 1 at 64, 68 (Brennan J), 95, 111, 119 (Deane and Gaudron JJ referring to "clear and unambiguous"), 177, 193-5, 205, 207 (Toohey J). The phrase "clear and plain" had been used in *Mabo (No 1)* (1988) 166 CLR 186 at 213 (Brennan, Toohey and Gaudron JJ) citing *Calder v Attorney-General (British Columbia)* [1973] SCR 313 at 402, 404 (Hall J) in turn quoting *United States v Sante Fe Pacific Railroad Co* 314 US 339 at 353 (1941) and *Lipan Apache Tribe v United States* 180 Ct Cl 487 (1967).

presumption, which may be seen as an aspect of the principle of legality, against interference with common law rights.[111] And because powers to deal with land are wholly statutory, nothing of relevance can be extracted from Brennan J adverting to the absence of an equivalent common law principle of non-derogation from grant that constrained non-statutory executive power: cf CS [92]–[95].[112]

65. The later statement in the *Native Title Act Case* (cited CS [98]) that "[a]t common law … native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title"[113] must, as Gageler J noted in *Congoo*, be understood in light of the footnoted reference to the judgment of Brennan J in *Mabo (No 2)*[114] and the many references in the case law to the clear and plain intention standard.[115] It is, as French CJ and Keane J said in *Congoo*, and Gageler J agreed, "an important normative principle" with "normative force" that informs the criterion of inconsistency.[116] The test of "logical antinomy" is a high threshold to cross before one can conclude that native title is extinguished. As demonstrated in *Wik*, *Ward* and later cases,[117] many acts will be consistent with the continued existence of native title rights. Contrast common law rights of the public that are "freely amenable" to abrogation when native title rights are not <u>because</u> native title rights define relationships (connection) between Indigenous peoples and land.[118]

---

111 (1904) 1 CLR 363 affirmed [1907] AC 73 cited *Mabo (No 2)* (1992) 175 CLR 1 at 111 (Deane and Gaudron JJ) and *Mabo (No 1)* (1988) 166 CLR 186 at 223 (Deane J).

112 (1992) 175 CLR 1 at 64; also, *Native Title Act Case* (1995) 183 CLR 373 at 439. That proposition is not without difficulty as rights to land recognised by the common law but not derived from grant, such as possessory and customary rights, are equally protected: see the argument in *Wik* (1996) 187 CLR 1 at 26 (Sher QC) and cases cited fn (87)-(89) including *Perry v Clissold* [1907] AC 73; also, Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (2014) at 124-6; McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 *Australian Indigenous Law Reporter* 181 at 192-4.

113 (1995) 183 CLR 373 at 439.

114 (1995) 183 CLR 373 at 439 citing (1992) 175 CLR 1 at 64 (Brennan J), and also 110-1 (Deane and Gaudron JJ); see also (1995) 183 CLR 373 at 423 "manifested clearly and plainly".

115 (2015) 256 CLR 239 at [158]-[159].

116 (2015) 256 CLR 239 at [34], [37]; [159] (Gageler J agreeing).

117 E.g. *Akiba* (2013) 250 CLR 209 (prohibition on commercial fishing), *Brown* (2014) 253 CLR 507 (mining lease), *Congoo* (2015) 256 CLR 239 (seizing land in war time); see Bartlett, "The Requirement of a Clear and Plain Intention and its Relationship to Equality and the Inconsistency Test in the Extinguishment of Native Title: *Akiba*, *Brown* and *Congoo*" (2015) 34 *Australian Resources and Energy Law Journal* 109; Stephenson "The Doctrine of Extinguishment: And Then There Was *Congoo*" (2016) 6 *Property Law Review* 3; Bush, "*Queensland v Congoo*: The Confused Re-emergence of a Rationale of Equality?" (2015) 39 *University of Western Australia Law Review* 451.

118 *Akiba* (2013) 250 CLR 209 at [37]-[38] (French CJ and Crennan J), [74] (Hayne, Kiefel and Bell JJ); *Blue Mud Bay Case* (2008) 236 CLR 24 at [21]-[27] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

The validity of an act affecting native title is determined by municipal law

66. In the *Native Title Act Case*, having noted that in the absence of some "positive act" private property is not extinguished in the course of acquiring sovereignty,[119] Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ continued:[120]

> After sovereignty is acquired, native title can be extinguished by a positive act which is expressed to achieve that purpose generally — for example, s 7 of the [*Land (Titles and Traditional Usage) Act 1993* (WA)] — provided the act is valid and its effect is not qualified by a law which prevails over it or over the law which authorises the act. Again, after sovereignty is acquired, native title to a particular parcel of land can be extinguished by the doing of an act that is inconsistent with the continued right of Aborigines to enjoy native title to that parcel — for example, a grant by the Crown of a parcel of land in fee simple — provided the act is valid and its effect is not qualified by a law which prevails over it or over the law which authorises the act. [emphasis added]

67. Constitutional limitations had been identified in *Mabo (No 2)*. CS [90] only partly quotes what Brennan J said about how sovereignty carries power to create and to extinguish interests in land. It happens to be the one passage in *Mabo (No 2)* where "defeasible" appears, when Brennan J said that rights "indefeasible under the old regime become liable to extinction". Relevantly, he continued:[121]

> 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. [emphasis added]

Similarly, Deane and Gaudron JJ said:[122]

> Like other legal rights, including rights of property, the rights conferred by common law native title and the title itself can be dealt with, expropriated or extinguished by valid Commonwealth, State or Territorial legislation operating within the State or Territory in which the land in question is situated. [emphasis added]

And Toohey J considered that:[123]

> … to say that, with the acquisition of sovereignty, the Crown has the power to extinguish traditional title does not necessarily mean that such a power is any different from that with respect to other interests in land. The Crown has the power, subject to constitutional, statutory or common law restrictions, to terminate any subject's title to property by compulsorily acquiring it. [emphasis added]

---

119 (1995) 183 CLR 373 at 422 referring to *Mabo (No 2)* (1992) 175 CLR 1 at 184 (Toohey J).
120 (1995) 183 CLR 373 at 422.
121 (1992) 175 CLR 1 at 63; see also 67.
122 (1992) 175 CLR 1 at 110-1.
123 (1992) 175 CLR 1 at 193-4.

2.4 Section 51(xxxi): acquisition of property and native title

68. In *Mabo (No 2)*, Deane and Gaudron JJ, after considering the possibility of common law compensation for wrongful extinguishment where there is no clear and plain legislative authority to abrogate native title rights, observed that:[124]

> There are, however, some important constraints on the legislative power of the 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). [emphasis added]

69. The difference between the majority members was that, subject to the operation of the RDA, Mason CJ, McHugh and Brennan JJ did not agree with the conclusion to be drawn from the judgments of Deane, Gaudron and Toohey JJ that absent clear and unambiguous statutory provision an extinguishment of native title by an inconsistent grant is wrongful and gives rise to compensatory damages.[125] But the majority judgments agreed that native title can be protected by legal and equitable remedies appropriate to the rights established,[126] and no member of the majority disagreed with the proposition by Deane and Gaudron JJ that in the case of acts attributable to the Commonwealth, native title is protected by s 51(xxxi): FC [423] **CAB147**.

70. Nothing said in *Mabo (No 2)*, or in any later High Court decision, supports the view that an act attributable to the Commonwealth, done under legislative authority, that divests from the Aboriginal native title holders the proprietary rights to land which they possessed by virtue of the common law's recognition of that title to land[127] is not constrained by s 51(xxxi) in the very manner identified by Deane and Gaudron JJ.

71. To the extent the statements by Gummow J in *Newcrest Mining*[128] relied upon by the Commonwealth (CS [59]) might suggest otherwise, the Full Court comprehensively,

---

124 (1992) 175 CLR 1 at 110-1.

125 (1992) 175 CLR 1 at 15 (Mason CJ and McHugh JJ), 71-4 (Brennan J), 116-7 (Deane and Gaudron JJ), 196-7 (Toohey J).

126 (1992) 175 CLR 1 at 61-2 (Brennan J), 112-3 (Deane and Gaudron JJ), 196 (Toohey J).

127 *Native Title Act Case* (1995) 183 CLR 373 at 475 that the validation of past acts under the NTA "divests from the Aboriginal native title holders the proprietary or usufructuary rights which they possessed by virtue of the common law and which were protected by s 11(1) of the [NTA] or by the [RDA]."

128 (1997) 190 CLR 513 at 613 quoted FC [292] **CAB115**.

and correctly, explained why, that would not conform with long established s 51(xxxi) principles and the native title case law: FC [396]–[443] **CAB140–51**. Simply, it does not follow from the circumstance that native title can be extinguished by a valid exercise of power, where there is a clear and plain intention to do so,[129] that the consequent extinguishment of native title does not amount to an "acquisition of property". Only Gummow J in *Newcrest* has referred to native title in the context of rights being inherently defeasible for the purposes of s 51(xxxi).[130] The approach of Deane and Gaudron JJ in *Mabo (No 2)* better conforms with s 51(xxxi) principles as well as the native title case law: see further, [72]–[82] below.

10 ***Statutory rights created by Parliament susceptible to adjustment***

72. The concept of inherently defeasible rights standing outside s 51(xxxi) has only been applied to rights that have no existence apart from statute: FC [318] **CAB121**. This Court has consistently distinguished in this context between rights that are recognised by the general law, and rights created by statute which have no existence apart from statute and whose continued existence depends upon statute.[131] This is because Parliament can create rights on terms contemplating adjustment or abrogation.[132] That is not to adopt any "broad view" that all statutory rights must stand outside s 51(xxxi): cf CS [69(b)], [71]–[72].[133] Rather than there being a "broad" or "narrow" view, later cases recognise that the question of whether statutory rights are inherently variable is
20 determined "having regard to their character and the context and purpose of the statute

---

129 See e.g. *Native Title Act Case* (1995) 183 CLR 373 at 439; *Ward* (2002) 213 CLR 1 at [78], [82]; *Brown* (2014) 253 CLR 507 at [33] (the Court).

