HIGH COURT OF AUSTRALIA

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

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant
and
YUNUPINGU (ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP) AND OTHERS NAMED IN THE SCHEDULE
Respondents

SECOND RESPONDENT'S SUBMISSIONS (NORTHERN TERRITORY OF AUSTRALIA)

Part I: Certification

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

Part II: Issues

2. The issues in this appeal are as set out in the Appellant's Submissions filed on 28 March 2024 (**CS**): **CS[4]**.

3. The Northern Territory of Australia (**Northern Territory**) engages with Grounds 1 and 3 of the appeal. It makes no submission in relation to Ground 2.

Part III: Certification

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

Part IV: Facts

5. The material facts are as set out at **CS[7]-[9]**.

Part V: Argument

A. SUMMARY

6. Ground 1 should be dismissed (**Construction Issue**). The power to make laws for the territories under s 122 of the Constitution is qualified by s 51(xxxi) in all its operations. Alternatively, s 51(xxxi) qualifies s 122 in its application to internal territories.

7. Ground 3 should be allowed (**Reservation Issue**). The Full Court below decided that the reservation of minerals in a pastoral lease (**Reservation**) did no more than withhold or keep back from the lessee any rights in relation to those minerals. In so doing it

erred because, on the proper construction of the pastoral lease instrument and the legislation under which it was granted, the grant both created rights to conduct pastoral activities in the lessee and created rights in relation to minerals in the Crown. The Crown's rights were necessarily inconsistent with the continued existence of any native title right to take the same minerals.

8. The appeal should be allowed in part and the matter remitted for further directions.

B. GROUND 1: THE CONSTRUCTION ISSUE

9. The Northern Territory advances two alternative submissions in answer to ground 1. The primary submission is that the just terms guarantee applies whenever the territories power is exercised to acquire property from a State or a person: see Part B.1 below.

10. The alternative construction is that the Commonwealth must comply with the just terms guarantee where it acquires property from a State or person when exercising the territories power in respect of an internal territory[1]: see Part B.2 below.

11. The question whether *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) or *Teori Tau v Commonwealth* (1969) 119 CLR 564 (***Teori Tau***) represents the current state of the law on the Construction Issue, and hence whether it is the Commonwealth or the Northern Territory who requires leave to reopen an existing authority of this court, is addressed in Part B.3 below.

B.1 Section 51(xxxi) controls s 122 in all its operations

12. ***Proper approach to construction***. The question is one of construction which turns on the constitutional text.[2] The starting point is that the text must be treated as the one instrument of federal government and is to be read as one coherent document[3] and not as two constitutions, one for the federation and the other for its territories: **CS[48]**.[4] Moreover, the constitution should not be read in parts merely because, for drafting convenience, it is divided into chapters: **cf CS[30]**.[5]

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1 Australian Capital Territory, Jervis Bay Territory and Northern Territory.
2 *Wurridjal* (2009) 237 CLR 309, [73] (French CJ).
3 *New South Wales v Commonwealth* (2006) 229 CLR 1 (***Workchoices***), [52], [134] (Gleeson CJ, Gummow, Hayne, Heydon, Crennan JJ).
4 *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248 (***Capital Duplicators No.1***), 272 (Brennan, Deane, Toohey JJ).
5 *Spratt v Hermes* (1965) 114 CLR 226 (***Spratt***), 246 (Barwick CJ).

13. As such, s 122 must not be read as if it is disjoined from the rest of the Constitution[6] and the fact that it is of a different order than s 51 does not mean it is not controlled in any respect by other parts of the Constitution. It remains a question of construction whether any particular provision operates to control s 122, that question being resolved upon a consideration of the text and of the purpose of the Constitution as a whole: **CS[15]**.[7] The starting point is not that s 122 prevails unless a contrary intention can be identified: **cf CS[33]**.

14. ***Preliminary observations***. That construction analysis must be undertaken against the background of settled principles.

15. First, the power in s 122 to legislate for the government of a territory is given to Parliament in its capacity as the national Parliament of Australia and not merely as a local legislature in and for the territories: **cf CS[18]**.[8] Parliament governs the territories not as *quasi* foreign countries remote from and unconnected with Australia, but as territories of Australia about the government of which the Parliament may make every proper provision as part of its legislative power operating throughout the Commonwealth.[9] It is implicit in these observations that Parliament is acting in the national interest and for the country as a whole, with potential impacts upon the States (fiscal and otherwise), when legislating for the government of a territory.

