HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D5/2023

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Appellant

and

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

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (THIRTY-FOURTH RESPONDENT/INTERVENER)

Document No: 16249961

PART I: Internet publication

1. This submission is in a form suitable for publication on the internet.

PART II: Basis of intervention

1. The Attorney-General for the State of **Queensland** intervened in the proceedings below pursuant to s 78A of the *Judiciary Act 1903* (Cth) and is named as the Thirty Fourth Respondent in this appeal.

PART III: Reasons why leave to intervene should be granted

2. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

3. Queensland supports the Appellant on Grounds 2 and 3: Notice of Appeal (**CAB 182**) in respect of the following issues:

   (a) whether s 51(xxxi) of the Constitution applies to the extinguishment of the claimed native title at issue in this case: Ground 2: Notice of Appeal (**CAB 182**); and

   (b) whether the reservation of minerals from the grant of the pastoral lease created rights of ownership in respect of the minerals in the Crown: Ground 3: Notice of Appeal (**CAB 182**).

4. Queensland does not make submissions in respect of Ground 1: Notice of Appeal (**CAB 182**).

STATEMENT OF ARGUMENT

Ground 2: Susceptibility to Extinguishment

5. At the heart of this issue is the question of the scope of the sovereign's power to grant, or reserve unto itself, rights and interests in land where native title has been recognised to exist by the common law.

6. Put broadly, the question here is whether any extinguishment or impairment of the claimed native title by the relevant acts relied upon, is capable of being characterised as an acquisition of property of the kind referred to in s 51(xxxi) of the Constitution.

7. On the Appellant's argument there are two possible answers in respect of Ground 2.

8. The *first* is, it does not arise in this matter if the Appellant is correct in respect of Ground 1 and *Teori Tau* remains the law. Queensland takes no position in respect of Ground 1.

9. The *second* is that the Appellant is correct that s 51(xxxi) does not apply in respect of the relevant acts. Queensland supports the Appellant on Ground 2.

10. If, contrary to the Appellant's arguments, s51(xxxi) is capable of applying to the extinguishment or impairment, at common law, of native title rights and interests by the relevant acts, then that raises the scope and nature of the Crown's power (in right of the Commonwealth) to extinguish native title (or, put another way, to withdraw recognition of that native title): see *Akiba v Commonwealth* (2013) 250 CLR 209, [10] per French CJ and Crennan J; *Queensland v Congoo* (2015) 256 CLR 239, [31] per French CJ and Keane J; 291, [129]-[130] per Bell J.

11. The Full Court's conclusion is limited to finding that s 51(xxxi) conditions the Crown's power to withdraw recognition of native title, in a way that it was not conditioned before 1901 so that it applies only in respect of the Commonwealth. It does not apply to those instances where the States act or embody the right of the Crown. See Full Court at **CAB 149 [470].**

12. While that outcome is confined, it is predicated on s 51(xxxi) being a limitation on the 'exercise of federal legislative power affecting proprietary rights' **CAB 149 [470]** and a conclusion that, as with many other proprietary rights, native title is defeasible (**CAB 156 [458]**).

13. The fact a right may be defeasible or that extinguishment of native title does not extinguish traditional laws and customs is not to the point (cf **CAB 156 [459]**). The Full Court's analysis does not engage with the conditions of the common law's recognition of native title (being a bundle of rights and interests). Those conditions include the power of the Crown (in any of its capacities) to withdraw recognition when

the Crown exercises its radical title to grant interests to others or take a right unto itself.

14. Native title is not a tenure; it is not an interest held of the Crown, mediately or immediately. It is derived solely from the traditional laws and customs of the indigenous peoples.

15. Although native title was recognised by the common law system of land law brought to Australia by the settlers (to the extent that it was not inconsistent with the basic doctrines of that system) it was not, and did not become, part of the introduced land law. It was then, and remains now, *sui generis*. At common law, the creation of a latter (inconsistent) interest by the Crown is always sufficient to bring the native title rights to an end.

16. The Crown always had the right to grant interests in land or to reserve rights to itself in that land (so long as it had not demised or alienated the land to someone else).

