

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

YUNUPINGU (ON BEHALF OF THE GUMATJ
CLAN OR ESTATE GROUP) & ORS

RESPONDENTS

Commonwealth of Australia v Yunupingu
[2025] HCA 6
Date of Hearing: 7, 8 & 9 August 2024
Date of Judgment: 12 March 2025
D5/2023

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

S P Donaghue KC, Solicitor-General of the Commonwealth, S B Lloyd SC and N Kidson KC with C J Klease for the appellant (instructed by Australian Government Solicitor)

A R Moses SC with K S Anderson and J D Alderson for the first respondent (instructed by Bowden McCormack)

N Christrup SC, Solicitor-General for the Northern Territory, and S J Wright SC with L S Peattie for the second respondent (instructed by Solicitor for the Northern Territory)

C L Lenehan SC with T M Wood for the 25th to 28th respondents (instructed by Mills Oakley)

S A Glacken KC and G A Hill SC with J R Wang for the 29th and 32nd respondents (instructed by Northern Land Council)

R J Webb KC with C I Taggart for the 34th respondent (instructed by Crown Law (Qld))

P J F Garrisson SC, Solicitor-General for the Australian Capital Territory, with H Younan SC and L A Coleman for the Attorney-General for the Australian Capital Territory, intervening (instructed by Government Solicitor for the Australian Capital Territory)

C S Bydder SC, Solicitor-General for the State of Western Australia, with A B Sanchez-Lawson for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

Submitting appearances for the fourth to tenth, 12th, 13th, 16th, 19th, 21st to 23rd, 31st and 33rd respondents

No appearance for the third, 14th, 15th, 18th, 20th and 30th respondents

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Commonwealth of Australia v Yunupingu

Constitutional law (Cth) – Legislative power – Acquisition of property on just terms – Where Gumatj Clan or Estate Group of Yolngu People claim entitlement to compensation under *Native Title Act 1993* (Cth) for "past acts" "attributable" to appellant – Where Gumatj Clan claim past acts attributable to appellant are specified appropriations to appellant and grants to third parties of interests in land in Gove Peninsula in Northern Territory – Where appropriations and grants occurred between 1939 and 1969 by or under ordinances made by Governor-General under *Northern Territory (Administration) Act 1910* (Cth) – Where Gumatj Clan claim each appropriation or grant invalid at time it occurred to extent inconsistent with native title rights and interests in relation to land then recognised at common law – Whether power conferred on Commonwealth Parliament by s 122 of *Constitution* to make laws for government of territory extends to making law with respect to acquisition of property otherwise than on just terms within meaning of s 51(xxxi) of *Constitution* – Whether extinguishment by or under law of Commonwealth of native title recognised at common law before commencement of *Native Title Act* constituted acquisition of property within meaning of s 51(xxxi) – Whether grant of pastoral lease in 1903 by Governor of South Australia under *Northern Territory Land Act 1899* (SA) had effect of extinguishing non-exclusive native title rights over minerals on or under subject land.

Words and phrases – "abstracts", "accession", "acquisition of property", "authorised and legally effective", "common law rule of recognition", "disjoined", "equality before the law", "erosion", "exception", "exception or reservation", "exclusive possession", "exclusive rights", "extinguishment", "for the government of a territory", "information of intrusion", "inherently defeasible", "inherently fragile", "land", "liberty of access", "minerals", "native title", "native title norms", "native title rights and interests", "non-derogation from grant", "on just terms", "pastoral lease", "plenary power", "precedent", "radical title", "recognition", "reservation", "sever", "skeletal principle", "taking", "title", "traditional laws and customs", "valid exercise of sovereign power", "with respect to", "withdrawal of recognition".

Constitution, ss 51(xxix), 51(xxxi), 96, 122.

Native Title Act 1993 (Cth), ss 14, 18, 223, 226, 228, 238, 239.

Northern Territory (Administration) Act 1910 (Cth).

Northern Territory Land Act 1899 (SA), ss 24, 25, Sch A, item (1).

Introduction

1 This appeal is from a decision of the Full Court of the Federal Court of Australia (Mortimer CJ, Moshinsky and Banks-Smith JJ)¹ answering separate questions² in an application to the Federal Court on behalf of the Gumatj Clan or Estate Group of the Yolngu People ("the Gumatj Clan") for a determination of compensation claimed to be payable to the Gumatj Clan by the Commonwealth of Australia under the *Native Title Act 1993* (Cth) ("the Native Title Act").

2 The appeal raises three important questions of law. The first question is whether the power conferred on the Commonwealth Parliament by s 122 of the Constitution to make laws for the government of a territory extends to making a law with respect to the acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution. The answer is it does not. The second question is whether an extinguishment by or under a law of the Commonwealth of native title recognised at common law before the commencement of the Native Title Act on 1 January 1994 constituted an acquisition of property within the meaning of s 51(xxxi). The answer is it did.

3 The third and more specific question is whether the grant of a pastoral lease in 1903 by the Governor of South Australia under the *Northern Territory Land Act 1899* (SA) ("the Northern Territory Land Act") had the effect of extinguishing any non-exclusive native title rights over minerals on or under the subject land. The answer is it did not.

The claim of the Gumatj Clan

4 The Gumatj Clan claim an entitlement to compensation under the Native Title Act for "past acts" that are "attributable" to the Commonwealth and that are "validated" by the Native Title Act.

5 Within the meaning of the Native Title Act, "native title" refers to "the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters", where "the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders" and "the Aboriginal

1 *Yunupingu v The Commonwealth* (2023) 298 FCR 160.

2 See r 30.01 of the *Federal Court Rules 2011* (Cth).

2.

peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters", and where "the rights and interests are recognised by the common law of Australia".³ An "act" includes the making of legislation as well as the exercise of executive power whether or not under legislation.⁴ A "past act" includes an act consisting of the making, amendment or repeal of legislation which occurred before 1 July 1993 or any other act at any time before 1 January 1994 which, apart from the retrospectively validating operation of the Native Title Act, was invalid to any extent at the time it occurred but would have been valid to that extent at that time if native title did not exist.⁵ A past act is "attributable" to the Commonwealth if it was done by the Commonwealth Parliament or under a law enacted by the Commonwealth Parliament.⁶

6 By operation of the Native Title Act, a past act attributable to the Commonwealth "is valid" and "is taken always to have been valid".⁷ However, native title holders are entitled to compensation, payable by the Commonwealth, for a past act attributable to the Commonwealth that meets specified criteria.⁸

7 The Gumatj Clan claim that the past acts attributable to the Commonwealth for which they are entitled to compensation are specified appropriations to the Commonwealth and grants to third parties of interests in land in the Gove Peninsula in the Northern Territory. These appropriations and grants of interests in land all occurred by or under ordinances made by the Governor-General under the *Northern Territory (Administration) Act 1910* (Cth) ("the Northern Territory Administration Act"). The earliest past act on which the Gumatj Clan continue to rely occurred in 1939, when "all ... minerals and metals on or below the surface of any land in the Territory" were "deemed to be the property of the Crown" by s 107 of the *Mining Ordinance 1939* (NT) ("the Mining Ordinance"). The latest occurred in 1969, when a mineral lease was granted under the Mining Ordinance in accordance with the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT).

3 Section 223(1) of the Native Title Act.

4 See s 226 of the Native Title Act.

5 See s 228 of the Native Title Act.

6 See s 239 of the Native Title Act.

7 See s 14 of the Native Title Act.

8 See s 18 of the Native Title Act.

3.

8 The Gumatj Clan claim that each such appropriation or grant of an interest in land was invalid at the time it occurred to the extent that it was inconsistent with native title rights and interests which, in light of *Mabo v Queensland [No 2]* ("*Mabo [No 2]*"),⁹ it must now be accepted that the common law of Australia recognised that the Gumatj Clan then held in relation to the land.

9 The theory underlying the claim of the Gumatj Clan, that each appropriation or grant was invalid at the time it occurred to the extent that it was inconsistent with their native title then recognised at common law, is founded on two main propositions. The first is that the power conferred on the Commonwealth Parliament by s 122 of the Constitution to make laws for the government of a territory – the source, or at least a source, of the power of the Commonwealth Parliament to enact the Northern Territory Administration Act – does not extend and has never extended to making a law with respect to the acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution. The second is that a law is properly characterised as a law with respect to the acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution if and to the extent that the law purported before the commencement of the Native Title Act to appropriate or grant an interest in land which was inconsistent with a native title right or interest in relation to that land then recognised at common law.

10 Each of those two propositions was considered in *Newcrest Mining (WA) Ltd v The Commonwealth*.¹⁰ The first was again considered in *Wurridjal v The Commonwealth*.¹¹ However, neither *Newcrest* nor *Wurridjal* authoritatively determined the correctness or incorrectness of either proposition.

11 The main purpose of stating the separate questions in the proceeding in the Federal Court was to elicit an authoritative determination of the correctness or incorrectness of the two propositions in the same way as if the procedure of the Federal Court had permitted the Commonwealth to demur to the Gumatj Clan's claim.¹²

9 (1992) 175 CLR 1.

10 (1997) 190 CLR 513.

11 (2009) 237 CLR 309.

12 See *Yunupingu v The Commonwealth* (2023) 298 FCR 160 at 167-173 [10]-[20].

12 The Full Court, in answering the separate questions, accepted both propositions to be correct. By the first two grounds of its appeal by special leave to this Court, the Commonwealth challenges the Full Court's acceptance of them.

13 The historical background to the application for compensation made by the Gumatj Clan and the particulars of their claim are explained in the reasons for judgment of Gordon J. Her Honour's explanation enables immediate consideration of the legal merits of the two propositions on which the Gumatj Clan's claim is founded. For reasons now to be explained, the Full Court was right to accept both propositions to be correct.

The first proposition: s 51(xxxi) "abstracts" from s 122 of the Constitution

14 Section 51(xxxi) is within Ch I of the Constitution, which is headed "The Parliament". Section 1 provides: "The legislative power of the Commonwealth shall be vested in a Federal Parliament ... which is hereinafter called 'The Parliament', or 'The Parliament of the Commonwealth'." Section 51(xxxi) provides, in full: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

15 Section 51(xxxi) of the Constitution has long been recognised to have two relevant effects. The first is that "it confers power to acquire property from any State or person for any purpose for which the Parliament has power to make laws and it conditions the exercise of that power on the provision of just terms". The second is that "by an implication required to make the condition of just terms effective, it abstracts the power to support a law for the compulsory acquisition of property from any other legislative power".¹³ The second of those effects has long been said to afford s 51(xxxi) "the status of a constitutional guarantee" operating "to protect [any State or person] from being deprived of their property except on just terms".¹⁴

16 The general principle of constitutional interpretation,¹⁵ or "rule of construction",¹⁶ through the operation of which s 51(xxxi) of the Constitution has

13 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 177.

14 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 168.

15 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 285.

16 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160.

5.

the second of those effects – that of "abstract[ing]"¹⁷ the power to support a law for the compulsory acquisition of property from other legislative powers – has long been understood to be that enunciated by Dixon CJ in *Attorney-General (Cth) v Schmidt*:¹⁸

"[W]hen you have, as you do in [s 51](xxxi), an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification."

- ¹⁷ Leaving s 122 of the Constitution to one side, the application of that general principle of constitutional interpretation to s 51(xxxi) of the Constitution is as follows. Had s 51(xxxi) not been in the Constitution, other legislative powers might have been construed as empowering the Parliament to make laws with respect to acquisitions of property, including laws with respect to acquisitions of property otherwise than on just terms.¹⁹ The consequence of s 51(xxxi) empowering the Parliament to make laws with respect to acquisitions of property "for any purpose in respect of which the Parliament has power to make laws" on condition that the power be exercised only on just terms is that s 51(xxxi) is construed as the sole source of power to make any law which has the character of a law with respect to an acquisition of property for any purpose in respect of which the Parliament has power to make any law. No other legislative power is construed to include that power because the "totality of the power" is found in s 51(xxxi) alone.²⁰ Abstracted from, or "carve[d] out"²¹ of, every other legislative power is accordingly power to make any law that is properly characterised as a law with respect to an acquisition of property within the meaning of s 51(xxxi).

¹⁷ *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 124 [55]; *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 561 [61].

¹⁸ (1961) 105 CLR 361 at 371-372.

¹⁹ *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371.

²⁰ *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445.

²¹ *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 445 [107]; *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 615 [271].

18 The ultimate question on the first ground of appeal is whether the relationship between s 51(xxxi) and s 122 of the Constitution conforms to that general principle of constitutional interpretation or is an exception to it.

19 Section 122 is within Ch VI of the Constitution, which is headed "New States". Part of the explanation for its location in that context is that one of its purposes was to provide for provisional government of a territory which might be admitted or established as a new State under s 121.²² Section 122 provides, in relevant part: "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth".

20 Section 122 of the Constitution can be seen from its terms to apply "compactly and briefly"²³ in relation to territories which might be in markedly different geographical locations and geopolitical situations, and which might or might not ever be expected to be admitted or established as new States. In particular, it applies in relation to an internal territory (one surrendered by a State to and accepted by the Commonwealth under s 111 of the Constitution so as to become "subject to the exclusive jurisdiction of the Commonwealth"), such as the Northern Territory²⁴ or the Australian Capital Territory,²⁵ in the same terms as it applies in relation to an external territory (one placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth) such as the current Territory of Cocos (Keeling) Islands²⁶ or

22 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 266, 271.

23 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 331 [7].

24 See *Northern Territory Acceptance Act 1910* (Cth).

25 See *Seat of Government Acceptance Act 1909* (Cth).

26 See *Cocos (Keeling) Islands (Request and Consent) Act 1954* (Cth); *Cocos Islands Act 1955* (UK); *Cocos (Keeling) Islands Act 1955* (Cth).

Australian Antarctic Territory²⁷ or the former Territories of Papua and New Guinea.²⁸

21 The power conferred by s 122 of the Constitution to "make laws for the government of any [such] territory" has often been described as "plenary", although the aptness of that descriptor has been doubted.²⁹ The power conferred by it is plenary not in the sense that s 122 is "disjoined from other provisions in the Constitution" but in the sense that "all that need be shown to support an exercise of the power is that there should be a sufficient nexus or connexion between the law and the Territory".³⁰

22 The plenary power conferred by s 122 of the Constitution has never been doubted to enable the Parliament to enact a law that provides for the "direct administration"³¹ of a territory, including by empowering the making of subordinate legislation,³² such as occurred in the Northern Territory under the Northern Territory Administration Act³³ and in the Australian Capital Territory under the *Seat of Government (Administration) Act 1910* (Cth). The power has also been accepted to enable the Parliament to enact a law that provides for the establishment of a territory as a self-governing polity having its own "separate political, representative and administrative institutions",³⁴ such as now exist in and for those territories under the *Northern Territory (Self-Government) Act 1978*

27 See *Australian Antarctic Territory Acceptance Act 1933* (Cth); *Australian Antarctic Territory Act 1954* (Cth).

28 See *Papua Act 1905* (Cth); *New Guinea Act 1920* (Cth). See also *Fishwick v Cleland* (1960) 106 CLR 186 at 197-198.

29 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 604-605, 611-612.

30 *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607-608.

31 *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607.

32 See *Palmer v Western Australia* (2021) 272 CLR 505 at 546 [120], citing *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 101-102.

33 *Northern Territory v GPAO* (1999) 196 CLR 553 at 576-577 [40], quoting *Kruger v The Commonwealth* (1997) 190 CLR 1 at 49-50.

34 *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607.

(Cth) ("the Northern Territory Self-Government Act") and the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ("the Australian Capital Territory Self-Government Act").³⁵

23 The question whether s 51(xxxi) abstracts from the legislative power conferred by s 122 of the Constitution power to make laws that are properly characterised as laws with respect to an acquisition of property, as it does from other legislative powers, was squarely addressed in *Teori Tau v The Commonwealth*.³⁶ The unanimous holding was that it does not. The "concern" of s 51 of the Constitution was said to be with "what may be called federal legislative powers as part of the distribution of legislative power between the Commonwealth and the constituent States" in contrast with the "concern" of s 122, which was said to be with "the legislative power for the government of Commonwealth territories in respect of which there is no such division of legislative power". The non-federal character attributed to the legislative power conferred by s 122 contributed to the conclusion that s 122 "is not limited or qualified by s 51(xxxi) or, for that matter, by any other paragraph of that section".³⁷ Though the question arose in relation to an external territory, the holding was emphasised to apply to internal and external territories alike.³⁸

24 The holding in *Teori Tau*, that s 51(xxxi) does not abstract from the power conferred by s 122 of the Constitution, was challenged in *Newcrest*. The result was inconclusive: three members of the Court (Brennan CJ,³⁹ Dawson J⁴⁰ and McHugh J⁴¹) favoured its retention, three (Gaudron J,⁴² Gummow J⁴³ and

35 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 263-267, 269-274.

36 (1969) 119 CLR 564.

37 (1969) 119 CLR 564 at 570.

38 (1969) 119 CLR 564 at 570-571.

39 (1997) 190 CLR 513 at 544-545.

40 (1997) 190 CLR 513 at 551-552.

41 (1997) 190 CLR 513 at 575-576.

42 (1997) 190 CLR 513 at 565.

43 (1997) 190 CLR 513 at 613-614.

Kirby J⁴⁴) favoured its reopening and overruling, and one (Toohey J⁴⁵) refrained from expressing an opinion.

25 The holding in *Teori Tau* was again challenged in *Wurridjal*. This time, four members of the Court (French CJ,⁴⁶ Gummow and Hayne JJ⁴⁷ and Kirby J⁴⁸) were unequivocal that *Teori Tau* should be reopened and overruled. However, only three of them (French CJ, Gummow and Hayne JJ) joined in the order of the Court.⁴⁹ For that reason, reopening and overruling *Teori Tau* cannot be treated as part of the ratio of *Wurridjal*.⁵⁰

26 The holding in *Teori Tau* therefore stands. Yet the authority of *Teori Tau* has been so weakened by *Newcrest* and *Wurridjal* as to have made it inevitable that *Teori Tau* would be reopened if leave to reopen were sought. The Gumatj Clan appropriately seek leave to reopen *Teori Tau*, and that leave should be granted.

27 In answer to the question whether s 51(xxxi) does or does not abstract from the legislative power conferred by s 122 of the Constitution power to make laws that are properly characterised as laws with respect to an acquisition of property, posed and answered in binary terms in *Teori Tau*, the Commonwealth proffers a hybrid alternative: a middle way. The approach for which the Commonwealth contends is that s 51(xxxi) abstracts the power to support a law with respect to the acquisition of property from the legislative power conferred by s 122 if the law is "made" under both s 122 and another source of legislative power in s 51 of the Constitution but that s 51(xxxi) does not abstract the power to support a law with respect to the acquisition of property from the legislative power conferred by s 122 if the law is "made" under s 122 alone.

44 (1997) 190 CLR 513 at 661.

45 (1997) 190 CLR 513 at 560-561.

46 (2009) 237 CLR 309 at 359 [86].

47 (2009) 237 CLR 309 at 388 [189].

48 (2009) 237 CLR 309 at 419 [287].

49 See (2009) 237 CLR 309 at 367 [116], 391 [203], 426 [312], 472.

50 See *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 563 [112], citing *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314.

28 It must be acknowledged that reasoning of Gaudron J in *Newcrest*,⁵¹ with which Toohey J,⁵² Gummow J⁵³ and Kirby J⁵⁴ expressed agreement, can be interpreted as supporting the alternative approach for which the Commonwealth contends. That said, the approach must be rejected.

29 The Commonwealth's hybrid approach would produce disconformity in the application of s 51(xxxi) and s 122 in relation to internal and external territories. On the one hand, s 51(xxxi) might or might not abstract from s 122 power to support a law with respect to an acquisition of property in an internal territory depending on whether the particular law in question might also be "made" under another source of legislative power in s 51. On the other hand, s 51(xxxi) would always abstract from s 122 power to support a law with respect to an acquisition of property in an external territory. That is because, despite an external territory being regarded as a part of the Commonwealth of Australia for some constitutional purposes,⁵⁵ any such law would necessarily be a law dealing with a matter geographically external to the continent of Australia and the island of Tasmania⁵⁶ so as necessarily also to be a law with respect to "external affairs" which might be "made" under s 51(xxix).⁵⁷ This bifurcated result means that s 51(xxxi) would operate as a complete guarantee against a legislatively imposed acquisition of property otherwise than on just terms in an external territory (with the curious consequence that *Teori Tau* would have been wrongly decided for that if for no other reason) but would operate only as a partial and contingent guarantee against a legislatively imposed acquisition of property otherwise than on just terms in an

51 (1997) 190 CLR 513 at 568-569.

52 (1997) 190 CLR 513 at 560.

53 (1997) 190 CLR 513 at 614.

54 (1997) 190 CLR 513 at 661-662.

55 *Bennett v The Commonwealth* (2007) 231 CLR 91 at 108 [35]-[36], referring to *Berwick Ltd v Gray* (1976) 133 CLR 603 at 605, 608.

56 *New South Wales v The Commonwealth* ("the Seas and Submerged Lands Act Case") (1975) 135 CLR 337 at 360, 470-471; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 600.

57 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 528, 602, 634, 696, 714; *Horta v The Commonwealth* (1994) 181 CLR 183 at 193-194; *XYZ v The Commonwealth* (2006) 227 CLR 532 at 539 [10], 546 [30], 548 [38].

internal territory. The result would be inexplicable as a matter of rational constitutional design.

30 But that is not the only problem, or even the main problem, with the approach. The fundamental problem with the approach lies in the distinction for the purpose of s 51(xxxi) between a law "made" under one source of legislative power alone (s 122) and a law "made" under that and another source of legislative power (in s 51).

31 Such a distinction contradicts the further settled general principle of constitutional interpretation "that a law upon a subject-matter within Commonwealth power does not cease to be valid because it touches or affects a topic outside Commonwealth power or because it can be characterized as a law upon a topic outside power".⁵⁸ One corollary of that principle is that "a single law can possess more than one character in the sense that it can properly be characterized as a law with respect to more than one subject-matter". Another is that "[i]t suffices for constitutional validity if any one or more of those characters is within a head of Commonwealth legislative power".⁵⁹

32 Application of the further settled general principle of constitutional interpretation means that:⁶⁰

"Where a law of the Parliament of the Commonwealth affects a property right, the ... critical question is whether s 51(xxxi) has withdrawn from every other head of federal power the authority to enact the law that affects the property in question. ... If s 51(xxxi) has withdrawn from every other head of federal power the capacity to acquire the property in question, it is the only source of power that can support the acquisition. If the legislation acquiring the property can be supported by another head of federal power that has not relevantly been curtailed by the presence of s 51(xxxi), s 51(xxxi) cannot invalidate the legislation."

33 Application of the further settled general principle of constitutional interpretation also means that where the Parliament "makes a law intended to be of general application throughout the whole of the Commonwealth and its territories it does so in the exercise of all powers it thereunto enabling". "If the law

58 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 151.

59 *Re F; Ex parte F* (1986) 161 CLR 376 at 387.

60 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 50 [131].

be within power under s 51 it will, by the combined effect of that section and of s 122, be law in and for the States and the territories alike" but "[i]f it be invalid as beyond s 51 then, in the absence of a clear indication that it should nevertheless apply in the territories, it will ... fail altogether of effect". If the law is not supported by a source of power in s 51, then "[w]hether a particular Act is intended to extend to the territories, or to a particular territory, as well as to the States", so as to be supported by s 122 in that application, "becomes a question of construction to be resolved either by its express provisions or by its intendment as revealed by its scope and nature".⁶¹

34 Adherence to settled principle therefore precludes it being said that a law is unsupported by s 122 if the law is unsupported by another source of legislative power through the effect of s 51(xxxi) on that other source of legislative power. Whether the law is supported by s 122 is a question that is independent of whether the law is supported by another source of legislative power. Either s 51(xxxi) abstracts from s 122 or it does not. There is no room for the hybrid approach.

35 The question posed and answered in binary terms in *Teori Tau* remains: does s 51(xxxi) abstract the power to make a law with respect to the acquisition of property from the legislative power conferred by s 122 of the Constitution?

36 The answer to that binary question must take into account, in addition to the reasoning in *Newcrest* and *Wurridjal*, the subsequent holding in *ICM Agriculture Pty Ltd v The Commonwealth*⁶² that s 51(xxxi) abstracts from the legislative power conferred on the Commonwealth Parliament by s 96 of the Constitution. Section 96, which is within Ch IV of the Constitution, headed "Finance and Trade", confers power on the Commonwealth Parliament to "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit". The abstracting effect of s 51(xxxi) was held in *ICM Agriculture* to constrain the terms and conditions which the Commonwealth Parliament can impose on the voluntary acceptance of a grant of financial assistance to a State: excluded from s 96 by s 51(xxxi) is any term or condition which would directly or indirectly require the State to exercise its own undoubted legislative power to acquire property otherwise than on just terms. The tide of history is strong.

37 The ultimately compelling counterpoint to the view which found favour in *Teori Tau* lies in the contemporary resonance of the earlier emphatic rejection in

61 *Spratt v Hermes* (1965) 114 CLR 226 at 278; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 533-534, 549.

62 (2009) 240 CLR 140 at 170 [46], 206 [174].

*Lamshed v Lake*⁶³ of the notion that s 122 can be interpreted "just as if the Commonwealth Parliament were appointed a local legislature in and for the [t]erritory with a power territorially restricted to the [t]erritory" in favour of the understanding that "s 122 is a power given to the national Parliament of Australia as such to make laws 'for', that is to say 'with respect to', the government of the [t]erritory". The understanding which prevailed in *Lamshed v Lake* was supported by the observation that "it is 'the Parliament' that is to make the law pursuant to the power s 122 confers", which "necessarily refers to s 1 of the Constitution", and that "the use of the expressions 'accepted by the Commonwealth' and 'placed under the authority of the Commonwealth'" can be seen to refer to "the polity established by the Constitution and ... the full legal authority which under the Constitution it possesses".⁶⁴

38 The characterisation in *Teori Tau* of s 51(xxxi) as a "federal legislative power" in contradistinction to s 122 as a power "for the government of Commonwealth territories" involved the creation of a dichotomy which is falsified by the national character of the sole repository of both of those legislative powers. "[W]hen s 122 gives a legislative power to the Parliament for the government of a territory the Parliament takes the power in its character as the legislature of the Commonwealth, established in accordance with the Constitution as the national legislature of Australia".⁶⁵ The same is true when s 51(xxxi) gives a legislative power to the Parliament to make laws with respect to the acquisition of property on just terms. Sections 51(xxxi) and 122 are both conferrals of legislative power on the Parliament of the Commonwealth to make laws that not only have the potential to have nationwide application but that also have the potential to be of national significance even if their application is territorially confined.

39 That meets the submission of the Commonwealth that for s 51(xxxi) to abstract from the power conferred by s 122 would be "incongruous" or "anomalous" given that no equivalent constraint exists on the legislative power of a State⁶⁶ and that s 111 of the Constitution provides for a State to surrender and the Commonwealth to accept a territory so as to result in the territory becoming subject to the Commonwealth's exclusive jurisdiction. The power of the Commonwealth

63 (1958) 99 CLR 132 at 141.

64 (1958) 99 CLR 132 at 141-142.

65 *Lamshed v Lake* (1958) 99 CLR 132 at 143.

66 See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [13]-[14].

Parliament in relation to the government of the surrendered territory cannot be equated with the power which the State Parliament had in relation to that territory prior to surrender: surrender to and acceptance by the Commonwealth moves the government of the territory to a national plane.

40 Textually, there is no difficulty construing the reference in s 51(xxxi) of the Constitution to "any purpose in respect of which the Parliament has power to make laws" as encompassing the purpose of "the government of any territory" for which the Commonwealth Parliament may make laws under s 122 of the Constitution. The circumstance that s 51(xxxi) is, and s 122 is not, expressed to be "subject to this Constitution" does not affect this construction. When s 51(xxxi) is so construed, the application to s 122 of the general principle of constitutional interpretation through the operation of which s 51(xxxi) abstracts the power to make a law which has the character of a law with respect to an acquisition of property necessarily follows.

41 For s 51(xxxi) to abstract from s 122 of the Constitution power to make laws that are properly characterised as laws with respect to an acquisition of property does not mean that the Commonwealth Parliament cannot confer authority on the legislature of a self-governing territory to acquire property on just terms. The argument of the Commonwealth to the contrary is answered by re-emphasising that s 51(xxxi) is, "first and foremost, a grant of power, and only secondarily a guarantee of 'just terms'".⁶⁷

42 As a grant of legislative power, no less than as a guarantee of just terms, s 51(xxxi) of the Constitution is to be "given as full and flexible an operation as will cover the objects it was designed to effect".⁶⁸ It is to be construed according to orthodox principles, "with all the generality which the words used admit"⁶⁹ and

67 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 187.

68 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349.

69 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16], quoting *R v Public Vehicles Licensing Appeal Tribunal (Tas)*; *Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226.

as "intended to apply to the varying conditions which the development of our community must involve".⁷⁰

43 When so construed, s 51(xxxi) of the Constitution is itself sufficient to support the present conferral by the Northern Territory Self-Government Act and the Australian Capital Territory Self-Government Act on the legislatures of the Northern Territory and the Australian Capital Territory respectively of power to make laws for the compulsory acquisition of property as an aspect of the general power of each legislature "to make laws for the peace, order and good government of the Territory"⁷¹ subject to the express limitation that the general power does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.⁷²

44 Consistently with the views of three members of the Court in *Newcrest* and four members of the Court in *Wurridjal*, *Teori Tau* must now be overruled. The time has come for it to be finally and authoritatively declared that the power conferred on the Commonwealth Parliament by s 122 of the Constitution to make laws for the government of a territory does not extend to making a law with respect to an acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution.

45 The first of the propositions on which the claim of the Gumatj Clan is founded is correct and the first ground of the appeal fails.

The second proposition: legislative "extinguishment" of native title constitutes an acquisition of property

46 In *Mabo [No 2]*, Deane and Gaudron JJ observed:⁷³

"Like other legal rights, including rights of property, the rights conferred by common law native title and the title itself can be dealt with,

70 *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 314, quoting *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368.

71 Section 6 of the Northern Territory Self-Government Act and s 22(1) of the Australian Capital Territory Self-Government Act.

72 Section 50(1) of the Northern Territory Self-Government Act and s 23(1)(a) of the Australian Capital Territory Self-Government Act.

73 (1992) 175 CLR 1 at 110-111.

expropriated or extinguished by valid Commonwealth, State or Territorial legislation operating within the State or Territory in which the land in question is situated. ...

There are, however, some important constraints on the legislative power of Commonwealth, State or Territory Parliaments to extinguish or diminish the common law native titles which survive in this country. In so far as the Commonwealth is concerned, there is the requirement of s 51(xxxi) of the Constitution that a law with respect to the acquisition of property provide 'just terms'. 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)."

47 This observation by Deane and Gaudron JJ in *Mabo [No 2]* formed the background to an argument against reopening *Teori Tau* which the Commonwealth advanced five years later in *Newcrest*. The argument was couched in terms that "the application of s 51(xxxi) to the Northern Territory would have the effect of invalidating significant provisions of Commonwealth legislation and would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the Territory since 1911 to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law".⁷⁴

48 This argument was squarely addressed and rejected in *Newcrest* by Gummow J, with whom Toohey J⁷⁵ and Kirby J⁷⁶ specifically agreed. Gummow J said:⁷⁷

74 (1997) 190 CLR 513 at 523. The consequence would be that these past acts would be validated by s 14(1) of the Native Title Act and compensation may thereby be payable for the otherwise invalid past acts under s 18.

75 (1997) 190 CLR 513 at 560.

76 (1997) 190 CLR 513 at 651.

77 (1997) 190 CLR 513 at 613 (emphasis in original), citing *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69, 89, 110, 195-196, *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 422, 439, 459 and

"Such apprehensions are not well founded. The characteristics of native title as recognised at common law include an inherent susceptibility to extinguishment or defeasance by *the grant* of freehold or of some lesser estate which is inconsistent with native title rights; this is so whether the grant be supported by the prerogative or by legislation".

49 This statement by Gummow J in *Newcrest* is central to the argument now advanced by the Commonwealth on the second ground of its appeal to the effect that a legislative appropriation or grant of an interest in land inconsistent with native title recognised at common law should not be characterised as having constituted an acquisition of property within the meaning of s 51(xxxi) of the Constitution.

50 The Commonwealth does not argue that native title recognised at common law is not "property" within the meaning of s 51(xxxi) of the Constitution. To do so would be untenable. "Property" within the meaning of s 51(xxxi) cannot be "confined pedantically to ... some specific estate or interest in land recognized at law or in equity".⁷⁸ It "extends to every species of valuable right and interest including real and personal property",⁷⁹ and extends to a right or interest incapable of assignment.⁸⁰

51 Furthermore, the Commonwealth does not argue that an appropriation of an interest in land to itself or a grant of an interest in land to a third party by or under Commonwealth legislation is insufficient to satisfy the additional requirement that an "acquisition" of property from a State or person within the meaning of s 51(xxxi) involves conferring a corresponding benefit of a proprietary nature on the Commonwealth or another person.⁸¹ To do so would again be untenable in light

Wik Peoples v Queensland (1996) 187 CLR 1 at 132-133 together with *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 653 and *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 235-237, 256, 264-265.

78 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349.

79 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290.

80 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 311-312.

81 *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 33-34 [42], 53 [118], 68 [169], 99 [278], 130-131 [365]; *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 560 [58].

of Brennan J's observation in *Mabo [No 2]* that, upon the grant of a lease extinguishing native title, "[t]he Crown's title is thus expanded from the mere radical title"⁸² and in light of acceptance in *Newcrest* that the "sterilising"⁸³ effect of a prohibition on mining imposed by Commonwealth legislation on the exercise of rights to mine conferred by mining tenements granted under Territory ordinances sufficiently enhanced property of the Commonwealth to amount to an acquisition of property insofar as the Commonwealth "was no longer liable to suffer the extraction of the minerals from its land in exercise of the rights conferred by [those] mining tenements".⁸⁴

52 Consistently with an observation made by Gummow J immediately following the statement in *Newcrest* on which the Commonwealth relies,⁸⁵ the Commonwealth also accepts that Commonwealth legislation purporting to effect a wholesale "extinguishment" of native title along the lines of the State legislation held invalid under s 109 of the Constitution in *Mabo v Queensland ("Mabo [No 1]")*⁸⁶ and *Western Australia v The Commonwealth (Native Title Act Case)*⁸⁷ would attract the operation of s 51(xxxi) of the Constitution.

53 The essence of the argument now advanced by the Commonwealth on the second ground of its appeal is that the "extinguishment" of a native title right or interest "recognised" at common law which occurred upon an appropriation or grant of an inconsistent right or interest by or pursuant to Commonwealth legislation is not an acquisition of property within the meaning of s 51(xxxi) of the Constitution as such "extinguishment" does not involve a "taking" of property. As framed in its notice of appeal, the argument of the Commonwealth is that property of native title holders was not taken upon an appropriation or grant of an inconsistent right or interest by or pursuant to Commonwealth legislation "because native title was inherently susceptible to a valid exercise of the Crown's sovereign

82 (1992) 175 CLR 1 at 68.

83 (1997) 190 CLR 513 at 533.

84 See *Smith v ANL Ltd* (2000) 204 CLR 493 at 504-505 [22], explaining *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 and *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 17 [17].

85 (1997) 190 CLR 513 at 613.

86 (1988) 166 CLR 186.

87 (1995) 183 CLR 373.

power, derived from its radical title, to grant interests in land and to appropriate to itself unalienated land for Crown purposes".

54 The Commonwealth argues that this inherent susceptibility of native title rights and interests "recognised" at common law to the contingency of "extinguishment" in the event of such a valid exercise of "sovereign power" deriving from "radical title" lies behind repeated descriptions of native title as "inherently fragile".⁸⁸

55 The Commonwealth seeks to support the argument by analogy between a native title right or interest recognised at common law and a statutory right of property "created on terms which make that right susceptible to administrative or legislative alteration or extinguishment without acquisition" in the sense that susceptibility of the right to alteration or extinguishment by subsequent administrative or legislative action is "a characteristic of the right that is created – 'inherent at the time of its creation and integral to the property itself'".⁸⁹

56 The Commonwealth seeks to support the argument further by calling in aid the observation that "even at general law, an estate or interest in land or other property may be defeasible upon the operation of a condition subsequent in the grant, without losing its proprietary nature".⁹⁰ The Commonwealth points out that the common law and equity both knew not only the "fee simple absolute" but also the "determinable fee simple": an estate which contained "within ... the words which define[d] [it] the seeds of [its] own destruction" in that it "automatically terminate[d] on the occurrence of a specified event which may or may not occur".⁹¹ As a matter of fact, grants of fees simple determinable in whole or in part on breach or fulfilment of conditions subsequent were common during the early colonial

88 See *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 453; *Fejo v Northern Territory* (1998) 195 CLR 96 at 151 [105]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 51 [47]; *Western Australia v Ward* (2002) 213 CLR 1 at 93-94 [91].

89 *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 563 [66], quoting *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 165.

90 *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 49 [104]. See also *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73 [196].

91 Helmore, *The Law of Real Property in New South Wales*, 2nd ed (1966) at 66-67, quoted in *Wilson v Anderson* (2002) 213 CLR 401 at 443 [89]. See also *Western Australia v Ward* (2002) 213 CLR 1 at 200 [432].

period in New South Wales and Van Diemen's Land.⁹² A notable example was the grant by the Governor of New South Wales in 1823 of 1400 acres of land "reserving to His Majesty ... any quantity of land, not exceeding ten acres, in any part of the said grant, as may be required for public purposes" held in *Cooper v Stuart*⁹³ to have "carried" to the grantee "the whole 1400 acres, but subject to a defeasance as to 10 acres".

57 The argument of the Commonwealth invites close attention to the common law rule according to which native title rights and interests were and continue to be "recognised" and according to which, before the commencement of the Native Title Act on 1 January 1994, native title rights and interests once "recognised" were able to be "extinguished".⁹⁴ The common law rule must be understood having regard to its formulation by Brennan J (with the agreement of Mason CJ and McHugh J) in *Mabo [No 2]* and to the considerations which informed that formulation. The common law rule so formulated must also be understood having regard to its subsequent exposition in *Western Australia v The Commonwealth (Native Title Act Case)*,⁹⁵ *Wik Peoples v Queensland*,⁹⁶ *Fejo v Northern Territory*,⁹⁷ *Yanner v Eaton*,⁹⁸ *The Commonwealth v Yarmirr*,⁹⁹ *Western Australia*

92 Campbell, "Conditional Land Grants by the Crown" (1966) 5 *Sydney Law Review* 267 at 267-269, 274-275; Campbell, "Conditional Land Grants by the Crown" (2006) 25 *University of Tasmania Law Review* 44 at 45-47, 55-56.

93 (1889) 14 App Cas 286 at 288, 290.

94 cf s 238(2) of the Native Title Act.

95 (1995) 183 CLR 373.

96 (1996) 187 CLR 1.

97 (1998) 195 CLR 96.

98 (1999) 201 CLR 351.

99 (2001) 208 CLR 1.

v Ward,¹⁰⁰ *Yorta Yorta Aboriginal Community v Victoria*,¹⁰¹ *Akiba v The Commonwealth*,¹⁰² *Western Australia v Brown*,¹⁰³ and *Queensland v Congoo*.¹⁰⁴

58 Native title is "not an institution of the common law".¹⁰⁵ That is to say, "native title rights and interests are not created by and do not derive from the common law".¹⁰⁶ There is accordingly no reason why native title rights and interests should be thought to correspond in their nature or incidents to any right or interest known to the common law or equity to be capable of being created by grant, whether conditional or unconditional.

59 "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory."¹⁰⁷ "The nature and incidents of native title" are "ascertained as a matter of fact by reference to those laws and customs".¹⁰⁸ The underlying existence of the traditional laws and customs ascertained as a matter of fact is accordingly "a *necessary* pre-requisite for native title".¹⁰⁹

60 Whilst the underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title, the underlying existence of those traditional laws and customs is not "a *sufficient* basis for recognising native title".¹¹⁰

100 (2002) 213 CLR 1.

101 (2002) 214 CLR 422.

102 (2013) 250 CLR 209.

103 (2014) 253 CLR 507.

104 (2015) 256 CLR 239.

105 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 59.

106 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 51 [48].

107 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58.

108 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58.

109 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46] (emphasis in original).

110 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46] (emphasis in original).

"Recognition" of native title at common law is by force of the common law itself.¹¹¹

"The theory accepted by this Court in *Mabo [No 2]* was not that the native title of indigenous Australians was enforceable of its own power or by legal techniques akin to the recognition of foreign law. It was that such title was enforceable in Australian courts because the common law in Australia said so".

61 Native title is "recognised" at common law in the sense that the common law "will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them".¹¹² Thus, to say that native title rights and interests are "recognised" at common law is to mean that "[t]hose rights, although ascertained by reference to traditional laws and customs are enforceable as common law rights [and interests]".¹¹³ In other words, the concept of "recognition" "translates" native title rights and interests existing under traditional laws and customs into "a set of rights and interests existing at common law".¹¹⁴

62 "Extinguishment" of native title, which is the concern of the argument of the Commonwealth and the statement by Gummow J in *Newcrest* on which that argument relies, is a concept which was introduced into the common law in *Mabo [No 2]* contemporaneously with the introduction of the concept of recognition of native title despite no issue of extinguishment having arisen for determination in that case.

63 Extinguishment of native title "is the obverse of recognition" of native title.¹¹⁵ Extinguishment "does not mean that native title rights and interests are extinguished for the purposes of the traditional laws acknowledged and customs observed by the native title holders". What it means is that "the native title rights

111 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 237-238.

112 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 49 [42], citing *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 61.

113 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84.

114 *Queensland v Congoo* (2015) 256 CLR 239 at 263 [31].

115 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 219 [10].

and interests cease to be recognised by the common law":¹¹⁶ they cease to be enforceable as common law rights as the withdrawal of the common law's recognition of the native title rights and interests means the withdrawal of the common law's protection of those native title rights and interests.

64 Native title recognised at common law could, and could only, be extinguished "by a valid exercise of sovereign power inconsistent with the continued enjoyment ... of native title".¹¹⁷ Reference to "sovereign power" in the context of native title rights and interests ceasing to be recognised by the common law serves to emphasise that recognition of native title rights and interests at common law is the result of an "intersection" of traditional laws and customs with the common law which occurred at the time of acquisition of sovereignty. Such native title rights and interests as were and have continued to be recognised at common law since the time of acquisition of sovereignty in the absence of extinguishment are "those which existed at [the time of acquisition of] sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected".¹¹⁸ The new legal order which came into being at the time of acquisition of sovereignty entailed "the power to create and to extinguish private rights and interests", and native title rights and interests recognised at common law became "liable to extinction by exercise of the new sovereign power".¹¹⁹

65 The concept of "radical title" is linked in the argument of the Commonwealth on the second ground of its appeal to the existence of sovereign power to extinguish native title rights and interests recognised at common law. In particular, the Commonwealth notes that in *Mabo [No 2]* Brennan J accepted that the common law's recognition of native title could not fracture a "skeletal principle of our legal system"¹²⁰ and that native title survived the Crown's acquisition of sovereignty but "burdens the Crown's radical title".¹²¹ In describing the power to

116 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 219 [10]. See also 226 [24].

