AGS

# Legal briefing

27 October 2025

## Commonwealth v Yunupingu [2025] HCA 6

The High Court has held, unanimously, that the:

- power of the Commonwealth to legislate with respect to territories in s 122 of the Constitution is subject to the 'just terms guarantee' in s 51(xxxi) of the Constitution
- extinguishment of common law native title before the commencement of the *Native Title Act 1993* (Cth) by inconsistent grants or by the Crown vesting land in itself amounted to an 'acquisition of property' within the meaning of those words in s 51(xxxi) of the Constitution.

## Background

On 12 March 2025, the High Court (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) handed down judgment in *Commonwealth v Yunupingu* (*Yunupingu*),[1] dismissing an appeal by the Commonwealth from the decision of the Full Court of the Federal Court in *Yunupingu v Commonwealth* (2023).[2]

The case arose in the Northern Territory. Indigenous peoples who have made native title claims over about 230 square kilometres of land in the Gove Peninsula in north-eastern Arnhem Land seek compensation under the *Native Title Act 1993* (Cth) (Native Title Act) for the historical extinguishment or impairment of their native title rights and interests by the Commonwealth. The appeal to the High Court concerned the correctness of the decision of the Full Court of the Federal Court on several issues of law that had been argued by the parties as preliminary points, with a view to obtaining a ruling on (amongst other points) whether, in relation to some of the extinguishing acts, the claim must fail for reasons of constitutional law. This summary is concerned only with the constitutional law aspects of the case.

There are 4 separate sets of reasons: a 4-member plurality (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), and 3 individual sets of reasons by Gordon, Edelman and Steward JJ. On the constitutional issues Steward J agreed 'generally' with the reasons of the plurality and Gordon J.

## The High Court's decision

*Issue 1: the power of the Commonwealth to legislate with respect to territories in s 122 of the Constitution is subject to the 'just terms guarantee' in s 51(xxxi)*

### Background to issue 1

Between 1911 (when South Australia surrendered the Northern Territory (NT) to the Commonwealth) and 1978 (when the NT attained self-government) the Commonwealth directly governed the NT. In doing so the Commonwealth Parliament relied heavily on the power in s 122 of the Constitution to make laws, mostly in the form of ordinances, for the government of the NT.

Those ordinances included the *Mining Ordinance 1939* (NT). Under that ordinance, all minerals and metals on or below the surface of any land in the NT were 'deemed to be property of the Crown'. Under the same ordinance, mining leases were granted over the land that is the subject of the present case.

The compensation claimants argued before the High Court that these acts, insofar as they extinguished the claimants' native title rights in the land in question, were invalid when purportedly done. This was because the laws that supported the doing of those acts were (the claimants allege) contrary to s 51(xxxi) of the Constitution. In consequence, the claimants argued, the acts were validated by the Native Title Act on terms that conferred on the native title holders an entitlement to compensation under that Act.

Section 51(xxxi) of the Constitution confers on the Commonwealth Parliament the power to make laws with respect to '[t]he 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'. Section 122 of the Constitution confers on the Commonwealth Parliament the power 'to make laws for the government of any territory' of the Commonwealth. That includes, relevantly, the NT.

It is a well-established proposition that s 51(xxxi) abstracts from or carves out the power to make laws properly characterised as laws with respect to 'the acquisition of property' from the heads of Commonwealth legislative power that are listed in s 51.[3] The question in *Yunupingu* was whether the proposition is also true of the Commonwealth's legislative power under s 122.

### Historical views of the relation between s 122 and s 51(xxxi)

For the first 70 years of federation the prevailing view was that Parliament's legislative power under s 122 is unconstrained by s 51(xxxi). That is, Commonwealth legislative power in the territories is analogous to state legislative power: 'plenary' and not subject to any constitutional requirement to provide just terms for acquisitions of property. This line of thinking culminated in the High Court's decision in *Teori Tau v Commonwealth* (*Teori Tau*),[4] in which the High Court so held, unanimously.[5]

*Teori Tau: the first conception of s 122*

*Teori Tau* came to the High Court from the (then) territory of New Guinea. This was during the period when Papua and New Guinea were 2 territories of the Commonwealth (administered together). Both territories were governed in significant part by ordinances made under the *New Guinea Act 1922* (Cth) – a statute that took its constitutional support from s 122 of the Constitution.

