HIGH COURT OF AUSTRALIA

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Details of Filing

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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

PART I: CERTIFICATION

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

PART II: ISSUES

2. On 31 December 1910, being the day before the commencement of the *Northern Territory Acceptance Act 1910* (Cth) (**NT Acceptance Act**), the Governor of the State of South Australia, in administering land in the Northern Territory in conformity with the *Northern Territory Crown Lands Act 1890* (SA) (**1890 Crown Lands Act**), could validly grant interests in land and dedicate or reserve unalienated land for the Crown's purposes, irrespective of the existence of, or effect on, native title. The effect of the Full Federal Court's decision is that, on the very next day, whilst exercising the same powers that were formerly vested in the Governor of South Australia under the same Act,[1] the Governor-General could not validly do so, if the exercise of those powers would have extinguished any native title, because the 1890 Crown Lands Act did not provide compensation to the holders of the affected native title.

3. If the Full Court is correct, then for almost seven decades a vast but indeterminate number of grants of interests in land in the Territory would have been invalid. Further, upon the validation of those grants by the *Native Title Act 1993* (Cth) (**NTA**), the Commonwealth would have become liable to pay compensation of a vast but presently unquantifiable amount (including interest, potentially going back to 1911). In ***Newcrest** Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 613, Gummow J explained why such grants would *not* be invalid, in an analysis that is entirely consistent with the explanation in ***Mabo (No 2)*** (1992) 175 CLR 1 as to the basis upon which the common law could recognise native title without fracturing skeletal principles of our legal system. The Commonwealth embraces Gummow J's explanation, but the Full Federal Court rejected it. Unless Gummow J's analysis is reaffirmed, this case will have enormous financial ramifications for the Commonwealth of a kind that, in themselves, would point strongly against re-opening past authorities to the effect that a law that is supported only by s 122 of the Constitution is not subject to s 51(xxxi). Further, the Full Court's reasoning would create arbitrary distinctions between native title holders in the Territories and those in other parts of Australia.

[1] By virtue of s 7 of the NT Acceptance Act, a law made pursuant to s 122 of the Constitution.

4. The specific issues in this appeal concern the validity of legislative and executive acts by the Commonwealth under Ordinances made between 1911 and 1978 pursuant to the *Northern Territory (Administration) Act 1910* (Cth) (**NT Administration Act**). There are three issues: (1) Did the just terms requirement in s 51(xxxi) of the Constitution not apply to the Ordinance-making power[2] in the NT Administration Act because it was a law that was supported by s 122 of the Constitution and by no other head of power? (2) Did the Ordinance-making power fall outside s 51(xxxi) because the susceptibility of native title to extinguishment or impairment by an otherwise valid exercise of the Crown's radical title was something inherent in, and integral to, native title as recognised by the common law, and that radical title was exercised by (a) vesting of property in the Crown of all unalienated minerals in the Northern Territory by s 107 of the *Mining Ordinance 1939* (NT) (**1939 Ordinance**); and (b) granting special mineral leases by the 1939 Ordinance and/or the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT) (**1968 Ordinance**)? (3) Did the reservation of "all minerals" in favour of the Crown in a grant of a pastoral lease by South Australia in 1903 create in the Crown a right of exclusive possession in the minerals that extinguished any native title rights that would otherwise have existed in respect of those minerals?

PART III: SECTION 78B NOTICE

5. Notice has been given under s 78B of the *Judiciary Act 1903* (Cth): **CAB 187-196**.

PART IV: CITATIONS

6. The citation for the decision below is *Yunupingu v Commonwealth* (2023) 298 FCR 160; [2023] FCAFC 76: **CAB 22-169**.

PART V: FACTS

7. This is an appeal in relation to answers given by the Full Court to separate questions heard in a **compensation application** made under s 61 of the NTA on behalf of the Gumatj Clan or Estate Group of the Yolgnu People (**Gumatj respondent**). The procedural history is set out in the Commonwealth's **chronology** at items 19-26. The compensation application seeks payment of compensation from the Commonwealth for the alleged effects on native title of particular executive and legislative acts done between 1911 and 1978 on the Gove Peninsula in north-eastern Arnhem Land of the Northern Territory (the **claim area**) (**CAB 36 [1], [2]**).

[2] Relevantly, s 21 from 1931 to 1947 and s 4U from 1947 to 1978.

8. Between 1886 and 1903, four pastoral leases were granted, each covering at least the whole of the claim area (**CAB 57-58 [76]-[77]**). By reason of the grant of the first pastoral lease in 1886, the Gumatj respondent accepts that any exclusive native title rights were extinguished such that, thereafter, the claimants held at most non-exclusive native title rights in respect of the claim area (including a right to access, take and use for any purpose the resources of the claim area, such resources to include those below, on or above the surface of the claim area, such as minerals) (**CAB 48 [43], 65 [104]**).

9. The fourth of those pastoral leases was Pastoral Lease No. 2229, which was granted on 21 September 1903 (**1903 Lease**) pursuant to the *Northern Territory Land Act 1899* (SA) (**1899 Land Act**) (**BFM 155-160**). The Commonwealth contends (ground 3) that, prior to any of the asserted compensable acts, the reservation of minerals contained in the 1903 Lease validly extinguished any subsisting native title rights so far as they related to minerals (**native title mineral rights**) (**CAB 48 [44], 58 [78]**).

10. Section 107 of the 1939 Ordinance, made by the Governor-General pursuant to s 21 of the NT Administration Act,[3] deemed all minerals in the Territory to be the property of the Crown, save that the ownership of gold and minerals in land granted in fee simple would depend upon the terms of any reservation of gold or other minerals (**CAB 46 [31]-[32]**). The Gumatj respondent asserts an entitlement to compensation under s 17 of the NTA on the basis that s 107 was a "past act" because (1) if valid, it would have extinguished the claimants' native title mineral rights and no other rights; and (2) it was invalid as it purported to acquire property on other than just terms within the meaning of s 51(xxxi) of the Constitution (**CAB 50 [50]**). Whether s 51(xxxi) could apply to s 21 of the NT Administration Act to the extent that it supported s 107 of the 1939 Ordinance is the subject of grounds 1 and 2.[4]

11. Between 1958 and 1969, five special mineral leases were granted over parts of the claim area pursuant to the 1939 Ordinance and (as to the fifth lease) under both the 1939 and 1968 Ordinances (**CAB 47 [37]-[38]**). The Gumatj respondent contends that these special mineral leases, if valid, would have "diminished and impaired" their surviving native title

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[3] See items 9-11 and 13 of the Commonwealth's chronology for the history of the Ordinance-making power.

[4] The effect of s 3 of the *Minerals (Acquisition) Ordinance 1953* (NT) (**1953 Ordinance**) (**CAB 46-47 [34]-[35]**) does not arise for consideration in this appeal (relevant only to ground 1) as the Gumatj respondent and the Commonwealth agree that s 107 of the 1939 Ordinance was effective to vest in the Commonwealth title to *all* minerals (not just a subset) on or under the claim area (**BFM 39 [201c], 42 [217]-[218]**; cf **CAB 165 [490]-[492]**).

rights, constituting acquisitions of property other than on just terms, and thus are compensable as validated past acts (**CAB 47 [39], 51-52 [54]**). These leases are likewise the subject of both grounds 1 and 2.

PART VI: ARGUMENT

GROUND 1: SECTION 122 OF THE CONSTITUTION

Summary

12. The constitutional question that is at the heart of Ground 1 is: is a law of the Commonwealth Parliament that has no constitutional support other than s 122 of the Constitution subject to the constraints of s 51(xxxi)?

13. The unanimous decision in ***Teori Tau*** *v Commonwealth* (1969) 119 CLR 564 at 571 answered this question: "no". This remains the present state of the law. This is because the statute in issue in *Newcrest* was also supported by a head of power in s 51, such that neither the reasoning nor result in *Newcrest* supplied an answer to the question just set out. Further, the application of the orthodox rules that govern the ascertainment of the *ratio* of a case indicates that ***Wurridjal*** *v Commonwealth* (2009) 237 CLR 309 did not overturn *Teori Tau* (cf **CAB 112 [278]**).

14. That said, given the stark differences of opinion expressed in the three authorities mentioned in the previous paragraph, and particularly as ground 1 concerns a law of a different character to those dealt with in those authorities, in this Court the answer to the above question is more appropriately resolved by reference to constitutional principle than by arguments about the *ratio* of those cases.

15. Approaching the question as one of constitutional principle, the starting point is an even more fundamental question of long standing: what are the principles that govern how s 122 interacts with the other provisions in the Constitution? Accepting that s 122 is not "disjoined from the rest of the Constitution"[5] does not supply the answer to that question. The fundamental principle, which has been recognised since ***Lamshed*** *v Lake* (1958) 99 CLR 132, is that whether the plenary power conferred by s 122 is "controlled in any respect" by other parts of the Constitution is a matter of construction, to be "resolved upon a consideration of the text and of the purpose of the Constitution as a whole".[6] There is no

[5] *Lamshed v Lake* (1958) 99 CLR 132 at 145 (Dixon CJ).
[6] *Spratt v Hermes* (1965) 114 CLR 226 at 241-242 (Barwick CJ).

other starting premise or default assumption.

16. A similar approach is appropriate when determining whether s 51(xxxi) abstracts from other grants of power in s 51 (in the absence of contrary indication).[7] In both cases, determining whether or how s 122 or s 51(xxxi) intersect with other provisions of the Constitution requires the application of orthodox principles for the interpretation of the Constitution: each provision should be given as "full and flexible an operation as will cover the objects it was designed to effect",[8] subject to it being confined within the scope of the particular power and to it not undermining the objects of, or the capacity of Parliament to exercise, another power or constitutional doctrine.[9]

10 17. Applying those principles, the scope of s 51(xxxi) does not extend to laws solely supported by s 122 because the text and context of s 51(xxxi) shows it applies only to laws made by the Commonwealth *qua* the Commonwealth, not the Commonwealth *qua* a territory. That is because the role of s 51(xxxi) is to empower and constrain the central legislature in its capacity as a legislature of the nation as a whole. When it acts solely as the legislature for a territory, s 51(xxxi) has no role.

18. That is the result achieved by *Newcrest*. It should be maintained as an explanation of the relationship between s 122 and s 51(xxxi) that achieves parity across the nation:[10] for laws enacted by the Commonwealth for the nation as a whole, persons in States and Territories alike are entitled to just terms; for laws enacted for the government of the local community
20 (whether it be by a State, or the relevant law-maker for a Territory), whether just terms should be provided (and what constitutes just terms) is a matter that the Constitution leaves to the judgment of the relevant legislature.

19. The breadth and flexibility required by the text and context of s 122 would be undermined by the application of s 51(xxxi) to laws solely supported by s 122. In that regard, it is important to recall that s 122 does not operate only with respect to the modern-day Northern Territory or Australian Capital Territory: it must be construed to endure for all periods and to apply to all territories that may come under the Commonwealth's control

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7 ***Mutual Pools*** *& Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 169 (Mason CJ), 186 (Deane and Gaudron JJ); *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

8 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371 (Dixon CJ).

9 *Mutual Pools* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ), 180 (Brennan J).

10 Cf *Newcrest* (1997) 190 CLR 513 at 654 (Kirby J); *Wurridjal* (2009) 237 CLR 309 at [79] (French CJ).

"of varying size and importance which are at different stages of political and economic development".[11] If the local governance of a territory, such as through ordinances made under the authority of s 122, were invariably constrained by the requirement to provide just terms, the relevant law-maker would be in an inferior position to their counterparts in the States in the exercise of the same type of powers. They would not have, and could not be given, the same flexibility to decide how to address challenges that may be encountered in the administration of diverse territories that may come under the control of the Commonwealth.

Relevant features of the impugned laws

20. The asserted compensable acts the subject of the separate questions involved either legislative acts directly vesting property in minerals in the Crown, or executive acts involving the grant of mineral leases. These acts all took place between 1939 and 1969, before the 1977 amendments to the Constitution engaging electors in territories[12] and before self-government in 1978, when a separate legislative body was established to exercise a distinct legislative power in the Northern Territory.[13] They were therefore acts occurring at an early stage of the development of the Northern Territory as a polity, when the Commonwealth had direct responsibility for the government of the Northern Territory.[14]

21. The acts were effected or authorised by Ordinances that provided for the regulation of mining solely within the Northern Territory. Those Ordinances have the same character as laws made by States with respect to the vesting of minerals or the grant of mining interests in a State.[15] They were important elements of the administration of the land law system of the Northern Territory, in the same way the equivalent State laws are integral to the governance of those States by State legislatures.

22. The mining Ordinances were made pursuant to the Ordinance-making power in the NT Administration Act. Section 21 (for the 1939 Ordinance) and s 4U (for the 1953 and 1968

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[11] *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607 (Mason J).

[12] Cf *Wurridjal* (2009) 237 CLR 309 at [188] (Gummow and Hayne JJ) and [286] (Kirby J); *Newcrest* (1997) 190 CLR 513 at 608-9 (Gummow J).

[13] ***Capital Duplicators*** *Pty Ltd v Australia Capital Territory* (1992) 177 CLR 248 at 282 (Brennan, Deane and Toohey JJ, with whom Gaudron J agreed at 284).

[14] Cf the laws under consideration in *Wurridjal* (2009) 237 CLR 309 or *Newcrest* (1997) 190 CLR 513.

[15] For example, Div 3 of Pt IV of *Mining Act 1978* (WA), s 117 *Mining Act 1904* (WA) discussed in *Western Australia v Ward* (2002) 213 CLR 1 at [282]-[335] and [376]-[385]. See also s 6 of *Mining on Private Land Act 1909* (Qld) discussed in ***Wik*** *Peoples v Queensland* (1996) 63 FCR 450 at 493-496 (Drummond J).

Ordinances) solely empowered the making of Ordinances for the government of the Northern Territory. Such Ordinances were the key mechanism by which the government of the Northern Territory was achieved before self-government. The Ordinance-making power served "no distinct constitutional purpose apart from the government of a Territory"[16] and is clearly a law falling solely within s 122 of the Constitution.[17] That is, it is wholly supported by s 122, and no other head of power in the Constitution is capable of wholly supporting that power.

Section 122 and its relationship with the rest of the Constitution

23. ***Text and context:*** Two key textual and contextual matters demonstrate the breadth of s 122 and the necessity for flexibility in its exercise to accommodate the wide range of territories that may come under the Commonwealth's control.

24. *First*, the power applies to "any territory". Section 122 identifies three types of territories. The geographical area[18] of the Northern Territory falls within the first category of "territory" mentioned in s 122, being a part of the State of South Australia at federation,[19] which was subsequently surrendered to, and accepted by, the Commonwealth. Territories in this category become "subject to the exclusive jurisdiction of the Commonwealth" upon acceptance by operation of s 111. Section 122 also applies to territories placed by the Queen under the authority of and accepted by the Commonwealth (the former territories of Papua and New Guinea, and present territories of Norfolk Island, Cocos (Keeling) Islands and the Australian Antarctic Territory are examples), and territories otherwise acquired by the Commonwealth.

25. The power conferred by s 122 is "capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development" and is wide enough to empower the passing of all laws for the direct administration of a Territory or to create separate territorial institutions.[20] It must be construed to confer flexibility on Parliament to accommodate those varied circumstances.

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16 ***Kruger*** *v Commonwealth* (1997) 190 CLR 1 at 104 (Gaudron J).