117 *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 439.

118 *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 453-454 [77]. See also *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46].

119 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63.

120 (1992) 175 CLR 1 at 43.

121 (1992) 175 CLR 1 at 58.

extinguish native title upon the acquisition of sovereignty, Brennan J observed 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*".¹²² On the Commonwealth's argument, that should be taken to mean that the common law's recognition of native title was subject to the exercise of that new sovereign power. The submissions of the Attorney-General for Queensland, supported by the Attorney-General for Western Australia, are to similar effect.

66 The Commonwealth's argument invites consideration of the significance of radical title and the nature of that "new sovereign power". The concept of "radical title" was introduced in *Mabo [No 2]* by reference to *St Catherine's Milling and Lumber Co v The Queen*¹²³ and *Amodu Tijani v Secretary, Southern Nigeria*,¹²⁴ not to explain recognition or cessation of recognition of native title at common law but to explain how common law doctrines which assume the ultimate legal title of the Crown to land (notably the doctrines of estates and tenures) can coexist with common law recognition of native title rights and interests in relation to that land.¹²⁵

67 The Commonwealth's notion that sovereign power to grant or appropriate an interest in land, which operates to extinguish a native title right or interest at common law, somehow "derives" from "radical title" finds no support in *Mabo [No 2]* or in any subsequent authority. The existence of radical title has never been a pre-requisite to the common law recognising a native title right or interest: hence, a native title right or interest can be recognised in relation to waters at common law on the same basis as it can be recognised in relation to land at common law.¹²⁶ Nor has the existence of radical title ever been a pre-requisite to the common law ceasing to recognise a native title right or interest in consequence of an exercise of sovereign power: hence, a native title right or interest could be extinguished in relation to waters at common law on the same basis as it could be extinguished in relation to land at common law.¹²⁷ There is also no reason in principle why a native

122 (1992) 175 CLR 1 at 63 (emphasis added).

123 (1888) 14 App Cas 46.

124 [1921] 2 AC 399.

125 See *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 49-51 [44]-[48].

126 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 51 [49]-[50].

127 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 67-68 [96]-[100].

title right or interest could not be extinguished by paramount operation of Commonwealth legislation in relation to land situated in a State in respect of which radical title was held by the Crown in right of that State.¹²⁸

68 What is critical to appreciating the nature of "sovereign power", exercise of which can result in cessation of recognition of native title rights or interests at common law, is the explanation given in *Mabo [No 2]* that "under the constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise it: municipal constitutional law determines the scope of authority to exercise a sovereign power over matters governed by municipal law, including rights and interests in land".¹²⁹ Sovereign power in the relevant municipal law sense is power to create and to extinguish rights and interests by force of law. It need hardly be added that, under the constitutional law of this country, a valid – that is to say, legally authorised and legally effective – exercise of governmental power to create or to extinguish a right or interest protected by the common law could only be constituted by either a constitutionally authorised exercise of legislative power or a constitutionally authorised and statutorily permitted exercise of executive power.

69 In short, "[n]ative 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 [the executive]".¹³⁰ Not otherwise.

70 There was much discussion in *Mabo [No 2]* of the prerogative power to dedicate or alienate interests in land, which was conceded by the common law to the Crown, and which was exercisable by the executive for and on behalf of the Crown at the time of the acquisition of sovereignty. As noted in *Mabo [No 2]*, however, the prerogative was abrogated by statute in Queensland¹³¹ with the result that the power of the Crown to grant an interest in land became exclusively

128 *Queensland v Congoo* (2015) 256 CLR 239 at 276 [72].

129 (1992) 175 CLR 1 at 63.

130 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84.

131 *Constitution Act 1867* (Qld), ss 30 and 40.

statutory,¹³² as it did in South Australia¹³³ and elsewhere throughout the Australian colonies in the course of the nineteenth century.

71 By force of the *Northern Territory Acceptance Act 1910* (Cth) operating to pick up its prior abrogation by South Australian legislation,¹³⁴ the prerogative was never "carried into the executive authority of the Commonwealth"¹³⁵ in relation to land in the Northern Territory. On and from the acceptance of the Northern Territory by the Commonwealth upon its surrender by South Australia in 1911, the creation or extinguishment of a right or interest in relation to land in the Northern Territory protected by the common law has only ever been able to occur by or under Commonwealth or Territory legislation. In the context of the alleged acts of extinguishment the subject of this appeal, that is the only relevant form of "new sovereign power" spoken of in *Mabo [No 2]* and that power must be exercised in conformity with the Constitution.

72 Whatever form a constitutionally authorised exercise of legislative power or a constitutionally authorised and statutorily permitted exercise of executive power might have taken in the Northern Territory or in any other part of Australia before the commencement of the Native Title Act, however, such an exercise of power resulted in the extinguishment – cessation of recognition – of a native title right or interest previously recognised at common law only if the exercise of power created a right or interest (whether by appropriation or conferral)¹³⁶ or imposed a

132 (1992) 175 CLR 1 at 63, citing *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520 at 533-534.

133 *South Australia Act 1834* (4 & 5 Will IV c 95), s 6. See Selway, *The Constitution of South Australia* (1997) at 5 [1.2], 202 [16.1.5].

134 See ss 6(2) and 7 of the *Northern Territory Acceptance Act 1910* (Cth) and the *Northern Territory Act 1863* (SA), s 6 of the *Northern Territory Land Act 1872* (SA), s 6 of the *Northern Territory Crown Lands Consolidation Act 1882* (SA) and s 6 of the *Northern Territory Crown Lands Act 1890* (SA).

135 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 226 [86], quoting *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 304.

136 *Western Australia v Ward* (2002) 213 CLR 1 at 89 [78], 91 [82]; *Queensland v Congoo* (2015) 256 CLR 239 at 272 [57].

prohibition¹³⁷ which was "inconsistent" with the native title right or interest continuing to be translated into a right or interest existing at common law.

73 Whether or not there was an inconsistency which resulted in the extinguishment of a native title right or interest is a question of law.¹³⁸ The answer to that question of law depends solely on a comparison of the legal incidents of the native title right or interest previously recognised at common law with the legal incidents of the right or interest appropriated or conferred or of the prohibition imposed. Either the two are inconsistent or they are not. Recognition of the native title right or interest at common law would cease if, and only if, there was "logical antinomy between them".¹³⁹

74 Is the cessation of recognition of a native title right or interest upon the creation of an inconsistent right or interest a consequence of the inherent defeasibility of the native title right or interest upon the occurrence of such a contingency? Or is the cessation of recognition of the native title right or interest no more than an orthodox instance of an authorised and legally effective exercise of legislative or executive power prevailing over the operation of the antecedent common law? Putting it another way, is the common law rule of recognition of native title rights and interests a conditional rule in the sense that such rights and interests are recognised only on condition that recognition will be withdrawn on an authorised and legally effective exercise of legislative or executive power which is inconsistent with continued recognition? Or is the common law rule of recognition of native title rights and interests an absolute rule in the sense that such rights and interests are recognised but if there is a subsequent authorised and legally effective exercise of legislative or executive power which is inconsistent with continued recognition, recognition will be withdrawn not as a result of the inherent defeasibility of the native title right or interest but because of the effect of the subsequent exercise of power on the antecedent recognition? If the former, there is no "taking" of the bundle of rights comprising the enforceability and protection of native title rights and interests that the common law rule of recognition provides. If the latter, there is such a "taking" as the withdrawal of

137 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185; *Queensland v Congoo* (2015) 256 CLR 239 at 300 [157].

138 *Yanner v Eaton* (1999) 201 CLR 351 at 395 [107].

139 *Western Australia v Brown* (2014) 253 CLR 507 at 523 [38], quoting *Western Australia v Ward* (2002) 213 CLR 1 at 91 [82]. See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185; *Queensland v Congoo* (2015) 256 CLR 239 at 273 [60]-[61], 281-282 [88]-[91], 299-300 [156].

recognition takes from the native title holders that bundle of rights. In neither case are the underlying native title rights and interests themselves acquired. Those native title rights and interests continue for so long as traditional laws and customs dictate.

75 Acceptance or rejection of the statement by Gummow J in *Newcrest*, and with it the argument of the Commonwealth, turns on the choice between these competing views.

76 Three considerations combine to warrant rejection of the statement of Gummow J, and with it the argument of the Commonwealth. The preferable view is that the common law rule of recognition was and remains absolute. On that view, cessation of recognition of a native title right or interest at common law upon a valid exercise of legislative or executive power before the commencement of the Native Title Act was, and was no more than, the consequence of a subsequent legally authorised and legally effective exercise of legislative or executive power operating of its own inherent force to prevail over the operation of the antecedent common law rule of recognition.

77 The first consideration is as obvious as it is fundamental. It is that our constitutional system makes it unnecessary to postulate the inherent defeasibility of a native title right or interest recognised at common law in order for the recognition of the native title right or interest to yield to a subsequent legally authorised and legally effective exercise of legislative or executive power. Inherent in the nature of a subsequent legally effective exercise of legislative or executive power which is inconsistent with an antecedent common law rule is that the subsequent exercise of power will prevail over the operation of the antecedent common law rule.

78 The second consideration is that to postulate the inherent defeasibility of a native title right or interest recognised at common law is to attribute to the right or interest translated by the common law rule of recognition and enforceable at and protected by the common law a new characteristic, extrapolated from the reasoning of Gummow J in *Newcrest*. The newly attributed characteristic of inherent defeasibility would be one which, as a matter of law, would not need to be a characteristic of the same native title right or interest as existing under traditional laws and customs to be capable of common law recognition and which, as a matter of fact, would almost certainly not be a characteristic of that native title right or interest as so existing. The protection afforded to the native title holders by the common law rule of recognition would therefore be of a right or interest that is, by reason and to the extent of the inherent defeasibility, less than the right or interest which the native title holders have under their traditional laws and customs. The native title right or interest as translated by the common law rule would be different

from and inferior to the underlying native title right or interest existing under traditional laws and customs.

79 The third consideration is that to attribute such a characteristic to a native title right or interest as translated by the common law rule of recognition in the absence of constitutional necessity for doing so would run counter to the fundamental consideration which impelled the formulation of the common law rule of recognition explained in *Mabo [No 2]*. The fundamental consideration was there explained to have been to bring the common law into conformity with "the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system".¹⁴⁰ The reference to "human rights" in this explanation must be understood as encompassing "the human right to own and inherit property (including ... to be immune from arbitrary deprivation of property)" identified in *Mabo [No 1]*.¹⁴¹

80 Were a native title right or interest as recognised under the common law rule to be treated as defeasible at common law in circumstances where the native title right or interest existing under traditional laws and customs is not, the common law rule of recognition formulated in *Mabo [No 2]* would undermine the motivating rationale of the decision in that case, of ensuring that all persons, including native title holders, are equal before the law in the enjoyment of their human right to own and inherit property. As was stated in *Mabo [No 2]*, to continue adherence to the common law's enlarged notion of terra nullius (that the prior occupation of indigenous inhabitants of a colony could be ignored if those inhabitants were perceived to be "without laws, without a sovereign and primitive in their social organization"¹⁴²) so that "the Crown acquired absolute beneficial ownership of land" on the acquisition of sovereignty would have "destroy[ed] the equality of all Australian citizens before the law" and perpetuated injustice based on an historical fiction.¹⁴³ In the present case, to adopt the conditional common law rule of recognition of native title rights and interests would destroy that equality and perpetuate its own form of injustice. In the end, it is adherence to that motivating rationale of equality before the law that compels rejecting the statement by Gummow J in *Newcrest*, and with it the argument of the Commonwealth.

140 (1992) 175 CLR 1 at 30.

141 (1988) 166 CLR 186 at 217.

142 (1992) 175 CLR 1 at 36.

143 (1992) 175 CLR 1 at 58.

81 In consequence, the Commonwealth's argument, relying on descriptions of native title rights and interests recognised at common law as inherently fragile, goes too far in equating the metaphor of inherent fragility with the legal status of inherent defeasibility. The true position is that:¹⁴⁴

"Unless traditional law or custom so requires, native title does not require any conduct on the part of any person to complete it, nor does it depend for its existence on any legislative, executive or judicial declaration. 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."

82 Native title rights and interests recognised at common law can be described as inherently fragile at common law, not because they are inherently defeasible at common law, but insofar as (before the Native Title Act) they would have been susceptible to executive extinguishment without compensation through the paramount force of an exercise of prerogative power (absent abrogation of that power by statute)¹⁴⁵ and insofar as a statute authorising the grant or appropriation of a right or interest in land conveys a clear and plain intention to extinguish, rather than merely to regulate, native title rights and interests.¹⁴⁶ That is all.

83 To sum up, the common law rule by which native title rights and interests existing under traditional laws and customs are recognised at common law is and always has been a rule of unconditional recognition. Before the commencement of the Native Title Act on 1 January 1994, cessation of recognition of a native title right or interest previously recognised at common law was not the result of an inherent or innate susceptibility of that right or interest as recognised at common law to defeasance. Cessation of recognition was wholly and solely the result of a legally authorised and legally effective exercise of legislative or executive power operating of its own force to prevail over the operation of a rule of the common law. From 1 January 1994, s 238 of the Native Title Act, in providing that if an act affects any native title the native title is not extinguished (the "non-extinguishment

144 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84. See also *Fejo v Northern Territory* (1998) 195 CLR 96 at 127 [44]; *Wilson v Anderson* (2002) 213 CLR 401 at 416-417 [4].

145 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63, 70-71.

146 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64.

principle" under that Act), modifies the common law rule of recognition in accordance with its terms.

84 The second of the propositions on which the claim made by the Gumatj Clan is founded is therefore correct. The second ground of the appeal fails. The theory of the claim is sound.

The 1903 pastoral lease

85 The final ground of the Commonwealth's appeal by special leave to this Court raises a discrete issue concerning the extent to which native title rights and interests of the Gumatj Clan recognised at common law were extinguished upon the grant of a pastoral lease over land in the Gove Peninsula in 1903 by the Governor of South Australia under the Northern Territory Land Act.

86 The premise of the Gumatj Clan's claim is that common law recognition of their (by then) non-exclusive rights and interests in relation to minerals in the land continued despite the grant of the pastoral lease. The Commonwealth disputes that premise. According to the Commonwealth, continuing recognition of any native title rights to or interests in minerals after the grant of the pastoral lease would have been inconsistent with a provision of the pastoral lease which is properly to be construed as having: (1) severed title to those minerals from the leasehold interest granted to the lessee; and (2) conferred, by way of appropriation, title to those minerals exclusively on the Crown in right of South Australia.

87 The inclusion in the pastoral lease of the provision on which the Commonwealth relies was mandated by a provision of the Northern Territory Land Act which required the grant of the pastoral lease to be subject to "[a]n exception or reservation in favor of the Crown, and all persons authorised of all minerals, metals, gems, precious stones, coal, and mineral oils together with all necessary rights of access, search, procuration, and removal, and all incidental rights and powers".¹⁴⁷ The provision in the pastoral lease itself was relevantly expressed in terms of "excepting and reserving out of this lease under His Majesty His Heirs and Successors ... all minerals metals ... ores and substances containing metals gems precious stones coal and mineral oils ... with full and free liberty of access ingress egress and regress to and for the ... Minister and his agents lessees and workmen and all other persons authorised by him or other lawful authority with horses carts engines and carriages or without in over through and upon the said land to ... dig try search for and work the said minerals metals ... ores and substances containing metals gems precious stones coal and mineral oils ... and to

147 See s 24 and item (l) of Sch A to the Northern Territory Land Act.

take the same from the said lands and to erect buildings and machinery and generally to do such other work as may be required".

88 The Full Court concluded that this provision created no title to minerals in the Crown in right of South Australia. In reaching that conclusion, the Full Court drew on an observation made in *Wade v New South Wales Rutile Mining Co Pty Ltd*,¹⁴⁸ with reference to a line of cases in New South Wales which commenced with *Attorney-General v Brown*,¹⁴⁹ and repeated in *Wik Peoples v Queensland*,¹⁵⁰ to the effect that "the words 'reservation', 'reserving' etc" when used in Crown grants have long been understood and should continue to be understood to mean "a keeping back of a physical part of a thing otherwise granted". Conformably with that observation, the Full Court construed the words "excepting and reserving out of this lease ... all minerals" as having constituted "a withholding or keeping back" of minerals as distinct from the creation of any right in the Crown.¹⁵¹

89 The Commonwealth's argument against the Full Court's construction on the appeal is that, unless the provision created a right to the minerals the subject of the exception and reservation in the Crown, the provision would not have been efficacious. This is because, the Commonwealth argues, an unauthorised taking of those minerals would have been remediable at the time of the grant of the pastoral lease only by an information of intrusion at common law. According to the Commonwealth, the information of intrusion would have been available only if the Crown had "exclusive possession", equating to full beneficial ownership, of those minerals. Merely to have withheld the minerals or kept them back from the grant, and thereby to have done no more than to have retained radical title to the minerals, the Commonwealth argues, would have been insufficient to support the information of intrusion.

90 The correctness of the proposition that the Crown's recourse against an unauthorised taking of minerals the subject of the exception or reservation was limited to an information of intrusion at common law can be assumed in the Commonwealth's favour without needing to be decided. The argument that the

148 (1969) 121 CLR 177 at 194.

149 (1847) 1 Legge 312 at 322.

150 (1996) 187 CLR 1 at 200-201.

151 *Yunupingu v The Commonwealth* (2023) 298 FCR 160 at 191 [109].

Crown required full beneficial ownership of the minerals to maintain the information of intrusion must be rejected.

91 An information of intrusion was a prerogative remedy "in the nature of a civil action at the suit of the Crown" able to be "instituted for the purpose of obtaining satisfaction in damages for some injury to Crown possessions".¹⁵² The civil action was understood to be "in the nature of an action of trespass *quare clausum fregit*", meaning that it "lay for an invasion of the plaintiff's land and damage to that land – the ordinary trespass of modern law – rather than for a dispossession".¹⁵³ By the common form of the information, the Attorney-General asserted that specified land was in the "possession" of the Crown and that the defendant had "intruded" into that possession.¹⁵⁴ A defendant who had in fact intruded onto the land needed to establish a superior right to possession of the land to that of the Crown in order not to be found liable as a trespasser.¹⁵⁵

92 There is no reason in principle to consider that the "possession" of the Crown vindicated by an information of intrusion was limited to absolute beneficial ownership. The common law has only ever been concerned in an action for trespass with the relative strengths of the claims to possession of the parties to an action.¹⁵⁶ The plaintiff has never needed to prove that no third party has a better right to possession than the plaintiff, and the defendant has never been able to meet the

152 Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820) at 332.

153 *The Commonwealth v Anderson* (1960) 105 CLR 303 at 322.

154 *Attorney-General v Brown* (1847) 1 Legge 312 at 313.

155 See generally McNeil, *Common Law Aboriginal Title* (1989) at 98-103.

156 See generally Fox, "Relativity of Title at Law and in Equity" (2006) 65 *Cambridge Law Journal* 330.

claim of the plaintiff by proving that a third party has a better right to possession. That has been so for a trespass to land¹⁵⁷ as it has been for a trespass to goods.¹⁵⁸

93 True it is that the information of intrusion in *Attorney-General v Brown* was held to be available to remedy an intrusion into what was there described as having been "always the property of the Crown", the effect of the reservation of coal from the Crown grant of the leasehold interest being said to be that the coal "never passed to the [lessee]".¹⁵⁹ And true it is that *Mabo [No 2]* overruled *Attorney-General v Brown* to the extent that *Attorney-General v Brown* held that unalienated land had no proprietor other than the Crown, which depended on the fiction of the enlarged notion of terra nullius. *Attorney-General v Brown* had so held in rejecting an argument that the Queen "never had any property in the waste lands of the Colony" such that the Attorney-General acting on her behalf was "not entitled to maintain trespass, or bring an information of intrusion, which assumes that she had possession".¹⁶⁰

94 But none of that means that the radical title of the Crown – which *Mabo [No 2]* recognised to be the common law's postulate of the doctrine of tenure in a territory over which the Crown acquired sovereignty, enabling the Crown, in the exercise of sovereign power, to grant interests in land to third parties or appropriate land to itself and as coexisting with native title rights and interests recognised at common law – would have been insufficient to support an information of intrusion at common law, including the information of intrusion in *Attorney-General v Brown* itself. No issue concerning the effect of native title rights arose in that case. They were simply ignored.

157 See *Asher v Whitlock* (1865) LR 1 QB 1 at 5; *Perry v Clissold* [1907] AC 73 at 79; *Mount Bischoff Tin Mining Co v Mount Bischoff Extended Tin Mining Co* (1913) 15 CLR 549 at 562; *NRMA Insurance Ltd v B & B Shipping and Marine Salvage Co Pty Ltd* (1947) 47 SR (NSW) 273 at 279; *Allen v Roughley* (1955) 94 CLR 98 at 110, 130, 137; *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 at 24-25. See generally Dixon, Bignell and Hopkins, *Megarry & Wade: The Law of Real Property*, 10th ed (2024) at 265-272 [7-002]-[7-013].

158 See *The Winkfield* [1902] P 42 at 55-56; *Gatward v Alley* (1940) 40 SR (NSW) 174 at 180; *Gollan v Nugent* (1988) 166 CLR 18 at 30-33, 48-49; *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at 45-46 [91].

159 (1847) 1 Legge 312 at 323.

160 (1847) 1 Legge 312 at 316.

95 The Commonwealth relies for the contrary proposition on an explanation of *Attorney-General v Brown* given by Gageler J in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*.¹⁶¹ That explanation was that, even construing the reservation in *Attorney-General v Brown* as merely having withheld coal from the leasehold estate granted to the lessee, "the Crown as represented by the Attorney-General would still have had the possession necessary to found an action for intrusion".¹⁶² The point was that *Mabo [No 2]* did not deny the existence, subject to legislative control, of non-statutory executive power to manage unalienated land in which radical title coexisted with native title.

96 That non-statutory executive power enabled radical title of the Crown to support an information of intrusion at common law to remedy a trespass to unalienated land in which radical title coexisted with native title accords with and complements the adoption in *Mabo [No 2]*¹⁶³ and again in *The Commonwealth v Yarmirr*¹⁶⁴ of explanations of radical title in *St Catherine's Milling and Lumber Co v The Queen*¹⁶⁵ as a "substantial and paramount estate" and in *Amodu Tijani v Secretary, Southern Nigeria*¹⁶⁶ as "a pure legal estate, to which beneficial rights may or may not be attached". In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*,¹⁶⁷ French CJ, Kiefel, Bell and Keane JJ said that "[t]he foundation of the decision in *Mabo [No 2]* was the recognition by the majority ... that the radical title to the land in the colony of New South Wales acquired by the Crown upon the establishment of the colony did not encompass absolute beneficial ownership of the land, even though the exercise of the Crown's radical title might create rights of ownership in itself or dispose of them in favour of others". The bringing of an information of intrusion to remedy a trespass to unalienated land can similarly be described as an "exercise of the Crown's radical title".

161 (2016) 260 CLR 232 at 276-277 [110]-[112].

162 (2016) 260 CLR 232 at 277 [112].

163 (1992) 175 CLR 1 at 49-50, 60.

164 (2001) 208 CLR 1 at 49-50 [44], 51 [47].

165 (1888) 14 App Cas 46 at 55.

166 [1921] 2 AC 399 at 403.

167 (2016) 260 CLR 232 at 262 [60].

Gageler CJ
Gleeson J
Jagot J
Beech-Jones J

36.

97 It is one thing to say that the coexistence of the Crown's radical title with native title rights and interests recognised at common law meant that the Crown could not have relied on its radical title to have succeeded in a proceeding in the nature of an action for trespass against native title holders occupying unalienated land. It would be quite another thing to say that the Crown could not have relied on its radical title to have succeeded in a proceeding in the nature of an action for trespass against a non-native title holder intruding onto that unalienated land. The Commonwealth's argument both overstates the possessory interest required to support the information of intrusion at common law and understates the legal significance of radical title at common law and with it the capacity of an executive government to seek an exercise of judicial power to remedy a trespass to unalienated land in which radical title coexisted with native title. Accordingly, its argument that the provision of the pastoral lease "excepting and reserving ... all minerals" must be construed as having conferred, by way of appropriation, title in those minerals exclusively in the Crown in right of South Australia for the exception to have efficacy must be rejected. Effect must be given to the ordinary meaning of the text of the provision that it was, as it said, a mere exception or reservation in favour of the Crown of all minerals. It was not an appropriation to the Crown of those minerals.

98 The result is that the final ground of the appeal also fails.

Disposition

99 The appeal must be dismissed with costs.

GORDON J.

Introduction

100 The first respondent, Dr Yunupingu AC (deceased), on behalf of the Gumatj Clan or Estate Group of the Yolngu People ("the Gumatj Clan"), brought two applications – a determination application and a compensation application – against the Commonwealth and more than 30 other respondents in the Federal Court of Australia under s 61 of the *Native Title Act 1993* (Cth) in relation to an area of the Gove Peninsula in north-eastern Arnhem Land in the Northern Territory ("the Claim Area").¹⁶⁸

101 The determination application seeks a determination of native title over the Claim Area in favour of the Gumatj Clan. The compensation application seeks compensation for the Gumatj Clan from the Commonwealth under the *Native Title Act* for the alleged extinguishment or impairment of their native title by certain executive and legislative acts done in relation to the Claim Area between 1911 and 1978.¹⁶⁹

102 The period from 1911 to 1978 must be understood by reference to the history of the Northern Territory. From July 1863, the Northern Territory was annexed to the colony of South Australia. At Federation, the Northern Territory remained part of the State of South Australia. On 1 January 1911, South Australia surrendered the Northern Territory under s 111 of the *Constitution*, the Commonwealth accepted that surrender by the *Northern Territory Acceptance Act 1910* (Cth) and the Northern Territory became a territory under the exclusive jurisdiction of the Commonwealth. In 1978, under s 122 of the *Constitution*,¹⁷⁰ the *Northern Territory (Self-Government) Act 1978* (Cth) was enacted, which established the Northern Territory as an independent body politic with the power to make its own laws.¹⁷¹

103 The Gumatj Clan accept that, by reason of the grant of a pastoral lease over the Claim Area in 1886 (and three further pastoral leases granted over the Claim Area in the years up to and including 1903), the claimants' *exclusive*

168 The claim area is slightly different for each application. The compensation claim area is approximately 236 square kilometres.

169 As will be explained, only the separate questions in relation to the compensation application that are set out in the Annexure are the subject of this appeal.

170 Section 122 of the *Constitution* provides that "[t]he Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth ...".

171 *Northern Territory (Self-Government) Act* (as enacted), ss 5 and 6.

native title rights in respect of the Claim Area were extinguished. The Gumatj Clan contend that the claimants continue to hold *non-exclusive* native title rights and interests in respect of the Claim Area. In that respect, the Gumatj Clan plead that when certain executive or legislative steps were taken prior to 1978 ("the Compensable Acts")¹⁷² to establish bauxite mining operations on the Gove Peninsula (steps Dr Yunupingu's forebears unsuccessfully sought to prevent in *Milirrpum v Nabalco Pty Ltd* ("the Gove Land Rights Case")¹⁷³), the claimants' rights to and interests in land possessed under traditional Yolngu law and custom were *non-exclusive* native title rights to live on and gain spiritual and material sustenance from the land and resources, such as "the right to access, take and use for any purpose the resources of the Claim Area (including resources below, on or above the surface of the Claim Area, such as minerals on or below the surface of the Claim Area)" ("the claimants' non-exclusive native title").

104 Put in different terms, the Gumatj Clan contend that in the period from 1911 to 1978, a number of grants or legislative acts took place (namely, the Compensable Acts) which, if valid, may have been inconsistent with the continued existence of the claimants' non-exclusive native title and may have extinguished or impaired their non-exclusive native title at common law. In particular, the Gumatj Clan contend that if the grants or acts had any extinguishing effect then those grants or acts were invalid by reason of the failure to provide just terms to the Gumatj Clan as required by s 51(xxxi) of the *Constitution*. It is on this basis that the Gumatj Clan contend that each of the Compensable Acts is a "past act" within the definition of a "past act" in the *Native Title Act*, that those acts are attributable to the Commonwealth and that, because the acts are now taken to be effective to grant or vest the rights they purported to grant or vest, the Gumatj Clan are entitled to "just compensation" for the effects of the Compensable Acts on their non-exclusive native title under ss 14, 17, 18 and 228 of the *Native Title Act*.

105 Under the *Native Title Act*,¹⁷⁴ a "past act" is an act that occurs at any time before 1 July 1993 if it is a legislative act, or before 1 January 1994 if it is any other act, when native title existed in relation to particular land and waters and, apart from the *Native Title Act*, the act was invalid to any extent, but would have been valid to that extent if native title did not exist. In sum, the Gumatj Clan

172 In these reasons, as in the Full Court of the Federal Court below, "Compensable Acts" describes the acts for which the claimants *may* seek compensation, depending on the findings of the Federal Court. It was also a shorthand phrase used in submissions before this Court. The use of "Compensable Acts" in these reasons does not imply that any view has been formed or expressed about the claimants' entitlement to the compensation claimed in the proceeding. That is not an issue in this appeal.

173 (1971) 17 FLR 141.

174 *Native Title Act*, s 228.

contend certain acts done by the Commonwealth are "past acts" because they were invalid by operation of s 51(xxxi) of the *Constitution* but are now taken by the *Native Title Act* to be valid on terms that the Commonwealth must pay compensation.

106 This appeal concerns the position of native title, as recognised by the common law, between 1911 and 1978, when the Commonwealth administered land in the Northern Territory. The appeal, and these reasons, therefore, are confined to the position of native title at common law prior to the enactment of the *Native Title Act*.¹⁷⁵

107 The Compensable Acts – past acts attributable to the Commonwealth in respect of the Claim Area (or part thereof) for which the claimants contend they are entitled to compensation – comprise:¹⁷⁶

- (1) In 1938 the Administrator of the Northern Territory granted a lease to the Methodist Missionary Society of Australia Trust Association ("the Mission Lease") under s 14 of the *Aboriginals Ordinance 1918* (NT). The Mission Lease covered the whole of the Claim Area and extended beyond it. Before this Court, the Commonwealth does not challenge the Full Court of the Federal Court of Australia's finding that the Mission Lease did not extinguish the claimants' non-exclusive native title.
- (2) In 1939 the *Mining Ordinance 1939* (NT) ("the 1939 Ordinance") was made under s 21 of the *Northern Territory (Administration) Act 1910* (Cth) ("the NT Administration Act"). Section 107 of the 1939 Ordinance provided that "gold, silver and all other minerals and metals on or below the surface of any land in the Territory, whether alienated or not alienated from the Crown, shall be and be deemed to be the property of the Crown", which it is said by the Gumatj Clan would, if valid, have been inconsistent with the claimants' non-exclusive native title to resources "insofar as it relates to minerals".
- (3) In 1953 the *Minerals (Acquisition) Ordinance 1953* (NT) ("the 1953 Ordinance") was made under the NT Administration Act. Section 3 of the 1953 Ordinance provided that "[a]ll minerals existing in their natural

175 On and from 1 January 1994, the *Native Title Act* has provided a statutory scheme for the recognition and protection of native title: *Native Title Act*, see, eg, ss 3(a), 10, 11.

176 At the time these acts occurred, the Claim Area lay within the Arnhem Land Reserve that had been set apart in April 1931 "for the use and benefit of the [A]boriginal native inhabitants" as an Aboriginal Reserve under the *Crown Lands Ordinance 1927* (NT) and continued to be an Aboriginal Reserve under later laws.

condition ... on or below the surface of any land in the Territory, not being minerals, which, immediately before the commencement of this Ordinance, were the property of the Crown or of the Commonwealth, are, by force of this Ordinance, acquired by, and vested absolutely in, the Crown". If valid, it is said by the Gumatj Clan that the 1953 Ordinance would have been inconsistent with the continued existence of the claimants' non-exclusive native title in relation to any minerals that were not the property of the Crown following the coming into effect of the 1939 Ordinance.

- (4) From 1958 to 1969, five special mineral leases were granted by the Commonwealth over parts of the Claim Area, each of which is said by the Gumatj Clan, if valid, to have been inconsistent with the continued enjoyment of the claimants' non-exclusive native title.¹⁷⁷ The first four leases were granted under the 1939 Ordinance (as amended). The fifth lease was granted under the 1939 Ordinance (as amended) and the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT).

108 In response to the contention that these acts were compensable, the Commonwealth contended before the Full Court that reservations in four pastoral leases,¹⁷⁸ granted *prior* to the Compensable Acts, on dates between 1886 and 1903 over land in the Claim Area, had already extinguished the claimants' non-exclusive native title in relation to minerals, namely:

- (1) Pastoral Lease No 1095 granted on or about 26 January 1886 under the *Northern Territory Land Act 1872* (SA) or the *Northern Territory Crown Lands Consolidation Act 1882* (SA);
- (2) Pastoral Lease No 1875 granted on or about 15 August 1896 under the *Northern Territory Crown Lands Act 1890* (SA) ("the 1890 Crown Lands Act");
- (3) Pastoral Lease No 1991 granted on or about 13 October 1899 under the 1890 Crown Lands Act; and

177 On 17 November 1958, the Commonwealth granted a special mineral lease to Commonwealth Aluminum Corporation Pty Ltd. On 11 March 1963, the Commonwealth granted the second, third and fourth special mineral leases to Gove Bauxite Corporation Ltd. On 30 May 1969, the Commonwealth granted a special mineral lease to Swiss Aluminium Australia Pty Ltd ("Swiss Aluminium") and Gove Alumina Ltd. This lease is still held by Swiss Aluminium.

178 These being the "pastoral lease reservations" defined in question 2(a) of the separate questions reserved for the consideration of the Full Federal Court: see Annexure.

- (4) Pastoral Lease No 2229 granted on or about 21 September 1903 under the *Northern Territory Land Act 1899* (SA) ("the 1903 Lease").

109 Each pastoral lease contained reservations of specific subject matters from the grant of the pastoral lease by the Crown to the lessee. Each reservation was expressed in different terms. Before the Full Court, the Commonwealth submitted that the 1903 Lease was expressed in the most favourable terms for the Commonwealth's argument that the pastoral leases had extinguished the claimants' non-exclusive native title and, in particular, had extinguished the claimants' non-exclusive native title under traditional law and custom to take and use resources, including minerals, for any purpose. The Full Court therefore explained its conclusion that the claimants' non-exclusive native title had *not* been extinguished by reference to the terms of the 1903 Lease. That remained the Commonwealth's position in this Court. It will be necessary to turn to the terms of the 1903 Lease later in these reasons.

110 Other aspects of the procedural history of these applications should be noted. The determination application has not been decided.¹⁷⁹ Instead, the Full Court stated questions in the compensation application to be determined first and separately from other issues in the proceeding. The separate questions, and the answers given by the Full Court, are set out in the Annexure.

111 Against that background, the specific issues raised by this appeal were:

- (1) whether the extinguishment of native title rights and interests amounts to an acquisition of property for the purposes of s 51(xxxi) of the *Constitution* ("native title and s 51(xxxi) of the *Constitution*");
- (2) whether the requirement of just terms in s 51(xxxi) of the *Constitution* applies to a Commonwealth law if the law is supported only by the territories power in s 122 of the *Constitution* ("ss 51(xxxi) and 122 of the *Constitution*"); and
- (3) whether the terms of the 1903 Lease created ownership rights to minerals in the Crown which extinguished the claimants' non-exclusive native title rights to and interests in minerals ("1903 Lease").

112 In addition to the Gumatj Clan, eleven parties made submissions to this Court: the Commonwealth, the Northern Territory, four members of the Rirratjingu Clan (together, "the Rirratjingu Respondents"), the Northern Land

179 There are complexities with the determination application including claims by other First Nations groups, and individuals, that the Claim Area, or parts of it, was land in which they held native title. Such claims are made by 21 respondents who identify as Yolngu and additional respondents who identify as Rirratjingu.

Council and the Arnhem Land Aboriginal Land Trust (together, "the NLC Respondents") as well as the Attorneys-General for the States of Queensland and Western Australia, and for the Australian Capital Territory. The Attorneys-General for Western Australia and the Australian Capital Territory intervened in this Court.

113 On the native title and s 51(xxxi) of the *Constitution* issue, the Commonwealth¹⁸⁰ submitted the extinguishment of native title is not an acquisition of property to which s 51(xxxi) of the *Constitution* applies because native title is "inherently defeasible", in the sense it is inherently susceptible to being extinguished or impaired by an otherwise valid exercise of relevant sovereign power. The Gumatj Clan¹⁸¹ submitted that the extinguishment of native title is subject to s 51(xxxi) and that the Commonwealth's submission involved a "novel and radical" extension of the concept of "inherent defeasibility" in s 51(xxxi) jurisprudence. As these reasons will explain, extinguishment of native title amounts to an acquisition of property for the purposes of s 51(xxxi) of the *Constitution*.

114 On the ss 51(xxxi) and 122 of the *Constitution* issue, the Commonwealth submitted a law that is supported only by s 122 of the *Constitution* is not subject to s 51(xxxi). The Gumatj Clan¹⁸² submitted all laws supportable by s 122 are subject to s 51(xxxi). As these reasons will explain, all laws supported by s 122, including any law of the Commonwealth Parliament which has no constitutional support other than under s 122 of the *Constitution*, are subject to s 51(xxxi).

115 On the 1903 Lease issue, the Commonwealth¹⁸³ submitted that a Minerals Exception and Reservation¹⁸⁴ in the 1903 Lease constituted an assertion by the Crown of a right of ownership in the minerals which extinguished any native

180 Supported by the Attorneys-General for Queensland, Western Australia and the Australian Capital Territory.

181 Supported by the NLC Respondents and the Rirratjingu Respondents. The Northern Territory did not make submissions on this issue.

182 Supported by the Northern Territory, the Attorney-General for the Australian Capital Territory, the NLC Respondents and the Rirratjingu Respondents. The Attorneys-General for Queensland and Western Australia did not make submissions on this issue.

183 Supported by the Northern Territory and the Attorneys-General for Queensland and the Australian Capital Territory.

184 See [230] below.

title in relation to minerals in the lease area. The Gumatj Clan¹⁸⁵ submitted to the contrary. As these reasons will explain, the 1903 Lease did not extinguish the claimants' non-exclusive native title to minerals in the lease area and, thereby, in the Claim Area.

116 For the reasons that follow, the appeal should be dismissed. Because the argument in this Court did not focus on the reasoning of the Full Court, and, at times, took a course different to that in the Full Court, these reasons will not deal directly with the Full Court's reasoning.

117 These reasons are organised as follows:

Part I – Yolngu People, native title and *Mabo (No 2)* [118]-[125]

Part II – Native title and s 51(xxxi) of the *Constitution*

- 1 Section 51(xxxi) as a constitutional guarantee [126]-[131]
- 2 Need to identify "property" subject to "acquisition" [132]
- 3 Native title "property" for s 51(xxxi) [133]-[144]
- 4 Commonwealth argument – native title "inherently defeasible" – rejected [145]-[171]
- 5 Extinguishment of native title is "acquisition of property" for s 51(xxxi) [172]-[175]

Part III – Sections 51(xxxi) and 122 of the *Constitution* [176]-[202]

Part IV – 1903 Lease

- 1 Legislative framework [205]-[210]
- 2 Exception or reservation [211]-[227]
- 3 1903 Lease [228]-[235]

Part V – Conclusion and orders [236]-[237]

¹⁸⁵ Supported by the NLC Respondents and the Rirratjingu Respondents. The Attorney-General for Western Australia did not make submissions on this issue.

Part I – Yolngu People, native title and *Mabo (No 2)*

118 The applications filed by Dr Yunupingu on behalf of the Gumatj Clan were the latest in a long campaign by the Yolngu People for recognition of their native title in the Claim Area. In 1971, in the *Gove Land Rights Case*,¹⁸⁶ Blackburn J held that Yolngu society¹⁸⁷ is founded on a government of laws but concluded the traditional rights and interests of the Yolngu clans in land on the Gove Peninsula within the Arnhem Land Reserve were not capable of recognition by the common law as property.¹⁸⁸ That decision stimulated the inquiry that led to the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which established the first extensive land rights scheme in Australia whereby Crown land comprising the Aboriginal Reserves in the Northern Territory was restored to traditional control.¹⁸⁹

119 The legal conclusion in the *Gove Land Rights Case* was overturned in *Mabo v Queensland [No 2]* ("*Mabo (No 2)*")¹⁹⁰ when six Justices of this Court held "the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands".¹⁹¹ "Native title" is defined in s 223(1) of the *Native Title Act*. The genesis of critical aspects of this definition was the reasons of Brennan J in *Mabo (No 2)*.¹⁹² Cases since *Mabo (No 2)* considering that definition are therefore useful to understanding the "native title" which was recognised in *Mabo (No 2)*.

120 "Native title" describes "the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous

186 (1971) 17 FLR 141.

187 In the *Gove Land Rights Case* (1971) 17 FLR 141 at 146, the first plaintiff, Milirrput, was "a member of the Rirratjingu clan" and another plaintiff, Munggurawuy, was a member of the Gumatj clan. Other Yolngu clans were represented by other plaintiffs.

188 *Gove Land Rights Case* (1971) 17 FLR 141 at 244-245, 262, 267, 273-274, 293.

189 *Yunupingu v The Commonwealth* (2023) 298 FCR 160 at 166 [3]. See also Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) at 66 [2.33].

190 (1992) 175 CLR 1.

191 (1992) 175 CLR 1 at 15; see also 57-58.

192 *Bodney v Bennell* (2008) 167 FCR 84 at 126 [163].

inhabitants".¹⁹³ As Brennan J said in *Mabo (No 2)*, "[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory".¹⁹⁴ "Native title, though recognized by the common law, is *not* an institution of the common law and is *not* alienable by the common law. Its alienability is dependent on the laws from which it is derived."¹⁹⁵ Thus, "[t]he common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise".¹⁹⁶ "[N]ative title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual."¹⁹⁷

121 Not only did native title to land survive the Crown's acquisition of sovereignty and radical title,¹⁹⁸ but the rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title.¹⁹⁹ After sovereignty, native title could be acquired outside traditional laws and customs *only* by the Crown.²⁰⁰ It is only on acquisition by the Crown of native title that the Crown's radical title is expanded to absolute ownership "for then there is

193 *Mabo (No 2)* (1992) 175 CLR 1 at 57. See also *Yanner v Eaton* (1999) 201 CLR 351 at 383 [73]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 143-144 [326].

194 *Mabo (No 2)* (1992) 175 CLR 1 at 58. See also *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 452; *Yanner* (1999) 201 CLR 351 at 382 [72].

195 *Mabo (No 2)* (1992) 175 CLR 1 at 59 (emphasis added). See also *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 439 [31]; *Queensland v Congoo* (2015) 256 CLR 239 at 273-274 [63].

