HIGH COURT OF AUSTRALIA

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**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

## APPELLANT'S SUBMISSIONS IN REPLY TO:

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| **1** | **Submissions of the First Respondent (Gumatj clan or estate group) filed 27 May 2024** | **GR** |
| **2** | **Submissions of the Second Respondent (Northern Territory) filed 15 April 2024** | **NT** |
| **3** | **Submissions of the Twenty-Fifth to Twenty-Eight Respondents (Rirratjingu parties) filed 27 May 2024** | **RR** |
| **4** | **Submissions of the Twenty-Ninth and Thirty-Second Respondent (NLC parties) filed 27 May 2024** | **NLC** |
| **5** | **Submissions of the Attorney-General of the Australian Capital Territory (Intervener) filed 11 June 2024** | **ACT** |

## PART I: CERTIFICATION

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

## PART II: ARGUMENT

### GROUND 1: SECTION 122 OF THE CONSTITUTION

#### Why s 51(xxxi) does not apply to laws solely supported by s 122

2. ***Power to govern territories:*** The Commonwealth's argument is directed to ensuring that s 122 confers power of the ambit and flexibility necessary to enable the Commonwealth to govern territories in a wide range of circumstances and at various stages of development. The respondents' contentions, which would mean swathes of the land statutes of the Territory and the titles granted under them were invalid from 1911 until validated in the 1990s, deny that power.

3. Sections 111 and 122 envisage the surrender of territory by a State to the Commonwealth, with the result that the territory would become subject to the exclusive jurisdiction of the Commonwealth. This necessarily involves the Commonwealth becoming the holder of radical title to the lands and waters of the surrendered territory,[1] meaning that the Commonwealth acquires the sovereign power to grant or otherwise appropriate to itself unalienated land. Section 122 also confers on the Parliament the power to make laws for the government of a surrendered territory. Those laws necessarily include laws concerning how radical title may be exercised.

4. At the time of the Convention Debates, the northern territory of South Australia was foreseen as a possible territory of the Commonwealth.[2] When the Commonwealth accepted the Northern Territory in 1910, there existed a range of South Australian laws that applied to the Territory, which conferred a range of powers on the Governor to grant interests in land.[3] Under State law, these grants were lawful and valid. Pursuant to s 122, the Commonwealth Parliament passed s 7 of the NT Acceptance Act, which continued those laws in force and conferred the same powers on the Governor-General or officers appointed by him. But, on the view of the respondents and the court below, either s 7 was invalid from the outset, or the powers conferred by the laws it continued in force were invalid because they authorised an acquisition of property otherwise than on just terms and s 122 was constrained by s 51(xxxi). The respondents implicitly contend that, from 1911, the Commonwealth could only have granted any interests in land, or appropriated

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1 *Newcrest* (1997) 190 CLR 513 at 634-635 (Gummow J).

2 *Capital Duplicators* (1992) 177 CLR 248 at 271 (Brennan, Deane and Toohey JJ); *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 25 January 1898, at 176.

3 Including the 1890 Crown Lands Act.

land to itself, after it had acquired it by compulsory acquisition pursuant to the *Lands Acquisition Act 1906* (Cth) or an equivalent provision. If that is right, then s 122 materially failed to confer the power required to govern the territories, because in doing so the Commonwealth would have been subject to constraints that were fundamentally different to, and more restrictive than, those applicable in the States, to the detriment of the development of the territories.[4] The argument is not simply about financial consequences (cf NT [40]-[43]; NLC [22]-[23]; GR [54]-[57]; RR [115]; ACT [22]-[24]) or "inconvenience" (NLC [22], [28]).

5. The respondents contend that there is no contrary intention shown by s 122 to displace s 51(xxxi) (NT [19]; GR [51]-[53]; RR [23], [27], [43]; ACT [23]). That argument assumes what they need to establish (that s 122 needs to "displace" s 51(xxxi), notwithstanding that the latter is textually subject to the former). But in any case, it would be incongruous for the Constitution to provide for the surrender of a territory to be governed by the Commonwealth (which must include a power to grant or otherwise appropriate interests in unalienated land) and, at the same time, to provide that that power could not be exercised over unalienated land without first acquiring that same land pursuant to a compulsory acquisition statute. Indeed, similar incongruity would arise if any of the provisions of Ch VI are constrained by s 51(xxxi).

6. ***Newcrest is coherent and in accordance with principle:*** It is false to characterise the judgment of Toohey J in *Newcrest* as "the only judgment in the history of this Court to adopt the hybrid position" (cf GR [47]). Whilst Toohey J refused to overturn *Teori Tau*, his Honour otherwise expressed agreement with Gaudron J whose reasons explained, in detail, the rationale for what became the holding in *Newcrest* (that where a law is properly characterised as a law with respect to a head of power in s 51, s 51(xxxi) will constrain it even if it is also supported by s 122: at 567-568). Each of Gummow (at 614) and Kirby JJ (at 661-662) also explicitly endorsed Gaudron J's reasoning in this respect, meaning that reasoning constitutes the ratio. That ratio was applied by Kiefel J in *Wurridjal*.[5] The respondents who contend that *Newcrest* is incoherent are, in substance, asking the Court to overturn *Newcrest* (NT [39]; GR [44]-[47]; RR [117]-[121]).

7. There is no incoherence in the holding in *Newcrest* for the following four reasons (with other matters raised against the Commonwealth's position on Ground 1 also being addressed).

8. *First*, the line of authority beginning with *Lamshed* (1958) 99 CLR 132 does not deny – indeed, it explicitly affirms – that s 122 has a non-federal subject matter and purpose (cf GR [38]-[43];

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4 See, eg, s 8 of the *Northern Territory Railway Extension Act 1923* (Cth), which authorised land to be resumed from lessees without compensation.

5 (2009) 237 CLR 309 at [456]-[460] (Kiefel J).

NLC [18]-[21]; RR [101]; NT [32]; ACT [13]). The widely quoted passage in Dixon CJ's reasons expressly recognises this:[6]

> … the legislative power with reference to the Territory, disparate and non-federal as in the subject matter, nevertheless is vested in the Commonwealth Parliament as the National Parliament of Australia. (emphasis added)

9. The *Lamshed* line of authority does establish a different point: that s 122 confers a power to be exercised by the national Parliament, such that its non-federal subject matter and purpose does not mean it is wholly apart from the other provisions in the Constitution. However, whilst debunking the extreme notion that s 122 must be treated as "disjoined" from the remainder of the Constitution, the language of the Court was carefully qualified to guard against the opposite extreme view that the respondents now embrace (ie that s 122 should be treated as if it were the same as the s 51 heads of power). For example, in a passage in ***Spratt*** *v Hermes* (1965) 114 CLR 226 at 246 upon which the respondents rely (GR [34](c); NT [12], [37]; ACT [13]), Barwick CJ was careful to limit his findings to the rejection of the extreme "disjoined" position, without embracing the view that the location of s 122 in Ch VI is irrelevant to its interpretation. Indeed, immediately after the passage on which the respondents rely, Barwick CJ observed: "No doubt on some occasions some assistance may be obtained from the place in the layout of the Constitution which a particular provision occupies when resolving ambiguities in language."

10. It is wrong to approach the interpretive issue in this case as depending upon a binary choice, such that s 122 is either wholly apart from, or exactly the same as, a s 51 head of power. That distorts the available constructional choices, and pays insufficient regard to relevant textual and structural matters pertaining to s 122 (cf GR [34], [39]-[42]; NLC [19]; RR [101]-[108]; NT [37]; ACT [13], [19]). Further, the submission is irreconcilable with the cases discussed in CS [33]-[35], in which the Court has held in various contexts that s 122 occupies an intermediate position.

11. *Secondly*, the federal conception to which the Constitution gives effect is that of "independent governments existing in the one area and exercising powers in different fields of action carefully defined by law".[7] Chapter I, and specifically s 51, represents the framers' "anxiously contrived" allocation of power between the Commonwealth and States.[8] By contrast, Ch VI is recognised as "a fundamentally different topic", with s 122 being a "legislative power of a different order to

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6 *Lamshed* (1958) 99 CLR 132 at 142 (Dixon CJ).