17 *Kruger* (1997) 190 CLR 1 at 53 (Dawson J), discussing the NT Administration Act; *Newcrest* (1997) 190 CLR 513 at 615 (Gummow J), discussing the 1939 Ordinance; acknowledging in neither case was it argued that those instruments were of dual character.

18 Being the sense in which the word "territory" is used: *Capital Duplicators* (1992) 177 CLR 248 at 275 (Brennan, Deane and Toohey JJ), 285 (Gaudron J).

19 *Capital Duplicators* (1992) 177 CLR 248 at 274-275 (Brennan, Deane and Toohey JJ), noting its explicit inclusion in the definition of "The States" in cl 6 of the *Commonwealth of Australia Constitution Act*.

20 *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607 (Mason J, Barwick CJ, McTiernan and Murphy JJ agreeing);

26. The breadth of the power conferred by s 122, to allow for differing territories, is reinforced by other provisions in the Constitution. Of particular note, when construed with ss 7, 24 and 128, it is clear that the extent to which any person in any territory can vote (whether to amend the Constitution or for members of either House of Parliament) is left completely to the discretion of the Commonwealth Parliament. Reliance on the amendment to the latter provision in 1977 to include electors in territories[21] is, therefore, misplaced. The fact that electors in the Northern Territory presently can vote is only due to Parliament's exercise of discretion; in any event, they were not in this position at the times relevant for this proceeding.

10 27. The purpose behind the breadth of the power given to Parliament by s 122 is made clear from the debates of the Australasian Federal Convention, when proposed amendments to constrain s 122 (with respect to representation and alienation of land) were rejected.[22] It was explained that an objective of s 122 was to give Parliament flexibility in recognition that "there would be many experiments in administration owing to the peculiar conditions of these territories, and we ought not to tie the Federal Parliament under these circumstances".[23]

28. *Second,* the power conferred on Parliament by s 122 is to "make laws for the government" of such territories. The section contains no words of constraint. All that needs to be shown is "a sufficient connexion or nexus with the good government of the Territory."[24] Its
20 breadth is uncontroversial. In that respect, the words of Barwick CJ are as apt today as they were in 1965:[25]

> Section 122 gives to the Parliament legislative power of a different order to those given by s 51. That power is not only plenary but is unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory –

Capital Duplicators (1992) 177 CLR 248 at 271-272 (Brennan, Deane and Toohey JJ).

21 See footnote 12 above.

22 Recourse to that history permissible for that purpose: *Cole v Whitfield* (1988) 165 CLR 360 at 385 (the Court); *Capital Duplicators* (1992) 177 CLR 248 at 274 (Brennan, Deane and Toohey JJ).

23 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, at 1012-1019 (esp 1014, 1018); *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607 (Mason J, Barwick CJ, McTiernan and Murphy JJ agreeing); *Re Governor, Goulburn Correctional Centre; Ex parte* ***Eastman*** (1999) 200 CLR 322 at [7], [9] (Gleeson CJ, McHugh, Callinan JJ); *Newcrest* (1997) 190 CLR 513 at 541 (Brennan CJ); *Bennett v Commonwealth* (2007) 231 CLR 91 at [10] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *NAAJA v Northern Territory* (2015) 256 CLR 569 at [167] (Keane J).

24 *Minister for Justice (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 526 (Mason J), approved *Capital Television* (1992) 177 CLR 106 at 223-224 (Gaudron J). See also *Berwick Ltd v Gray* (1976) 133 CLR 603, 607 (Mason J, Barwick CJ, McTiernan and Murphy JJ agreeing).

25 *Spratt v Hermes* (1965) 114 CLR 226 at 241-242 (Barwick CJ).

> an expression condensed in s. 122 to "for the government of the Territory". This is as large and universal a power of legislation as can be granted.

29. That description demonstrates that, with respect to the geographical area of the territories, when the Parliament has legislative power *solely* pursuant to s 122, that power is akin to that of the States *qua* the States. There can be no doubt that it includes the power to legislate for the compulsory acquisition of property for the purposes of the local polity (such as for the construction of roads, schools and hospitals), such a power being "an essential feature of 'government'".[26]

30. Further, as Barwick CJ recognised, it is a power of a different order to that found in s 51: it is not limited by subject matter but is "complete" in the sense that it empowers the making of laws on any subject so long as they are connected with the government of the territory. Its location in Chapter VI, as opposed to Part V of Chapter I, also supports a construction of s 122 that recognises that it is different in some significant respects from the other heads of Commonwealth legislative power (as is developed below). This is not to say it is disjointed from the rest of the Constitution; however, the framers' ultimate decision to place it outside Chapter I cannot be ignored.[27] The breadth and form of s 122 is not found elsewhere in the Constitution: it is a sui generis provision.

31. ***Relationship of s 122 with other provisions:*** Whilst the characterisation of s 122 as a plenary power has not altered over time, its relationship with other provisions of the Constitution has. In the first half of the twentieth century, s 122 was treated as a "disparate and non-federal matter", standing outside the federal system (or "Commonwealth proper").[28] The decision in *Lamshed* (1958) 99 CLR 132 heralded a change in the Court's approach, so as to treat the Constitution, in the words of Kitto J at 154, "as one coherent instrument". There are two important features of this change that can easily be overlooked: *first*, the result of the decision in *Lamshed* was to give <u>breadth</u> (not restraint) to s 122; and *second*, it expressly recognised that there may be many sections of the Constitution that do <u>not</u> engage with s 122.[29]

32. Since *Lamshed*, the principle that has been consistently articulated and applied is that whether s 122 is engaged by other parts of the Constitution is to be determined as a matter

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[26] *Newcrest* (1997) 190 CLR 513 at 648 (Kirby J).

[27] Cf *Newcrest* (1997) 190 CLR 513 at 603 (Gummow J).

[28] *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 545 (Viscount Simonds for the Court); *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 441-443 (Isaacs J) and 448 (Higgins J).

[29] *Lamshed* (1958) 99 CLR 132 at 142 (Dixon CJ, Webb and Taylor JJ agreeing).

of construction.[30] As a consequence, different results can ensue depending upon the other constitutional provisions or doctrines in issue. To discount a conclusion that s 122 is not constrained by another provision as an application of the defunct disparate theory misunderstands the nature of the enquiry that has been applied since *Lamshed*.[31] Properly understood, the differing results (including that in *Teori Tau*) are simply a product of the application of the same principles of construction to different provisions or doctrines.

33. Prominently among those principles is that preference will be given to a construction of other provisions of the Constitution that does not deny s 122 the flexibility that the framers clearly intended it to have. For example, the Court refused to construe the powers in ss 7 and 24 in a way that would deprive s 122 "of significant content".[32] Instead, it recognised the width of Parliament's power under s 122 to determine the extent to which, and the terms on which, representation of a territory may be allowed. In doing so, it preferred a construction of ss 7 and 24 that did not limit s 122 to empower only "voteless" and "voiceless" representation.[33]

34. A further example of the same principle is found in the Court's continued acceptance that s 72 does not apply to Territory courts.[34] Whilst acknowledging a contrary construction was available, the Court has nevertheless refused to overrule this finding, including because it "produces a sensible result, which pays due regard to the practical considerations arising from the varied nature and circumstances of territories", including that some may enjoy self-government and others will not.[35] Thus, the Court has afforded the same "room for legislative choice" with respect to Territory courts as it has afforded to States with respect to the characteristics of their courts, including as to the mechanisms to ensure that they comply with the minimum standards of independence and impartiality required by the *Kable* principle.[36]

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30 *Spratt v Hermes* (1965) 114 CLR 226 at 241-242 (Barwick CJ); endorsed in obiter in *Bennett v Commonwealth* (2008) 231 CLR 91 at [43] (Gleeson CJ, Gummow, Hayne, Heydon, Crennan JJ).

31 *Wurridjal* (2009) 237 CLR 309 at [85] (French CJ); [178], [188] (Gummow and Hayne JJ).

32 *Western Australia v Commonwealth* (1975) 134 CLR 201 at 270 (Mason J, McTiernan J agreeing).

33 *Western Australia v Commonwealth* (1975) 134 CLR 201 at 270, 272 (Mason J, McTiernan J agreeing).

34 *Spratt v Hermes* (1965) 114 CLR 226 at 242-243 (Barwick CJ); *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.

35 *Eastman* (1999) 200 CLR 322 at [9]-[12] (Gleeson CJ, McHugh and Callinan JJ).

36 *North Australia Legal Aid Service v* ***Bradley*** (2004) 218 CLR 146 at [3] (Gleeson CJ); *NAAJA v Northern Territory* (2015) 256 CLR 569 at [41] (French CJ, Kiefel and Bell JJ), [115] (Gageler J), [146] (Keane J).

35. Yet a further example is found in the Court's acceptance that the amplitude of s 122 is not constrained by s 52(i), on the basis that the reference to "exclusive power" in the chapeau to s 52 only excluded State legislative power. In reaching that result, the Court had regard to the fact that, by ss 111 and 122, "the Commonwealth would, in any event, have political dominion and legislative authority" in a territory, suggesting that there was no need for s 52(i) to extend to territories in order for Parliament to have the intended power.[37]

36. On the other hand, the process of construction has yielded a different result when that was necessary so as not to undermine constitutional doctrines of significance to the nation that the Constitution created. Thus, ss 90 and 92 have been found to constrain laws made under
10 s 122[38] in the same way as they constrain laws made by States, because otherwise it would "frustrate the manifest purpose" or "destroy a central objective of the federal compact": the creation and maintenance of a free trade area throughout the Commonwealth.[39] Similarly, laws made under s 122 are subject to the implied freedom of political communication for the same reasons that principle applies to the States (that is, due to the "significant interaction between the different levels of government in Australia … [which] is reflected in communication between the people about them").[40] The requirement of impartiality and independence for all courts in the Australian court system capable of exercising the judicial power of the Commonwealth, which is "necessary for the preservation of" the structure of Chapter III, likewise applies to Territory courts.[41]

20 37. ***Authorities on relationship of s 122 with s 51(xxxi):*** In a unanimous decision, the Court in *Teori Tau* (1969) 119 CLR 564 held that Ordinances made pursuant to Ordinance-making powers supported by s 122 were not invalid if they failed to provide just terms. In reaching that decision, the Court approached the question – consistently with *Lamshed* – as a constructional enquiry. It acknowledged (at 570) that s 51(xxxi) abstracted from other heads of legislative power in s 51, and that the Constitution must be read as a whole, such

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37 *Svikart v Stewart* (1994) 181 CLR 548 at 559 (Mason CJ, Deane, Dawson and McHugh JJ). See also at 560.

38 *Cole v Whitfield* (1988) 165 CLR 360 at 391 (the Court); *Capital Duplicators* (1992) 177 CLR 248 at 276-277 (Brennan, Deane and Toohey JJ), 290 (Gaudron J); *Vanderstock v Victoria* (2023) 98 ALJR 208 at [61]-[63] (Kiefel CJ, Gageler and Gleeson JJ).

39 *Capital Duplicators* (1992) 177 CLR 248 at 276 at 276, 277, 279 (Brennan, Deane and Toohey JJ).

40 See, eg, *Unions NSW v New South Wales* (2013) 252 CLR 530 at [20]-[26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1 at [26]-[27] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

41 *Bradley* (2004) 218 CLR 146 at [28]-[29] (McHugh, Gummow, Kirby, Hayne, Callinan, Heydon JJ), approving *Ebner v Official Trustee* (2000) 205 CLR 337 at [81] (Gaudron J); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [42] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ).

that s 122 may be subject to "other appropriate provisions". The Court's emphatic conclusion at 570, that s 122 "is not limited or qualified by s 51(xxxi)", was the result of the Court's analysis of the particular relationship between ss 122 and 51(xxxi), and had particular regard to the fact that, unlike s 122, s 51 was "concerned with … the distribution of legislative power between the Commonwealth and the constituent States", where s 122 conferred power in respect of "territories in respect of which there is no such division of legislative power".[42] Thus, while "[t]he federal compact permits property to be compulsorily acquired in a State pursuant to a law of the Commonwealth but the terms on which that is provided for are set out in s 51(xxxi)",[43] no equivalent consideration applies to s 122. The fact that the Court reached its conclusion in *Teori Tau* without difficulty enhances rather than diminishes its authority. The Court's confidence on the point likely reflected the fact that five of the seven justices who decided *Teori Tau* had also sat in *Spratt v Hermes* (1965) 114 CLR 226, in which the relationship between s 122 and other provisions of the Constitution had been fully argued just four years earlier.[44]

38. In the almost three decades following *Teori Tau*, the Court "uniformly"[45] did not doubt it, notwithstanding that it decided many cases that involved detailed consideration of when s 51(xxxi) constrains other provisions of the Constitution, and when s 122 is constrained by other provisions of the Constitution.[46]

39. In *Newcrest*, some 28 years after *Teori Tau*, a direct submission was made that it should be overruled. That submission was not accepted by a majority of the Court.[47] *Newcrest* concerned proclamations made under the *National Parks and Wildlife Conservation Act 1975* (Cth). Those proclamations were held to be invalid on the basis that the just terms requirement in s 51(xxxi) will apply if a law is supported by s 51, whether or not it is also

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42 *Teori Tau* (1969) 119 CLR 564 at 570 (the Court); cf *Wurridjal* (2009) 237 CLR 309 at [85] (French CJ), [178], [188] (Gummow and Hayne JJ).

43 *Newcrest* (1997) 190 CLR 513 at 543 (Brennan CJ).

44 *Newcrest* (1997) 190 CLR 513 at 539-540 (Brennan CJ).

45 *Newcrest* (1997) 190 CLR 513 at 540-541 (Brennan CJ). See also at 647, 650 and 652 where Dawson J explained that *Teori Tau* was not an anomaly.

46 See, eg *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Northern Land Council v Commonwealth* (1986) 161 CLR 1 at 6 (the Court); *Capital Duplicators* (1992) 177 CLR 248 at 269 (Brennan, Deane and Toohey JJ), 287 (Gaudron J); *Mutual Pools* (1994) 179 CLR 155 at 169 (Mason CJ), 177 (Brennan J).

47 It was accepted by three Justices: *Newcrest* (1997) 190 CLR 513 at 565 (Gaudron J), 614 (Gummow J), 661 (Kirby J). However, while Toohey J otherwise agreed with Gaudron J (including her agreement with Gummow J), he reserved his position on the correctness of *Teori Tau*. On the other hand, the correctness of *Teori Tau* was emphatically reaffirmed by Brennan CJ (at 544), Dawson J (at 552) and McHugh J (at 576).

a law for the government of a Territory.[48] The result, as well as this reasoning, left undisturbed the authority of *Teori Tau* with respect to a law supported only by s 122.

40. In *Wurridjal*, some 40 years after *Teori Tau* was decided, the Court again considered whether it ought to be overruled. The Commonwealth submits that the decision in *Wurridjal* did not overturn *Teori Tau*, because the conclusion that *Teori Tau* should be overruled did not form part of the reasoning of four or more members of the majority who upheld the validity of the challenged Commonwealth enactments. That submission was rejected by the Full Federal Court, for reasons addressed further below.

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

41. The Commonwealth submits that s 51(xxxi) does not abstract from the "complete power to make laws for the peace, order and good government of the territory"[49] that is conferred by s 122. Both the text of s 51(xxxi), and its place in the structure of the Constitution, demonstrate it does not apply to laws made solely for the government of a Territory. Further, the application of s 51(xxxi) is contra-indicated by the text and purpose of s 122, and because it would undermine the objective of the framers to confer flexibility on Parliament to accommodate the potentially diverse group of territories under its control.