196 *Mabo (No 2)* (1992) 175 CLR 1 at 60.

197 *Mabo (No 2)* (1992) 175 CLR 1 at 61. See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 169; *Yarmirr* (2001) 208 CLR 1 at 49 [42]; *Western Australia v Ward* (2002) 213 CLR 1 at 67 [21].

198 *Mabo (No 2)* (1992) 175 CLR 1 at 57, 69 (proposition 1-3). See also *Native Title Act Case* (1995) 183 CLR 373 at 422; *Yarmirr* (2001) 208 CLR 1 at 48 [41], 50 [46].

199 *Mabo (No 2)* (1992) 175 CLR 1 at 57, 69 (proposition 1-3).

200 *Mabo (No 2)* (1992) 175 CLR 1 at 60.

no other proprietor" than the Crown.²⁰¹ It is in that sense correct to state 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".²⁰²

122 But the exercise of sovereign power in this country is *not* at large.²⁰³ "[U]nder the constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise it".²⁰⁴ As native title is not granted by the Crown, "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".²⁰⁵ That requirement, which is "patently the right rule", flows from the seriousness of the consequences to Indigenous Australians of extinguishing their traditional rights to and interests in land.²⁰⁶

123 A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control consistent with the continued enjoyment of native title.²⁰⁷ A law which reserves or authorises the reservation of land from sale for the purpose of permitting Indigenous Australians and their descendants to enjoy their native title works no extinguishment.²⁰⁸ "Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests", such as authorities to prospect

201 *Mabo (No 2)* (1992) 175 CLR 1 at 60, 69 (proposition 1-4).

202 *Mabo (No 2)* (1992) 175 CLR 1 at 63, 69 (proposition 3-4). See also *Native Title Act Case* (1995) 183 CLR 373 at 452; *Wik* (1996) 187 CLR 1 at 123; *Fejo* (1998) 195 CLR 96 at 128 [48].

203 *Mabo (No 2)* (1992) 175 CLR 1 at 63, 69 (proposition 3).

204 *Mabo (No 2)* (1992) 175 CLR 1 at 63. See also *Native Title Act Case* (1995) 183 CLR 373 at 422.

205 *Mabo (No 2)* (1992) 175 CLR 1 at 64. See also *Ward* (2002) 213 CLR 1 at 89 [78]; *Akiba v The Commonwealth* (2013) 250 CLR 209 at 240 [62]; *Congoo* (2015) 256 CLR 239 at 264 [32], 300-301 [158]-[159].

206 *Mabo (No 2)* (1992) 175 CLR 1 at 64.

207 *Mabo (No 2)* (1992) 175 CLR 1 at 64.

208 *Mabo (No 2)* (1992) 175 CLR 1 at 64-65.

for minerals²⁰⁹ or the grant of a pastoral lease.²¹⁰ "Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency."²¹¹

124 As native title comprises rights and interests of different kinds, extinguishment is not necessarily a single act; the individual rights or interests which comprise native title may be extinguished from time to time. As such, "native title" may be likened to a "single large painting", in which – with each act that extinguishes a particular native title right or interest – holes are successively punched.²¹² In the absence of complete extinguishment, the "painting" remains; "native title survives and is legally enforceable".²¹³

125 In sum, there are three fundamental, well established premises concerning native title in light of which the issues raised in this appeal must be addressed. First, native title is recognised by the common law of Australia. Second, native title rights and interests may be extinguished by (and only by) the exercise of sovereign power.²¹⁴ Third, extinguishment depends on inconsistency between what is granted by the exercise of sovereign power and native title rights and interests. Extinguishment does not depend in any way upon any characteristic (inherent or otherwise) of the rights and interests which are extinguished.

Part II – Native title and s 51(xxxi) of the *Constitution*

1 Section 51(xxxi) as a constitutional guarantee

126 Section 51(xxxi) gives the Commonwealth Parliament power to make laws with respect to "the acquisition of property on just terms from any State or person

209 *Mabo (No 2)* (1992) 175 CLR 1 at 69 (proposition 4). See also *Native Title Act Case* (1995) 183 CLR 373 at 439; *Wik* (1996) 187 CLR 1 at 124, 133, 176, 185; *Fejo* (1998) 195 CLR 96 at 126-127 [43]-[44]; *Yanner* (1999) 201 CLR 351 at 371-372 [35]; *Ward* (2002) 213 CLR 1 at 89 [78]; *Akiba* (2013) 250 CLR 209 at 240 [62].

210 *Wik* (1996) 187 CLR 1 at 131, 167, 204.

211 *Mabo (No 2)* (1992) 175 CLR 1 at 69-70 (proposition 5). See also *Western Australia v Brown* ("*WA v Brown*") (2014) 253 CLR 507 at 522 [37].

212 *Northern Territory v Griffiths* (2019) 269 CLR 1 at 101 [205], 105 [219].

213 *Mabo (No 2)* (1992) 175 CLR 1 at 68.

214 *Mabo (No 2)* (1992) 175 CLR 1 at 63; *Native Title Act Case* (1995) 183 CLR 373 at 439.

for any purpose in respect of which the Parliament has power to make laws". It serves a "double purpose": it is both a limit on legislative power and a guarantee of property rights.²¹⁵

- 127 Section 51(xxxi) confers a power and, at the same time, "abstracts", in the sense of removes, that power from the Commonwealth's other heads of power.²¹⁶ A law properly characterised as a law for the "acquisition" of "property" within the meaning of s 51(xxxi) must be authorised by s 51(xxxi) and, to be authorised by s 51(xxxi), it must be an acquisition on just terms. The circumstances in which a law properly characterised as for the "acquisition" of "property" will not be subject to s 51(xxxi) are limited (eg a law imposing a tax).²¹⁷

215 *Bank of New South Wales v The Commonwealth* ("the Bank Nationalisation Case") (1948) 76 CLR 1 at 349; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370-371; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 424; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 145; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 254; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 197 [134]; *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 615 [270].

216 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 318, 325; *Schmidt* (1961) 105 CLR 361 at 371; *Tooth* (1979) 142 CLR 397 at 445; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 526; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 177, 179, 188, 193; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 283; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160, 166; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 124 [55]; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 387 [186]; *ICM* (2009) 240 CLR 140 at 197 [135]; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 67 [167]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 445 [107]; *Cunningham* (2016) 259 CLR 536 at 561 [61], 615 [271].

217 See [189] below.

The status of s 51(xxxi) as a "constitutional guarantee",²¹⁸ a "very great constitutional safeguard",²¹⁹ is significant. The purpose of the guarantee is to protect private property; it prevents arbitrary exercises of power at the expense of a State or subject, being exercises of power giving rise to expropriation of property without adequate compensation.²²⁰ Consistent with its status as a constitutional guarantee of just terms, the provision is given a "liberal construction appropriate to such a constitutional provision",²²¹ by giving a liberal construction to the concepts "property"²²² and "acquisition"²²³ in s 51(xxxi). As in the case of other "constitutional guarantees",²²⁴ the court looks to the practical operation –

218 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 202; *Mutual Pools* (1994) 179 CLR 155 at 168, 180, 184, 223; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 568, 595.

219 *Tooth* (1979) 142 CLR 397 at 403. See also *Wurridjal* (2009) 237 CLR 309 at 385 [178]; *ICM* (2009) 240 CLR 140 at 169 [43]; *JT International* (2012) 250 CLR 1 at 95 [263].

220 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 291; *Mutual Pools* (1994) 179 CLR 155 at 169; *Smith v ANL Ltd* (2000) 204 CLR 493 at 501 [9]; *JT International* (2012) 250 CLR 1 at 128 [355]; *Cunningham* (2016) 259 CLR 536 at 560 [57], 575 [116], 615 [270].

221 *Clunies-Ross* (1984) 155 CLR 193 at 202; *Australian Tape Manufacturers* (1993) 176 CLR 480 at 509; *Mutual Pools* (1994) 179 CLR 155 at 184; *Newcrest* (1997) 190 CLR 513 at 595; *ICM* (2009) 240 CLR 140 at 169 [43], 213 [185]; *JT International* (2012) 250 CLR 1 at 33 [41]. See also *Bank Nationalisation Case* (1948) 76 CLR 1 at 349; *Schmidt* (1961) 105 CLR 361 at 371; *Mutual Pools* (1994) 179 CLR 155 at 172.

222 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276; *Mutual Pools* (1994) 179 CLR 155 at 172; *Ex parte Lawler* (1994) 179 CLR 270 at 285; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303, 312, 319-320; *Newcrest* (1997) 190 CLR 513 at 602; *ANL* (2000) 204 CLR 493 at 533 [119]; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 663 [21]; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230 [43]; *ICM* (2009) 240 CLR 140 at 213 [186].

223 *Mutual Pools* (1994) 179 CLR 155 at 184-185; *Ex parte Lawler* (1994) 179 CLR 270 at 285; *Georgiadis* (1994) 179 CLR 297 at 303; *ANL* (2000) 204 CLR 493 at 533 [119]; *Telstra* (2008) 234 CLR 210 at 230 [43]; *ICM* (2009) 240 CLR 140 at 179-180 [82], 213 [186].

224 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 572, 618; *Cole v Whitfield* (1988) 165 CLR 360 at 401; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 522-523; *Ha v New South Wales* (1997) 189 CLR 465 at 498.

the substance, rather than form – of a law which purports to effect an "acquisition" of "property".²²⁵ A law cannot avoid the "just terms" limitation by operating as a "circuitous device" to acquire property.²²⁶ This appeal raises no issue as to the meaning of "just terms" for the purposes of s 51(xxxi).

129 In sum, s 51(xxxi) – the constitutional guarantee – will only apply if there is a law that has the effect that someone else acquires an interest in the property of another and where the law is properly characterised as a law with respect to the acquisition of property.

130 No decision of this Court has decided whether native title is "property" and capable of "acquisition" for the purposes of s 51(xxxi).²²⁷ In this Court, the Commonwealth accepted native title is "property" for the purposes of s 51(xxxi). That concession was properly made. The Commonwealth's contention, however, was that native title is property *not* subject to s 51(xxxi) because it is "inherently defeasible". The description of native title as "inherently defeasible" is not found in the authorities. The Commonwealth used this expression to refer to the fact that native title, as explained in *Mabo (No 2)*, is recognised by the common law as subject to extinguishment by an inconsistent grant.

131 The Commonwealth's argument that native title is "property" for the purposes of s 51(xxxi), but the "property" is "inherently defeasible" and thus outside the scope of s 51(xxxi), is internally inconsistent. On its face, the Commonwealth's argument asserts native title is both a form of "property" and not a form of "property" protected by s 51(xxxi). For the following reasons, the contention that native title is "inherently defeasible" and, for this reason, outside the scope of the s 51(xxxi) protection is rejected.

2 Need to identify "property" subject to "acquisition"

132 The Commonwealth sought to adopt an approach to "property" at odds with the status of s 51(xxxi) as a constitutional guarantee and the Court's decisions on s 51(xxxi). The Commonwealth's argument wrongly proceeded on the basis it was

²²⁵ *Tooth* (1979) 142 CLR 397 at 433; *Mutual Pools* (1994) 179 CLR 155 at 184, 219, 223; *Georgiadis* (1994) 179 CLR 297 at 320; *ICM* (2009) 240 CLR 140 at 169-170 [44]; *JT International* (2012) 250 CLR 1 at 67 [169].

²²⁶ *Bank Nationalisation Case* (1948) 76 CLR 1 at 349; *Tooth* (1979) 142 CLR 397 at 407; *Tasmanian Dam Case* (1983) 158 CLR 1 at 282-283; *Australian Tape Manufacturers* (1993) 176 CLR 480 at 510; *Mutual Pools* (1994) 179 CLR 155 at 173; *Georgiadis* (1994) 179 CLR 297 at 320; *JT International* (2012) 250 CLR 1 at 74 [193], 100 [280], 129 [361].

²²⁷ cf *Newcrest* (1997) 190 CLR 513 at 613.

not necessary to address the nature of the "property" subject to an "acquisition" for the purposes of s 51(xxxi). That is, the Commonwealth's contention that native title is "inherently defeasible" was treated as a question which stood separately from whether there is "property" and an "acquisition" for the purposes of s 51(xxxi). Whether the "property" is "inherently defeasible" so as to take the acquisition outside the scope of the s 51(xxxi) protection can only be informed by a characterisation of the "property" subject to "acquisition".²²⁸

3 Native title "property" for s 51(xxxi)

133 "Property" for the purposes of s 51(xxxi) is to be construed liberally.²²⁹ The language of s 51(xxxi) is "perfectly general"; it is "not restricted to ... particular types of property".²³⁰ It extends to rights²³¹ exercisable with respect to land²³² and, beyond, to "every species of valuable right and interest"²³³ and to "innominate and anomalous interests".²³⁴

134 The relevant "property" for the purposes of s 51(xxxi) in this appeal is the native title recognised by the common law in *Mabo (No 2)*. Native title rights

228 *Chaffey* (2007) 231 CLR 651 at 664 [22]; *Cunningham* (2016) 259 CLR 536 at 562-563 [65], 616 [274].

229 See [128] above.

230 *Dalziel* (1944) 68 CLR 261 at 285.

231 *Yanner* (1999) 201 CLR 351 at 365-367 [17]-[20]. See also *Telstra* (2008) 234 CLR 210 at 230-231 [44]; *Wurridjal* (2009) 237 CLR 309 at 360 [89]; *JT International* (2012) 250 CLR 1 at 31-32 [37], 107 [299]-[300].

232 *Dalziel* (1944) 68 CLR 261 at 285.

233 *Dalziel* (1944) 68 CLR 261 at 290. See also *Bank Nationalisation Case* (1948) 76 CLR 1 at 299; *Australian Tape Manufacturers* (1993) 176 CLR 480 at 509; *Mutual Pools* (1994) 179 CLR 155 at 184; *Georgiadis* (1994) 179 CLR 297 at 303; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 559; *Chaffey* (2007) 231 CLR 651 at 663 [21]; *Telstra* (2008) 234 CLR 210 at 232 [49]; *Wurridjal* (2009) 237 CLR 309 at 359 [87]; *ICM* (2009) 240 CLR 140 at 196 [131], 214-215 [189]; *JT International* (2012) 250 CLR 1 at 95 [263]; *Cunningham* (2016) 259 CLR 536 at 615 [272].

234 *Bank Nationalisation Case* (1948) 76 CLR 1 at 349. See also *Australian Tape Manufacturers* (1993) 176 CLR 480 at 528; *Mutual Pools* (1994) 179 CLR 155 at 184-185; *Georgiadis* (1994) 179 CLR 297 at 303; *Wurridjal* (2009) 237 CLR 309 at 359-360 [88]; *JT International* (2012) 250 CLR 1 at 95 [263]; *Cunningham* (2016) 259 CLR 536 at 561-562 [62], 606 [233].

and interests, as recognised by the common law, are rights and interests exercisable with respect to land (and waters). They are rights and interests which have "some or all of the features which a common lawyer might recognise as a species of property".²³⁵ They are rights and interests to do things in relation to land and waters.²³⁶ As was stated in *Wik Peoples v Queensland*,²³⁷ they "may comprise what are classified as personal or communal usufructuary rights involving access to the area of land in question to hunt for or gather food, or to perform traditional ceremonies. This may leave room for others to use the land either concurrently or from time to time."²³⁸ At the opposite extreme, the degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable estate therein.^{239"}

135 While it may be useful to compare native title with other rights and interests afforded protection by s 51(xxxi) for the purposes of determining whether native title is protected by s 51(xxxi), this should not obscure the fact that native title rights and interests are *sui generis* and have no precise analogy with other common law property rights.

136 Native title is not "created by" and does not derive from the common law.²⁴⁰ In *Mabo (No 2)*, it was held that, at sovereignty, the common law accepted that "the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty" and "[t]hose antecedent rights and interests thus constitute[d] a burden on the radical title of the Crown".²⁴¹ What we call "native title" takes its content from the traditional laws acknowledged, and the traditional customs observed, by Indigenous Australians. "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.²⁴²

235 *Yarmirr* (2001) 208 CLR 1 at 38 [12].

236 *Griffiths* (2019) 269 CLR 1 at 38 [23].

237 (1996) 187 CLR 1 at 169.

238 *Mabo (No 2)* (1992) 175 CLR 1 at 66-67.

239 *Mabo (No 2)* (1992) 175 CLR 1 at 89.

240 *Yarmirr* (2001) 208 CLR 1 at 51 [48]. See also *Fejo* (1998) 195 CLR 96 at 128 [46]; *Yorta Yorta* (2002) 214 CLR 422 at 453 [75].

241 *Mabo (No 2)* (1992) 175 CLR 1 at 57 (emphasis added).

242 *Mabo (No 2)* (1992) 175 CLR 1 at 58-61. See also *Native Title Act Case* (1995) 183 CLR 373 at 452; *Fejo* (1998) 195 CLR 96 at 128 [46]; *Yanner* (1999) 201 CLR 351

Native title involves an intersection of two systems: the common law recognising the traditional laws and customs of Indigenous Australians.²⁴³

137 As counsel for the Gumatj Clan put it "[w]e are dealing with a form of title that reflects the social, cultural, economic, and religious framework of the society of Indigenous Australians, who occupied the country tens of thousands of years before the arrival of the sovereign Crown". Native title recognises that, according to their laws and customs, Indigenous Australians have a connection with country. It is a connection which existed and persisted before and beyond settlement, before and beyond the assertion of sovereignty and before and beyond Federation. It is older and deeper than the *Constitution*.

138 Native title is different from what common lawyers identify as property rights. While native title may be characterised as rights and interests with respect to land and waters, *equating* native title with proprietary rights in relation to land and waters is "artificial and capable of misleading".²⁴⁴

139 First, native title may continue to exist at traditional law, even once those rights and interests have been extinguished by the common law.²⁴⁵ The metaphor of "recognition" reflects the proposition that the common law cannot and does not transform traditional laws and customs, and cannot and does not transform or alter the relationships to country which they define, or the rights and interests which native title holders would recognise as continuing to exist under traditional laws and customs.²⁴⁶

140 Second, "native title does not exhibit the uniformity of rights and interests of an estate in land at common law".²⁴⁷ The native title rights and interests in relation to land and waters will vary from Indigenous group to Indigenous group. To put it in different terms: "[t]he content of native title, its nature and incidents,

at 382-383 [72]; *Yorta Yorta* (2002) 214 CLR 422 at 439 [31]; *Congoo* (2015) 256 CLR 239 at 273-274 [63]; *Love v The Commonwealth* (2020) 270 CLR 152 at 179 [34], 189 [70], 205 [115], 228 [205], 252 [268], 273 [339], 313 [450].

243 *Fejo* (1998) 195 CLR 96 at 128 [46]. See also *Yanner* (1999) 201 CLR 351 at 382-383 [72]; *Yorta Yorta* (2002) 214 CLR 422 at 441 [38]; *WA v Brown* (2014) 253 CLR 507 at 522 [36].

244 *Mabo (No 2)* (1992) 175 CLR 1 at 178.

245 *Yanner* (1999) 201 CLR 351 at 373 [38]. See also *Akiba* (2013) 250 CLR 209 at 219 [10].

246 *Congoo* (2015) 256 CLR 239 at 263 [31].

247 *Yanner* (1999) 201 CLR 351 at 383 [72].

will vary from one case to another".²⁴⁸ The common lawyer's "ingrained habits of thought and understanding"²⁴⁹ must be adjusted to reflect the diverse rights and interests which arise under the rubric of native title.²⁵⁰ So, for example, for the purposes of the determination and compensation applications before the Federal Court, the Gumatj Clan claim non-exclusive native title rights and interests to live on the land, to travel over it, to hunt, fish and forage, to take and use resources, to have access to and use the natural water, to engage in cultural and social activities (including conducting cultural practices relating to birth and death), and to protect sites of significance and areas or objects of cultural importance.

141 Third, native title involves a "communal" or "special collective" set of rights or interests "vested in an Aboriginal group by virtue of its long residence and communal use of land or its resources".²⁵¹ The particular rights and interests which comprise native title may be communal, group (eg the right to conduct cultural practices) or individual.²⁵² The "communal" or "collective" nature of native title, as well as the communal rights and interests it may comprise, do "not correspond to the concept of ownership as understood by the land law of England".²⁵³

142 Fourth, native title has a cultural, spiritual or metaphysical aspect that has no analogue in European law: it is "something over and above and separate from 'enjoyment' in the sense of the ability to engage in activity or use"; it "refers to a defining element in a view of life and living".²⁵⁴ It is a connection with land where the land "owns" the people and the people are responsible for the land. It is a two-way connectedness the law has tried to capture by speaking of spiritual connection.²⁵⁵ It is a "religious relationship ... the people of the clan,

248 *Wik* (1996) 187 CLR 1 at 169.

249 *Wik* (1996) 187 CLR 1 at 177.

250 *Yanner* (1999) 201 CLR 351 at 383 [72].

251 *Mabo (No 2)* (1992) 175 CLR 1 at 178-179; see also 57, 62, 109-110, 119. See also *Yanner* (1999) 201 CLR 351.

252 *Mabo (No 2)* (1992) 175 CLR 1 at 57. See also *Wik* (1996) 187 CLR 1 at 169; *Yanner* (1999) 201 CLR 351 at 383 [73]; *Ward* (2002) 213 CLR 1 at 66 [17].

253 *Mabo (No 2)* (1992) 175 CLR 1 at 178.

254 *Griffiths* (2019) 269 CLR 1 at 95 [187].

255 *Yanner* (1999) 201 CLR 351 at 372-373 [37]-[38]; *Ward* (2002) 213 CLR 1 at 64 [14]; *Congoo* (2015) 256 CLR 239 at 274 [64]; *Griffiths* (2019) 269 CLR 1 at 38

particular land and everything that exists on and in it, are organic parts of one indissoluble whole".²⁵⁶

143 Native title is "property"; property which is enduring, substantial and significant. To hold otherwise would be contrary to the characterisation of native title in *Mabo (No 2)*, which has been affirmed by many subsequent decisions of this Court including *Wik*,²⁵⁷ *Fejo v Northern Territory*,²⁵⁸ *Yanner v Eaton*,²⁵⁹ *Western Australia v Ward*,²⁶⁰ and *Queensland v Congoo*.²⁶¹ Indeed, failure to recognise native title as protected by s 51(xxxi) would be inconsistent with the central basis for recognition of native title in *Mabo (No 2)*. In deciding to overrule the cases that had held that the Crown acquired full beneficial ownership of the land upon sovereignty, Brennan J said "[t]o maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land."²⁶²

144 In light of the views just expressed about the nature of native title as "property" to which s 51(xxxi) attaches, it is unnecessary to consider the alternative contention of the Rirratjingu Respondents that in considering the "property" for s 51(xxxi), the traditional owners of native title held another distinct form of "property" in addition to the rights and interests recognised in *Mabo (No 2)* to which s 51(xxxi) attaches – namely, a right analogous to a chose in action.

[23], 99 [199]; *Love* (2020) 270 CLR 152 at 189 [70], 205 [115], 225 [194], 260-261 [290].

256 *Ward* (2002) 213 CLR 1 at 64 [14], citing *Gove Land Rights Case* (1971) 17 FLR 141 at 167.

257 (1996) 187 CLR 1 at 169.

258 (1998) 195 CLR 96 at 128 [46].

259 (1999) 201 CLR 351 at 373 [38].

260 (2002) 213 CLR 1 at 64-65 [14].

261 (2015) 256 CLR 239 at 274 [64].

262 *Mabo (No 2)* (1992) 175 CLR 1 at 58.

4 Commonwealth argument – native title "inherently defeasible" – rejected

145 It is against that analysis of why native title is and must be "property", as well as the nature of that "property", for the purposes of s 51(xxxi) of the *Constitution*, that the Commonwealth's contention that native title is outside the reach of s 51(xxxi) because it is "inherently defeasible" is to be addressed. The Commonwealth's contention involved four interrelated aspects: (a) native title being "inherently defeasible" is supported by Brennan J's reasoning in *Mabo (No 2)* that the Court is not free to adopt principles that would "fracture the skeleton of principle"; (b) native title, as recognised in *Mabo (No 2)*, is "fragile"; (c) the concept of "inherent defeasibility" in the statutory rights authorities is not limited to rights conferred by statute; and (d) a statement by Gummow J in *Newcrest Mining (WA) Ltd v The Commonwealth*²⁶³ supports the Commonwealth's "inherent defeasibility" submission. Each aspect of the submission is addressed below and rejected.

(a) *Mabo (No 2)* and "fracturing the skeleton" metaphor

146 The Commonwealth submitted that in *Mabo (No 2)* Brennan J set out a principle as guiding the task of the Court: that in declaring the common law, the 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".²⁶⁴ The Commonwealth submitted the various references in *Mabo (No 2)* to the "skeletal principle"²⁶⁵ and not "fracturing the skeleton"²⁶⁶ of the legal system supported the "unavoidable" conclusion 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".

147 The metaphor of fracturing the skeleton of our legal system cannot and should not be used to "obscure the underlying principles ... in issue".²⁶⁷ Justice Brennan's analysis of the "skeleton of principle" led his Honour to conclude that the Crown retained radical title and could, by asserting or creating inconsistent rights over unalienated land, extinguish inconsistent native title.²⁶⁸ In rejecting

263 (1997) 190 CLR 513 at 613.

264 *Mabo (No 2)* (1992) 175 CLR 1 at 29 (emphasis added).

265 *Mabo (No 2)* (1992) 175 CLR 1 at 43.

266 *Mabo (No 2)* (1992) 175 CLR 1 at 45.

267 *Yarmirr* (2001) 208 CLR 1 at 68 [97].

268 *Mabo (No 2)* (1992) 175 CLR 1 at 48, 50-51.

the same argument from the Commonwealth in *The Commonwealth v Yarmirr*, four judges aptly explained there are "obvious dangers" in attempting to use the skeleton metaphor to gain an understanding of the principles.²⁶⁹ Heeding that warning, the skeleton metaphor is not relevant to characterising the nature of native title, as recognised in *Mabo (No 2)*, in deciding whether the extinguishment of native title is subject to s 51(xxxi).

148 Holding now that Commonwealth laws which extinguished native title involved an acquisition of property for the purposes of s 51(xxxi) will not "fracture the skeleton" of our legal system. Titles acquired under the accepted land law will be unaffected. This appeal concerns a specific issue:²⁷⁰ whether the extinguishment of native title by various acts, including the passing of Commonwealth legislation, is a "past act" within the meaning of the *Native Title Act*. There is no threat to existing titles. But native title claimants will be entitled to compensation for extinguishment of native title that did not comply with the just terms limitation in s 51(xxxi) of the *Constitution*.

(b) Native title not uniquely "fragile" so as to be outside protection of s 51(xxxi)

149 The Commonwealth then submitted native title is, of its nature, "inherently fragile" because, until the passing of the *Native Title Act*, it was "inherently defeasible". None of the bases identified by the Commonwealth in support of the contention native title is "inherently fragile" and, for this reason, outside the scope of s 51(xxxi) protection should be accepted.

150 First, the Commonwealth submitted native title is "inherently fragile" because native title is subject to extinguishment by an exercise of the "relevant sovereign power" of the Crown to grant interests in land or to appropriate to itself interests in unalienated land. In this case, the "relevant sovereign power" is statutory: the granting or extinguishment of rights and interests concerning land in the Northern Territory, following its surrender to the Commonwealth,²⁷¹ has always been pursuant to Commonwealth or Territory legislation.

269 *Yarmirr* (2001) 208 CLR 1 at 68 [97].

270 See [104]-[106] above.

271 See [102] above.

151 The description of native title as "inherently fragile",²⁷² "defeasible"²⁷³ or "vulnerab[le] to defeasance"²⁷⁴ in earlier authorities was a shorthand for saying native title, as recognised by the common law, is subject to extinguishment by an inconsistent grant. That has been uncontroversial since *Mabo (No 2)*.²⁷⁵ But this does not say anything about the nature of native title, as recognised by the common law, for the purposes of s 51(xxxi). As has been explained,²⁷⁶ native title has the features a common lawyer understands of "property", but also comprises *sui generis* rights and interests that are enduring, substantial and significant in a sense beyond the common lawyer's understanding of "property".

152 The purported "fragility" or "inherent defeasibility" of native title contended for by the Commonwealth is not relevantly different to any common law proprietary right to which s 51(xxxi) protection extends. Just as an exercise of statutory power may extinguish any of those common law property rights,²⁷⁷ native title rights and interests are no less susceptible to extinguishment by an exercise of statutory power.

153 In *Mabo (No 2)*, Brennan J explained that "[s]overeignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory".²⁷⁸ A private right or interest granted by the Crown can be extinguished by the Crown with statutory authority.²⁷⁹ Likewise, native title will be extinguished by the grant of an interest under statute wholly or partially

272 *Yarmirr* (2001) 208 CLR 1 at 51 [47], see also 115 [258]; *Ward* (2002) 213 CLR 1 at 93-94 [91], see also 241 [561], 263 [616], 287 [665].

273 *Native Title Act Case* (1995) 183 CLR 373 at 418. cf *Yarmirr* (2001) 208 CLR 1 at 88 [169].

274 *Native Title Act Case* (1995) 183 CLR 373 at 453. See also *Fejo* (1998) 195 CLR 96 at 118 [15].

275 See [121] above.

276 See [133]-[144] above.

277 *Mabo (No 2)* (1992) 175 CLR 1 at 63. See also *Fejo* (1998) 195 CLR 96 at 128 [48].

278 *Mabo (No 2)* (1992) 175 CLR 1 at 63.

279 *Mabo (No 2)* (1992) 175 CLR 1 at 64.

inconsistent with one or more of the rights and interests comprising that native title.²⁸⁰

154 The only possible difference in this respect between native title and other common law property rights is how the legislature must manifest the necessary intention to extinguish those rights. In the case of common law property rights, a statute which confers a power on the Crown will be interpreted, so far as is consistent with the purpose for which the power is conferred, to stop short of authorising any impairment of an interest in land granted by the Crown, or dependent on a Crown grant.²⁸¹ The Commonwealth referred to this as the "non-derogation" principle. In substance, this is an aspect of the principle of legality. There is no *equivalent* principle affecting the conferring of any power on the Crown the exercise of which is apt to extinguish native title.²⁸² Rather, in the case of native title, the exercise of power must reveal a "clear and plain intention" to extinguish native title, which will be the case where an exercise of statutory power creates an inconsistent right (even if the grant of the power does not reveal an express intention to extinguish native title).²⁸³

155 The possible difference between how the legislature must manifest the necessary intention to extinguish common law property rights (namely, subject to the non-derogation principle) and native title is insufficient to justify treating native title differently from other common law property rights protected by s 51(xxxi). The exercise of the power must reveal a "clear and plain intention" to extinguish native title,²⁸⁴ acknowledging as is necessary, in the case of common law property rights, that there must be a clear threshold for extinguishing native title because of the "seriousness of the consequences" that follow from extinguishing traditional rights and interests.²⁸⁵

156 To seek to place determinative significance on the fact the extinguishment of native title by statute is not subject to the non-derogation principle would be to adopt a distinction of form over substance, which is contrary to long established

280 See, eg, *Yarmirr* (2001) 208 CLR 1 at 47-48 [40], 68 [100]; *Congoo* (2015) 256 CLR 239 at 263-266 [31]-[37], 299-301 [155]-[159].

281 *Mabo (No 2)* (1992) 175 CLR 1 at 64.

282 *Mabo (No 2)* (1992) 175 CLR 1 at 64.

283 See [122]-[123] above.

284 See [123] above.

285 *Mabo (No 2)* (1992) 175 CLR 1 at 64.

and unchallenged principles of s 51(xxxi) decisions of the Court.²⁸⁶ Whether the law extinguishes native title by an exercise of sovereign power that reveals a clear and plain intention to extinguish native title, or by legislation which expressly evinces an intention to extinguish native title, native title is extinguished.

157 Finally, the Commonwealth submitted native title is "inherently defeasible" (and for this reason, not protected by s 51(xxxi)) *because* the "foundational characteristic of native title ... is that it has its source in another legal system" – traditional laws and customs – such that there is a "hierarchy" so far as native title and common law property rights are concerned. To accept that particular argument, or the Commonwealth's wider submissions about inherent defeasibility and s 51(xxxi), would create a distinction between native title and other common law proprietary rights contrary to the equality of all Australian citizens before the law, which the Court recognised and sought to address with the recognition of native title in *Mabo (No 2)*.²⁸⁷

(c) "Inherent defeasibility" of statutory rights cannot be extended to native title

158 The Commonwealth's argument that native title was inherently defeasible also relied on authorities addressing when rights conferred by statute may be outside the scope of s 51(xxxi) protection because those rights are "inherently defeasible".²⁸⁸ In this Court, the Commonwealth did not dispute the existing authorities concerned statutory rights. And although the Commonwealth was careful to submit no part of its case involved drawing an analogy between the nature and characteristics of native title and statutory rights, the Commonwealth did contend that there are no reasons of underlying principle or authority that confine the concept of "inherent defeasibility" to statutory rights and that the concept of "inherent defeasibility" has been used in relation to property rights more generally. Those arguments should be rejected.

159 The question is *not* whether the concept of "inherent defeasibility", as used in the context of the statutory rights cases concerning s 51(xxxi), may be extended outside that context to other property rights. The question is whether the concept of "inherent defeasibility" can be extended to *native title rights and interests*. It cannot, and should not, be so extended for at least four reasons.

286 See [128] above.

287 See Pt I and [143] above.

288 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73 [195]-[196], 75 [203]; *Chaffey* (2007) 231 CLR 651 at 663-664 [21]-[25]; *Telstra* (2008) 234 CLR 210 at 219-220 [8], 233-234 [52]; *Cunningham* (2016) 259 CLR 536 at 553 [32], 554-555 [40], 555-556 [43], 556 [46], 562 [63], 563 [66], 564-565 [69].

160 First, native title rights and interests are enduring, substantial and a significant form of "property" that both accords with and is beyond the common lawyer's conception of "property".²⁸⁹ Significantly, native title, unlike some other property rights (including rights conferred by statute), is not the subject of a *grant*. The common law did not grant native title to Indigenous Australians; the common law recognised the *antecedent* rights and interests that pre-dated sovereignty.²⁹⁰ While the "property" for the purposes of s 51(xxxi) is native title as recognised by the common law, the nature and character of that property must be found in and informed by the traditional laws and customs of Indigenous Australians because that is what the common law recognised. For that reason alone, one must be careful in equating native title with other forms of property rights (including rights conferred by statute).

161 Second, native title cannot be equated with rights conferred by statute for the purposes of s 51(xxxi). It is well established that not all rights conferred by statute will be outside the scope of s 51(xxxi) protection; it is necessary to look to the express legislative stipulation which *creates* the statutory right.²⁹¹ Once this is appreciated, there is no analogy to be drawn between native title and statutory rights; the nature and character of statutory rights is entirely and exclusively determined by the terms of the legislation which *creates* those rights. Native title is created by neither statute nor the common law.

162 Third, the concept of "inherent defeasibility" in s 51(xxxi) jurisprudence was developed in the historical context of the dawn of the age of statutes, where the Court was confronted with an increasing number of s 51(xxxi) cases concerning statutory rights.²⁹² This is not to foreclose the possibility that the concept may, in another case, be relevant outside the context of statutory rights. But any extension of the principle would need to take account of the historical context in which it was developed. The Commonwealth's submission that there are no reasons of underlying principle or authority that confine the concept to statutory rights ignores this historical context.

289 See [138]-[143] above.

290 See [136] above.

291 *Chaffey* (2007) 231 CLR 651 at 664 [24]-[25]. See also *WMC Resources* (1998) 194 CLR 1 at 70 [182]; *Telstra* (2008) 234 CLR 210 at 232 [49]; *Wurridjal* (2009) 237 CLR 309 at 382-383 [172]; *Cunningham* (2016) 259 CLR 536 at 556 [43], 563 [66], 604-605 [229], 616 [273].

292 See, eg, in 1994 alone: *Georgiadis* (1994) 179 CLR 297; *Mutual Pools* (1994) 179 CLR 155; *Nintendo* (1994) 181 CLR 134.

163 Fourth, the concept of "inherent defeasibility" in the s 51(xxxi) authorities does not regard the mere contingency of legislative extinguishment as sufficient for the right to fall outside the protection afforded by s 51(xxxi). Those authorities treat the concept of "inherent defeasibility" as informing consideration of whether the right is "property" or subject to "acquisition" for the purposes of s 51(xxxi).

164 In *Health Insurance Commission v Peverill*,²⁹³ Brennan J considered that the fact the statutory right at issue²⁹⁴ did not have "any degree of permanence or stability", and thus was "not a right of a proprietary nature", led to the conclusion the right was not protected by s 51(xxxi).²⁹⁵ Then, in *The Commonwealth v WMC Resources Ltd*,²⁹⁶ Toohey J explained that although the rights in issue had no existence except under statute, it did not follow that they were not protected by s 51(xxxi); it was necessary to analyse the particular rights at issue to assess whether they were "transient, defeasible and did not give rise to the possibility of acquisition".²⁹⁷

165 In *Attorney-General (NT) v Chaffey*, the plurality said it is too broad a proposition to say the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of s 51(xxxi); it was necessary to consider the nature of the rights and interests at issue.²⁹⁸ And in *Cunningham v The Commonwealth*, the plurality, following *Chaffey*, said where the "property" has no existence apart from statute, it is necessary to consider the nature of the proprietary right.²⁹⁹

166 That view is correct as a matter of principle because "inherent defeasibility", in the sense of a grant being subject to the contingency of extinguishment by statute, describes a characteristic of any and every "property" right. Depending on the terms of the contingency, and other features of the right, the contingency may not be the determinative feature of that right for the purposes of determining whether it should be afforded s 51(xxxi) protection. For example,

293 (1994) 179 CLR 226.

294 The right of a medical practitioner to receive a payment for Medicare benefits assigned to them by a patient.

295 (1994) 179 CLR 226 at 243-244, 246.

296 (1998) 194 CLR 1.

297 (1998) 194 CLR 1 at 29 [53]; see also 99 [253]. See also *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 165.

298 *Chaffey* (2007) 231 CLR 651 at 664 [24]-[25].

299 *Cunningham* (2016) 259 CLR 536 at 555-556 [43]-[46].

the Crown may grant an interest in fee simple subject to the contingency that it may be acquired for public purposes during a time of war. The land is so acquired 10, 20 or 200 years (it matters not which) after the initial grant. If the mere contingency from years prior was sufficient to take the acquisition outside the scope of s 51(xxxi), the status of s 51(xxxi) as a "constitutional guarantee"³⁰⁰ would be gravely compromised. The Commonwealth could avoid the s 51(xxxi) "just terms" guarantee by making every grant of a right that is "property" subject to the contingency of extinguishment.

167 Native title cannot be characterised as lacking "permanence or stability".³⁰¹ Native title is not "transient".³⁰² Native title is an enduring, substantial, and significant form of "property" that both accords with and is beyond the common lawyer's conception of "property". Native title is therefore not "inherently defeasible" in the sense in which that term is used in the context of statutory rights, even if the statutory rights cases are relevant, and they are not.

(d) Gummow J in *Newcrest*

168 The Commonwealth placed significant reliance on the following passage from the reasons of Gummow J in *Newcrest*, who, in the context of the intersection between ss 51(xxxi) and 122 of the *Constitution*, stated:³⁰³

"The characteristics of native title as recognised at common law include an inherent susceptibility to extinguishment or defeasance by *the grant* of freehold or of some lesser estate which is inconsistent with native title rights; this is so whether the grant be supported by the prerogative or by legislation.³⁰⁴ Secondly, legislation such as that considered in *Mabo v Queensland*³⁰⁵ and *Western Australia v The Commonwealth (Native Title*

300 See [128] above.

301 cf *Peverill* (1994) 179 CLR 226 at 243-244.

302 cf *WMC Resources* (1998) 194 CLR 1 at 29 [53].

303 *Newcrest* (1997) 190 CLR 513 at 613 (emphasis in original).

304 *Mabo (No 2)* (1992) 175 CLR 1 at 69, 89, 110, 195-196; *Native Title Act Case* (1995) 183 CLR 373 at 422, 439, 459; *Wik* (1996) 187 CLR 1 at 132-133. See also *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 653; *Peverill* (1994) 179 CLR 226 at 235-237, 256, 264-265.

305 (1988) 166 CLR 186.

Act Case),³⁰⁶ which is otherwise within power but is directed to the extinguishment of what otherwise would continue as surviving native title (or which creates a 'circuitous device' to acquire indirectly the substance of that title³⁰⁷), may attract the operation of s 51(xxxi).³⁰⁸"

169 As is apparent, Gummow J distinguished between the extinguishment of native title by grants of freehold or other estates that are inconsistent with native title on the one hand, and the extinguishment of native title by legislation which purports to extinguish native title wholesale, on the other. In the former, Gummow J said the acquisition is outside s 51(xxxi), but in the latter, it "may attract the operation of s 51(xxxi)".

170 That analysis about "inherent defeasibility" should not be adopted. It approaches the inquiry from the wrong starting point.³⁰⁹ It does not first consider the nature of the rights at issue. If native title as recognised in *Mabo (No 2)* is considered,³¹⁰ it is not possible to conclude such rights and interests are not protected by s 51(xxxi). Secondly, if the passage was intended to draw the stark distinction identified, a principled basis for the distinction drawn between extinguishment of native title by grants of freehold and legislation which extinguishes native title wholesale is unclear. To consider that the latter, but not the former, would attract the operation of s 51(xxxi) is to adopt a distinction of form over substance contrary to accepted principles about the operation of s 51(xxxi),³¹¹ principles to which his Honour referred. In both scenarios, native title is extinguished, and "property" is subject to "acquisition" by another.³¹²

171 Finally on this aspect, the Commonwealth's submission that six Justices in *Fejo* endorsed this passage by Gummow J in *Newcrest* on the basis the passage was cited in a footnote should be rejected.³¹³ The passage from Gummow J was being cited in *Fejo* in support of the proposition that native title is susceptible to extinguishment by an inconsistent grant. This is an uncontroversial proposition.

306 (1995) 183 CLR 373.

307 *Bank Nationalisation Case* (1948) 76 CLR 1 at 349.

308 *Mabo (No 2)* (1992) 175 CLR 1 at 111.

309 See [132] above.

310 See [134]-[143] above.

311 See [128] above.

312 See [173] below.

313 *Fejo* (1998) 195 CLR 96 at 127 [44] fn 157.

The passage from Gummow J was not being cited for the controversial proposition, which has just been rejected, that susceptibility to extinguishment by an inconsistent grant is somehow determinative of the character of native title for the purposes of s 51(xxxi).