The ordinances in issue in *Teori Tau* provided for the vesting in the Crown of minerals – much like the *Mining Ordinance 1939* (NT) that was the subject of the arguments in *Yunupingu*.

The plaintiff in *Teori Tau* sought a declaration that the ordinances were invalid on the grounds that they were laws providing for the acquisition of property in the traditional lands of the plaintiff and his people, without the provision of just terms (contrary to s 51(xxxi)).

The High Court unanimously rejected the challenge to validity. The Court held that the ultimate source of power for the ordinances was s 122 of the Constitution, and laws made under s 122 were not subject to the 'just terms' guarantee in s 51(xxxi).

*Newcrest: the 'middle way' position*

Over the ensuing decades the authority of *Teori Tau* was weakened by 2 subsequent High Court decisions. The first was *Newcrest Mining (WA) Ltd v Commonwealth* (*Newcrest*),[6] which qualified *Teori Tau* in a significant way.

*Newcrest* concerned the validity of proclamations made under s 7(8) of the *National Parks and Wildlife Conservation Act 1975* (Cth). The proclamations added into Kakadu National Park the NT areas of land that were the subject of mining leases held by or on behalf of a mining company. The practical effect of including those areas in Kakadu National Park was to deny the mining company the ability to exercise its rights under its leases.

The purpose of the proclamations and the statutory provisions that authorised the making of them was to facilitate the carrying out by Australia of its obligations under an international treaty, namely the *Convention for the Protection of the World Cultural and National Heritage.*[7] The statutory provisions in question therefore appeared to be capable of having dual constitutional support. They could be characterised as both:

- laws for the government of the NT (and so apparently supported by s 122)
- laws with respect to the acquisition of property for the purposes of a treaty obligation (and so apparently supported by s 51(xxxi) read in conjunction with the external affairs power in s 51(xxix)).

The question arose whether the 'just terms' requirement in s 51(xxxi) applied. In answer:

- 3 Justices (Brennan CJ, Dawson and McHugh JJ) said it did not apply on the basis that *Teori Tau* was correct – that is, no laws that are supported by s 122 are subject to s 51(xxxi)
- 3 Justices (Gaudron, Gummow and Kirby JJ) said it did apply on the bases that:
  - *Teori Tau* was wrong and should be overruled: all laws that are supported by s 122 are subject to s 51(xxxi) and
  - alternatively, and in any event, a law that can be characterised as having a dual constitutional support (in the way described above) *is* subject to the just terms requirement in s 51(xxxi). *Teori Tau* did not hold to the contrary and so did not govern the circumstances of *Newcrest* (the 'middle way' position)
- the final Justice (Toohey J) said it did apply, but only on the basis of the 'middle way' position. His Honour declined to overrule *Teori Tau.*

*Wurridjal: did it overrule Teori Tau or not?*

The subsequent decision in *Wurridjal v Commonwealth* (*Wurridjal*)[8] added further complexity to an already complicated picture.

*Wurridjal* was a challenge on s 51(xxxi) grounds to the validity of the *Northern Territory National Emergency Response Act 2007* (Cth) and associated statutes. These were all statutes that were, according to the 'middle way' position, capable of dual constitutional support (that is, from both s 122 and s 51).

The Commonwealth 'demurred' to the claims of invalidity. A demurrer is a formal procedure by which one party says (in effect) that the other party's case suffers from a fundamental defect of law such that it would be futile for the case to proceed to trial in the usual way. A demurrer can rely on multiple grounds of law. Even so, the only question that the Court needs ultimately to answer is whether the demurrer should be 'allowed' or 'overruled'. The Court's ruling on the demurrer determines whether the case is brought to an immediate end (if the demurrer is allowed) or allowed to proceed to trial in the usual way (if the demurrer is overruled).