7 *R v Kirby; Ex parte* ***Boilermakers*****'** *Society of Australia* (1956) 94 CLR 254 at 267-268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

8 *Spratt* (1965) 114 CLR 226 at 250 (Kitto J); *Boilermakers* (1956) 94 CLR 254 at 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

those given by s 51", "non-federal in character in the sense that the total legislative power to make laws to operate in and for a territory is not shared in any wise with the States".[9] It is for this reason that s 122 is not treated in an identical way to the other heads of power in s 51 when determining its relationship with s 51(xxxi). Section 122 is in a different position (quite literally) because Ch VI does not share Ch I's preoccupation with the federal distribution of legislative power between the Commonwealth and States.[10]

12. If a law can be characterised as a law with respect to a head of power in s 51, then by definition that law engages considerations pertaining to the federal distribution of legislative power. That is true whether or not some part of the law could also be characterised as a law for the government of a territory (cf RR [113]).[11] Justice Gaudron's focus in *Newcrest* on the fact that the law then in issue (the *National Parks and Wildlife Conservation Act 1975 (Cth)* (**Conservation Act**)) was intended to operate throughout the Commonwealth, and to give effect to Australia's international obligations, reflected this point. As it happens, her Honour correctly recognised that the Conservation Act, as a law of national concern, could not properly be characterised as a law for the government of a territory[12] even to the extent that it applied within a territory (reflecting the "accepted approach to characterisation which treats a law of general application that is not supported by s 51 as invalid in its application to the Territories unless there is some indication that it should nevertheless apply to them").[13] But, even if the Conservation Act could have been characterised (in part) as a law for the government of a territory under s 122, Gaudron J recognised that the fact that it was a law with respect to a power in s 51 was sufficient to demonstrate that it was for a purpose that enlivened the federal concerns underpinning Ch I (cf GR [40]-[41]). No such considerations arise with respect to the NT Administration Act.

13. *Thirdly*, whilst the "abstraction" metaphor may be adequate to explain the interaction between s 51(xxxi) and the other heads of s 51 legislative power, care is required in extending the metaphor outside of s 51 (cf RR [13]-[20]; ACT [10], [16]). In *Wurridjal*, Gummow and Hayne JJ indicated that the "abstraction" metaphor was "no more than a shorthand description of the effect of applying the principle of construction identified by Dixon CJ in *Schmidt*."[14] As Dixon CJ explained, that principle of construction depends on the applicability of two (or more)

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9 *Spratt* (1965) 114 CLR 226 at, respectively, 250 (Kitto J), 241-242 (Barwick CJ).
10 *Teori Tau* (1969) 119 CLR 564 at 570 (the Court); *Newcrest* (1997) 190 CLR 513 at 543 (Brennan CJ).
11 See, eg, *Kruger* (1997) 190 CLR 1 at 43 (Brennan CJ), 117-118 (Gaudron J).
12 *Newcrest* (1997) 190 CLR 513 at 567 (stating "[i]t is unlikely that an Act of general application throughout the Commonwealth will also be a law passed pursuant to s 122") and 568 (Gaudron J).
13 *Newcrest* (1997) 190 CLR 513 at 566 (Gaudron J).
14 *Wurridjal* (2009) 237 CLR 309 at [186] (Gummow and Hayne JJ).

powers, being "an express power, subject to a safeguard, restriction or qualification" and "other powers … [to enact] the same kind of legislation but without the safeguard, restriction or qualification".[15] Once that is appreciated, it is apparent that the Rirratjingu respondents are wrong to submit that *Newcrest* reflects a "compromise position" that is "untenable as a matter of principle" because s 51(xxxi) either does, or does not, abstract from s 122, there being "no third option" (RR [117]-[120]). That is wrong because s 51(xxxi) could only ever abstract from s 122 to the extent that those powers overlap. If a Commonwealth law is properly characterised as a law for the government of a territory within s 122, but not as a law with respect to any head of power in s 51, there can be no "abstraction".[16]

14. *Finally*, the *Newcrest* approach produces the principled result that the safeguard in s 51(xxxi) is enlivened when federal considerations are engaged, reflecting that s 51(xxxi) is a power of acquisition "for objects which fall within the Federal province",[17] but not for laws where the Commonwealth stands in a like position to the States. It recognises that laws made under s 51 can apply nationally, including within the territories, and that laws of that kind will have a uniform national application because any safeguards that attach to s 51 heads of power will apply to such a law even if that law would also be supported by s 122 in its application to a territory (cf NT [16], [22]; GR [30]-[31]; ACT [33]). It also recognises that there is one national Parliament, which is constrained when it exercises its national powers (even when s 122 would otherwise supply a partially overlapping power) (cf GR [38]; NLC [19], [21]; NT [15], [34]; ACT [31]). But s 122 is not constrained where the law in question cannot be characterised as a law with respect to any other head of power because it is only a law for the government of a territory, because if only one power is applicable the principle of interpretation in *Schmidt* has no relevance. The position reached in *Newcrest* therefore is not illogical or incoherent, but principled and correct.

15. ***The appropriate level of analysis:*** The law of the Commonwealth Parliament relevant to this proceeding is s 21 of the NT Administration Act (with respect to s 107 of the 1939 Ordinance) and its successor, s 4U (with respect to Part VIIA of the 1939 Ordinance and the 1968 Ordinance) (collectively, the **ordinance-making powers**). It is these provisions that must be characterised to ascertain the relevant head or heads of power that support them (cf RR [123]-[124]; NLC [31]). These provisions empowered the Governor-General to make Ordinances having the force of law in and in relation to the Territory. Their terms directly reflected the language of s 122 (cf RR

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[15] *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-372 (Dixon CJ).
[16] *Newcrest* (1997) 190 CLR 513 at 542, 544 (Brennan CJ), 574-575 (McHugh J).
[17] *WH Blakeley & Co Pty Ltd v Commonwealth* (1953) 87 CLR 501 at 521 (the Court).

[122]). They were broad enough to apply to all possible ordinances that may have needed to be made for the government of the territory, covering all persons, places and events in a territory.[18] As such, they were clearly laws for the government of the Northern Territory, wholly supportable by s 122. Equally, they clearly were not supportable as laws with respect to any other head of power,[19] including s 51(xxxi) or s 51(xxvi)[20] (cf NLC [32]-[39]; RR [126]). As Commonwealth laws that were wholly supported by s 122, there was no occasion to read down or partially disapply the ordinance-making powers in reliance on s 15A of the *Acts Interpretation Act 1901* (Cth) to attempt to preserve some valid applications.[21] Instead, the constitutional analysis having taken place at the level of the primary legislation, and having yielded the ready answer that the ordinance-making powers are valid, no further constitutional question arises.[22] In such a case, it would be contrary to all principle to ignore the valid empowering provision, and to attack a particular ordinance on constitutional grounds (cf NLC [31]-[39]; RR [123]-[126]). The only question that can arise with respect to any particular ordinance is the "statutory question":[23] is the ordinance authorised by the ordinance-making power. In any case, even if the analysis could in some cases appropriately be conducted at the level of an ordinance, s 107 of the 1939 Ordinance, for example, would have been wholly supported by s 122.[24]

16. ***No distinction between internal and external territories*:** There is no textual or other basis to distinguish between internal and external territories for the purposes of answering Ground 1. Clause 5 of the Constitution draws no such distinction, providing that the Constitution is to apply

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18 *Kruger* (1997) 190 CLR 1 at 104 (Gaudron J).

19 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 186 (Latham CJ).

20 As is particularly evident given it was not directed to a differential operation upon people of a particular race: *Native Title Act Case* (1995) 183 CLR 373 at 460-461 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

21 In both *Williams (No 2)* and *Hughes*, the Court recognised that the empowering provisions would not have been wholly valid in accordance with their terms, that being the reason the Court went on to consider whether particular applications of those laws could be supported when they were read down or partially disapplied in reliance on s 15A: see *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 at [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *R v Hughes* (2000) 202 CLR 535 at [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also ***Palmer*** *v Western Australia* (2021) 272 CLR 505 at [124] (Gageler J). The laws in issue in *Williams (No 2)* and *Hughes* were unusual, and lent themselves to characterisation as laws supported by many heads of power. A law that is capable of being read down in different ways so as to bring it within power will be wholly invalid, unless the statute itself indicates the basis upon which it should be read down: eg ***Pidoto*** *v Victoria* (1943) 68 CLR 87 at 110-111 (Latham CJ); *Strickland v Rocla* ***Concrete Pipes*** *Ltd* (1971) 124 CLR 468 at 489-490, 497-498 (Barwick CJ), 506 (Menzies J), 512-513 (Windeyer J), 513 (Owen J), 519 (Walsh J); *Spence v Queensland* (2019) 268 CLR 355 at [87] (Kiefel CJ, Bell, Gageler and Keane JJ).