16. Secondly, s 122 is not the sole source of power available to Parliament when legislating for a territory, because it also has available to it at least some of the enumerated heads of power in ss 51 and 52, such as the power to make laws for naval and military defence, the postal services, fisheries beyond territorial limits, State banks and State insurance trading in a territory, the naturalisation of aliens, the relations of the Commonwealth with the islands of the Pacific, industrial disputes extending from a State into a territory, the seat of government, taxation, and powers incidental thereto.[10] It has been recognised in this context that the external territories, and therefore *a fortiori* the internal territories[11], form part of the Commonwealth of

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6 *Lamshed v Lake* (1958) 99 CLR 132 (***Lamshed***), 145 (Dixon CJ, Webb, Taylor and Kitto J agreeing); *Berwick Ltd v Gray* (1976) 133 CLR 603 (***Berwick***), 608 (Mason J, Barwick CJ, McTiernan, Jacobs, Murphy JJ agreeing).

7 *Bennett v Commonwealth* (2007) 231 CLR 91 (***Bennett***), [43] (Gleeson CJ, Gummow, Hayne, Heydon, Crennan JJ).

8 *Lamshed* (1958) 99 CLR 132, 141 (Dixon CJ, Webb, Taylor and Kitto J agreeing).

9 Ibid, 143,144 (Dixon CJ, Webb, Taylor and Kitto J agreeing).

10 Ibid, 143 (Dixon CJ, Webb, Taylor and Kitto J agreeing). See also *Newcrest Mining (WA) Pty Ltd v Commonwealth* (1997) 190 CLR 513 (***Newcrest***), 597 (Gummow J).

11 *Wurridjal* (2009) 237 CLR 309, [74] (French CJ).

Australia for the purpose of the chapeau to s 51[12], thus confirming that the operation of s 51 is not confined to the relationship between the Commonwealth and the States.

17. Thirdly, the requirement in s 51(xxxi) to provide just terms has assumed the status of a "very great constitutional safeguard"[13] and is to be given a liberal construction.[14]

18. Fourthly and related to the third, s 51(xxxi) operates:[15]

> … to reduce the content of other grants of legislative power through the medium of a rule of construction that "it is in accordance with the soundest principles of interpretation to treat" the conferral of "an express power subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect" 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 authorised the same kind of legislation but without the safeguard, restriction or qualification."

19. This operation of s 51(xxxi) may be displaced where the Constitution evinces a contrary intention, either expressed or made manifest in the other grant of power: for example, where the other grant of legislative power clearly encompasses the making of laws providing for the acquisition of property unaccompanied by any *quid pro quo* of just terms.[16] However, that will only be so if the subject matter of the other power makes the provision of just terms compensation an "*inconsistent* or *incongruous* notion."[17] It must be necessary to say that the provision of just terms would be "*incompatible* with the very nature of the exaction."[18]

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12 *Berwick* (1976) 133 CLR 603, 608 (Mason J, Barwick CJ, McTiernan, Jacobs, Murphy JJ agreeing). Cf. *Bennett* (2007) 231 CLR 91 at [36], suggesting that whether an external territory is to be regarded as a "part of the Commonwealth" may depend on the purpose for which the question is asked.

13 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403 (Barwick CJ). It is true that s 51(xxxi) makes plain that the Parliament has a power of eminent domain. However, such power would likely have been implicit within other powers: *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 (***Schmidt***), 371 (Dixon CJ, Fullagar, Kitto, Taylor and Windeyer JJ agreeing): **cf CS[42]**.
Section 51(xxxi) has the *dual character* of a limitation on and a grant of power: *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 445 (Aickin J), discussed in *Wurridjal* (2009) 237 CLR 309, [186] (Gummow and Hayne JJ).

14 *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201-202 (Gibbs CJ, Mason, Wilson, Brennan, Deane, Dawson JJ), *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane, Gaudron JJ).

15 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 (***Nintendo***), 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ), citing Dixon CJ (Fullagar, Kitto, Taylor, Windeyer JJ agreeing) in *Schmidt* (1961) 105 CLR 361, 371-372. See also *Workchoices* (2006) 229 CLR 1, [219] (Gleeson CJ, Gummow, Hayne, Heydon, Crennan JJ).

16 *Nintendo* (1994) 181 CLR 134, 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ).