In *Wurridjal* the Commonwealth's demurrer relied on 3 separate and distinct grounds of law. It was sufficient that any one of those 3 grounds be accepted in order for the Court to rule that the Commonwealth's demurrer be 'allowed'.

The first of these 3 grounds was to the effect that:

- *Teori Tau* is correct
- *Newcrest* was wrong to place a qualification on *Teori Tau*
- *Newcrest* should therefore be overruled

and therefore, the impugned laws were not relevantly subject to the just terms requirement in s 51(xxxi).

The High Court divided in different ways on each of the 3 grounds of the Commonwealth's demurrer. A majority (French CJ, Gummow, Hayne and Kirby JJ) rejected the first ground of demurrer (just described above). However, a differently constituted majority accepted one of the other grounds. In the final result, the Court decided 6:1 to allow the Commonwealth's demurrer. The Court's final order said simply 'demurrer allowed'. Justice Kirby in dissent would have ordered 'demurrer overruled'.

The Full Court of the Federal Court in *Yunupingu* held that *Wurridjal* had overruled *Teori Tau.* Their Honours reasoned that a majority of the Justices in *Wurridjal* had decided that the Commonwealth's first ground of its demurrer should be rejected, and in the course of that had held that *Teori Tau* is wrong and should be overruled. The Full Court therefore held that it was bound by the ratio of *Wurridjal* to rule in favour of the Indigenous parties on the s 122 issue.

## The High Court's findings on issue 1

*Wurridjal did not overrule Teori Tau*

In *Yunupingu*, the High Court unanimously held that the Full Court of the Federal Court had erred in holding that *Wurridjal* had overruled *Teori Tau*. The High Court confirmed that in ascertaining the ratio of a case, what is crucial is the Court's final orders. The ratio of a case (if there is one) is a common line of reasoning adopted by a majority of the justices, being the

line of reasoning that led *those* justices to support the Court's final order. Thus, the reasoning of a justice who dissented from the final order (in the case of *Wurridjal*, Kirby J) cannot count towards a majority for purposes of ascertaining the ratio of a case.[9]

*The 'middle way' position in Newcrest rejected*

The Commonwealth, having failed in its attempt in *Wurridjal* to have *Newcrest* overruled, in *Yunupingu* now accepted and supported the correctness of *Newcrest*.

The Commonwealth's argument was in support of the 'middle way' position that found favour with a majority in *Newcrest*. This argument was summarised by the plurality as follows:[10]

> … 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.

The plurality rejected this argument.[11] Their Honours held that the 'middle way' position in *Newcrest* (which they referred to as 'the hybrid approach') is inconsistent with settled principles that govern the characterisation of Commonwealth laws.[12]

By these well-settled principles any Commonwealth statute is (in principle), in the eyes of the Constitution, capable of being characterised as a law that is simultaneously about (or, using the language of the Constitution, a law 'with respect to') multiple different topics or 'subject-matters'. Moreover, a law on a subject-matter that is within Commonwealth legislative power is valid, even if the law is simultaneously also capable of being characterised as a law on a subject matter that is not within power. A single available source of power is sufficient to secure the validity of a Commonwealth law.[13]

In the view of the plurality these considerations were fatal to the 'middle way' position. For if the 'middle way' position was correct, that would mean that it should be possible for a statute to be supported by both:

- s 122 (and, to that extent, not be subject to s 51(xxxi)) and
- another source of legislative power under s 51 (and, to that extent, be subject to s 51(xxxi)).

According to the well-settled principles just described, such a statute ought to be valid even it does not provide just terms. That is because such a statute would have a valid source of power in s 122. But the 'middle way position' requires the opposite result: such a statute *must* provide just terms in order to be valid. It follows (in the view of the plurality) that the 'middle way' position must be wrong.

In the result, as the plurality put it:[14]

> Either s 51(xxxi) abstracts from s 122 or it does not. There is no room for the hybrid approach.

