HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 07 Aug 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 27F - Appellant's Outline of oral argument
Filing party:	Appellant
Date filed:	07 Aug 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 **No D5 of 2023**
DARWIN REGISTRY

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

and

YUNUPINGU ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP
First Respondent and others named in the Schedule

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 2: Inherent defeasibility (CS [57]-[129], CR [24]-[49])

2. In *Mabo (No 2)*, this Court held that the common law was able to recognise native title without fracturing the skeleton of principle which gives the body of our law its shape and internal consistency because native title is susceptible to extinguishment or impairment by exercise of the sovereign power to grant interests in land, or to appropriate unalienated land to itself (the **relevant sovereign power**). The majority held that, at common law, the exercise of the relevant sovereign power (including pursuant to statute) is not unlawful, and gives rise to no entitlement to compensation even if its effect is to extinguish native title. That is a consequence of native title not being a form of common law tenure and not being protected by the common law principle of non-derogation from grant: see *Mabo (No 2)* (1992) 175 CLR 1 at 15, 29-31, 43-50, 63-64 **(Vol 9, Tab 87)**; *Fejo* (1998) 195 CLR 96 at [44]-[48], [58] **(Vol 7, Tab 73)**.

3. The defeasibility at common law of native title to the exercise of the relevant sovereign power is why this Court has described it as "inherently fragile": *Yarmirr* (2001) 208 CLR 1 at [47] **(Vol 6, Tab 70)**; *Western Australia v Ward* (2002) 213 CLR 1 at [91] **(Vol 17, Tab 123)**; *Native Title Act Case* (1995) 183 CLR 373 at 453 **(Vol 16, Tab 122)**. That inherent fragility – which was always confined to defeasibility to the exercise of a particular kind of sovereign power – was removed by the *Native Title Act 1993* (Cth), but this appeal is concerned only with acts that long predate that legislation.

4. The exercise of the relevant sovereign power does not involve an acquisition of property for the purposes of s 51(xxxi), even if its effect is to extinguish native title. Justice Gummow's recognition in *Newcrest* (1997) 190 CLR 513 at 522-523, 613 **(Vol 12, Tab 95)** that a characteristic of native title as recognised at common law is "an inherent susceptibility to extinguishment or defeasance" by exercise of the relevant sovereign power was correct, and explains why an exercise of that power would not be invalid by reason of s 51(xxxi) even if no compensation was payable. The other Justices who joined in the order of the Court agreed with that aspect of Gummow J's reasoning: at 560, 561 and 651; see also *Congoo v Qld* (2014) 218 FCR 358 **(FFC [424], CAB 147])**.

5. Justices Deane and Gaudron in *Mabo (No 2)* at 111 **(Vol 9, Tab 87)** did not hold otherwise and, in any event, their reasoning on this point was inconsistent with that of the

majority because it proceeded on the footing that the extinguishment of native title is unlawful.

6. The notion that property may be "inherently defeasible" to the occurrence of a particular contingency, whilst maintaining its character as "property", is not confined to property that is created by statute: **CS [105]**; **CR [41]**; *McGrath v Williams* (1912) 12 SR (NSW) 477 at 481 **(Vol 20, Tab 137)**. Where property has that characteristic, the occurrence of the contingency does not involve an acquisition of property for the purposes of s 51(xxxi): *WMC Resources* (1998) 194 CLR 1 at [195]-[196], [203] **(Vol 6, Tab 69)**; *Cunningham* (2016) 259 CLR 536 at [32], [40], [43], [46], [63], [66], [69] **(Vol 6, Tab 71)**; *Telstra* (2008) 234 CLR 210 at [8], [52] **(Vol 15, Tab 115)**.

7. The compensable acts that remain in issue all involved the exercise of the relevant sovereign power. As such, even if native title was extinguished by those acts, that did not involve an acquisition of property contrary to s 51(xxxi). That is not because native title is not "property" within s 51(xxxi). It is because the native title rights recognised by the common law were never of the "nature and amplitude asserted", for their ongoing recognition was always subject to the exercise of the relevant sovereign power.

Ground 1: Section 122 of the Constitution (CS [12]-[56]; CR [2]-[23])

8. Putting aside any effect of s 51(xxxi), s 122 empowers the Parliament to make laws for the government of a territory, including laws that effect an acquisition of property: **CS [24]-[30]**; *Spratt v Hermes* (1965) 114 CLR 226 at 241-242, 250-251, 273, 276, 277, 280 **(Vol 15, Tab 112)**; *Berwick* (1976) 133 CLR 603 at 607 **(Vol 5, Tab 61)**; *Teori Tau* (1969) 119 CLR 564 at 570 **(Vol 15, Tab 116)**; *Newcrest* at 561, 594, 648 **(Vol 12, Tab 95)**.

9. Section 51(xxxi) is a "power to make laws" with respect to the acquisition of property on just terms for s 51 federal purposes: **CS [44]**; **CR [11], [14]**; *WH Blakely & Co Pty Ltd v Commonwealth* (1953) 87 CLR 501 at 521; *Newcrest* at 532, 542, 548-549, 551-553, 560-561, 568, 583, 614, 649, 661 **(Vol 12, Tab 95)**; *Svikart v Stewart* (1994) 181 CLR 548 at 557, 559-560 **(Vol 15, Tab 114)**; *Teori Tau* at 570 **(Vol 15, Tab 116)**; *Wurridjal* (2009) 237 CLR 309 at [12], [13], [187], [189], [318]-[319], [353], [446], [456]-[457], [460] **(Vol 19, Tab 126)**.