22 *Palmer* (2021) 272 CLR 505 at [119]-[120] (Gageler J); ***Wotton*** *v Queensland* (2012) 246 CLR 1 at [22]-[24] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

23 *Palmer* (2021) 272 CLR 505 at [119]-[120] (Gageler J); *Wotton* (2012) 246 CLR 1 at [22]-[24] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

24 See, eg, *Palmer* (2021) 272 CLR 505 at [122] (Gageler J).

to "every part of the Commonwealth".[25] Section 122 likewise does not differentiate between the three types of territories to which it may apply – it does not warrant any distinction being made between internal territories that were once part of a State and external territories.[26] There is, therefore, no basis to find that the just terms guarantee applies only to internal territories (cf NT [51]-[64]). In particular, it is not appropriate to take into account the contemporary "relative stability" and self-government to read down s 122, which is a constitutional provision "intended to endure and apply to changing conditions".[27] This is especially demonstrated in the circumstances of this appeal, which concerns the validity of legislation enacted in 1911 (and ordinances made between 1939 and 1968) when those factual circumstances had not yet come about. While the Court in *Capital Duplicators* found it was unnecessary to decide the position of external territories (cf NT [62]),[28] that was in circumstances where the Court's recognition that s 90 constrains s 122 was to ensure "the central objective of the federal compact" was not frustrated throughout the Commonwealth.[29]

17. There is also no basis to make the opposite finding, as contended for by other respondents, that the just terms guarantee will apply to external territories because the external affairs power will engage the *Newcrest* principle (cf NLC [24]-[25]; RR [88]-[89]; ACT [26]). As an absolute proposition the claim that the external affairs power would mean that *Newcrest* is <u>always</u> engaged for such territories is not correct, because even if external territories are geographically external to Australia <u>after</u> their acceptance or acquisition by the Commonwealth, it does not follow that <u>every</u> Commonwealth law that applies in such a territory is necessarily a law with respect to external affairs (so as to engage the *Newcrest* principle).[30] The fact that the Commonwealth Parliament <u>could</u> have framed a law that would have been supported – in a particular factual application – by one head of power does not mean that the Parliament <u>did</u> frame or enact such a law.[31] As Menzies J put it in *Concrete Pipes*, "[s] 15A does not give a chameleon like quality to all Acts of Parliament so that if the question arises whether one person is bound thereby it is only

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25 *Newcrest* (1997) 190 CLR 513 at 597 (Gummow J), citing *Berwick Ltd v Gray* (1976) 133 CLR 603 at 605 (Barwick CJ), 606 (McTiernan J), 608 (Mason J), 611 (Jacobs J); *Capital Duplicators* (1992) 177 CLR 248 at 274-275 (Brennan, Deane and Toohey JJ), 286 (Gaudron J).

26 *Spratt* (1965) 114 CLR 226 at 241, 247 (Barwick CJ), 258-259 (Kitto J), 264 (Taylor J), 273 (Windeyer J); *NAAJA v Northern Territory* (2015) 256 CLR 569 at [167] (Keane J); *Eastman* (1999) 200 CLR 322 at [7] (Gleeson CJ, McHugh, Callinan JJ).

27 *Spratt* (1965) 114 CLR 226 at 272 (Windeyer J), re *Fishwick v Cleland* (1960) 106 CLR 186 at 197 (the Court).

28 *Capital Duplicators* (1992) 177 CLR 248 at 274 (Brennan, Deane and Toohey JJ), re *Spratt* (1965) 114 CLR 226 at 247 (Barwick CJ), 270 (Menzies J) and *Berwick Ltd v Gray* (1976) 133 CLR 603 at 608 (Mason J), found territories were part of the Commonwealth.

29 See CS [36] and *Capital Duplicators* (1992) 177 CLR 248 at 276-277, 279 (Brennan, Deane and Toohey JJ).

30 *Newcrest* (1997) 190 CLR 513 at 566 (Gaudron J).

31 *Pidoto* (1943) 68 CLR 87 at 109 (Latham CJ); *Concrete Pipes* (1971) 124 CLR 468 at 495, 497-498 (Barwick CJ), 502-503 (Menzies J), 512 (Windeyer J), 516 (Walsh J).

necessary to see whether the Commonwealth, by a different law, could bind that person".[32] The manner in which legislation is drafted may not allow its provisions to draw upon all the constitutional support that is potentially available. For that reason, if, for example, Parliament enacts a law that applies without differentiation to internal and external territories, that law will be supported by s 122, but it cannot be characterised as a law with respect to external affairs even if, in some operations, it applies in places that are geographically external to Australia.

18. In any event, there is no decision of this Court that holds that the external affairs power applies to laws made with respect to external territories after their acceptance or acquisition by the Commonwealth. In fact, there are statements of this Court that suggest otherwise,[33] including for the territory of New Guinea (cf NLC [25]; RR [89]).[34] The cases relied upon by the respondents that relate to external territories are silent as to the external affairs power and emphasise the breadth and flexibility of the Parliament's powers under s 122.[35] The cases relied upon by the respondents that relate to the geographical externality limb of the external affairs power did not consider the question of external territories (except that some implicitly treated external territories as part of the territory of the nation state of Australia).[36] Given the above, there are reasons to doubt that the geographical externality limb of the external affairs power applies to external territories. This is an important constitutional question, which should not be decided in a case where it does not arise on the facts before the Court.

19. ***Wurridjal did not overturn Teori Tau*** (CS [50]-[52]; cf NT [75]-[77]; GR [18]-[20]; RR [63]-[73]): The principles as to ratio are not in issue. The Commonwealth embraces the statement of principle by Cross and Harris (cf RR [63]), as adapted for multi-judgment decisions by Gordon J in *Vanderstock v Victoria* (2023) 98 ALJR 208 at [430]: "the ratio decidendi is any rule of law 'expressed in or necessarily implied by reason for judgment to which a majority of the participating judges assent' as a necessary step in reaching their conclusion".[37] What is in issue

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32 *Concrete Pipes* (1971) 124 CLR 468 at 505 (Menzies J).

33 *Lamshed* (1958) 99 CLR 132 at 144 (Dixon CJ); *Berwick v Gray* (1976) 133 CLR 603 at 605 (Barwick CJ), 608 (Mason J, with whom McTiernan and Murphy JJ agreed at 606 and 611 respectively).

34 *Fishwick v Cleland* (1960) 106 CLR 186 at 197 (the Court), as recognised in *Re Minister for Immigration; Ex parte* ***Ame*** (2005) 222 CLR 439 at [27] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

35 *Ame* (2005) 222 CLR 439 at [22], [33] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Bennett v Commonwealth* (2007) 231 CLR 91 at [10], [37] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

36 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 362, 366 (Barwick CJ); see also *Bonser v La Macchia* (1969) 122 CLR 177 (1969) 122 CLR 177 at 191, 194, 197 (Barwick CJ).

37 Subject to the qualification that the reference to the "participating judges" is to judges who were in the majority as to the result: see Herzfeld and Prince, *Interpretation* (Thomson Reuters, 3rd ed, forthcoming) at [34.120], fn 43. That qualification is supported by the reasons of Brennan J in *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 267, upon which Gordon J drew in articulating the above principle.

is the identification of the "conclusion" for the purposes of identifying which judges constituted part of the majority, such that their reasons contribute to the ratio.

20. Whilst the Commonwealth agrees that demurrers allow for the resolution of a proceeding by consideration of a discrete legal question,[38] the Commonwealth does not accept that each ground of a demurrer is the same as a separate question and, therefore, that a finding on a ground of a demurrer is a relevant "conclusion" (cf RR [67]). No case cited by the respondents addresses the question of a ground of a demurrer (cf NT [76]). However, there is clear authority that each ground of appeal does not give rise to such a conclusion.[39] In principle, a ground of demurrer should attract the same analysis.

21. In *Wurridjal*, the demurrer raised a single "discrete legal question" with respect to each category of property: whether or not the particular provisions were invalid by reason of s 51(xxxi) of the Constitution. Each ground of the demurrer reflected an element of the plaintiffs' causes of action, each of which the plaintiffs had to establish in order to obtain the relief they sought. The language of the Court reflects that the ultimate legal question was validity.[40] Moreover, two Justices were able to not address all grounds of the demurrer precisely because the "discrete legal question" before the Court was the validity of the legislative provisions (rather than whether each element of the cause of action could be established).[41] For this reason, Kirby J having dissented on the ultimate legal question of validity, his reasons on the applicability of s 51(xxxi) to laws made under s 122 cannot be considered in identifying the ratio in *Wurridjal* (cf NT [73], [76]).