Justice Edelman reached a similar conclusion, reasoning that 'the middle way is itself incoherent. Either s 51(xxxi) constrains the exercise of power in s 122 or it does not'.[15] That said, Edelman J's reasoning on this point was far briefer than that of the plurality and differs from it in a small but significant way.[16]

Justice Gordon did not deal with the 'middle way' position separately apart from treating the rejection of it (and, with that, the overruling of *Newcrest)*[17] as a necessary consequence of her Honour's view of the correct position on the relation between s 122 and s 51(xxxi).

*Section 122 is fully subject to s 51(xxxi) (Teori Tau overruled)*

The plurality, having held that there is a binary choice to be made – 'either s 51(xxxi) abstracts from s 122 or it does not' – then turned to decide which is the correct position.

When considering the relation between s 122 and other provisions of the Constitution – whether it be ss 51(xxxi), 72, 80, 90, 109 or Ch III generally – the same answer is not universally applicable. Laws made under s 122 might or might not engage numerous other constitutional provisions and doctrines. There is no uniform rule that governs the result in all cases. Much turns on the particular text of the specific constitutional provisions in question. So far as the relation between s 51(xxxi) and s 122 is concerned, the question is particularly difficult because there are various textual considerations that can be read as pointing in different directions.[18]

That said, over the course of the last 7 decades, there has been a slow shift in the High Court's thinking on s 122. It is true that the cases have not all gone in one direction: *Teori Tau*, for example, represents an older view about s 122. But the general tendency has been firmly in the other direction. In retrospect, the unanimous judgment in *Teori Tau* can be seen as one of the last emphatic expressions of the older view. The plurality in *Yunupingu* remarked 'the tide of history is strong',[19] and it has been in the opposite direction to that represented by *Teori Tau*.

The moment that the 'tide' began to turn can be identified with precision. It was in the reasons of Sir Owen Dixon in *Lamshed v Lake* (*Lamshed*).[20] His Honour there held that a law made under s 122 can operate beyond the bounds of a territory. His Honour further held that a law made under s 122 counts as 'a law of the Commonwealth' for the purposes of s 109 of the Constitution and therefore prevails over an inconsistent state law. In so holding his Honour said, in a remark given great weight by the justices in *Yunupingu*, 'I have always found it hard to see why s 122 should be disjoined from the rest of the Constitution'.[21] The view to the contrary treats the Commonwealth Parliament, when legislating for the territories under s 122, as having a different character and function – the function of a local legislature like a state parliament – than it has when legislating for the nation as a whole in exercise of its s 51 powers. Sir Owen rejected this distinction in another passage also given great weight by the Court in *Yunupingu*: even when Parliament is exercising its powers under s 122, '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*'.[22]

Once it was accepted that s 122 should not be treated as 'disjoined' from s 109 and that Parliament legislating under s 122 acts as the 'national legislature of Australia', it became increasingly difficult to resist the conclusion that, by parity of reasoning, s 122 should also not be treated as 'disjoined' from other provisions of the Constitution. That is particularly the case for s 51(xxxi), given that it 'has the status of a constitutional guarantee' that prevents persons from being deprived of their property except on just terms.[23] It would seem anomalous for persons in states, but not persons in territories, to have the full protection of that guarantee.

Mainly for these reasons the Court held, unanimously, that *Teori Tau* should be overruled. The plurality said:[24]

> The power of the Commonwealth Parliament in relation to the government of the surrendered territory [that is, surrendered to the Commonwealth, as occurred with the NT] 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.
>
> … 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 does not extend to making a law with respect to an acquisition of property otherwise than on just terms …

Both Gordon J and Edelman J identified that there would be potentially significant consequences from the decision to overrule *Teori Tau*[25] but both asserted the importance of adopting what they regarded as the clearly correct position notwithstanding those consequences.[26]

### *Issue 2: extinguishment of common law native title before the commencement of the Native Title Act is an 'acquisition of property' in the eyes of s 51(xxxi)*

The High Court held unanimously that extinguishment of native title rights before the commencement of the Native Title Act by an inconsistent Crown grant or vesting is an 'acquisition of property' within the meaning of that phrase in s 51(xxxi) of the Constitution.