17 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 (***Emmerson***), [77] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

18 Ibid, quoting from *Theophanous v Commonwealth* (2006) 225 CLR 101 (***Theophanous***), [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

20. ***Analysis***. The text and context of the Constitution as a whole comfortably reveals that s 122 is in all respects controlled by s 51(xxxi).

21. *Text of the just terms guarantee*. Section 51(xxxi) provides that:

> 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.

22. The starting point is that the language of s 51(xxxi) is broad in that it applies to any *person* and is geographically unconfined. "Person" is not limited to a resident of a State and extends on its face to all persons, including a person (natural or incorporated[19]) in a territory. The presence of the word "State", and the fact that "person" is not tethered to that word, makes that conclusion inescapable. That may be contrasted with other provisions of the Constitution, which are textually limited to the residents of the States.[20] Consistent with that, the "Commonwealth" in the chapeau extends to the territories[21] and Covering Clause 5 makes the Constitution (including s 51(xxxi)) binding on the courts, judges, and "*people* of every State and of *every part of the Commonwealth*", the latter including people of the territories.

23. Further, the reference to a "State" cannot limit the operation of s 51(xxxi) geographically to the States. Section 92 is textually limited to trade, commerce and intercourse *amongst the States*, but even that provision may operate where laws made under s 122 affect interstate trade passing through a territory.[22] Section 51(xxxi) speaks of "[t]he acquisition of property… *from any State*" not of the acquisition of property *in a State* from that State. A State may own property elsewhere[23] (e.g. in a territory) and there is no sound constitutional basis for the just terms guarantee applying to a State's property within a State but not in a territory. In any event, s 122 may also sustain extraterritorial laws which acquire property *in* a State *from* a State.[24] It would be incongruous for Parliament to be able to achieve that end indirectly

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19 It is not limited to natural persons: e.g. *Newcrest* (1997) 190 CLR 513.

20 The phrase is thus broader than that used in (for example) s 100, which prevents the Commonwealth from abridging the right "of a State *or of a resident therein*" to the reasonable use of water: compare also ss 25, 75(iv) and 117.

21 *Spratt* (1965) 114 CLR 226, 247 (Barwick CJ); *Berwick* (1976) 133 CLR 603, 608 (Mason J, Barwick CJ, McTiernan, Jacobs and Murphy JJ agreeing); *Newcrest* (1997) 190 CLR 513, 597 (Gummow J, Gaudron J agreeing); *Wurridjal* (2009) 237 CLR 309, [74] (French CJ).

22 *Lamshed* (1958) 99 CLR 132, 143 (Dixon CJ, Webb, Kitto and Taylor JJ agreeing); *Vunilagi v The Queen* (2023) 97 ALJR 627 (***Vunilagi***), [177] (Edelman J).

23 E.g. *State Authorities Superannuation Board v Commissioner of Taxation (WA)* (1996) 189 CLR 253. See also *Newcrest* (1997) 190 CLR 513, 594 (Gummow J, Gaudron J agreeing).

24 *Newcrest* (1997) 190 CLR 513, 655, 656 (Kirby J); *Wurridjal* (2009) 237 CLR 309, [80] (French CJ).

(through extraterritorial legislation under s 122) if it could not do that directly (under ss 51 or 52).

24. Finally, s 51(xxxi) applies to an acquisition for *any* purpose in respect of which the Parliament has power to make laws. As explained below, the power to make laws for the government of a territory in s 122 is plainly such a purpose: see [30].

25. Against those plain textual indicators, one may expect that the framers would have used words of limitation found elsewhere in the Constitution had they intended s 51(xxxi) would not qualify s 122 or would be limited to ss 51 and 52, but there are no such words: cf ss 13 ("For the purposes of *this section*"), 15 ("chosen or appointed *under this section*"), 25 ("For the purposes of *the last section*"), 85(iii) ("passing to the Commonwealth *under this section*"), 95 ("duty on any goods *under this section*"), 102 ("within the meaning of *this section*") and 128 ("In *this section*"). There is thus no textual basis in s 51(xxxi) for confining its operation to the exercise of powers under ss 51 or 52: **cf CS[17]**, **[44]**. It is not controversial that s 51(xxxi) qualifies powers in other Chapters of the Constitution: e.g. s 96.[25]