130 In *Fejo* (1998) 195 CLR 96 at [44] fn 57, the joint judgment cites Gummow J in *Newcrest Mining*, but only in support of a passage from *Wik* (1996) 187 CLR 1 at 84 (Brennan CJ) stating that native title can be extinguished by later grant of an inconsistent grant. This citation in *Fejo* does not endorse any conclusion drawn by Gummow J about s 51(xxxi), which was not an issue in *Fejo*: contra CS [99]; see also FC [438]-[439] **CAB150**. *Yarmirr* and *Ward* referred to at CS [101]-[102] are addressed elsewhere in these submissions, but note CS [102] quotes *Ward* only in part — the passage goes on to say that: "But because native title is more than the right to be asked for permission … there are other rights and interests which must be considered, including rights and interests in the use of the land."

131 ***Cunningham*** *v Commonwealth* (2016) 259 CLR 536 at [43] (French CJ, Kiefel and Bell JJ); ***Georgiadis*** *v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-6 (Mason CJ, Deane and Gaudron JJ); *WMC Resources* (1998) 194 CLR 1 at [16] (Brennan CJ), [78] (Gaudron J), [140] (McHugh J), [182] (Gummow J).

132 *WMC Resources* (1998) 194 CLR 1 at [134] (McHugh J). E.g. modification of statutory intellectual property interests is not an "acquisition of property": *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

133 Citing *WMC Resources* (1998) 194 CLR 1 at [144]-[146] (McHugh J).

creating them".[134] The susceptibility must exist at the time of creation of the right by reason of the terms upon which the right was created.[135] There is no error in the Full Court's review of the case law: FC [320]–[395] **CAB122–40**.

(1) In each of *Attorney-General (NT) v* ***Chaffey***[136] and *WMC Resources*,[137] the right depended for its content upon the will of the legislature from time to time,[138] and was thus inherently variable: cf CS [108]–[118]. The same for the Medicare benefits in *Health Insurance Commission v* ***Peverill***[139] and Parliamentary entitlements in *Cunningham*:[140] cf CS [119]–[124]. In *Telstra Corporation*, Telstra's rights to the relevant assets under the constating legislation were always subject to the rights of competitors to require use of the assets:[141] cf CS [59].

(2) In ***ICM*** *Agriculture Pty Ltd v Commonwealth*[142] and in *Davey*,[143] the statutory right was a licence to take a limited public resource, which was subject to close regulation. It was inherent in the nature of such a right that it may require alteration from time to time, to avoid the degradation of the resource:[144] cf CS [117]. In *WMC Resources*, a further strand of reasoning was that the Commonwealth does not have title in the seabed, so (unlike *Newcrest Mining*) the extinguishment of a statutory offshore exploration permit did not confer any corresponding proprietary benefit on the Commonwealth.[145]

(3) In contrast, in *Newcrest Mining*, sterilising rights to mine in Kakadu amounted to an acquisition of property as the interests of the Director and the Commonwealth

---

134 *Cunningham* (2016) 259 CLR 536 at [43] (French CJ, Kiefel and Bell JJ) [emphasis added]; also, [66] (Gageler J), [223] (Nettle J), [252] (Gordon J).

135 *Minister for Primary Industry and Energy v* ***Davey*** (1993) 47 FCR 151 at 165 (Black CJ and Gummow J); *Telstra Corporation* (2008) 234 CLR 210 at [52] (the Court).

136 (2007) 231 CLR 651 at [25], [30] (Gleeson CJ, Gummow, Hayne and Crennan JJ), [47]-[49] (Kirby J), [66]-[67] (Heydon J), considering workers compensation rights.

137 (1998) 194 CLR 1 at [146] (McHugh J), [198]-[199] (Gummow J).

138 See *Cunningham* (2016) 259 CLR 536 at [44] (French CJ, Kiefel and Bell JJ).

139 (1994) 179 CLR 226 at 237 (Mason CJ, Deane and Gaudron JJ); *Cunningham* (2016) 259 CLR 536 at [232] (Nettle J).

140 (2016) 259 CLR 536 at [47]-[48] (French CJ, Kiefel and Bell JJ), [66] (Gageler J dissenting in part) [155] (Keane J), [238], [240] (Nettle J), [252]-[253] (Gordon J).

141 (2008) 234 CLR 210 at [52]-[53] (the Court).

142 (2009) 240 CLR 140.

143 (1993) 47 FCR 151.

144 *ICM* (2009) 240 CLR 140 at [84] (French CJ, Gummow and Crennan JJ), [143]-[144] (Hayne, Kiefel and Bell JJ). ***JT International*** *SA v Commonwealth* (2012) 250 CLR 1 at [104] (Gummow J).

145 (1998) 194 CLR 1 at [20]-[24] (Brennan CJ), [83]-[84] (Gaudron J), [161], [173] (Gummow J).

in the land were freed from the rights of Newcrest to mine the land.[146] And in *Wurridjal*, an estate in fee simple granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), understood as an interest conferring rights of ownership recognised by general law, was not so unstable or defeasible by the prospect of statutory controls to deny the operation of s 51(xxxi), such that the grant of a lease to the Commonwealth by force of the *Northern Territory National Emergency Response Act 2007* (Cth) was an acquisition of property.[147]

(4) In *Georgiadis*, the extinguishment of an accrued general law cause of action against the Commonwealth was an acquisition of property, even if the practical enforcement of that right depended on having a right to proceed derived from statute).[148] Similarly, for an extinguishment of native title rights, even if their continued recognition (enforcement) may be affected by inconsistent legislation.

73. In *Wurridjal*, Gummow and Hayne JJ said of *WMC Resources* and *Chaffey*:[149]

> Those cases concerned express legislative stipulations in existence at the time of the creation of the relevant statutory "right", whereby its continued and fixed content depended upon the will from time to time of the legislature. The registered fee simple owned by the Land Trust is not of that character.

74. The cases do not support the Commonwealth's contentions: cf CS [125].

No difference with acquisition laws

75. The Commonwealth submits that the reference by Deane and Gaudron JJ in *Mabo (No 2)* to "any legislative extinguishment" should be read as only a reference to the future extinguishment of native title under Commonwealth laws such as the *Lands Acquisition Act 1989* (Cth): CS [63]. That cannot be so. Their Honours were referring to limitations on the possibility of native title being extinguished by inconsistent grants

---

146 (1997) 190 CLR 513 at 634-5 (Gummow J).

147 (2009) 237 CLR 309 at [127], [171] (Gummow and Hayne JJ); see also [100]-[101] (French CJ), [295] (Kirby J dissenting), [450] (Kiefel J); contra [398] (Crennan J).

148 (1994) 179 CLR 297 at 305-6 (Mason CJ, Deane and Gaudron JJ), 311-2 (Brennan J) cf 326 (McHugh J) (in dissent), holding that the cause of action was not property, in part because the right to proceed derived from the *Judiciary Act 1903* (Cth), which could be amended. *Mewett v Commonwealth* (1997) 191 CLR 471 now holds that the right to proceed against the Commonwealth derives, by implication, from the conferral of federal jurisdiction.

149 (2009) 237 CLR 309 at [172].

of Crown land or by other inconsistent dealings in Crown land, such as an appropriation, dedication, or reservation giving rise to third party rights.[150]

76. CS [64] also suggests that Deane and Gaudron JJ cannot be taken to have meant what they said in *Mabo (No 2)* because the "analytical development" of rights inherently susceptible to variation had not yet occurred, referring to the 1994 *Mutual Pools* line of authority.[151] But *Allpike v Commonwealth* had already held that the Commonwealth can regulate a federal statutory entitlement to a payment even after the conditions entitling payment are fulfilled because, as Latham CJ said: "That right may be altered by the authority which created it. … [T]he … Act may vary or modify any right which has been created":[152] and see FC [342] **CAB342**.

77. CS [63]–[64], when read with CS [128]–[129], appears to repeat the argument below that extinguishing native title by use of powers to grant or assert interests in land will not engage s 51(xxxi) (then called "appropriation"), yet use of powers under compulsory acquisition laws to extinguish native title will engage s 51 (xxxi) (then called "expropriation"): see FC [472]–[477] **CAB159–61**. The Full Court correctly rejected the argument, noting "how difficult it is to conceive of an interference with title in land by a grant relying on federal legislative authority that does not attract s 51(xxxi)": FC [476] **CAB 161**.

78. Three further points may be made. *First*, by s 51(xxxi), the Commonwealth can only acquire property "for any purpose in respect of which the Parliament has power to make laws". It may be doubted whether acquiring property simply to deprive another of that property is a permitted purpose.[153] *Second*, there is nothing in general s 51(xxxi) principle that would support any such supposed distinction. Any difference in <u>who obtains</u> the countervailing proprietary benefit is irrelevant to the operation of

---

150 (1992) 175 CLR 1 at 110.

151 *Mutual Pools v Commonwealth* (1994) 179 CLR 155; *Peverill* (1994) 179 CLR 225; *Georgiadis* (1994) 179 CLR 297.

152 (1948) 77 CLR 62 at 69; also 76-7 (Dixon J), considered in *Peverill* (1994) 179 CLR 226 at 256 (Toohey J), 260-1 (McHugh J); *WMC Resources* (1998) 194 CLR 1 at [135]-[136] (McHugh J). See also *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 (Dixon CJ) that the "abstraction" principle could not be applied "in a too sweeping and undiscriminating way" (Dixon CJ) and *Trade Practices Commission v Tooth & Co* (1979) 142 CLR 397 at 408 (Gibbs CJ) and 427 (Mason J) that s 51(xxxi) did not apply to every compulsory divesting of property.