42. ***Text and context of s 51(xxxi):*** Section 51(xxxi) is, "first and foremost",[50] a grant of power primarily enacted to ensure the Commonwealth possessed a power to compulsorily acquire property.[51] The Convention debates indicate that s 51(xxxi) was introduced into the draft Constitution late in the drafting process (seven years after s 122) to put beyond doubt Parliament's "right of eminent domain for federal purposes".[52] This purpose was not relevant to territories for which the Commonwealth had exclusive jurisdiction by virtue of s 111 and all necessary power to acquire land under s 122, perhaps explaining the absence of discussion of territories in this context. Just as in *Svikart v Stewart*, "it can hardly be thought that its purpose was to extend the ambit of the clause to places acquired in a Territory" for Territory purposes under s 122.[53]

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48 *Newcrest* (1997) 190 CLR 513 at 568-569 (Gaudron J), with whom the other judges of the majority agreed at 560 (Toohey J), 614 (Gummow J), 661-2 (Kirby J).

49 *Spratt v Hermes* (1965) 114 CLR 226 at 242 (Barwick CJ).

50 *Mutual Pools* (1994) 179 CLR 155 at 187 (Deane and Gaudron JJ).

51 *Mutual Pools* (1994) 179 CLR 155 at 168-169 (Mason CJ), citing *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290-291 (Dixon J).

52 *Newcrest* (1997) 190 CLR 513 at 649 (Kirby J); *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290-291 (Dixon J).

53 *Svikart v Stewart* (1994) 181 CLR 548 at 560 (Mason CJ, Deane, Dawson and McHugh JJ), 566 (Brennan J).

43. The "just terms" requirement is the second purpose of s 51(xxxi), but it "exists as a confining component of the subject matter of that paragraph's positive grant of legislative power".[54] As a result, it is necessarily confined in its operation to the terms of that grant of power and does not exist as a freestanding "right" of citizens in the same way as the Fifth Amendment to the United States' Constitution.[55]

44. The text of s 51(xxxi) confines its operation to laws made for the nation as a whole. It explicitly confines the power conferred by s 51(xxxi) to laws that have the character of being for the Commonwealth, whether that be a law of general application throughout the entire territory of the Commonwealth, or, even if their application is confined geographically, to laws that have a purpose ("in terms of the end to be achieved")[56] that is directed to the Commonwealth as a whole.[57] A law that the Parliament has power to enact only under s 122 is of a different character. This is clearly demonstrated by the law in question in this matter. The Ordinance-making power in the NT Administration Act neither applies to the whole geographical territory of the nation, nor is it directed to the community of the nation as a whole. It is a law solely for the government of a territory. Indeed, the making of Ordinances was the quintessential mechanism by which the Northern Territory was governed until self-government. The Ordinance-making power is the very type of (past) law that Toohey J in *Newcrest* clearly recognised should be left undisturbed, warranting *Teori Tau* to be maintained as the law.[58] Section 51(xxxi) says nothing about such a law.

45. ***Section 51(xxxi) does not abstract from all other legislative powers:*** The rule of construction whereby s 51(xxxi) indirectly reduces the content of ("abstracts from") other grants of power in s 51 of the Constitution is subject to contrary intention.[59] Such an intention may be indicated through the express terms of the other power or may appear from the nature or the subject of the other power. Thus, s 51(xxxi) will not abstract another

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54 *Mutual Pools* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ).

55 *Mutual Pools* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ). See also at 168-169 (Mason CJ).

56 *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 653 (Wilson J).

57 *Newcrest* (1997) 190 CLR 513 at 536 (Brennan J), 553 (Dawson J), 566-567 (Gaudron J), 605 (Gummow J). See also *Eastman* (1999) 200 CLR 322 at [30]-[33] (Gaudron J); *R v Sharkey* (1949) 79 CLR 121 at 152-153 (Dixon J); Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 512-515; *Attorney-General (Ontario) v Attorney-General for the Dominion* [1896] AC 348 at 361 (Lord Watson for the Court).

58 *Newcrest* (1997) 190 CLR 513 at 561 (Toohey J).

59 *Mutual Pools* (1994) 179 CLR 155 at 169 (Mason CJ), 186 (Deane and Gaudron JJ); *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

legislative power if, relevantly, it would "reduce the capacity of the Parliament to exercise [that other power] … effectively" or otherwise reduce it "to an extent which could not have been intended".[60] The Commonwealth submits there are three clear indications in the scheme of the Constitution that s 51(xxxi) does not abstract from s 122.

46. *First*, even if (contrary to the above) the words of s 51(xxxi) are capable of applying to a law made solely for the government of a Territory, the presence of the words "subject to this Constitution" in the chapeau to s 51 (and their absence from s 122) provide an express indication that, where there is any tension between those provisions, the s 51 head of power is subordinate.[61] Any starting premise that s 51(xxxi) is the dominant provision in the event of conflict would be inconsistent with the constitutional text.

47. *Second*, an intention that s 51(xxxi) does not abstract from s 122 is manifested by the text of s 122 and the nature of the power it confers. For the reasons set out at paragraphs 23 to 30 above, s 122 is as wide and complete a power as can be granted. It is a "universal legislative power", unlike the powers "with respect to" particular subjects in s 51.[62] Further, the s 51 heads of power all operate concurrently with the legislative powers of the States. By contrast, s 122 does not assume the existence of concurrent and plenary State legislative power: "the power conferred by s 122 is not possessed by or shared with any State".[63] Instead, it contemplates that the Commonwealth Parliament may be the sole legislative authority, and may make the domestic laws of the territory. In that context, its purpose was to give Parliament as much flexibility as possible in the governance of a diverse range of territories. If s 122 were constrained by s 51(xxxi), that would create a financial and practical burden that may deter development of the territories. It would, for example, remove the discretion from the relevant law maker to acquire property for the purposes of building roads, schools or hospitals (etc) on terms it considers appropriate in the circumstances of the territory at the particular time. That would significantly reduce flexibility in the administration of territories that may come under the authority of the Commonwealth, being territories that may be at diverse stages of development.

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60 *Mutual Pools* (1994) 179 CLR 155 at 180 (Brennan J), 189 (Deane and Gaudron JJ). See also at 219 (McHugh J).

61 *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Victoria)* (2004) 220 CLR 388 at [36] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Newcrest* (1997) 190 CLR 513 at 577, 580 (McHugh J); cf at 606 (Gummow J).

62 *Newcrest* (1997) 190 CLR 513 at 536 (Brennan CJ).

63 *Newcrest* (1997) 190 CLR 513 at 536 (Brennan CJ), noting the reference to "exclusive power" in s 111 of the Constitution with respect to internal territories surrendered by a State. See also *Spratt v Hermes* (1965) 114 CLR 226 at 241-242 (Barwick CJ), 250-251 (Kitto J).

48. *Third,* and relatedly to the point above, it would be anomalous for s 51(xxxi) to abstract from s 122, in circumstances where there is no equivalent constraint upon the legislative power of the States. It is without question that States are not constrained by the requirements of s 51(xxxi). Whilst recognising there are implied limits in the Constitution that apply to States (including those identified in *Kable* and *Lange*),[64] the majority in *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 said that the contention that s 51(xxxi) limits State legislatures "is not, as a matter of logical or practical necessity, implicit in the federal structure within which State Parliaments legislate".[65] Interpreting the Constitution as a coherent instrument, there is no reason why, when the Commonwealth Parliament is empowered to legislate solely with respect to a territory – and therefore when it stands in an equivalent position to a State Parliament – the effect of s 51(xxxi) should be any different. In both contexts, s 51(xxxi) has no role to play, because it constrains only the exercise of a particular type of legislative power:[66] the power to make laws for the "peace, order, and good government of the Commonwealth".

49. Critically, that construction of the Constitution achieves equality of treatment for people wherever they live. For laws made by the Commonwealth *qua* the Commonwealth, all persons across the nation are protected equally by s 51(xxxi). For laws made solely for the government of a State or Territory, the legislative power is not so constrained, with the scope of the acquisition power for those laws being left to the judgment of the relevant legislature.[67] The contrary conclusion, which would arise if *Teori Tau* is overturned, would place Territorians in a superior position to persons from States in relation to the latter type of legislative activity. In that event, s 51(xxxi) would invalidate provisions of Ordinances that may be materially identical, in text and purpose, to State statutes.[68] In the particular context of native title, it would make the position of native title holders in the Territories vastly superior to those of native title holders throughout the rest of Australia, because (unless the Commonwealth succeeds on Ground 2) native title holders in the Territory

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64 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

65 (2001) 205 CLR 399 at [13]-[14] (Gaudron, McHugh, Gummow, Hayne JJ, Callinan J agreeing) (citations omitted), [59] (Kirby J).

66 *Newcrest* (1997) 190 CLR 513 at 535 (Brennan CJ), 585 (McHugh J).

67 Section 23(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) and s 50(2) of the *Northern Territory (Self-Government) Act 1978* (Cth) are examples of the Commonwealth Parliament exercising this judgment in the course of establishing self-government in those territories by legislation enacted under s 122.

68 See, eg, s 4 of the *Petroleum Act 1915* (Qld) and s 6(2) of *Mining on Private Land Act 1909* (Qld), which are to the same effect as s 5 of the *Petroleum (Prospecting and Mining) Ordinance 1954* (NT) and s 107 of the 1939 Ordinance, respectively.

would have a constitutional right to compensation if native title was extinguished, whereas those in the States would have no such right (with respect to extinguishment pre-1975). That inequality is avoided if *Newcrest* is preserved.

The status of *Wurridjal*

50. ***Wurridjal did not overturn Teori Tau:*** The summary of the judgments in *Wurridjal* and the Commonwealth's arguments as to their effect on *Teori Tau* are recorded at **CAB 102 [247]- 106 [256]**. The Full Court rejected the Commonwealth's submission that *Teori Tau* was not overruled by *Wurridjal* and found that the reasons of French CJ, Gummow and Hayne JJ (who upheld the demurrer) could be combined with the reasons of Kirby J (who dissented, as he would have dismissed the demurrer) to overturn *Teori Tau*.

51. The Full Court considered that it was entitled to give weight to dissenting reasons in identifying the *ratio* of *Wurridjal* on the basis that reasons given in respect of one ground of a demurrer were akin to an order answering questions in a case stated (**CAB 106 [258], 107 [263], 108 [265], 110-111 [271], [272]**). That is contrary to the orthodox approach, which identifies the *ratio* as the "binding principle of law at an appropriate level of generality that can be identified from the reasons of a majority that is sufficient for the decision",[69] meaning the order of the Court.[70] One cannot find the reasons that led to the order of the Court from the reasons of judges who disagree with that order.[71]

52. Further, the Full Court's analogy with questions in a case stated or special case mistakenly assumes it answers the question of *ratio* (**CAB 108 [265]**). Whether grounds of a demurrer may be akin to such questions can only be ascertained by an assessment of whether there is, as a matter of substance, a single ultimate question or multiple self-standing questions that the Court must answer in a given case. In *Wurridjal*, there was only one question that the Court was required to answer: whether or not the plaintiff's whole claim must fail because the relevant laws were not invalid by operation of s 51(xxxi) of the Constitution. The Commonwealth demurred on three grounds, any one of which was sufficient to answer the substantive question in its favour. The question before the Court was, in form and

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[69] *Garlett v Western Australia* (2022) 404 ALR 182 at [239] (Edelman J); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [59] (McHugh J); *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 267 (Brennan J); Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93 at 103-4.

[70] *Long v Chubbs Australian Co Ltd* (1935) 53 CLR 143 at 151 (the Court); *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390 at 396 (Barwick CJ); Cross and Harris, *Precedent in English Law* (Oxford University Press, 4th ed, 1991) at 77; Honoré, 'Ratio Decidendi: Judges and Court' (1955) 71 *Law Quarterly Review* 196 at 198.

[71] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [112] (Gaudron, McHugh and Gummow JJ).

substance, a single question warranting the single order as was made by the Court: "Demurrer allowed". It was also why it was possible for two of the justices to refrain from deciding all grounds.[72] The three grounds in that demurrer are no different to three grounds of appeal, any one of which will give an appellant the relief it seeks. In either case, there is one ultimate question,[73] for which there is one majority and, so long as that majority agrees on at least one principle sustaining the order, one ratio.

53. ***Factors supporting re-opening (if required):*** Alternatively, if *Wurridjal* did overrule *Teori Tau*, the Commonwealth seeks leave to re-open *Wurridjal* to that extent. It relies upon four matters in support of that application.[74] *First,* the divergence in opinion between *Teori Tau*, *Newcrest* and *Wurridjal* demonstrates that there is an unsettled question about the relationship between ss 51(xxxi) and 122. The very fact that complex argument, including the novel adaptation of principles relating to the identification of *ratio* in the case of demurrers, is necessary in order to ascertain the present state of the law as to that relationship itself justifies re-opening the authorities so as to allow the Court to settle and clarify the law on this point.

54. *Secondly,* the Full Court's finding that the extinguishment of native title is not outside the operation of s 51(xxxi) (the subject of ground 2 of this appeal), if upheld, would represent a significant departure from a position stated by Gummow J in *Newcrest* at 613, which formed an important reason why he thought that *Teori Tau* could be overruled without producing unacceptable consequences. Justices Toohey, Gaudron and Kirby agreed with that part of Gummow J's reasons.[75] It is implicit that the parties and the Court[76] in *Wurridjal* likewise proceeded on the premise of the correctness of Gummow J's position. Unless ground 2 is upheld, it would follow that the reasoning in *Newcrest* and *Wurridjal* that is critical of *Teori Tau* proceeded from a wrong premise. It would mean that this Court should confront the relationship between s 51(xxxi) and s 122 recognising that the serious consequences of overruling *Teori Tau* that were discounted by Gummow J in *Newcrest* will

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

73 *R v Ireland* (1970) 126 CLR 321 at 330-331 (Barwick CJ, with whom McTiernan, Windeyer, Owen and Walsh JJ agreed); endorsed where statute did not require separate questions to be answered in *Perara-Cathcart v The Queen* (2017) 260 CLR 595 at [45]-[48] (Kiefel, Bell and Keane JJ).

74 These being the points of substance that emerge applying the familiar factors from *John v Commissioner of Taxation (Cth)* (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

75 *Newcrest* (1997) 190 CLR 513 at 560, 561 and 651.

76 *Wurridjal* (2009) 237 CLR 309 at [86] (French CJ) "its overruling would not effect any significant disruption to the law as it stands"; at [283] (Kirby J) refers to the passages of Gummow J, Gaudron J and himself in *Newcrest* that refer to those "significant implications" of it being overruled.

eventuate, including the invalidity of all grants in the Northern Territory between 1911 and 1978 that were inconsistent with the existence of native title. That already extreme consequence will be further magnified if the Gumatj respondent succeeds in their assertion of native title rights in minerals, and by their claimed entitlement to compound interest (**BFM 17 [52biv]**, **103-4 [501b]**). It will be magnified again if the Gumatj respondent succeeds in establishing that s 51(xxxi) is also engaged by the impairment of native title, such that acts inconsistent with the enjoyment or exercise of native title are also invalid and compensable under the NTA. To rely upon the reasoning in *Newcrest* and *Wurridjal* concerning the overruling of *Teori Tau* without taking into account that – if the Full Court is correct – a key foundation for that reasoning has been destroyed would be apt to produce serious error. *Wurridjal* should be re-opened (if necessary) in order to ensure that the issue raised by Ground 1 is resolved upon a correct understanding of the issue raised by Ground 2.