22. Reliance on remarks by Heydon J at [325] are misplaced (cf NT [77]; ACT [48]). His Honour's observation that an argument raised in the context of just terms lacked "practical reality" cannot be seen as an adoption or agreement to the overruling of *Teori Tau*. His Honour expressly did not decide that question, stating that he could "assume" the answer to questions including "whether s 51(xxxi) applies to the acquisition" so as to proceed directly to whether the legislation provided just terms (at [318]-[319]).

23. ***Factors supporting re-opening (if required)*:** If necessary, the Commonwealth relies on its

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38 *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 125-126 (Barwick CJ), 135 (Gibbs J).

39 *Perara-Cathcart v The Queen* (2017) 260 CLR 595 at [45]-[48] (Kiefel, Bell and Keane JJ), [85]-[90] (Gageler J), [145]-[153] (Gordon J), discussing *R v Ireland* (1970) 126 CLR 321 at 329-331 (Barwick CJ, with whom McTiernan, Windeyer, Owen and Walsh JJ agreed at 336). See Herzfeld and Prince, *Interpretation* (Thomson Reuters, 3rd ed, forthcoming) at [34.140].

40 *Wurridjal* (2009) 237 CLR 309 at [8] (French CJ), [131], [174], [190]-[191], [200]-[201] (Gummow and Hayne JJ), [215] (Kirby J), [345] (Crennan J), [470] (Kiefel J).

41 *Wurridjal* (2009) 237 CLR 309 at [318]-[319] (Heydon J), [353], [355] (Crennan J).

submissions in chief as to why *Wurridjal* should be re-opened: CS [53]-[56]; cf NT [78]-[82]; GR [21]-[25]; RR [74]-[97]. The alternative argument of some respondents (RR [86]-[90]; ACT [27]), that *Teori Tau* was not left undisturbed by *Newcrest* with respect to a law supported only by s 122, neither acknowledges, nor confronts, the explicit language of Toohey J in *Newcrest,* and the analysis of Kiefel J in *Wurridjal*, to opposite effect.[42] For the reasons given at [17]-[18] above, *Teori Tau* would not have been answered differently on the application of *Newcrest*.

## GROUND 2: INHERENT DEFEASIBILITY

### Native title is "property" that was "inherently defeasible" at common law to the exercise of radical title: CS [77]-[104]

24. ***Clarification*:** Much of the focus in the submissions of the Gumatj respondent and NLC parties is directed to distinctions between prerogative and legislative powers, and, in that respect, seems to misunderstand the Commonwealth's case. Some confusion appears to have resulted from the Commonwealth's use of the phrase "exercise of radical title" (taken from *NSWALC* (2016) 260 CLR 232 at [55], [60]) (cf CS [65], [86]-[87], [91], [96], [104]). This is a shorthand expression, used to refer to the exercise of the Crown's sovereign power to create or assert rights in unalienated land, whether pursuant to statute or prerogative.[43] It is not a reference to prerogative power only (cf GS [68]-[70], [108]; NLC [46], [49]-[50], [52]-[55], [58]-[62]).[44]

25. ***Gummow J's analysis in* Newcrest** (CS [65]-[68]): The respondents seek to marginalise the key passage in Gummow J's judgment at 613 by emphasising that the passage is brief, and that *Newcrest* did not concern native title rights (RR [158]-[160]; GR [101]-[103]; NLC [71]).

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[42] *Newcrest* (1997) 190 CLR 513 at 561 (Toohey J); *Wurridjal* (2009) 237 CLR 309 at [456]-[460] (Kiefel J).

[43] *Mabo (No 2)* (1992) 175 CLR 1 at 48, 50-51, 53-54, 58, 63, 67-68, 70-71 (Brennan J).

[44] NLC [58]-[62] is a series of propositions culminating in a submission that the notion of radical title ceased to be relevant to questions of recognition or extinguishment of native title once interests in Crown land became wholly statutory. In so far as the NLC relies on the judgment of Gummow J in *Wik HC* (1996) 187 CLR 1 at 189, the short answer is *Fejo*, set out in paragraph [32] below, in which Gummow J was a member of the majority. For completeness, in *Wik HC*, Gummow J adopted Brennan J's conception of radical title as a postulate to support the exercise of sovereign power (at 186). His Honour's rejection of the theory of a reversion expectant being created by the grant of a Crown lease pursuant to a statutory scheme was the point where the State's case "broke down", and did not involve any wider rejection of Brennan J's analysis (at 187-189). As for the three other Justices in the majority: **(1)** Toohey J did not find that the doctrine of tenure ceased to apply to the grants of Crown lands under statute, and expressly stated that his view about a pastoral lease not creating a beneficial reversion in the Crown did not detract from the doctrine of sovereignty and radical title as articulated by Brennan J in *Mabo (No 2)* (at 127-129); **(2)** Gaudron J did not address the position at common law, and based her decision on the character of the particular grants; **(3)** Kirby J rejected the application of a reversion expectant for leases granted under the Land Acts (at 244-245). But his Honour plainly did not depart from Brennan J's analysis. To the contrary, in *Fejo* (at [103]-[104]), Kirby J explained that one of his reasons for holding that interests created in land prior to *Mabo (No 2)* cannot be disturbed was Brennan J's rationale that the Court should not destroy or contradict an "important and settled principle of the legal system".

Those submissions overlook that *Newcrest* involved an application to overrule *Teori Tau*. The Commonwealth submitted that one reason *Teori Tau* should not be overruled was that to take that step would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the Territory since 1911. As Brennan CJ recognised (and as cannot seriously be doubted), if overruling *Teori Tau* would have had that consequence, that would at least have been a "powerful consideration which tells against the reopening of *Teori Tau*".[45] That none of Toohey, Gaudron, Gummow or Kirby JJ thought that this consequence did weigh against reopening *Teori Tau* is explained solely by the passage in Gummow J's reasons at 613 upon which the Commonwealth relies. Other than that passage, the argument was unanswered. In those circumstances, the fact that the key passage occupies less than one (densely reasoned) page, and that the rights being litigated in *Newcrest* were not native title rights, is not to the point. The point is that, unless Gummow J's analysis was accepted as answering the Commonwealth's objection, a major obstacle to reopening *Teori Tau* was left completely unanswered (including by three Justices who would have reopened and overruled that decision). The key passage therefore cannot be marginalised as the respondents attempt.

26. Further, the respondents read the key passage in isolation from the judgment in which it appears, and fail to give sufficient attention to Gummow J's central role in developing the law concerning inherent defeasibility and s 51(xxxi) not just in this Court, but in the foundational judgment in *Davey*. In *Newcrest*, quite independently of the passage at 613 on which the Commonwealth relies, Gummow J discussed inherent defeasibility in deciding whether there had been an acquisition of property with respect to Newcrest's mining leases. In that context, his Honour explained that a property right may be subject to "an inherent but limited liability to impairment" in a particular way (at 634) (emphasis added), but that if the impairment that actually occurs is not an impairment of that kind then s 51(xxxi) may nevertheless be engaged. During that analysis, Gummow J cited both *Peverill* and *Davey*. This part of his Honour's judgment illustrates that rights in land can be inherently susceptible to the exercise of one power, but not another (cf GR [78](a); NLC [77]-[78]). That reflects the same kind of reasoning found in 613. That his Honour did not see inherent susceptibility as limited to statutory rights was subsequently expressly confirmed in *JT International*, when he said that "even at general law, an estate or interest in land or other property may be defeasible upon the operation of a condition subsequent in the grant, without losing its proprietary nature" (emphasis added).[46]

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[45] *Newcrest* (1997) 190 CLR 513 at 544 (Brennan CJ). See also 552 (Dawson J).
[46] *JT International v Commonwealth* (2012) 250 CLR 1 (2012) 250 CLR 1 at [104] (Gummow J) (emphasis added).

27. ***Constitutional limits*:** As to GR [70], [92]-[94] and NLC [66]-[67], it is trite that the valid exercise of the Crown's sovereign power depends upon compliance with constitutional limits. However, whether s 51(xxxi) constrains the exercise of the Commonwealth's sovereign power in this case is the very issue that is to be determined. It is circular to assume that s 51(xxxi) constrains the power to extinguish or impair native title, and then to use that assumption to support the existence of the constraint.[47]

28. ***Basis of inherent defeasibility of native title*:** A central issue in this appeal is whether native title rights are properly characterised as "inherently defeasible" to the exercise of a particular kind of sovereign power (the power of the Crown to grant interests in land or appropriate to itself unalienated land for Crown purposes), such that the exercise of that power does not involve an "acquisition of property" for the purposes of s 51(xxxi). It is the characteristics of native title that render it susceptible to extinguishment or impairment by the exercise of sovereign power of that kind. Those characteristics do not vary with the source of the power to create or assert rights in unalienated land, meaning that it can make no difference to the argument whether the sovereign power is sourced in statute or the prerogative.