5 *Extinguishment of native title is "acquisition of property" for s 51(xxxi)*

172 The concept of "acquisition" for the purposes of s 51(xxxi), like "property", is broad.³¹⁴ The language "is not restricted to acquisition by particular methods or of particular types of interests".³¹⁵ For there to be an "acquisition", there must be the obtaining of at least "some identifiable benefit or advantage relating to the ownership or use of property".³¹⁶ The identifiable benefit or advantage relating to the ownership or use of property does not need to correspond precisely to what was taken.³¹⁷

173 Extinguishment of native title, as recognised by the common law, is an "acquisition". Any act which extinguishes native title confers an "identifiable benefit or advantage" on a person with an interest in the land: the person will no longer be burdened by the rights and interests of native title holders to go on that land and exercise their native title rights and interests. In the context of the present appeal, that would include extinguishment of the claimants' non-exclusive native title. In sum, the extinguishment of native title involves an "acquisition" by relieving a reciprocal burden on the title to land.³¹⁸

174 This analysis is not new. In *Mabo (No 2)*, Deane and Gaudron JJ said their "conclusion that rights under common law native title are true legal rights which are recognized and protected by the law would ... 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)".³¹⁹

314 See [128] above.

315 *Dalziel* (1944) 68 CLR 261 at 285.

316 *Mutual Pools* (1994) 179 CLR 155 at 185. See also *ICM* (2009) 240 CLR 140 at 179-180 [82]; *JT International* (2012) 250 CLR 1 at 63-64 [152]-[153], 69 [173], 77-78 [198].

317 *Georgiadis* (1994) 179 CLR 297 at 304-305. See also *Newcrest* (1997) 190 CLR 513 at 634.

318 *WMC Resources* (1998) 194 CLR 1 at 18 [20]; see also 37 [84].

319 *Mabo (No 2)* (1992) 175 CLR 1 at 111. See also *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at 244-245 [36].

175 The Commonwealth submitted that that analysis of Deane and Gaudron JJ should not be relied on because (a) their Honours were making prospective reference to any legislation which purported to extinguish or diminish native title which had survived colonial dispossession; (b) their Honours would not have had in contemplation the application of s 51(xxxi) to laws of the Territory because *Teori Tau v The Commonwealth* had not been doubted at that time;³²⁰ and (c) their Honours' reasoning was premised on a minority view in relation to what legislative intention was required to extinguish native title. These submissions do not advance the Commonwealth's argument. After the passage extracted above, their Honours immediately proceeded to refer to legislative provisions that have "clearly and unambiguously extinguished or adversely affected common law native title".³²¹ The past tense indicates their analysis was not purely prospective. And, neither of the subsequent arguments separately, or collectively, detract from or bear upon the fact that, even if not binding, the analysis of Deane and Gaudron JJ identifies that the extinguishment analysis now adopted is not new.

Part III – Sections 51(xxxi) and 122 of the *Constitution*

176 The intersection between ss 51(xxxi) and 122 of the *Constitution*, and whether the just terms requirement in s 51(xxxi) applies to laws enacted pursuant to s 122, has been the subject of different views for more than 50 years. Three views have been expressed: there is no intersection between ss 122 and 51(xxxi) ("the *Teori Tau* view");³²² s 51(xxxi) only intersects with s 122 when the laws are also supported by a s 51 head of power ("the Gaudron J view");³²³ and, finally, all laws supported by s 122, including any law of the Commonwealth Parliament which has no constitutional support other than under s 122 of the *Constitution*, are subject to s 51(xxxi).³²⁴

177 The *Teori Tau* view, subject to the Gaudron J view, is binding on this Court. In *Wurridjal v The Commonwealth*, four Justices of this Court held that *Teori Tau*

320 As will be explained, in *Teori Tau* (1969) 119 CLR 564, the High Court unanimously held that laws made in reliance on the territories power in s 122 are not subject to s 51(xxxi).

321 *Mabo (No 2)* (1992) 175 CLR 1 at 112 (emphasis added).

322 *Teori Tau* (1969) 119 CLR 564 at 570-571. See also *Newcrest* (1997) 190 CLR 513 at 534, 539-540.

323 *Newcrest* (1997) 190 CLR 513 at 568-569; see also 560, 614, 661.

324 *Newcrest* (1997) 190 CLR 513 at 614, 652; see also 568; *Wurridjal* (2009) 237 CLR 309 at 359 [86], 388 [189], 418 [283].

should be overruled.³²⁵ However, as Kirby J was in the minority in *Wurridjal*, his reasoning does not form part of the *ratio decidendi* of the decision.³²⁶ The Gumatj Clan and the parties that supported them on this issue³²⁷ sought leave to re-open *Teori Tau*.

178 In this appeal, the Commonwealth submitted that the *Teori Tau* view, subject to the Gaudron J view, should be adopted because, unless its submissions were accepted, the Commonwealth would be liable to pay holders of native title compensation for extinguishment of their rights and interests pursuant to an indeterminate number of grants of interests in land in the Territory and that would have "enormous financial ramifications" for the Commonwealth.

179 This Court must adopt the correct view: the issue relates to an important provision of the *Constitution* which deals with individual rights³²⁸ and justice for dispossessed holders of native title is at stake.³²⁹ Leave to re-open *Teori Tau* should be granted. Neither the *Teori Tau* view nor the Gaudron J view has commanded support in subsequent cases and, given the Court's more recent decisions about the territories power in s 122,³³⁰ the better view is that all laws supported by s 122, including any law of the Commonwealth Parliament which has no constitutional support other than under s 122 of the *Constitution*, are subject to s 51(xxxi). Section 122 confers power on the Parliament to "make laws for the government of any territory". All that needs to be shown for a law to be supported by s 122 is that there is a sufficient nexus or connection between the law and the government of a

325 *Wurridjal* (2009) 237 CLR 309 at 359 [86] (French CJ), 388 [189] (Gummow and Hayne JJ), 418 [283] (Kirby J).

326 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 267; *Vanderstock v Victoria* (2023) 98 ALJR 208 at 316 [430]; 414 ALR 161 at 286. See also *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 613-614 [107]-[108].

327 See [114] above.

328 *Newcrest* (1997) 190 CLR 513 at 613.

329 *Newcrest* (1997) 190 CLR 513 at 576.

330 See [191]-[193] below.

territory.³³¹ The breadth of that power has been described as "plenary".³³² As will become clear, the "plenary" nature of s 122 does not mean it is immune from the qualifications and limitations found elsewhere in the *Constitution*.

180 *Teori Tau* concerned a challenge to the validity of Ordinances made under the *New Guinea Act 1920* (Cth), the *New Guinea Act 1920-1926* (Cth) and the *Papua and New Guinea Act 1949-1964* (Cth) on the ground they provided for the compulsory acquisition of property without providing just terms for the acquisition.³³³ The plaintiff argued the Ordinances had purported to vest in the Crown certain minerals to which Indigenous people of New Guinea claimed they were entitled.³³⁴ The plaintiff argued the challenged laws were contrary to s 51(xxxi) of the *Constitution* and the Commonwealth had no other power to authorise the acquisitions without providing just terms.³³⁵ The judgment of the Court was delivered, *ex tempore*, by Barwick CJ.³³⁶ The Court gave two primary reasons for s 122 not being subject to s 51(xxxi): first, s 51 is concerned with "federal legislative power"; and secondly, the terms of s 122 are sufficiently "plenary in quality" to cover the acquisition of property.³³⁷

181 Subsequent judgments of the Court³³⁸ have since explained why *Teori Tau* should be overruled as a matter of principle. The reasons given in those judgments, in substance, reflect many of the arguments put to this Court in this appeal for why

331 *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607; *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 157 [335]-[337]; *Vunilagi v The Queen* (2023) 97 ALJR 627 at 650 [100]; 411 ALR 224 at 247.

332 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320; *Spratt v Hermes* (1965) 114 CLR 226 at 241-242; *Berwick* (1976) 133 CLR 603 at 607; *Capital Duplicators Pty Ltd v Australian Capital Territory ("Capital Duplicators (No 1)")* (1992) 177 CLR 248 at 265; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 43, 54, 55, 78, 79; *Wurridjal* (2009) 237 CLR 309 at 347 [55], 348 [57], 349 [61], 369 [123], 385 [180].

333 *Teori Tau* (1969) 119 CLR 564 at 569.

334 *Teori Tau* (1969) 119 CLR 564 at 565-566.

335 *Teori Tau* (1969) 119 CLR 564 at 566.

336 *Teori Tau* (1969) 119 CLR 564 at 568-569.

337 *Teori Tau* (1969) 119 CLR 564 at 570.

338 *Newcrest* (1997) 190 CLR 513 at 614 (Gummow J), 652 (Kirby J); *Wurridjal* (2009) 237 CLR 309 at 359 [86] (French CJ), 388 [189] (Gummow and Hayne JJ), 418 [283] (Kirby J).

Teori Tau should be overruled and respond to many of the arguments put by the Commonwealth for why *Teori Tau* should not be overruled.

182 First, it is uncontroversial that because s 51(xxxi) includes a restriction on the power to legislate with respect to acquisitions of property, it "abstracts" that power from the other Commonwealth heads of power.³³⁹ This starting point accords with the status of s 51(xxxi) as a "constitutional guarantee", which is to be construed "liberally", and which has the purpose of preventing arbitrary exercises of power at the expense of a State or subject.³⁴⁰

183 The second proposition is that each provision of the *Constitution*, including s 122, is to be read together with other provisions of the *Constitution*. The fact s 122 is found in Ch VI of the *Constitution*, not Ch I, does not warrant construing s 122 "as though it stood isolated from other provisions of the Constitution which might qualify its scope".³⁴¹ Indeed, the Convention Debates indicate there was some suggestion (not adopted) that s 122 should be placed in what became s 52 of the *Constitution*.³⁴² In sum, s 51(xxxi) should be read with s 122 and not "torn from the constitutional fabric".³⁴³

184 It is now accepted that s 122 should not be read as "disjoined"³⁴⁴ from the rest of the *Constitution*, notwithstanding its placement in Ch VI. In *Spratt v Hermes*,³⁴⁵ Barwick CJ did state that s 122 is "non-federal in character" and "as large and universal a power of legislation as can be granted".³⁴⁶ However, his Honour explained that "this does not mean that the power is not controlled in any respect by other parts of the Constitution or that none of the provisions to be

339 See [127] above. See also *Schmidt* (1961) 105 CLR 361 at 371; *Mutual Pools* (1994) 179 CLR 155 at 169; *Nintendo* (1994) 181 CLR 134 at 160; *Newcrest* (1997) 190 CLR 513 at 596, 652-653; *Wurridjal* (2009) 237 CLR 309 at 354-355 [75], 386-387 [185]-[186].

340 See [128] above.

341 *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 272. See also *Newcrest* (1997) 190 CLR 513 at 604.

342 *Newcrest* (1997) 190 CLR 513 at 603.

343 *Newcrest* (1997) 190 CLR 513 at 597-598.

344 *Lamshed v Lake* (1958) 99 CLR 132 at 145. See also *Newcrest* (1997) 190 CLR 513 at 600, 652, 653.

345 (1965) 114 CLR 226.

346 *Spratt* (1965) 114 CLR 226 at 242.

found in chapters other than [Ch] VI are applicable to the making of laws for the Territory or to its government".³⁴⁷ As his Honour went on to state, it would be "an error to compartmentalize the Constitution, merely because for drafting convenience it has been divided into chapters"; the place of a provision in the *Constitution* will only provide assistance when "resolving ambiguities".³⁴⁸

185 Treating s 122 as disjoined from s 51(xxxi) would also produce absurdities.³⁴⁹ Not only was the area of the Northern Territory at Federation within a State,³⁵⁰ but s 122 authorises the Commonwealth Parliament to make laws the operation of which may extend to the States. For example, it would be a "curious result" for s 51(xxxi) not to apply to land acquired in a State to establish a tourist bureau for a territory. As Gummow J succinctly put it in *Newcrest*, "the Commonwealth would be in a position to impose upon those holding property in a State a burden from which the Constitution was designed to protect them".³⁵¹ In addition, consistent with the broad concept of "property" for s 51(xxxi), incorporeal property such as a patent, design or registered trade mark cannot necessarily be situated in any particular State or territory.³⁵² In light of this, the constitutional guarantee "cannot be coherently construed" if there is a dichotomy between the situation of property in a State and in a territory.³⁵³

186 Thirdly, there are three textual bases for s 51(xxxi) applying to s 122 in the same way it applies to other heads of power in s 51. The first basis is that s 51(xxxi) confers power to make laws with respect to the acquisition of property for "*any purpose* in respect of which the Parliament has power to make laws" and s 122 empowers Parliament to make laws "*for* the government of any territory". Section 122 identifies a legislative "purpose" within the meaning of s 51(xxxi)

347 *Spratt* (1965) 114 CLR 226 at 242.

348 *Spratt* (1965) 114 CLR 226 at 246.

349 See, eg, *Newcrest* (1997) 190 CLR 513 at 600; *Wurridjal* (2009) 237 CLR 309 at 357 [80].

350 *Newcrest* (1997) 190 CLR 513 at 600-601. See also *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 274.

351 *Newcrest* (1997) 190 CLR 513 at 602.

352 *Newcrest* (1997) 190 CLR 513 at 602.

353 *Newcrest* (1997) 190 CLR 513 at 602.

of the *Constitution*, being the power to make laws for the government of the territories.³⁵⁴

187 The second basis is that the chapeau to s 51 refers to the power to make laws for the people of "the Commonwealth". "The Commonwealth", as it appears in covering cl 5 of the *Constitution*, includes the territories.³⁵⁵ The third basis is that s 51(xxxi) extends to acquisition of property from "any person" (and is not limited to acquisitions of property from any State).³⁵⁶ "Any person" plainly extends to the people of the territories.

188 The fact that s 51 is expressed as "subject to this Constitution" does not alter that conclusion. It does not subordinate s 51 to s 122; the presence of "subject to this Constitution" in s 51 and its absence from s 122 does not mean s 122 is not to be read with the *Constitution* as a whole.³⁵⁷ The phrase "subject to this Constitution" in s 51 serves to emphasise that the s 51 heads of power are restrained by limitations contained elsewhere.

189 Fourthly, nothing about the nature of the power conferred by s 122 displaces s 51(xxxi). Section 51(xxxi) will not apply to laws in connection with which "just terms" is an "inconsistent or incongruous" notion.³⁵⁸ Acquisition without just terms must be a "necessary or characteristic feature" of the means which the law selects to achieve an objective which is within power.³⁵⁹ Examples of such laws include laws levying taxes,³⁶⁰ seizing the property of enemy aliens, imposing fines and

354 *Newcrest* (1997) 190 CLR 513 at 597, 600, 652.

355 *Newcrest* (1997) 190 CLR 513 at 597; *Wurridjal* (2009) 237 CLR 309 at 353-354 [74]. See also *Berwick* (1976) 133 CLR 603 at 608.

356 *Newcrest* (1997) 190 CLR 513 at 594; *Wurridjal* (2009) 237 CLR 309 at 357 [79].

357 *Newcrest* (1997) 190 CLR 513 at 606, 653.

358 *Mutual Pools* (1994) 179 CLR 155 at 187; *Ex parte Lawler* (1994) 179 CLR 270 at 285; *Theophanous* (2006) 225 CLR 101 at 124 [56]; *ICM* (2009) 240 CLR 140 at 214 [188]; *Emmerson* (2014) 253 CLR 393 at 436 [77]. See also *JT International* (2012) 250 CLR 1 at 122 [335].

359 *Mutual Pools* (1994) 179 CLR 155 at 179, 180-181. See also *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133 at 180 [98]; *Wurridjal* (2009) 237 CLR 309 at 439 [361]; *ICM* (2009) 240 CLR 140 at 229 [222]; *Emmerson* (2014) 253 CLR 393 at 448 [118].

360 *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263; *Federal Commissioner of Taxation v Barnes* (1975) 133 CLR 483 at 494-495; *MacCormick*

exacting penalties and forfeitures.³⁶¹ In these cases, the "just terms" requirement does not apply because to characterise these exactions as an acquisition of property would be "incompatible with the *very nature* of the exaction".³⁶² There is nothing in the nature of the power in s 122 which suggests it displaces, let alone in fact displaces, s 51(xxxi).

190 In relation to the nature of the power in s 122, the Commonwealth submitted that 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. To exclude the people of the territories from the "constitutional guarantee" of s 51(xxxi) would have required clear expression.³⁶³ The absence of the phrase "subject to this Constitution" in s 122 is not sufficient to supply the necessary contrary intention to displace the operation of s 51(xxxi).³⁶⁴ The scope of the power conferred by s 122 is also not "inconsistent or incongruous" with the application of s 51(xxxi). The fact s 122 is a "plenary" power does not mean it is without limits.³⁶⁵ Describing the power as "plenary" does not supply the necessary contrary intention to displace the operation of s 51(xxxi).³⁶⁶ In any event, there is no apparent reason why s 122 would be any less "plenary" in nature if the constitutional guarantee also applies to laws made under it.³⁶⁷

191 Fifthly, the fact that s 122 must be subject to s 51(xxxi) is reflected in the number of limitations outside Ch VI which have been held to apply to laws

v Federal Commissioner of Taxation (1984) 158 CLR 622 at 638-639; *Australian Tape Manufacturers* (1993) 176 CLR 480 at 508-509. See also *Mutual Pools* (1994) 179 CLR 155 at 187, 220.

361 *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 487; *Ex parte Lawler* (1994) 179 CLR 270 at 285; *Emmerson* (2014) 253 CLR 393 at 436 [77]. See also *Mutual Pools* (1994) 179 CLR 155 at 178; *Theophanous* (2006) 225 CLR 101 at 124-125 [56], 126 [60]; *JT International* (2012) 250 CLR 1 at 122 [335].

362 *Theophanous* (2006) 225 CLR 101 at 126 [60] (emphasis added). See also *Emmerson* (2014) 253 CLR 393 at 438 [84].

363 *Newcrest* (1997) 190 CLR 513 at 654.

364 *Newcrest* (1997) 190 CLR 513 at 607, 653.

365 *Newcrest* (1997) 190 CLR 513 at 605, 654-655.

366 *Newcrest* (1997) 190 CLR 513 at 607.

367 *Newcrest* (1997) 190 CLR 513 at 605, 654.

made under s 122 of the *Constitution*.³⁶⁸ The rationale for those limitations applying to s 122 is that otherwise the purpose behind the limitation would be defeated. Three should be noted.³⁶⁹

192 Section 90 constrains laws made under s 122.³⁷⁰ The purpose of the power is to ensure the Parliament, to the exclusion of the legislatures of both the States and the internal territories, may exercise s 90 powers. If s 122 authorised the creation of a legislature for an internal territory with those powers, it would be a "Trojan horse available to destroy a central objective of the federal compact".³⁷¹

193 Next, the *Kable* principle³⁷² applies to territory courts.³⁷³ It is necessary for the preservation of the structure of the *Constitution* and implicit in the terms of Ch III that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal. Because the territory courts may exercise the judicial power of the Commonwealth, it is therefore necessary that territory courts are subject to the *Kable* principle.³⁷⁴ And, of course, laws made under s 122 are subject to the implied freedom of political

368 *Newcrest* (1997) 190 CLR 513 at 656-657; *Wurridjal* (2009) 237 CLR 309 at 348 [57]-[58]. See also *Vunilagi* (2023) 97 ALJR 627 at 650 [100]; 411 ALR 224 at 247.

369 These examples are not exhaustive. Section 122 is also subject to s 92: *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 275. See also *Palmer v Western Australia* (2021) 272 CLR 505 at 545 [117].

370 *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 279. See also *Vanderstock* (2023) 98 ALJR 208 at 231 [61], 309 [400] fn 1002, 320 [441] fn 1102; 414 ALR 161 at 180, 277, 291.

371 *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 279.

372 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 101, 114-116, 143. See also *Emmerson* (2014) 253 CLR 393 at 424 [40].

373 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [28]-[29]; *Emmerson* (2014) 253 CLR 393 at 425 [42].

374 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81]; *Bradley* (2004) 218 CLR 146 at 163 [28]-[29]; *South Australia v Totani* (2010) 242 CLR 1 at 49 [72].

communication because discussion of matters at a territory level "might bear upon the choice that the people have to make in federal elections".³⁷⁵

194 Taking the same approach, the rationale behind s 51(xxxi) would be defeated if it were not to apply to Commonwealth laws made "for" the territories.³⁷⁶ The just terms guarantee relates not only to the States but to "persons".³⁷⁷ The purpose of the s 51(xxxi) limitation includes preventing arbitrary exercises of the power to acquire property at the expense of the individual.³⁷⁸ Achievement of this purpose necessitates that the limitation applies to protect individuals in the territories in the same way as it applies to protect those in the States in so far as Commonwealth laws are concerned.

195 Sixthly, s 51(xxxi) cannot be construed as a limit on only the powers contained in s 51, or within Ch I. The Commonwealth submitted s 51(xxxi) is a power to make laws with respect to the acquisition of property on just terms for "s 51 federal purposes". The text of s 51(xxxi) is not so confined.³⁷⁹ Moreover, this characterisation of s 51(xxxi) is at odds with authority. Section 51(xxxi) has been held to apply outside s 51 and, indeed, outside Ch I of the *Constitution*. In *ICM Agriculture Pty Ltd v The Commonwealth*, this Court held s 96 (in Ch IV) does not confer power on the Commonwealth to grant financial assistance to a State on terms and conditions requiring the State to acquire property other than on just terms.³⁸⁰

196 Finally, the reasoning in *Teori Tau* is in tension with other authorities.³⁸¹ In particular, it is contrary to the reasoning which underpinned *Lamshed v Lake*³⁸²

375 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 550 [25]. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

376 See [186] above.

377 *Newcrest* (1997) 190 CLR 513 at 594; *Wurridjal* (2009) 237 CLR 309 at 357 [79].

378 See [182] above.

379 See [186]-[188] above.

380 *ICM* (2009) 240 CLR 140 at 170 [46], 206 [174], cf 199 [141].

381 *Newcrest* (1997) 190 CLR 513 at 610-612; cf 650-652.

382 (1958) 99 CLR 132. See *Newcrest* (1997) 190 CLR 513 at 609, 613; *Wurridjal* (2009) 237 CLR 309 at 346 [53], 358 [85], 383 [175], 385 [178], 386 [183], 387 [188].

and *Spratt*,³⁸³ which were decided before *Teori Tau*. The reasoning in *Teori Tau* involved at least three steps which were inconsistent with those authorities.³⁸⁴

197 The first flawed step was that *Teori Tau* took as one of its premises that s 122 of the *Constitution* is "the source of power to make laws for the government of the territories".³⁸⁵ The Court has long rejected the notion that a law necessarily has only one characterisation.³⁸⁶ That is, the Court has long rejected the notion that a law may only be supported by one head of constitutional power. It is more accurate to say s 122 is a source of power to make laws for the territories.³⁸⁷ Reflecting this, *Spratt* determined that a court of a territory may enforce laws made in reliance on a s 51 head of power in relation to acts occurring within that territory.³⁸⁸

198 The second flawed step was made by asserting (again, as a premise for the conclusion) the grant of power in s 122 is "general and unqualified".³⁸⁹ That premise dictates the conclusion. "*Capital Duplicators*"³⁹⁰ denies any proposition that the grant in s 122 is 'unlimited and unqualified in point of subject matter'.³⁹¹

383 (1965) 114 CLR 226. See *Newcrest* (1997) 190 CLR 513 at 599, 601, 603, 606, 609-610, 611-612, 613; *Wurridjal* (2009) 237 CLR 309 at 346 [51].

384 *Newcrest* (1997) 190 CLR 513 at 611-612.

385 *Teori Tau* (1969) 119 CLR 564 at 570 (emphasis added). See also *Newcrest* (1997) 190 CLR 513 at 611.

386 See, eg, *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 601; *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 192-194; *Re F; Ex parte F* (1986) 161 CLR 376 at 388; *Mutual Pools* (1994) 179 CLR 155 at 188; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; *Work Choices Case* (2006) 229 CLR 1 at 103-104 [142].

387 *Newcrest* (1997) 190 CLR 513 at 611; *Wurridjal* (2009) 237 CLR 309 at 386 [184].

388 *Spratt* (1965) 114 CLR 226 at 248, 259-260, 264-265, 278. See also *Newcrest* (1997) 190 CLR 513 at 609.

389 *Teori Tau* (1969) 119 CLR 564 at 570. See also *Newcrest* (1997) 190 CLR 513 at 611; *Wurridjal* (2009) 237 CLR 309 at 347 [54].

390 *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 269.

391 *Newcrest* (1997) 190 CLR 513 at 612. See also [183] and [190]-[192] above.

199 The third flawed step was to assert s 51 is concerned with "federal legislative powers" as part of the distribution of legislative power between the Commonwealth and the States, whereas s 122 is concerned with the legislative power for the government of the Commonwealth territories, for which there is no such division of legislative power.³⁹² The notion s 122 is a "non-federal" power has been discarded. In *Lamshed*, it was argued that "s 122 empowers the Parliament to make laws for the government of the Territory ... as if the Commonwealth Parliament were appointed a local legislature in and for the Territory with a power territorially restricted to the Territory".³⁹³ Chief Justice Dixon "wholly reject[ed]" that interpretation.³⁹⁴ His Honour explained that "when s 122 gives a legislative power to the Parliament for the government of a territory the Parliament takes the power in its character as the legislature of the Commonwealth, established in accordance with the Constitution as the national legislature of Australia".³⁹⁵ The Court therefore held the challenged law was a "law of the Commonwealth" within the meaning of s 109 of the *Constitution*.³⁹⁶

200 For these reasons, *Teori Tau* should be overruled.

201 It follows that the Gaudron J view must also be overruled. In *Newcrest*, Gaudron J agreed with Gummow J's reasoning and conclusion that *Teori Tau* should be overruled.³⁹⁷ However, her Honour proposed an *alternative* basis for the conclusion that the challenged law must be subject to s 51(xxxi), which formed part of the *ratio decidendi* of the decision.³⁹⁸ Her Honour reasoned that "[o]n the assumption that par (xxxi) is to be read down so that it applies only to laws enacted under s 51, its terms, even when strictly construed, extend to a law a purpose of which is one 'in respect of which the Parliament has power to make

392 *Teori Tau* (1969) 119 CLR 564 at 570. See also *Newcrest* (1997) 190 CLR 513 at 612; *Wurridjal* (2009) 237 CLR 309 at 347 [54].

393 *Lamshed* (1958) 99 CLR 132 at 141.

394 *Lamshed* (1958) 99 CLR 132 at 141.

395 *Lamshed* (1958) 99 CLR 132 at 143. See also *Newcrest* (1997) 190 CLR 513 at 609; *Wurridjal* (2009) 237 CLR 309 at 386 [183].

396 *Lamshed* (1958) 99 CLR 132 at 148, 153-154.

397 *Newcrest* (1997) 190 CLR 513 at 568.

398 *Newcrest* (1997) 190 CLR 513 at 560-561 (Toohey J), 568 (Gaudron J), 614 (Gummow J), 640 (Kirby J).

laws [under s 51]".³⁹⁹ As the challenged law in *Newcrest* was supported by the external affairs power in s 51(xxix) of the *Constitution*,⁴⁰⁰ this was an *alternative* route to the conclusion that it must be subject to s 51(xxxi). For the reasons explained above, the premise for this alternative route – that s 51(xxxi) is to be read down so that it applies only to laws enacted under s 51 – is incorrect.

202 All these considerations compel the conclusion that all laws supported by s 122, including any law of the Commonwealth Parliament which has no constitutional support other than under s 122 of the *Constitution*, are subject to s 51(xxxi). They leave no room for the *Teori Tau* view or the Gaudron J view. The operation of the constitutional guarantee to s 122 should not be denied.⁴⁰¹

Part IV – 1903 Lease

203 The Commonwealth submitted that the terms of the 1903 Lease, and, in particular, the exception and reservation of minerals in favour of the Crown in the 1903 Lease, created ownership rights to minerals in the Crown which extinguished the claimants' non-exclusive native title rights to and interests in minerals. That contention should be rejected.

204 The legal effect of the exception and reservation of minerals in the 1903 Lease depends on the terms of the statute under which the pastoral lease was granted because the pastoral lease owed its origin and existence to the provisions of that statute.⁴⁰² It is therefore necessary to consider the applicable legislative framework.

1 *Legislative framework*

205 In 1899, the *Northern Territory Land Act 1899* (SA) ("the 1899 Land Act") was enacted "to amend the Northern Territory Land Laws".⁴⁰³ The 1899 Land Act was incorporated into, and was to be read as one with, the "principal Act", the 1890 Crown Lands Act, "except so far as inconsistent" with that Act.⁴⁰⁴ The 1899 Land Act set out a comprehensive scheme dealing with the grant of

399 *Newcrest* (1997) 190 CLR 513 at 568 (emphasis added).

400 *Newcrest* (1997) 190 CLR 513 at 567.

401 *Newcrest* (1997) 190 CLR 513 at 614.

402 *Wik* (1996) 187 CLR 1 at 190; see also 108, 153, 226, 242.

403 1899 Land Act, title.

404 1899 Land Act, s 1.

pastoral leases.⁴⁰⁵ Pastoral leases were granted upon application to the Minister.⁴⁰⁶ The Governor could only grant pastoral leases of pastoral lands in the manner provided by the 1899 Land Act.⁴⁰⁷

206 Every pastoral lease was required to "contain the covenants, exceptions, reservations, and provisions mentioned in Schedule A", "subject to any modifications or additions stated in the conditions of opening the lands for leasing or required by the Minister for giving effect to [the] Act".⁴⁰⁸ Section 25 of the 1899 Land Act stated that "[n]o lease granted under this Act shall authorise the lessee to carry on mining operations of any description whatsoever upon the land leased, or any part thereof".

207 The covenants, exceptions, reservations and provisions mentioned in Sch A to the 1899 Land Act included eleven covenants by the lessee which concerned paying rent annually in advance, stocking the land with sheep or cattle, keeping the land free of vermin, not assigning or subletting without the Minister's consent, the circumstances in which timber may be cut, obstruction or interference with public roads, paths or other ways and other matters.⁴⁰⁹ Schedule A then stated that, in addition to those covenants, each pastoral lease was required to contain prescribed exceptions, reservations and provisions including:⁴¹⁰

- "(l) *An exception or reservation* in favor of the Crown, and all persons authorised of all minerals, metals, gems, precious stones, coal, and mineral oils together with all necessary rights of access, search, procuration, and removal, and all incidental rights and powers:
- (m) An unrestricted right for the Crown and all persons authorised to enter and view the demised premises, and view the state and condition thereof, and to serve notice on the lessee of any wants of reparation, &c:

405 1899 Land Act, Pt II (The Granting of Pastoral Leases) (ss 7-22), Pt III (Terms and Conditions of Leases) (ss 23-31), read with s 3 definitions of "pastoral lease" and "pastoral lands".

406 1899 Land Act, ss 8 and 10.

407 1899 Land Act, s 7.

408 1899 Land Act, s 24.

409 1899 Land Act, Sch A (a)-(k).

410 1899 Land Act, Sch A (l)-(s) (emphasis added), read with s 24.

...

- (q) Such leases shall also contain all such exceptions and reservations in favor of the Crown, the Minister, Land Boards, Road Boards, and other authorities, the aborigines of the colony, and other persons, necessary or proper for giving effect to any Act or regulation for the time being in force, or not inconsistent therewith, as may be prescribed, or as the Minister may require:

...

- (s) All the above to be expressed in each form as may be prescribed, or as may be approved by the Minister."

208 The 1899 Land Act and the 1890 Crown Lands Act were passed in the 1890s. As Gummow J said in *Wik* "[t]he Court is called upon to construe statutes enacted at times when the existing state of the law was perceived to be the *opposite* of that which it since has been held then to have been".⁴¹¹ In this appeal, the "opposite" state of the law was that at the time of the enactment of the 1890 Crown Lands Act and 1899 Land Act, it was assumed or understood that the Crown had full beneficial ownership of all land in the colony and no right or interest in land could be possessed by any person unless granted by the Crown.⁴¹² Since *Mabo (No 2)*,⁴¹³ it has been consistently held, contrary to that earlier understanding, that at sovereignty, "the *antecedent rights and interests* in land possessed by the indigenous inhabitants ... survived the change in sovereignty" and that "[t]hose antecedent rights and interests thus constitute a burden on the radical title of the Crown".⁴¹⁴

209 Before turning to consider the 1903 Lease, it is therefore necessary to say something about the 1890 Crown Lands Act and the 1899 Land Act and, in particular, Sch A to the 1899 Land Act. Each of the covenants, exceptions, reservations and provisions required to be included in the pastoral lease concerned

411 *Wik* (1996) 187 CLR 1 at 184 (emphasis added); see also 244. See also *Akiba* (2013) 250 CLR 209 at 229-230 [31].

412 *Mabo (No 2)* (1992) 175 CLR 1 at 26, citing *Attorney-General v Brown* (1847) 1 Legge 312 at 316.

413 (1992) 175 CLR 1 at 57, 69 (proposition 1-3). See also *Native Title Act Case* (1995) 183 CLR 373 at 422; *Wik* (1996) 187 CLR 1 at 207; *Yarmirr* (2001) 208 CLR 1 at 48 [41], 50 [46]; *Love* (2020) 270 CLR 152 at 177 [27], 273 [338], 274 [340].

414 (1992) 175 CLR 1 at 57 (emphasis added).

the relationship between the Crown and the lessee;⁴¹⁵ not the relationship between the Crown and the world at large. In other words, the prescribed form of pastoral lease used language found in a lease between private parties.⁴¹⁶ Contrary to the Commonwealth's submission, item (l) in Sch A to the 1899 Land Act is not to be read as dealing with the relationship between the Crown and the world at large as if the item were conferring or asserting rights of ownership in the Crown *against the world*. Item (l) should be read consistently with all the other covenants, exceptions, reservations and provisions in Sch A as dealing with the relationship between the Crown and the lessee.

210 In the pre-*Mabo (No 2)* context of the 1890 Crown Lands Act and the 1899 Land Act as enacted, and their regulation of the grants of pastoral leases, it is unsurprising that none of ss 7, 24 and 25 of the 1899 Land Act or item (l) of Sch A expressly conferred on the Crown the estate necessary to grant a lease or recorded the Crown as having ownership rights in the minerals. At that time, the Crown erroneously held the view that it had full beneficial ownership of any land that would be the subject of a pastoral lease. That had the consequence that the Crown also erroneously held the view that it was the owner of minerals on that land. The common law position was that the owner of a freehold estate possessed all minerals beneath the surface of the land, except Royal metals.⁴¹⁷ But, in any event, as will be seen,⁴¹⁸ if the Crown intended for legislation to vest property in minerals in the Crown, so that the Crown might deal with them against the world, that issue could be expressly addressed in the applicable legislation.

2 *Exception or reservation*

211 Before turning to address the proper construction of the 1903 Lease in that statutory context, it is necessary to consider the phrase "exception or reservation" in item (l) of Sch A, which concerned minerals. At common law, the two concepts – exception or reservation – had distinct meanings:⁴¹⁹ "First, there was an exception, whereby the vendor excluded from the conveyance some existing part of what was conveyed ... Second, there was a reservation in the strict sense,

⁴¹⁵ There were some limited exceptions, reservations and provisions that also concerned persons other than the Crown: see Sch A (l), (m) and (q).

⁴¹⁶ cf *Ward* (2002) 213 CLR 1 at 124 [172].

⁴¹⁷ *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 185.

⁴¹⁸ See [226] below.

⁴¹⁹ *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark [No 2]* [1973] 1 WLR 1572 at 1586-1587; [1973] 3 All ER 902 at 917.

whereby the vendor created in his own favour some new interest which issued out of the property conveyed".

212 Consistent with that distinction, a "reservation" may create in the lessor, for example, some interest in their favour out of the property conveyed. However, the words "reservation" and "reserving" have often been used, and long been understood in the Australian law of real property, to mean "a keeping back of a physical part of a thing otherwise granted" (rather than a positive conferral of rights).⁴²⁰ In particular, a reservation of minerals has been understood as a mere keeping back,⁴²¹ rather than a positive conferral of rights in the minerals on the Crown. The likely explanation for that is that, prior to *Mabo (No 2)*, the Crown regarded itself as having full beneficial ownership in any interests held back from a grant.⁴²²

213 Two decisions are instructive. In *Wade v New South Wales Rutile Mining Co Pty Ltd*, Windeyer J put it most directly when his Honour said "[i]n a strict legal sense reservations are not equivalent to exceptions ... But the words 'reservation', 'reserving' etc are often used to mean a keeping back of a physical part of a thing otherwise granted: and so they are to be understood and have long been understood in the Australian law of real property".⁴²³

214 The Commonwealth and the Northern Territory submitted this Court would err if it relied on the characterisation of a "reservation" as a keeping back in cases decided before *Mabo (No 2)*, such as *Wade*. That submission is misplaced. The fact that *Wade* was decided before *Mabo (No 2)* reinforces, rather than detracts from, the fact that the long understanding of the meaning of "reservation" at the time that the 1903 Lease was granted (ie before *Mabo (No 2)*) was a keeping back of a physical part of a thing otherwise granted.

215 Second, in *Wik*, Gummow J explained that "[t]he term 'reservation' in strict usage identifies something newly created out of the land or tenement demised" and that the term "reservation" "is inappropriate to identify an exception or

420 *Wade* (1969) 121 CLR 177 at 194. See also *Yandama Pastoral Co v Mundi Mundi Pastoral Co Ltd* (1925) 36 CLR 340 at 348, 376-377, 377-378; *Ward v Western Australia* ("*Ward FC*") (1998) 159 ALR 483 at 556; *Ward* (2002) 213 CLR 1 at 128-129 [186], 310 [716].

421 *Wade* (1969) 121 CLR 177 at 194; *Wik* (1996) 187 CLR 1 at 200-201.

422 See [208] above.

423 *Wade* (1969) 121 CLR 177 at 194. See also *Ward* (2002) 213 CLR 1 at 310 [716]; *Ward FC* (1998) 159 ALR 483 at 556.

keeping back from that which is the subject of the grant".⁴²⁴ However, his Honour again recognised there was and is an "Australian usage" of "reservation" which "was apt ... to identify that which was withheld or kept back".⁴²⁵ The Commonwealth, the Northern Territory and the Queensland Attorney-General submitted this statement could not be relied upon because it was obiter and contrary to an unchallenged finding of the primary judge. Justice Gummow's statement in *Wik*, citing *Wade*, records the history of the meaning of "reservation" in the context of pastoral leases in Australia. On that basis, at least, Gummow J's statement is correct and persuasive.

216 The Commonwealth did not dispute that the "reservation" of minerals in item (l) involved a keeping back but contended that the "reservation" had a *second function*, which was to create a record of the Crown's assertion of property in the minerals or of conferring rights of ownership in the minerals on the Crown, on which an action in intrusion could be based, without the need for an office or inquest. This was said to be necessary because there was real uncertainty in the 1890s as to whether the Crown could bring an action in ejectment. The contention that the reservation had a second function must be rejected.

217 Whether or not the Crown could bring an action for ejectment in the 1890s, the Commonwealth's argument proceeded on the basis that it is legitimate to identify a legislative purpose apparent not from the Act, but *only* from the historical context at the time the legislation was enacted. That is, the Commonwealth's contention that the minerals reservation had a second function to create a record of the Crown's assertion of property in the minerals on which an action in intrusion could be based was derived from the historical context of the 1890s, not the 1899 Land Act read with the 1890 Crown Lands Act. This reverses the proper approach to statutory construction. A purpose ascertained from history cannot override the text. The purpose must be evident in the text.⁴²⁶

218 And, contrary to the Commonwealth's argument that the reservation in item (l) of Sch A to the 1899 Land Act was intended to create a record of the

424 *Wik* (1996) 187 CLR 1 at 200.

425 *Wik* (1996) 187 CLR 1 at 200-201.

426 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33]; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389-390 [25]-[26], 395 [41]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551 at 582 [52].

Crown's assertion of property in the minerals – the so called second function – the Act properly construed did not support the existence of that second function.

219 Nowhere does the 1899 Land Act (or the 1890 Crown Lands Act) expressly provide that any reservation from the grant of a pastoral lease confers an interest in the reserved subject matter on the Crown. At most, item (l) in Sch A provides that the exception or reservation is to be "in favor of the Crown". That language is more readily construed as a statement of the position as understood at the time. A reservation was "in favor of the Crown" because the "reservation" was a keeping back of the Crown's rights of full beneficial ownership in the land the subject of the pastoral lease (and minerals beneath the surface of that land), rather than a positive conferral of rights on the Crown. At that point in time, as has been explained, the Crown was under the misapprehension it had absolute beneficial ownership of all land in the Territory.⁴²⁷ Of course, that was an erroneous view of the law – at sovereignty, the Crown had radical title.⁴²⁸ Nonetheless, it is a matter of historical context which explains why the Act did not positively confer rights in land or minerals on the Crown. The fact that the reservation conferred rights of access also does not advance the Commonwealth's position. Conferring rights of access is consistent with the legislature proceeding on the basis the Crown had beneficial ownership of the reserved interests.

220 In sum, the Act properly construed, as well as the pre-*Mabo (No 2)* context, compel the rejection of the Commonwealth's contention. The function of item (l) in a pastoral lease was *not* for the Crown to assert property in the minerals, or to confer rights of ownership in the minerals on the Crown, because at that time the Crown understood or assumed, incorrectly, it had those rights.

221 The Commonwealth placed significant emphasis on a statement of Gageler J in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* ("*NSW Aboriginal Land Council*").⁴²⁹ That case concerned whether two parcels of Crown land in Berrima, New South Wales, which remained dedicated for "gaol purposes" were lawfully "occupied" for the purposes of the definition of "claimable Crown lands" in s 36(1) of the *Aboriginal Land Rights Act 1983* (NSW).⁴³⁰ The Land Council argued the occupation of the claimed land was unlawful without statutory authority.⁴³¹ The majority held that the land was

427 *Mabo (No 2)* (1992) 175 CLR 1 at 26, citing *Brown* (1847) 1 Legge 312 at 316.

428 *Mabo (No 2)* (1992) 175 CLR 1 at 48.

429 (2016) 260 CLR 232 at 277 [112].

430 *NSW Aboriginal Land Council* (2016) 260 CLR 232 at 287 [144].

431 *NSW Aboriginal Land Council* (2016) 260 CLR 232 at 272 [96].

lawfully occupied and was therefore not "claimable Crown lands".⁴³² Justice Gageler rejected the Land Council's argument on the basis that the *New South Wales Constitution Act 1855* (Imp)⁴³³ confirmed the existence of non-statutory executive power in the context of the system of responsible government provided for by the State's Constitution.⁴³⁴ In rejecting this argument, Gageler J set out the nature of the Crown's non-statutory executive power since 1788.⁴³⁵

222 His Honour discussed *Attorney-General v Brown*,⁴³⁶ which concerned an action for intrusion brought by the Attorney-General of New South Wales against a person who had engaged in mining coal the subject of an express reservation from a Crown lease granted in 1840 (prior to the enactment of legislation dealing with Crown grants of land).⁴³⁷ The Court's holding in *Brown* that the Crown was the absolute beneficial owner of all the land in New South Wales from the time of settlement was overruled in *Mabo (No 2)*.⁴³⁸ That was the context for the following paragraph from Gageler J's judgment on which the Commonwealth placed particular reliance:⁴³⁹

"Momentous as *Mabo [No 2]* was in the development of the common law of Australia, its significance for those aspects of *Attorney-General v Brown* that are of present relevance is minimal. Given that the land in question had been the subject of the grant of a Crown lease from which the coal in question had been expressly reserved, it is difficult to see how the result in *Attorney-General v Brown* could have been different even if the view which was to prevail in *Mabo [No 2]* had been applied. What would have been different would have been the steps in the analysis leading to that result: *instead of the grant and reservation being seen as the exercise by the Crown of a proprietary right which the Crown had as*

432 *NSW Aboriginal Land Council* (2016) 260 CLR 232 at 260-261 [53]-[56], 262 [61]-[62], 271-272 [94]-[95], 273 [100], 287 [142].