55. *Third,* the reasoning in *Wurridjal* is unpersuasive. In particular, a disjunctive versus integrationist dichotomy played too great a role in the reasoning of those judges who concluded that *Teori Tau* should be overruled. That reasoning reflected a false binary, treating any conclusion that s 122 was not constrained by another provision of the Constitution as if it were the result of applying the disjunctive approach, rather than as the result of the issue by issue construction enquiry that has been applied since *Lamshed* (1958) 99 CLR 132. This error can be seen in the characterisation of *Teori Tau* as depending upon the wrong principle,[77] and in the (mistaken) observation that there was disparity between Barwick CJ's position in *Teori Tau* and later statements.[78] It may also explain the discounting of relevant constructional matters, on the premise that they depended upon the disjunctive theory.[79] Further, their Honours' reliance on legislative development in only two territories also reveals error,[80] those matters being incapable of affecting the proper construction of s 122, which is applicable to all territories irrespective of their economic or legislative conditions.

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77 *Wurridjal* (2009) 237 CLR 309 at [85] (French CJ), [178], [188] (Gummow, Hayne JJ); cf *Teori Tau* (1969) 119 CLR 564 at 569 ("a question of proper construction of the Constitution"), 570 (recognising constructional rule that par. xxxi abstracts from other heads of power and "Constitution must be read as a whole" and may be subject to "other appropriate provisions").

78 *Wurridjal* (2009) 237 CLR 309 at [56] (French CJ), [178] (Gummow and Hayne JJ), [285] (Kirby J).

79 For example, *Wurridjal* (2009) 237 CLR 309 at [76] (French CJ).

80 *Wurridjal* (2009) 237 CLR 309 at [188] (Gummow and Hayne JJ, with whom Kirby J agreed at [286]).

56. *Fourthly,* whilst recognising it has been cited in subsequent decisions, *Wurridjal* has not been relied upon in the determination of any justiciable controversy on the relationship between s 51(xxxi) and s 122.

GROUND 2: INHERENT DEFEASIBILITY

Summary

57. In ***Mabo (No 2)***, in taking the momentous step of holding that native title was not extinguished at the time of settlement, and was recognised by the common law as a right capable of being protected under the new legal system, Brennan J (with whom Mason CJ and McHugh J agreed) was guided by the principle that recognition would be impossible if it was inconsistent with the essential tenets of the system of land law that had been brought by the settlers. Such inconsistency would have existed if the recognition of native title would have disturbed the titles to land that had been created under that system since the time of settlement. That consequence was avoided by the common law conferring recognition on terms that ensured, from the moment of recognition, that the Crown would be free validly to create or assert new rights in unalienated land, irrespective of the effect on native title and without payment of compensation. In that way, native title could be recognised without overturning the essential framework of Australia's system of land law.

58. In *Newcrest*, this Court explained that s 51(xxxi) did not alter that position. In that case, the Court was faced with a similar issue to that arising in this appeal when deciding whether to overrule *Teori Tau* and hold that s 51(xxxi) qualifies s 122. Justice Gummow (at 613, with the agreement of Toohey, Gaudron and Kirby JJ at 560, 561 and 651 respectively) rejected the Commonwealth's argument that to do so would potentially invalidate every grant of an interest in Crown land in the Northern Territory since 1911 (to the extent that the grant extinguished native title). Justice Gummow rejected that argument by relying on the basis upon which *Mabo (No 2)* had been decided. His Honour explained, by reference to the way in which native title was recognised by the common law, that native title was inherently defeasible to the Crown granting new rights that were inconsistent with native title. When that occurred, there was no acquisition of property within the meaning of s 51(xxxi) because the extinguishment of native title upon that occurrence was something inherent in, and integral to, the property itself.

59. The answer given by Gummow J in *Newcrest* was correct. The "property" to which s 51(xxxi) refers is a wide and varied class. It encompasses native title. But s 51(xxxi)

takes pre-existing property rights as it finds them. It does not alter the characteristics of the property rights that it protects. Instead, it operates solely as a constraint on legislative power. Thus, the application of s 51(xxxi) depends upon the nature of the "property" in question, ascertained according to the terms upon which it came into existence as a legal right within our legal system. If those terms reveal that the right of property was always, of its nature, susceptible to variation or defeasance by what, in fact, occurred, that variation or defeasance cannot properly be described as an acquisition of property in the constitutional sense. That is the case whether the right of property in question derives from statute or the general law, or whether instead it is recognised by the common law. Section 51(xxxi) applies to all property rights with this characteristic in the same way. In such cases, a s 51(xxxi) claim does not fail because the rights in question are not "property". It fails because, as in ***Telstra*** *v Commonwealth*,[81] the property rights were never of the "nature or amplitude" asserted.

Section 51(xxxi) and native title

60. This appeal is concerned with the position of native title during the period between 1911 and 1978 when the Commonwealth administered land in the Northern Territory and held the radical title to the land. In principle, the issues raised by the appeal would also apply to the position of native title in relation to land within the Australian Capital Territory during the period between 1909 to 1989. The appeal therefore concerns the position of native title as it was recognised and protected at common law.

61. On and from 1 January 1994, the NTA provided a statutory system for the recognition and protection of native title (ss 3(a), 10, 11). One effect of the NTA was to remove the element of defeasibility which was inherent in native title's recognition and protection at common law.[82] These submissions are confined to the position of native title at common law, prior to the enactment of the NTA. That, coupled with the fact that native title was only inherently defeasible to an exercise of radical title (which, in the case of the Commonwealth with respect to the Northern Territory, it ceased to have in 1978), means that the issue that lies at the heart of ground 2 is of historical (albeit significant) import.[83]

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[81] (2008) 234 CLR 210 at [8], [52] (the Court).

[82] *State of Western Australia v Commonwealth* (***Native Title Act Case***) (1995) 183 CLR 373 at 453 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[83] These submissions adopt the language used in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at [55], [60] (French CJ, Kiefel, Bell and Keane JJ) of the Crown "exercising" its radical title.

62. Returning to the common law, in *Mabo (No 2)*, this Court did not need to decide whether s 51(xxxi) had any application to a law that extinguished native title. The issue was mentioned only in *dicta* by Deane and Gaudron JJ as follows (at 111):

> Our conclusion that rights under common law native title are true legal rights which are recognized and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s 51(xxxi).

63. At this point in the judgment, their Honours were speaking prospectively about the legislative power to extinguish or diminish native titles which had survived colonial dispossession to the present day and would thenceforth be understood as having been recognised by the common law.[84] It is most likely that Deane and Gaudron JJ were referring to the possibility of future extinguishment of native title under Commonwealth laws such as the *Lands Acquisition Act 1989* (Cth). That would explain why their Honours immediately went on to identify the *Racial Discrimination Act 1975* (Cth) (**RDA**) as "an even more important restriction" upon legislative powers (at 111-12). In any event, when *Mabo (No 2)* was decided in 1992, the settled authority regarding the application of s 51(xxxi) of the Constitution to laws of the Northern Territory was *Teori Tau*. As such, it cannot have been within the contemplation of Deane and Gaudron JJ that s 51(xxxi) had ever applied to Ordinances in force in the Northern Territory during the period from 1911 to 1978.

64. In any case, recognition that certain kinds of property might be "inherently susceptible" to variation or defeasance, and the ramifications of this for the operation of s 51(xxxi) with respect to property of that kind, had not yet occurred when *Mabo (No 2)* was decided (cf. **CAB 113 [285]-[286]**). That analytical development did not occur until the trilogy of decisions handed down in 1994 (the *Mutual Pools* line of authority).[85] The circumstances of those cases, and the reasoning of each of the Justices, is discussed at **CAB 122-131 [322]-[359]**. The Commonwealth does not take issue with anything said in those passages.

65. The next occasion that presented itself for the Court to consider the concept of "inherent susceptibility" was *Newcrest*, where it applied that concept to native title. That consideration occurred in the context of Gummow J answering the Commonwealth's

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[84] See *Mabo (No 2)* (1992) 175 CLR 1 at 109 (xi) (Deane and Gaudron JJ).

[85] *Mutual Pools* (1994) 179 CLR 155; *Health Insurance Commission v* ***Peverill*** (1994) 179 CLR 226; ***Georgiadis*** *v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

contention about the potential invalidity of grants of interests in land in the Northern Territory if *Teori Tau* were overturned. The relevant passage is reproduced in full at **CAB 115 [292]**. The essential point made by Gummow J (at 613) was that the extinguishment of native title by the grant of an estate or interest in land that was inconsistent with the continuing existence of native title (ie by the exercise of radical title) did not amount to an acquisition of property; whereas another form of legislative extinguishment of native title may amount to an acquisition of property. His Honour's citation of *Peverill* (in fn 321), use of the exact language from *Peverill* ("inherent susceptibility"), and attribution of the characteristics of native title as recognised by the common law as the source of the "inherent susceptibility", show that Gummow J regarded the extinguishment of native title by acts of that kind as falling within the s 51(xxxi) concept expounded in *Peverill*.

66. Justice Gummow cannot be understood in any other way (cf **CAB 143 [407]-[408]**). His Honour was responding to the Commonwealth's "in terrorem" argument, which he said was "not well founded". That could only be the case if grants of this kind would not constitute an acquisition of property, and therefore would not be invalid. Otherwise, the Commonwealth's argument would have been unanswered.

67. As for Toohey, Gaudron and Kirby JJ, their Honours should be treated as meaning what they said (cf **CAB 144-146 [414]-[419]**). Justices Toohey and Gaudron were members of the Court in *Mabo (No 2)*, the *Native Title Act Case*, *Wik HC*[86] and *Peverill*. Justices Gummow and Kirby formed a majority with them in *Wik HC*. None can be regarded as having failed to appreciate the significance of the issue or its consequences. If Toohey, Gaudron or Kirby JJ considered Gummow J's answer to be "radical", or "novel and controversial", or simply wrong, one would expect them to say so, or at least say that they disagreed with the answer (and then provide their own answer for why the potential invalidity of titles was not a reason to decline to overturn *Teori Tau*) (cf **CAB 143 [395], 144 [412], 145 [418]**). They did none of those things. Further, for reasons already explained, Gaudron J's statement about s 51(xxxi) in *Mabo (No 2)* provides no basis to read down the extent of her Honour's agreement with Gummow J (cf **CAB 145 [418], 146-147 [421]-[423]**).

68. Justice Gummow's answer in *Newcrest* was then, and is now, entirely coherent with the learning in this Court about both the basis upon which the common law recognised native

[86] *Wik Peoples v Queensland* (1996) 187 CLR 1 (***Wik HC***).

title, and the s 51(xxxi) concept of "inherent susceptibility" to variation or defeasance (in shorthand, "inherent defeasibility"). The same answer should be given in this appeal.

The Full Court's approach

69. The Full Court rejected the Commonwealth's case on inherent defeasibility for reasons stated in summary form at **CAB 112 [282]**. What lies beneath that summary statement are the following propositions:

(a) *First*, that the concept of inherent defeasibility is an analytical tool relevant only to the question of whether particular rights are "property" for the purposes of s 51(xxxi), and not to the analysis of whether there has been an "acquisition" in the constitutional sense (**CAB 119-121 [310]-[318]**);

(b) *Secondly*, that the rationale for the s 51(xxxi) concept of inherent defeasibility is that Federal Parliament is both the creator of the rights and the entity capable of taking them away, and that rationale has no application to native title (**CAB 121-2 [319], 131 [360], 133 [367], 135-136 [380], 137 [384], 138 [387], 139 [391]**);

(c) *Thirdly*, that the kinds of statutory rights that have been found to be inherently defeasible bear no comparison to native title rights (**CAB 122 [321], 143-144 [407]-[409], 150 [440], 151-153[447]-[451]**); and

(d) *Fourthly*, that native rights are defeasible but not "inherently defeasible" as that concept is understood for the purposes of s 51(xxxi) (**CAB 143 [408], 150 [438], 150-151 [443], 155-156 [455]-[458], 158 [467]**).

70. As for the ***first proposition***, that native title rights are proprietary rights (as the Full Court found at **CAB 151 [444]-[446], 161 [478]**) would be fatal to the Commonwealth's case if, as their Honours also found, the concept of inherent defeasibility had no relevance beyond determining whether a right is "property" for the purposes of s 51(xxxi). However, as developed in paragraphs [112]-[125] below, neither *Attorney-General (NT) v* ***Chaffey*** (2007) 231 CLR 651, nor ***Cunningham*** *v Commonwealth* (2016) 259 CLR 536, stand for that proposition. In fact, they are to the opposite effect. It is true that, in some cases, the inherent susceptibility of a right to variation or defeasance may render the right so precarious or unstable that it cannot be characterised as "property" at all. However, in many cases the inherent susceptibility of a right to variation or defeasance does not deprive the right of its proprietary character: it is simply that there is no acquisition of property in

a constitutional sense when the particular contingency to which the right is inherently susceptible comes to pass. The extinguishment or impairment of native title by the exercise of the Crown's radical title falls into the latter category.

71. As for the ***second proposition***, the Full Court conflated a broad view and a narrow view of the concept of "inherent defeasibility" in the context of statutory rights. As McHugh J explained in *Commonwealth v* ***WMC Resources*** *Ltd* (1998) 194 CLR 1 at [144]-[146], a **broad view** is that a right of property that has no existence apart from the statute that creates it is always liable to be amended, revoked or extinguished by legislation, such that every statutory right is, by its nature, inherently susceptible to modification or extinguishment and is therefore outside the ambit of s 51(xxxi). The rationale identified by the Full Court underpins the broad view. However, that view has never found majority support in this Court and was expressly disavowed in *Chaffey* (at [24]) and *Cunningham* (at [44]) in favour of the narrow view.

72. The **narrow view** is not based on the power of Parliament to repeal or amend rights that it has created. It looks instead to the specific terms on which a particular right of property was created, and whether, by those terms, the right was inherently subject to variation or extinguishment in particular ways. The rationale is that:

(a) if a right of property was always, of its nature, liable to variation or defeasance, a variation or defeasance later effected cannot properly be described as an acquisition of property (*Cunningham* at [46]); or

(b) susceptibility to alteration or extinguishment by subsequent administrative or legislative action is a characteristic of the right, inherent at the time of its creation and integral to the property itself (*Cunningham* at [66]).

73. As explained below, that rationale applies to any property rights that have those characteristics, whatever their source. There is no principled reason why it should not apply to native title. The focus of the analysis is on the nature and amplitude of the particular property rights, and the terms upon which they came into being. If the rights in question derive from statute, that will necessarily involve a process of statutory construction, but that feature of the analysis in cases concerning statutory rights must not obscure the nature of the inquiry and its applicability to non-statutory rights.