153 *Griffiths v Minister for Lands (NT)* (2008) 235 CLR 232 at [28] (Gummow, Hayne and Heydon JJ), referring to *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 200.

s 51(xxxi). It applies to all acquisitions of property pursuant to Commonwealth law, whether the property is acquired by the Commonwealth itself or by some third party.[154] *Third*, the benefit of extinguishing native title to others is the same, whether the mechanism is described as an "expropriation" or "appropriation", or whether any other device is employed. In the context of the validation of past acts permitted by the NTA, it was described in the *Native Title Act Case* as a "divesture"[155] and in the *Timber Creek Case* as "a clearing of the native title rights" from the land.[156]

Property (recognition by common law) and acquisition (clearing title)

79. The common law "recognises" native title rights in the sense that "by the ordinary processes of law and equity, [it will] give remedies in support of the relevant rights and interests to those who hold them".[157] The concept of *property* for the purposes of s 51(xxxi) includes every species of valuable right, including choses in action.[158] Native title has been described as both valuable and invaluable.[159]

80. The Commonwealth's argument that native title is *property* within s 51(xxxi) but that its extinguishment does not occasion an *acquisition* in the constitutional sense (CS [59], [69a], [70], [105]–[106]) does not advance things. *First*, if there is intended a criticism that the Full Court focused on whether native title is property within s 51(xxxi), that might be unfair given the Commonwealth was coy about conceding that: FC [294]–[295], [444] **CAB115–6**, **151**. *Second*, the Full Court was perfectly aware of, and addressed, dicta in s 51(xxxi) cases that there can be property but not an acquisition: see FC [361]–[391] **CAB131–9** cf CS [112]–[125]. *Third*, as the review of *Mutual Pools*, *Peverill* and *Georgiadis* at FC [322]–[359] **CAB122–31** reveals, with which the Commonwealth does not take issue (CS [64]), analysis of the nature of the relevant right as to whether it is property informs whether the act in issue causes an

---

154 See e.g. ***Australian Tape Manufacturers*** *Association Ltd v Commonwealth* (1993) 176 CLR 480 at 510-1 (Mason CJ, Brennan, Deane and Gaudron JJ); *ICM* (2009) 240 CLR 140 at [42] (French CJ, Gummow and Crennan JJ).

155 (1995) 183 CLR 373 at 475-6.

156 (2019) 269 CLR 1 at [32] (Kiefel CJ, Keane, Nettle and Gordon JJ).

157 *Yarmirr* (2001) 208 CLR 1 at [42] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

158 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290 (Starke J); *JT International* (2012) 250 CLR 1 at [41] (French CJ), [263] (Crennan J), [366] (Kiefel J).

159 Edgeworth, "Valuable, Invaluable or Unvaluable? The High Court on Native Title Compensation" (2019) 93 *Australian Law Journal* 442.

acquisition of property because there is a "linkage" between the two concepts.[160] *Fourth*, the Full Court addressed whether the extinguishment of native title occasions a s 51(xxxi) acquisition in the constitutional sense with proper appreciation of the nature of native title: FC [444]–[480] **CAB151–61**.

81. *Fifth*, the lack of substance to the analogy with cases on statutory rights is further revealed by the circumstance that, on any view, a law that grants or asserts interests in land extinguishing existing native title rights to the land does result in a s 51(xxxi) *acquisition* of property. What Deane and Gaudron JJ said in *Mabo (No 2)* is supported by the settled meaning of "acquisition" in s 51(xxxi). An "acquisition" is different from a taking, and therefore a bare extinguishment of property may not be an acquisition.[161] However, an extinguishment will amount to an "acquisition" if it confers a countervailing proprietary benefit on another person.[162] That need not correspond precisely to what is taken or diminished, but the benefit must be proprietary in nature for there to be an acquisition of property within s 51(xxxi).[163] In *Newcrest Mining*, the legislative prohibition of mining on the proclamation of Stage III of Kakadu National Park resulted in the Director acquiring the land freed of the right of the company holding mineral leases to conduct mining on the land and in the Commonwealth acquiring reserved sub-surface minerals freed from the right of the company to recover minerals.[164] That analysis was approved in *WMC Resources*[165] and again in *ICM*.[166]

82. The analysis in the cases on when there is an *acquisition* of property corresponds to the analysis of Deane and Gaudron JJ in *Mabo (No 2)*; namely, the extinguishment of one right to land confers a countervailing proprietary benefit by expanding the property rights of the Crown (or by creating rights in others).[167] It is incontrovertible, and deeply rooted in the common law, that when native title is extinguished, the underlying interest

---

160 *Wurridjal* (2009) 237 CLR 309 at [88] (French CJ).

161 See e.g. *Australian Tape Manufacturers* (1993) 176 CLR 480 at 499-500 (Mason CJ, Brennan, Deane and Gaudron JJ).

162 *Georgiadis* (1994) 179 CLR 297 at 305-6 (Mason CJ, Deane and Gaudron JJ).

163 See e.g. *JT International* (2012) 250 CLR 1 at [42] (French CJ), [169]-[170] (Hayne and Bell JJ), [303]-[305] (Crennan J), [365] (Kiefel J); also [131]-[132] (Gummow J).

164 (1997) 190 CLR 513 at 634-5 (Gummow J, Toohey and Gaudron JJ agreeing at 560-1); also Brennan CJ at 530-1.

165 (1998) 194 CLR 1 at [20], [24] (Brennan CJ), [84] (Gaudron J).

166 (2009) 240 CLR 140 at [85] (French CJ, Gummow and Crennan JJ), [152] (Hayne, Kiefel and Bell JJ).

167 Isdale, *Compensation for Native Title* (2022) at 155.

(radical title) of the Crown is enlarged on being freed of that burden.[168] The *Timber Creek Case* recognised the diminution in the value of native title rights to land consequent on the benefit to the Northern Territory in the clearing of those rights from the burden on the Territory's radical title to the land. That countervailing benefit to the Territory informed the amount the Territory, as the hypothetical purchaser on adaptation of the *Spencer* test, would have been prepared to pay for the extinguishment of the native title rights and the clearing of its title:[169] see also [83]–[86] below). That answers the description of a s 51(xxxi) *acquisition of property*.

Native title is both more than, and different from, common law property

10 83. Contra CS [76], reference to the *Timber Creek Case*, and to what was said in the *Native Title Act Case* and *Mabo (No 1)*, hardly bespeaks error when assessing the effects of a pre NTA/RDA Commonwealth law on native title. *First*, the references at FC [465]–[466] **CAB157–8** to the *Native Title Act Case* and *Mabo (No 1)* went to the nature of native title as a human right to own and inherit property protected by the RDA. That is relevant to the s 51(xxxi) question of what is property on which the Commonwealth was "coy": FC [444] **CAB 151**. The earlier reference at FC [445] **CAB 151** quoted the *Native Title Act Case* that "land subject to native title is not the unburdened property of the State to use or dispose of as though it were the beneficial owner", which is relevant to the s 51(xxxi) question of when property is acquired.

20 84. *Second*, the references at FC [462], [467] **CAB157–8** to the *Timber Creek Case* were appropriate as they bear upon what inheres in native title and its extinguishment. That is relevant to both the s 51(xxxi) questions of what is property and when is property acquired. The plurality in the *Timber Creek Case* observed that the consequences of acts impacting native title rights engage "concepts and ideas which are both ancient and new; developed but also developing; retrospective but also prospective".[170] In part,

---

168 See *Yarmirr* (2001) 208 CLR 1 at [44]-[45] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) discussing ***St Catherine's Milling*** *and Lumber Co v The Queen* (1888) 14 App Cas 46; *Attorney-General (Quebec) v Attorney-General (Canada)* [1921] 1 AC 401; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399. See also *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 397 (Barwick CJ).

169 (2019) 269 CLR 1 at [32], [85], [104] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [244] (Gageler J), [281]-[283] (Edelman J). On diminution of value as a test of a constitutional taking in the United States, see Wenar, "The Concept of Property and the Takings Clause" (1997) 97 *Columbia Law Review* 1923 at 1929-30 referring to *Pennsylvania Coal Co v Mahon* 260 US 393 at 412-6 (1922) (Holmes J).

170 (2019) 269 CLR 1 at [27] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

this is because, as Gordon J said in ***Love*** *v Commonwealth*:[171] "Native title is both more than, and different from, what common lawyers identify as property rights." There is a "two-way connectedness" where "the land 'owns' the people and the people are responsible for the land" rather than the one-way connection common lawyers identify as rights over an article of property.[172] This is part of the "deeper truth" recognised by *Mabo (No 2)*, that the Indigenous Australians are the first people of this country.[173]

85. The common law recognises, and is taken to have always recognised, that there are ongoing Aboriginal communities (or societies) united in the acknowledgment and observance of laws and customs that have their origins in the normative systems that existed upon the Crown acquiring sovereignty.[174] There is, as Edelman J noted in *Love*, a growing appreciation that: "The Aboriginal inhabitants of Australia had community, societies and ties to land now recognised as a 'connection to country.'"[175] Indeed, that is traced to *Milirpum* where Blackburn J said of the connection of Yolgnu to country:[176]

> As I understand it, the fundamental truth about the [A]boriginals' relationship to the land is that whatever else it is, it is a religious relationship

86. The *Timber Creek Case* holds that the considerations relevant to assessing whether just terms compensation is afforded to native title holders for acts that extinguish or impair their title to land (NTA s 51(1)) are those applicable for the acquisition of common law estates in land. As Kiefel CJ, Bell, Keane, Nettle and Gordon JJ said:[177]

> Native title rights and interests are not the same as common law proprietary rights and interests but the common law's conception of property as comprised of a "bundle of rights" is translatable to native title, and, as has been held, draws attention to the fact that, under traditional law and custom, some but not all native title rights and interests are capable of full or accurate expression as rights to control what others may do on or with the land. [emphasis added]