29. The foundational characteristic of native title that accounts for its inherent defeasibility is that it has its source in another legal system.[48] That leads to the following propositions:

(a) *First*, native title depends upon recognition by the common law in order to have force and effect within the new legal system. The common law conferred that recognition at time of settlement, but only to the extent that native title was not inconsistent with the common law: *Mabo (No 2)* at 45; *Yarmirr* at [40], [42]. Where recognition would have given rise to inconsistency at the outset (as in *Yarmirr*, with respect to exclusive rights over the sea and seabed), recognition was withheld. Where, after settlement, the continued recognition of native title would have given rise to inconsistency, recognition was withdrawn (extinguishment). Either way, recognition by the common law is integral to the existence of native title rights as legal rights for the purposes of our legal system: ***Akiba** v Commonwealth* (2013) 250 CLR 209 at [10] (French CJ and Crennan J). As Toohey J explained in *Wik HC* (at 129):

> [N]ative title rights depend on their recognition by the common law. That recognition carries with it the power to extinguish those rights. (emphasis added)

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47 *Cunningham* (2016) 259 CLR 536 at [40] (French CJ, Kiefel and Bell JJ).

48 *Mabo (No 2)* (1992) 175 CLR 1 at 58-59 (Brennan J); *Fejo* (1998) 195 CLR 96 at [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Members of the **Yorta Yorta** Aboriginal Community v State of Victoria* (2002) 214 CLR 422 at [37], also [33], [40], [75] (Gleeson CJ, Gummow and Hayne JJ).

(b) *Secondly*, because native title has its origin in a different legal system, and is not a creature of the common law, it is recognised by the common law but not as a common law tenure: *Mabo (No 2)* at 61; *Yorta Yorta* at [75]; *Fejo* at [46].

(c) *Thirdly*, because native title has its origin in a different legal system and is not recognised as a common law tenure, the common law did not confer the protections upon native title that it confers upon rights in land granted by the Crown, namely: (i) the common law principle of non-derogation from grant; and (ii) in statute law, the presumption against derogation from grant (CS [92], [98]-[99]). These protections had the effect of constraining the Crown's power (under the prerogative and subsequently under statute) to deal with land in which there were existing rights that had their source in the sovereign's legal system.

(d) *Fourthly*, because of the previous point, native title was subject to the exercise of the Crown's sovereign power to create and assert rights in unalienated land. In the case of statutory power, in the absence of any presumption against derogation, general Crown land legislation was interpreted as empowering the Crown validly to create rights in unalienated land, irrespective of the effect on native title, subject only to compliance with any statutory requirements (CS [93]-[94]).

(e) In summary, by its very nature, and from the moment of its recognition, native title was susceptible to extinguishment or impairment by the exercise of the Crown's sovereign power to grant interests in land or appropriate to itself unalienated land for Crown purposes, whether that power was exercised pursuant to statute or the prerogative.

30. While, from the time of Federation, s 51(xxxi) has operated as a constraint on Commonwealth legislative power, it does not alter the nature or characteristics of the property rights that it protects (cf RR [169]-[170]). It therefore has no effect on the intrinsic and integral feature of native title that it is susceptible to defeasance by the exercise of the sovereign power described above. That is no doubt why, in *Mabo (No 2)* (at 68), Brennan J saw no difference in substance between the Commonwealth, States and Territories exercising "the Crown's sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes".

31. The shift from prerogative to statutory grants of land did not change the nature or characteristics of native title; nor did it alter the terms upon which native title was recognised by the common law. If it were otherwise, the recognition of native title would have allowed

existing titles to be disturbed. Plainly, however, when Brennan J cautioned in *Mabo (No 2)* (at 47) that "titles acquired under the accepted land law cannot be disturbed", his Honour was not confining that remark to titles sourced in prerogative grants (CS [57], [84]-[85], [96]).

32. The system of land law in Australia (and certainly in the Northern Territory at all material times) may be wholly statutory, but it is still based on a system of Crown grants and appropriation of unalienated land. As such, it has continued to require the exercise of the Crown's sovereign power to grant interests in land or to appropriate to itself unalienated land for the Crown's purposes; and native title continued to be inherently susceptible to the exercise of that sovereign power (although post the NTA that is no longer the case). This is well illustrated in *Fejo* (1998) 195 CLR 96, which concerned a freehold grant made pursuant to s 8 of the *Northern Territory Land Act 1872* (SA). After citing Brennan J in *Mabo (No 2)* at 63, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ noted that the "new sovereign power" was, in the case before it, exercised pursuant to statute, not prerogative powers (at [48]); and that the power to deal with waste lands in the Northern Territory was to be found wholly in statute (at [50]). Nevertheless, their Honours concluded (at [58]):

> That the grant of freehold title extinguishes rather than suspends native title rights follows from the way in which the sovereign power to create rights and interests in land was exercised … The rights created by the exercise of sovereign power being inconsistent with native title, the rights and interests that together make up that native title were necessarily at an end … Their recognition has been overtaken by the exercise of 'the power to create and to extinguish private rights and interests in land within the Sovereign's territory [citing Brennan J in *Mabo (No 2)* at 63]'. (emphasis added)

33. The same analysis applies to the Crown appropriating to itself unalienated land for Crown purposes pursuant to statute. In *Ward* (2002) 213 CLR 1 (at [219]), the plurality explained that by designating land as a reserve for a public purpose, the executive, acting pursuant to legislative authority, "thus exercised the power that was asserted at settlement by saying how the land could be used" (emphasis added). Native title was extinguished to the extent of any inconsistency.

34. ***Recognition and the NTA*:** As to NLC [56]-[57], *Wik HC* advanced the law on extinguishment, but it did not disturb any of the essential holdings in *Mabo (No 2)* about the recognition of native title. Recognition is integral to the way in which native title rights are able to exist as legal rights for the purposes of our legal system (see paragraph [29(a) above). As for s 223(1)(c) of the NTA, the statement in *Yorta Yorta* at [75]-[76] is about the content of native title rights, not the terms of recognition. What s 223(1)(c) reflects is that recognition

by the common law is integral to rights under traditional law and custom being "native title rights" for the purpose of the NTA (*Yorta Yorta* at [77]).[49] That is no different to saying that for native title to exist as an enforceable right under the new sovereign's legal system, it requires recognition by the common law. In that way, recognition at the time of settlement marked the beginning of the existence of native title for the purposes of the new sovereign's legal system (just as withdrawal of recognition marks the end of the existence of native title for the purposes of the new sovereign's legal system), notwithstanding that the rights may at all times exist under traditional law and custom (cf GR [88], [123](d); NLC [59]-[60]).

35. ***RR alternative argument*:** The Rirratjingu parties contend (RR [168]), in the alternative, that even if native title was inherently defeasible to the exercise of prerogative power, the same cannot be said of statutory power, because the colonial legislatures had power to impair both Crown tenures and native title in the same way. The Gumatj respondent makes a similar contention at GR [77], [84]-[85], [122], [123](c). That argument does not meet the Commonwealth's case, for the Commonwealth does not suggest (and it plainly is not the case) that the fact that Parliamentary supremacy means that a right is subject to legislative modification or extinguishment means that it is inherently defeasible. And, as paragraph [29] above demonstrates, it is not suggested that the reason that native title is inherently defeasible is because it can be extinguished by an exercise of legislative power.

**Any "property" can be inherently defeasible**

36. ***Inherent defeasibility and "property"*:** The Commonwealth contends that the decisions in *Chaffey* (2007) 231 CLR 651 and *Cunningham* (2016) 259 CLR 536 established that the concept of inherent defeasibility is part of the analysis of whether the alteration or extinguishment of a right of property effects an "acquisition of property" as a compound concept (CS [70], [105], [116], [118], [120], [124]). The Full Court was wrong to accept the submission of the Rirratjingu parties that *Chaffey* and *Cunningham* established that the concept only applies to the determination of whether particular rights are "property" (**CAB 119-121 [310]-[318]**). Indeed, in this Court, the Rirratjingu parties offer only faint support for the Full Court's agreement with their submission that the concept of inherent defeasibility is relevant only to the "property" limb (cf RR [139]), and make no attempt to counter the Commonwealth's analysis that *Chaffey* and *Cunningham* are to the opposite effect.

[49] See also *Ward* (2002) 213 CLR 1 at [17] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), where s 223(1)(a), (b) and (c) are identified as the "three characteristics" of native title as defined in the NTA (emphasis added).