74. As to the ***third proposition***, the Commonwealth's case does not call for native title to be compared to the kinds of statutory rights that have been found to be inherently defeasible; nor does it "equate" native title with a Medicare payment or exploration permit or pension entitlement. What must be identified in all property rights before they will be "inherently defeasible" for the purposes of a s 51(xxxi) analysis are inherent limitations: that is, limitations that "exist in something as a permanent and inseparable element, quality, or attribute".[87] Thus, the description of statutory rights as "inherently susceptible" to modification and extinguishment, or "inherently unstable", identify a feature within the rights in question. Those descriptors do not refer to the liability of all statutory rights *per se* to subsequent modification or extinguishment (*Cunningham* at [45]-[46]). For example, Torrens land title is not inherently defeasible, even though it is referrable to statute. Indeed, the Torrens system was designed to remedy the uncertainty that arose from the common law doctrine of relativity of title, which meant that even an estate in fee simple in land was defeasible in the face of "a better claim advanced on behalf of somebody else".[88] In that context, the object of the early Torrens statutes was to "simplify the title to land, and to facilitate dealing therewith, and to secure indefeasibility of title to all registered proprietors",[89] subject only to limited exceptions. The creation of Torrens title therefore provides examples both of common law interests that are inherently defeasible to the assertion of other interests, and of statutory rights that are not, thereby highlighting the importance of a detailed analysis of the rights in question.

75. When Justices of this Court have spoken of the "inherent fragility" of native title,[90] they were not referring to the defeasibility of native title by general legislation that operates indifferently as between native title and other interests in land (such as an acquisition statute like the *Lands Acquisition Act 1989* (Cth)) (cf **CAB 155 [455], 156 [458]**). The reference was rather to the way in which the terms of common law recognition, upon which native title depends for its existence as an enforceable right under the Australian legal system, provide that native title may be extinguished or impaired. Thus, s 51(xxxi)

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87 *Macquarie Dictionary* (9th ed, 2023).

88 Gray and Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) at 167 [2.1.29].

89 See, eg, *Real Property Act 1886* (SA) ss 10, 69. It is that Act that was in force in the territory upon its surrender to the Commonwealth, and that was continued in force by s 7 of the NT Acceptance Act.

90 ***Fejo*** *v Northern Territory* (1998) 195 CLR 96 at [105], [108] (Kirby J); *Commonwealth v* ***Yarmirr*** (2001) 208 CLR 1 at [47] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Western Australia v* ***Ward*** (2002) 213 CLR 1 at [91] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

"inherent susceptibility", and native title's "inherent fragility", each direct attention to the characteristics of the right itself that render it liable to variation or defeasance.

76. As to the ***fourth proposition***, whether because of one or more of the errors described above, the Full Court did not undertake the inquiry that s 51(xxxi) required. The Court did not engage with the substance of the Commonwealth's argument about the terms upon which the common law recognised native title (see paragraphs [79]-[105] below) (cf **CAB 150 [438], 150 [440], 150-1[443], 155 [455], 156 [458]**). While the Full Court noted that the description of native title as "inherently fragile" speaks to the way in which the intersection between the two legal systems "will play out", there was no interrogation of the result of that process (cf **CAB 156 [457]**). Their Honours' reliance on authorities that describe the position of native title after the commencement of the RDA (cf **CAB 157 [462], 157-8 [465]-[466]**),[91] and after the commencement of the NTA (cf **CAB 151 [445], 158 [467]**), is misplaced. For reasons already explained, this appeal concerns only the position of native title at common law.

Native title is "property" that was "inherently defeasible" at common law to the exercise of radical title

77. Native title has its origin in the traditional laws and customs of the Indigenous people who possess it. Native title is neither an institution of the common law nor a form of common law tenure, but it is recognised by the common law (*Fejo* at [46]). As explained by the plurality in *Yarmirr* (at [12]), native title rights and interests may have some or all of the features which a common lawyer might recognise as a species of property; however, neither the use of the word "title" (cf **CAB 158-9 [469]**), nor the fact that the rights and interests include some rights and interests in relation to land (cf **CAB 151 [444]**), should be seen as necessarily requiring identification of the rights and interests as what the common law traditionally recognises as items of "real property".

78. The native title rights and interests asserted to exist in the claim area at the time of the claimed compensable acts are non-exclusive rights (it being accepted that all exclusive native title had been extinguished prior to 1911). Nevertheless, whilst exclusive possession "is very often" a characteristic of a proprietary right, it is not an essential one.[92] Moreover,

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[91] Section 10 of the RDA rendered discriminatory laws of the Commonwealth invalid to a similar extent as those of a State, but through implied repeal rather than s 109 of the Constitution. Further, ordinances made prior to self-government under the Administration Act, whether before or after 31 October 1975, had no operation to the extent they were repugnant to the RDA.

[92] *Queen v Toohey; Ex Parte* ***Meneling Station*** *Proprietary Limited* (1982) 158 CLR 327 at 344 (Mason J).

the word "property" in s 51(xxxi) extends to "every species of valuable right and interest",[93] and to "innominate and anomalous interests".[94] Given that wide class, the Commonwealth accepts that native title rights of the kind asserted in this case are "property" for the purposes of s 51(xxxi). But, contrary to **CAB 119-121 [310]-[318]**, that is not the end of the inquiry as to inherent defeasibility. What must be ascertained is the "nature or amplitude" of the property rights in question.[95] That directs attention to the terms of common law recognition of native title.

79. ***Common law recognition***: In *Mabo (No 2)*, six justices of this Court agreed to reject the notion of terra nullius, and held that the antecedent native title rights of Australia's Indigenous peoples survived the act of settlement and could be recognised by the common law.[96] The latter result was made possible because the Court held that what the Crown acquired at the time of settlement was not absolute beneficial ownership of land, but rather "radical title" that was burdened by native title rights where they existed.[97]

80. The justices in *Mabo (No 2)* had different views about the effect of the recognition of native title upon the freedom of the Crown to exercise its radical title by granting interests in land and appropriating to itself unalienated land for Crown purposes. Justice Brennan (with whom Mason CJ and McHugh J agreed) held that acts of this kind could validly be done without payment of compensation for any resultant extinguishment of native title. The short reasons of Mason CJ and McHugh J record that they were authorised by the other members of the Court to say that that was the outcome of the case[98] (meaning that the views of Deane and Gaudron JJ, and Toohey J, that acts that extinguished native title would be wrongful and give rise to a claim for compensation or damages, reflected a minority position). In the Commonwealth's submission, Brennan J's view continues to represent the current and correct understanding of common law recognition of native title (see paragraphs [97]-[103] below).

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93 *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 290 (Starke J).

94 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J).

95 *Telstra* (2008) 234 CLR 210 at [8], [52] (the Court); *Cunningham* (2016) 259 CLR 536 at [32], [40] (French CJ, Kiefel and Bell JJ).

96 *Mabo (No 2)* (1992) 175 CLR 1 at 15 (Mason CJ and McHugh J, agreeing with Brennan J); 32-33, 57 (Brennan J); 77-78, 97-99, 109 (Deane and Gaudron JJ); 180 (Toohey J).

97 *Mabo (No 2)* (1992) 175 CLR 1 at 37-38, 45-48, 50-51, 57-58 (Brennan J); 80-81, 86-87 (Deane and Gaudron JJ); 180, 182, 211-212 (Toohey J).

98 *Mabo (No 2)* (1992) 175 CLR 1 at 15-16. The position stated by their Honours was said to be subject to the operation of the RDA.

81. ***The guiding principle***: In an early part of his judgment in *Mabo (No 2)*, Brennan J set out the principle that he regarded as guiding the task of the Court. He said (at 29):

> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. (emphasis added)

82. This guiding principle permeates Brennan J's reasoning (especially at 30). Even after concluding that terra nullius should be rejected, his Honour reiterated (at 43) that:

> [R]ecognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system. The proposition that the Crown became the beneficial owner of all colonial land on first settlement has been supported by more than a disregard of indigenous rights and interests. It is necessary to consider these other reasons for past disregard of indigenous rights and interests and then to return to a consideration of the question whether and in what way our contemporary common law recognizes such rights and interests in land. (emphasis added)

83. The reference to "whether and in what way" indicates that Brennan J did not regard common law recognition of native title as an all-or-nothing proposition. Rather, his Honour accepted that it was within the capacity of the common law to recognise native title on such terms as were necessary to avoid a fracture in our legal system of the kind described. The working out of those terms is foreshadowed when Brennan J segues into a consideration of arguments pertaining to the feudal basis for Crown ownership of land, when he stated (at 45):

> Though the rejection of the notion of terra nullius clears away the fictional impediment to the recognition of indigenous rights and interests in colonial land, it would be impossible for the common law to recognize such rights and interests if the basic doctrines of the common law are inconsistent with their recognition.
>
> A basic doctrine of the land law is the doctrine of tenure … and it is a doctrine which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency. It is derived from feudal origins. (emphasis added)

84. After describing Crown grants as the "foundation" of the doctrine of tenure, "which is an essential principle of our land law", his Honour concluded (at 47):

> It is far too late in the day to contemplate an allodial or other system of land ownership. Land in Australia which has been granted by the Crown is held on a tenure of some kind and the titles acquired under the accepted land law cannot be disturbed. (emphasis added)

85. Given Brennan J's analysis up to that point, the conclusion is unavoidable that if his Honour had not thought it possible for the common law to recognise native title in a way that did not disturb the titles acquired under the accepted land law, he would have concluded that the common law could not recognise native title. For that reason, the

reasoning process that allowed his Honour to conclude that the recognition of native title did not disturb such titles was essential to the result in *Mabo (No 2)*.

86. ***Extinguishment by prerogative***: Justice Brennan examined the essential preconditions for the doctrine of tenure to operate (at 47-48). He concluded that it was not necessary for the Crown to become the absolute beneficial owner of land at the time of settlement. Rather, it was sufficient that the Crown have a title by which it could subsequently create rights of ownership in itself or dispose of them in favour of others. As his Honour explained (at 48):

> The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty. As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne.
>
> By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne. The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes. (emphasis added)

87. So conceived, the Crown's radical title did not prevent the recognition of native title because (at 50-51):

> [R]adical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory). Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown's territory should not continue to be subject to native title. (emphasis added)

88. As foreshadowed above, it must follow, from the logic of Brennan J's reasoning, that the common law could not have recognised native title if to do so would have prevented the Crown from validly exercising its radical title "in one or other of those ways", because otherwise "the titles acquired under the accepted land law" would be disturbed. It is also implicit in the above passage that, upon such an exercise of the radical title, the land in question might not continue to be subject to native title (as confirmed at 51).

89. When fixing the rule to be applied at the time of settlement with respect to the survival of antecedent private rights and interests in land, Brennan J was clearly persuaded by the reasoning of the Privy Council in *Sobhuza II v Miller*[99] that, whilst the title of an Indigenous community survived as a burden on the sovereign's radical title, it was capable

[99] [1926] AC 518 at 525 (Viscount Haldane), cited in *Mabo (No 2)* (1992) 175 CLR 1 at 56, fn 61.

of being extinguished "by the action of a paramount power which assumes possession or the entire control of land" (at 56-57). That is the language used by his Honour when explaining that native title was extinguished by "the recurrent exercise of a paramount power" as colonial settlement expanded (at 58). In *Sobhuza* (at 528), the sovereign power to extinguish Indigenous title was able to be, and was in that case, exercised as a prerogative power.

90. This is one of the ways in which the approach of the Justices in *Mabo (No 2)* differed. Neither Deane and Gaudron JJ, nor Toohey J, considered that the sovereign power of the Crown after settlement included a prerogative power to extinguish native title (at 79-80, 82, 100-101, 193-194). In contrast, when Brennan J specifically addressed the extinguishment of native title, his Honour stated (at 63):

> Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power. (emphasis added)

91. In support, Brennan J cited a trilogy of United States decisions to the effect that: the power to extinguish Indian title is an attribute of sovereignty;[100] that power can be exercised in various ways not confined to statute;[101] and the extinguishment of Indian title is not a taking under the Fifth Amendment and does not require compensation.[102] In short, on his Honour's approach, from the moment native title was recognised by the common law, it was liable to be extinguished or impaired, without compensation, by an otherwise valid exercise of the Crown's sovereign power, embodied in its radical title, to grant interests in land or appropriate to itself unalienated land for Crown purposes.

92. ***Extinguishment by legislation***: That was no less the case when the sovereign power to alienate land became subject to the control of colonial legislatures.[103] From that point onwards, the validity of a Crown grant depended upon conformity with the relevant statute. After explaining that an interest in land granted by the Crown cannot be derogated from without statutory authority, and that statutes are presumed to operate consistently with this

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[100] Fn 70: *Joint Tribal Council of the Passamaquoddy Tribe v Morton* (1975) 528 Fed 2d 370 at p 376 n 6.

[101] Fn 71: *United States v Santa Fe Pacific Railroad Co* (1941) 314 US 339 at 347.

[102] Fn 71: *Tee-Hit-Ton Indians v United States* (1954) 348 US 272 at 281-285.

[103] The context for Brennan J's analysis in *Mabo (No 2)* (at 63-64) was the effect of ss 30 and 40 of the *Constitution Act 1867* (Qld). Since the law-making power in each of those provisions is with respect to "the waste lands of the Crown" within the State of Queensland, his Honour was clearly referring to statutes that confer power on the Crown to create or assert rights in unalienated land.

principle of non-derogation, Brennan J held that no such protection was afforded to native title. His Honour reasoned as follows (at 64):

> As the Crown is not competent to derogate from a grant once made, a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorizing any impairment of an interest in land granted by the Crown or dependent on a Crown grant. But, as native title is not granted by the Crown, there is no comparable presumption affecting the conferring of any executive power on the Crown the exercise of which is apt to extinguish native title.
>
> However, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive. (emphasis added)

93. On Brennan J's approach there are two separate steps in the process of construction of a power to grant interests in land. The first step is to construe the scope of the power conferred by the statute, and thereby determine the validity of what was done. The second step is to identify whether the exercise of the statutory power (determined at the first step to have been valid) resulted in native title being extinguished.

94. It is necessary to examine the ***first step*** a little further. The point made by Brennan J was that, as a matter of statutory construction, conformity with the principle of non-derogation may require a statute to be read down so as not to authorise any impairment of an interest in land granted by the Crown. It would follow that, if native title was protected in the same way as a Crown grant, a statute that generally provided for the exercise of the Crown's radical title would be read down so as not to authorise any impairment of native title. On that approach, a purported grant of interests in unalienated land where there was subsisting native title would have been invalid. In the case of Queensland (being the focus of Brennan J's analysis in *Mabo (No 2))*, that had the potential to invalidate an indeterminate number of dealings with Crown land after the commencement of the *Constitution Act 1867* (Qld). The approach taken by Brennan J avoided that outcome.

95. That approach is importantly different to that favoured by Deane and Gaudron JJ, and Toohey J, who considered that the "ordinary rules of statutory interpretation" applied so that clear and unambiguous words were needed before imputing to the legislature an intent to take away property without compensation.[104] On that basis, their Honours did not think that general Crown lands legislation authorised the extinguishment of native title.[105] That

[104] *Mabo (No 2)* (1992) 175 CLR 1 at 111; 195-196. Their Honours collectively cited: *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 563; *Central Control Board (Liquor Traffic) v Cannon Brewery Company Ltd* [1919] AC 744 at 752; *Clissold v Perry* (1904) 1 CLR 363 at 373-374.

[105] For Deane and Gaudron JJ, grants made pursuant to such powers were a wrongful infringement of native title rights (at 88-90, 94, 101, 110-111). For Toohey J, any extinguishing grants were invalid (at 196).

reasoning did not prevail, essentially because it failed to give due effect to the inherent vulnerability of native title to extinguishment by inconsistent grant which was a condition of its recognition by the common law.