26. It is true that the chapeau to s 51 contains the qualification "subject to this Constitution", which does not appear in s 122: **CS[46]**. However, that does not foreclose the issue. The presence of those words in s 51 is explained by it addressing a multitude of subject matters and purposes. Although s 122 does not contain those words, it is undoubtedly subject to a number of other limitations found elsewhere in the Constitution: e.g. ss 90[26], 92[27], the implied freedom of political communication[28], and the *Kable* principle.[29] Similarly, s 96 is not expressed to be "subject to this Constitution", but it is qualified by s 51(xxxi).[30] The words are thus "superfluous"[31] once one applies the "elementary"[32] canon of construction that the Constitution must be construed as a whole.[33] Further, the words "subject to the Constitution" assume far

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25 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 (***ICM***), [46] (French CJ, Gummow, Crennan JJ), Heydon J agreeing at [174].

26 *Capital Duplicators No.1* (1992) 177 CLR 248, 279 Brennan, Deane and Toohey JJ), 290 (Gaudron J).

27 *Palmer v Western Australia* (2021) 272 CLR 505, [117] (Gageler J).

28 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-568 (the Court); *Meyerhoff v Darwin City Council* (2005) 16 NTLR 222 (NTCA).

29 *Emmerson* (2014) 253 CLR 393, [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

30 *ICM* (2009) 240 CLR 140, [46] (French CJ, Gummow, Crennan JJ), Heydon J agreeing at [174].

31 *Newcrest* (1997) 190 CLR 513, 606 (Gummow J, Gaudron J agreeing), 653 (Kirby J).

32 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 185 (Latham CJ).

33 Cf *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, [36] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon JJ), which concerned the relationship between ss 52(i) and 55. While the words "subject to this Constitution" in s 52(i) made clear that it was qualified by s 55, the passage is not authority for the proposition that the absence of such words in s 122 produced the opposite result. The first sentence demonstrates that this question is open despite *Buchanan v*

less significance in the case of s 51(xxxi) because that provision is a constitutional safeguard and must be given a liberal construction appropriate to its status as a guarantee: **cf CS[46]**.

27. *The territories power.* The text of s 122 has two components, one concerning the government of a territory and another concerning representation in Parliament. It says:

> 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 representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

28. A number of textual matters may be noted at the outset. First, s 122 contains no express language giving it paramountcy over other provisions which might qualify its scope. This may be contrasted with, for example, s 105A(6), which provides that the powers conferred by that section are not limited in any way by the provisions of s 105.

29. Secondly, the power naturally answers the description in s 51(xxxi) of a purpose in respect of which the Parliament has power to make laws: **cf CS[42]-[44]**. The words "*for* the government of any territory" speaks of "the purpose of the law in terms of the end to be achieved".[34] The power is vested in the same federal legislative organ referred to in s 51(xxxi). As Dixon CJ observed in *Lamshed* (emphasis added):[35]

> … 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*, so that the territory may be governed not as a *quasi* foreign country… but as a territory of Australia …

30. Thirdly, s 122 confers admittedly broad power on Parliament to make laws across a spectrum, ranging from laws directly governing a territory to the establishment of a new body politic with independent plenary legislative, executive and judicial power: **CS[19]**, **[25]**.[36] The power has thus been said to be "plenary"[37], but that label is apt to

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Commonwealth (1913) 16 CLR 315. In the latter respect, see also D Mossop, *The Constitution of the Australian Capital Territory*, 2021, pp 50-51.

34 *Newcrest* (1997) 190 CLR 513, 597 (Gummow J, Gaudron J agreeing).

35 *Lamshed* (1958) 99 CLR 132, 143-144 (Dixon CJ, Webb, Kitto and Taylor JJ agreeing).

36 *Berwick* (1976) 133 CLR 603, 607 (Mason J, Barwick CJ, McTiernan, Jacobs, Murphy JJ agreeing); *Capital Duplicators (No 1)* (1992) 177 CLR 248, 271-272 (Brennan, Deane, Toohey JJ); *Bennett* (2007) 231 CLR 91, [36] (Gleeson CJ, Gummow, Hayne, Heydon, Crennan JJ); *Queanbeyan City Council v ACTEW Corporation* (2011) 244 CLR 530 (***ACTEW***), [4] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ); *Vunilagi* (2023) 97 ALJR 627, [27] (Kiefel CJ, Gleeson, Jagot JJ).