87. Two further points in the *Timber Creek Case* bear upon the relationship of native title, as rights and interests to land, with s 51(xxxi). *First*, native title has a recognisable

---

171 (2020) 270 CLR 152 at [339].
172 (2020) 270 CLR 152 at [341].
173 (2020) 270 CLR 152 at [289] and cases collected at fn (481).
174 *Love* (2020) 270 CLR 152 at [58]-[62], [69] (Bell J), [249]-[254] (Nettle J), [316]-[322] (Gordon J), [429] (Edelman J).
175 (2020) 270 CLR 152 at [392] citing *Timber Creek Case* (2019) 269 CLR 1 at [176] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Meneling Station* (1982) 158 CLR 327 at 357-8 (Brennan J); *Mabo (No 2)* (1992) 175 CLR 1 at 70; *Ward* (2002) 213 CLR 1 at [14], [580].
176 (1971) 17 FLR 141 at 167; see also FC [450] **CAB153**; SOC [19]-[29], [517]-[530] **AFM12-4, 106-16**.
177 (2019) 269 CLR 1 at [68] (citations omitted).

economic worth that lies in what might be fairly demanded for its lawful extinction in favour of the Crown. The benefit to the relevant body politic in the clearing of the native title from its radical title to the land informs that economic worth. The quantum of loss may vary according to an axis of exclusivity/non-exclusivity of rights, but that does not deny a pre-RDA/NTA value.[178] *Second*, and in any event, compensation for the non-economic effects of extinguishment of native title (cultural loss) is for "the value of land to native title holders which is inherent in the thing that has been lost", a "loss [that is] is permanent and intergenerational".[179]

2.5 NT, WA and Qld

10 88. The Northern Territory now disavows its position below on s 51(xxxi) and native title: NTS [3]. Western Australia intervenes to adopt the Commonwealth's submissions, without more, but in *Timber Creek* intervened in the Full Federal Court to argue that the extinguishment of native title and validation of extinguishing acts by the NTA does amount to an acquisition of property within s 51 (xxxi).[180] Queensland supports the Commonwealth, adding that the "conditions of the common law's recognition of native title … include the power of the Crown … to withdraw recognition when the Crown exercises its radical title": QS [13]. The argument has already been addressed, but one may add that the metaphor used reveals error — in the common law of Australia, there is no requirement of an act of recognition by the Crown.[181]

20 *2.6 Conclusion on s 51(xxxi) and native title*

89. To recap the case law in sections 2.3–2.4 (and see FC [444]–[459] **CAB151–6**), *native title* comprises rights and interests in land held under the laws and customs of Indigenous Australian communities that existed at the time of first settlement and survived that change in sovereignty. Recognition of a radical title of the Crown on settlement is consistent with native title because sovereignty and ownership are not to be equated. That authority of the body politic over land has long been wholly statutory.

---

178 (2019) 269 CLR 1 at [32], [69], [85], [104] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [244] (Gageler J), [280]-[283] (Edelman J); see generally, Jagot, "Compensation for Economic Loss" (2022) 96 *Australian Law Journal* 832.

179 (2019) 269 CLR 1 at [154], [230] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

180 *Northern Territory v Griffiths* (2017) 256 FCR 478 at [457].

181 *Mabo (No 2)* (1992) 175 CLR 1 at 57 (Brennan J), 81-2 (Deane and Gaudron JJ), 183-4 (Toohey J). Toohey J declined to follow *Tee-Hit-Ton Indians v United States* 348 US 272 (1955) in that context.

Native title is an Indigenous communal title to land that depends for its existence on the observance of the relevant laws and customs. It is inalienable outside of the relevant community, except by surrender to or acquisition by the Crown in which case radical title is enlarged. The rights comprising native title are recognised by the common law, that is, they may be enforced by legal remedy as rights to land. At the heart of native title is a connection where people, ancestors, land, and everything on and in land, are one indissoluble whole. Words like "land", "earth" and "homeland" are "too spare and meagre" to capture the richness of that connection. And our traditions have been slow to appreciate "this other world of meaning and significance".[182]

10 90. Despite all that, the Commonwealth contends that from the moment of first settlement, and from and beyond federation, native title can be extinguished without compensation: CS [91], [96].[183] But a law of the Commonwealth body politic that grants or asserts interests in land in diminution of existing native title rights to the land plainly meets the two basic conditions of s 51(xxxi): (1) the law authorises an acquisition of property — the taking of property from a person for the conferral of a corresponding interest in property on the Commonwealth or on another person, and; (2) that acquisition fits within the conception of just terms — it is congruent with the provision of compensation to the former owner (as *Timber Creek* illustrates). The Commonwealth has not shown that such a law does not otherwise meet the description of a law with
20 respect to the acquisition of property within s 51(xxxi).[184]

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

91. Ground 3 contends that the reservation of minerals from the grant of a pastoral lease created rights of ownership to the minerals reserved in the Crown, "such that the Crown henceforth had a right of exclusive possession of the minerals and could bring an action for intrusion", citing the *NSWALC Case* (2016) 260 CLR 232 at [112]: **CAB182**. The separate question to which ground 3 relates is whether the enactment of s 107 of the *Mining Ordinance* deeming minerals to be the property of the Crown had no relevant

---

182 Stanner, *White Man Got No Dreaming* (1979) at 230 quoted in *Meneling Station* (1982) 158 CLR 327 at 356-7 (Brennan J) and FC [450] **CAB153**.

183 Cf *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 876 at 880 (Lord Denning): the "one guiding principle" that the "British Crown intends that the rights of property of the inhabitants are to be fully respected" and while it "can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded".

184 *Cunningham* (2016) 259 CLR 536 at [59]-[60] (Gageler J dissenting in part on the result).

effect on the premise that any native title right in relation to minerals was extinguished by the reservation of minerals in four pastoral leases granted over the claim area between 1886 to 1903: Question 2(a) **CAB18**.

92. The NLC Parties submitted below that in view of the obiter in *Ward*[185] the relevant extinguishing act, *if there be one*, is the enactment of s 107 of the 1939 Ordinance, and not the reservation of minerals from grant, but that s 107 is not inconsistent with the claimed non-exclusive native title right. Unlike in *Ward*, there is no claimed native title right to control the use and enjoyment of resources by others. As extinguishment is a legal conclusion,[186] it was submitted that the anterior point of inconsistency could be decided, despite the assumption of extinguishment in the SOC.[187] The Full Court declined to decide the point on the basis that the separate questions do not raise it, but did not foreclose the argument being raised at a later stage of the proceeding: FC [486] **CAB163**. The NLC Parties formally reserve their position.

3.1 Pastoral Lease 2229

93. The Commonwealth's argument, supported by the Territory, is confined to the fourth pastoral lease (PL 2229) granted on 21 September 1903 under the *Northern Territory Land Act 1899* (SA) (the **1899 Land Act**) incorporated with the *Northern Territory Crown Lands Act 1890* (SA) (the **1890 Lands Act**). This lease was identified by the Commonwealth as the one "most favourable" to its case: FC [78]–[79] **CAB58**.

94. PL 2229 provided for the grant of a pastoral lease to the Eastern and African Cold Storage Company of a portion of Crown lands situated on the Gove Peninsula, estimated to be 19,250 square miles, for pastoral purposes (**AFM155**):

> EXCEPTING out of this lease to Aboriginal Inhabitants of the State and their descendants during the continuance of this lease full and free right of ingress egress and regress … and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use food birds and animals *ferœ naturœ* in such manner as they would have been entitled to do if this lease had not been made.
>
> …

---

185 (2002) 213 CLR 1 at [383]-[384] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); also [572] (Kirby J), [640] (Callinan J, McHugh J agreeing at [472]).

186 *Brown* (2014) 253 CLR 107 at [51] (the Court); *Murray v Western Australia* [2016] FCA 752 at [1354] (McKerracher J).

187 SOC [195] **AFM38** asserting partial extinguishment of the non-exclusive resource right pleaded at [52(b)(iv)] **AFM17** by the enactment of s 107 of the 1939 Ordinance: cf *Taylor v Attorney-General (Cth)* (2019) 268 CLR 224 at [9]-[10], [45] (Kiefel CJ, Bell, Gageler and Keane JJ) re anterior question.

> AND ALSO excepting and reserving out of this lease under His Majesty His Heirs and Successors all trees and wood standing and being on the said lands and all minerals metals (including Royal metals) ores and substances containing metals gems precious stones coal and mineral oils guano claystone and sand with full and free liberty of access ingress egress and regress to and for the said Minister and his agents lessees and workmen and all other persons authorised by him or other lawful authority with horses carts engines and carriages or without in over through and upon the said land to fell cut down strip and remove all or any trees wood or underwood or bark and to work or convert such trees wood or underwood into charcoal and to dig try search for and work the said minerals metals (including Royal metals) ores and substances containing metals gems precious stones coal and mineral oils guano claystone and sand and to take the same from the said lands and to erect buildings and machinery and generally do such other work as may be required. [emphasis added]

95. The terms of PL 2229 must be read against the legislative framework.

3.2 South Australian Crown lands and mining legislation

96. Various South Australian laws made provision for mining in the Northern Territory.[188] Section 8 of the 1890 Lands Act provided that "[t]he grant in fee-simple of any land hereafter granted …, and any lease made under Part II hereof, shall not be construed to include or to convey any property" in minerals, the "same being reserved by the Crown", and that it "shall be lawful for the Minister, and for all persons authorised by him", to enter the land to search and remove minerals "reserved".[189] Part II dealt with conditional purchase leases and perpetual leases, with s 31 providing that every lease granted under Part II "shall contain a reservation to the Crown" of minerals and timber, excepting use of timber by the lessee in clearing the land for cultivation and in improvements. The grant of a pastoral lease, not being within Part II, did not engage s 8 or s 31, but regulations under the 1890 Lands Act required pastoral leases to except rights to enter and search for gold and other minerals,[190] as had earlier regulations.[191]

---

188 E.g. *Northern Territory Land Act 1872* (SA) Pt V; *Northern Territory Gold Mining Act 1873* (SA); *Northern Territory Crown Lands Consolidation Act 1882* (SA) Pt V; *Northern Territory Mineral Act 1888* (SA). Before the incorporation of the Territory in 1863, the New South Wales legislature had passed some laws for mining: see ***Wade*** *v New South Wales Rutile Mining Co* (1969) 121 CLR 177 at 186-8 (Windeyer J); *Cadia Holdings* (2010) 242 CLR 195 at [35]-[38] (French CJ).