In doing so, the High Court rejected the argument that 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 that it is inherently susceptible to being extinguished or impaired by an otherwise valid exercise of relevant sovereign power.

## Background to the 'inherent defeasibility' argument

The basic common law rule, from which the recognition of native title by the common law flows, is that when the British Crown acquires new territory, the Crown is presumed not to have intended to have disturbed pre-existing rights of property there. This rule was endorsed by the High Court in *Mabo v Queensland [No 2]* (*Mabo No 2*).[27] As Brennan J (with whom Mason CJ and McHugh J agreed) put it in that case, 'antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty'.[28] It is these pre-existing rights, insofar as they have continued to survive until the present day, that are enforceable by the courts as 'native title' or 'native title rights'.

Native title rights, therefore, do not have their ultimate source in the common law. Their ultimate source lies instead in the traditional laws and customs of the Indigenous peoples who have continuously acknowledged and observed such laws and customs from before the time of the coming to Australia of the British.[29] The common law 'recognised' those pre-existing rights under Indigenous laws and customs as common law rights:[30]

> Native title is 'recognised' at common law … 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]'. 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'.

In this way, rights in relation to land and water that have their ultimate source in Indigenous traditional laws and customs are able to be given force and effect by Australian courts.

However, the common law's recognition of native title can be withdrawn. This can occur when, under the new (that is, non-Indigenous) legal system, new legal rights are validly created that are inconsistent with the continued recognition of any given set of native title rights. As Brennan J said in *Mabo No 2*:[31]

> Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime [that is, under the traditional laws and customs of Indigenous people] become liable to extinction by exercise of the new sovereign power.

One way that the new sovereign – in traditional terminology, 'the Crown' – can extinguish native title rights is by making land grants that are inconsistent with continued recognition of native title or by vesting land in the Crown itself. Justice Brennan said in *Mabo No 2*:[32]

> 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 …
>
> 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.

In Brennan J's view, this exposure of native title to the prospect of extinguishment 'by a valid exercise of sovereign power'[33] was necessary in order for the common law to be able to recognise native title at all. His Honour considered that it would have been impermissible for the Court to overturn existing doctrine (as the Court did in *Mabo No 2*) and hold that the common law recognises native title rights if to do so would have cast doubt on the validity of 'titles acquired under the accepted land law'.[34] Accordingly, on his Honour's approach, the common law's recognition of native title must be on terms that allow for extinguishment of native title by inconsistent grant or vesting.

Justice Brennan's analysis of native title in *Mabo No 2* provided the main basis for some important remarks by Gummow J in *Newcrest*. In the remarks in question Gummow J considered whether s 51(xxxi) is capable of being engaged by the extinguishment of native title. His Honour came to the view that certain kinds of extinguishment of native title do not engage s 51(xxxi).

Justice Gummow said:[35]

> 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.

Justice Gummow here invoked and applied to the circumstances of *Newcrest* the accepted s 51(xxxi) doctrine of 'inherent defeasibility'. Under that doctrine certain rights are, of their nature, 'inherently susceptible' to alteration or abolition in particular ways. When those rights are abolished or altered in that way, that does not amount to an 'acquisition of property' within the meaning of those words in s 51(xxxi). The basic idea behind the doctrine is that when Parliament makes a law that provides for the modification or taking away of rights that

were always, of their nature, liable to be modified or taken away in that manner, that statute does not engage the 'just terms' guarantee in s 51(xxxi).