37. ***The proposed "taxonomy" of s 51(xxxi)*:** The Rirratjingu parties' attempt (RR [12]-[50]) to state an all-embracing "taxonomy" of s 51(xxxi) is problematic, both as to: (a) the assumption that an all-embracing theory of s 51(xxxi) can usefully be attempted at all; and (b) the content of the suggested taxonomy.[50] For good reasons, the Court is generally cautious of overarching theories.

38. According to the Rirratjingu parties, s 51(xxxi) requires an analytical process which involves a prima facie characterisation, and then analysis through a framework of "displacing" features, so as to produce an ultimate characterisation of a law for the purposes of s 51(xxxi). That is a novel approach (although it is not presented as such in RR [36], [42]-[50]).[51] Within that framework, it is asserted that the concept of inherent defeasibility (albeit confined, they say, to statutory rights) is a "displacing" feature (RR [45]).[52] It is not until RR [140] that it is acknowledged that this does not reflect the current state of authority. Nor can their submissions accurately be described as merely asking the Court to "clarify the state of the law" (RR [140]), because the position they invite the Court to adopt would involve a fundamental departure from *Chaffey* and *Cunningham*. Three points may be noted.

39. *First*, it may be accepted that the first step in s 51(xxxi) analysis is to determine whether the textual requirements of the placitum are met: the law in question must authorise or effect an acquisition of property (RR [31]-[34]). If the law does not meet that threshold condition, then s 51(xxxi) is not engaged. If the law does meet that threshold condition, there remains an ultimate question as to whether the law is properly characterised as a law with respect to the acquisition of property (although that analysis does not involve any requirement to displace a prima facie characterisation) (cf RR [36]).

40. *Secondly*, the question at the first step is not whether a law authorises an acquisition of property "in a general sense" or on a "prima facie" basis (cf RR [29.1], [35], [37]-[38], [41]). The task is to identify with precision the nature of the rights, and what is said to constitute the taking of those rights. When that is done, it may become apparent that what is involved does not involve an "acquisition of property" in the necessary sense, such that this is the end

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[50] The number of steps (or stages) in their analysis, and the content of these steps, are contestable and/or materially incomplete: RR [29]-[47]. Many are also entirely irrelevant to this case. The issues for decision in this appeal are complex and significant enough without attempting a "theory of everything".

[51] RR [36] cites Mason CJ in *Mutual Pools* (1994) 179 CLR 155 at 169, but his Honour does not use the word "displaces". Its only judicial support appears to be in Kirby J's judgment in *Cunningham*.

[52] The joint judgment in *Georgiadis* (1994) 179 CLR 297 at 306 is cited at RR [45], but does not support inherent defeasibility being treated as an issue of ultimate characterisation: see [44] below.

of the inquiry (CS [113]-[116]). That may be so for reasons that include, as the joint judgment in *Cunningham* explained (at [46]), that:

> If a right or entitlement was always, of its nature, liable to variation, apart from the fact that it was created by statute, a variation later effected cannot properly be described as an acquisition of property. (emphasis added)

41. Recognition that in some cases a law that varies property rights nevertheless may not "properly be described" as an "acquisition of property" reflects the fact that, in such a case, the textual requirements of s 51(xxxi) are not met. That is, the analysis takes place at the first step. So much is illustrated by Gageler J in *Cunningham*, where his Honour explained (at [59], expressly discussing the first step) that whether a legislative alteration of a right of property takes property from one person and confers a corresponding interest in property on another person, so as to constitute an acquisition of property, turns "in part on the characteristics of the right and in part on the extent of the alteration" (emphasis added). As Gageler J went on to explain, one potential characteristic of a statutory right of property is that it may be created on terms which make it susceptible to "administrative or legislative alteration or extinguishment without acquisition"; it may be a "characteristic of the right … 'inherent at the time of its creation and integral to the property itself'" (at [66]) (emphasis added). While that is commonly a characteristic of statutory rights, the concept potentially applies to any right of property (whatever its source) that was always, of its nature, liable to variation or defeasance in the way that came to pass (CS [106]-[125]).[53]

42. *Thirdly*, the attempt at RR [37]-[41] to cast the ultimate question of characterisation as reflecting a balancing of two "competing visions" of "the relationship between private property and the State", and as producing the result that only in "exceptional cases" (RR [40]) will a law that "prima facie" involves the acquisition of property not be characterised as a law with respect to the acquisition of property, finds no support in the actual analysis in the judgments of this Court.

43. The Court need not in this case address this point at all because, for the reasons addressed immediately above, in this case the analysis properly takes place at the first step.[54] For completeness, however, the attempt to recast s 51(xxxi) analysis as involving prima facie

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[53] An example is a common law reservation in a prerogative grant of a right to resume any quantity of the land as may be required for public purposes: see, eg, *Cooper v Stuart* (1889) 14 AC 286 at 290, where the Privy Council explained that a reservation of this kind does not take effect immediately, but when put in force, "it takes effect in defeasance of the estate previously granted" (emphasis added).

[54] *Chaffey* (2007) 231 CLR 651 at [22] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Cunningham* (2016) 259 CLR 536 at [40] (French CJ, Kiefel and Bell JJ).

characterisation, to be "displaced" only in exceptional circumstances, is irreconcilable with authority. Cases recognising that the provision of just terms in some cases may be "incongruous" (eg for laws imposing taxation, penalties or forfeiture), or that no acquisition of property is affected by a law properly characterised as concerned with "the adjustment of competing rights, claims or obligations", have nothing to do with those cases being "exceptional", still less with the Court engaging in public policy balancing about whether it is desirable (on economic, moral or other grounds) that compensation be payable. Instead, as the judgments make clear, these authorities are the product of the application of ordinary principles of characterisation having regard to the subject matter and purpose of the law.[55] No case has approached the ultimate characterisation question by reference to the nature of the property rights involved.

44. ***Georgiadis*:** The Rirratjingu parties' (tendentious) formulation at RR [45] of what they call "the statutory susceptibility principle" wrongly conflates two separate propositions in the cited passage from the joint judgment of Mason CJ, Deane and Gaudron JJ in *Georgiadis* (at 306). They seemingly seize upon *Georgiadis* due to an *obiter* statement that refers to "a right which has no basis in the general law". This is said to confine the application of the inherent defeasibility principle to a "purely statutory right" (RR [127]-[129], [148]-[152]; see also GR [78](b), [81]-[83], [123](b); NLC [72]). It is also said to show that native title rights fall outside the principle, because they "have a basis in the general law" (RR [130]). The relevant discussion in *Georgiadis* occurred in the context of an explanation that the extinguishment of a vested cause of action under the general law could constitute an acquisition of property because such a cause of action was not "susceptible of modification or extinguishment". It was in that context that reference was made, by way of contrast, to statutory rights that may be susceptible to modification or extinguishment. The comparison that the Court was drawing did not call for the Court to attempt to be exhaustive. It certainly did not call for the Court to decide the broad proposition that any right that has any basis in the general law (even if only because it is recognised by the common law) can never be inherently defeasible for the purposes of s 51(xxxi), irrespective of the actual nature and characteristics of the right (cf RR [130], [150]). The Court decided no such thing.

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[55] For example, transfers of title were regarded as "subservient and incidental to or consequential upon the principal purpose and effect sought to be achieved by the law", so that the provision respecting property "had no recognisable independent character": *Mutual Pools* (1994) 179 CLR 155 at 171 (Mason CJ). See observations to similar effect by Deane and Gaudron JJ in *Mutual Pools* at 189-190, and by Gageler J in *Cunningham* (2016) 259 CLR 536 at [60].

45. ***The claimed "historical context" of inherent defeasibility*:** The Rirratjingu parties seek to explain and limit the application of the inherent defeasibility concept by reference to what is claimed to be its "proper historical context" (RR [148]). Yet the historical picture that they paint, including the "dilemma for the Court" (RR [144]) that the dawning of "the age of statutes" ([RR [142]-[143]) is said to have posed, and the impetus this is said to have given to the development of the "statutory susceptibility principle", is no more than an attempt to retrofit the authorities into a narrative that produces the answer for which they contend. That narrative bears little or no relationship to the way that constitutional principle actually develops in this Court: incrementally, as is necessary to decide actual controversies as and when they arise, paying close regard to the text and structure of the Constitution, the specific rights in issue and the legislative provisions that affect them, and where necessary by the application of analogical reasoning[56] (**CAB 122-131 [322]-[359]**; CS [108]-[125]).