433 18 & 19 Vict c 54.

434 *NSW Aboriginal Land Council* (2016) 260 CLR 232 at 273 [100]. See also 259-261 [50]-[54].

435 *NSW Aboriginal Land Council* (2016) 260 CLR 232 at 273-277 [101]-[110].

436 (1847) 1 Legge 312.

437 *NSW Aboriginal Land Council* (2016) 260 CLR 232 at 276 [110].

438 *NSW Aboriginal Land Council* (2016) 260 CLR 232 at 277 [111].

439 *NSW Aboriginal Land Council* (2016) 260 CLR 232 at 277 [112] (emphasis added).

the original absolute owner of all land in New South Wales on and from settlement in 1788, the grant and reservation would have been seen as an exercise by the Crown of non-statutory executive power which had the consequence of creating rights of ownership in respect of the land in question, in the Crown and in the lessee, on and from the time of the exercise of that non-statutory executive power in 1840. Either way, the Crown as represented by the Attorney-General would still have had the possession necessary to found an action for intrusion."

In that passage, Gageler J did no more than identify, consistent with *Mabo (No 2)*,⁴⁴⁰ that a grant and reservation pursuant to the exercise of the Crown's non-statutory executive power would have had the consequence of creating rights of ownership in the Crown in respect of the land.

223 However, as we know, the 1903 Lease was granted by and in accordance with the 1899 Land Act, read with the 1890 Crown Lands Act. The same conclusion reached by Gageler J in *NSW Aboriginal Land Council* does not follow where, as here, the exercise of the Crown's powers to alienate land was governed by statute. This was also the position in *Mabo (No 2)*, where Brennan J said "[i]n Queensland, [the Crown's powers to alienate or appropriate to itself the waste lands of the Crown] are and at all material times have been exercisable by the Executive Government subject, in the case of the power of alienation, to the statutes of the State in force from time to time".⁴⁴¹ And, here, the 1890 Crown Lands Act and 1899 Land Act did not confer on the Crown an interest in the minerals.⁴⁴²

224 That conclusion is not new. In *Wik Peoples v Queensland* in the Federal Court,⁴⁴³ s 6(2) of the *Mining on Private Land Act 1909* (Qld) ("the 1909 Act") required all Crown grants and leases under any Act relating to Crown land issued after the commencement of the Act to contain a reservation of all gold and minerals on and below the surface of the land and also a reservation of the right of access for the purpose of searching for or working any mines of gold

440 (1992) 175 CLR 1 at 70.

441 *Mabo (No 2)* (1992) 175 CLR 1 at 70-71.

442 See [209]-[210] above.

443 (1996) 63 FCR 450 ("*Wik FC*").

and minerals.⁴⁴⁴ The need for those reservations was in the context that s 6(1) of the 1909 Act included the following specific provisions:⁴⁴⁵

"Subject to this Act —

- (i) Gold on or below the surface of all land in Queensland, whether alienated in fee-simple or not so alienated from the Crown, and if so alienated whensoever alienated, *is the property of the Crown*;
- (ii) Silver ... *is the property of the Crown*;
- (iii) Copper, tin, opal, and antimony on or below the surface of all land which is situated within the limits of a gold field or mineral field, and has been alienated in fee-simple from the Crown or lawfully contracted to be so alienated since the first day of March, one thousand eight hundred and ninety-nine, and also on or below the surface of all land wheresoever situated which is not alienated in fee-simple from the Crown at the commencement of this Act, *are the property of the Crown*;
- (iv) Coal ... *is the property of the Crown*;
- (v) All other minerals on or below the surface of all land which is not alienated in fee-simple from the Crown at the commencement of this Act *are the property of the Crown*."

225 The text of s 6(2) of the 1909 Act, read with the declaration in s 6(1)(v), provided that all minerals in Crown land not alienated by the date of the commencement of the 1909 Act *were the property of the Crown*. The 1909 Act also "made no attempt to expropriate to the Crown any of those four kinds of mineral that had passed into private ownership, for example, by grants in fee made prior to 1899".⁴⁴⁶

226 In the present appeal, there was no legislative provision like s 6 of the 1909 Act until, at the earliest, the enactment of s 107 of the 1939 Ordinance, which expressly provided "gold, silver and all other minerals ... shall be and be deemed to be the property of the Crown". A provision like s 6 of the 1909 Act was not included in the earlier legislative regimes dealing with public control of all minerals under Crown lands in the Northern Territory, such as the *Northern*

444 *Wik FC* (1996) 63 FCR 450 at 494.

445 *Wik FC* (1996) 63 FCR 450 at 493-494 (emphasis added).

446 *Wik FC* (1996) 63 FCR 450 at 496.

Territory Mining Act 1903 (SA). Again, that is likely explained by the fact that, at the time, the Crown erroneously held the view it had full beneficial ownership of any land, and minerals beneath the surface of that land. In those circumstances, a provision like s 6 of the 1909 Act would not have been considered necessary for the earlier legislative regimes to operate. The inclusion of s 107 in the 1939 Ordinance was likely for the avoidance of doubt. Nonetheless, in light of *Mabo (No 2)*, the absence of such a provision in earlier legislative regimes meant that property in all minerals had not been vested in the Crown prior to the enactment of the 1939 Ordinance.

227 Further, as we have seen, other than the four pastoral leases,⁴⁴⁷ before the Compensable Acts⁴⁴⁸ there were no identifiable acts or grants said to be inconsistent with the claimants' non-exclusive native title. It is therefore necessary to turn to the 1903 Lease, which the Commonwealth submitted was expressed in the most favourable terms for its argument that the pastoral leases had already extinguished the claimants' non-exclusive native title prior to the Compensable Acts.⁴⁴⁹

3 1903 Lease

228 The construction of the 1903 Lease must be considered in its statutory context.⁴⁵⁰ The 1903 Lease, granted on or about 21 September 1903, addressed the covenants, exceptions, reservations and provisions in Sch A to the 1899 Land Act. It is necessary to set out relevant aspects of the 1903 Lease, which was granted over approximately 19,250 square miles of the Northern Territory (then a portion of South Australia).

229 Against the side note "Exceptions and Reservations" in relation to "Aboriginal Inhabitants of the State and their descendants", the 1903 Lease stated:

"EXCEPTING out of this lease to Aboriginal Inhabitants of the State and their descendants during the continuance of this lease full and free right of ingress egress and regress into upon and over the said lands and every part thereof and in and to the springs and natural surface water thereon and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and

447 See [108] above.

448 See [107] above.

449 See [109] above.

450 See [204] above.

to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to do if this lease had not been made ..."

The effect of this exception was to limit the interest granted by the Crown under the 1903 Lease and to preserve an *existing* right of the Aboriginal people.⁴⁵¹

230 Next, against the side note "Reservation of metals, &c" and then "Right of access, &c, to Minister, &c", the 1903 Lease stated ("the Minerals Exception and Reservation"):

"**AND ALSO** *excepting and reserving out of this lease* under His Majesty His Heirs and Successors all trees and wood standing and being on the said lands and *all minerals* metals (including Royal metals) ores and substances containing metals gems precious stones coal and mineral oils guano claystone and sand *with full and free liberty of access* ingress egress and regress *to and for the said Minister and his agents lessees and workmen and all other persons authorised by him or other lawful authority* with horses carts engines and carriages or without in over through and upon the said land to fell cut down strip and remove all or any trees wood or underwood or bark and to work or convert such trees wood or underwood into charcoal and *to dig try search for and work the said minerals* metals (including Royal metals) ores and substances containing metals gems precious stones coal and mineral oils guano claystone and sand and *to take the same from the said lands* and to erect buildings and machinery and generally to do such other work as may be required ..." (emphasis added)

This is the exception and reservation in issue in this appeal.

231 Finally, against the side note "Not to obstruct mineral or timber lessee or licensee", the 1903 Lease stated:

"**AND ALSO** [the Lessee] will not obstruct or hinder the holder of any mineral timber or other lease or licence granted by or on behalf of the Crown nor any other person lawfully authorised in that behalf in the exercise of the rights or powers conferred by such lease or licence ..."

232 The Minerals Exception and Reservation implements the terms of the exception or reservation in item (1) of Sch A. Consistent with the analysis of the applicable provisions in the 1890 Crown Lands Act and the 1899 Land Act,⁴⁵²

⁴⁵¹ *Ward FC* (1998) 159 ALR 483 at 556. See also *Ward* (2002) 213 CLR 1 at 122-123 [169], 128 [185].

⁴⁵² See [205]-[210] above.

the Minerals Exception and Reservation does not affect and should not be construed as affecting the claimants' non-exclusive native title.

233 Two aspects of the Minerals Exception and Reservation should be addressed. First, it implements item (l) of Sch A to the 1899 Land Act by stating that the "Minister and his agents lessees and workmen" may access the land, and also "all other persons authorised by him or other lawful authority". The extension to "all other persons authorised by [the Minister] or other lawful authority" reflects and is consistent with: (a) the terms of s 25 of the 1899 Land Act⁴⁵³ and (b) the fact that the grant of the 1903 Lease did not in its terms deal with, and was not intended to deal with, the Crown's rights in respect of minerals as against the world. The Crown's rights in respect of minerals as against the world were dealt with by Acts such as the *Northern Territory Mineral Act 1888* (SA), which provided for the grant of licences to search for minerals.

234 Second, and no less importantly, the Minerals Exception and Reservation is an exception *and* reservation. In its terms, it was a mere keeping back, rather than a positive conferral of rights in the minerals on the Crown.⁴⁵⁴ The terms of the 1903 Lease, and in particular the Minerals Exception and Reservation, were not "inconsistent with the continued enjoyment"⁴⁵⁵ of the claimants' non-exclusive native title in the land covered by the 1903 Lease. The 1903 Lease did not confer ownership rights in the minerals on the Crown. The Crown could go onto the land covered by the 1903 Lease and search for and take minerals but that, on its own, was not inconsistent with the claimants also exercising their non-exclusive rights to go onto the same land and take and use the minerals on and below the surface of the land. In the absence of the exercise of a right inconsistent with the claimants' non-exclusive native title, the claimants' rights and interests were not extinguished by the 1903 Lease but survived and were legally enforceable until the 1939 Ordinance was enacted.⁴⁵⁶

235 As the Commonwealth's contended second function is not supported by the text of the statute or the 1903 Lease, it is not necessary to consider whether that second function was required: that is, whether the Crown must have had full beneficial ownership in the minerals to maintain an information of intrusion at common law. In any event, the radical title recognised by Brennan J in *Mabo (No 2)* was "merely a logical postulate required to support the doctrine of

453 See [210] above.

454 *Wade* (1969) 121 CLR 177 at 194; *Wik* (1996) 187 CLR 1 at 200-201.

455 *Mabo (No 2)* (1992) 175 CLR 1 at 68.

456 *Mabo (No 2)* (1992) 175 CLR 1 at 68.

tenure".⁴⁵⁷ Radical title has been described as a "legal theory".⁴⁵⁸ It is not "proprietary title".⁴⁵⁹ The Crown's radical title co-exists with the rights and interests of native title holders,⁴⁶⁰ and could not have been the basis for any proceeding brought against native title holders in the nature of an action for trespass.

Part V – Conclusion and orders

236 For those reasons, extinguishment of native title amounts to an acquisition of property for the purposes of s 51(xxxi) of the *Constitution*; all laws supported by s 122 of the *Constitution*, including any law of the Commonwealth Parliament which has no constitutional support other than under s 122, are subject to s 51(xxxi); and the 1903 Lease did not extinguish the claimants' non-exclusive native title to minerals in the lease area and, thereby, in the Claim Area. The answers to the separate questions given by the Full Court are correct. The other issues in the proceeding, not addressed by those separate questions and answers, will need to be heard and determined in the Federal Court.

237 The appeal is dismissed with costs.

457 *Mabo (No 2)* (1992) 175 CLR 1 at 50 (emphasis added).

458 *Yarmirr* (2001) 208 CLR 1 at 51 [48]. See also *Yorta Yorta* (2002) 214 CLR 422 at 441 [38]; *Congoo* (2015) 256 CLR 239 at 276 [71].

459 *Mabo (No 2)* (1992) 175 CLR 1 at 211, cf 163; see also 50, 68. See also *Wik* (1996) 187 CLR 1 at 165; Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (2014) at 147.

460 *Mabo (No 2)* (1992) 175 CLR 1 at 50.

ANNEXURE

The questions reserved for consideration be answered as follows:

- (1) On the facts set out in the applicant's statement of claim, does the whole of the applicant's claim fail because:
 - a. the grant of a lease to the Methodist Missionary Society of Australia Trust on 1 July 1938 pursuant to the *Aboriginals Ordinance 1918-1937* (NT) (**Mission Lease**) (identified in paragraph [171] of the statement of claim) validly extinguished any native title rights in the claim area that then subsisted; and
 - b. the grant was not invalid as a result of the legislation empowering the grant being required to, but failing to, comply with s 51(xxxi) of the Constitution because:
 - i. the just terms requirement contained in s 51(xxxi) of the Constitution does not apply to laws enacted pursuant to s 122 of the Constitution, including the *Northern Territory (Administration) Act 1910* (Cth) (and Ordinances made thereunder); and, in any event,
 - ii. the grant was not capable of amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution notwithstanding that any subsisting native title rights in the claim area (if established) were extinguished by the grant, because native title was inherently susceptible to extinguishment by a valid exercise of the Crown's sovereign power – derived from its radical title – to grant interests in land and to appropriate to itself unalienated land.

Answer: **No**

- (2) If the answer to question (1) is "no", on the facts set out in the applicant's statement of claim, does the applicant's claim insofar as it relates to the enactment of s 107 of the *Mining Ordinance 1939* (NT) (**1939 Ordinance**) on 13 May 1939 (identified in paragraphs [190]-[191] of the statement of claim), which *inter alia* vested property in all minerals on or below the surface of land in the claim area in the Crown, fail because:
 - a. the vesting did not have any effect on native title in the claim area as any native title right in relation to minerals in the claim area (if established) had already been extinguished by the reservation of those minerals to the Crown in pastoral lease PL1095 granted on 26 January 1886, or pastoral lease PL1875 granted on 15 August 1896, or pastoral lease PL1991 granted on 13 October 1899, or

pastoral lease PL2229 granted on 21 September 1903 (collectively, the **pastoral lease reservations**);

Answer: No

- b. further and in the alternative, the vesting did not have any effect on native title in the claim area because all subsisting native title rights in the claim area (if established) had already been extinguished by the grant of the Mission Lease; and

Answer: No

- c. in any event, for the reasons specified in paragraph 1(b) above.

Answer: No

- (3) If the answer to question (1) is "no", on the facts set out in the statement of claim, does the applicant's claim insofar as it relates to the enactment of the *Minerals (Acquisition) Ordinance 1953* (NT) on 22 April 1953 (identified in paragraph [213] of the statement of claim), fail:

- a. because the said enactment did not have any effect on native title in the claim area as:
 - i. any native title right in relation to minerals in the claim area (if established) was extinguished by the pastoral lease reservations;
 - ii. further and in the alternative, all subsisting native title rights in the claim area (if established) were extinguished by the grant of the Mission Lease;
 - iii. further and in the alternative, any subsisting native title right in relation to minerals in the claim area (if established) was extinguished by the 1939 Ordinance; and

Answer: No

- b. in any event, because the just terms requirement contained in s 51(xxxi) of the Constitution does not apply to laws enacted pursuant to s 122 of the Constitution, including the *Northern Territory (Administration) Act 1910* (Cth) (and Ordinances made thereunder).

Answer: No

93.

- (4) If the answer to question (1) is "no", on the facts set out in the statement of claim, does the applicant's claim insofar as it relates to the grants of special mineral leases identified in paragraphs [232], [255] and [293] of the statement of claim, fail because the grants were not invalid as asserted in that:
- a. none of the grants had any effect on native title in the claim area as all subsisting native title rights in the claim area (if established) were extinguished by the grant of the Mission Lease; and

Answer: No

- b. in any event:
- i. as per paragraph 1(b)(i) above, the Ordinances under which the special mineral leases were granted were not relevantly subject to the just terms requirement contained in s 51(xxxi) of the Constitution;
- ii. none of these grants were capable of amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution because native title (if established) was inherently susceptible to a valid exercise of the Crown's sovereign power – derived from its radical title – to grant interests in land.

Answer: No

EDELMAN J.

I. A fundamental question for constitutional precedent and three large issues	[238]-[250]
II. The first issue: is s 122 "disjoined from the rest of the Constitution"?	[251]-[277]
(i) <i>Section 51(xxxi) and s 122 of the Constitution</i>	[251]-[252]
(ii) <i>Two conceptions of s 122 of the Constitution</i>	[253]-[255]
(iii) <i>The problems with the first conception</i>	[256]-[262]
(iv) <i>Re-opening and overruling the reasoning in Teori Tau</i>	[263]-[268]
(v) <i>The Commonwealth's proposed media sententia</i>	[269]-[272]
(vi) <i>A related heresy</i>	[273]-[277]
III. The second issue: is native title inherently defeasible?	[278]-[321]
(i) <i>The reasoning of Gummow J in Newcrest</i>	[278]-[282]
(ii) <i>The first two propositions: the interaction of radical title and native title</i>	[283]-[302]
(a) The basis for the first two propositions	[283]
(b) The concepts of "radical title" and "native title"	[284]-[287]
(c) Recognition of native title norms	[288]-[297]
(d) Extinguishment of native title rights and interests	[298]-[302]
(iii) <i>The third proposition: two different meanings of "inherent defeasibility" confused</i>	[303]-[316]
(iv) <i>The fourth proposition: native title and the principle of non-derogation from grant</i>	[317]-[320]

(v) <i>The fifth proposition: no acquisition of property under s 51(xxxi) of the Constitution</i>	[321]
IV. The third issue: Did pre-1911 leases extinguish any native title rights or interests?	[322]-[371]
(i) <i>The legal status of trees on the land and minerals under the land</i>	[329]-[339]
(ii) <i>Exceptions, reservations, and profits à prendre</i>	[340]-[344]
(iii) <i>Informations of intrusion</i>	[345]-[356]
(iv) <i>The statutory regime in 1903</i>	[357]-[363]
(v) <i>Interpreting the exception and reservation clause in the 1903 Lease</i>	[364]-[371]
V. Conclusion	[372]

I. A fundamental question for constitutional precedent and three large issues

238 Which constitutional injury leaves the least long-term damage: (i) inconsistency with longstanding, and heavily relied upon, precedent and understanding; or (ii) a fundamental lack of justification for that precedent and understanding, which causes constitutional incoherence? Such a question is rarely presented as starkly as it is in this case. Usually decisions of this Court involving longstanding precedent and understanding will be underpinned by some coherent justification, even if part of that justification might have fallen away or become contestable. In those usual circumstances, the humility that requires respect for the collected wisdom of judicial predecessors aligns with the importance of a stable foundation for government. That alignment requires respect for the result and necessary reasoning of a decision or, at least, the adoption of a fresh and stronger justification that preserves the result. The stark question posed by this case is rare indeed.

239 The facts of this appeal and the background to the three issues raised are set out comprehensively in the reasons of Gordon J. The Gumatj Clan or Estate Group of the Yolngu People seek compensation for the alleged effects on their native title rights and interests of various Commonwealth legislative and executive acts between 1911 (when the Commonwealth of Australia accepted the surrender by South Australia, under s 111 of the *Constitution*, of the area of land comprising the

Northern Territory⁴⁶¹) and 1978 (when the Northern Territory obtained self-government powers⁴⁶²) in the Gove Peninsula in north-eastern Arnhem Land in the Northern Territory. The Full Court of the Federal Court of Australia unanimously answered a series of questions in favour of the Gumatj Clan. The answers to those questions do not resolve the Gumatj Clan's determination application or their compensation application. Other issues remain in dispute. But the questions reserved for consideration by the Full Court raised three fundamental issues of principle which arise on this appeal.

240 The **first issue** raised by this appeal concerns whether, and the extent to which, the unanimous reasoning of this Court in *Teori Tau v The Commonwealth* ("*Teori Tau*")⁴⁶³ should be re-opened and overruled. In that case, the issue for this Court was whether the territories power in s 122 of the *Constitution* empowered the Commonwealth Parliament to enact legislation providing for the Governor-General, the Deputy of the Governor-General and the House of Assembly for the Territory of Papua and New Guinea to make mining ordinances in the Territory of Papua and New Guinea. The plaintiff, in his personal capacity and on behalf of a group of Indigenous people of that Territory, claimed that the ordinances were invalid because they purported to vest in the Commonwealth or in the Administration of that Territory the title to minerals within land in the Territory. The plaintiff asserted that the land was owned by his kinship group in accordance with traditional custom, and had been acquired by the Commonwealth or the Administration of the Territory "without providing just terms". This Court unanimously decided in an ex tempore decision that s 122 of the *Constitution* is a power for the Commonwealth to legislate which is "general and unqualified", and unconstrained by the guarantee in s 51(xxxi) of the *Constitution* that an acquisition of property for any purpose in respect of which the Commonwealth Parliament has power to make laws be "on just terms".⁴⁶⁴ The reasoning of this Court was based upon the premise that s 122 of the *Constitution* was effectively unqualified by almost all of the remainder of the *Constitution*. The only qualification expressly recognised as limiting the power in s 122, which was described by the Court as "unlimited and unqualified in point of subject matter", was s 116 of the *Constitution*.⁴⁶⁵

⁴⁶¹ See *Northern Territory Surrender Act 1907* (SA); *Northern Territory Acceptance Act 1910* (Cth).

⁴⁶² See *Northern Territory (Self-Government) Act 1978* (Cth), ss 5, 6.

⁴⁶³ (1969) 119 CLR 564.

⁴⁶⁴ *Teori Tau* (1969) 119 CLR 564 at 570.

⁴⁶⁵ *Teori Tau* (1969) 119 CLR 564 at 570.

241 The decision in *Teori Tau* was reached ex tempore and without calling for oral argument from any of the defendants.⁴⁶⁶ The decision was easily reached because it reflected a widespread understanding that had been held by the courts and by Parliament for seven decades since Federation. The result in *Teori Tau* was affirmed by six members of this Court in 1984⁴⁶⁷ and was relied upon without question by this entire Court in 1986.⁴⁶⁸ Numerous other judges in this Court have reaffirmed *Teori Tau*, implicitly or explicitly.⁴⁶⁹ The decision was described by one member of this Court as "manifestly correct".⁴⁷⁰ The weight of this authority provided powerful reasons for reliance upon its correctness by the Commonwealth Parliament. On this appeal, the Commonwealth submitted that if *Teori Tau* is overruled, or if s 51(xxxi) is not otherwise confined in its operation, "then for almost seven decades a vast but indeterminate number of grants of interests in land in the [Northern] Territory would have been invalid". The consequence of overturning *Teori Tau* in the Northern Territory alone is that, since 1911, "any grant or transfer of property that involved a compulsory acquisition is exposed to uncertainty if not invalidity" with "consequences of unforeseen and unforeseeable difficulty".⁴⁷¹

242 Each of the consequential (third and fourth) factors in *John v Federal Commissioner of Taxation*⁴⁷² militates powerfully against overruling the decision. The consequences of overruling *Teori Tau* weigh almost as heavily as any consequences could weigh upon whether a decision should be re-opened and its reasoning and result overruled. The reasoning and result in *Teori Tau* should only be overruled if there is absolutely no doubt that such a step is required by the more important dimension of justification. That conclusion must be reached because the

466 *Teori Tau* (1969) 119 CLR 564 at 568.

467 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201.

468 *Northern Land Council v The Commonwealth* (1986) 161 CLR 1 at 6.

469 *New South Wales v The Commonwealth* ("the Seas and Submerged Lands Act Case") (1975) 135 CLR 337 at 390; *Coe v The Commonwealth* (1979) 53 ALJR 403 at 409, 412; 24 ALR 118 at 130, 138; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 458; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 246; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 269; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 169, 177, 193; *Gambotto v Resolute Samantha Ltd* (1995) 69 ALJR 752 at 754; 131 ALR 263 at 266-267.

470 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 552.

471 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 545.

472 (1989) 166 CLR 417 at 438-439.

reasoning in *Teori Tau*, which requires s 122 of the *Constitution* to be treated as effectively disjoined from the rest of the *Constitution*, is contrary to a century of judicial development by which s 122 has been interpreted so that its operation is integrated with the other provisions of the *Constitution*. In my view, the reasoning in *Teori Tau* is now so clearly wrong and so inconsistent with the mosaic of constitutional principle that it has no possible justification. The decision is so lacking in justification that the extremely powerful consequential considerations are overwhelmed.

243 The consequential considerations that weigh against overruling the result in *Teori Tau* cannot be mitigated by an alternative path of reasoning adopted by four members of this Court in a case in which three of those four would have overturned the result in *Teori Tau*.⁴⁷³ That alternative reasoning—which treats s 122 as constrained by the guarantee of acquisition on just terms in s 51(xxxi) where there is a concurrent source of power in s 51 but not otherwise—is ultimately based upon the same flaw: s 122 is disjoined from the rest of the *Constitution* other than where it would overlap with a head of power in s 51. Indeed, it is uncertain whether that alternative reasoning would have supported the result in *Teori Tau* in any event, since it is unclear whether the laws concerning a territory of the body politic of Australia (the Territory of Papua and New Guinea) challenged in that case fell within the subject matter of any head of power in s 51, other than being laws concerning an acquisition of property. For instance, the laws were not, without more, laws with respect to external affairs that fell within s 51(xxix).

244 The **second issue** raised by this appeal effectively seeks to avoid many of the extreme consequences of overruling the reasoning in *Teori Tau* by way of reasoning which preserves only the result in that case (at least so far as it relates to native title rights and interests).⁴⁷⁴ Specifically, this issue arises from the acceptance by Gummow J, in a separate judgment in 1997 that commanded majority support,⁴⁷⁵ of the same submission as that which is now made by the Commonwealth in this case. In the course of reasoning that *Teori Tau* should be overruled, Gummow J held that the susceptibility of native title rights and interests to defeasance meant that the extinguishment of native title was not an acquisition of property within s 51(xxxi) of the *Constitution*. The essential premise of this reasoning is that native title is recognised at common law subject to a condition subsequent that it is not the subject of an exercise of "radical title" to inconsistent

473 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 565, 613-614, 661; cf 560-561.

474 See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 71 [55]. See also at 74 [65], 86-87 [100], 101-106 [153]-[167].

475 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 613. See also at 560, 561, 661.

effect. This issue focuses only upon native title rights and interests at common law. It is not concerned with the operation of native title under the *Native Title Act 1993* (Cth).

245 The essential premise of this reasoning, which was developed at length by the Commonwealth, is ingenious and insightful but ultimately inapplicable to native title. The reasoning of Gummow J, developed by the Commonwealth, ingeniously and insightfully identifies some conditional rights or interests as falling outside s 51(xxxi) because they are not "acquired" within the meaning of s 51(xxxi). Such rights or interests are those that are created subject to a condition subsequent that they can be extinguished by the Commonwealth upon the occurrence of an event. An obvious example of such rights is statutory entitlements payable by the Commonwealth which are created on the express or implied condition that they can be revoked at will, usually by the Commonwealth Parliament. The same is true of common law rights to land or chattels that are subject to conditions subsequent. If a creditor took a mortgage over Commonwealth land, or a chattel mortgage over Commonwealth goods, in order to secure a debt, there would be no acquisition of property when the creditor's title was extinguished following repayment of the debt by the Commonwealth.

246 By contrast with rights and interests that are created subject to a condition subsequent, native title rights and interests, as recognised by the common law, are not subject to a condition subsequent that they are defeasible at will by the Commonwealth Parliament or by an exercise of statutory power to grant an estate in land inconsistent with the native title right or interest. Indeed, the Commonwealth conceded that its submission that native title rights and interests were subject to a condition subsequent applied only to native title rights and interests over land; it was accepted in oral argument that the reasoning could not apply to native title rights and interests over chattels and over some waters. Once the concept of radical title is properly understood, the reasoning also cannot apply to native title rights and interests over land.

247 The **third issue** on this appeal arises as a consequence of the conclusion that the power in s 122 of the *Constitution* is constrained by the guarantee of just terms in s 51(xxxi) and that this guarantee applies to legislation supported by s 122 which extinguishes native title rights and interests. The third issue focused upon a single "pastoral lease" granted in 1903 ("the 1903 Lease"), which was the most favourable lease to the interests of the Commonwealth on this appeal. The issue was whether a clause concerning "[e]xceptions and [r]eservations" in the 1903 Lease ("the exception and reservation clause") created exclusive rights for the Crown (the body politic of South Australia) to the subsurface minerals, thus extinguishing native title rights to and interests in those minerals before the surrender of the Northern Territory to, and its acceptance by, the Commonwealth in 1911.

248 The submissions of the Commonwealth concerning the third issue were based upon the opposite premise from the second issue. The submissions concerning the third issue were based upon the premise that any rights to the minerals located in the land had somehow been legally severed from the land and therefore had a separate existence at law from the land itself. That premise reflects a common view of mineral rights consistent with the approach taken in modern legislation. But, as an expression of the common law, it involves a basic and fundamental legal error, to which this Court referred in *North Shore Gas Co Ltd v Commissioner of Stamp Duties (NSW)*,⁴⁷⁶ of treating things that are part of the substrata of land as though they are not land. The premise is an inaccurate picture of the common law and the statutory regime existing in South Australia in 1903. Indeed, if it were true that the minerals had been severed from the land, the Commonwealth's submissions in relation to the second issue, as they applied to minerals, would have been based on a false premise; namely that the native title rights and interests with which this case is concerned exist only in relation to land.

249 Properly understood in its historical context, the exception and reservation clause in the 1903 Lease did no more than ensure that any rights of the Crown (the body politic of South Australia at that time) concerning the subsurface of the land were preserved from any interference by the exercise of the surface rights granted in the 1903 Lease. At the time the 1903 Lease was granted, it would have been assumed to a high degree of certainty by all parties that the rights being preserved amounted to full beneficial ownership of all substrata of the land. That assumption accorded with the unanimous decision of the Supreme Court of New South Wales in *Attorney-General v Brown*.⁴⁷⁷ If the assumption were correct, native title rights and interests would have been extinguished. But the assumption was falsified by the decision of this Court in *Mabo v Queensland [No 2]* ("*Mabo [No 2]*").⁴⁷⁸ The effect of that decision is that the Crown had radical title (a sovereign power to create rights to the surface, supersurface, and subsurface of land) but, until the exercise of that sovereign power over unallocated Crown land, the Crown did not have any title (in other words, did not have a possessory right) to the land.

250 For the reasons below, the appeal must be dismissed.

⁴⁷⁶ (1940) 63 CLR 52 especially at 70, 72.

⁴⁷⁷ (1847) 1 Legge 312 at 316-317.

⁴⁷⁸ (1992) 175 CLR 1.

II. The first issue: is s 122 "disjoined from the rest of the *Constitution*"?

(i) *Section 51(xxxi) and s 122 of the Constitution*

251 Section 51(xxxi) of the *Constitution* provides that the Commonwealth Parliament shall, "subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

252 Section 122 of the *Constitution* sets out a purpose for which the Commonwealth Parliament has power to make laws. Section 122 does not expressly provide that it is "subject to this Constitution" but that is plainly implied. Section 122 provides:

"The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

(ii) *Two conceptions of s 122 of the Constitution*

253 There are two conceptions of s 122 of the *Constitution*. The first treats s 122 as a plenary power that is intended to ensure that the power of the Commonwealth Parliament in relation to the territories (both internal and external) is broadly of the same plenary nature as the power of the State Parliaments in relation to the States: s 122 therefore ensures that the plenary power of the Commonwealth Parliament stands in relation to the territories "in the place of [the power that is held by State Parliaments in relation to] the States".⁴⁷⁹ This conception was said to be supported by the presence of s 122 in Ch VI of the *Constitution* ("New States") rather than Ch I ("The Parliament", including Pt V of that Chapter, "Powers of the Parliament").⁴⁸⁰

254 For seven decades that was the prevailing understanding of s 122. Barwick CJ described the s 122 power as "a complete power to make laws for the peace, order and good government of the territory" and "as large and universal a

⁴⁷⁹ *R v Bernasconi* (1915) 19 CLR 629 at 635.

⁴⁸⁰ *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 536.

power of legislation as can be granted".⁴⁸¹ And, in *Teori Tau*,⁴⁸² in reasons given by Barwick CJ, this Court unanimously reiterated that the power is "plenary in quality and unlimited and unqualified in point of subject matter". On this conception, the power of the Commonwealth Parliament to make laws under s 122, like analogous powers of State Parliaments,⁴⁸³ is not constrained by a requirement of just terms.

255 The second conception of s 122 most clearly emerged from the reasons for decision of Gummow J in *Newcrest Mining (WA) Ltd v The Commonwealth* ("Newcrest").⁴⁸⁴ Section 122 empowers the Commonwealth Parliament to make laws for the government of any territory subject to express and implied restrictions in the *Constitution*, even if those restrictions would not apply to an analogous plenary power of a State. Although the power of the Commonwealth Parliament under s 122 to make laws for the government of a territory should be given "a full operation according to its terms",⁴⁸⁵ including enabling a self-governing legislature to legislate for the acquisition of property, the ability to confer that power cannot contradict the condition upon the separate and general source of power for the Commonwealth Parliament to acquire property, in s 51(xxxi), which is a condition of just terms.

(iii) *The problems with the first conception*

256 The first conception rested upon the view, expressed in *Porter v The King; Ex parte Yee*,⁴⁸⁶ that there is a constitutional distinction between, on the one hand, the "Commonwealth proper", consisting of the law area comprised in the States, and, on the other hand, the territories. Hence, in *Teori Tau*,⁴⁸⁷ this Court contrasted s 51 of the *Constitution* as concerned with "the distribution of legislative power between the Commonwealth and the constituent States" and s 122 as "concerned

481 *Spratt v Hermes* (1965) 114 CLR 226 at 242.

482 (1969) 119 CLR 564 at 570.

483 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [13]-[14].

484 (1997) 190 CLR 513 at 604-607.

485 See *Re F; Ex parte F* (1986) 161 CLR 376 at 387, quoting *Russell v Russell* (1976) 134 CLR 495 at 539.

486 (1926) 37 CLR 432 at 441-443, 448. See also *R v Bernasconi* (1915) 19 CLR 629 at 635, 637; *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320; *Spratt v Hermes* (1965) 114 CLR 226 at 241-242, 250-251; *Newcrest* (1997) 190 CLR 513 at 537-538.

487 (1969) 119 CLR 564 at 570.

with the legislative power for the government of Commonwealth territories". That attempted distinction treated the territories of Australia as though they were "a *quasi* foreign country remote from and unconnected with Australia except for owing obedience to the sovereignty of the same Parliament".⁴⁸⁸

257 As Dixon CJ identified in *Lamshed v Lake*,⁴⁸⁹ in rejecting the distinction upon which the first conception rested, s 122 confers power concerning a territory of Australia "as part of [Commonwealth] legislative power operating throughout its jurisdiction". Section 122 is not "disjoined from the rest of the Constitution".⁴⁹⁰ Indeed, during the convention debates, Mr Deakin observed that it was a matter for the drafting committee whether s 122 was included in the chapter concerning "New States" (Ch VI) or the chapter concerning the powers of the Parliament (Ch I).⁴⁹¹ Once the obvious truth was recognised that the territories are part of the Commonwealth, and s 122 was integrated into the *Constitution*, the first conception should have immediately been seen as untenable. The first conception is "fundamentally opposed" to the truth recognised in *Lamshed v Lake* that "there is but one Commonwealth and that s 122 [is] meaningless unless read with other provisions of the Constitution".⁴⁹² But instead of pulling the first conception out by the roots, the foundations of the first conception have been gradually eroded.

258 The source of the first erosion of the first conception existed in a decision before *Teori Tau*. The effect of the first conception was that if s 122 really conferred upon the Commonwealth Parliament the plenary power of a State in relation to the territories then s 109 could not apply to a law supported by s 122 because "[t]he most that s 122 does is to give the Parliament of the Commonwealth the powers of a sovereign State, which do not include the power to invade the legislative domain of another sovereign State".⁴⁹³ Even before *Teori Tau*, that

488 *Lamshed v Lake* (1958) 99 CLR 132 at 144.

489 (1958) 99 CLR 132 at 144.

490 *Lamshed v Lake* (1958) 99 CLR 132 at 145.

491 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 28 January 1898 at 257. See *Newcrest* (1997) 190 CLR 513 at 603.

492 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 595 [174], quoting Cowen and Zines, *Federal Jurisdiction in Australia*, 2nd ed (1978) at 172. See also Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 251.

493 *Lamshed v Lake* (1958) 99 CLR 132 at 135.

argument was rejected by this Court in *Lamshed v Lake*.⁴⁹⁴ After *Teori Tau*, the same view was maintained.⁴⁹⁵

259 The second erosion of the first conception also had its source in a decision before *Teori Tau*. In *P J Magennis Pty Ltd v The Commonwealth*,⁴⁹⁶ a majority of this Court held that the power of the Commonwealth Parliament to grant financial assistance to any State on terms and conditions was constrained by the requirement in s 51(xxxi) such that any term or condition concerning acquisition of property must involve just terms. That conclusion was upheld by this Court in *ICM Agriculture Pty Ltd v The Commonwealth*⁴⁹⁷ and is now settled.⁴⁹⁸ In *ICM Agriculture Pty Ltd v The Commonwealth*, Hayne, Kiefel and Bell JJ rejected for s 96 the "echo[]" of the like argument that s 122 is not constrained by the requirement of just terms in s 51(xxxi).⁴⁹⁹

260 The third erosion of the first conception was that which was recognised in *Teori Tau*⁵⁰⁰ itself when the Court acknowledged that the power in s 122 was subject to constitutional restrictions such as those contained in s 116, which precludes the Commonwealth Parliament from making "any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion" and prohibits any religious test being required "as a qualification for any office or public trust under the Commonwealth".

261 The fourth erosion of the first conception concerned the longstanding view expressed prior to *Teori Tau* that Ch III of the *Constitution* did not constrain the

494 (1958) 99 CLR 132 at 148, 152, 154. See also *Spratt v Hermes* (1965) 114 CLR 226 at 247.

495 *Attorney-General (WA) Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492 at 526. See also *Newcrest* (1997) 190 CLR 513 at 599.

496 (1949) 80 CLR 382 at 403, 406, 423, 430-431.

497 (2009) 240 CLR 140 at 169 [40].

498 *Hornsby Shire Council v The Commonwealth* (2023) 276 CLR 645 at 662-663 [13].

499 *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 197-198 [135]-[136].

500 (1969) 119 CLR 564 at 570.

application of Commonwealth legislative power under s 122.⁵⁰¹ That view, relying upon the first conception, required "the Commonwealth" in Ch III to be interpreted as excluding the territories that are part of the Commonwealth.⁵⁰² In *Sankey v Whitlam*,⁵⁰³ Mason J referred to the view of Windeyer J⁵⁰⁴ that "[t]he phrase 'laws made by the Parliament' seems to be less extensive in denotation than 'laws of the Commonwealth'". As Mason J explained, Windeyer J was politely saying that the view that Ch III of the *Constitution* does not apply to the territories "is unacceptable". The strained interpretation of "laws made by the Parliament" was later rejected by a stream of authority that recognised that, at least in relation to territory courts "created pursuant to s 122",⁵⁰⁵ the restrictions derived from Ch III of the *Constitution* apply to the exercise of federal jurisdiction.⁵⁰⁶ There might still remain issues for the application of Ch III to territory courts,⁵⁰⁷ but the first conception has been rejected in its support for the absence of a relation between s 122 and Ch III.

262 The fifth erosion of the first conception concerned the reasoning in *Teori Tau* that s 122 was "the", in the sense of "the only", "source of power to make laws for the government of the territories of the Commonwealth".⁵⁰⁸ Under the first conception, therefore, there could be no tension between, on the one hand, laws

501 *R v Bernasconi* (1915) 19 CLR 629 at 635; *Mitchell v Barker* (1918) 24 CLR 365 at 367; *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 585; *Waters v The Commonwealth* (1951) 82 CLR 188 at 191; *Lamshed v Lake* (1958) 99 CLR 132 at 142; *Spratt v Hermes* (1965) 114 CLR 226 at 243, 251-252.

502 *Spratt v Hermes* (1965) 114 CLR 226 at 243, 252-253.

503 (1978) 142 CLR 1 at 91.

504 *Spratt v Hermes* (1965) 114 CLR 226 at 276.

505 *cf Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 332-333 [9] with 341 [39].

506 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362-363 [80]-[81]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 162-163 [27]. See also *South Australia v Totani* (2010) 242 CLR 1 at 49 [72]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 425 [42]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 595 [41].

507 *Vunilagi v The Queen* (2023) 97 ALJR 627 at 663-664 [172]-[173]; 411 ALR 224 at 265-266.

508 *Teori Tau* (1969) 119 CLR 564 at 570.

for the government of a territory which permitted acquisition of property without just terms and, on the other hand, laws for the acquisition of property under s 51(xxxi) for some other purpose within s 51 and on just terms.⁵⁰⁹ But that lack of tension was achieved at the expense of the longstanding recognition that a law might have dual characters, being "properly described as with respect to more than one subject";⁵¹⁰ a law might be a law both for the government of any territory *and* for a subject matter or purpose falling within s 51.⁵¹¹ That source of constitutional incoherence led to the view, addressed below, that the reasoning in *Teori Tau*, and the first conception, could not apply at least where a law had such a dual character.⁵¹² To the extent of that erosion, the reasoning in *Teori Tau*, although not the result, was overruled.

(iv) *Re-opening and overruling the reasoning in Teori Tau*

263 The first conception, and the reasoning in *Teori Tau*, was entirely rejected by three of the seven judges of this Court in *Newcrest*⁵¹³ and by four of the seven judges of this Court in *Wurridjal v The Commonwealth* ("*Wurridjal*").⁵¹⁴ But that entire rejection of *Teori Tau* in *Wurridjal* was not part of any ratio decidendi of that case. A ratio decidendi, the reason for deciding, is a set of reasons that is sufficient to support the relevant order or orders made. The ratio decidendi which is taken by lower courts to be binding is the chosen expression by those courts of the reasons for a decision, usually chosen from a number of possible rationes decidendi, which is expressed at an appropriate level of generality.⁵¹⁵

264 There is some logical force in the reasoning of the Full Court in this case that when a court allows a demurrer on a number of grounds the grounds for allowing the demurrer are akin to answers given in a special case. With that analogy, the Full Court reasoned, the identification of a ratio decidendi should focus upon the separate grounds upon which the demurrer is sought rather than the

509 See *Newcrest* (1997) 190 CLR 513 at 533.

510 *Victoria v The Commonwealth* ("the Payroll Tax Case") (1971) 122 CLR 353 at 400. See also *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 151-152.

