



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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

D5 of 2023

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant
and
**YUNUPINGU ON BEHALF OF THE GUMATJ CLAN
OR ESTATE GROUP**
First Respondent and others named in the Schedule

**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(THIRTY-FOURTH RESPONDENT)
OUTLINE OF ORAL SUBMISSIONS**

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 2: Susceptibility to Extinguishment

2. Whilst concepts such as “radical title”, “sovereign power”, and “burden” (whether on the Crown’s sovereign power or radical title) are relevant to the determination of that issue, they do not define the issue that is at the heart of this ground.
3. Amongst other things, Ground 2 concerns the extinguishment at common law of native title rights and interests by the relevant acts.
4. Reduced to its simplest form, that raises for consideration the terms of the common law’s recognition of native title rights and interests and the circumstances in which that recognition will be withdrawn. It is *that* issue which arises for resolution: does the common law’s recognition of native title rights and interests include within it the withdrawal of that recognition so as to extinguish the native title rights and interests? The answer to that question is “yes”.

5. As Brennan J explained in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 50 (**Vol 9, Tab 87**), radical title is the "logical postulate" for both:
 - (a) the operation of the common law's "doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land)"; and
 - (b) "the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory)",adapted to Australian conditions.
6. That analysis does not rise or fall on whether the sovereign power is exercised so as to grant an interest in or reserve an interest in land. Rather, the common law recognises the existence of native title (albeit not as a common law tenure) and, being recognised, native title "may be protected by such legal and equitable remedies as are appropriate to the particular rights and interests established by the evidence" (*Mabo* at 61 per Brennan J). However, that protection does not extend to denying to the Crown as the sovereign power its capacity to grant an interest in land or to appropriate to itself ownership of parcels of land within the Crown's territory (*Mabo* at 58).
7. It also does not extend to deny to the Crown as the sovereign power its capacity to appropriate to itself resources such as (relevantly to this case) minerals. In the context of this case, which concerns native title rights including a claimed right to access, take and use for any purposes the resources of the claim area (including the minerals), the case of *Western Australia v Ward* (2002) 213 CLR 1 (**Vol 17, Tab 123**) provides an illustration (albeit in obiter) of circumstances where the reservation of rights to the Crown (by the vesting of property in minerals by statute) would have extinguished a native title right to take minerals, if that right had otherwise existed.
8. With those additional submissions, the Attorney General for Queensland otherwise adopts her written submissions and the Commonwealth's oral submissions on grounds 2 and 3.

Dated: 7 August 2024

Raine Webb

R J Webb KC

C I Taggart

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

D5 of 2023

SCHEDULE

Northern Territory of Australia
Second Respondent

East Arnhem Regional Council
Third Respondent

Layilayi Burarrwanga
Fourth Respondent

Milminyina Valerie Dhamarrandji
Fifth Respondent

Lipaki Jenny Dhamarrandji (nee Burarrwanga)
Sixth Respondent

Bandinga Wirrpanda (nee Gumana)
Seventh Respondent

Genda Donald Malcolm Campbell
Eighth Respondent

Naypirri Billy Gumana
Ninth Respondent

Maratja Alan Dhamarrandji
Tenth Respondent

Rilmuwurr Rosina Dhamarrandji
Twelfth Respondent

Wurawuy Jerome Dhamarrandji
Thirteenth Respondent

Manydjarri Wilson Ganambarr
Fourteenth Respondent

Wankal Djiniyini Gondarra
Fifteenth Respondent

Marrpalawuy Marika (nee Gumana)
Sixteenth Respondent

Guwanbal Jason Gurruwiwi
Eighteenth Respondent

Gambarrak Kevin Mununggurr
Nineteenth Respondent

Dongga Mununggurritj
Twentieth Respondent

Gawura John Wanambi
Twenty First Respondent

Mangutu Bruce Wangurra
Twenty Second Respondent

Gayili Banunydj Julie Marika (nee Yunupingu)
Twenty Third Respondent

Bakamumu Alan Marika
Twenty Fifth Respondent

Wanyubi Marika
Twenty Sixth Respondent

Wurrulnga Mandaka Gilngilngma Marika
Twenty Seventh Respondent

Witiyana Matpupuylngu 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