96. Justice Brennan's analysis of the intersection between the common law and native title logically applied to every polity exercising the radical title of the Crown, whether Commonwealth, State or Territory. In other words, it was not the absence of an equivalent provision to s 51(xxxi) in State Constitutions that ensured the States could validly grant interests in land inconsistent with native title, even after the power to grant an interest in Crown land became exclusively statutory (and thus subject to common law principles of interpretation). It was the fact that the principle of non-derogation applies only to interests granted by the Crown, and native title is not such an interest (cf. **CAB 159 [470]**).

97. ***Subsequent authorities***: It is sufficient to refer to four decisions of this Court to demonstrate that it is Brennan J's judgment in *Mabo (No 2)* that represents the current and correct understanding of the basis upon which the common law permitted the recognition of native title (being that it is, and must be, susceptible to extinguishment by inconsistent grant or by the Crown appropriating interests in unalienated land to itself).

98. *First*, in the ***Native Title Act Case*** at 438-439, a joint judgment of six justices compared the position of native title at common law with that of interests granted by the Crown. For the latter, the non-derogation principle applied (which included, but was not limited to, protection against inconsistent grant). Their Honours explained that, by contrast, native title could be "extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title".

99. *Secondly*, in ***Fejo*** (at [44]), a joint judgment of six justices quoted the following statement by Brennan CJ in *Wik HC* at 84, where his Honour had repeated his view from *Mabo (No 2)* that native title was not protected by any common law rule of statutory construction comparable to the presumption against derogation from grant:

> The strength of native title is that it is enforceable by the ordinary courts. Its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant. Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it.

100. In the footnote to that passage, in addition to citing *Wik HC*, the joint judgment also cited Gummow J's analysis in *Newcrest* at 612-613. That citation includes the passage

discussed in paragraph 65 above (and reproduced in full at **CAB 115 [292])** in which Gummow J explained that the extinguishment of native title by the grant of an estate or interest in land did not amount to an acquisition of property because native title was "inherently susceptible" to extinguishment or defeasance by such a grant. That citation can only reasonably be read as at least "tacit approval" of the passages cited (cf. **CAB 148-150 [431]-[440]**). More generally, the joint judgment (at [45]-[58]) cited only Brennan J in *Mabo (No 2)*, and reasoned entirely in accordance with his Honour's approach. See also Kirby J at [104]-[105] and [108].

101. *Thirdly*, in ***Yarmirr***, Gleeson CJ, Gaudron, Gummow and Hayne JJ, when considering whether native title could be recognised in the seabed and territorial seas, again adopted and applied the underlying framework of Brennan J's analysis in *Mabo (No 2)*. Their Honours accepted that the common law will only recognise native title to the extent that it is not inconsistent with common law doctrines to do so (at [40], [42]). Applying that approach, their Honours concluded that it would be antithetical to the common law to recognise exclusive native title rights in areas where the continuation of such rights would be inconsistent with the terms on which sovereignty was asserted (namely, that sovereignty carried with it public rights to fish and navigate) (at [99]-[100]). This coheres with Brennan J's analysis, and implicitly accepts its correctness. Again, the plurality noted the "inherently fragile" nature of native title (at [46]-[47]).

102. Lastly, in *Western Australia v* ***Ward*** (2002) 213 CLR 1, Gleeson CJ, Gaudron, Gummow and Hayne JJ stated (at [91]):

> Reference was made in *Mabo (No 2)* to the inherent fragility of native title. One of the principal purposes of the NTA was to provide that native title is not able to be extinguished contrary to the Act (s 11(1)). An important reason to conclude that, before the NTA, native title was inherently fragile is to be found in this core concept of a right to be asked permission and to speak for country. The assertion of sovereignty marked the imposition of a new source of authority over the land. Upon that authority being exercised, by the creation or assertion of rights to control access to land, the right to be asked for permission to use or have access to the land was inevitably confined, if not excluded. (emphasis added)

103. In fact, none of the judgments in *Mabo (No 2)* actually used the term "inherent fragility" or "inherently fragile". The above passage therefore reflects an *ex post facto* characterisation of what was said in *Mabo (No 2)*, albeit an accurate one, in essentially the same terms as appear in *Yarmirr*. And, once again, the whole approach in *Ward* to the recognition of native title, and to the basis upon which it could be extinguished, reflected that of Brennan J in *Mabo (No 2)*.

104. ***Conclusion***: The Court should again hold – as it has consistently previously held – that native title was recognised by the common law on terms that it was inherently susceptible to being extinguished or impaired by an otherwise valid exercise of the Crown's radical title (whether pursuant to statute or prerogative), to grant interests in land and to appropriate to itself unalienated land for the Crown's purposes. The conclusion that native title was inherently susceptible to action of that kind, and therefore that its recognition did not imperil the validity of the creation of rights by the Crown, was central to Brennan J's analysis of why the common law could properly be developed so as to recognise native title. His Honour's analysis has been consistently adopted by this Court ever since. The ramifications of that analysis for the operation of s 51(xxxi) with respect to native title provide no proper basis to depart from it.

Any "property" can be "inherently defeasible"

105. Professor HLA Hart wrote that the word "defeasible" is "used of a legal interest in property which is subject to termination or 'defeat' in a number of different contingencies but remains intact if no such contingencies mature".[106] As that definition demonstrates, there is no inconsistency between a right being simultaneously characterised both as "property" and "defeasible". As it also demonstrates, the concept that property might be "defeasible" is not a novel notion developed in the context of s 51(xxxi), nor a concept that is confined to statutory rights.[107] In fact, the concepts of defeasibility and indefeasibility are ancient common law notions, frequently applied to common law rights throughout the history of the common law. In that history it has generally been acknowledged that common law rights tend to be more subject to defeasance, and statutory rights tend more to indefeasibility.[108] Since *Mutual Pools*, the case law concerning s 51(xxxi) has recognised that some property rights may have this characteristic and that, when they do, this is analytically significant because the occurrence of the "contingency" that terminates or defeats the right cannot properly be characterised as an "acquisition" of property.

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[106] Hart, "The Ascription of Responsibility and Rights" in Flew (ed), *Logic and Language* (Oxford, 1952) at 148.

[107] As Gummow J said in *JT International v Commonwealth* (2012) 250 CLR 1 at [104], "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". Butt, *Land Law* (6th ed, 2010) at [8.23] gives an example: a grant "to A and his heirs, but if the land ceases to be used as a school then it shall return to the grantors and his heirs". The common law even knew the determinable fee and the fee simple (to which a condition was attached by which the estate might be cut short): see *Ward* at [432]; *Wilson v Anderson* (2002) 213 CLR 401 at [89].

[108] Note, eg, *Earl of Leicester v Heydon* (1584) 1 Plowden 384 at 394 [75 ER 582 at 597], recording a submission that "that which is confirmed by Parliament is made indefeasible, although it were defeasible before".

106. Once the terms of common law recognition of native title are understood, it can readily be demonstrated that native title rights are inherently defeasible to the exercise of the Crown's radical title, such that their extinguishment or impairment as a result of the exercise of that radical title does not occasion "any acquisition in the constitutional sense".[109] That is because, to paraphrase *Cunningham* (see paragraph [71] above):

(a) native title was always, of its nature, liable to extinguishment or impairment by the exercise of the Crown's radical title, such that extinguishment or impairment later effected in this way cannot properly be described as an acquisition of property; or

(b) susceptibility to extinguishment or impairment by the exercise of the Crown's radical title is a characteristic of native title, inherent at the time of its recognition and integral to the property itself.

107. There are no reasons of underlying principle or authority that confine the concept of inherent defeasibility to (1) the analysis of whether particular rights are "property"; or (2) statutory rights. To make good on those contentions, it is sufficient to refer to *WMC Resources*, *Chaffey* and *Cunningham*.

108. The subject matter of ***WMC Resources*** is set out in **CAB 133 [368]**. The four majority justices (Brennan CJ, Gaudron, McHugh and Gummow JJ) all proceeded on the basis that the exploration licences in question were "property" for the purposes of s 51(xxxi). Two of the majority (Brennan CJ and Gaudron J) found there was no acquisition of that property, because the Commonwealth did not acquire any benefit from modification of the exploration licences (at [24], [84]). However, McHugh and Gummow JJ, despite accepting that the permits were "property" (at [144], [195]) held them to be inherently defeasible, with the result that there was no acquisition of property.

109. Justice McHugh's approach to a broad and narrow view of the concept of inherent defeasibility is discussed in paragraph [71] above. His Honour found either basis established. Importantly, McHugh J expressly stated (in fn 179) that the defeasible character of the permit was not relevant to "whether the permit constituted 'property'" (which he stated that it did).

110. Justice Gummow explained that analysis of the nature and function of the permits and the legislation under which they were granted may disclose that the modification or revocation

[109] *WMC Resources* (1998) 194 CLR 1 at [196] (Gummow J).

of those permits could not involve an acquisition within the meaning of s 51(xxxi) (at [194]-[195]). His Honour then stated (at [196]):

> To accept this proposition is not to assert that the defeasible character of the statutory rights in question denies them the attribute of "property" in the "traditional" sense of the general law. For example, the vested interest of a beneficiary under a settlement in which the settlor reserved a power of revocation would, pending such revocation, be proprietary in nature. ... The point of present significance is that in some circumstances, of which the statutory rights in this case are an instance, the nature of the property may be such that its defeasance or abrogation does not occasion any acquisition in the constitutional sense. (emphasis added)

111. That passage highlights that rights under the general law may be inherently susceptible to variation in specified circumstances, without losing their proprietary character. If that is a feature of the property in question (some statutory rights being simply "an instance" of property rights that may have this character), there would be no acquisition in the constitutional sense if the occurrence of the relevant contingency causes the defeasance or abrogation of the relevant property right.[110]

112. Turning to *Chaffey*, at issue was whether amendments to the ***Work Health Act*** *1986* (NT) engaged the limit in the *Northern Territory Self-Government Act 1978* (Cth) equivalent to s 51(xxxi), by retrospectively amending the method by which Mr Chaffey's accrued right to statutory workers compensation was to be calculated.

113. The appellants (the Attorney-General for the Northern Territory and Santos Ltd, which was Mr Chaffey's employer) accepted that Mr Chaffey's accrued right to compensation was "property" for relevant purposes. The Northern Territory also accepted (and Santos does not appear to have disputed) that Mr Chaffey's property was diminished by the amendment, and that there was an identifiable and measurable countervailing benefit or advantage accruing to the employer.[111] Nonetheless, they contended that, on the proper construction of the Work Health Act, the method prescribed for quantifying the amount of compensation payable "was always subject to variation" (at [18]). Gleeson CJ, Gummow, Hayne and Crennan JJ agreed, with the consequence that (at [30], also [20]):

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[110] See also [198] (citing *Minister for Primary Industry and Energy v* ***Davey*** (1993) 47 FCR 151 at 163-165 (Black CJ and Gummow J)) and [203]. Note that McHugh J (at [146], fn 181) also cited this aspect of *Davey*. See also *Newcrest* (1997) 190 CLR 513 at 618-619, 634 (Gummow J).

[111] *Chaffey* at 653, 655 (summary of argument). The Northern Territory argued that Mr Chaffey's right to compensation was "inherently defeasible or inherently susceptible to modification" for the purposes of s 51(xxxi). Santos argued that the variation in the amount of compensation payable was not a defeasance or abrogation or acquisition of that property but a variation "inherent at the time of its creation and integral to the property itself" (citing *Davey* at 165).

> [Mr Chaffey's] rights to compensation under that statute were of a nature which rendered them liable to variation by a provision such as that made by the 2004 Act. Once this nature of the "property" involved is understood it is apparent that there was no "acquisition" spoken of in s 50 of the Self-Government Act. (emphasis added)

114. That passage contains no finding that Mr Chaffey's compensation entitlement was not "property". Rather, it proceeds on the basis that it was property, albeit property of a "nature" that rendered it subject to the kind of variation that had occurred. That is reinforced by the next passage in the judgment, which left open the question whether subsequent legislation might so remove the content of the rights to compensation "as to go beyond what was contemplated by [the Act] and amount to abolition" (at [31]). There would be no point in preserving a future argument of that kind if Mr Chaffey's compensation rights were never "property" to begin with (cf. **CAB 120 [312]-[313]**).

115. The plurality's reasons (at [21]-[25]) must be read in this context. When their Honours observed (at [21]) that "these appeals do not turn upon the notion of 'acquisition'. They depend upon the identification of the 'property' to which s 50 … is said to apply", they were not saying that the concept of "inherent defeasibility" is relevant only to whether the rights in question are proprietary. The determinative issue was whether the nature of Mr Chaffey's "property" was such that it was always liable to be varied in the way that had occurred. In concluding that it was, the plurality (at [25]) explained:

> In *WMC*, as with Pt V of the *Work Health Act*, by express legislative stipulation in existence at the time of the creation of the statutory "right", its continued and fixed content depended upon the will from time to time of the legislature which created that "right". (emphasis added)

116. Thus, applying the narrow view of inherent defeasibility (see paragraph [71] above), the critical feature of the statutory scheme was that the contingency to which Mr Chaffey's compensation rights were subject arose, at the outset, from the terms of the statute that created the right. Contrary to what had been asserted by Mr Chaffey (at [19]), that right was a right to be paid compensation according to a prescribed formula that "was always subject to variation". Owing to their inherent susceptibility to variation, Mr Chaffey's rights were not of the nature or amplitude that he had asserted. Their variation did not amount to an acquisition of property.

117. In support of that conclusion, the plurality referred to specific passages from decisions of the Federal Court, including *Davey* at 163-165.[112] The significance of *Davey* is discussed

[112] *Chaffey*, fn 55. These same passages were relied upon by Gummow J in *WMC Resources* at [198].

at **CAB 131-3 [362]-[367]**. In that case, Black CJ and Gummow J drew a distinction (at 165) between:

(a) a right conferred by statute that is "so slight or insubstantial" that it may not constitute a proprietary interest at all (citing, by way of example, the grazing licence considered in *Meneling Station* (1982) 158 CLR 327); and

(b) a statutory right that confers only "a defeasible interest", subject to alteration by the Minister, so that the making of such amendments "is not a dealing with the property; it is the exercise of powers inherent at the time of its creation and integral to the property itself".

118. In *Chaffey*, the plurality's reasons resonate with the second category in *Davey*. The case does not support the proposition that a right cannot be both "property" and "inherently defeasible". It is to opposite effect. Like *WMC Resources*, it demonstrates that some kinds of "property" may be inherently defeasible to particular contingencies which, if they occur, do not involve an acquisition of property in the constitutional sense.

119. *Cunningham* is a further illustration of the same principle. The issues that arose in that case are summarised in **CAB 137 [385]**. By way of context, French CJ, Kiefel and Bell JJ rejected the plaintiffs' argument that their entitlements under the *Parliamentary Contributory* ***Superannuation Act*** *1948* (Cth) had "at all times been of a fixed and certain kind" (at [36]). They held, instead, that the plaintiffs' rights were not "free from any condition permitting a variation in the nature of a reduction of the value of their benefits" (at [39]). Whether s 51(xxxi) applied to the amendments required identification of "the nature of the rights making up the plaintiffs' property" (at [40]). The plurality went on to recognise that (at [43]):

> Some cases concerning s 51(xxxi) have drawn a distinction between rights recognised by the general law and those which have no existence apart from statute and whose continued existence depends upon statute. The dichotomy is useful. Rights which have only a statutory basis are more liable to variation than others. (emphasis added)

120. Consistently with the earlier authorities, it is implicit in the words "more liable" that some rights that do not have "only a statutory basis" may nevertheless be inherently susceptible to variation. The plurality went on to describe the plaintiffs' case as being based "upon statutory rights of a proprietary nature" that ignored "the limitations inherent in those rights" (at [47]). As a result of those limitations, and despite the "proprietary nature" of the rights in question, the amendments that reduced the plaintiff's entitlements were not

laws "with respect to the acquisition of property and s 51(xxxi) has no application to them" (at [48]).

