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‘Just terms’, native title and the territories: *Commonwealth of Australia v Yunupingu*

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Content warning

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‘Just terms’, native title and the territories: *Commonwealth of Australia v Yunupingu*

On 12 March 2025, the High Court of Australia handed down its decision in *Commonwealth of Australia v Yunupingu*. The case has significant implications for constitutional and native title law, in particular:

- legislative action pursuant to the ‘territories power’ is subject to the just terms requirement of the Constitution
- acts extinguishing native title are capable of being an acquisition of property within the meaning of the just terms requirement.

Practically speaking, the case has exposed the Commonwealth to significant liability for actions impacting native title in a territory from the early 1900s. More recent relevant actions were already compensable under the *Native Title Act 1993* (NTA).

Background

Between 1911 and self-government in 1978, the Commonwealth administered and had exclusive power to pass laws for the Northern Territory. It exercised this power in making, among other things, various ordinances and grants of mining leases, including over parts of land claimed by the Gumatj clan in the Gove Peninsula, Arnhem Land. These circumstances prompted the *Gove Land Rights Case*, and the Yirrkala Bark Petition.

The Gumatj clan native title compensation application was brought by the late Dr Yunupingu AC. The procedural background to the case is complicated, and the claim itself remains unresolved; however, the constitutional issues were considered in a Full Federal Court test case in 2023. The Commonwealth appealed the result, raising 3 questions:

- whether the guarantee of just terms for the acquisition of property in section 51(xxxi) of the Constitution applies to laws made for territories under section 122
- whether a legislative ‘extinguishment’ of native title before the commencement of the *Native Title Act* on 1 January 1994 would constitute an acquisition of property under section 51(xxxi)
- whether the grant of a pastoral lease in 1903 had extinguished any non-exclusive native title rights over minerals.

Territories and the just terms requirement

Section 122 of the Constitution provides the Commonwealth with the power to legislate for the government of the territories. Section 51(xxxi) states that the Commonwealth can legislate to acquire property on just terms for any purpose for which it has the power to make

laws. This just terms requirement only applies to the Commonwealth, not the states, and until the present case there was some uncertainty as to whether it applied to laws made for a territory under section 122.

In 1969, the High Court in *Teori Tau* found that the just terms requirement did not apply to laws made under section 122, but this precedent had been weakened by judicial statements in the subsequent cases of *Newcrest Mining* and *Wurridjal*. Now, in *Yunupingu*, the High Court has clearly stated that *Teori Tau* has been overruled, and authoritatively declared that the power to make laws for the government of a territory is subject to the requirement that an acquisition of property must be on just terms.

Legislative 'extinguishment' of native title

The NTA provides a scheme for native title compensation; however, there has been a view that native title compensation only applied to actions post 1975, when the *Racial Discrimination Act 1975* commenced.

In this case, the Commonwealth argued that extinguishment or impairment of native title rights at common law should not be characterised as having constituted an acquisition of property within the meaning of section 51(xxxi) of the Constitution. This would have meant there was no entitlement to compensation in respect of the Gumatj clan claim.

The essence of the Commonwealth's argument was that the property of native title holders was not taken because native title was 'inherently susceptible' to 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 for Crown purposes.

The High Court has, from time to time, referred to the 'inherent fragility of native title', and the Commonwealth laid considerable emphasis on 'inherent susceptibility' in *Newcrest Mining*.

The majority rejected this argument, finding that the concept of 'inherent defeasibility' (that native title was, by its nature, subject to extinguishment) was unnecessary and problematic. The majority made reference to the values of justice and human rights which impelled the formulation of the common law rule of recognition explained in *Mabo [No 2]*.

According to the majority, extinguishment or impairment of native title is not the result of an inherent or innate susceptibility to defeasance of that right or interest as recognised at common law. 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.

On the third question, the High Court held that the 1903 grant of the pastoral lease had not extinguished any non-exclusive native title rights over minerals on or under the subject land.

Implications of the case

Indigenous groups, including the Gumatj clan and the National Native Title Council have welcomed the decision. Legal commentators have highlighted the 'pivotal' significance of the case.

While the High Court's decision was that the 'theory of the claim is sound', it does not mean compensation is necessarily payable in this case. The claim will need to return to the Federal Court to proceed through the NTA process.

The Commonwealth’s written submissions put the broader implications in stark terms: ‘a vast but indeterminate number of grants of interests in land in the Territory’, which were validated by the NTA, would have resulted in ‘a vast but presently unquantifiable liability’ (paragraph
[3]).

Noting this, it seems highly likely the decision will result in additional claims for native title compensation in the Northern Territory and potentially also the ACT. The extensive time period and legal complexities involved will likely be considerable. What action the Commonwealth will take to address this remains to be seen.

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