Prior to Gummow J's comments in *Newcrest*, the 'inherent defeasibility' doctrine had been applied only in cases of alteration or abolition by Parliament of certain kinds of *statutory rights* – whereas native title is a right recognised by the common law. Few kinds of common law rights are regarded as 'inherently defeasible' (although there are examples).[36]

## The High Court holds that extinguishment of native title by inconsistent grant is an 'acquisition of property' in the eyes of s 51(xxxi)

*Overview of the High Court's decision on issue 2*

Before the Full Court of the Federal Court, and then again on appeal before the High Court, the Commonwealth relied on Gummow J's analysis of native title in *Newcrest*. The Commonwealth did not argue that native title rights do not count as 'property' at all in the eyes of s 51(xxxi).[37] Indeed, the Commonwealth expressly accepted that native title is 'property' for the purposes of s 51(xxxi). The Commonwealth's argument was rather that native title rights are 'property' of a kind that have 'an inherent susceptibility to extinguishment or defeasance' by inconsistent grant or vesting. Extinguishment of native title by the engagement of this inherent defeasibility, the Commonwealth submitted, 'does not involve a "taking" of property' such as to engage s 51(xxxi) of the Constitution.[38]

The High Court unanimously rejected the characterisation of native title as 'inherently susceptible to defeasance'. The Court therefore held that the analysis of Gummow J in *Newcrest* is wrong.

*The plurality's 3 reasons for rejecting the view of Gummow J in Newcrest*

The plurality emphasised that, as Brennan J acknowledged in *Mabo No 2*, the 'sovereign power' to extinguish native title 'must be exercised in conformity with the Constitution'.[39] On the one hand, 'conformity with the Constitution' must include conformity with s 51(xxxi). On the other hand, 'conformity with the Constitution' also includes conformity with s 51(xxxi) doctrine of 'inherent defeasibility'. Therefore, is that doctrine engaged by the extinguishment of native title by inconsistent grant or vesting?

This question gave rise to what the plurality conceived of as the central issue in the case: whether the common law's recognition of native title can properly be described as 'conditional' or 'absolute'. If conditional then the Gummow J analysis is correct; if absolute, then the Gummow J analysis is wrong.[40]

That is, the plurality[41] in effect drew a distinction between 2 different kinds of legal rights:

- a 'conditional' right: this is a legal right that exists only on the basis of some inherent condition that the right may be brought to an end by the exercise of some legislative or executive power
- an 'absolute' right: this is a legal right that does not exist subject to any inherent conditions or qualifications. But the right is, of course (like all legal rights), liable to be abrogated by some lawful statute or executive act 'operating of its own inherent force'.[42]

In the view of the plurality, native title rights fall into the latter category. It followed that the analysis of Gummow J was wrong and must be rejected.[43]

The plurality gave 3 reasons for the conclusion that native title is an 'absolute' right. To regard the common law's recognition of native title as conditional is:

- *First*, unnecessary. The 'conditional' theory of native title is not needed in order to explain why native title can be extinguished. It is already 'inherent' in the nature of statutory or executive power that such power, when lawfully exercised, is capable of abrogating common law rights. That is sufficient to explain why a valid exercise of legislative or executive power is capable of extinguishing native title rights. It is superfluous reasoning to postulate that native title rights are subject to an 'inherent defeasibility' that conditions their recognition by the common law.[44]
- *Second*, not properly reflective of traditional laws and customs. The rights or interests that the common law recognises as 'native title rights' are not conditional under the traditional laws and customs that are their ultimate source. It is anomalous to treat the recognition of native title by the common law as conditional when traditional laws and customs do not. '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'.[45]
- *Third*, contrary to the principle of equality before the law that was (in the plurality's view) a 'fundamental consideration' for the common law's recognition of native title in the first place.[46] To treat native title as defeasible at common law:[47]

> … would undermine the motivating rationale of the decision in [*Mabo No 2*], 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 … would have 'destroy[ed] the equality of all Australian citizens before the law' and perpetuated injustice based on an historical fiction. 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.

*Justice Gordon's reasoning on issue 2*

Justice Gordon said that the Commonwealth's concession that native title is 'property' in the eyes of s 51(xxxi) was 'properly made'. Her Honour then rejected the Commonwealth's further submission that native title is property of an 'inherently defeasible' kind.[48] She regarded the latter submission as being 'at odds with the status of s 51(xxxi) as a constitutional guarantee'.[49] In this regard, Gordon J placed weight on the importance of s 51(xxxi) as a guarantee of 'property' rights. She cited authorities to the effect that s 51(xxxi) is a 'constitutional guarantee' and a 'very great constitutional safeguard'. As such s 51(xxxi) is to be given a 'liberal construction'.[50]

In her Honour's view an examination of the nature of 'native title' shows why it cannot be regarded as 'inherently defeasible'. Indeed, in her Honour's view, even '*equating* native title with proprietary rights in relation to land and waters is "artificial and capable of misleading"'.[51] Rather:[52]

> 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.