189 Section 9 of the *Crown Lands Act 1888* (SA) made similar provision, but that Act did not apply to the Northern Territory (s 199), reversing the (unusual) policy in the *Grants in Fee Simple Act 1877* (SA) that a grant in fee simple conveyed "absolute property" in minerals including gold and silver. The 1877 Act sought to remove doubts about earlier grants in response to *Woolley v Attorney-General (Vic)* [1877] 2 AC 163 (PC) holding that a fee simple grant did not convey title to royal metals unless expressly stated: O'Hare, "A History of Mining Law in Australia" (1971) *Australian Law Journal* 281 at 285; Veatch, *Mining Laws of Australia and New Zealand* (1911) at 55, 67.

190 *Northern Territory Crown Lands Regulations 1891* (SA) reg 39.

191 *Northern Territory Pastoral Regulations 1883* (SA) reg 8; *Northern Territory Crown Lands Regulations 1885* (SA) Part II reg 12 under the *Northern Territory Crown Lands Consolidation Act 1882* (SA).

97. The 1899 Land Act, incorporated with the 1890 Lands Act, made new provision for pastoral leases (replacing Part V of the 1890 Act). Section 24 of the 1899 Act provided that every pastoral lease "shall contain the covenants, exceptions, reservations, and provisions" in Schedule A, subject to any modifications or additions required by the Minister. Schedule A items (a) to (k) listed "[c]ovenants by the lessee", including "[n]ot to cut timber, except for erections, fencing or firewood, without the licence of the Minister": item (g). Schedule A then provided for additional matters, including an "exception or reservation" in favour of the Crown and of authorised persons of "all minerals, metals, gems, precious stones, coal and mineral oils" (item (l)), as well as "such exceptions and reservations" in favour of the Crown and other authorities, and "the aborigines of the colony", and other persons, for giving effect to any Act or regulation, as the Minister may require (item (q)).

3.3 A clear and plain intention to extinguish the native title right is not established

No error in principle

98. No party takes issue with the account of the applicable principles at FC [99]–[103] **CAB62–5** on when native title rights may be extinguished. That includes references to the case law (considered in section 2.3 above) that whether there is a clear and plain intention to extinguish native title is a matter of statutory construction (informed by the normative force of that standard) that must be clearly established on there being a logical antinomy between the two sets of rights.[192] The high threshold arises from the seriousness of the consequences of extinguishment.[193] The enactment of a law that provides for dealings in Crown land is not in itself inconsistent with native title. Inconsistency arises, if at all, upon the exercise of such a legislative power.[194]

99. It is not contended that the provision in the 1899 Land Act that pastoral leases reserve to the Crown rights to minerals (Schedule A item (l)) had any effect on the asserted non-exclusive native title right to take the natural resources of the land. Rather, the case is that the grant of PL 2229 containing that exception or reservation extinguished that

---

192 *Brown* (2014) 253 CLR 507 at [38] (the Court); *Congoo* (2015) 256 CLR 239 at [34] (French CJ and Keane J), [159] (Gageler J) cited FC [102] **CAB65**.

193 *Congoo* (2015) 256 CLR 239 at [32] (French CJ and Keane J) referring to *Mabo (No 2)* (1992) 175 CLR 1 at 64 (Brennan J).

194 *Mabo (No 2)* (1992) 175 CLR 1 at 68 (Brennan J); *Native Title Act Case* (1995) 183 CLR 373 at 433-4; *Ward* (2002) 213 CLR 1 at [306].

right (in part). Yet PL 2229 also reserved to the Crown powers to resume the land when "necessary or expedient" **AFM156** (1899 Land Act Schedule A item (q)) and it could not be suggested that an exercise of that reserved power, let alone its existence, would give the Crown any larger title to the land.[195]

100. Contra NTS [115], there is no logical antimony between the *existence* of a power over resources, as expressed by the 1890 Lands Act (ss 8, 31) and 1899 Land Act (Schedule A), and the *existence* of a non-exclusive native title right to those resources. Questions of possible inconsistency could only arise upon the exercise of the power over the resources (licences to take timber and mineral), not upon the grant of an interest excepting those resources from grant (a pastoral lease). Even then, that would only result in competition between the *exercise* of the two sets of rights.[196]

101. That is sufficient reason to reject ground 3. The Full Court was correct to conclude that the grant of PL 2229 did not extinguish the claimed non-exclusive native title right to resources for several other reasons (again, any one of which suffices to reject ground 3).

The purpose of Crown reservations from grant

102. *First*, the Full Court's conclusion that the 1890 Lands Act and the 1899 Land Act simply did not purport to convey title to minerals to the Crown or any person (FC [111]–[115] **CAB68–70**) is supported by the purpose of Crown reservations. The practice of the Crown reserving from grant rights to resources commenced on the settlement of New South Wales accompanied by conditions requiring grantees to improve and cultivate land. As the colony developed and the need for materials grew, reservations of timber were extended to minerals. That enabled the control of timber and mineral resources for public purposes, and to obtain revenue for their exploitation on licence, and reserving powers of resumption controlled the future use of land that might be required for public purposes.[197] Later statutory provision, influenced by the

---

195 See *Ward* (2002) 213 CLR 1 at [208].

196 *Brown* (2014) 253 CLR 507 at [64] (the Court).

197 Edgeworth, *Butt's Land Law* (7th Ed, 2017) at [2.140]; Christensen et al, "Early Land Grants and Reservations" (2008) 15 *JCU Law Review* 42 at 50. A detailed treatment of mineral reservations is given in O'Hare, "A History of Mining Law in Australia" (1971) *Australian Law Journal* 281 at 284-6. For an example of reservations in early grants, see *McGrath v Williams* [1912] SR (NSW) 477 at 481-2 (Simpson CJ) where the mineral reservation was treated as an immediate exception and resumption as a future defeasance. NTS [107] confuses a resumption or dedication of land with a reservation of minerals.

policy that the exploitation of Crown land fund colonial development, repeated that early practice, reserving land from sale as well as reserving powers of resumption.[198]

103. The exception of timber and minerals from PL 2229 in accordance with the 1899 Land Act must be read with an appreciation of that history and the relationship of the exception (reservation) with the provisions creating powers to confer rights to take those substances and to prohibit their taking without licence — see:

(1) 1890 Lands Act ss 81 (licences for timber etc), 90 (powers to mine under reserved lands), 97 (penalty for unauthorised occupation of Crown land), 106 (penalty for unauthorised taking of timber, metals, ores etc from Crown land);

(2) *Northern Territory Mineral Act 1888* (SA) ss 4 (licence to search for minerals), 9 (leases to mine) (that scheme being continued from 1 January 1904 by the *Northern Territory Mining Act 1903* (SA) Parts III (miners' rights), VI (gold mining leases), VII (mineral leases), s 138 (penalty for unlawful mining));

(3) 1899 Land Act s 25 (pastoral lease does not authorise mining); *Northern Territory Crown Lands Amendment Act 1896* (SA) s 2 (permit for pastoral lessee to mine).

104. Four points follow: (1) power to deal with timber and minerals was wholly statutory; (2) that did not depend on Crown ownership (whether a radical title or more); (3) the provisions left unaffected the lawful taking of those substances by native title holders[199] (cf NTS [114], [118]); and (4) there is no evident intention to extinguish native title.

The presence of reservations is consistent with native title rights

105. *Second*, the Full Court was correct to hold that the presence of reservations within a pastoral lease is a key reason why there is no inconsistency between its grant and the continued existence of non-exclusive native title rights to use the land and its resources: FC [108] **CAB67**;[200] contra CS [156]; NTS [104]

106. The arguments at CS [150], [156] and NTS [87], [94], [104] seeking to distinguish the passages in *Wik* and *Ward* (cited in FC [108]) cannot be sustained. First, as was said in

---

198 See *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71-4 (Windeyer J); *NSWALC Case* (2016) 260 CLR 232 at [101]-[106] (Gageler J); *Cooper v Stuart* (1889) 14 App Cas 286 at 293-4 (Lord Watson for the Privy Council); *Wade* (1969) 121 CLR 177 at 186-9 (Windeyer J).

199 *Ward* (2002) 213 CLR 1 at [167], [179]-[184].

200 Citing *Wik* (1996) 187 CLR 1 at 122 (Toohey J), 154 (Gaudron J), 200-1 (Gummow J), 229 (Kirby J); *Ward* (2002) 213 CLR 1 at [178], [184].

Ward in the context of the provisions on unlawful use of Crown land, the grant of a "precarious interest" subject to "extensive reservations and exceptions" is "not to be understood as rendering unlawful what was previously a lawful use of the land by native title holders".[201] That cannot be read as if the reference to the *land* is no more than its bare surface without use of the land's resources integral to the rights of native title holders to live on, and gain spiritual and material sustenance from, the land.