37 *Berwick* (1976) 133 CLR 603, 607 (Mason J, Barwick CJ, McTiernan, Jacobs, Murphy JJ agreeing).

mislead when applied in Australia's constitutional arrangements: **cf CS[15]**, **[28]**, **[31]**.[38] The powers in ss 51 and 52 have similarly been described as "plenary"[39] though they are subject to limitations found elsewhere in the Constitution. So too the powers of the colonial legislatures which were "plenary" despite being subject to the paramount laws of the Imperial Parliament.[40] In the same way, s 122 may be described as "plenary" whilst at the same time being limited by other provisions. As was said in *Spratt* (emphasis added):[41]

> The power [in s 122] is not only plenary but is unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory – an expression condensed in s 122 to "for the government of the Territory". This is as large and universal a power of legislation as can be granted… *But 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 found in chapters other than Ch VI are applicable to the making of laws for the Territory or its government*.

31. The fourth point is that the very breadth of the power in s 122 underscores the relative particularity with which s 51(xxxi) is framed. On orthodox constitutional analysis, that very general language must give way to the specific.[42]

32. *A non-federal power*. Turning to the broader context, characterising s 122 as disparate and non-federal[43] is unhelpful in two respects: **CS[31]**. The first is that the territories power is not exclusively non-federal. It plays an important federal function because, amongst other things, the seat of federal government must be within a territory and laws made under s 122 may operate within a State.[44] The legislation upheld in *Lamshed* and *Attorney-General (WA) (ex rel Ansett Transport Industries (Operations) Pt Ltd v Australian National Airlines Commission* (1976) 138 CLR 492 provide instructive examples of just how intrusive a s 122 law can be on State affairs. All that is required for the law to be characterised as one for the government of a territory is that there is a sufficient nexus or connection between the law and the territory.[45]

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38 *ACTEW* (2011) 244 CLR 530, [7] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ).
39 E.g. *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 333 (Dixon J).
40 See the authorities in *Newcrest* (1997) 190 CLR 513, 604 ffn 287-290 (Gummow J).
41 *Bennett* (2007) 231 CLR 91, [43] (Gleeson CJ, Gummow, Hayne, Heydon, Crennan JJ).
42 *Schmidt* (1961) 105 CLR 361, 371 (Dixon CJ, Fullagar, Kitto, Taylor and Windeyer JJ agreeing).
43 *Attorney-General (Commonwealth) v The Queen* (1957) [1957] AC 288, 320 (Viscount Simonds on behalf of the Board).
44 *Lamshed* (1958) 99 CLR 132, 142-143 (Dixon CJ, Webb, Kitto and Taylor JJ agreeing); *Spratt* (1965) 114 CLR 226, 246 (Barwick CJ).
45 *Berwick* (1976) 133 CLR 603, 607 (Mason J, Barwick CJ, McTiernan, Jacobs, Murphy JJ agreeing).

33. Further, even where the Commonwealth makes laws for the direct governance of a territory (as is the case with the legislation in this case), the legislative process has a distinct federal character.

(a) They are introduced, debated and passed pursuant to Ch I of the Constitution by at least[46] the representatives directly chosen by the people of the States (in the case of the Senate)[47] and by the representatives directly chosen by the people of the Commonwealth (in the case of the House of Representatives).[48]

(b) The laws have the capacity to trigger a double dissolution under s 57 of the Constitution.[49]

34. Section 122 confers "on the legislative organ *of the federation* plenary power in respect of such areas as may be offered to and accepted by *the federation* so as to become territories to be governed by *the federation*" and so that it may be "fitted into the Australian scene [and] that the entire legal situation of the territory, both internally *and in relation to all parts of the Commonwealth*, may be determined by or by the authority of Parliament."[50]

35. The second and converse point is that those Chapters which are traditionally associated with the federal distribution of powers (Chs I-III) are not limited in their operation to the States. As to Ch I, because s 122 contemplates that representatives from the Northern Territory and Australian Capital Territory can sit in Parliament, it follows that s 122 "requires to be read with Ch I" and "account must be taken of s 122 in the interpretation of ss 7 and 24".[51] As to Ch II, s 61 confers executive power in relation to territories.[52] As to Ch III, s 122 empowers Parliament to authorise territory courts to exercise federal judicial power[53] and, in those circumstances, they are courts exercising federal jurisdiction from which an appeal to this Court lies under s 73(ii). They form part of the integrated, national judicial system created by Ch III and it would

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46 It is open to Parliament to provide for a territory to also be represented in either House pursuant to the second component of s 122, as it has done: *Western Australia v Commonwealth* (1975) 134 CLR 201; *Queensland v Commonwealth* (1977) 139 CLR 585.