121. One further aspect of the plurality judgment is notable. In response to an argument from the plaintiffs (at [45]) that the descriptors "inherently susceptible" to modification and extinguishment, or "inherently unstable", are misleading and circular because all statutory provisions are liable to amendment, the plurality said (at [46]):

> The plaintiffs' submissions overlook that these descriptions identify within particular statutory rights a feature which is critical to their nature as "property" for the purposes of the application of s 51(xxxi). 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. The Commonwealth does not as a result of an amendment effecting a variation receive a release from an existing liability and therefore acquire property, as the plaintiffs contend. The Commonwealth's liability corresponds with the variation made. (emphasis added)

122. This explanation shows that use of the term "inherent" is purposeful because it directs attention to a feature within particular statutory rights, as opposed to a general liability of all statutory rights to amendment. That is, the liability to variation must be a feature of the right apart from the fact that it was created by statute. That embraces the narrow view of the concept of inherent defeasibility (see paragraph [71] above). Further – and critically for present purposes – that supports the conclusion that, as a matter of principle, other kinds of property might share the same characteristic.

123. Indeed, given that the underlying rationale of the "inherently susceptible" analysis is that the Commonwealth cannot properly be characterised as acquiring property when what has occurred is a contingency to which the property was always subject, that rationale can and should apply to all property rights that have that character. It would be arbitrary to treat the defeasance of a statutory right that is inherently susceptible to defeasance as outside s 51(xxxi), while reaching the opposite result for a non-statutory right that is inherently susceptible to defeasance.

124. As to the other judgments in *Cunningham*, Gageler J's approach (at [66]) is conceptually consistent with that of the plurality, including treating the concept of inherent defeasibility as arising only where there is a right of property (see also [70]-[71]). Justice Nettle likewise implicitly accepted that a right can be both proprietary and inherently defeasible (at [235]). Justice Keane applied the analysis in *Chaffey*, but concluded that the entitlements were not "property" on the facts (at [124], [154]-[155]). Justice Gordon found that the various entitlements were so unstable as not to amount to "property protected from

acquisition by s 51(xxxi)", but also made findings that there was no "acquisition" (at [289], [328]-[329], [335]-[336], [357]-[358]).

125. In short, *Chaffey* and *Cunningham* make clear that rights that constitute "property" for the purpose of s 51(xxxi) may nevertheless be "inherently defeasible". Further, the rationale for the view of inherent defeasibility that both decisions embrace is not confined to statutory rights. The Full Court below erred in reaching the contrary conclusion (cf. **CAB 112 [282(a)], 121-2 [318]-[319], 131 [360], 133 [367], 135-6 [380], 138 [387], 139 [391]**).

Native title was inherently susceptible to the compensable acts

126. ***Vesting of minerals by 1939 Ordinance***: **CAB 46 [31]-[33], 161-4 [481]-[487]**. In *Ward* at [376]-[385], this Court held that the vesting of property in the Crown of (unalienated) minerals was "the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question". The operative words of s 107 of the 1939 Ordinance are analogous to the Western Australian provisions considered in *Ward*. Accordingly, the same characterisation should apply to the enactment of s 107, with the consequence that, because native title was inherently susceptible to the exercise of the Crown's radical title to appropriate unalienated minerals to itself for Crown purposes, any extinguishment of native title mineral rights effected by s 107 was not an acquisition of property.

127. ***Special mineral leases***: **CAB 47 [37]-[39], 165-6 [494]-[496]**. The grant of mining leases under Part V of the 1939 Ordinance involved "the use of statute to carve out mining interests from the radical title enjoyed by the Commonwealth": *Chaffey* at [24], approving *Newcrest* at 635. Any resultant impairment of native title was not an acquisition of property, because native title was inherently susceptible to the exercise of the Crown's radical title to grant those interests.

128. ***1953 Ordinance***: In so far as the 1953 Ordinance is concerned, no reliance was placed on the "inherent defeasibility" ground, because the Commonwealth contends that the proper characterisation of the 1953 Ordinance is a compulsory acquisition statute that provides just terms compensation (**CAB 51 [53]**).

129. That position reflects the Commonwealth's acceptance that the principles discussed above concerning the recognition of native title do not suggest any basis for affording lesser protection to native title against the exercise of sovereign powers that apply indifferently as between native title and other interests in land. A compulsory acquisition law is a power

of that kind, as is the law considered in *Congoo v Queensland* (2014) 218 FCR 358 at [75]. Extinguishment or impairment of native title pursuant to such laws does not result from an exercise of the Crown's radical title. Section 51(xxxi) may be engaged by one kind of exercise of power, but not another (cf. **CAB 160-1 [476]**). So much was expressly recognised by Gummow J in the key passage in *Newcrest* at 613 discussed in paragraphs [65] to [68] above.

GROUND 3: MINERALS RESERVATION IN PASTORAL LEASE

Summary

130. By answering "no" to separate question 2(a) (**CAB 171**), the Full Court erred in failing to find that the minerals reservation in the 1903 Lease constituted an assertion by the Crown of a right of exclusive possession in the minerals, which extinguished any native title mineral rights (**CAB 53 [59], 66 [106]**).

131. The Full Court failed to recognise and give effect to the important function a minerals reservation performed in the statutory and historical context of turn-of-the-century Northern Territory. One function of minerals reservations was to ensure the Crown had the ability to prevent others from taking the reserved minerals without authority. It served that function because – at the time of the 1903 Lease – the Crown's recourse against such taking was limited to an action for intrusion, which required the Crown to hold exclusive possession in the minerals.

132. The recognition in *Mabo (No 2)* that the Crown did not hold full beneficial title in the land has no bearing on this function of a minerals reservation. It does, however, affect the characterisation of such a reservation, which necessarily must compare the result achieved by the reservation with the nature of the interests held before the grant that was the subject of the reservation. It was the Full Court's reliance on the characterisation of minerals reservations found in authorities prior to *Mabo (No 2)* (**CAB 67 [107]**) that led it into error, and caused it to miss the import of the statement by Gageler J in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 (***NSWALC***) at [112] that the reservation of minerals "had the consequence of creating rights of ownership in respect of the land in question, in the Crown" so that the Attorney-General "would still have had the possession necessary to found an action for intrusion".

Context

133. ***Historical context:*** At common law, the Crown holds the prerogative right to all mines[113] of gold and silver,[114] which includes the right to enter upon land to extract those metals.[115] Royal metals could be conveyed, but only by clear and precise words found in the terms of the grant or legislation. This position applied in Australia.[116]

134. In the case of minerals,[117] the common law treats the owner of a freehold estate as being in possession "not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth", entitling the owner to anything regarded as part of the soil (including minerals).[118] Subject to contrary indication,[119] a conveyance of a fee simple will include minerals.[120]

135. For a demise of a lease at common law, unless it provides otherwise, the lessee will take possession of the minerals if they form part of the lessor's title but will have no property in, or right to work, those minerals due to the rule against waste.[121] An exception exists whereby a lessee may continue to work, and take profits from, any mines already opened at the time of the demise.[122]

136. The other important contextual matter is the position of the Crown at common law. *First*, the Crown need not enter land in order to have possession. The Crown generally proves possession by title, generally by record or, if no record exists, through a process called an "inquisition"/ "inquest" or "office" to establish the Crown held the title, thus creating a record (sometimes called an "office found").[123] *Secondly*, the Crown could not bring an

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[113] In old instruments and statutes this term means "an unopened and unworked seam, lode, or deposit of metallic ore in the ground": ***Wade*** *v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 194-195.

[114] *Case of Mines* (1568) 1 Plowden 310; 75 ER 472.

[115] ***Cadia Holdings*** *Pty Ltd v New South Wales & Anor* (2010) 242 CLR 195 at [16] (French CJ), [80] (Gummow, Hayne, Heydon, Crennan JJ).

[116] ***Woolley*** *v Attorney-General (Vic)* (1877) 2 App Cas 163 at 166-167; *Cadia Holdings* (2010) 242 CLR 195 at [14] (French CJ).

[117] When used in these submissions concerning ground 3, the term "minerals" does *not* include the Royal metals of gold and silver.

[118] *Elwes v Brigg Gas Co* (1886) 33 Ch D 562 at 568; *Wade* (1969) 121 CLR 177 at 185 (Windeyer J).

[119] *Bocardo SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380; [2010] UKSC 35 at [27] (Lord Hope, with whom the other Lords agreed on this question: [46], [57], [94], [116]); which confirms the position at common law as stated in *Mitchell v Mosley* [1914] 1 Ch 438 at 450.

[120] *Grigsby v Melville* [1973] 3 All ER 455 at 460-462.

[121] *Keyse v Powell* (1853) 2 El & Bl 132; *Commonwealth v New South Wales* (1923) 33 CLR 1 at 67 (Higgins J); ***Campbell*** *v Wardlaw* (1883) 8 App Cas 641 at 645, 647 (Lord Blackburn), 656 (Lord Fitzgerald). See also O'Hare, 'A History of Mining Law in Australia' (1971) 45(6) *Australian Law Journal* 281 at 283.

[122] *Campbell* (1883) 8 App Cas 641 at 645, 647 (Lord Blackburn), 650 (Lord Watson).

[123] **Robertson** (ed), *The Law and Practice of Civil Proceedings, by and Against the Crown and Departments of the*

action in ejectment (in which a plaintiff complains they had been wrongly ejected).[124] This inability was, in part, explained by the fiction that, where the Crown had obtained possession of land as a matter of record (not involving entry), the Crown could never be dispossessed, which is a necessary element in an action for ejectment. This position applied in Australia[125] and was only rejected by the High Court in 1960.[126]

137. As a result, in 1903, the Crown had to rely upon an information of intrusion, being a proceeding by the Attorney-General on behalf of the Crown in respect of a trespass committed against the property of the Crown including its land and minerals.[127] The Crown's title was taken as proved by the information (relying on the record or the office found), immediately resulting in eviction of the defendant and/or compensation being awarded, unless a defendant could show a legal title to possession by record (even one held concurrently with the Crown).[128] Thus, the Crown could sustain an information of intrusion only if the Crown was entitled to exclusive possession of the relevant property. Further, the Crown could only avoid the additional process, of an inquest or office, if there was an existing record of such title.

138. ***Statutory context***: The 1890 Crown Lands Act applied to the claim area when the 1903 Lease was granted.[129] Some provisions are summarised by the Full Court at **CAB 68-70 [111], [114]**.[130] However, the Commonwealth says four further aspects of the 1890 Crown Lands Act (as amended) are also relevant: **(1)** s 6 gave the Crown broad, non-exhaustive powers to create rights in others and appropriate land to itself including by dedication and reservation – the latter being contemplated as appropriation to the Crown by Brennan J in *Mabo (No 2)*[131] and by the Court in *Ward*[132] (cf **CAB 69 [112]**); **(2)** s 24 of the 1899 Act makes clear that pastoral leases must include the terms specified in Annexure A, and

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Government: With Numerous Forms and Precedents (Stevens and Sons, 1908) at 430-431; **Chitty**, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Rights and Duties of the Subject* (Joseph Butterworth & Son, 1820) at 249-250.

[124] Chitty at 245, cited by Dixon CJ in *The Commonwealth v Anderson* (1960) 105 CLR 303 at 311-312.

[125] *Attorney-General v **Brown*** (1847) 1 Legge 312 at 329.

[126] *Commonwealth v Anderson* (1960) 105 CLR 303 at 313 (Dixon CJ), with whom the other justices agreed.

[127] *Brown* (1847) 1 Legge 312; *Attorney-General for the Isle of Man v Mylchreest* (1879) 4 AC 294; Robertson at 178-179.

[128] Chitty at 332-334; Robertson at 177-182, see particularly at 182.

[129] Read as one with the *Northern Territory Crown Lands Amendment Act 1896* (SA) (**1896 Act**), *Northern Territory Land Act 1899* (SA) (**1899 Act**) and *Northern Territory Land Amendment Act 1901* (SA).

[130] The Commonwealth does not dispute this summary save for the characterisation in the chapeau of paragraph [111(d)] or the conclusions in the first sentence of the chapeau of [114].

[131] (1992) 175 CLR 1 at 69-70 point 5 (Brennan J).

[132] (2002) 213 CLR 1 at [151], [215], [219] Gleeson CJ, Gaudron, Gummow and Hayne JJ.

therefore constitutes a statutory requirement that the Crown assert rights including the reservation of minerals (which is provided for in Annexure A, paragraph (l)) (cf **CAB 70 [115]**); **(3)** the Crown could grant rights under the 1890 Crown Lands Act (as amended) to search for, or extract, metals or minerals in specified circumstances,[133] meaning that the 1890 Crown Lands Act did deal with mining or minerals other than just in the context of describing the contours of the leases granted, such that the mining enactments were not an exclusive code (cf **CAB 69-70 [112]-[113]**); and **(4)** the 1890 Crown Lands Act did not impose a statutory penalty for taking minerals without lawful authority (other than those falling within the limited terms of s 106). Indeed, at the time the 1903 Lease was granted, no other statute that applied in the Northern Territory[134] imposed a statutory penalty for the taking of minerals (other than gold)[135] on any lands without lawful authority.[136]

139. The statutory scheme just summarised required the Crown's assertion of rights in minerals through a minerals reservation. That follows because there was no statutory mechanism in any of the enactments that empowered the Crown to prevent anyone from taking minerals without lawful authority (apart from gold from Crown lands). It was minerals reservations that provided the legal basis to prevent such taking.

Function of minerals reservation

140. ***In general***: By 1903, the common law position that grants of freehold would convey the property in all minerals (other than royal metals) had been reversed by the express terms of s 8 of the 1890 Act, with the effect that a minerals reservation was not required for the purpose of preventing a freehold grant from passing property in minerals. In the case of pastoral leases, the common law position that lessees could not work unopened mines was extended to apply to opened and unopened mines alike.[137] As property was never conveyed by a demise of a lease, there was no need for an equivalent of s 8 of the 1890 Act for pastoral leases, and a minerals reservation was also not required to prevent the lease from passing property in minerals (cf **CAB 70 [115]**).

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[133] See s 2 of 1896 Act and s 77 of 1890 Crown Lands Act.

[134] *Northern Territory Gold Mining Act 1873* (SA); *Gold Mining Amendment Act 1886* (SA); *Northern Territory Gold Mining Amendment Act 1895* (SA); *Northern Territory Gold Mining Amendment Act 1898* (SA); *Northern Territory Minerals Act 1888* (SA); *Mining on Private Property Act 1888* (SA); *Mining on Private Property Amendment Act 1895* (SA); *Mining on Private Property Amendment Act 1899* (SA); *Mining on Private Property Amendment Act 1901* (SA).

[135] *Northern Territory Gold Mining Amendment Act 1895*, s 11 imposed a penalty for gold on Crown lands.