107. Second, the exception in favour of Aboriginal people in PL 2229 contemplates the use of substances excepted from the grant (e.g. trees, wood, claystone (ochre) and sand to make dwellings), expressing a clear intention that subsisting native title rights to live on the land and use its resources are unaffected.[202] Third, the arguments resurrect the type of contention rejected in *Wik* that the grant of a statutory interest can expand radical title to beneficial ownership, but here, somehow to minerals in the land.[203] Fourth, NTS [85]–[86] segments ground 3 into two questions; whether the Crown asserted rights over minerals and, if so, whether that amounted to a right of exclusive possession, and contends that the Full Court did not address the second. The burden of the submission is unclear. The case put to the Full Court was that the reservation was an assertion by the Crown of beneficial ownership in minerals with a right of exclusive possession. The Full Court rejected that case: FC [105], [112]–[117] **CAB65**, **69–70**.

108. Fifth, no submission is made that the exception from grant, expressed as an exception for timber, minerals and other substances, extinguished native title rights in relation to timber and those other substances. Why only minerals and not the others? NTS [117] suggests different legal effects can be produced by the "different nature" of minerals and timber (which is not articulated) or by the 1899 Land Act (Schedule A) referring to a "covenant" for timber (item (g)) and an "exception or reservation" for minerals (item (l)). But the case asserts extinguishment by the grant of PL 2229 containing an exception and reservation of timber, minerals and other substances without difference.

109. Sixth, no party contends that the asserted native title right to take resources in general has been extinguished (NTS fn (121)), being a non-exclusive right to access, take and

---

201 *Ward* (2002) 213 CLR 1 at [184] [emphasis added].
202 *Ward* (2002) 213 CLR 1 at [186], [417].
203 (1996) 187 CLR 1 at 127-9 (Toohey J), 155-6 (Gaudron J), 188-90 (Gummow J), 244-5 (Kirby J); contra 88-9 (Brennan CJ, Dawson and McHugh JJ agreeing).

use for any purpose the resources of the claim area, including resources below, on or above the surface such as minerals. It is broadly expressed and inapt for sectioning into incidents.[204] The grant of a pastoral lease that excepts from grant specified resources does not imply the non-existence of the generally expressed non-exclusive right to take the resources of the area, including minerals.

110. Seventh, the argument at NTS [117] that timber can be treated differently because of the exception for Aboriginal use was rejected by in *Ward*. A reservation in favour of Aboriginal people does not define or confine the rights that native title holders can exercise over land and things found on, over and in the land.[205]

111. It would be a most curious result that the grant of a "precarious" interest to depasture stock[206] over a vast area (19,250 square miles) that is subject to "various derogations" adverse to the grantee demonstrated a clear and plain intention to extinguish the rights of the Indigenous inhabitants of the land:[207] cf CS [156].

The settled understanding of a reservation of minerals ought not be disturbed

112. *Third*, presumably the government parties accept that on settlement, the rights of the Crown to minerals in Crown land has to be understood in light of the concept of a radical title as containing authority to deal with those substances, not proprietary ownership.[208] The argument that reserving minerals in a Crown grant converted its radical title to those substances cannot be sustained given the settled understanding that a "reservation" of minerals operates as an exception. A reservation is a re-grant out of the land conveyed of something not previously existing, such as a rent or an easement. An exception is the retention of something already existing in the land, such as minerals and rights to work them.[209] That understanding is not usurped by *Mabo (No 2)*: FC [107] **CAB67** cf CS [149]; NTS [93]–[95]. It is restated in the native title case law.

---

204 *Akiba* (2013) 250 CLR 209 at [20]-[24] (French CJ and Crennan J), [59]-[60], [65]-[66] (Hayne, Kiefel and Bell JJ).

205 (2002) 213 CLR 1 at [185], [417] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

206 (2002) 213 CLR 1 at [170]-[172] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

207 *North Ganalanja Aboriginal Corporation v Queensland* (1995) 61 FCR 1 at 23 (Lee J).

208 *Cadia Holdings* (2010) 242 CLR 195 at [28]-[29] (French CJ); cf NTS [105] suggesting beneficial ownership was needed for the Crown to deal with minerals.

209 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 522 (Hope JA) approved in *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 at [40] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

113. In *Wik*, Brennan CJ, when referring to a situation where a leasehold estate is the only proprietary interest granted by the Crown in a parcel of land, stated:[210]

> In this context, where ownership of minerals is reserved from a grant, the reservation is truly an exception, that is, the minerals do not form part of the parcel of land that is the subject of the grant of the leasehold estate.

Similarly, while not accepting that a pastoral lease comprises a leasehold estate, Gummow J noted, in reference to the provisions of the *Land Act 1910* (Qld) prescribing in Form 3 the "reservations and conditions" of a pastoral lease, being to the same effect as Schedule A of the 1899 Land Act relied upon in this case, that:[211]

> The term "reservation" in strict usage identifies something newly created out of the land or tenement demised and is inappropriate to identify an exception or keeping back from that which is the subject of the grant.[212] However, in accordance with the Australian usage referred to by Windeyer J in *Wade v New South Wales Rutile Mining Co Pty Ltd*,[213] "reservation" was apt in Form 3 to identify that which was withheld or kept back by the grants made … under the 1910 Act.

114. Contra NTS [94], the reservations in *Wik* were <u>not</u> different to those in this case: see *Land Regulations 1912* (Qld) reg 4 Form 3 cited 187 CLR 200 fn (746).

115. Further, contra NTS [94] and CS [156] fn (149), the passages in *Wik* that a reservation of minerals is an exception (keeping back) from grant cannot be read as implying that a reservation created beneficial ownership of minerals because of the answer on the other questions about minerals by Drummond J not on appeal.[214] The passages were part of the analysis that the terms of the *Land Act 1910* (Qld) identified the characteristics and incidents of the interest granted.[215]

116. What Gummow J said in *Wik* has been applied in other settings.[216] That well-settled understanding that a reservation of minerals operates as an exception from grant has been applied in many contexts, and ought not be disturbed.[217]

---

210 (1996) 187 CLR 1 at 91 fn (362); see also 75 fn (294).
211 (1996) 187 CLR 1 at 200-1.
212 *Norton on Deeds* (2nd ed) 268-72.
213 (1969) 121 CLR 177 at 194.
214 *Wik Peoples v Queensland* (1996) 63 FCR 450 at 491 Question 3.
215 (1996) 187 CLR 1 at 91 (Brennan CJ), 201 (Gummow J).
216 E.g. *Minister for Mineral Resources v Brantag Pty Ltd* (1997) 8 BPR 15,815 at 15,823 (Mason P); *Payne v Dwyer* (2013) 46 WAR 128 at [77] (Pritchard J).
217 See the cases collected in *Payne v Dwyer* (2013) 46 WAR 128 at [77]-[78] (Pritchard J); see also Edgeworth, *Butt's Land Law* (7th Ed, 2017) at [2.140]; Bridge et al, *Megarry & Wade The Law of Real*

117. Nothing in the terms of PL 2229 or the 1890 and 1899 Acts suggests otherwise. PL 2229 speaks of "excepting and reserving out of this lease" specified substances "with liberty" for others to access the land and take the substances under authority. It does not alter the nature of the rights of the Crown over those substances (which are, in any event, statutory powers: see Part V2.2 and [96]–[97], [103] above). The reservation complemented the lessee's covenant not to obstruct others holding licences to take timber and minerals (**AFM156**) as well as provisions that a pastoral lessee required a permit to mine: 1899 Land Act s 25; *Northern Territory Crown Lands Amendment Act 1896* (SA) s 2. The inclusion of the Minister and agents, as well as those under lawful authority, within the reserved liberty to access the land overcomes any inability of the Crown's agents to enter, without lawful authority, land in which minerals are located:[218] cf CS [152]–[154]; NTS [96], [99]–[100].

Circular misconceptions about Crown "beneficial ownership"

118. *Fourth*, attempts to characterise the grant of a pastoral lease (indeed any interest under statute) as creating in the Crown "beneficial ownership" (CS [144]; NTS [111]) are a distraction, as are contestable propositions about Crown "ownership" of royal metals by prerogative:[219] NTS [88]–[89], [93], [118]. The relevant inquiry is whether there is a clear and plain intention to extinguish native title. One can only speak of the Crown having beneficial ownership of land (and its resources) after concluding that native title has been extinguished. As Brennan J put it in *Mabo (No 2)* in his summary of the common law: "If native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner".[220]

Misconceptions about intrusion and ejectment

119. *Fifth*, ground 3 depends upon the thesis that the reservation of minerals was an assertion of the Crown's property in minerals on which an action in intrusion could be based, on the supposition that at the time of the grant of PL 2229 (1903) an action in ejectment was unavailable: CS [137], [141], [151]. But in *Commonwealth v Anderson*, a majority

---

Property (9th Ed, 2019) at [27-009]; Forbes and Lang, *Australian Mining and Petroleum Laws* (2nd Ed, 1987) at [207] referring to reservations as "an early form of strata title".

218 Cf *Cadia Holdings* (2010) 242 CLR 195 at [50]-[51] (French CJ), [84] (Gummow, Hayne, Heydon and Crennan JJ); *Ward* (2002) 213 CLR 1 at [185].

219 Cf *Cadia Holdings* (2010) 242 CLR 195 at [28]-[29], [51] (French CJ).

220 (1992) 175 CLR 1 at 70 point 9 [emphasis added].

decided that at least since the *Common Law Procedure Act 1852* (UK) the Crown could bring an action in ejectment and was not restricted to an information of intrusion.[221] The equivalent provisions operated in South Australia as from 1 January 1854 in the form of ss 123–173 of the *Supreme Court Procedures Act 1853* (SA).[222]

120. Also, Crown lands legislation stipulated offences for the unlawful occupation or use of Crown land. As Gummow J noted in *Wik*, they were enacted when there was doubt whether the Crown was obliged to proceed by way of information, later dispelled by *Anderson*.[223] At the time of the grant of PL 2229 (21 September 1903), Part VIII of the 1890 Lands Act, titled "Trespass, Penalties, and Legal Procedure", included provision in s 106 that it was an offence for any person to "remove and take away … any metal, or ore containing metal" from Crown land without "a valid licence or other lawful authority", with power to apprehend and remove persons found committing an offence. An offender was liable to "forfeit and pay … the value of the … metal, or other material" plus a penalty of 20 pounds or two months imprisonment. As from 1 January 1904, the *Northern Territory Mining Act 1903* (SA) made it an offence to "mine or prospect" if not authorised by that Act "or some enactment heretofore in force" (s 138).