47 Constitution, s 7.

48 Constitution, s 24.

49 As was the case in *Western Australia v Commonwealth* (1975) 134 CLR 201.

50 *Lamshed* (1958) 99 CLR 132, 153-154 (Kitto J), quoted in *Bennett* (2007) 231 CLR 91, [30] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

51 *Western Australia v Commonwealth* (1975) 134 CLR 201, 269 (Mason CJ). See also *Spratt* (1965) 114 CLR 226, 246 (Barwick CJ).

52 *Kruger v Commonwealth* (1997) 190 CLR 1, 168 (Gummow J); *Spratt* (1965) 114 CLR 226, 246 (Barwick CJ); *Lamshed* (1958) 99 CLR 132, 142 (Dixon CJ).

53 *Emmerson* (2014) 253 CLR 393, [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

be beyond the legislative power of the Commonwealth under s 122 to undermine their institutional integrity as repositories of federal judicial power.[54]

36. Thus, "top down"[55] reasoning about the federal nature of ss 51 and 52 on the one hand, and the exclusively non-federal nature of s 122 on the other, not only distracts from the text (which is controlling); it is inaccurate.

37. *Physical separation of ss 51 and 122.* Nothing can be drawn from s 122's location in Ch VI: **CS[30]**. In *Spratt*, Barwick CJ recognised the general proposition that the provisions of Chs I, II, III and VI ought not be compartmentalised merely because "for drafting convenience [the Constitution] has been divided into chapters".[56] That was said before regard could be had to the Convention Debates[57], which show an ambivalence as to whether the territories power should be included in ss 52 or 122: **cf CS[27]**.[58] Sir Alfred Deakin noted that (what are now) ss 52 and 122 both provided for exclusive powers and asked why "the two clauses should be needed or placed so far apart". Sir Edmund Barton responded that the only reason for including s 122 in Ch VI was that it "refers particularly to that kind of territory which afterwards develops into a new state." There was no suggestion that this division was intended to have some broader consequence. Sir Alfred Deakin responded that s 122 was "logical where it is, *and it would also be logical if included in [s 52]*." That ambivalence is inconsistent with the notion that placing s 122 outside of s 52 was intended to give it a fundamentally different character.

38. *Section 122 is not entirely immunised*. In any event, following *Newcrest,* it can no longer be said that s 122 is entirely immunised from s 51(xxxi). It was there held that a law which has two purposes, one which is for the government of a territory and the other which is for a purpose in s 51, attracts the requirement of just terms.[59] This will be particularly so where the law has a national character, so that it operates in the States and the territories: **CS[18]**.

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54 Ibid.

55 *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J).

56 *Spratt* (1965) 114 CLR 226, 246 (Barwick CJ).

57 *Cole v Whitfield* (1988) 165 CLR 360, 385 (the Court). As to the position when *Spratt* was decided, see *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 17 (Barwick CJ).

58 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 28 January 1898, vol 1, p 257, quoted in *Newcrest* (1997) 190 CLR 513, 603 (Gummow J, Gaudron J agreeing). See also *Wurridjal* (2009) 237 CLR 309, [52] (French CJ).

59 *Newcrest* (1997) 190 CLR 513, 560-561 (Toohey J), 568-9 (Gaudron J), 614 (Gummow J), 661 (Kirby J).

39. Nonetheless, *Newcrest* produces two problems of coherence. The first is that the distinction is "capricious".[60] A law will still acquire property regardless of whether it is sustained under only s 122 or a combination of ss 51, 52 and 122. The second is that the distinction could be easily avoided by the Commonwealth passing separate statutes, one under s 122 in the territories and one under ss 51 and 52 (or the nationhood power) in the States. But that would permit the Commonwealth to do indirectly that which it could not do directly. Those arbitrary distinctions are avoided if s 122 is in all respects qualified by s 51(xxxi).

40. ***Inconvenience.*** The centrepiece of the Commonwealth's submissions is the purposive argument that the application of the just terms-requirement would reduce the flexibility afforded to the Commonwealth in the government of the territories: **CS[47], but also [19], [23], [25], [27], [33] and [41]**. This is said to demonstrate a necessary implication that s 51(xxxi) does not qualify s 122, despite the textual and contextual matters essayed above.