Thus:[53]

> Native title cannot be characterised as lacking 'permanence or stability'. Native title is not 'transient'. 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 …

Her Honour, like the plurality, placed importance on the principle of equality before the law in rejecting the Commonwealth's 'inherent defeasibility' argument:[54]

> To accept … 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 …

*Justice Edelman's reasoning on issue 2*

Justice Edelman's reasoning on issue 2 (which was detailed) was broadly along the same lines as the plurality. However, there were some significant differences.

Like the other members of the Court, it was important for Edelman J that native title rights at common law arise from a 'process by which the common law recognises the norms underlying traditional laws and customs'. His Honour emphasised that 'the process remains one of *recognition*, not *transformation* … The common law alters or develops by its recognition of those norms, not the other way around'.[55]

On the crucial question of whether native title rights as recognised by the common law are 'inherently defeasible', his Honour drew a similar distinction as the plurality, albeit in different language. The distinction apprehended by Edelman J was between a:[56]

- property right that is subject to termination or defeat by reason of a contingency that is 'inherent in the content of the property right itself' (this contingency is often called a 'condition subsequent') and
- property right that can be 'defeated by some circumstance external to the interest itself'.

It is only the former kind of rights (whether statutory or common law rights) that engage the 'inherent defeasibility' doctrine of s 51(xxxi).

The question was therefore whether native title rights as recognised by the common law fall into the former (inherently defeasible) or the latter (not inherently defeasible) category. The Commonwealth submitted that they fall into the former category for the reason that, as held by Brennan J in *Mabo No 2*, the common law was only able to recognise native title rights at all on the basis that they were liable to extinguishment by some subsequent Crown grant or vesting. As Edelman J conceived it:[57]

> … 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' [that is, the power of the Crown to make grants of unalienated land or appropriate such land to itself].

Justice Edelman was of the view that the submission should not be accepted because it would involve a mischaracterisation of common law native title. The submission, if correct, would mean (in his Honour's view) that common law native title would amount to no more than a revocable permission to occupy traditional lands.[58] Justice Edelman considered that common law native title rights are more than that and to attribute to them the quality of a

revocable permission to occupy would not adequately reflect the norms of the traditional laws and customs that are the ultimate source of native title. For Edelman J that would in effect mean the common law would denature the rights in question by transforming them into rights of a significantly inferior nature. The true rule is that the common law 'recognises' the rights in question rather than transforming them in that way:[59]

> 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.

In the view of Edelman J, when native title is extinguished it is not because of something inherent in native title itself. It is because of a circumstance external to native title – namely, the exercise of legislative power. It is of the nature of legislative power to change the common law or modify or terminate existing rights (or to provide for this to occur). A grant or vesting done under a statute that extinguishes native title can therefore be attributed to a 'circumstance external to native title', rather than something inherent in native title itself.

It is also notable that Edelman J (alone of the Justices) appeared to express doubts about whether the High Court's decision in *Fejo v Northern Territory*[60] – that at common law extinguishment of native title is permanent – is correct.[61]

*Justice Steward's reasoning on issue 2*

Justice Steward 'generally' agreed with the reasoning of the plurality and Gordon J. However, that was subject to one qualification.

Justice Steward conceives of common law native title rights differently to Gordon J. His Honour therefore disagreed with some of the language that Gordon J used to describe native title rights, finding it 'perhaps unhelpful':[62]

> 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. … 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.
>
> 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.

AGS (Gavin Loughton and Jye Beardow from the Office of General Counsel's Constitutional Litigation Unit and Gordon Kennedy and Max Heffernan from AGS Dispute Resolution) acted for the Commonwealth. The Commonwealth Solicitor-General, Dr Stephen Donaghue KC, Stephen Lloyd SC, Nitra Kidson KC and Carla Klease appeared as counsel for the Commonwealth.