121. The thesis that the function of a reservation from grant as provided by the 1899 Land Act (s 24 and Schedule A) and the 1890 Lands Act (ss 8 and 31) was to support an action in intrusion is without substance: contra CS [140]–[142].

NSWALC Case

122. *Sixth*, an appreciation of that statutory and historical context also reveals error in the argument that the grant of PL 2229, as a pastoral lease granted under statute, created in the Crown new (beneficial) rights of ownership to the substances reserved from grant: CS [132], [143]–[144] and NTS [110] citing the dicta in the *NSWALC Case* at [112] (Gageler J). There, at issue was whether there remained, after the *Australian Colonies Waste Lands Act 1842* (Imp), a power in the Crown to lawfully occupy land in New

---

221 (1960) 105 CLR 303 at 311-3 (Dixon CJ, McTiernan and Fullagar JJ agreeing), 323-4 (Windeyer J); also 318 (Menzies J) that whatever be the prior view, it had no application to the Australian federation, 315 (Kitto J not deciding).

222 Sections 123 and 161 corresponded with ss 119 and 161 of the *Common Law Procedure Act 1852* (UK) mentioned in *Anderson* (1960) 105 CLR 303 at 324 (Windeyer J).

223 (1996) 187 CLR 1 at 191.

South Wales without statutory authority. Noting that *Attorney-General v Brown*[224] was overruled in *Mabo (No 2)* to the extent it held the Crown to be the absolute beneficial owner of all land from the time of settlement, Gageler J stated that the significance of *Mabo (No 2)* to the issue was "minimal".[225] Other members of the Court found it unnecessary to deal with any implication in the change in understanding of the nature of the interest acquired by the Crown on settlement in deciding that issue, for on registration of a Torrens title, the State enjoyed the right to occupy the claimed land.[226]

123. In *Brown*, the land at Newcastle was granted by the Crown in 1840[227] to one Dumaresq under whom Brown claimed as lessee. The grant contained a reservation of minerals with liberty to search and mine the same, and a proviso that the grant would be void if its conditions and reservations were not observed. The Attorney-General brought an action on an information of intrusion to restrain the defendant from mining coal. The defendant disputed the title of the Crown on four grounds. The third was that the "Queen was … not in possession", title needing to be proved as a matter of record.[228] Gageler J considered that whether the grant is viewed in terms of the Crown exercising a proprietary right as "the original absolute owner of all land" (*Brown*) or as an "exercise … of non-statutory executive power which had the consequence of creating rights of ownership in respect of the land" (*Mabo (No 2)*), "[e]ither way, the Crown … would still have had the possession necessary to found an action for intrusion".[229] His Honour did not refer to consequential rights of "beneficial ownership": cf CS [144]. That was the language earlier used when explaining that on the post *Mabo (No 2)* view the Crown did not acquire an interest of that kind on and from settlement.[230]

---

224 (1847) 1 Legge 312.

225 (2016) 260 CLR 232 at [111]-[112].

226 (2016) 260 CLR 232 at [49]-[54], [59]-[61] (French CJ, Kiefel, Bell and Keane JJ; Nettle and Gordon JJ not deciding the issue).

227 (2016) 260 CLR 232 at [110] suggests the 1840 grant was of a lease, but being before 1847 it is more likely to have been a freehold grant with quit-rent: *Wilson v Anderson* (2002) 213 CLR 401 at [97] (Gaudron, Gummow and Hayne JJ) quoting Fry, *Freehold and Leasehold Tenancies of Queensland Land* (1946) at 20; see also Fry, "Land Tenures in Australian Law" (1947) 3 *Res Judicatae* 158 at 159-60; *Wik* (1996) 187 CLR 1 at 111 (Toohey J), 140 (Gaudron J), 171-4 (Gummow J). Thus, it was argued in *Brown* that the reservations meant the grant was other than that of a free and common socage being the only "free" tenure known and received in Australia: see the account of the case in the *Sydney Morning Herald* 22 July 1846 and Buck, *The Making of Australian Property Law* (2006) at 1-11.

228 (1847) 1 Legge 312 at 313-4, 316 (Stephen CJ).

229 (2016) 260 CLR 232 at [112].

230 (2016) 260 CLR 232 at [111] quoting *Wik* (1996) 187 CLR 1 at 186 (Gummow J).

124. *Brown* (1847) involved a grant made under the prerogative (1840) before statutory restriction on alienation of Crown land[231] and provisions dealing with the unlawful occupation and use of Crown land like that in Part VIII of the 1890 Lands Act. *Brown* also pre-dated the *Common Law Procedure Act 1852* (UK) adopted in New South Wales on 1 January 1854 by which the Crown could bring an action in ejectment.[232] All that might now be derived from *Brown* is that "at the time of making a grant of land to a subject, the Crown is presumed to have had a title to the land".[233] On a revisionist post *Mabo (No 2)* view, that is understood in light of the concept of a radical title as containing authority to deal with the land, not proprietary ownership.[234] That would suffice to found an information for intrusion as against a subject in possession of Crown land without lawful authority,[235] if relevant pre statutory provision, which is not relevant here. *Brown* cannot be re-read as authority for the proposition that an exception of minerals from grant created in the Crown beneficial ownership of minerals, more so given *Brown* held that "there was no reservation, but simply a thing excluded".[236]

125. In the *NSWALC Case*, Gageler J went on to note that in the *Government House Case*,[237] if the view in *Mabo (No 2)* had been applied, "also like" in *Brown*, the result would not have been different. Power to set apart land for use, when there was no relevant State law restricting that power, "would not have been couched in terms of a proprietary right", but instead "would have been couched, as it is sufficiently couched now, simply as within non-statutory executive power."[238] The Full Court correctly noted that the dicta in the *NSWALC Case* concerned non-statutory executive power and was not concerned with the extinguishment of native title by statutory power: FC [117] **CAB70**.

Obiter in Ward

126. *Seventh*, in *Ward*, the trial judge had determined that the native title holders had rights to "use and enjoy resources" of the area, to "control the use and enjoyment of others of

---

231 *Wik* (1996) 187 CLR 1 at 172 (Gummow J).
232 *Commonwealth v Anderson* (1960) 105 CLR 303 at 324 (Windeyer J).
233 (1847) 1 Legge 312 at 317 (Stephen CJ)
234 *Cadia Holdings* (2010) 242 CLR 195 at [28]-[29] (French CJ).
235 For a detailed discussion of *Brown* in that context, see Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (2014) at 261-5.
236 (1847) 1 Legge 312 at 324 (Stephen CJ)
237 *Williams v Attorney-General (NSW)* (1913) 16 CLR 404.
238 (2016) 260 CLR 232 at [136].

resources" of the area, to "trade in resources" of the area, and to "receive a portion of any resources taken by others" from the area.[239] The Full Court found that the only "resources" shown to be subject to those rights was ochre, which was not within the definition of minerals in the *Mining Act 1904* (WA), and the majority considered, in any event, that by the legislative declaration of property in minerals made by s 117 of that Act, native title rights to minerals were extinguished.[240]

127. The High Court reversed the Full Court on the basis that questions of extinguishment did not arise because no native title interest in minerals was established at trial.[241] The plurality observed that if it had been established then it would have been extinguished by s 117 of the *Mining Act 1904* (WA) which provided that, subject to certain qualifications, minerals "are the property of the Crown".[242] The plurality said:[243]

> Reserving them to the Crown and vesting "property" in them in the Crown had several consequences. First, it was no longer necessary (if it ever had been necessary) to consider questions of prerogative rights to some but not all minerals. Thenceforth, upon the subsequent alienation of land by the Crown, all minerals on or under the land would remain vested in the Crown. Secondly, the Crown could, and did, deal with minerals separately from the land and could thereafter, and did, grant separate rights to search for and recover them. But unlike the fauna legislation considered in *Yanner v Eaton*, the vesting of property in minerals was no mere fiction expressing the importance of the power to preserve and exploit these resources.[244] Vesting of property and[245] minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question no matter whether the substances were on or under alienated or unalienated land. [emphasis added]

The plurality refers (1) to minerals being reserved to "remain vested in the Crown" on the alienation of land, enabling the grant of "separate rights" to minerals, and (2) to the "[v]esting of property in minerals" as the "conversion of the radical title to land …. to full dominion", being the terminology of s 117 of the *Mining Act 1904* (WA) that minerals in lands, whether alienated or not, "are the property of the Crown".[246] It is the

---

239 *Ward v Western Australia* (1998) 159 ALR 483 at 645 clause (3)(e)-(h) (Lee J).
240 (2000) 99 FCR 316 at [541] (Beaumont and von Doussa JJ); contra [841]-[843] (North J).
241 (2002) 213 CLR 1 at [382] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); [461] for the NT.
242 The text is set out at (2002) 213 CLR 1 at [378].
243 (2002) 213 CLR 1 at [384]; also [572] (Kirby J), [640] (Callinan J with whom McHugh J agreed: [472]).
244 *Yanner* (1999) 201 CLR 351 at [28], [114]-[117]; *Toomer v Witsell* (1948) 334 US 385 at 402.
245 "And" should read "in". The error appears in the report.
246 (2002) 213 CLR 1 at [383]; see also [151] referring to where "the executive, pursuant to statutory authority, takes full title or plenum dominium to land", the language of Lord Watson in *St Catherine's Milling* (1888) 14 App Cas 46 at 55 quoted in *Yarmirr* (2001) 208 CLR 1 at [45] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

second step, by that provision, that altered rights to minerals. There is no equivalence between that provision and reserving minerals from grant: contra CS [155]; NTS [119].