[136] Noting that it is the *Northern Territory Minerals Act 1888* (SA) and *Northern Territory Gold Mining Act 1873* (SA) that applied to land subject to a pastoral lease.

[137] 1899 Act s 25.

141. In that context, in 1903, a minerals reservation in freehold grants and pastoral leases had two functions: (1) it severed the title of the minerals from the title of the fee simple estate or pastoral lease;[138] and (2) it effected, and created a record of, the Crown's assertion of property in the minerals, on which an action in intrusion could be based without the need for an office or inquest. The first function was important to prevent the freeholder or lessee from establishing (in themselves or their assignees) constructive possession in the minerals by their possession of the surface,[139] which if established would defeat an action of intrusion by the Crown. It also had the consequence that neither the freeholder nor pastoral lessee could sustain an action in trespass against third parties in relation to the taking of minerals on their land without their authority.

142. It is significant that, in 1903, there was no person who could take action to dispossess a person working minerals without lawful authority (other than gold on Crown lands) unless the minerals reservation performed the second function of asserting exclusive possession of the minerals in the Crown (thereby allowing the Crown to take an information of intrusion). This made the second function of a minerals reservation one of real practical importance at the time the 1903 Lease was granted.

143. ***The authorities***: That a minerals reservation involves both of the functions just identified is supported by authorities before and after *Mabo (No 2)*. Justice Gageler expressly recognised and endorsed the second function of a minerals reservation in *NSWALC*. There, after explaining why *Brown* had been overruled in *Mabo (No 2)* (to the extent it held the Crown to be the absolute beneficial owner of all land in New South Wales from settlement), his Honour explained that the result would not have altered even if the view in *Mabo (No 2)* had been applied: [110]-[112].

144. In his Honour's view, the starting position (i.e. whether the Crown held absolute beneficial title or radical title) was irrelevant, because the minerals reservation brought about relevantly the same result as would have arisen if the Crown had held beneficial title: i.e. the Crown had rights of ownership in that part of the land described in the reservation (the minerals) sufficient to found an action for intrusion (being exclusive possession). The "different steps in the analysis", averted to by his Honour, that result from the different starting premise are that, with radical title, the reservation created the rights of ownership

[138] It severs the minerals (a physical part of the land already in existence: "in esse") from the land (the "thing") before the grant: *Doe d. Douglas v Lock* (1843) 2 Ad & E 705 at [743]-[744]; *Wade* (1969) 121 CLR 177 at 194.

[139] *Commonwealth v New South Wales* (1923) 33 CLR 1 at 67 (Higgins J).

in the Crown; whereas, implicitly, if the Crown held absolute beneficial title, the reservation retained the Crown's rights of ownership. In either case, however, the reservation involved an assertion of beneficial ownership by the Crown.

145. The Full Court's relegation of these statements to the limited context of the existence of non-statutory executive power to create interests in land is misplaced (cf **CAB 70 [117]**). Whilst the issue in *NSWALC* did not require any conclusions to be drawn about extinguishment of native title, the first step in any extinguishment analysis is to ascertain the nature of the rights conferred by a grant or asserted by the Crown.[140] Gageler J (at [112]) undertook that very analysis and concluded that the nature of the rights in a freehold grant that reserves minerals to the Crown involved the creation of rights of ownership in the Crown that constitute exclusive possession so as to be sufficient to found an action for intrusion. There is no principled basis upon which the analysis could be any different when the question is whether those same rights extinguished native title.

146. Further, in *Wik*,[141] Drummond J explicitly considered the result of a reservation of minerals from the post-*Mabo (No 2)* starting premise. Having recorded the requirement in s 58 of the *Mining Act 1898* (Qld) that grants in fee simple made after 1 March 1899 contain reservations to the Crown of certain minerals, his Honour found that subsequent legislation (which vested in the Crown the property of those minerals in land alienated in fee simple after that date) "merely confirmed the Crown's ownership" of those minerals. His Honour clearly saw that the reservation of the particular minerals in grants of fee simple after 1 March 1899 had already given the Crown ownership of those minerals.

147. The result of a minerals reservation was the same in the pre-*Mabo (No 2)* decisions. There was no doubt in those decisions that minerals reservations in favour of the Crown resulted in the beneficial ownership of the minerals being held by the Crown. In those cases, minerals were variously described as "belonging to the Crown",[142] being the "property of the Crown"[143] or "in the ownership of the Crown".[144]

148. Further, the findings in those pre-*Mabo (No 2)* decisions, that minerals reservations in Australia constitute exceptions, supports the Commonwealth's contentions as to the first

[140] *Ward* (2002) 213 CLR 1 at [78]-[79].
[141] (1996) 63 FCR 450 at 496.
[142] *Wade* (1969) 121 CLR 177 at 189, 193 (Windeyer J).
[143] *Colon Peaks Mining Co (NL) v Wollondilly Shire* (1911) 13 CLR 438 at 447; *Brown* (1847) 1 Legge 312 at 323.
[144] *Commonwealth v New South Wales* (1923) 33 CLR 1 at 23 (Knox CJ and Starke J).

function of a minerals reservation (cf **CAB 67 [107]**). Accepting it is an exception does not mean a minerals reservation has no other function or otherwise denies that it involves the assertion of beneficial ownership of those severed minerals in the Crown.

149. Where the Full Court fell into error was in their adoption of the characterisation of an exception in pre-*Mabo (No 2)* decisions as simply a "holding back" (**CAB 67 [107]**). This characterisation compares what was held before the grant and the situation created by the grant, and thus is entirely predicated upon the pre-*Mabo (No 2)* view that the Crown held beneficial title. However, the proper enquiry is to ascertain the function of a minerals reservation in its historical and statutory context to determine its result. Any contemporary characterisation would need to compare that result with the situation before the grant on the post-*Mabo (No 2*) (radical title) view of the world.

150. The Full Court also relied (at **CAB 67 [107]**) upon the characterisation of the mineral reservations by Gummow J in *Wik HC* at 200-201 as being a "keeping back". That passage did not support the Full Court's analysis, because it had been found at first instance, and not subject to appeal, that the Crown already held absolute beneficial title in the minerals prior to the grant of the leases under consideration by reason of the legislative declaration in 1909 of Crown ownership in the minerals.[145] For that reason, there was no occasion to consider the effect of a minerals reservation where the Crown previously did not hold beneficial title in relation to minerals in the relevant land.

151. ***The minerals reservation in the 1903 Lease:*** The text of the minerals reservation in the 1903 Lease is consistent with the two functions identified above. *First*, the minerals reservation stated that it excepted and reserved all minerals (etc) "out of this lease". This must be understood to implement the first function of a minerals reservation: ie severing the title of the pastoral lease from the title of the minerals. In holding (**CAB 67 [109]**) that "out of this lease" suggests a "holding back", the Full Court wrongly omitted the critical step of analysis (identifying the result sought to be achieved by these words).

152. *Secondly*, the minerals reservation stated it excepted and reserved all minerals (etc) "under His Majesty His Heirs and Successors", which must be understood to effect the second function of asserting exclusive possession in the Crown. The word "under" signifies both an action being taken with respect to the minerals (the assertion of a right) as well as the nature of that assertion (one of control and beneficial ownership of the minerals by the

[145] *Wik* (1996) 63 FCR 450 at 500. The leases under consideration were granted in 1915, 1919, 1945 and 1974.

Crown). This is consistent with the requirement in s 24 and Schedule A of the 1899 Act that a pastoral lease include an exception "in favor of the Crown", signifying it is to be for the benefit of the Crown. It is also consistent with the fact that the minerals reservation conferred an express right to take the reserved minerals.

153. Further supporting the second function, the minerals reservation included the words, "with full and free liberty of access … to and for the said Minister and his agents …. and all other persons authorised by him or other lawful authority" (emphasis added). The conjunction "with", in this context, has been found to confer an express additional right on the grantor not limited as the implied right to those things "necessary" for obtaining the excepted minerals.[146] The express grant of rights was given immediately and directly to the Minister and his agents.

154. These express rights – which were conferred directly on the Minister – are consistent with the assertion of ownership of the minerals in the Crown. They are not in the language of a preservation of the status quo, whereby rights may or may not be granted in the future to third parties to take the minerals. The inclusion of third parties with "other lawful authority" does not derogate from the rights asserted directly in the Minister. They merely make clear who else may access the land to take the Crown's minerals (cf **CAB 67 [109]**).

Extinguishing effect

155. The assertion of beneficial ownership of the minerals in the Crown is wholly inconsistent with the existence of any native title right in so far as they relate to minerals.[147]

156. Whilst not deciding whether the rights vested in the Crown by the minerals reservation could co-exist with any native title rights in respect of the minerals (**CAB 70 [118]**), the Full Court suggested it would be paradoxical if it did effect extinguishment, given reservations in a pastoral lease are a key reason why pastoral leases are not inconsistent with the continuing existence of non-exclusive native title rights (**CAB 67 [108]**). This misunderstands the role of reservations in that context. *First*, each of the references cited by the Full Court show that a pastoral lessee was found not to have exclusive possession because the existence of extensive reservations demonstrated there were rights in others, including the Crown, to enter the land.[148] This acknowledges that the reservations in the

[146] *Earl of Cardigan v Armitage* (1823) 107 ER 356 at 361-362; *Dand v Kingscote* (1840) 151 ER 370 at 379-380.
[147] *Ward* (2002) 213 CLR 1 at [151], [383]-[384]; *Wik* (1996) 63 FCR 450 at 500.
[148] Eg *Ward* (2002) 213 CLR 1 at [178].

relevant grant created rights in persons other than the grantee (just as the minerals reservation did here). *Secondly*, in the cases cited the Court did not have to consider the impact of mineral reservations on native title mineral rights as such rights had either been extinguished[149] or not established.[150] There is no incongruency with those decisions.

157. There is no doctrinal basis or authority that supports a different conclusion for the reservation of minerals in a grant (on the one hand) or the vesting of minerals in the Crown by statute (on the other). They both involve the assertion by the Crown of beneficial ownership in the minerals, amounting to a right of exclusive possession. That exclusive possession was a necessary precondition to the Crown being able to control who could or, more particularly, who could not exploit the minerals of the Northern Territory through the sole mechanism of enforcement available at that time. Such possession is entirely inconsistent with the existence of any native title right to the extent it relates to minerals.

PART VII ORDERS SOUGHT

158. The Commonwealth seeks the orders set out in its notice of appeal (**CAB 183**).

PART VII ESTIMATED TIME

159. The Commonwealth estimates that it will require 4.5 hours to present oral argument in chief and 1.25 hours in reply.

Dated: 28 March 2024

Stephen Donaghue
Solicitor-General of the Commonwealth
T: (02) 6141 4139
stephen.donaghue@ag.gov.au

Stephen Lloyd
Sixth Floor Selborne Wentworth Chambers
T: (02) 9235 3753
stephen.lloyd@sixthfloor.com.au

Nitra Kidson
Higgins Chambers
T: (07) 3221 3785
nkidson@qldbar.asn.au

Carla Klease
Higgins Chambers
T: (07) 3012 8558
cklease@qldbar.asn.au

[149] *Wik* (1996) 63 FCR 450 at 500.
[150] *Ward* (2002) 213 CLR 1 at 385.

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No D5 of 2023

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

and

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

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

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

No.	Description	Version	Provision(s)
Commonwealth			
1.	Commonwealth Constitution	Current	ss 7, 24, 51(xxxi), 52(i), 72, 90, 92, 111, 122, 128
2.	*Native Title Act 1993* (Cth)	Current (compilation No. 49, 18 October 2023 to present)	ss 3, 10, 11, 15, 17, 61
3.	*Northern Territory Acceptance Act 1910* (Cth)	No. 20 of 1910, as at 1 January 1911	s 7
4.	*Northern Territory (Administration) Act 1910* (Cth)	No. 27 of 1910, as at 1 January 1911	
5.	*Northern Territory (Administration) Act 1910-1931* (Cth)	No. 5 of 1931, as at 21 May 1931	s 21
6.	*Northern Territory (Administration) Act 1910-1947* (Cth)	No. 39 of 1947, as at 12 June 1947	s 4U
7.	*Racial Discrimination Act 1975* (Cth)	Current (compilation No. 19, 13 December 2022 to present)	s 10

State and Territory			
8.	*Gold Mining Amendment Act 1886* (SA)	No. 368 of 49 and 50, Vic, 1886, as at 8 September 1886	
9.	*Minerals (Acquisition) Ordinance 1953* (NT)	No. 5 of 1953, as at 17 April 1953	s 3
10.	*Mining Act 1904* (WA)	No. 15 of 1904, as at 16 January 1904	s 117
11.	*Mining Act 1978* (WA)	No. 107 of 1978, as at 8 December 1978	Div 3 of Pt IV
12.	*Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT)	No. 15 of 1968, as at 16 May 1968	
13.	*Mining on Private Land Act 1909* (Qld)	9 Edw. VII, No. 15, 1909, as at 19 December 1909	s 6
14.	*Mining on Private Property Act 1888* (SA)	No. 448 of 51 and 52 Vic, 1888, as at 8 December 1888	
15.	*Mining on Private Property Amendment Act 1895* (SA)	No. 626 of 58 and 59 Vic, 1895, as at 20 December 1895	
16.	*Mining on Private Property Amendment Act 1899* (SA)	No. 728 of 62 and 63 Vic, 1899, as at 21 December 1899	
17.	*Mining on Private Property Amendment Act 1901* (SA)	I Edw. VII, No. 772, 1901, as at 21 December 1901	
18.	*Mining Ordinance 1939* (NT)	No. 9 of 1939, as at 18 May 1939	ss 106, 107
19.	*Mining Ordinance 1939-1960* (NT)	Reprint as at 1 January 1961 (incorporating amendments assented to on 2 September 1960)	Div 2A of Part V
20.	*Northern Territory Crown Lands Act 1890* (SA)	No. 501 of 53 and 54 Vic, 1890, as at 23 December 1890	ss 5, 6, 8, 31, 33, 63, 77, 78, 90, 106
21.	*Northern Territory Crown Lands Amendment Act 1896* (SA)	No. 649 of 59 and 60 Vic, 1896, as at 2 September 1896	s 2

22.	*Northern Territory Gold Mining Act 1873* (SA)	No. 18 of 37 Vic, 1873, as at 18 December 1873	
23.	*Northern Territory Gold Mining Amendment Act 1895* (SA)	No. 628 of 58 and 59 Vic, 1895, as at 20 December 1895	s 11
24.	*Northern Territory Gold Mining Amendment Act 1898* (SA)	No. 695 of 61 and 62 Vic, 1898, as at 23 December 1898	
25.	*Northern Territory Land Act 1899* (SA)	No. 722 of 62 and 63 Vic, 1899, as at 22 November 1899	ss 23, 24, 25, Schedule A
26.	*Northern Territory Land Amendment Act 1901* (SA)	Edw. VII, No. 771, 1901, as at 21 December 1901	
27.	*Northern Territory Mineral Act 1888* (SA)	No. 445 of 51 and 52 Vic, 1888, as at 8 December 1888	
28.	*Petroleum Act 1915* (Qld)	6 Geo. V, No. 23, 1915, as at 22 December 1915	s 4
29.	*Petroleum (Prospecting and Mining) Ordinance 1954* (NT)	No. 5 of 1954, as at 21 May 1954	s 5
30.	*Real Property Act 1886* (SA)	No. 380 of 49 and 50 Vic, 1886, as at 1 January 1887	ss 10, 69

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