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## Notes

[1] [2025] HCA 6.

[2] [2023] FCAFC 75.

[3] *Commonwealth of Australia v Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors* [2025] HCA 6 (*Yunupingu*), plurality, [17].

[4] (1969) 119 CLR 564.

[5] *Yunupingu*, Edelman J, [241], [254].

[6] (1997) 190 CLR 513 (*Newcrest*).

[7] [1975] ATS 47.

[8] (2009) 237 CLR 309.

[9] Explained in most detail by Edelman J at [373] – see also at [26] (the plurality), [177] (Gordon J) and [373] (Steward J 'generally' agreeing with both the plurality and Gordon J).

[10] *Yunupingu*, [27].

[11] *Yunupingu*, [28].

[12] *Yunupingu*, [30]–[34].

[13] *Yunupingu*, [31].

[14] *Yunupingu*, [34].

[15] *Yunupingu*, [272].

[16] *Yunupingu*, [268] cf [35]–[44].

[17] *Yunupingu*, [201]–[202].

[18] See e.g. at [20]–[21], [40] and [186]–[190].

[19] *Yunupingu*, [36].

[20] (1958) 99 CLR 132 (*Lamshed*).

[21] *Lamshed*, 145.

[22] *Lamshed*, 143; emphasis added. Cited with approval in *Yunupingu*, [38] (plurality), [199] (Gordon J).

[23] *Yunupingu*, [15] (plurality); see also at [126]–[131] (Gordon J), [240], [243], [247], [268] (Edelman J).

[24] *Yunupingu*, [39], [44]. (For the same conclusion see Gordon J at [196]–[200] and Edelman J at [242].)

[25] *Yunupingu*, [178] (Gordon J); at [266] Edelman J.

[26] *Yunupingu*, [179] (Gordon J); at [242] (Edelman J).

[27] (1992) 175 CLR 1 (*Mabo No 2*).

[28] *Mabo No 2*, 57.

[29] *Yunupingu*, plurality, [58]–[59]; Gordon J, [120]; Edelman J, [288].

[30] *Yunupingu*, plurality, [61]. To similar effect, see also Edelman J, [288]–[290].

[31] *Mabo No 2*, 63.

[32] *Mabo No 2*, 69, 70.

[33] *Mabo No 2*, 69.

[34] *Mabo No 2*, 47; see also at 43; and on this, see also *Yunupingu*, Edelman J, [296].

[35] *Newcrest*, 613; emphasis in original.

[36] See *Yunupingu*, Edelman J, [308].

[37] *Yunupingu*, plurality, [50].

[38] *Yunupingu*, [53].

[39] *Yunupingu*, [71]; see also [68].

[40] *Yunupingu*, [74]–[75].

[41] *Yunupingu*, [74].

[42] *Yunupingu*, [74]; also [76].

[43] *Yunupingu*, [76].

[44] *Yunupingu*, [77].

[45] *Yunupingu*, [78].

[46] *Yunupingu*, [79]–[80].

[47] *Yunupingu*, [80].

[48] *Yunupingu*, [130].

[49] *Yunupingu*, [132].

[50] *Yunupingu*, [128], [133].

[51] *Yunupingu*, [138]; emphasis in original.

[52] *Yunupingu*, [137]. These particular remarks were the subject of specific disagreement on the part of Steward J: see further discussion under heading '*Justice Steward's reasoning on issue 2'*.

[53] *Yunupingu*, [167].

[54] *Yunupingu*, [157].

[55] *Yunupingu*, [290]; emphasis in original.

[56] *Yunupingu*, [305].

[57] *Yunupingu*, [310].

[58] *Yunupingu*, [310], [312].

[59] *Yunupingu*, [311]; emphasis in original.

[60] (1998) 195 CLR 96.

[61] *Yunupingu*, [302].

[62] *Yunupingu*, [374], [375].