17. That right was not curtailed by existing native title rights and interests. Rather, the Crown's right and the native title rights and interests co-existed *until such time as the Crown exercised its right* in a way that was inconsistent with the native title rights. Once it did so, the native title was extinguished (or no longer recognised) to the extent of the inconsistency. The act of the grant or reservation was sufficient to extinguish (or withdraw recognition of) the native title rights and interests at common law. It is that limitation inherent in native title by virtue of the conditions of its recognition by the common law that removes it from being within the scope of a s 51(xxxi) 'acquisition of property'.

18. Whilst the existence of native title has been described as a 'burden' on the Crown's title, care must be taken not to allow that description to mislead or colour. The effect of the existence of native title is such that the Crown does not, upon the acquisition of sovereignty, become the sole and ultimate owner. Rather, it becomes the sovereign with the right to full dominion when, and to the extent that, it grants or reserves interests in the land. The native title is no burden to that right.

19. With those additional submissions, Queensland adopts paragraphs [57] to [129] of Appellant's submissions filed on 28 March 2024.

Ground 3: Reservation of Minerals in Pastoral Lease

20. Queensland supports the position of the Appellant on Ground 3 as to the effect of the reservation of minerals in the pastoral lease.

21. There is no paradox between a mineral reservation conferring ownership of minerals to the Crown and the conclusion that a pastoral lease and non-exclusive native title rights and interests may co-exist (cf **CAB 67 [108]**).

22. The effect of mineral reservations from a grant of fee simple made in accordance with s 58 of the *Mining Act 1898* (Qld) (which required grants made after 1 March 1899 to contain a reservation to the Crown of copper, tin, opal and antimony) was considered by Drummond J in *Wik*[1] to have conferred ownership of those minerals on the Crown; this ownership was confirmed by the legislative declaration of Crown ownership of the minerals in s 6 of the *Mining on Private Land Act 1909* (Qld). This finding was not subject to appeal in *Wik*. Despite being the subject of submission by the Northern Territory below, the Full Court did not address or consider Drummond J's judgment in *Wik*. Instead, the Full Court relied on Gummow J's characterisation of the minerals reservation in the High Court in *Wik* at 200-201 in circumstances where there was no issue before the Court that the minerals were not beneficially held by the Crown (**CAB 67 [107]**). *Ward* also found at [383]-[385] that by the terms of applicable State legislation, minerals were wholly owned by the Crown.

23. The fact that a pastoral lessee is not conferred with a right of exclusive possession in the land so that non-exclusive native title rights and interests are not wholly extinguished is not inconsistent with, or paradoxical from, a conclusion that the Crown is the owner of minerals in that land (which is what both *Wik* and *Ward* held).

24. The conclusion of the Full Court that the minerals reservation in the 1903 pastoral lease was not an assertion by the Crown of a right of exclusive possession in the minerals which extinguished any native title mineral rights departs from the judgment of Drummond J in *Wik* in 1996, without consideration or reason.

25. With those additional submissions Queensland adopts paragraphs [130] to [157] of the Appellant's submissions filed on 28 March 2024.

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1 (1996) 63 FCR 450 at 496. See also 500-503.

PART V: Time estimate

26. It is estimated that Queensland will require no more than 10 minutes for the presentation of oral argument.

Dated 15 April 2024.

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Raelene Webb KC
Counsel for the Attorney-General
for Queensland
Telephone: 08 6244 5125
Facsimile: --
Email: rwebb@mchambers.com.au

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Cobey Taggart
Counsel for the Attorney-General
for Queensland
Telephone: 08 9220 0408
Facsimile: 08 9325 9111
Email: ctaggart@francisburt.com.au

IN THE HIGH COURT OF AUSTRALIA **No. D5/2023**

DARWIN REGISTRY

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Applicant

and

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

ANNEXURE TO SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Statutes and Statutory Instruments referred to in the submissions

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

No.	Description	Version	Provisions
Constitutional provisions			
1.	Commonwealth *Constitution*	Current Compilation No. 6	S 51(xxxi)
Statutes			
2.	Nil		

Schedule

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

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 (CAN 008 589 099)
Thirtieth Respondent

TELSTRA CORPORATION LIMITED (ABN 33 051775 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