41. The asserted inflexibility does not arise. It may be accepted that there is variation in circumstances that can be expected to pertain to the territories that come under the Commonwealth's control.[61] It may also be accepted that this will necessarily require the Commonwealth to engage in the government of the territories in different ways. However, the application of s 51(xxxi) to s 122 does not deny that capacity. Section 122 confers all the flexibility that the Commonwealth could require, regardless of whether or not s 51(xxxi) applies. It is given complete control of not only the mode of government (the spectrum referred to in [30] above), but also of the manner of government by dictating the content of the laws that are to apply in governing a territory, subject only to the applicable constitutional constraints. Further, it must be remembered that s 51(xxxi) is not engaged by the mere extinguishment of property rights in others[62]; there must be some vesting of property which is necessarily something of "value".[63] With the possible exception of the matter in Ground 2, the

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60 *Newcrest* (1997) 190 CLR 513, 601 (Gummow J, Gaudron J agreeing); *Wurridjal* (2009) 237 CLR 309, [80(3)] (French CJ).

61 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, [7] (Gleeson CJ, McHugh and Callinan JJ); *Bennett* (2007) 231 CLR 91, [10] (Gleeson CJ, Gummow, Hayne, Heydon, Crennan JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, [27] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan, Heydon JJ).

62 *Wurridjal* (2009) 237 CLR 309, [90] (French CJ).

63 *Victoria v Commonwealth* (1996) 187 CLR 416, 559 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

Commonwealth has not explained how the "flexibility" to vest in itself valuable private property without compensation is necessary to govern its territories.

42. On the other hand, the same argument could be made in respect of the other powers in ss 51 and 52. Defence is the *ultima ratio* of the nation[64] and, in times of total war, the defence power may expand to give Parliament almost complete latitude to respond to the conflict.[65] Even then, the power in s 51(vi), flexible though it must be, is constrained by s 51(xxxi).[66]

43. By the presence of s 51(xxxi), the Constitution contemplates that Parliament will in general not be unduly hampered in the exercise of its legislative powers by the requirement to provide just terms when the Commonwealth wishes to acquire property. In addition, responsibility for a territory cannot be thrust upon the Commonwealth without its consent.[67] It remains open for the Commonwealth to not accept or acquire a territory if the requirement for just terms means its administration will be unduly burdensome, and it may accept or acquire the territory on terms by which it is released from liability for any acquisition necessary for the government of the territory.[68]

44. This may be contrasted with those powers which are not constrained by s 51(xxxi) because their subject matter makes the provision of just terms "inconsistent or incongruous".[69] Those categories include laws levying taxation, imposing a fine, exacting a penalty or forfeiture, enforcing a statutory lien, authorising seizure of the property of enemy aliens or effecting the condemnation of prize.[70] The relevant "boundary" of s 51(xxxi) is marked out by compensation being "incompatible with the very nature *of the exaction*" (emphasis added).[71]

45. The breadth of the territories power means that certain laws sustained under s 122 which effect something akin to an acquisition pass beyond that boundary (such as the forfeiture law in *Emmerson*), but that cannot be said of all subject matters which may

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64 *Farey v Burvett* (1916) 21 CLR 433, 453 (Isaacs J).

65 Ibid; *Stenhouse v Coleman* (1944) 69 CLR 457, 471-472 (Dixon J).

66 E.g. *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

67 Section 122 only applies to territories surrendered by a State and *accepted* by the Commonwealth, any territory placed by the Queen under the authority of and *accepted* by the Commonwealth or otherwise *acquired* by the Commonwealth.

68 E.g. *Seat of Government Acceptance Act 1909* (Cth), s 3 and First Schedule, clause 15; *Seat of Government Surrender Act 1909* (NSW), s 5 and First Schedule, clause 15; *Northern Territory Acceptance Act 1910* (Cth), s 5 and Schedule, clause 3; *Northern Territory Surrender Act 1907* (SA), s 6 and Schedule, clause 3.

69 *Theophanous* (2006) 225 CLR 101, [56] (Gummow, Kirby, Hayne, Heydon, Crennan JJ).