511 *Newcrest* (1997) 190 CLR 513 at 614.

512 *Newcrest* (1997) 190 CLR 513 at 568-569.

513 (1997) 190 CLR 513 at 565, 614, 661.

514 (2009) 237 CLR 309 at 359 [86], 388 [189], 419 [287].

515 *Vunilagi v The Queen* (2023) 97 ALJR 627 at 659-660 [155]; 411 ALR 224 at 260.

order itself.⁵¹⁶ But the logic of the Full Court's reasoning ignores the fact that the binding force of a court's decision ultimately derives from the orders of the court, not from its reasons. Reasons for decision have incidental binding force in other disputes to the extent that they support the binding orders, not the other way around. Hence, it is the order allowing the demurrer, not the grounds or reasons for allowing it, that is the ultimate source from which a ratio decidendi must be derived. Thus, the orthodox rule is that a ratio decidendi can only be derived from the reasons for decision of those judges who participate in the order of the court.⁵¹⁷

265 The majority of the Court in *Wurridjal*, whose single order disposing of the demurrer was to allow the demurrer, consisted of six members of this Court, with Kirby J dissenting. Only three of the judges whose reasoning rejected *Teori Tau* and the first conception of s 122—French CJ and Gummow and Hayne JJ—joined in that order.⁵¹⁸ The fourth, Kirby J, would have "overruled" the demurrer.⁵¹⁹ Since the first conception as set out in *Teori Tau* was not overruled by *Wurridjal*, the Gumatj Clan must persuade this Court to re-open and overrule that reasoning as well as the result in *Teori Tau*.

266 As explained in the introduction to these reasons, there can be no doubt that enormous instability will follow from overruling *Teori Tau*. But those consequences do not include, as the Commonwealth claimed, the invalidity of a power for the legislature of a self-governing territory to legislate for the acquisition of property on just terms.⁵²⁰ The argument that a self-governing territory would be deprived of that power if *Teori Tau* were overruled was advanced by Brennan CJ in *Newcrest*, who posed the rhetorical question: "[i]f the power to enact a law for the compulsory acquisition of property were held to be abstracted from s 122, how could the [Commonwealth] Parliament confer that power on the territorial legislature?"⁵²¹

267 It can be accepted that, as Brennan CJ assumed, the power in s 51 for the *Commonwealth* Parliament to make laws with respect to various subject matters is (unlike s 122) not a power to enable a *territory* Parliament to make laws with

516 *Yunupingu v The Commonwealth* (2023) 298 FCR 160 at 221-223 [257]-[265].

517 *Vanderstock v Victoria* (2023) 98 ALJR 208 at 316 [430]; 414 ALR 161 at 286.

518 *Wurridjal* (2009) 237 CLR 309 at 359 [86], 367 [116], 388 [189], 391 [203].

519 *Wurridjal* (2009) 237 CLR 309 at 419 [287], 426 [312].

520 See, eg, *Australian Capital Territory (Self-Government) Act 1988* (Cth), ss 22(1), 23(1)(a); *Northern Territory (Self-Government) Act 1978* (Cth), ss 6, 50.

521 *Newcrest* (1997) 190 CLR 513 at 542.

respect to various subject matters.⁵²² For example, powers contained in s 51(iv), s 51(vi), or s 51(xxix) are not powers for the Commonwealth Parliament to make laws enabling a *territory* Parliament to make laws with respect to borrowing money on the public credit of the Commonwealth, the defence of the Commonwealth, or external affairs. And the power in s 51(xxxi) is not a power for the Commonwealth Parliament to make laws enabling a *territory* Parliament to make laws with respect to the acquisition of property on just terms. But this acceptance does not require the conclusion suggested by Brennan CJ, namely that it would follow from s 51(xxxi) qualifying s 122 that the Commonwealth Parliament lacks power to enable a territory Parliament to legislate with respect to the acquisition of property on just terms.

268 The question posed by Brennan CJ in *Newcrest* was answered in the same case by Gummow J,⁵²³ and subsequently by Gummow and Hayne JJ.⁵²⁴ Their answer was, in effect, that the power existed because the "abstraction"⁵²⁵ from the power of the Commonwealth Parliament in s 122 to make laws for the government of any territory is only to the extent that an acquisition of property is *not* on "just terms" consistently with s 51(xxxi). Although "the presence in s 51 of par (xxxi)" requires that the other powers in s 51 "be read as depending for the acquisition of property" upon s 51(xxxi),⁵²⁶ a power to enable the Parliament of a territory to legislate to acquire property does not lose its character as a law for the government of a territory and s 51(xxxi) does not withhold or "abstract" that power from s 122. That is, in addition to abstracting the power to legislate with respect to the acquisition of property from the other s 51 powers, s 51(xxxi) operates as a guarantee of just terms for all laws made under the *Constitution*, and s 122 is

522 See *In re The Initiative and Referendum Act* [1919] AC 935 at 945; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 119-121; *Cobb & Co Ltd v Kropp* [1967] 1 AC 141 at 156-157; *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 373-374, 381, 383, 385.

523 *Newcrest* (1997) 190 CLR 513 at 594.

524 *Wurridjal* (2009) 237 CLR 309 at 387 [186]-[187].

525 To use the difficult metaphor apparently coined in this context by Aickin J: *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445.

526 *Attorney-General of the Commonwealth v Schmidt; Re Döhnert Müller Schmidt and Co* (1961) 105 CLR 361 at 371. See also *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349-350; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445-448.

"limited" in that respect.⁵²⁷ Indeed, as Quick and Garran observed in 1901,⁵²⁸ prior to Australian Federation the Supreme Court of the United States had reached a similar conclusion in relation to the Fifth Amendment to the Constitution of the United States.⁵²⁹

(v) *The Commonwealth's proposed media sententia*

269 In carefully formulated submissions, the Commonwealth sought to defend the result, but not the reasoning, in *Teori Tau* by a middle way. The Commonwealth submitted that s 122 was restricted by s 51(xxxi) but only in relation "to laws made by the Commonwealth *qua* the Commonwealth, not the Commonwealth *qua* a territory". As the Commonwealth submitted, this middle way was part of the ratio decidendi in *Newcrest* because it was relied upon by Gaudron J (with whom Toohey J,⁵³⁰ Gummow J,⁵³¹ and Kirby J⁵³² agreed on this point). Her Honour said that even if s 51(xxxi) did not constrain a law enacted solely under s 122 of the *Constitution*, it would still constrain a law that was supported by s 122 in addition to a head of power in s 51.⁵³³

270 The perceived benefit of this middle way appears to be that: (i) it ameliorates the extreme consequences of overturning *Teori Tau* by preserving some Commonwealth legislative power in relation to the territories that is not constrained by s 51(xxxi) of the *Constitution*; and (ii) it reduces the extent of the incoherence between the interpretation of s 122 adopted in *Teori Tau* and the remainder of the *Constitution*. Perhaps for these reasons, the middle way was

527 *Wurridjal* (2009) 237 CLR 309 at 387 [186]. See also *Constitution*, s 96, discussed above at [259].

528 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 641.

529 *Cherokee Nation v Southern Kansas Railway Co* (1890) 135 US 641 at 658-659. See *Newcrest* (1997) 190 CLR 513 at 594.

530 *Newcrest* (1997) 190 CLR 513 at 560-561.

531 *Newcrest* (1997) 190 CLR 513 at 614.

532 *Newcrest* (1997) 190 CLR 513 at 661-662.

533 *Newcrest* (1997) 190 CLR 513 at 568.

favoured by Kiefel J in *Wurridjal*,⁵³⁴ with her Honour declining to decide the issue raised by the parties, namely whether *Teori Tau* should be overruled.⁵³⁵

271 It might be doubted whether these perceived benefits are substantial. For instance, in this appeal the possibility of this middle way prompted an application by the Northern Land Council and the Arnhem Land Aboriginal Land Trust ("the NLC parties") to file a notice of contention asserting that various of the past acts claimed in this proceeding to be attributable to the Commonwealth were enacted as, or supported by, delegated legislation which had a source of power derived from s 51(xxvi) of the *Constitution*.

272 More fundamentally, although the middle way might reduce the incoherence in the interpretation of the *Constitution* caused by the first conception, the middle way is itself incoherent. Either s 51(xxxi) constrains the exercise of power in s 122 or it does not. If it constrains the exercise of power in s 122, then any law for the government of any territory which acquired, or empowered a law to acquire, property could only do so on just terms. If it does not constrain the exercise of power in s 122, then any law for the government of any territory which acquired, or empowered a law to acquire, property would not require just terms. In either case, the presence of all other heads of power in s 51 apart from s 51(xxxi) is irrelevant. None of the heads of power in s 51 other than s 51(xxxi) can authorise the acquisition of property.⁵³⁶

(vi) *A related heresy*

273 This rejection of the Commonwealth's middle way submission can, and should, be reached without adopting a further argument against it that was made in written and oral submissions by the NLC parties. The argument of the NLC parties was that the middle way would require internal and external territories to be treated differently under s 122. The premise of that argument was that any law with respect to an external territory was a law in relation to external affairs under s 51(xxix) which, under the middle way submission of the Commonwealth, would require any acquisition of property to be governed by s 51(xxxi) and would be subject to the just terms requirement.

274 If the premise of the NLC parties' argument were correct then that argument would be a very powerful reason to reject the middle way: neither the text nor the context of s 122 provides any basis for distinguishing between internal and

⁵³⁴ (2009) 237 CLR 309 at 468-469 [456]-[460].

⁵³⁵ *Wurridjal* (2009) 237 CLR 309 at 314-315.

⁵³⁶ *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445-448.

external territories.⁵³⁷ Indeed, if the premise were correct then the result in *Teori Tau* would not need to be overruled in this case because it would already have been overruled by *Newcrest*, since the administered Territory of Papua and New Guinea (that is, the relevant territory in *Teori Tau*) was external to the Australian mainland.

275 The premise of this argument of the NLC parties was also a premise of *Teori Tau*.⁵³⁸ But the premise is not correct. The premise was that any law of the Commonwealth Parliament concerning an external territory is a law with respect to external affairs within s 51(xxix) of the *Constitution*.⁵³⁹ That is a radical proposition. It is one thing to say that an external affair includes matters external to the territory of Australia.⁵⁴⁰ But it is another thing to treat external territories as not forming part of the territory that comprises the body politic of the Commonwealth of Australia. The body politic of the Commonwealth of Australia includes all external territories over which that body politic extends. Matters concerning territories external to the Australian mainland are not therefore "external affairs" by reason of their geographic location only. Their geographic location does not make them external to the territory of the body politic of the Commonwealth of Australia.

276 It is telling that the most significant support⁵⁴¹ for this submission by the NLC parties was the separate judgment of Barwick CJ, the author of *Teori Tau*, in *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Act Case*"),⁵⁴² a judgment which his Honour gave less than four months before his Honour acknowledged that the external territory of Norfolk Island "is part of the

537 *Spratt v Hermes* (1965) 114 CLR 226 at 240-241; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 331 [7]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 631 [167].

538 (1969) 119 CLR 564 at 570-571.

539 Referring to *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 528, 600, 602, 634, 696, 714.

540 *Horta v The Commonwealth* (1994) 181 CLR 183 at 193-194; *XYZ v The Commonwealth* (2006) 227 CLR 532 at 539 [10], 546 [30], 548 [38].

541 See the observations of Deane J in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 600.

542 (1975) 135 CLR 337.

Commonwealth".⁵⁴³ In the *Seas and Submerged Lands Act Case*,⁵⁴⁴ Barwick CJ severed the body politic of the Commonwealth for the purposes of s 51(xxix), saying that "the continent of Australia and the island of Tasmania are, in my opinion, bounded by the low-water mark on the coasts". His Honour's reasoning deployed the same notions of a geographically divided Commonwealth body politic as his reasons in *Teori Tau*.

277 In oral submissions, the Commonwealth powerfully argued against this Court unnecessarily deciding this submission by the NLC parties, by correctly identifying a picture of a unified body politic of the Commonwealth of Australia. That powerful and coherent picture identified by the Commonwealth should be accepted. If the submission of the NLC parties were to be accepted, it would introduce to s 51(xxix) a very similar heresy to the one that this Court today abolishes in relation to s 122. As this Court said in *Fishwick v Cleland*,⁵⁴⁵ in remarks that apply a fortiori to territories that form part of the Commonwealth of Australia:

"The Commonwealth Parliament has legislative power in relation to territories conferred by s 122 of the Constitution. It is a provision framed in terms perhaps not altogether appropriate in expression to the mandatory or trusteeship system but we think it should be construed widely. On the whole it seems preferable to refer the source of power over New Guinea to s 122 rather than to s 51(xxix), the legislative power with respect to external affairs."

III. The second issue: is native title inherently defeasible?

(i) *The reasoning of Gummow J in Newcrest*

278 In *Newcrest*, the Commonwealth and the Director of National Parks and Wildlife had argued that making s 122 subject to the constraint of requiring just terms for any acquisition of property "would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the [Territory] since 1911 to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law".⁵⁴⁶ In addressing this submission, Gummow J complemented his powerful reasoning of principle for

⁵⁴³ *Berwick Ltd v Gray* (1976) 133 CLR 603 at 605.

⁵⁴⁴ (1975) 135 CLR 337 at 360.

⁵⁴⁵ (1960) 106 CLR 186 at 197.

⁵⁴⁶ *Newcrest* (1997) 190 CLR 513 at 613.

rejecting the first conception of s 122 with an analysis which mitigated the consequences of overruling the reasoning in *Teori Tau*. His Honour said:⁵⁴⁷

"Such apprehensions are not well founded. The characteristics of native title as recognised at common law include an inherent susceptibility to extinguishment or defeasance by *the grant* of freehold or of some lesser estate which is inconsistent with native title rights; this is so whether the grant be supported by the prerogative or by legislation.⁵⁴⁸ Secondly, legislation such as that considered in *Mabo v Queensland*⁵⁴⁹ and *Western Australia v The Commonwealth (Native Title Act Case)*,⁵⁵⁰ which is otherwise within power but is directed to the extinguishment of what otherwise would continue as surviving native title (or which creates a 'circuitous device' to acquire indirectly the substance of that title⁵⁵¹), may attract the operation of s 51(xxxi).⁵⁵² However, no legislation of that character, with an operation in the Territory, was pointed to in the submissions in this case."

279 Three other Justices in *Newcrest* (Toohey J, Gaudron J and Kirby J) agreed with Gummow J's reasoning on this point.⁵⁵³ It is arguable that this reasoning of, or adopted by, each of those judges in the majority in *Newcrest* was an essential part of their primary or alternative reasoning and therefore formed part of the reasoning which was the ratio decidendi of *Newcrest*. But in oral submissions in this case the Commonwealth disclaimed any such submission and therefore disclaimed any suggestion that the rejection of this submission would require any reasoning in *Newcrest* to be re-opened.

547 *Newcrest* (1997) 190 CLR 513 at 613 (emphasis in original).

548 *Mabo [No 2]* (1992) 175 CLR 1 at 69, 89, 110, 195-196; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 422, 439, 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 132-133. See also *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 653; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 235-237, 256, 264-265.

549 (1988) 166 CLR 186.

550 (1995) 183 CLR 373.

551 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349.

552 *Mabo [No 2]* (1992) 175 CLR 1 at 111.

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

280 Whether or not this analysis of Gummow J was part of the ratio decidendi in *Newcrest*, many of the consequences of departing from that reasoning in *Newcrest*—which was the essential reasoning for rejecting the Commonwealth and the Director of National Parks and Wildlife's submissions on the asserted consequences of overruling the reasoning in *Teori Tau*—are the same asserted consequences as those of overruling the result in *Teori Tau*. The issue depends on the extent to which the reasoning is supported by principle.

281 The Commonwealth's submission as to principle depended on five propositions: (i) this Court in *Mabo [No 2]* held that native title rights and interests can exist at common law without fracturing any "skeletal principle"⁵⁵⁴ of the legal system, and without treating the creation of tenures as wrongful conduct; (ii) the recognition of the existence at common law of native title rights and interests is possible because "radical title" includes a power to extinguish native title; (iii) unlike tenures granted by the relevant body politic, native title is inherently defeasible, in the sense that when native title norms are recognised by the common law as rights and interests then those rights and interests contain a condition subsequent of defeasance by the exercise of radical title; (iv) this concept of inherent defeasibility is evidenced by the lack of any presumption in the interpretation of legislation that might extinguish native title which is equivalent to a presumption that the body politic does not intend to permit derogation from a grant of an interest in land; and (v) the inherent defeasibility of native title has the effect that when it is extinguished by an act supported by legislation there is no "acquisition of property" within s 51(xxxi) of the *Constitution*.

282 The first two propositions advanced by the Commonwealth are correct. The third, fourth, and fifth are not. The third proposition confuses two different meanings of "inherent defeasibility". The fourth proposition misunderstands the basis for the presumption that legislation is not intended to derogate from a grant. The fifth proposition must therefore be rejected as it is dependent upon the errors in the third and fourth.

(ii) *The first two propositions: the interaction of radical title and native title*

(a) The basis for the first two propositions

283 The first page reference to *Mabo [No 2]* footnoted by Gummow J in the passage from *Newcrest* quoted above was part of a discussion in which Brennan J described the extinguishment of native title rights and interests by the grant of a "Crown lease" as expanding the title of the body politic "from the mere radical title".⁵⁵⁵ Brennan J continued, saying that the radical title acquired with

554 *Mabo [No 2]* (1992) 175 CLR 1 at 43.

555 *Mabo [No 2]* (1992) 175 CLR 1 at 68.

sovereignty meant that "the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title".⁵⁵⁶ His Honour also explained that "[i]f native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner".⁵⁵⁷ This description of the interaction between radical title and native title requires explanation of those concepts as well as explanation of what is meant by the recognition of native title and its extinguishment by the exercise of radical title.

(b) The concepts of "radical title" and "native title"

284 Radical title has been said to have two limbs: it is "a postulate of the doctrine of tenures and a concomitant of sovereignty".⁵⁵⁸ It is unfortunate that the label "radical title" was chosen to describe this sovereign power of the settling authority, which is a postulate of the doctrine of tenures. "Title" is shorthand for an entitlement. "Title" to land is an entitlement to the land. But "radical title" is not title to land or an "estate" in land at all.⁵⁵⁹ It describes the sovereign power for a body politic to *create* titles in a system of tenure, including to appropriate beneficial ownership to itself.⁵⁶⁰ But it is not "beneficial ownership".⁵⁶¹ As Maitland wrote more than a century ago, "no two legal ideas seem more distinct from each other than that of governmental power and that of proprietary right".⁵⁶²

285 The most basic point decided by six members of this Court in *Mabo [No 2]* is that there is, in principle, no inconsistency between: (i) any right or interest in relation to land, whether a native title right or interest or not; and (ii) a sovereign

556 *Mabo [No 2]* (1992) 175 CLR 1 at 69.

557 *Mabo [No 2]* (1992) 175 CLR 1 at 70.

558 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 188.

559 cf *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 403. See also Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (2014) at 147.

560 *Sac and Fox Tribe of Indians of Oklahoma v United States* (1967) 383 F 2d 991 at 997; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 94, 127-128, 156, 186, 189, 244. See also *In re Southern Rhodesia* [1919] AC 211 at 230-231, 239-241; Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (2014) at 38; Bartlett, *Native Title in Australia*, 5th ed (2023) at 280 [15.2].

561 *Mabo [No 2]* (1992) 175 CLR 1 at 50-51; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 51 [47].

562 Maitland, *Domesday Book and Beyond* (1897) at 342.

power to *create* another right or interest.⁵⁶³ An inconsistency might potentially arise at the point at which a new right or interest is created but, until that point, the pre-existing right or interest and the "radical title" can co-exist.

286 "Native title" is also a loose description. It is loose in two respects. The first respect in which "native title" is a loose description is that it conflates two different dimensions: the source of the common law rights and interests and the legal recognition of those rights and interests. In one sense, "native title" can describe the norms that underlie the traditional laws and customs of Aboriginal and Torres Strait Islander peoples, which create rights and interests in relation to land, waters, and chattels. This was the sense in which Brennan J used "native title" in *Mabo [No 2]*⁵⁶⁴ when his Honour spoke of native title being ascertained "as a matter of fact by reference to [traditional] laws and customs" and of native title being recognised by the common law but not being an "institution of the common law". But "native title" can also be used to describe the rights and interests existing at common law *after* recognition at common law of those norms. That was the sense in which Deane and Gaudron JJ used the expression "common law native title" in *Mabo [No 2]*⁵⁶⁵ and that is the sense in which the expression is used, interchangeably with "native title rights and interests", in the *Native Title Act*.⁵⁶⁶ In these reasons, the norms that underlie the traditional laws and customs of Aboriginal and Torres Strait Islander peoples, which create rights and interests in relation to land, waters, and chattels, will be described as "native title norms" rather than merely "native title", as Brennan J had described them. By contrast, the expression "native title rights and interests" will be used to describe the rights and interests as recognised by the common law, where that recognition was based upon native title norms.

287 The second respect in which "native title" is a loose description is that it is suggestive of a single legal concept. That suggestion evokes the muddled thinking⁵⁶⁷ and sometimes "awkward and incongruous"⁵⁶⁸ metaphor of a "bundle

563 *Mabo [No 2]* (1992) 175 CLR 1 at 15, 50, 86-87, 193-194; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 51 [47].

564 (1992) 175 CLR 1 at 58, 59.

565 (1992) 175 CLR 1 at 87-88.

566 *Native Title Act*, s 223(1).

567 See *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at 82-83 [203]-[204]; Smith, "Property Is Not Just a Bundle of Rights" (2011) 8 *Econ Journal Watch* 279.

568 *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 107 [300].

of rights"—a metaphor that, at best, is "little more than a slogan".⁵⁶⁹ The muddled thinking arises because native title rights and interests are a variety of different legal relations recognised by the common law. They are not a single concept of "native title" bundled together. To give just two examples: sometimes native title rights and interests are a privilege⁵⁷⁰ (which others do not generally enjoy) to use land, waters, or chattels for a variety of purposes; on other occasions, "native title" describes a collective right to possess land or waters to the exclusion of others or other groups. In short, "native title" at common law describes a variety of different legal relations (rights and other interests being powers, privileges, and immunities) that are recognised by the common law: "various assortments of artificially defined jural right".⁵⁷¹

(c) Recognition of native title norms

288 Recognition is based on identifying and giving effect to the norms that underlie traditional laws and customs. In this sense, the common law recognition of native title norms involves the same organic development of the common law based upon social practices as in areas such as the law merchant, which involved the common law "recognition of mercantile custom; but ... no wholesale or slavish reception" of the custom.⁵⁷² The important point is that what is recognised are the underlying norms, not every aspect of a practice, in a legal system where rights and interests have been recognised over time based upon norms underlying a wide range of general social practices. Although native title rights and interests will be recognised as the particular jural relations of the common law, whether as rights, powers, privileges, or immunities, the "traditional laws and customs" from which those rights and interests are derived "may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer".⁵⁷³

569 Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43 *UCLA Law Review* 711 at 714.

570 *Western Australia v Manado* (2020) 270 CLR 81 at 114-116 [84]-[85].

571 *Yanner v Eaton* (1999) 201 CLR 351 at 373 [38], quoting Gray and Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (1998) 15 at 27.

572 Holdsworth, *A History of English Law* (1925), vol 8 at 151. See also *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48 at 54-55; Bederman, *Custom as a Source of Law* (2010) at 81-84.

573 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 442 [40].

289 The normative content of complex traditional laws and customs must be identified at the right level of generality.⁵⁷⁴ If the norms of native title are too narrowly expressed, then any slight change in traditional laws and customs could erroneously lead to the norm being treated as having been abandoned despite the community continuing to observe the norm in more general terms. The continuing norms, identified at the right level of generality, must be adopted by the common law unless they are inconsistent with any other common law rights or interests. That common law process of adopting the continuing norms as common law rights and interests, provided that the norms are not inconsistent with other existing common law rights and interests, is described as recognition.

290 The process by which the common law recognises the norms underlying traditional laws and customs does not permit the norms to be transplanted slavishly into the common law because there must be consideration of, and reconciliation with, any inconsistent common law rules. But the process remains one of *recognition*, not *transformation*, of the identified norms underlying traditional laws and customs. Recognition focuses upon traditional laws and customs to "identify and protect the [underlying norms of] native [title] rights and interests".⁵⁷⁵ It does not transform those norms. The common law alters or develops by its recognition of those norms, not the other way around. Hence, it is an error to "impose common law concepts of property on peoples and systems which saw the relationship between the community and the land very differently from the common lawyer".⁵⁷⁶ In relation to these traditional laws and customs, "using Anglo-Australian law to decide [the content of] the rights of Indigenous people ... is the same as using Aboriginal law to decide [the content of] the rights of non-indigenous Australians".⁵⁷⁷

291 As a matter of principle, the recognition of the norms underlying traditional laws and customs by the common law should involve as little change to the other rules of the common law as possible. This principle gives the greatest respect to both systems of law.⁵⁷⁸ This is, in effect, a principle of greatest accommodation. Nevertheless, there will be areas where the two systems of law might come into conflict. In those areas, there can be only one common law rule. If a norm underlying traditional laws and customs is inconsistent with an essential common

574 *Mabo [No 2]* (1992) 175 CLR 1 at 61.

575 *Mabo [No 2]* (1992) 175 CLR 1 at 60.

576 *Western Australia v Ward* (2002) 213 CLR 1 at 93 [90].

577 Watson, "Law and Indigenous Peoples: The Impact of Colonialism on Indigenous Cultures" (1996) 14(1) *Law in Context* 107 at 110.

578 See *Mabo [No 2]* (1992) 175 CLR 1 at 56-57, 82-83.

law principle or postulate, then the generally accepted position is that the norm cannot be, or cannot continue to be, recognised.

292 Once it was found by six members of this Court in *Mabo [No 2]* that radical title could co-exist with native title rights and interests recognised by the common law, the issue of inconsistency could only arise where radical title was, or had been, *exercised* to create rights that were inconsistent with native title rights or interests. There were, broadly, two possible approaches suggested for the manner in which the common law should reconcile this potential conflict.

293 One approach began with the characterisation of the potentially inconsistent norm underlying traditional laws and customs. There were two variants of characterisation of the norm on this approach: (i) the exclusive possession of land which is the equivalent of a common law fee simple estate; or (ii) a unique personal right. In broad terms, each variant, (i) and (ii), of this approach was the reasoning in *Mabo [No 2]* of Toohey J,⁵⁷⁹ and of Deane and Gaudron JJ,⁵⁸⁰ respectively. On either variant, each characterisation led to the same approach by the common law process of recognition to resolving conflict with potentially inconsistent common law rights.

294 On the characterisation that recognised the norm as a native title right equivalent to a fee simple estate, the possession of land by Aboriginal and Torres Strait Islander peoples would be treated by the common law in the same way as the possession of land by settlers. Any exercise of radical title to grant an estate that is inconsistent with the recognised native title right could potentially be a wrongful interference with the prior title.

295 On the characterisation that treated the native title right as a unique personal right, the recognition of the native title right would also have the effect that an exercise of radical title to create an inconsistent right or interest could involve wrongful interference with the relevant personal right. Whether or not any wrong was actionable, the relativities of title recognised by the common law would mean that, in both cases, the native title rights and interests would not be subordinated to the exercise of sovereign power. In both cases, the native title rights would truly be a pre-existing burden on the radical title.

296 Another approach began by assessing whether the norms underlying those traditional laws and customs were: (i) proprietary or personal; and (ii) held by a community, a group, or a person. Where the norms included an assertion of exclusive possession of land as "a proprietary title capable of recognition by the common law", the reconciliation of the native title norms with the common law

579 (1992) 175 CLR 1 at 210-214.

580 (1992) 175 CLR 1 at 94-95, 100-101, 110-111.

doctrine of tenure would require that "essential postulate[s]" of the rules of common law tenure not be disturbed. The common law could not change in those essential respects. One of the essential postulates of the common law system of tenure that seems to have been assumed by Brennan J is the unimpaired exercise of radical title, namely the unimpaired exercise of sovereign power to grant estates in land (at least by legislation). The recognition of a pre-existing native title right or interest involving exclusive possession of land would, therefore, be extinguishable by the exercise of radical title. In broad terms, Brennan J (with whom Mason CJ and McHugh J agreed) adopted this approach in *Mabo [No 2]*.⁵⁸¹

297 Although Brennan J described native title as a "burden on ... radical title",⁵⁸² and although four members of this Court later described native title in the same way in *The Commonwealth v Yarmirr*,⁵⁸³ this language was inapt in light of the assumption by Brennan J that it was an essential postulate of the system of tenure that the exercise of sovereign power to grant estates in land would necessarily be unimpaired by native title. Perhaps for this reason, members of this Court (including three of the four who described it in this way in *The Commonwealth v Yarmirr*) have since cautioned against the metaphor of native title rights and interests as being a burden on radical title.⁵⁸⁴

(d) Extinguishment of native title rights and interests

298 Although the common law recognition of native title came much later than other forms of recognition by the common law, it is no more possible for the common law to "extinguish" the existence of traditional laws and customs, and the norms upon which they are based, than it was for the common law to eliminate the existence of other practices (such as mercantile practices), and the norms upon which they were based, which were sometimes recognised by the common law. The concept of "extinguishment" of native title rights and interests concerns only the cessation of the rights and interests of native title at common law, not the source of those rights and interests. The source of those rights and interests in the norms of native title continues to exist although those norms are no longer recognised, in

581 (1992) 175 CLR 1 at 15-16 (Mason CJ and McHugh J), 43, 45-48, 51, 61 (Brennan J).

582 *Mabo [No 2]* (1992) 175 CLR 1 at 51, 57. See also at 50, quoting *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 403.

583 (2001) 208 CLR 1 at 51 [47].

584 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 441 [38].

the sense that effect is no longer given to them at common law. For this reason, it is correct to say that "[e]xtinguishment is the obverse of recognition".⁵⁸⁵

299 One manner in which native title rights and interests might be said to be extinguished, or no longer recognised, is where there has been an abandonment of the traditional laws and customs from which the norms of native title are established—there are no longer any native title norms that can be recognised as giving rise to native title rights and interests. The cessation of those norms permanently destroys the native title rights and interests based upon those norms: "native title [norms] which ... ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition".⁵⁸⁶

300 Another manner in which native title rights and interests might be extinguished is where the extinguishment is necessary to ensure that there is no inconsistency between common law rights and interests created by the exercise of radical title and native title rights and interests that would otherwise be recognised by the common law. During this appeal, there was a focus upon the decision of this Court in *Fejo v Northern Territory*,⁵⁸⁷ in which the effect of such extinguishment was considered. In *Fejo v Northern Territory*, a question for this Court was whether native title rights and interests could "revive" when those rights and interests had been extinguished by the exercise of radical title to grant a fee simple in land but the fee simple title to the land was later resumed by "the Crown" (that is, the body politic of the Commonwealth of Australia) and the legal estate was vested in the body politic of the Commonwealth (and later passed to the Northern Territory).⁵⁸⁸ This Court held that the native title rights and interests were not merely "suspended" by the grant of the fee simple estate, they were extinguished:⁵⁸⁹ "[a] grant in fee simple does not have only some temporary effect on native title rights or some effect that is conditioned upon the land not coming to be held by the Crown in the future".⁵⁹⁰

301 The point that was *not* addressed by this Court in *Fejo v Northern Territory* was whether, if the traditional laws and customs, and the underlying norms, were to continue despite the extinguishment of the common law native title rights and

585 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 219 [10].

586 *Mabo [No 2]* (1992) 175 CLR 1 at 60.

587 (1998) 195 CLR 96.

588 *Fejo v Northern Territory* (1998) 195 CLR 96 at 131 [57].

589 *Fejo v Northern Territory* (1998) 195 CLR 96 at 126-127 [42]-[45], 131 [56]-[57], 154 [112].

590 *Fejo v Northern Territory* (1998) 195 CLR 96 at 127 [45].

interests, *new* native title rights or interests would be recognised by the common law if, at a later point in time, the inconsistent estate in the land ceased to exist. In many cases, the creation of an inconsistent right or interest in land, by an exercise of radical title, will interrupt traditional laws and customs sufficiently to break the continuity of the underlying norm in relation to that land. The continued connection with land, which is a necessary (but not sufficient)⁵⁹¹ precondition to the continued recognition of native title norms, requires proof of the ongoing observance of laws and customs, identified at a sufficient level of generality,⁵⁹² to evidence the continued existence of the underlying norms.

302 However, in a case where all estates in the land which had been previously granted by the Crown had been subsequently extinguished, so that the land was subject only to the potential exercise of radical title, and where the creation of the inconsistent right or interest had not interrupted the acknowledgement of traditional laws and observance of customs (so far as practicable),⁵⁹³ in relation to the land, to such an extent that the continuity of the underlying norm had been broken, it is hard to see why, at that point, the common law would not recognise new native title rights and interests based on any norms underpinning traditional laws and customs that existed at settlement and had continued.

(iii) The third proposition: two different meanings of "inherent defeasibility" confused

303 In *Mabo [No 2]*,⁵⁹⁴ Brennan J said 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". Although Brennan J did not explain precisely what he meant by the notion that native title was defeasible by the exercise of the new sovereign power, his Honour must have meant that native title rights and interests could be extinguished by the exercise of power supported by legislation (legislative power or statutory executive power). For however long the various bodies politic in Australia had a prerogative power to grant interests in land, that prerogative power did not include a power in peacetime to transfer or extinguish non-indigenous title.⁵⁹⁵ The same must have

591 See *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46].

592 See above at [289].

593 *Mabo [No 2]* (1992) 175 CLR 1 at 70.

594 (1992) 175 CLR 1 at 63.

595 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 269-270 [29], referring to *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at 115. See also *Bayley v Great Western Railway Co* (1884)

been true of native title rights and interests. It would have entrenched racial discrimination in the common law to recognise a prerogative power that could extinguish native title rights and interests in peacetime.⁵⁹⁶

304 As the Commonwealth rightly conceded, Brennan J was not suggesting that native title rights and interests fell outside the concept of property within s 51(xxxi). "Property" is a concept, like "family resemblances", that is used in different ways that depend upon particular legal contexts, although those contexts will have overlapping characteristic features in a "network of similarities overlapping and criss-crossing".⁵⁹⁷ "Property" in s 51(xxxi) is used in one of its widest connotations. It "extends to every species of valuable right and interest",⁵⁹⁸ including "innominate and anomalous interests".⁵⁹⁹ The concept of "property" in s 51(xxxi) is not limited to a legal relation between persons concerning some thing. "Property" in s 51(xxxi) includes anything of value or any "financial advantage" gained by extinguishing any legal interest (not merely a "unilateral expectation"⁶⁰⁰) of any person.⁶⁰¹ A legal interest is a right, power, privilege, or immunity.⁶⁰²

305 The remarks of Brennan J must instead be understood as describing circumstances in which native title rights or interests, as "property", are defeasible. HLA Hart described the concept of a "defeasible" legal interest in property by analogy with a contract, established as valid, but subject to being defeated. Hart explained that the defeasible legal interest in property is one "which is subject to termination or 'defeat' in a number of different contingencies but remains intact if

26 Ch D 434 at 452; *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 at 225-226.

596 See Brennan, "Native Title and the 'Acquisition of Property' under the *Australian Constitution*" (2004) 28 *Melbourne University Law Review* 28 at 69.

597 See Wittgenstein, *Philosophical Investigations*, trans Anscombe (1953) at 32 §§66-67.

598 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290.

599 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349.

600 *Board of Regents of State Colleges v Roth* (1972) 408 US 564 at 577. See also *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 264 fn 12.

601 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236.

602 Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 28-30.

no such contingencies mature".⁶⁰³ One relevant circumstance is where the contingency is inherent in the content of the property right itself. Such a circumstance is commonly described as a "condition subsequent". A second circumstance is where an interest in property is defeated by some circumstance external to the interest itself.

306 The first alternative was relied upon by the Commonwealth. At least since *Health Insurance Commission v Peverill*,⁶⁰⁴ the jurisprudence of s 51(xxxi) has recognised, in effect, that interests created by statute can commonly be held subject to a condition subsequent which, when it occurs, will not amount to an *acquisition* of property if the effect of the condition subsequent is to remove the interest holder's entitlement to the interest. In *Health Insurance Commission v Peverill*, legislation that retrospectively reduced the amount of statutory medicare benefits that were payable by the Commonwealth was held not to be an acquisition of property. In passages to which reference was made by Gummow J in the passage quoted above from *Newcrest*,⁶⁰⁵ McHugh J said that although the statutory entitlement to a medicare benefit was property, "a law which alters or repeals that entitlement is not a law with respect to the acquisition of property within the meaning of s 51(xxxi)".⁶⁰⁶ His Honour later added that the entitlement was "created subject to the condition that it can be altered or even abolished by an exercise of power" without being an acquisition of property, until the entitlement has been transformed into property recognised by the general law.⁶⁰⁷

307 Although statutory entitlements will usually be created subject to a condition subsequent that the entitlement is defeasible by later legislation, it is neither necessary nor sufficient for the existence of such a condition subsequent that the rights the subject of the condition be statutory rights. It is not sufficient that the subject be a statutory right because not all statutory rights are intended by Parliament to be created subject to the condition subsequent of defeasance. In particular, where the statutory right is not merely exigible against the body politic of the Commonwealth, such as the statutory creation of intellectual property rights (copyrights, patents of inventions, designs, and trade marks) which are exigible against the world at large, the Parliament will rarely be taken to have intended that

⁶⁰³ Hart, "The Ascription of Responsibility and Rights", in Flew (ed), *Logic and Language* (1952) 145 at 148.

⁶⁰⁴ (1994) 179 CLR 226.

⁶⁰⁵ (1997) 190 CLR 513 at 613 fn 321. See above at [278].

⁶⁰⁶ *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 264-265.

⁶⁰⁷ *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 265-266.

the statutory right contain a condition subsequent in the sense that it be "subject to the terms of the statutory regime as they stand from time to time".⁶⁰⁸

308 It is also unnecessary, for the existence of a condition subsequent of defeasance of an interest, that the subject of the condition be a statutory interest. An example is a grant of a right to use land which is "qualified by a power of recall contained in the terms of the grant".⁶⁰⁹ In *The Commonwealth v WMC Resources Ltd*,⁶¹⁰ Gummow J reasoned to the effect that the nature of non-statutory property (that is, rights created in respect of an exploration permit) was such that it contained a condition subsequent, the fulfilment of which had the effect that "there could be no acquisition within the meaning of s 51(xxxi)". Another example given by his Honour in that case is "the vested interest of a beneficiary under a settlement in which the settlor reserved a power of revocation".⁶¹¹ Pending revocation, the interest of the beneficiary is "property" within s 51(xxxi). But if the Commonwealth, as settlor, exercises the power of revocation, that will not be an acquisition of property. The same is true of the grant by the Commonwealth of a "fee simple to which a condition was attached by which the estate might be cut short";⁶¹² the species of such conditions subsequent were collected by Blackstone, including estates granted upon express or implied condition and, commonly, estates held in vadio, in gage, or in pledge: living pledges (*vivum vadium*) and dead pledges (*mortgages*).⁶¹³

309 The Commonwealth sought to explain native title rights and interests in the same way, including by reference to the decision of the United States Supreme Court, cited in a different context by Brennan J in *Mabo [No 2]*,⁶¹⁴ of *Tee-Hit-Ton Indians v United States*.⁶¹⁵ That case, described by Professor McNeil as "one of the most regressive, and in some ways surprising, decisions [the Supreme Court of the

608 *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 48 [104].

609 *Native Title Act Case* (1995) 183 CLR 373 at 439.

610 (1998) 194 CLR 1 at 73 [195].

611 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73 [196].

612 *Western Australia v Ward* (2002) 213 CLR 1 at 200 [432].

613 Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 10 at 152, 157.

614 (1992) 175 CLR 1 at 63.

615 (1955) 348 US 272 at 281-285.

United States] has ever made regarding Indian rights",⁶¹⁶ held that traditional Indian title was not a property right to land which was protected by the Fifth Amendment to the Constitution of the United States. The Supreme Court held that the "original Indian title" was "permission from the whites to occupy".⁶¹⁷ If the "inherent quality of the title itself"⁶¹⁸ were that the native title right or interest was merely occupation with permission then there could be no "acquisition" of property when the permission was revoked.

310 Although the Commonwealth's submission was more sophisticated and less abrasive than the reasoning of the Supreme Court of the United States in *Tee-Hit-Ton Indians v United States*, the effect of the submission was the same. In the terms in which the Commonwealth expressed the submission, the argument was that the legal rights and interests recognised by the common law as native title are subject to a condition subsequent that the right or interest will cease to exist upon the exercise of the sovereign power over land that is described as "radical title". This, the Commonwealth submitted, was what was meant by the description of native title as being "inherently fragile". That description of inherent fragility was also given by Gleeson CJ, Gaudron, Gummow and Hayne JJ in both *The Commonwealth v Yarmirr*⁶¹⁹ and *Western Australia v Ward*,⁶²⁰ and by Kirby J in *Fejo v Northern Territory*⁶²¹ and *Wilson v Anderson*.⁶²² Although there is some obscurity in the meaning of these references to the inherent fragility of native title, the Commonwealth's submission should not be accepted.

311 The Commonwealth's submission, if correct, would change the process of *recognition* of the norms underlying traditional laws and customs by the creation of common law native title rights and interests into a process of *transformation* of the underlying norms into common law native title rights and interests that do not reflect those norms because they contain a new condition subsequent.

616 McNeil, "How the New Deal Became a Raw Deal for Indian Nations: Justice Stanley Reed and the *Tee-Hit-Ton* Decision on Indian Title" (2019-2020) 44 *American Indian Law Review* 1 at 1.

617 *Tee-Hit-Ton Indians v United States* (1955) 348 US 272 at 279.

618 *Mabo [No 2]* (1992) 175 CLR 1 at 194.

619 (2001) 208 CLR 1 at 51 [47].

620 (2002) 213 CLR 1 at 94 [91].

621 (1998) 195 CLR 96 at 151 [105].

622 (2002) 213 CLR 401 at 457 [138].

312 It is one thing to say that there should be no *recognition* of particular native title norms because: (i) if the common law were to recognise native title rights and interests corresponding with the norms, then those rights and interests would be inconsistent with a title created by an exercise of "radical title" by an Australian body politic; or (ii) if native title rights and interests had been created through a common law process of recognition prior to inconsistency with a later-created title arising, then those rights and interests would be extinguished. But it is quite another thing to say that such potential for inconsistency requires the norms underlying traditional laws and customs to be *transformed* into, effectively, a permission to occupy granted by any Australian body politic so that the native title rights and interests would not be acquired when the condition subsequent arose, namely when the permission to occupy was revoked.