10. Where a law that effects or empowers an acquisition of property is made under both s 51 and s 122, the just terms guarantee applies to that law. Where a law that effects or empowers an acquisition of property is made solely under s 122, the just terms guarantee does not apply: **CS [44], [49], CR [6]-[14];** *Newcrest* at 561 **(Vol 12, Tab 95)**.

11. The impugned Ordinances were made under s 21 (or its successor, s 4U) of the *Northern Territory (Administration) Act* **(Vol 1, Tab 4; Vol 2, Tab 11)**, which were laws made solely under s 122: **CS [20]-[22], CR [15]**; *Palmer* (2021) 272 CLR 505 at [119]-[120] **(Vol 13, Tab 98)**.

12. Further, if necessary, the relevant provisions of the impugned Ordinances themselves, if made by the Commonwealth Parliament, would not be supported by any head of power in s 51: **CR [15]**; *Mining Ordinance 1939* (NT) **(Vol 2, Tab 30** and **Tab 33)**; **CBFM 164, 178, 199, 220, 243**.

13. It would be incongruous for s 51(xxxi) to apply to s 122: **CS [47]-[49]**; **CR [4]-[5]**.

14. *Wurridjal* did not create a binding ratio inconsistent with the above propositions. If it did, it should be re-opened and to that limited extent overturned: **CS [50]-[56]**; **CR [19]-[23]**; Herzfeld and Prince **(Vol 22, Tab 156)**.

Ground 3: Minerals reservation in pastoral lease (CS [130]-[157]; CR [50]-[64])

15. An important function of a minerals reservation in the relevant statutory scheme was to ensure that the Crown had the ability to bring an information for intrusion to prevent others from taking reserved minerals from alienated land without the Crown's authority. This required the minerals to be excepted from grant and ownership of the minerals after grant to be in the Crown: *Wik* (1996) 187 CLR 1 at 190-193 **(Vol 18, Tab 124)**; *Northern Territory Crown Lands Act 1890* (SA), ss 6, 8, 31, 96, 97, 106 **(Vol 2, Tab 37)**; *Northern Territory Land Act 1899* (SA), ss 24, 25, Sch A **(Vol 2, Tab 43)**; *Attorney-General v Brown* (1847) 1 Legge 312 at 313, 316-320, 322-323, 325 **(Vol 20, Tab 130)**.

16. The change in understanding brought about by *Mabo (No 2)* did not alter this function or result. By the minerals reservation, the Crown asserted, and thereby appropriated to itself, ownership of all minerals on or under the surface of the land covered by the lease: *Wik Peoples v Queensland* (1996) 63 FCR 450 at 491, 493-496 **(Vol 21, Tab 146)**; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at [110]-[112] **(Vol 10, Tab 92)**.

17. It is unnecessary to decide what effect (if any) the minerals reservation had on trees and wood because "excepting and reserving" operate differently according to subject matter: *McGrath v Williams* (1912) 12 SR (NSW) 477 at 480-482 **(Vol 20, Tab 137)**.

Dated: 7 August 2024

Stephen Donaghue Stephen Lloyd Nitra Kidson Carla Klease

SCHEDULE

Northern Territory of Australia
Second Respondent

East Arnhem Regional Council
Third Respondent

Layilayi Burarrwanga
Fourth Respondent

Milminyina Valerie Dhamarrandji
Fifth Respondent

Lipaki Jenny Dhamarrandji (nee Burarrwanga)
Sixth Respondent

Bandinga Wirrpanda (nee Gumana)
Seventh Respondent

Genda Donald Malcolm Campbell
Eighth Respondent

Naypirri Billy Gumana
Ninth Respondent

Maratja Alan Dhamarrandji
Tenth Respondent

Rilmuwmurr Rosina Dhamarrandji
Twelfth Respondent

Wurawuy Jerome Dhamarrandji
Thirteenth Respondent

Manydjarri Wilson Ganambarr
Fourteenth Respondent

Wankal Djiniyini Gondarra
Fifteenth Respondent

Marrpalawuy Marika (nee Gumana)
Sixteenth Respondent

Guwanbal Jason Gurruwiwi
Eighteenth Respondent

Gambarrak Kevin Mununggurr
Nineteenth Respondent

Dongga Mununggurritj
Twentieth Respondent

Gawura John Wanambi
Twenty First Respondent

Mangutu Bruce Wangurra
Twenty Second Respondent

Gayili Banunydji Julie Marika (nee Yunupingu)
Twenty Third Respondent

Bakamumu Alan Marika
Twenty Fifth Respondent

Wanyubi Marika
Twenty Sixth Respondent

Wurrulnga Mandaka Gilnggilngma Marika
Twenty Seventh Respondent

Witiyana Matpupuyngu Marika
Twenty Eighth Respondent

Northern Land Council
Twenty Ninth Respondent

Swiss Aluminium Australia Limited (ACN 008 589 099)
Thirtieth Respondent

Telstra Corporation Limited (ABN 33 051 775 556)
Thirty First Respondent

Arnhem Land Aboriginal Land Trust
Thirty Second Respondent

Amplitel Pty Ltd
Thirty Third Respondent

Attorney-General for the State of Queensland
Thirty Fourth Respondent