46. If the assertion that the "statutory susceptibility principle was forged in the face of the specific manifestation of that general dilemma" (RR [146]) is supposed to convey anything about the actual reasoning advanced by any Justices of this Court, it is plainly incorrect. If it is advanced simply as an academic rationalisation of the course of past authority (or, more precisely, authority up to 2000, when the article upon which they rely was written) then it is of little assistance in deciding the issue that falls for decision in this appeal concerning the relationship between s 51(xxxi) and native title. The safer guide for that purpose is the actual reasoning that has addressed inherent defeasibility in the context of s 51(xxxi). That reasoning directs attention to the characteristics of the property in question and to whether, from the time of its creation, it was susceptible to variation or defeasance of the specific kind that occurred.

47. Once a constitutional principle has been identified, that principle should be applied in a non-arbitrary way, with like cases decided alike. The proper question therefore becomes: is there a relevant difference between an inherently defeasible statutory right and an inherently

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[56] As NLC [76] points out, the constitutional concept of inherent defeasibility was not devised *ab initio* by Justices in the 1990s. Those Justices drew on the earlier decision in *Allpike v Commonwealth* (1948) 77 CLR 62, a case that might be seen as the beginning of the development of the constitutional concept: see *Peverill* (1994) 179 CLR 226 at 256 (Toohey J), 263 (McHugh J); *WMC* (1998) 194 CLR 1at [135]-[136] (McHugh). Note also that, on a much earlier occasion, Kitto J apprehended that older cases on the defeasibility of common law rights were capable of application by analogy to a valid condition on a statutory right, which condition, if enlivened, might cause the right to be forfeited: *Television Corporation Ltd v Commonwealth* (1963) 109 CLR 59 at 70. The true position is that the "inherent defeasibility" concept was gradually extended to the constitutional context by operation of analogical reasoning over a longer period than contemplated by the Rirratjingu parties. This history reinforces, rather than undermines, the basic identity or commonality of defeasible statutory and non-statutory rights.

defeasible non-statutory right? The answer is that there is not, because the relevant point for the purposes of s 51(xxxi) analysis is that, where a right is defeasible to a contingency, the occurrence of the contingency is not an acquisition of property (cf RR [153]-[154]). It would be arbitrary to apply that consequence of defeasibility to a statutory right but not to a non-statutory right.

48. The Rirratjingu parties seek to avoid this result by claiming that the relevant quality is not merely defeasibility, but also the statutory basis of a given right (RR [128]-[129], [153]-[154]). But that cannot be correct because, as the plurality said in *Cunningham* (see paragraph [40] above), inherent defeasibility is a quality that must exist apart from the statutory nature of a right (CS [121]-[122]). Otherwise, all statutory rights would be inherently defeasible.

49. ***No relief from a reciprocal burden*:** The respondents all press a submission that, where the extinguishment or impairment of native title relieves a reciprocal burden on the Crown's radical title, that is an acquisition of property (GR [74], [78](a), [100], [120](b), [123](a); NLC [42], [51], [78], [80]-[82], [90]; RR [164.2]). However, as *Chaffey* and *Cunningham* make clear, that is not the correct analysis when the property rights in question were always subject to a contingency that came to pass. In that situation, there is no acquisition of property within the meaning of s 51(xxxi) because the native title rights in issue were never of the amplitude asserted: those rights were always subject to the exercise of the Crown's sovereign power to grant interests in land or appropriate unalienated land to itself for Crown purposes.

## GROUND 3: MINERALS RESERVATIONS IN PASTORAL LEASE

### Approach to construction

50. Contra to GR [132]-[135], [137] and [155] and NLC [118], the Commonwealth approaches Ground 3 applying the orthodox criterion for determining whether a legislative or executive act should be taken to have extinguished native title. That criterion turns on whether there is inconsistency between the rights granted and the propounded native title rights and interests. Application of that criterion involves "an objective inquiry which requires identification and comparison between the two sets of rights".[57] NLC [118] confuses the normative conclusion that may result from that comparison (ie extinguishment) with the anterior enquiry of identification

[57] *Queensland v* ***Congoo*** (2015) 256 CLR 239 at [34] (French CJ and Keane J), quoting *Ward* (2002) 213 CLR 1 at [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

of the rights conferred or asserted by the Crown.[58] As *Congoo* demonstrates, the inquiry as to inconsistency begins with the construction of the relevant statute, which is properly informed by its purpose.[59] That purpose is ascertained applying the ordinary rules of construction,[60] meaning it is necessary to have regard to what the legislation objectively sought to achieve and to the surrounding legal context (which, here, includes the other powers available to the Crown).

51. GR [133]-[135], [137] mischaracterise the Commonwealth's submissions. The Commonwealth contends that the reservation and its constating legislation should be construed by reference to the mischief to which it was directed at the time of enactment (not to any current objects that might be hypothesised having regard to subsequent legal developments). Once the rights that were created are identified, their legal effects are determined against the fact, now known, that the Crown had a radical title.[61]

52. As it happens, the First Respondent and NLC do the very thing they wrongly accuse the Commonwealth of doing: they seek to construe an historical statute and grant with the benefit of hindsight. Specifically, they seek to call in aid the holding in *Commonwealth v* ***Anderson*** (1960) 105 CLR 303 that the Crown could bring an action for ejectment (GR [149]-[155]; NLC [119], [124]).[62] Yet the statute and grant must be construed in the context of the mischief to which they were directed at the time they were made (in 1899 and 1903 respectively). At that time, there was real uncertainty as to whether the Crown could bring an action for ejectment, and that uncertainty was not dispelled until the decision in *Anderson* in 1960.[63] It is therefore not open to identify the mischief to which the statute and grant were directed on the footing that an action for ejectment was available to the Crown (cf NLC [129]-[131]).

**Historical and statutory context**

53. The suggestion that the Crown had other means (unrelated to the reservation of minerals) to deal with unlawful mining in 1899 and 1903 is wrong (cf NLC [119]-[121]). The summary of

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58 *Congoo* (2015) 256 CLR 239 at [35] (French CJ and Keane J).

59 *Congoo* (2015) 256 CLR 239 at [35] (French CJ and Keane J).

60 *Congoo* (2015) 256 CLR 239 at [36] (French CJ and Keane J).

61 *NSWALC* (2016) 260 CLR 232 at [112] (Gageler J).

62 It is also noted that only two of the six Justices who agreed in this result found it was because the *Common Law Procedure Act 1852* brought about the change (Dixon CJ, with whom McTiernan J agreed). Windeyer J found the position to have changed at an earlier time, and found the Act did not displace that position (at 323-324). Fullagar, Kitto and Menzies JJ did not decide on this basis.

63 *Wik HC* (1996) 187 CLR 1 at 191 (Gummow J); *Anderson* (1960) 105 CLR 303 at 315, where Kitto J cites cases in 1865 and 1888 which assumed intrusion and not ejectment was the remedy available to the Crown at those times; and at 321 (Windeyer J), noting that the edition of *Halsbury's Laws of England* in force as at 1960 still stated it was not available to the Crown. See also Robertson (ed), *The Law and Practice of Civil Proceedings, by and Against the Crown and Departments of the Government: With Numerous Forms and Precedents* (Stevens and Sons, 1908) at 2, 181, 183-184, 757-759.

provisions at NLC [103] and [120] should be read with caution.[64] In particular, s 106 of the 1890 Crown Lands Act does not provide a penalty for unauthorised taking of ores *simpliciter* (just ores containing metals) (cf NLC [103](1)); and the *Northern Territory Mining Act 1903* (SA) (including s 138) was not in force at the time the 1899 Land Act was made or PL 2229 was granted (cf NLC [103](2), [120]). Similarly, contrary to GR [147], the statutory provision to cancel a pastoral lease for breach of conditions (etc) only ended a pastoral lessee's right to occupy the land for pastoral purposes. It did not provide a legal mechanism to prevent, or obtain damages for, unlawful mining by the pastoral lessee or provide any mechanism with respect to unlawful mining by any other person.

54. NLC [123]-[124] misunderstands what was necessary to sustain an information for intrusion by the Crown. Radical title was not sufficient to found an information for intrusion, either by record or office found (cf NLC [124]). To avoid the more onerous office found procedure, a record demonstrating the Crown's title was required (here, the grant). For either kind of information, the Crown needed a right to exclusive possession (for the action could be defeated by a defendant showing a concurrent legal title to possession): see CS [137]. Justice Gageler's reference in *NSWALC*[65] to the "rights of ownership … in the Crown" was, in context, clearly a reference to the right to exclusive possession necessary to found the action for intrusion (cf NLC [123]).[66]

**Function of minerals reservation**

55. ***Distinction between exception and reservation:*** GR [136], [138]-[142] and NLC [99]-[100], [102], [112]-[117] appear to misunderstand the distinction between an exception and a reservation. The cases cited by Windeyer J in *Wade* (1969) 121 CLR 177 at 194 identify, on the one hand, an exception as preventing a physical part, that is already in existence (in esse), of the "thing" being granted ever passing to the grantee – it severs that part from the "thing" before the grant.[67] By contrast, a reservation results in the whole "thing" passing to the grantee and creates a new right for the grantor that did not exist before the grant and which may never come into operation.[68]

56. In the case of minerals, the "thing" is the land, of which minerals form a physical part and are

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64 See also NLC [54], fn 81: s 6 of the 1890 Crown Lands Act did not provide Crown land could "not otherwise" be dealt with other than in accordance with its terms.