313 The concepts of recognition and extinguishment, in the above sense which excludes transformation, are what Brennan J must be taken to have meant in *Mabo [No 2]*⁶²³ when his Honour said that "[t]he rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title [rights and privileges] to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title". This is also all that should be understood by expressions like the "inherent fragility" of native title or, more accurately, the "vulnerability to defeasance" of native title⁶²⁴ or the liability of native title "to extinction by [the] exercise of ... sovereign power".⁶²⁵ Hence, to adapt what was said by four members of this Court in the context of the *Native Title Act*, where the norms underlying traditional laws and customs involve assertions of exclusive control over land, "it is not to be supposed that ... native title rights and interests [are treated] less favourably [than freehold title]".⁶²⁶

314 Since recognition precludes the transformation of the norms underlying traditional laws and customs into native title rights and interests in relation to land which include a condition subsequent, there is no fundamental difference between the process of recognition of native title norms in relation to land when compared with the same recognition of native title norms in relation to chattels, such as those arising from "the taking or keeping of fauna",⁶²⁷ or native title norms, where they

623 (1992) 175 CLR 1 at 69.

624 *Native Title Act Case* (1995) 183 CLR 373 at 453.

625 *Mabo [No 2]* (1992) 175 CLR 1 at 63.

626 *Tjungarrayi v Western Australia* (2019) 269 CLR 150 at 165 [36].

627 *Yanner v Eaton* (1999) 201 CLR 351 at 370-371 [31].

can be recognised,⁶²⁸ in relation to offshore waters.⁶²⁹ Indeed, as explained below, the premise of the Commonwealth's submissions in relation to the third issue was that the assumed native title rights and interests in this case were rights to minerals and not to land. Yet, the Commonwealth, in oral submissions, properly disclaimed any submission that any native title norms in relation to chattels or offshore waters would be recognised by the common law only if the underlying norms could be transformed into rights and interests with a condition subsequent of defeasance by the exercise of power sourced in Commonwealth legislation.

315 A curious consequence would apparently arise if common law recognition could transform native title norms into native title rights and interests in relation to land which include a condition subsequent of defeasance. That consequence would be that Commonwealth legislation under s 122, which was otherwise valid, could effect wholesale extinguishment of native title rights and interests⁶³⁰ without the just terms requirement in s 51(xxxi).⁶³¹ Yet, in part of the passage from Gummow J in *Newcrest* quoted above,⁶³² which was relied upon by the Commonwealth, his Honour considered that such wholesale extinguishment may be an exceptional case where extinguishment is not possible without just terms.

316 If native title rights and interests included a condition subsequent of defeasance by sovereign power, then such an exception could not be justified on the basis that the condition subsequent (to which native title rights and interests were said to be subject) is defeasance only by the exercise of a power to acquire or create title, but that wholesale extinguishment would not truly amount to the exercise of such a power. The exercise of Commonwealth legislative power to create title for itself on a large scale is, in principle, no different from the exercise of the Commonwealth's executive power on a smaller scale (whether supported by the prerogative when it existed or by statutory executive power).⁶³³ Nor is there any justification for such an exception by attempting to draw a distinction between indirect extinguishment by the exercise of statutory executive power to create a new (and inconsistent) title and direct extinguishment by legislation with

628 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 68 [98], 165 [384]; cf 127 [285].

629 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 225 [21].

630 Akin to laws considered in *Mabo v Queensland* (1988) 166 CLR 186 and *Native Title Act Case* (1995) 183 CLR 373.

631 *Newcrest* (1997) 190 CLR 513 at 613, referring to *Mabo [No 2]* (1992) 175 CLR 1 at 111.

632 See above at [278].

633 See *Wik Peoples v Queensland* (1996) 187 CLR 1 at 140. See also *Mabo [No 2]* (1992) 175 CLR 1 at 63.

widespread effects. Widespread legislation of the type contemplated in the exception might, without any contrivance, be concerned with creating widespread new titles.

(iv) The fourth proposition: native title and the principle of non-derogation from grant

317 In *Mabo [No 2]*,⁶³⁴ Brennan J said that in the interpretation of legislation that might extinguish native title rights and interests there is no presumption equivalent to the presumption that the Crown (that is, the relevant body politic) does not intend to permit derogation from a grant. In *Wik Peoples v Queensland*,⁶³⁵ in a passage cited with approval by six members of this Court in *Fejo v Northern Territory*,⁶³⁶ Brennan CJ described a "weakness" of native title rights and interests as being that they are "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".

318 In oral submissions, the Commonwealth seized upon the principle of non-derogation from grant and the presumption that a Parliament does not intend to authorise derogation from a grant as a talisman for treating differently the process of common law recognition of native title norms in relation to land when compared with native title norms in relation to chattels or offshore waters. The Commonwealth submitted that the reason that the non-derogation principle was inapplicable to prevent legislation that empowers the creation by the Executive of interests in land from being interpreted to be subject to native title rights and interests was that native title rights and interests incorporated a condition subsequent of defeasance by the exercise of radical title. This submission misunderstands the operation of the non-derogation principle and the associated presumption of interpretation.

319 The principle of non-derogation from grant concerns grants by any person, not merely a body politic with radical title. In some cases, the principle is the foundation for recognising an implied grant of an easement on the sale of part of a hereditament (something that could be inherited),⁶³⁷ and for permitting an implication to be recognised in an instrument "that the grantor is assumed to have intended that [the] grant shall be effectual".⁶³⁸ The principle has thus been

634 (1992) 175 CLR 1 at 64.

635 (1996) 187 CLR 1 at 84.

636 (1998) 195 CLR 96 at 127 [44].

637 Elliott, "Non-Derogation from Grant" (1964) 80 *Law Quarterly Review* 244 at 244.

638 *Bayley v Great Western Railway Co* (1884) 26 Ch D 434 at 453.

described as one of "common honesty".⁶³⁹ In a more general sense, the principle is not limited to grants of land and the presumption is not limited to legislation authorising the grant of interests in land. Indeed, in his Honour's discussion of the rule in *Mabo [No 2]*, the case relied upon by Brennan J concerned non-derogation from the grant of a patent.⁶⁴⁰

320 The principle of non-derogation from grant, and the interpretive principle that Parliament is generally taken not to have intended to derogate from a grant, are therefore independent of the nature of the right granted, including whether the right is one of native title. Since native title rights and interests are not granted by the Crown, the principle does not apply to native title rights and interests and the principle says nothing about the nature of native title rights and interests other than that they are not the subject of a grant. Hence, it is unnecessary to consider analogies with other interpretive principles relevant to native title rights and interests. Nor is it necessary to consider the interpretive principle that, given the "seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land", a "clear and plain intention" must be discerned, not merely for the *exercise* of a power to extinguish native title rights and interests,⁶⁴¹ but also for the *creation* of a power the exercise of which could have that effect.

(v) *The fifth proposition: no acquisition of property under s 51(xxxi) of the Constitution*

321 The consequence of the consideration above of each of the four propositions concerning the second issue is that the fifth proposition put by the Commonwealth is incorrect, and the reasoning of Deane and Gaudron JJ in *Mabo [No 2]*⁶⁴² is unassailable:

"Our conclusion that rights under common law native title are true legal rights which are recogni[s]ed 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)."

639 *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 at 225.

640 *Stead v Carey* (1845) 1 CB 496 at 523 [135 ER 634 at 645], cited in *Mabo [No 2]* (1992) 175 CLR 1 at 64 fn 75.

641 *Mabo [No 2]* (1992) 175 CLR 1 at 64.

642 (1992) 175 CLR 1 at 111.

IV. The third issue: Did pre-1911 leases extinguish any native title rights or interests?

322 The third issue concerns four pastoral leases all of which cover at least the claim area. It is common ground that the first of the four pastoral leases extinguished any exclusive native title rights and interests of the Gumatj Clan, including any exclusive rights to access, take, or use minerals which, at common law, would be described as profits à prendre. The issue is whether any non-exclusive native title rights and interests were also excluded by any of the pastoral leases. Those non-exclusive native title rights and interests claimed include a privilege to access, take, and use the resources of the claim area including the area below the surface. This issue was conveniently addressed in submissions on this appeal by a focus upon the grant of a single pastoral lease—the 1903 Lease—granted on 21 September 1903 pursuant to the *Northern Territory Land Act 1899* (SA) ("the 1899 Act").

323 It was accepted by the Commonwealth that the 1903 Lease, like the "leases" in *Wik Peoples v Queensland*,⁶⁴³ was not a true lease because it did not generally confer rights of exclusive possession on the "lessee". The issue, as it was expressed by the Commonwealth, was whether the inclusion of the exception and reservation clause in the 1903 Lease was, in effect, the exercise of a sovereign power by the Crown (the body politic of South Australia) to create exclusive rights "to minerals" under the surface of the land the subject of the 1903 Lease. The expression "minerals" was used at some points in the Commonwealth's submissions in a broad sense extending to everything under the ground other than the royal metals of gold and silver.

324 The "[e]xceptions and [r]eservations" (as they are described in the marginal note) in the 1903 Lease began with an "exception":

"EXCEPTING out of this lease to Aboriginal Inhabitants of the State and their descendants during the continuance of this lease full and free right of ingress egress and regress into upon and over the said lands and every part thereof and in and to the springs and natural surface water thereon and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to do if this lease had not been made".

325 The relevant provision of the lease, the exception and reservation clause, later provided:

643 (1996) 187 CLR 1.

"AND ALSO excepting and reserving out of this lease under His Majesty His Heirs and Successors all trees and wood standing and being on the said lands and all minerals metals (including Royal metals) ores and substances containing metals gems precious stones coal and mineral oils guano claystone and sand with full and free liberty of access ingress egress and regress to and for the said Minister and his agents lessees and workmen and all other persons authorised by him or other lawful authority with horses carts engines and carriages or without in over through and upon the said land to fell cut down strip and remove all or any trees wood or underwood or bark and to work or convert such trees wood or underwood into charcoal and to dig try search for and work the said minerals metals (including Royal metals) ores and substances containing metals gems precious stones coal and mineral oils guano claystone and [sand] and to take the same from the said lands and to erect buildings and machinery and generally to do such other work as may be required".

326 The Commonwealth submission was effectively that notwithstanding that the 1903 Lease did not generally confer exclusive rights of possession, and notwithstanding the "exception" for Aboriginal people to have "full and free right" of "ingress egress and regress into upon and over the said lands and every part thereof", the 1903 Lease created exclusive rights to "the minerals" under the land in favour of the body politic of South Australia (which exercised sovereignty over the land which was the subject of the 1903 Lease). Prior to the grant of the 1903 Lease, the body politic of South Australia had only radical title to that land (that is, a sovereign power to create titles and other rights in relation to the land). So the Commonwealth submission requires the exception and reservation clause of the 1903 Lease to be interpreted as having created new and exclusive rights to "the minerals" in favour of the body politic of South Australia.

327 The exception and reservation clause of the 1903 Lease can conveniently be divided into two parts. The first part involves an exception and reservation for all trees and wood above the land and for everything below the land (minerals, metals, ores, and sand). The second part involves a liberty for the Minister (and those exercising such liberty in right of the Minister) to enter the land and perform work to remove trees above the land and minerals, metals, ores and sand below the land. The Commonwealth relied only upon the first part as creating the exclusive rights to "minerals", but the Northern Territory also relied upon the second part.

328 In order to address this third issue, it is essential to address three historical and basic legal conceptions before turning to the statutory context in which the exception and reservation clause was made and the interpretation of that clause. The first is the legal status of: (i) trees and wood over the land; and (ii) minerals (used broadly to include soil, sand, metals, ores, and everything contained within ores) under the land. The second is the difference between reservations, exceptions, and profits à prendre. The third is the operation of an information of intrusion.

(i) *The legal status of trees on the land and minerals under the land*

329 Blackstone recognised that "land" is "a word of a very extensive signification".⁶⁴⁴ In common parlance, it is usual to speak of things affixed to the surface of land, or things contained within the subsurface of land, as though those things had an independent existence from the land. People commonly speak of the "house" on their land, the "trees" on their land, and the minerals under the surface of their land. That common parlance causes legal confusion.

330 A house, trees, and minerals do not have any separate existence at common law, in the sense of being the subject of rights separate from rights to the land, while they remain affixed to, or within, the land and in their natural position. This is due to the principle, which has existed for millennia, known in Roman law as *accessio*⁶⁴⁵ and in English and Australian law as accession.⁶⁴⁶ At common law, while houses, trees, and minerals remain affixed to, or within, land and in their natural position, they accede to the land and will be owned by the owner of the land. This point was made neatly by Blackstone in words which, while now commonly neglected and open to doubt as to the extent of the vertical boundaries, would have been obvious to any 18th or 19th century conveyancer:⁶⁴⁷

"Land hath also, in [its] legal signification, an indefinite extent, upwards as well as downwards. *Cuius est solum, eius est usque ad coelum*,^[648] is the maxim of the law, ... downwards, whatever is in a direct line between the surface of any land, and the cent[re] of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word 'land' includes not only the face of the earth, but every thing under it, or over it."

331 In short, "land is above all a *spatial* category".⁶⁴⁹ As Dixon J (with whom McTiernan J agreed) said in *North Shore Gas Co Ltd v Commissioner of Stamp*

644 Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 2 at 16.

645 Inst II.I.26. See G II.73; Inst II.I.29-30; D 6.1.23.6-7; D 9.2.50; D 41.1.7.10-12. See also *Foskett v McKeown* [2001] 1 AC 102 at 121-122.

646 Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 26 at 404; *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303 at 308.

647 Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 2 at 18.

648 The full maxim, attributed to the jurist Accursius in the 13th century, is *cuius est solum, eius est usque ad coelum et ad inferos*: whoever owns the land also owns everything up to heaven and down to hell.

649 Edgeworth, *Butt's Land Law*, 7th ed (2017) at 34 [1.280] (emphasis in original).

Duties (NSW),⁶⁵⁰ in the context of concluding that mains and service pipes embedded in public land (subject to a statutory right of removal by the owner) were not "goods, wares, or merchandise" within a statutory exemption from stamp duty, "[s]o much of the earth as the pipes displace formed a space in the occupation of the company and that space constitutes land". And in reasoning which applies a fortiori to subsurface minerals, which, unlike pipes, occur naturally in the soil, his Honour added:⁶⁵¹

"[e]very physical characteristic ... tends to place the mains and service pipes in the same category as the soil from which, without disintegration or disconnection, they are inseparable".

332 Of course, the long-established legal concept of "land", and the common law rules concerning things that accede to land, can be altered by legislation. Much modern Australian legislation has altered the common law, at least in relation to mineral rights held by the relevant bodies politic. Relevantly, much modern legislation has partially amended the long-established rules of accession by creating new non-possessory proprietary rights to minerals separate from everything to which they are attached.⁶⁵² For instance, in 1971, long after the execution of the 1903 Lease, South Australia introduced legislation that provided that "the property in all minerals is vested in the Crown".⁶⁵³ The definition of "minerals" included a "naturally occurring deposit of metal" notionally severed from the soil.⁶⁵⁴ Those Crown mineral rights are rights that can be sold or assigned separately from the land to which they would have acceded at common law, although legislation generally provides that the title to the minerals does not pass from the Crown at least until it has been severed from the land and become a chattel.⁶⁵⁵

⁶⁵⁰ (1940) 63 CLR 52 at 70.

⁶⁵¹ *North Shore Gas Co Ltd v Commissioner of Stamp Duties (NSW)* (1940) 63 CLR 52 at 70. See also at 72 (Evatt J).

⁶⁵² See Chambers, *An Introduction to Property Law in Australia*, 5th ed (2025) at 211 [14.185].

⁶⁵³ *Mining Act 1971* (SA), s 16. See South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 3 August 1971 at 490-491, 493.

⁶⁵⁴ *Mining Act 1971* (SA), s 6.

⁶⁵⁵ For instance, *Mining Act 1992* (NSW), s 11; *Mineral Resources Act 1989* (Qld), s 310; *Mining Act 1971* (SA), s 18; *Mineral Resources (Sustainable Development) Act 1990* (Vic), s 11; *Mining Act 1978* (WA), s 85.

333 At common law, by contrast, since minerals, like houses, pipes, or trees in their natural state, are part of the land, a purported agreement to sell rights to any of those separately from the land to which each is a part cannot immediately transfer title, although the agreement could provide "contractual rights to sever ... from the land".⁶⁵⁶ On one view,⁶⁵⁷ a narrow departure at common law from this rule arises in the case of gold and silver, even where those metals are contained in ore beneath the land. In a decision described in the late 19th century as "settled law" whether "the reasons assigned in the case ... approve themselves or not to modern minds",⁶⁵⁸ those metals were notionally severed from the rest of the land and made the subject of prerogative Crown "ownership",⁶⁵⁹ albeit that this ownership was later held to be without a liberty to access on freehold land.⁶⁶⁰ Putting to one side the proper understanding of this exception of "royal metals" from a grant, the principle of accession at common law precludes title at an atomic level of elements and metals contained within rock or ore which are, themselves, contained within, and thus annexed to, land.

334 If minerals were truly severed from the land at common law before mining, and if title were really held to the minerals at common law, then the title would be held as a non-possessory title to a chattel. But, as the Full Court of the Supreme Court of Victoria held in *Chirnside v The Registrar of Titles*,⁶⁶¹ when a certificate of title registered "mines and minerals" that had been excepted from a conveyance, the subject of the registration remained an "estate[,] right or interest [in land]" which was a hereditament. A so-called title "to the minerals" is a title to something having no separate legal existence at common law.

335 There is, therefore, confusion of thought in expressions such as "an estate in fee simple ... in the minerals"⁶⁶² or "an estate in fee simple in the growing

656 *Melluish v BMI (No 3) Ltd* [1996] AC 454 at 473.

657 *Contrast Plant v Rollston* (1894) 6 QJLJ 98 at 106: "a 'royal mine of gold' is and comprises not only the actual gold but the stratum in which the gold is contained".

658 *Woolley v Attorney-General of Victoria* (1877) 2 App Cas 163 at 166.

659 *The Case of Mines* (1568) 1 Plow 310 at 336-337 [75 ER 472 at 510-512]. See *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 20, 35 ("the converse to the law of fixtures").

660 *Lyddall v Weston* (1739) 2 Atk 19 at 20 [26 ER 409 at 409]. See *Plant v Rollston* (1894) 6 QJLJ 98 at 102; *Wik Peoples v Queensland* (1996) 63 FCR 450 at 495.

661 [1921] VLR 406 at 408, 410-411. See *Transfer of Land Act 1915* (Vic), s 121.

662 Tiffany, *The Law of Real Property and Other Interests in Land* (1903), vol 1 at 517 §219.

timber",⁶⁶³ the latter of which has been cleverly satirised by Swadling as "treehold".⁶⁶⁴ Confusion is also invited by the widespread and extremely common references, repeated on this appeal, to common law notions of minerals, which remain in their natural state as part of the land, being "severed from the land" by a common law conveyance, or the "title of the minerals" at common law being "severed ... from the title of the fee simple estate" by a conveyance, or references to the grant of "title to minerals" and "passing property in minerals" by a conveyance.

336 As a matter of common law, expressions such as "title to minerals" in their natural state in the land, or "title to trees" naturally affixed to the land, can only refer to property rights in three ways. The first possible meaning of such expressions is an exclusive property right in the land to take the minerals or trees, which when physically severed will become a new chattel. This property right is an "incorporeal hereditament"⁶⁶⁵ called a profit à prendre, "a right exercised over another's real property and accompanied with participation in the profits of the soil thereof".⁶⁶⁶

337 The second possible meaning of such expressions, particularly in instruments that suggest a conveyance of all the subsurface, is a conveyance of rights to land "by horizontal subdivision" as well as "by vertical subdivision":⁶⁶⁷ "the surface belonging to one person, and a stratum below [or above⁶⁶⁸] the surface

663 *Beatty v Mathewson* (1908) 40 SCR 557 at 567-568. See also *National Trust Co Ltd v Miller* (1912) 46 SCR 45 at 65 (approved in *Eastern Construction Co Ltd v National Trust Co Ltd* [1914] AC 197 at 208); *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 34, 61. But compare *McDonnell Estate v Scott World Wide Inc* (1997) 149 DLR (4th) 645.

664 Swadling, "Treehold", in Mrockova, Nair and Rostill (eds), *Modern Studies in Property Law* (2023), vol 12, 35 at 54.

665 Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 3 at 20.

666 Hall, *A Treatise on the Law Relating to Profits à Prendre and Rights of Common* (1871) at 1. See also Hohfeld, "Faulty Analysis in Easement and License Cases" (1917) 27 *Yale Law Journal* 66 at 97-99.

667 *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73 at 91.

668 Coke, *The First Part of the Institutes of the Lawes of England* (1628), bk 1 at 48b §59 ("A man may have an inheritance in an upper chamber, though the lower buildings and [soil] be in another"). See also *Resumed Properties Department v Sydney Municipal Council* (1937) 13 LGR (NSW) 170 at 172; *Glenthams Pty Ltd v City of Perth* [1986] WAR 205 at 206-207, 211.

to another, this frequently occurring in the case of a conveyance of the minerals separate from the surface".⁶⁶⁹

338 The third possible meaning is so unlikely that it can be put to one side. This possible meaning is that the expressions "title to minerals" and "title to trees" signify the conveyance of a freehold title to the surface or subsurface of land by reference to the vertical and horizontal location of particular minerals or trees. In that instance, the freehold estate in that part of the surface or subsurface location of the land would subsist even after the removal and severance of the minerals or trees from the land. The minerals or trees, on this possibility, would serve as no more than identifiers of the location of particular land conveyed based on the location of the minerals or trees at the time of conveyance. It is, of course, highly unlikely that parties would wish to convey only the vertical and horizontal space occupied by minerals or trees at the time of conveyance. Indeed, the prospect that parties might intend to convey the space wherever the mineral or tree happened to be located at any point in time could present considerable difficulties. As Swadling has observed in relation to an attempt to convey the space occupied by a tree at any given time:⁶⁷⁰

"Does the space grow with the tree, diminishing the space over which other titles to the land extend? What happens when roots penetrate neighbouring soil, or branches overhang boundaries? Are the neighbour's rights thereby reduced? What happens when the tree is transplanted to a different area? Does the freehold title to the space previously occupied by the tree move with it or stay put?"

339 The reasoning above confirms the extremely perspicacious observations of Zacaroli J in *ARC Aggregates Ltd v Branston Properties Ltd*⁶⁷¹ that there are, in effect, only two ways at common law in which a property right in relation to mines and minerals beneath the surface of land might be asserted by someone other than the owner of the surface:

"The first is to divide up the land into separate physical strata, with boundaries at different vertical levels. Each of the separate strata is a

669 Tiffany, *The Law of Real Property and Other Interests in Land* (1903), vol 1 at 516 §218. See *Bowser v Maclean* (1860) 2 De G F & J 415 at 420 [45 ER 682 at 684]; see also *Commissioner for Railways v Valuer-General* [1974] AC 328 at 352 and *ARC Aggregates Ltd v Branston Properties Ltd* [2021] 2 P & CR 1 at 6 [22].

670 Swadling, "Treehold", in Mrockova, Nair and Rostill (eds), *Modern Studies in Property Law* (2023), vol 12, 35 at 39 (footnote omitted).

671 [2021] 2 P & CR 1 at 5-6 [21]-[23].

corporeal estate ... capable of being owned in fee simple by different persons.

The second is by the grant of ... a profit à prendre, described as 'a right to take something off another person's land'.

(ii) *Exceptions, reservations, and profits à prendre*

340 In *Doe on the demise of Douglas v Lock*,⁶⁷² Lord Denman CJ, giving the judgment of the Court of King's Bench, explained the long-established position, by reference to *Sheppard's Touchstone*,⁶⁷³ that an exception withdraws from the grant an existing "part of the thing granted" but a reservation involves the creation of new rights "out of" that which was granted in favour of a grantor.⁶⁷⁴ This distinction has been described as "very clear" in English law.⁶⁷⁵

341 An exception, in this strict sense, can accurately be described as "a keeping back of a physical part of a thing otherwise granted".⁶⁷⁶ Thus, Coke CJ said that if a person grants "a lease for life of a manor ... and excepts one acre" and subsequently "grants over the reversion", the acre "shall not pass to the grantee" of the reversion but is "severed and disunited from the manor for ever, as an arm or other member, divided from the body".⁶⁷⁷

342 By contrast, a reservation to the grant of land by a grantor involves the creation of a new right in favour of the grantor. But English law did not recognise all new rights conferred upon the grantor as reservations. If the new right arose from a re-grant by the grantee to the original grantor of rights to the land, then this was not recognised as a reservation. Hence, reservations were limited to rights to rent, heriot, suit of mill, and suit of court; profits and easements were not reservations.⁶⁷⁸ A profit à prendre in a lease, therefore, was not a reservation but a

672 (1835) 2 Ad & E 705 at 744 [111 ER 271 at 287].

673 *Sheppard's Touchstone of Common Assurances*, 7th ed (1820), vol 1, ch 5 at 80.

674 See *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 61; Tiffany, *The Law of Real Property and Other Interests in Land* (1903), vol 1 at 703-704 §316.

675 *Duke of Hamilton v Graham* (1871) 9 M (HL) 98 at 102-103.

676 *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 194.

677 *Liford's Case* (1614) 11 Co Rep 46b at 50a [77 ER 1206 at 1214].

678 *Doe on the demise of Douglas v Lock* (1835) 2 Ad & E 705 at 743 [111 ER 271 at 287]; *Wickham v Hawker* (1840) 7 M & W 63 at 76 [151 ER 679 at 685]; *The*

re-grant from the lessee to the lessor.⁶⁷⁹ This narrow view of a reservation meant that the grantee was required to execute any conveyance which included a profit in or an easement over the land in favour of the grantor; a re-grant by the grantee was impossible if the conveyance were executed by the grantor only.⁶⁸⁰ In the United States, where many conveyances were executed only by a grantor, courts adopted a broader view of reservations which extended to such re-grants.⁶⁸¹

343 Despite the strict legal meanings of "reservation" and "exception", for centuries a "reservation" was sometimes used erroneously in conveyances to refer to an exception.⁶⁸² For instance, in *Doe on the demise of Douglas v Lock*,⁶⁸³ a "reservation" of "wood and underground produce" was "not a reservation, but an exception". In *The Earl of Cardigan v Armitage*⁶⁸⁴ the Court of King's Bench considered the language of "except and always reserved" in relation to coal which was "part of the thing granted, part of the land, and in esse [that is, existing] at the time". In delivering the judgment of the Court, Bayley J held that the words "excepted and always reserved" created only an exception.⁶⁸⁵ Contrary to the submission of counsel for the plaintiff in that case, the express power to sink pits and get the coals was not a purported re-grant of a profit à prendre; rather, it was a mere liberty to ensure latitude in the mining for coal as opposed to a property right. The liberty was given because the exception would otherwise only have permitted

Durham and Sunderland Railway Company v Walker (1842) 2 QB 940 at 967 [114 ER 364 at 374]. See also Tiffany, *The Law of Real Property and Other Interests in Land* (1903), vol 1 at 704 §316; Swadling, "Treehold", in Mrookova, Nair and Rostill (eds), *Modern Studies in Property Law* (2023), vol 12, 35 at 41.

679 *Proud v Bates* (1865) 34 LJ (Ch) 406 at 411.

680 See *Statute of Frauds* (29 Car 2 c 3), s 4.

681 *Chappell v New York, New Haven & Hartford Railroad Co* (1892) 62 Conn 195 at 206-208; *Claflin v Boston & Albany Railroad Co* (1892) 157 Mass 489 at 492-493. See also Tiffany, *The Law of Real Property and Other Interests in Land* (1903), vol 2 at 874-875 §383.

682 *Doe on the demise of Douglas v Lock* (1835) 2 Ad & E 705 at 745 [111 ER 271 at 287-288]; *ARC Aggregates Ltd v Branston Properties Ltd* [2021] 2 P & CR 1 at 6 [26].

683 (1835) 2 Ad & E 705 at 746 [111 ER 271 at 288].

684 (1823) 2 B & C 197 at 207 [107 ER 356 at 360].

685 *The Earl of Cardigan v Armitage* (1823) 2 B & C 197 at 207 [107 ER 356 at 360].

the use of the surface of the land for mining purposes that were strictly necessary.⁶⁸⁶

344 In Australia, in *Attorney-General v Brown*⁶⁸⁷ the word "reserve" was likewise held to be an exception. As Windeyer J rightly said in this Court in *Wade v New South Wales Rutile Mining Co Pty Ltd*,⁶⁸⁸ the words "reservation" and "reserving" were "often used to mean a keeping back of a physical part of a thing otherwise granted: and so they are to be understood and have long been understood in the Australian law of real property".

(iii) *Informations of intrusion*

345 An information of intrusion was "in the nature of an action of trespass ... for trespass committed on the lands of the King ... as by entering thereon without title ... taking the profits, cutting down timber, and the like".⁶⁸⁹ The information of intrusion was "but in effect for a trespass".⁶⁹⁰ The information of intrusion "supposeth that the party intruded upon the King's possession";⁶⁹¹ it was necessary that the Crown "had possession".⁶⁹² A defendant to an information of intrusion could not avoid eviction and "damages ... for any particular trespasses ... as cutting trees" by relying merely on title that was derived from the fact of their actual possession.⁶⁹³

346 A defendant to an information of intrusion could defend by pleading specially and relying upon any "legal title" to possession, which meant any title

686 *The Earl of Cardigan v Armitage* (1823) 2 B & C 197 at 211-212 [107 ER 356 at 362]. See also *Duke of Hamilton v Graham* (1871) 9 M (HL) 98 at 109.

687 (1847) 1 Legge 312 at 322.

688 (1969) 121 CLR 177 at 194. See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 200-201.

689 Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (1820) at 332; see, generally, at 332-334. See also Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (1908) at 178.

690 *The Case of Mines* (1568) 1 Plow 310 at 337 [75 ER 472 at 512].

691 *Friend v The Duke of Richmond* (1667) Hard 460 at 462 [145 ER 547 at 549].

692 *Attorney-General v Brown* (1847) 1 Legge 312 at 316.

693 Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (1820) at 332-334.

other than a possessory title obtained by occupation.⁶⁹⁴ But if the defendant pleaded generally (not guilty or *non intrusit*), then it was sufficient that the Crown's title appeared on the information so that if the defendant was in occupation they would be evicted.⁶⁹⁵ Even where the defendant pleaded specially (a plea of legal title), the proper course was for the Crown to demur and to assert that the plea of legal title was not sufficient or established.⁶⁹⁶ If the defendant could not establish legal title then the Crown would succeed but if the defendant did establish a legal title then the defendant would succeed because even a title concurrent with the Crown was sufficient.⁶⁹⁷ In short, the common law procedure of an information of intrusion did not require the Crown to prove title.

347 Although the Crown did not have to prove title to succeed by demurrer on an information of intrusion, if there were a trial of the Crown's title then for the Crown to prove title it was generally necessary to do so by record. The general rule, subject to a number of exceptions,⁶⁹⁸ was that the Crown was only entitled to a right to possession by "matter of record".⁶⁹⁹ As a general principle, although a "common person" required an entry (real or notional) onto the land to take possession, the Crown required a record.⁷⁰⁰ In the absence of a record, an inquest

694 *Attorney-General v Parsons* (1836) 2 M & W 23 at 25-26 [150 ER 652 at 653-654]. See also *Attorney-General v Hallett* (1847) 1 Exch 211 at 219 [154 ER 89 at 93]; Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (1820) at 333; Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (1908) at 182.

695 *R v Steel* (1834) 1 Legge 65 at 67. See also Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (1820) at 333.

696 Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (1908) at 182.

697 Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (1908) at 182.

698 *The Warden and Commonalty of Sadlers' Case* (1588) 4 Co Rep 54b at 54b [76 ER 1012 at 1014].

699 *Case of the Dutchy of Lancaster* (1561) 1 Plow 212 at 213 [75 ER 325 at 327]; *Crocker v Dormer* (1593) Poph 22 at 27 [79 ER 1143 at 1147]. See also Comyns, *A Digest of the Laws of England* (1766), vol 4 at 414 §D.66; Viner, *A General Abridgment of Law and Equity* (1743), vol 17 at 171 §Z.c [1].

700 Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (1908) at 431.

of office could be held, at which a jury could return an "office of entitlement", finding that the Crown had title if it determined that the facts supported Crown possession. The office of entitlement then served as a record by which the Crown established possession.⁷⁰¹ The possession was "found" by the office of entitlement; the office of entitlement did not create that right.⁷⁰²

348 Cases in Australia prior to 1903 had held that, if the Crown were required to prove title for an information of intrusion, then the relevant body politic described as the Crown would have possession over the relevant land due to records that established that the Crown acquired beneficial ownership at the time of sovereignty. An example is the 1847 decision of the Supreme Court of New South Wales in *Attorney-General v Brown*.⁷⁰³ In that case, the Supreme Court of New South Wales held that the Crown, being the body politic of New South Wales, could bring an information of intrusion against the defendant for entering coal mines and veins of coal under land that the Crown had granted to a third party by an exercise of prerogative power. The grant of the land by the Crown had been subject to "reserv[ing] ... all mines of gold and silver and of coals, with full and free liberty and power to search for, dig, and take away the same".⁷⁰⁴ The New South Wales Supreme Court accepted the submission that the "reservation" of coal was an exception of "all *strata of coal*" from the grant of the land and thus the Court held that the land in those strata was "always the property of the Crown".⁷⁰⁵

349 In *Attorney-General v Brown*, the defendant had argued, in effect, that the Crown could only obtain title to the exclusion of its subjects by matter of record and that, not only was there no record, but the Crown did not have the right to possession or to "any beneficial ownership" of "the waste lands of the Colony".⁷⁰⁶ Therefore, despite the holding back by the Crown of the strata of land that contained coal from the grant, it was argued that the Crown was "not *in possession*"; not entitled to maintain trespass, or bring an information of intrusion, which

701 Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 17 at 258.

702 *Sheffield v Ratcliffe* (1615) Hob 334 at 347 [80 ER 475 at 487]; Finch, *Law or A Discourse Thereof in Four Books* (1759), bk 2 at 82-83; Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 17 at 259; Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (1820) at 247; McNeil, *Common Law Aboriginal Title* (1989) at 96.

703 (1847) 1 Legge 312.

704 *Attorney-General v Brown* (1847) 1 Legge 312 at 313.

705 *Attorney-General v Brown* (1847) 1 Legge 312 at 322-323 (emphasis in original).

706 *Attorney-General v Brown* (1847) 1 Legge 312 at 316.

assumes that [the Crown] had possession".⁷⁰⁷ That submission was rejected by the Supreme Court. Stephen CJ, giving the reasons of the Court, held that "at the time of making a grant of land to a subject, the Crown must be presumed to have had a title to that land" and that, in any event, the Crown was the beneficial owner of the land, saying that "the waste lands of this Colony are, and ever have been, from the time of its first settlement in 1788, in the Crown".⁷⁰⁸

350 The reasoning in *Attorney-General v Brown* that the Crown, being the body politic of New South Wales, had absolute beneficial ownership of "waste lands" was rejected in *Mabo [No 2]* by six members of this Court. This Court held that the Crown had only "radical title", a sovereign power to create title.⁷⁰⁹ Further, the theory that the Crown grant of an estate or interest in land would cause the Crown's radical title to enlarge to a full beneficial title in reversion was rejected by the majority in *Wik Peoples v Queensland*.⁷¹⁰ A reversion required a "residue of an estate left in the grantor".⁷¹¹ But if the grant of land was not made from any estate held by the Crown, but rather from the Crown's radical title, there could be no residue. The Crown's "radical title", its sovereign power to alienate land, was unchanged. Hence, the Crown in *Attorney-General v Brown* had no possessory title that could have supported an information of intrusion.

351 At the centre of the Commonwealth's submission to the contrary on this issue was an observation by Gageler J in *New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act*.⁷¹² After expressing the view that "it is difficult to see how the result in *Attorney-General v Brown* could have been different" even if the view accepted in *Mabo [No 2]*, that the Crown obtained only radical title in the land at sovereignty, had been applied, his Honour said:⁷¹³

"What would have been different would have been the steps in the analysis leading to that result: instead of the grant and reservation being seen as the

707 *Attorney-General v Brown* (1847) 1 Legge 312 at 316 (emphasis in original).

708 *Attorney-General v Brown* (1847) 1 Legge 312 at 316-317.

709 *Mabo [No 2]* (1992) 175 CLR 1 at 15, 48, 50, 69, 81, 118-119, 211.

710 (1996) 187 CLR 1 at 126-129, 155-156, 186-190, 243-245.

711 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 128, quoting Helmore, *The Law of Real Property in New South Wales*, 2nd ed (1966) at 227 and Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 11 at 175.

712 (2016) 260 CLR 232.

713 *New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act* (2016) 260 CLR 232 at 277 [112].

exercise by the Crown of a proprietary right which the Crown had as the original absolute owner of all land in New South Wales on and from settlement in 1788, the grant and reservation would have been seen as an exercise by the Crown of non-statutory executive power which had the consequence of creating rights of ownership in respect of the land in question, in the Crown and in the lessee, on and from the time of the exercise of that non-statutory executive power in 1840. Either way, the Crown as represented by the Attorney-General would still have had the possession necessary to found an action for intrusion."

352 With the greatest of respect, this reasoning is inconsistent with the decision of the majority of this Court in *Mabo [No 2]*. In *Attorney-General v Brown*, neither the grant of the lease nor the "reservation" created rights of ownership in the Crown (the body politic of New South Wales) in respect of the land in question. The grant of the lease was the exercise of sovereign power to create rights in the *lessee*. Even if a lessee's possessory rights could be described as rights of "ownership", *Wik Peoples v Queensland* established that the rights of a pastoral "lessee" would generally be taken not to be leasehold rights.⁷¹⁴ As for the "reservation", that only withheld whatever the Crown already had (radical title) even if it was mistakenly believed at the time that the Crown had absolute beneficial ownership. Therefore, the grant of the lease in *Attorney-General v Brown* did not in any sense *create* rights of ownership in the Crown, as a grantor, by the creation of rights in favour of the lessee.

353 The result in *Attorney-General v Brown* cannot be defended after the decision in *Mabo [No 2]*. As explained above, sovereign power to grant title ("radical title") is not possession, nor is it a possessory title; "[t]here is no foundation for the conclusion that by annexation the Crown acquired a proprietary title or freehold possession of occupied land. It acquired a radical title only."⁷¹⁵ Radical title has never been sufficient to support an action for trespass or an information of intrusion (which was in the nature of an action for trespass⁷¹⁶). If radical title had been sufficient to support an action for trespass, then the Crown would have been in the unique position, unlike any other person, of being able to bring an action for trespass against any person, with any title, because trespass

714 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 155. See also at 132-133, 167, 204-205, 261.

715 *Mabo [No 2]* (1992) 175 CLR 1 at 211.

716 Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (1820) at 332.

would not have required the Crown to have a right to "immediate and exclusive possession".⁷¹⁷

354 If radical title had been sufficient to support an action for intrusion, then Chief Baron Hale would have been wrong to assume that an information of intrusion required the King to be "in possession by title".⁷¹⁸ Baron Alderson would have been wrong to say that a defendant to an information of intrusion was entitled to hold the possession until the Crown proved that it had a title.⁷¹⁹ And the English Parliament would have been legislating nonsense when it required the Crown to prove title to succeed on a defendant's plea of the general issue in an information of intrusion where the Crown had been out of possession, or had not taken profits from the land, for the previous 20 years.⁷²⁰

355 The only modern suggestion that the Crown always had title sufficient to support an action for intrusion was in *Mabo [No 2]* itself,⁷²¹ where, after a footnote reference to a page of a separate judgment of Dixon J which correctly observed that a squatter can acquire a possessory title to an estate in fee simple in land by trespass,⁷²² Dawson J said that "any possessory title would not withstand the assertion by the Crown of its radical title". In other words, in a system of relativity of title, even if native title rights and interests were equated with a freehold estate, the Crown's radical title was the strongest right to possession. That was a dissenting view.

356 The dissenting view of Dawson J was rejected by six other members of the Court. Now, almost 33 years later, and after passage of the *Native Title Act*, it is too late to revisit that issue. All parties and interveners in this appeal, and in the Full Court of the Federal Court, were correct not to make any submission that radical title was an "estate" in land in any real sense, particularly in the sense of creating a fiction of possession sufficient for an information of intrusion and prevailing over other rights to possession. If such a submission had been made, I would not have accepted it. Apart from its direct inconsistency with the decision of all members of the majority in *Mabo [No 2]*, for hundreds of years it has been the case that the Crown's title to land is "as dependent on possession as a

717 *Barker v The Queen* (1983) 153 CLR 338 at 341-342.

718 *Friend v The Duke of Richmond* (1667) Hard 460 at 460 [145 ER 547 at 547].

719 *Attorney-General v Parsons* (1836) 2 M & W 23 at 26 [150 ER 652 at 654].

720 *Intrusions Act 1623* (21 Jac 1 c 14).

721 (1992) 175 CLR 1 at 163.

722 *Wheeler v Baldwin* (1934) 52 CLR 609 at 632.

subject's".⁷²³ Relativity of title in a real and not a fictional sense has been "the constant barrier between the [C]rown and the subject".⁷²⁴

(iv) *The statutory regime in 1903*

357 The interpretation of the exception and reservation clause in the 1903 Lease also requires an understanding of the historical and statutory context in which the 1903 Lease was granted. An important part of that context is that in 1903 there was no legislation in South Australia that vested property in all minerals in the Crown. This was a natural consequence of: (i) the widespread understanding, and holding in *Attorney-General v Brown*,⁷²⁵ that the Crown became the beneficial owner of all land in the colony upon acquisition of sovereignty; and (ii) the principle at common law that the owner of land also owned all the substrata beneath the land, and everything contained within it, with the exception of the royal metals.⁷²⁶

358 The legislative regime that was in place in 1903 preserved that understanding of the rights of the Crown to the substrata by exceptions from freehold and leasehold grants of land. Section 24 of the 1899 Act relevantly provided for "covenants, exceptions, reservations, and provisions" mentioned in Sch A to the Act to be included in every pastoral lease (subject to irrelevant exceptions). In addition to a list of "[c]ovenants by the lessee", Sch A included:

"An exception or reservation in favor of the Crown, and all persons authorised of all minerals, metals, gems, precious stones, coal, and mineral oils together with all necessary rights of access, search, procurement, and removal, and all incidental rights and powers".⁷²⁷

Section 25 of the 1899 Act prohibited any lease granted under the Act from authorising the lessee to "carry on mining operations of any description whatsoever upon the land leased" and preserved only the liberty of the lessee "to utilise the surface of the land, or any part thereof".

359 Consistently with the discussion of exceptions and reservations above, the words "exception" and "reservation" in the 1899 Act had a history of being treated as describing true exceptions (and not reservations) when used in relation to mines and minerals. The English and Scottish courts had repeatedly held that an

723 See McNeil, *Common Law Aboriginal Title* (1989) at 94.

724 *Burgess v Wheate* (1759) 1 Eden 177 at 188 [28 ER 652 at 656].