128. Contra CS [146] (and QS [22]), no different analysis is given by Drummond J in *Wik Peoples v Queensland*[247] dealing with claimed native title rights of ownership of minerals.[248] Section 6(1)(v) of the *Mining on Private Land Act 1909* (Qld) provided that minerals on or below the surface of land which was not alienated in fee simple at the commencement of the Act are the property of the Crown. Section 21A was later inserted by the *Mining Acts Amendment Act 1925* (Qld) which provided that minerals below the surface of land, whether alienated in fee simple or not, are the property of the Crown. Drummond J considered that the "declaration of Crown ownership of minerals" by s 6(1)(v) was "repeated in" s 21A and effected the "general expropriation" of minerals.[249] Again, it is the declaring of property in minerals that effected this transformation of the Crown's powers. A reservation from future grant retains power in the Crown to create rights in minerals, if exercised, but absent the declaration of property the power or interest of the Crown is that of its radical title to land.[250]

Later legislative measures to vest in the Crown property in minerals

129. *Eighth*, that excepting minerals from grant did not alter rights to minerals is confirmed by the legislative history. South Australian Crown lands and mining laws continued on the acceptance of the Northern Territory by the Commonwealth until replaced by Ordinances dealing with mining[251] and reserving minerals from grant.[252] Section 107 of the *Mining Ordinance* (enacted in 1939) provided that:

> Subject to the provisions of this Ordinance and the regulations, gold, silver and all other minerals and metals on or below the surface of any land in the Territory, whether alienated or not alienated from the Crown, shall be and be deemed to be the property of the Crown:

---

247 Adopted in *Western Australia v Ward* (2000) 99 FCR 316 at [541] (Beaumont and von Doussa JJ).

248 See Question 3 (1996) 63 FCR 450 at 491.

249 (1996) 63 FCR 450 at 500-1.

250 (1996) 63 FCR 450 at 483-4, 496 (re *Mining on Private Land Act 1909* (Qld) ss 6(1)(v) (property) and 6(2) (reserving)), 500.

251 *Mining Ordinance 1939* (NT) repealing *Northern Territory Mining Act 1903* (SA) and *Mining on Private Property Act 1909* (SA). Some alterations to those laws that are not presently material had been made by the *Mining Ordinance 1927-1938* (NT).

252 *Crown Lands Ordinance 1912* (NT) s 16(b), 17(b); *Crown Lands Ordinance 1924* (NT) ss 25(b), 26(b), also repealing (s 3 and Schedule) the 1890 Lands Act and 1899 Land Act; *Crown Lands Ordinance 1927* (NT) ss 20(b), 21(b), 101; *Crown Lands Ordinance 1931* (NT) ss 23(b), 24(b), 102.

> Provided that this section shall not apply in the case of land granted by the Crown in fee simple, in which case the ownership of gold and minerals shall depend on the terms of any reservation (if any) of gold or other minerals. [emphasis added]

Section 107 was located within Part VII dealing with mining on *private land* alienated from the Crown (s 106), with provision that the compensation payable to the owner of private land make no allowance for any minerals known to be in the land: ss 106, 134.

130. Later, s 3 of the *Minerals (Acquisition) Ordinance 1953* (NT)[253] provided that:

> All minerals existing in their natural condition, or in a deposit of waste material obtained from any underground or surface working, on or below the surface of any land in the Territory, not being minerals, which, immediately before the commencement of this Ordinance, were the property of the Crown or of the Commonwealth, are, by force of this Ordinance, acquired by, and vested absolutely in, the Crown in right of the Commonwealth. [emphasis added]

The extrinsic material[254] reveals that the 1953 Ordinance sought to end private interests in minerals where title had passed by earlier unqualified fee simple grants (i.e. before the 1890 Lands Act requiring reservation). There were thought to be about 2000 such titles in the Darwin and gulf districts making up an area of about 675 square miles.[255]

131. The measures reflect that reserving minerals from the grant of an interest in land, as required from 1890 onwards, had not vested in the Crown "property" in minerals. There is an evident difference between (1) a legislative provision that a future grant of an interest in land contain a "reservation in favour of the Crown" with respect to minerals (1890 Lands Act ss 8, 31; 1899 Land Act Schedule A item (l)), and (2) a declaratory legislative provision that whether or not the land has been granted, minerals in the land "shall be and be deemed to be the property of the Crown" (1939 Ordinance s 107), or if not already "property of the Crown", are "acquired by, and vested absolutely in, the Crown" by force of the provision (1953 Ordinance s 3).

Part VI — Notice of contention

132. See [3] and Part V1.3 above.

---

253 Following amendment of s 10 of the *Acceptance Act* to provide that the terms upon which interests held from South Australia that continued to be held from the Commonwealth were subject to Ordinances enacted under the *Administration Act*: *Northern Territory Acceptance Act 1952* (Cth) s 2.

254 Hansard, House of Representatives 6 May 1952 at 23-4; Legislative Council 2 September 1952 at 46-8.

255 House of Representatives, Hansard 6 May 1952 at 23. In *Fejo* (1998) 195 CLR 96 at [10]-[11] the fee simple estate granted under the *Northern Territory Land Act 1872* (SA) was expressed to grant the land "together with all Timber Minerals and Appurtenances".

Part VII — Estimate

133. The NLC parties estimate they will require two hours to present oral argument.

Dated: 27 May 2024

…….....
Sturt Glacken
T: (03) 9225 8171
E: glacken@vicbar.com.au

…….....
Graeme Hill
T: (03) 9225 6701
E: graeme.hill@vicbar.com.au

…….....
Julia Wang
T: (03) 9225 6439
E: julia.wang@vicbar.com.au

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

ANNEXURE TO THE NLC PARTIES' SUBMISSIONS

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

No.	Description	Version	Provisions
1.	Constitution	Current	ss 51(xxvi), 51(xxxi), 85, 111, 122
2.	*Aboriginals Ordinance 1918* (NT)	As made	s 21
3.	*Aboriginals Ordinance 1924* (NT)	As made	ss 4, 5
4.	*Aboriginals Ordinance 1933* (NT)	As made	s 2
5.	*Aboriginals Ordinance 1953*	As made	s 3
6.	*Crown Lands Act 1888* (SA)	As made	ss 9, 199
7.	*Crown Lands Ordinance 1912* (NT)	As made	ss 16, 17
8.	*Crown Lands Ordinance 1924* (NT)	As made	ss 3, 6, 25, 26, Schedule
9.	*Crown Lands Ordinance 1927* (NT)	As made	ss 6, 20, 21, 101
10.	*Crown Lands Ordinance 1931* (NT)	As made	ss 23, 24, 69, 102, 107, 109
11.	*Minerals (Acquisition) Ordinance 1953* (NT)	As made	s 3
12.	*Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968*	As made	Whole
13.	*Mining on Private Property Act 1888* (SA)	As made	s 5
14.	*Mining on Private Property Act 1909* (SA)	As made	ss 34, 40

15.	*Mining Ordinance 1939* (NT)	As made	s 107
16.	*Mining Ordinance 1953* (NT)	As made	s 5
17.	*Mining Ordinance 1957* (NT)	As made	s 6
18.	*Mining Ordinance 1958* (NT)	As made	ss 7, 35
19.	*Mining Ordinance 1939-1960* (NT) (Reprint)	As made	Part VIIA
20.	*Mining Ordinance (No 2) 1964* (NT)	As made	ss 4, 10-12, 14-15
21.	*Native Title Act 1993* (Cth)	Current	ss 10-11, 14, 18, 53, 223, 228, 233
22.	*Northern Territory Acceptance Act 1910* (Cth)	As made	s 6
23.	*Northern Territory Acceptance Act 1952* (Cth)	As made	s 2
24.	*Northern Territory Act 1963* (SA)	As made	s 15
25.	*Northern Territory (Administration) Act 1910* (Cth)	As made	s 9
26.	*Northern Territory Crown Lands Consolidation Act 1882* (SA)	As made	ss 6, 61
27.	*Northern Territory Crown Lands Act 1890* (SA)	As made	ss 5, 6, 8, 31, 81, 90, 97, 106
28.	*Northern Territory Crown Lands Amendment Act 1896* (SA)	As made	s 2
29.	*Northern Territory Crown Lands Regulations 1885* (SA)	As made	reg 12
30.	*Northern Territory Crown Lands Regulations 1891* (SA)	As made	reg 39
31.	*Northern Territory Gold Mining Act 1873* (SA)	As made	ss 26, 34-35
32.	*Northern Territory Land Act 1872* (SA)	As made	ss 6, 45, 57
33.	*Northern Territory Land Act 1899* (SA)	As made	ss 2, 5, 24, 25 Schedule A
34.	*Northern Territory Minerals Act 1888* (SA)	As made	ss 4, 9-10
35.	*Northern Territory Mining Act 1903* (SA)	As made	Pts III, VI, VII, s 138
36.	*Northern Territory Pastoral Regulations 1883* (SA)	As made	reg 8

37.	*Petroleum (Prospecting and Mining) Ordinance 1954* (NT)	As made	ss 1-6, Pt III Div 5
38.	*Social Welfare Ordinance 1964* (NT)	As made	s 17
39.	*South Australian Colonisation Act 1834* (Imp)	As made	s 6
40.	*Waste Lands Act 1857* (SA)	As made	s 1
41.	*Welfare Ordinance 1953* (NT)	As made	s 45
42.	*Welfare Ordinance 1961* (NT)	As made	s 19

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

BADINGA 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

ARNHEM LAND ABORIGINAL LAND TRUST
Thirty Second Respondent

AMPLITEL PTY LTD
Thirty Third Respondent

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
Thirty Fourth Respondent

ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA
Intervener