65 (2016) 260 CLR 232 at [112] (Gageler J).

66 The suggestion at NLC [125] that it can draw assistance from *NSWALC* at [136] (Gageler J) is also misplaced – the *Government House Case* (1913) 16 CLR 404 did not involve a reservation or exception, and the analogy sought to be drawn solely related to the source of power available to the executive government of the State.

67 *Doe d. Douglas v Lock* (1843) 2 Ad & E 705 at [743]-[744].

68 *McGrath v Williams* (1912) 12 SR (NSW) 477 at 481 (Simpson CJ in Eq).

actually in existence at the time of the grant (in esse). An exception severs the title of the minerals from the title of the land on the grant, so that the minerals never pass to the grantee.[69] In contrast, a reservation (in its technical sense) would result in the land (and all minerals that form part of it) passing to the grantee with just a right (in the nature of a profit-a-prendre) in the grantor to take any minerals at some indeterminate time in the future (property only passing to the grantor for those minerals taken at the time of their taking).[70]

57. What Windeyer J confirmed in *Wade* was that, in Australia, regardless of whether the term "reservation" is used, a reservation of minerals[71] is strictly an exception. The Commonwealth is not contending for a different understanding of the use of minerals reservations in Australia (cf NLC [112]-[116]) – they are a technical exception, severing the title of the minerals from the land before the grant or demise of the land.[72] This is the first function of a minerals reservation contended by the Commonwealth (CS [141]). That does not deny the second function for which the Commonwealth contends.

58. Justice Windeyer did not hold that every reservation (of any kind) is an exception. Further, neither *Wade* nor ***Yandama*** *Pastoral Company v Mundi Mundi Pastoral Company Ltd* (1925) 36 CLR 340 is authority for the proposition that a reservation in the form of a future contingency to resume land (cf NLC [99]-[100]), or in the form considered in *Yandama* (cf GR [138]), is a holding back or is otherwise the same as a minerals reservation. Indeed, the reservation in *Yandama* was solely a reservation of the "rights of crossing the said lands": it did not purport to "reserve" any tangible part of the land or to take any part of the land (whether immediately or by contingency in the future). Both types of reservations are so starkly different to the minerals reservation under consideration in this case, and to mineral reservations in general, that any analogies or submissions that rely on such reservations are of no assistance.

59. Further, contra GR [141]-[142], the authorities explicitly hold that, at common law, an express liberty of access to take minerals (and do various things for the purposes of that taking), that follows an exception or reservation of minerals using the conjunction "with" or "together with", confers rights on the grantor that are in addition to (and does not limit) any rights that may be implied as part of the exception of minerals.[73] This is an additional, separate right to the exception

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[69] *Brown* (1847) Legge 312 at 323.

[70] *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 483-484; *Bayview Properties Pty Ltd v Attorney-General for Victoria* [1960] VR 214 at 216.

[71] As distinct from a reservation of a liberty to search (etc) unaccompanied by a reservation of minerals – this would be a reservation in its technical sense: *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 483-484.

[72] See also *Wik HC* (1996) 187 CLR 1 at 91, fn 362 (Brennan CJ), 200-201 (Gummow J).

[73] *The Earl of Cardigan v Armitage* (1823) 107 ER 356 at 362.

of minerals, because it permits the grantor to access and do things on the land of the grantee. That is, such language does not define the rights asserted by the exception of minerals, but rather enhances the ability of the grantor to take the excepted minerals (see CS [153]-[154]).

60. It is to this additional right that the words "reservation" and "reserving" in, respectively, Schedule A of the 1899 Land Act and the reservation is directed, in recognition that this right cannot be an exception, for it is an access right over the "thing" (the land, without the minerals) that is wholly granted to the lessee (cf GR [145]). As such, that this additional right encompasses persons other than the Crown who are "authorised" does not limit the construction of the exception of minerals or its exclusive vesting in the Crown – it merely recognises that the Crown may authorise others to take its minerals (cf GR [142], [145], [156]).

61. ***Relevance of other reservations*:** As to NLC [105]-[111], *first*, the analysis in *Ward* was directed to the effect of rights granted to a pastoral lessee after legislative vesting of minerals in the Crown (cf NLC [106]). *Secondly*, NLC is inconsistent with its use of the reservation in favour of Aboriginal people, saying it should be used in the assessment of the effect on native title rights (NLC [107]) but subsequently say it "does not define or confine" native title rights (NLC [110]). There is no inconsistency between the exception of minerals involving an assertion of exclusive possession and the reservation in favour of Aboriginal people in PL 2229, because that reservation does not permit or otherwise assume use of the minerals (cf NLC [107], [108]). Finally, the arguments rejected in *Wik* were about the reversionary interest of the Crown and had nothing to do with reservations to the Crown (cf NLC [107]).

**Extinguishing effect**

62. The submission at NLC [109], that there is no extinguishment by the minerals reservation because the native title right claimed is a generally expressed non-exclusive right to take resources, should be put aside. The submission was not made by the NLC parties in the court below with respect to the minerals reservation.[74] If it had been, it would inevitably have met the same fate as their submission that the vesting of property of minerals in the Crown by s 107 was not inconsistent with the claimed native title right (**CAB 163-164 [486]**). That is because, in each case, the right asserted by the Commonwealth is the same (full beneficial ownership of minerals), and the relevant claimed native title right is the same. The analysis of inconsistency between those two rights is unaffected by the mechanism by which the Commonwealth's right is created. In any event, the submission at NLC [92] in relation to the effect of s 107 is based on a false

[74] cf s 107 of the 1939 Ordinance, for which the NLC reserved its position to take a position contrary to the pleaded position in the Statement of Claim, as to which see NLC [92].

premise: the analysis in *Ward* of the effect of the equivalent Western Australian provision did not turn on a claimed native title right "to control the use and enjoyment of resources by others". Rather, an array of claimed native title rights were potentially relevant, including "the right to use and enjoy resources", but the creation of full beneficial ownership of minerals in the Crown extinguished "any native title that may have existed in relation to minerals": *Ward* at [376], [377], [383]. Put simply, the common law could not recognise a native title right to take property that belongs to another. The NLC parties cannot seriously contend to the contrary.[75]

63. All this Court is called upon to decide with respect to separate question 2(a) is whether the vesting by s 107 of the 1939 Ordinance had no effect on native title in the claim area as any native title right in relation to minerals in the claim area (if established) had already been extinguished (**CAB 18**). As NLC [109] acknowledges, no party contends that the claimed native title right to take natural resources was affected to any greater extent.

64. Finally, neither the Court in *Ward* nor Drummond J in *Wik*[76] held the declaration or vesting of property in minerals (by provisions equivalent to s 107 of the 1939 Ordinance in Western Australian and Queensland) was the only means by which the Crown could convert its radical title in minerals to full dominion (cf NLC [127]-[128]). The plurality in *Ward* at [384] was speaking of the situation after the legislative vesting – the Court was not called upon to consider the position before such vesting (cf NLC [127]). Further, Drummond J explicitly did find that reservation of certain minerals had vested property of those minerals in the Crown such that the subsequent legislative vesting had no further effect but merely confirmed the Crown's ownership (CS [146]; cf NLC [128]). This finding does equate the effect of the declaration of property provision and the reservation of minerals and thus supports it extinguishing any native title rights in relation to minerals (cf NLC [127]-[128]).

Dated: 1 July 2024

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[75] The statements in *Akiba* cited in NLC [109], fn 204, do not assist. The Court was there dealing with the effect on a native title right "to take for any purpose resources in the native title areas" of a regulatory regime that imposed a conditional prohibition on taking fish for commercial purposes. Nothing in *Akiba* speaks to the situation in which ownership of a resource is vested in another.

[76] (1996) 63 FCR 450.

**IN THE HIGH COURT OF AUSTRALIA** **No D5 of 2023**
**DARWIN REGISTRY**

## 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