725 (1847) 1 Legge 312 at 316-317.

726 See above at [330].

727 1899 Act, Sch A, item (1).

"exception" or an "exception and reservation" of mines was a holding back from the grant of the owner's title to the substrata rather than a re-grant from the initial grantee to the initial grantor of a *profit à prendre*: "where a freeholder grants lands excepting the mines, he intends, first of all, as a matter of construction, to except not merely minerals, but the portion of the subsoil containing the minerals; in other words, to retain a stratum of the property ... [T]he word 'mines' meant subsoil containing the minerals, and not merely the minerals themselves".⁷²⁸

360 The same was generally true of "reservations" of mines and minerals. In *Duke of Hamilton v Graham*,⁷²⁹ when considering a reservation of coal and limestone, Lord Westbury said that "[t]he effect of the reservation [ie exception] in that grant was to show that the [grantor] intended to retain the *plenum dominium* over the mines", and that the exception of the coal and limestone was a holding back of the "undiminished undeteriorated absolute estate in the mines".

361 The same must also be true of an exception of minerals generally. And this must be the meaning of loose expressions in similar contexts such as minerals being "the property of the Crown",⁷³⁰ minerals being "in the ownership of the Crown",⁷³¹ or, in *Wade v New South Wales Rutile Mining Co Pty Ltd*,⁷³² "minerals belonging to the Crown". Indeed, the *Mining on Private Lands Act 1894* (NSW), which was considered in *Wade v New South Wales Rutile Mining Co Pty Ltd*,⁷³³ provided that where a lease to mine was granted with respect to the subsurface only, the Governor was empowered to "stipulate at what vertical depth from the surface such lease shall commence".⁷³⁴

362 The concern of the 1899 Act, as well as the *Northern Territory Crown Lands Act 1890* (SA) ("the 1890 Act"), which the 1899 Act developed, incorporated, and to the greatest extent possible was to be "read as one with",⁷³⁵ was therefore to ensure an exception was created from any grant of an estate by a

728 *Eardley v Granville* (1876) 3 Ch D 826 at 835; *Batten Pooll v Kennedy* [1907] 1 Ch 256 at 265. See also *Proud v Bates* (1865) 34 LJ (Ch) 406 at 411.

729 (1871) 9 M (HL) 98 at 111-112.

730 *Colon Peaks Mining Co v Wollondilly Shire Council* (1911) 13 CLR 438 at 447.

731 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 23.

732 (1969) 121 CLR 177 at 189, 193.

733 (1969) 121 CLR 177 at 188-189.

734 *Mining on Private Lands Act 1894* (NSW), s 6.

735 1899 Act, s 1.

lease under the 1899 Act. The exception would be for the substrata of relevant land, with a liberty in favour of those acting in right of, or with the authority of, the Crown (the body politic of South Australia) to use the surface of the land to enter the excepted strata. No new property rights were created by the adoption in any clause of a lease of the terms of item (1) of Sch A to the 1899 Act.

363 This interpretation is entirely consistent with the reasoning and conclusion of the majority of this Court in *Wik Peoples v Queensland*,⁷³⁶ that the rights conferred by particular "pastoral leases" under Queensland legislation⁷³⁷ were rights to use the surface of the land for pastoral purposes and were not property rights of exclusive possession. Indeed, on this appeal the Commonwealth conceded that the legislation considered by this Court in *Wik Peoples v Queensland* was directly comparable to the 1899 Act, and that the 1903 Lease was of the same nature as the leases considered in *Wik Peoples v Queensland*, in that it did not confer rights to exclusive possession of the surface.⁷³⁸ That properly made concession reinforces the interpretation of the prohibition in s 25 of the 1899 Act, upon mining operations, as ensuring the preservation of the liberty of the lessee "to utilise the surface of the land, or any part thereof", and the "exception or reservation" required by s 24 and item (1) of Sch A as ensuring the *preservation* of the rights believed to be held by the Crown in relation to the subsurface, rather than the *creation* of new rights.

(v) *Interpreting the exception and reservation clause in the 1903 Lease*

364 The discussion above compels an interpretation of the exception and reservation clause in the 1903 Lease as concerning an exception in relation to the substrata of the land with the purpose of ensuring the preservation of, and non-interference with, all Crown rights to the substrata whatever those rights might be. This interpretation of the exception and reservation clause is further reinforced by the breadth of the matters it describes as "except[ed] and reserv[ed]", including the "sand" and "substances containing ... claystone" as well as all minerals, metals, and ores, and substances containing the various minerals, metals, and ores. Although the meaning of the word "minerals" always depends upon context, Lord Macnaghten described "minerals" as a term that "[i]n its widest signification

736 (1996) 187 CLR 1.

737 *Land Act 1910* (Qld); *Land Act 1962* (Qld). See *Wik Peoples v Queensland* (1996) 187 CLR 1 at 112-115.

738 See *Wik Peoples v Queensland* (1996) 187 CLR 1 at 155; see also at 132-133, 167, 204-205, 261.

... probably means every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life".⁷³⁹

365 Since the exception and reservation clause created a true exception, and in light of (as explained below) the then prevailing *assumption* of full beneficial ownership by the Crown of that substrata of land, the liberty of access given by the lessee to the Minister must have been a true (non-exclusive) liberty as it had been held to be in *The Earl of Cardigan v Armitage*,⁷⁴⁰ given only for the purposes of ensuring the Crown's full access to the relevant substrata. Since all Crown rights were preserved by the exception and reservation clause, it would not have been seen as necessary, at the time the 1903 Lease was granted, for the Crown to exercise its radical title to create a profit à prendre (or any other property right) over the substrata that the Crown assumed that it owned. Nor, as is now known,⁷⁴¹ was there any power for the "lessee" of the non-exclusive 1903 Lease to grant a profit à prendre to the Crown "not merely as a license [from the lessee to the Crown], but as a grant [that is, an estate or interest] also".⁷⁴² For that reason, the submission of the Northern Territory that the liberty of the Minister created a profit à prendre should not be accepted.

366 There is, however, one aspect of the exception and reservation clause about which the submission of the Northern Territory should be accepted. That is the "exception" and "reservation" in relation to "all trees and wood standing and being on the said lands". For the reasons already explained, that part of the clause could not operate as an exception for the strata above, on, and below the area of space that corresponded with the tree and its roots. The only proper meaning that can be given to that part of the clause, in light of the decision of this Court in *Wik Peoples v Queensland*,⁷⁴³ is that it simply restricted the liberty of the pastoral lessee to access the land, in so far as that liberty would have otherwise extended to trees. In this respect the Commonwealth was correct in oral submissions to accept that the clause operated differently in relation to trees. The Commonwealth thus eschewed any submission that the effect of the clause in relation to trees meant that the overall effect of the clause was to create a profit à prendre in relation to both trees and minerals. The submissions of the Northern Territory adopted a similar approach.

739 *Magistrates of Glasgow v Farie* (1888) 15 R (HL) 94 at 108.

740 (1823) 2 B & C 197 at 211 [107 ER 356 at 362]. See also *Duke of Hamilton v Graham* (1871) 9 M (HL) 98 at 109.

741 *Wik Peoples v Queensland* (1996) 187 CLR 1.

742 *Muskett v Hill* (1839) 5 Bing (NC) 694 at 707 [132 ER 1267 at 1272].

743 (1996) 187 CLR 1.

367 Although describing the exception and reservation clause as concerning "title to the minerals" rather than the substrata of the land, the Commonwealth therefore conceded that the clause was a true exception, withholding rights from the conferral of rights upon the lessee in the 1903 Lease. But the Commonwealth submitted that the Crown, being the body politic of South Australia, must have intended that the exception and reservation clause serve *also* to create a title to that subsurface land in the Crown. In this submission, which was not relied upon by the Northern Territory although the asserted result was supported, the Commonwealth argued that the exception and reservation clause was necessary to create a record to support an information of intrusion by the Crown, without which there would have been no way to evict a trespasser over that part of the land.

368 The Commonwealth correctly pointed to the doubt in 1903 about whether the Crown could bring an action for ejectment due to the legal fiction that the Crown could never be factually dispossessed.⁷⁴⁴ And the Commonwealth effectively asserted that unless the exception and reservation clause also involved the positive exercise of sovereign power to create a record of beneficial ownership, an information of intrusion would not have been available and therefore there would have been no remedy against a trespasser to the substrata of land with which the exception and reservation clause was concerned.

369 That submission is misconceived for three reasons. First, even if the exception and reservation clause were intended to stand in place of an inquest of office to establish a record of Crown possession for an information of intrusion, the clause (like the inquest) would not *create* that right of possession. It would merely be the formal record sufficient to satisfy the requirements of the information of intrusion.

370 Secondly, the premise of the submission (that without a right of possession created by the exception and reservation clause there would be no remedy against a trespasser) is wrong. The premise misunderstands the procedure for an information of intrusion. As explained above, if a defendant pleaded specially to the information of intrusion, then the natural and proper response of the Crown was to demur to that pleading. The defendant would be required to prove a legal title that did not merely arise from the fact of the defendant's possession. The Crown would not need to prove title. Further, it is open to serious doubt that the only remedy against a trespasser on the subsurface of land subject to a pastoral lease was by an information of intrusion brought by the Crown. Although there were doubts about whether the Crown could bring an action for ejectment, there

744 Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 17 at 257. See also *The Commonwealth v Anderson* (1960) 105 CLR 303 at 313; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 191.

may have been statutory remedies that could have been sought by the Crown on the basis that the subsurface remained "lands vested in the Crown".⁷⁴⁵

371 Thirdly, and in any event, although *Mabo [No 2]* established that the Crown was not in possession and hence could not have established an information of intrusion, both the positive state of the law, and the ubiquitous understanding, in 1903 was that it was established by record that the Crown was the beneficial owner of any "waste land[]" in Australia that was excepted from a grant.⁷⁴⁶ The purpose of a conveyance, and the manifested intentions of the parties to the conveyance, cannot be retrofitted based upon new understandings of the law nearly a century later.

V. Conclusion

372 The appeal should be dismissed with costs.

⁷⁴⁵ 1890 Act, ss 96, 97, 106, read with 1899 Act, s 1.

⁷⁴⁶ *Attorney-General v Brown* (1847) 1 Legge 312 at 316.

373 STEWARD J. Save in what follows, I generally, and respectfully, agree with the reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ and the reasons of Gordon J in relation to grounds one and two. I also generally agree with the reasons of Gordon J in relation to ground three, which reject the appellant's claim that the grant of Pastoral Lease No 2229, pursuant to the *Northern Territory Land Act 1899* (SA) ("the NT Land Act"), validly extinguished any subsisting native title rights to minerals in the claim area. However, I would decide ground three differently for the reasons expressed below. I otherwise very gratefully adopt the description of the facts set out in the reasons of Gordon J.

374 Something first should be said about language and native title. This is a property law case. The "property" in issue is that identified in s 51(xxxi) of the *Constitution*. That "property" is not those traditional and various laws and customs acknowledged and observed by Indigenous Australians which are the source of native title. Rather, it is the common law's *recognition* of native title. That recognition manifests itself by the *enforcement* of rights and interests over land and water by the common law. There will often be nothing "metaphysical" about the exercise of those rights by Indigenous Australians. In contrast, underlying native title rights and interests, as classes of foreign laws, reflect religious or spiritual connections to land. How they do, and the extent to which they might do, would depend upon the particular Indigenous group in question, and would be a matter for evidence, including anthropological expert evidence. But the recognition by the common law, endlessly practical in its unique genius, that is achieved by *enforcement* of native title is not concerned with those underlying connections, save for the purposes of proving the continued existence of native title. Those connections are otherwise a matter for each Indigenous group and person.

375 It is in that context that the use of value-laden language in a native title case to describe the common law's enforcement of native title rights is, with great respect, perhaps unhelpful. Comparisons between the nature and quality of the various kinds of native title which endure, as against the nature and quality of the common law and the *Constitution*, are of no assistance in the resolution of this appeal. I thus, and with profound respect, cannot agree with some of the language used by Gordon J to the extent that it seeks to compare native title with Australian domestic law. To repeat: this is a property law case. And, ultimately, what is being sought is a determination of certain native title claims and then "compensation".⁷⁴⁷

747 I also do not agree with the reliance upon the so-called implied freedom of political communication at [193] of Gordon J's reasons; I do not agree with the present form of that implication.

Preliminary issue

376 This case has proceeded as a demurrer to the whole of the first respondent's statement of claim. The utility of such a procedure, used to discern the rights of parties, is, however, premised on a statement of claim that "exhaust[s] the universe of relevant factual material"⁷⁴⁸ and which has been drawn "so as to allege with distinctness and clearness the constituent facts of the cause of action".⁷⁴⁹ As Gummow and Hayne JJ observed in *Wurridjal v The Commonwealth*:⁷⁵⁰

"Much thus depends upon the statement of material facts in the pleading which attracts the demurrer and thus close attention will be required to the terms of the statement of claim by the plaintiffs."

377 The case before the Court is based upon two critical assumptions: that the first respondent held native title over the claim area, a matter that remains in dispute, and secondly, that such title gave the first respondent the right to take and use all the minerals below the claim area. The second claim manifests itself as no more than the barest of assertions in the statement of claim. It is pleaded thus at para 52:

"At the present time, the rights and interests held by the Gumatj in respect of the Claim Area, in accordance with traditional Yolngu law and custom, are:

- a. where native title has not been extinguished to any extent or where prior extinguishment must be disregarded – the Exclusive Native Title Rights;
- b. where exclusive native title has been partially extinguished by an earlier act – the following rights – the Non-Exclusive Native Title Rights:

...

- iv. the right to access, take and use for any purpose the resources of the Claim Area (including resources below, on or above the surface of the Claim Area, such as minerals on or below the surface of the Claim Area)".

⁷⁴⁸ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357 [50].

⁷⁴⁹ *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142.

⁷⁵⁰ (2009) 237 CLR 309 at 368 [119].

378 Save for a reference to "thin yam found within the bauxite soils" (see para 530(hh)(v)), the claim is repeated with no greater detail, indeed in some cases in less detail, at paras 8, 27(b), 28(c), 522 and 530(cc)(iv)-(v). With great respect, no particulars or details have been provided as to how in the past the Gumatj clan accessed, took and used, for example, bauxite from under the ground. In a case which asserts non-exclusive rights to, for example, bauxite, and which may require a comparison of competing rights, that is problematic. It falls short of exhausting the universe of material facts relevant to the first respondent's case. In that respect, ground three should be confined to the right to take and use, for any purpose, one resource only, namely "minerals", and not all resources. That is the basis upon which the appeal proceeded.

379 In *Mabo v Queensland*,⁷⁵¹ the demurrer concerning the effect of the *Racial Discrimination Act 1975* (Cth) on the *Queensland Coast Islands Declaratory Act 1985* (Qld) was found by Mason CJ to be "unsuitable".⁷⁵² That was partly because the pleaded rights and interests of the Meriam people over the Murray Islands had not been precisely defined or described, and partly because those rights and interests remained contested; they were assumed to exist under the demurrer. Of this, Mason CJ said:⁷⁵³

"The need to make this assumption, when it is unaccompanied by a precise definition or description of the rights and interests said to have been owned and enjoyed by the Murray Islanders presents a formidable obstacle to the resolution of the issues which have been debated."

380 With great respect, a similar criticism can be made of the demurrer now before this Court. However, as no complaint has been made of it, nothing further should be said.

Inconsistency and the assertion of sovereign power

381 In *The Commonwealth v Yarmirr*,⁷⁵⁴ Gleeson CJ, Gaudron, Gummow and Hayne JJ explained the concept of "radical title" in these terms:⁷⁵⁵

"[W]hen the Crown acquired sovereignty over land it did not acquire beneficial ownership of that land in the same way as a subject may, by grant

751 (1988) 166 CLR 186.

752 (1988) 166 CLR 186 at 195.

753 *Mabo v Queensland* (1988) 166 CLR 186 at 196.

754 (2001) 208 CLR 1.

755 (2001) 208 CLR 1 at 51 [47] (footnote omitted).

from the Crown, acquire beneficial ownership. What the Crown acquired was a 'radical title' to land, a 'substantial and paramount estate, underlying the [native] title'. The native title rights and interests could co-exist with that radical title and, although inherently fragile, could, so long as they existed, be seen as a burden on that radical title."

382 The concept of "radical title" does not, in any way, involve any concession or diminishment of sovereignty over Australia. As Gleeson CJ, Gummow and Hayne JJ observed in *Members of the Yorta Yorta Aboriginal Community v Victoria*:⁷⁵⁶

"But what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible."

383 In *Queensland v Congoo*,⁷⁵⁷ French CJ and Keane J explained the idea of the extinguishment of native title in these terms:⁷⁵⁸

"'Extinguishment' describes the result of applying principles by which common law recognition is withheld or withdrawn in the face of legislative or executive acts affecting the land or waters in which native title is said to subsist."

384 In *Mabo v Queensland [No 2]*,⁷⁵⁹ Brennan J considered how native title might be extinguished by the immutable acquisition, and then existence and exercise, of Australian sovereign power. His Honour said:⁷⁶⁰

"A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title."

756 (2002) 214 CLR 422 at 443-444 [44].

757 (2015) 256 CLR 239.

758 (2015) 256 CLR 239 at 263-264 [31].

759 (1992) 175 CLR 1.

760 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64 (footnotes omitted).

385 And in *Western Australia v The Commonwealth (Native Title Act Case)*,⁷⁶¹
Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said:⁷⁶²

"At common law, however, native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title."

386 In other words, the circumstances in which an inconsistency sufficient to extinguish native title may exist are not limited to where there has been a grant of a proprietary interest in land, such as an estate in fee simple. But a law which merely regulates an interest in, or the use of, land may not create a legal regime sufficiently inconsistent with native title; in such a case native title rights will endure. As French CJ and Keane J said in *Queensland v Congoo*:⁷⁶³

"The high threshold of attributed legislative intention flows from the seriousness of the consequences of extinguishment for indigenous inhabitants. So a law which merely regulates the enjoyment of native title or creates a regime of control consistent with its continued enjoyment does not, on that account only, reveal an intention to extinguish or impair native title rights and interests."

387 But a law which does more than regulate the enjoyment of native title may constitute an assertion and exercise of sovereignty which is inconsistent with the enjoyment of native title rights, in whole or in part. In such a case, native title may also be extinguished. That is because regulation "may shade into prohibition".⁷⁶⁴

388 In *Akiba v The Commonwealth*,⁷⁶⁵ French CJ and Crennan J observed that "competing rights" might result in inconsistency.⁷⁶⁶ They cited the following

761 (1995) 183 CLR 373.

762 (1995) 183 CLR 373 at 439 (footnote omitted).

763 (2015) 256 CLR 239 at 264 [32] (footnotes omitted); see also *Akiba v The Commonwealth* (2013) 250 CLR 209 at 230 [33].

764 *Yanner v Eaton* (1999) 201 CLR 351 at 372 [37]; *Akiba v The Commonwealth* (2013) 250 CLR 209 at 241 [64]. See also *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 188-190, 211-212; *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 148-149, 155-156; *Brunswick Corporation v Stewart* (1941) 65 CLR 88 at 93-94, 95; *Municipal Corporation of City of Toronto v Virgo* [1896] AC 88 at 93-94.

765 (2013) 250 CLR 209.

766 (2013) 250 CLR 209 at 230 [31].

passage from *Wik Peoples v Queensland*,⁷⁶⁷ and said that in the case of competing rights the question was:⁷⁶⁸

"whether the respective incidents thereof are such that the existing right cannot be exercised without abrogating the statutory right. If it cannot, then by necessary implication, the statute extinguishes the existing right."

389 In that respect, care must be taken in this matter, which concerns the possible extinguishment of native title at common law rather than for the purposes of the *Native Title Act 1993* (Cth). This case thus does not concern in any way s 211 of that Act, which preserves particular native title rights in the face of certain regulatory laws, and which featured heavily in the reasons in *Yanner v Eaton*⁷⁶⁹ and *Akiba v The Commonwealth*⁷⁷⁰ (considered below).

390 By reason of the foregoing, the parties here were correct in observing that s 107 of the *Mining Ordinance 1939* (NT) ("the 1939 Mining Ordinance") had the effect, subject to the *Constitution*, of extinguishing any native title rights to minerals over the claim area. Section 107 provided:

"Subject to the provisions of this Ordinance and the regulations, gold, silver and all other minerals and metals on or below the surface of any land in the Territory, whether alienated or not alienated from the Crown, shall be and be deemed to be the property of the Crown:

Provided that this section shall not apply in the case of land granted by the Crown in fee simple, in which case the ownership of gold and minerals shall depend on the terms of any reservation (if any) of gold or other minerals."

391 The foregoing is consistent with the conclusion of this Court in *Western Australia v Ward*,⁷⁷¹ which, amongst other issues, addressed the effect of s 117 of the *Mining Act 1904* (WA). Section 117 vested property in minerals in the Crown. Gleeson CJ, Gaudron, Gummow and Hayne JJ said:⁷⁷²

767 (1996) 187 CLR 1 at 185.

768 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 230 [31].

769 (1999) 201 CLR 351.

770 (2013) 250 CLR 209.

771 (2002) 213 CLR 1.

772 *Western Australia v Ward* (2002) 213 CLR 1 at 186 [384] (footnotes omitted).

"[U]nlike the fauna legislation considered in *Yanner v Eaton*, the vesting of property in minerals was no mere fiction expressing the importance of the power to preserve and exploit these resources. Vesting of property and minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question no matter whether the substances were on or under alienated or unalienated land."

392 As it happens, and for the reasons given below, the Crown had already asserted its sovereign rights over minerals in the Northern Territory before that territory was surrendered to the Commonwealth. That assertion by the Crown was inconsistent with any enduring native title rights to minerals.

South Australian regulation of mining in the Northern Territory

393 At common law, apart from royal metals, the owner of an estate in fee simple owned all of the minerals under the land. In Australia the law has since changed. The position may be summarised thus:⁷⁷³

"The present position in Australia regarding mineral ownership stands in stark contrast with the common law. The norm is public rather than private ownership."

394 That "norm" existed in the Northern Territory since at least 1903. That is the short answer to ground three. An examination of the law concerning the mining of natural resources in the Northern Territory before 1911 bears that out.

395 In 1873, the *Northern Territory Gold Mining Act 1873* (SA) was passed into law. Section 26 of that Act prescribed the rights which were to be conferred on the holder of a miner's right in the Northern Territory. One of these, contained in s 26(x), conferred ownership of gold found by a miner who held a miner's right. It provided:

"And subject as aforesaid, during such continuance as aforesaid, all gold then being in and upon any such parcel, shall (except as against Her Majesty) be the absolute property of the person or persons for the time being in the lawful occupation of such parcel".

396 In 1882, South Australia enacted the *Northern Territory Crown Lands Consolidation Act 1882* (SA). Part V of that Act was headed "Provisions respecting Mining". Pursuant to s 61 in Pt V of that Act, waste land in the Northern Territory could be leased for the purposes of mining for any mineral or metal, other than gold. Pursuant to s 65, each lease bound the lessee to mine and work the land. Leases were to be in the form appearing in the Tenth Schedule to the Act. One of

773 Lang and Crommelin, *Australian Mining and Petroleum Laws* (1979) at 12 [202].

the clauses which appeared in the Tenth Schedule gave a lessee the liberty "to dig sink drive make and use all such pits shafts levels watercourses and other works which it may be necessary to use in finding seeking for winning working and obtaining the copper and other ores not being gold therein". The lease also permitted the lessee to separate ores and minerals from the soil and to smelt or reduce such ore into metal.

397 In 1888, South Australia enacted the *Northern Territory Mineral Act 1888* (SA). It repealed Pt V of the *Northern Territory Crown Lands Consolidation Act 1882* (SA).⁷⁷⁴ It provided in s 9 for the grant of leases of Crown lands "for mineral purposes". The term "Crown lands" was defined in s 3 to mean all lands in the Northern Territory except lands reserved for or dedicated to any public purpose, lands granted in fee simple by or on behalf of the Crown, and lands subject to any lease with a right of purchase or any lease or licence for mineral purposes granted by or on behalf of the Crown. Pursuant to s 10, a mineral lease conferred ownership of minerals (except gold) found in the leased land on the leaseholder. It provided:

"Every mineral lease ... shall entitle the lessee during the currency [of the lease] to mine for and dispose of for his own benefit all metals and minerals upon the leased land except gold".

398 In 1893, South Australia enacted the *Mining Act 1893* (SA). It did not apply to the Northern Territory.⁷⁷⁵ It was otherwise a comprehensive Act for the public administration of mining in South Australia and provided for ownership of any minerals found and won by miners. By s 13, the province of South Australia was to be divided into "mining districts". Section 26 provided:

"Prospecting and mining shall be permitted pursuant to this Act by virtue of—

- (a) A miners' right:
- (b) A gold lease:
- (c) A mineral lease:
- (d) A coal lease:
- (e) An oil lease: or
- (f) A miscellaneous lease".

⁷⁷⁴ *Northern Territory Mineral Act 1888* (SA), s 2.

⁷⁷⁵ *Mining Act 1893* (SA), s 6.

399 Each of the foregoing (with the exception of "miscellaneous lease") was a defined term. Thus, for example, pursuant to s 32(b), the holder of a miner's right had "the preferential right to a mineral lease, and in the meantime the right to mine on the claim for any metals or minerals, except gold, and the ownership of all such metals and minerals when found". The holder of a miner's right could obtain a mineral lease. Pursuant to s 58(ii), the holder of such a lease could only use the leased land for mining. Pursuant to s 55, "[t]he holder of a gold lease under this Act shall be entitled by virtue of his lease to mine for all metals, minerals, coal, and oil". The word "metals" was defined to include gold.⁷⁷⁶ This Act also specifically encouraged mining. Pursuant to s 89, the Minister could grant a reward to the "actual discoverer of any new mineral district, or of any new and valuable deposit of metals, minerals, coal, or oil".

400 In 1903, South Australia passed the *Northern Territory Mining Act 1903* (SA) ("the NT Mining Act"). Like the *Mining Act 1893* (SA), this Act was a sweeping measure for the exploitation of mining. It represented a comprehensive exercise of sovereignty over the natural resources of the Northern Territory. Section 6 provided that the Minister may from time to time "erect the whole or any portion of the Northern Territory into a mining district or districts". Pursuant to s 16, a "miner's right" could be granted and, by reason of s 17, such a right would have been "available for the whole of the Northern Territory" (with a limited exception). Section 19 set out the entitlements of the holder of a miner's right. The first listed was to "take possession of, mine, and occupy Crown lands for mining purposes". The term "Crown lands" was defined in s 4 to be all lands "vested in His Majesty in the Northern Territory" except lands dedicated to any public purpose, lands granted in fee simple, lands subject to any lease with a right to purchase, lands held under any gold mining lease or mineral lease, and certain other lands. Section 20(1) provided that any person or company taking up and occupying Crown lands by reason of a miner's right shall "be deemed in law to be possessed (except as against His Majesty) of such land so taken up and occupied".

401 Section 20(2) is important. It provided for a miner to take title absolutely to minerals won under a miner's right. It stated (emphasis added):

"*All gold and other minerals* found upon any land so taken up and occupied for the purpose of mining for gold, *and all minerals* other than gold found upon any land so taken up and occupied for the purpose of mining for minerals other than gold, shall be the absolute property of the holder of such miner's right in lawful occupation of such land."

402 Part VI of the NT Mining Act also addressed gold mining leases. Pursuant to s 32, gold mining leases could be issued for, amongst other purposes, "mining

776 *Mining Act 1893* (SA), s 4.

for gold".⁷⁷⁷ Pursuant to s 33, the holder of a gold mining lease was entitled to mine for "all" metals and minerals upon the land. Pursuant to s 34, rent was payable out of the net profits from the sale of *all* metals and minerals obtained from the land the subject of the lease.

403 Part VII of the NT Mining Act also dealt with mineral leases.⁷⁷⁸ Section 40 provided that a mineral lease "shall entitle the lessee ... to mine for and dispose of for his own benefit *all* metals and minerals upon the leased land except gold" (emphasis added). Pursuant to s 43 rent was payable from the "net profits obtained from the occupation and working of *all* mines and the sale of *all* metals and minerals" (emphasis added).

404 The NT Mining Act otherwise had extensive provisions about, for example, the "Amalgamation of Claims and Leases" (Pt IX); the "Forfeiture of Leases" (Pt X); "Wardens, Their Powers and Duties" (Pt XI); "Inspection of Mines" (Pt XIII); and the making of regulations (Pt XIV). Part XVI dealt with "Miscellaneous Matters". Section 138, found in that Part, is important. It rendered it illegal for any person to mine or prospect without lawful authority granted under the NT Mining Act or some preceding Act. It provided:

"If any person not holding a miner's right, or not otherwise authorised to mine or prospect by virtue of this Act or some enactment heretofore in force, shall mine or prospect, whether on his own behalf or on behalf of any other person, whether or not the lawful possessor of any claim, or as partner with any such person, he shall be liable, on conviction, to pay for each such offence a penalty not exceeding Two Pounds; and the burden of proving that he is the holder of a miner's right, or otherwise authorised as aforesaid, shall rest upon him."

405 Section 139 is also important. It permitted the warden to impose an on the spot "miner's right fee", and also a fine, on a person found to be mining or prospecting on any Crown lands who was unable to produce their miner's right authorising such activity, or where they could not satisfactorily account to the warden for not having a miner's right. If the fee and fine was not paid immediately, the warden could cause the offender to be arrested and to be imprisoned "in the nearest lockup or the nearest gaol".

406 Section 142 is again important. Any person found working for or removing gold or minerals without permission could be forcibly ejected by a warden or a police officer and "on conviction thereof shall forfeit and pay for every such

⁷⁷⁷ NT Mining Act, s 32(1).

⁷⁷⁸ It should be noted that the NT Mining Act did not create any entitlement to a mineral lease: see s 56.

offence any sum not exceeding Fifty Pounds, or in default of payment to be imprisoned for any term not exceeding six months".

407 Several features of the NT Mining Act should be noted:

- (a) first, the Act was an unambiguous legislative regime for the public control of all minerals under Crown lands in the Northern Territory;
- (b) secondly, the Act was not limited to the mere regulation of natural resources. It delivered title to those minerals to the holder of a miner's right, or a gold or mineral lease;
- (c) thirdly, to be able to deliver unencumbered title to the natural resources an implied, but nonetheless necessary, conclusion must be drawn that there had been, at least by the enactment of the NT Mining Act, an assertion of state sovereignty or complete dominion over all relevant minerals on Crown lands.⁷⁷⁹ Whether this amounted to beneficial ownership is of no moment; what is crucial is that the State had aggregated to itself all such minerals for their eventual disposal to the holders of mineral tenements;
- (d) fourthly, in the case of each mineral tenement, title was capable of being won in relation to "all" minerals in the claim area. There was no possibility of any sharing of title with a third party without the permission of the owner of the mineral tenement;
- (e) fifthly, all mining on Crown lands in the Northern Territory could only take place in accordance with the regime set out in the NT Mining Act. Otherwise, a fine had to be paid and, if not paid, imprisonment might have followed; and
- (f) sixthly, the reach of the regime created by the NT Mining Act was exhaustive. Save for exceptions *inter alia* for previously issued mining rights, it covered all of the Crown lands of the Northern Territory.⁷⁸⁰ In that respect, the mineral resources of the Northern Territory are finite and the design of the NT Mining Act was to facilitate "operations for getting at and getting out minerals".⁷⁸¹ And when such minerals were found and then won, they were expected to be used or sold in some way.⁷⁸² Such a regime

⁷⁷⁹ Insofar as there had not been previous mineral tenements granted under previous enactments, such as the *Northern Territory Mineral Act 1888* (SA).

⁷⁸⁰ NT Mining Act, s 4.

⁷⁸¹ *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 194.

⁷⁸² See, for example, s 41(3) of the NT Mining Act.

necessarily could not co-exist with a native title right to take and use mineral resources. And mineral resources are unlike other natural resources, such as fish stocks, that can be replenished and more naturally shared.⁷⁸³

408 The foregoing is consistent with the requirement that pastoral leases in the Northern Territory contain a reservation in favour of the Crown of all minerals. Thus, in the NT Land Act, s 24 provided that every pastoral lease must contain the "covenants, exceptions, reservations, and provisions" set out in Sch A to that Act. Schedule A contained the following reservation in respect of minerals in favour of the Crown:

"An exception or reservation in favor of the Crown, and all persons authorised of all minerals, metals, gems, precious stones, coal, and mineral oils together with all necessary rights of access, search, procurement, and removal, and all incidental rights and powers".

409 In the case of the claim area, and consistently with the foregoing, Pastoral Lease No 2229, relied upon by the appellant, contained the following reservation of minerals:

"AND ALSO excepting and reserving out of this lease under His Majesty His Heirs and Successors ... all minerals metals (including Royal metals) ores and substances containing metals gems precious stones coal and mineral oils guano claystone and sand with full and free liberty of access ingress egress and regress to and for the said Minister and his agents ... to dig try search for and work the said minerals metals (including Royal metals)".

410 That a reservation like this might be capable of creating title to minerals is illustrated by the decision of this Court in *Colon Peaks Mining Co v Wollondilly Shire Council*.⁷⁸⁴ There, in the context of New South Wales law, Griffith CJ explained that the effect of this type of reservation was to create an independent title to minerals in favour of the Crown. Griffith CJ thus said:⁷⁸⁵

"In the case of grants not containing a reservation of minerals the owner of the fee simple was also the owner of the minerals, and the whole property was held under a single title—the Crown Grant; while in the case of grants containing such a reservation there were two independent titles—one to the land excepting the minerals, the other to the minerals, to which

⁷⁸³ cf *The Commonwealth v Yarmirr* (2001) 208 CLR 1.

⁷⁸⁴ (1911) 13 CLR 438.

⁷⁸⁵ *Colon Peaks Mining Co v Wollondilly Shire Council* (1911) 13 CLR 438 at 444.

the grantee had no title, and the property in which remained in the Crown until demised under the Act."

The right to access, take and use for any purpose the minerals of the claim area

411 Ground three is not concerned with the extinguishment of all of the alleged native title rights claimed by the Gumatj clan. It is concerned only with the non-exclusive claim made to "access, take and use for any purpose" the "minerals" in the claim area. In that respect, two observations should be made. First, it is accepted that native title may comprise a "bundle of rights".⁷⁸⁶ Here the asserted right to take and use minerals is one such right. Secondly, it is also accepted that native title may be extinguished in part.⁷⁸⁷ That can include one or more of the rights held as part of a bundle of rights. That principle is applicable here.

412 I agree with Gordon J that the reservation in favour of minerals in Pastoral Lease No 2229 did not of itself constitute an assertion of absolute beneficial ownership of all minerals in the claim area. But, for the reasons set out above, that reservation is nonetheless consistent with the complete dominion over minerals by the Crown which, at the latest, existed from when the NT Mining Act came into law. Whilst the appellant did not rely upon the operation of that Act in order to contend for the extinguishment of the claimed right to minerals, that proposition was raised in argument, and is too important to be cast aside. For the reasons set out below, the operation of the NT Mining Act did extinguish any native title right to take and use minerals in the claim area.

413 In that respect, this is not a case about the mere regulation of rights although, plainly, the NT Mining Act is concerned with the regulation of natural resources in the Northern Territory. The case is unlike, for instance, the decision of this Court in *Yanner v Eaton*.⁷⁸⁸ That case concerned the operation of the *Fauna Conservation Act 1974* (Qld). Section 7 of that Act purported to make fauna the "property of the Crown". Section 54 of that Act prohibited a person from taking or keeping fauna without a necessary licence or other authority. That Act was found not to be inconsistent with a native title right to hunt for particular fauna, namely juvenile crocodiles. That was because s 7 did not really operate to confer beneficial ownership in the fauna on the Crown. The plurality⁷⁸⁹ quoted Holmes J in *Missouri*

⁷⁸⁶ *Western Australia v Ward* (2002) 213 CLR 1 at 95 [95].

⁷⁸⁷ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69.

⁷⁸⁸ (1999) 201 CLR 351.

⁷⁸⁹ *Yanner v Eaton* (1999) 201 CLR 351 at 368 [25].

v Holland,⁷⁹⁰ who wrote "[w]ild birds are not in the possession of anyone; and possession is the beginning of ownership". It followed from this that:⁷⁹¹

"[T]he statutory vesting of 'property' in the Crown by the successive Queensland fauna Acts can be seen to be nothing more than 'a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource'⁷⁹²."

414 The Court otherwise decided that the *Fauna Conservation Act 1974* (Qld) merely regulated the particular native title right to hunt. Regulating a right did not result in any necessary inconsistency and thus extinguishment. Thus, the plurality observed:⁷⁹³

"Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, 'You may not hunt or fish without a permit', does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing."

415 Nor is this case analogous to the decision of this Court in *Akiba v The Commonwealth*.⁷⁹⁴ That case concerned whether a series of legislative regimes since 1877 for the management of commercial fishing had extinguished native title fishing rights in the Torres Strait. Again, this was a case of mere regulation. Moreover, the native title right identified – namely the right to access and to take resources from the identified waters *for any purpose* – was much broader than the activity that required management under the Act.⁷⁹⁵ Thus, Hayne, Kiefel and Bell JJ observed:⁷⁹⁶

790 (1920) 252 US 416 at 434.

791 *Yanner v Eaton* (1999) 201 CLR 351 at 369 [28].

792 *Toomer v Witsell* (1948) 334 US 385 at 402 per Vinson CJ (footnote omitted).

793 (1999) 201 CLR 351 at 373 [38].

794 (2013) 250 CLR 209.

795 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 241-242 [65]-[69].

796 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 244 [75].

"The repeated statutory injunction, 'no commercial fishing without a licence', was not, and is not, inconsistent with the continued existence of the relevant native title rights and interests."

416 This is a case where the NT Mining Act went further than mere regulation. It provided for the giving of title to third parties in the very thing – namely minerals – which is the subject matter of the particular native title right in question. And in order for this to be possible, the Crown had to have asserted lawful dominion or sovereignty over all minerals on Crown lands in the Northern Territory. Any competing native title right would have been necessarily inconsistent with such a regime. That is because it is simply not possible to share a non-exclusive right to a particular mineral, say a singular globule of bauxite. And moreover, for reasons already given, the miner's right, gold mining lease and mineral lease convey rights to mine *all* relevant minerals within a given mining tenement. Save with the consent of the holder of such a right or lease, the regime for the management of minerals on Crown lands created by the NT Mining Act did not permit or countenance non-exclusive ownership of minerals. Instead, the very point of the legislative regime was to confer exclusive rights to mine; to use the language of Windeyer J, a mining lease is "a means by which the Crown disposes of minerals the property in which it has retained".⁷⁹⁷

417 In that respect, it is simplistic to contend that the NT Mining Act falls short of necessary inconsistency because it, unlike the 1939 Mining Ordinance, contains no express provision stating that all "gold, silver and all other minerals and metals ... in the Territory" was the property of the Crown.⁷⁹⁸ That Ordinance traversed the same field of operation as the NT Mining Act. So, for example, s 30(2) provided that the holder of a miner's right obtained "absolute property" of minerals (other than gold) found in land taken up by the right. There were also similar provisions dealing with "Gold-mining Leases" (Div 1 of Pt V of the 1939 Mining Ordinance) and "Mineral Leases" (Div 2 of Pt V of the 1939 Mining Ordinance).

418 In that respect it should be inferred that s 107 (which provided for the Crown to own all minerals) was enacted out of an abundance of caution. That is because it appears in Pt VII of the 1939 Mining Ordinance, which addressed mining on private land, and also because s 107 stated that the Crown's ownership of minerals did not apply to land held in fee simple; in such a case "the ownership of gold and minerals shall depend on the terms of any reservation (if any) of gold or other minerals". In contrast, the NT Mining Act did not address mining on private land at all. In other words, the section was no doubt included to make the

⁷⁹⁷ *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 193.

⁷⁹⁸ 1939 Mining Ordinance, s 107.

public ownership of minerals clearer, in circumstances where at common law the owner of land owned the minerals beneath it (save for royal metals).⁷⁹⁹

419 Nor should it be accepted that inconsistency would only ever arise upon the actual and subsequent issue of a miner's right, gold mining lease or mineral lease pursuant to the NT Mining Act. It is the exercise of sovereign power, as manifested by the terms of that Act, which is necessarily inconsistent with any native title rights to minerals from the moment of enactment. That exercise is exhaustive in nature and necessarily asserted immediate public control of all mineral resources on Crown lands. In effect, there had been a full nationalisation of those resources of the Northern Territory on Crown lands for the benefit of the people of the territory. And that nationalisation admitted of no exceptions;⁸⁰⁰ duality of title was impossible.⁸⁰¹ In that respect, the NT Mining Act is distinguishable from laws regulating flora, fauna and aquatic resources; those resources are, by nature, replenishable and thus non-exclusive native title rights to them may simply endure.⁸⁰² As described above, the mineral resources of the Northern Territory are finite. Moreover, the foregoing is consistent with the agreement of the parties that, subject to the *Constitution*, s 107 of the 1939 Mining Ordinance, and not any mining tenement thereafter issued, immediately extinguished native title to minerals on Crown lands.

Disposition

420 I would answer the questions relating to grounds one and two in the same way as Gordon J. Question two of the questions answered by the Full Court of the Federal Court of Australia, from which the third ground of appeal before this Court arises, relevantly asks whether the first respondent's claim, insofar as it relates to the vesting of property in minerals on Crown lands by reason of s 107 of the 1939 Mining Ordinance, necessarily fails because any native title rights to such minerals had already been extinguished by reason of the grant of certain pastoral leases, in particular Pastoral Lease No 2229. For the reasons given by Gordon J, the pastoral leases had no such effect. Nonetheless, as set out above, native title rights to such minerals were extinguished for another reason before the surrender of the Northern Territory to the Commonwealth.

799 *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 185.

800 Save for past grants of mineral tenements.

801 *cf Western Australia v Ward* (2002) 213 CLR 1 at 161 [292].

802 See, eg, *Yanner v Eaton* (1999) 201 CLR 351; *Akiba v The Commonwealth* (2013) 250 CLR 209.

421 It follows that, like the question posed by the Administrative Appeals Tribunal in *Hepples v Federal Commissioner of Taxation*,⁸⁰³ the wrong question has been asked. In that respect, it should be repeated that the possible legal effect of the NT Mining Act on native title was raised with the parties during oral argument. In these circumstances, I would remit the proceeding back to a docket judge for the determination of the first respondent's claims in accordance with these reasons.

422 It should also be noted that it is presently impossible to identify with any precision any other particular native title rights, assuming they exist, that have been extinguished by reason of the NT Mining Act. As Gleeson CJ, Gaudron, Gummow and Hayne JJ observed in *Western Australia v Ward*,⁸⁰⁴ in analogous circumstances, the identification of such rights "requires further findings of fact and a more precise determination of the content of the native title rights and interests being asserted".⁸⁰⁵ That can be achieved on remittal.

803 (1992) 173 CLR 492 at 552-553.

804 (2002) 213 CLR 1.

805 (2002) 213 CLR 1 at 176 [341].