70 Ibid, [56], [60] (Gummow, Kirby, Hayne, Heydon, Crennan JJ); *Emmerson* (2014) 253 CLR 393, [77] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

71 *Theophanous* (2006) 225 CLR 101, [60] (Gummow, Kirby, Hayne, Heydon, Crennan JJ).

be covered. The power may also sustain laws for the acquisition of title to land, for which compensation could not be said to be incongruous. The same acquisition, were it to be made by the Commonwealth in a State, would not only be compatible with the payment of compensation; it would be constitutionally required. Further, upon its acceptance of the Northern Territory, the Parliament did not permit the Commonwealth's acquisition of land in the Territory without just terms compensation[72] and it conferred self-government with a just terms guarantee analogous to s 51(xxxi).[73] It thus cannot be said that the acquisition of property by the Commonwealth in a territory *simpliciter* is incompatible with just terms compensation.

10 46. ***False equivalence.*** The other primary contention advanced by the Commonwealth is that, because the Constitution does not compel a State to provide just terms when acquiring property, it would incongruous to compel Parliament to do so when it passes legislation solely for a territory: **CS[18], [19], [21], [29], [34], [48], [49].**

47. There is no sound reason for construing s 122 such that the Commonwealth *qua* a territory should have the same powers as a State *qua* the State and much pointing the other way. First, and most obviously, there is no express requirement for just terms in the State Constitutions[74] or the Constitution[75] in the case of State legislatures, but there is such a requirement in the case of the Commonwealth Parliament.

48. Secondly, the asserted necessary equivalence is diametrically opposed to the
20 observation in *Lamshed* that Parliament acts as the national legislature when it makes laws under s 122 and to the emphatic rejection of the submission that Parliament merely acts as the local legislature in and for the territory.[76]

49. Thirdly, the asserted equivalence is false because the Constitution has a different operation in respect of the Commonwealth and the States. Sections 106-108 preserve the pre-existing constitutions, legislatures and laws of the former colonies. By contrast, the Commonwealth was newly created by the Constitution (Covering Clause 3), its new legislative powers were vested in a new legislative organ (s 1), and those legislative powers were both conferred and delimited by Chs I-VI. There is

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72 *Northern Territory (Administration) Act 1910* (Cth), s 9.

73 *Northern Territory (Self-Government) Act 1978* (Cth), s 50(2); *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 23(1)(a); *Norfolk Island Act 1979* (Cth), s 19(2)(a).

74 Those Constitutions confer general legislative power without any analogous restriction: *Constitution Act 1902* (NSW), s 5; *Constitution Act 1975* (Vic), s 16; *Constitution Act 1867* (Qld), s 2; *Constitution Act 1889* (WA), s 2(2); *Constitution Act 1934* (SA), s 5.

75 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, [14] (Gaudron, McHugh, Gummow and Hayne JJ).

76 *Lamshed* (1958) 99 CLR 132, 141 (Dixon CJ, Webb, Kitto and Taylor JJ agreeing).

nothing in the text of those provisions which provides that, in the territories, Parliament's power was to be a facsimile of (heterogeneous) State legislative power. On the contrary, those powers are not the same because (for example) laws made under s 122 prevail over State law.[77]

50. The analysis in **CS[49]** (suggesting an absence of equality of treatment between people in the States and the people in the territories) should be rejected for the same reasons. The Commonwealth's argument presents the analysis from the perspective of the person from whom the property is acquired, when in truth the perspective must be from the lawmaker, given that the requirement for just terms is a restriction on legislative power rather than a right conferred upon the subject as such.[78] Viewed in that way, where it is the Commonwealth who acquires the property, the equal treatment of people in the States and in the territories is assured.[79] This also explains the change in powers between 31 December 1910 and 1 January 1911 described in **CS[2]**.

B.2 Section 51(xxxi) applies in relation to internal territories

51. The alternative construction to resolve the tension between ss 51(xxxi) and 122 is that the Commonwealth must comply with the requirement of just terms where it acquires property from a State or person only when exercising the Territories power in respect of an internal territory.

52. The idea that the distinction between internal and external territories may have a role to play in resolving the tension is not a new one. In *Wurridjal*, Kiefel J suggested that s 122 may have a different operation where "it is exercised with respect to territories in Australia such as the Northern Territory."[80] However, this has so far not been adopted in any decision of a majority of this court.

53. The construction does however receive support from the sentiments underpinning the observation by Gummow J in *Newcrest* that the disapplication of s 51(xxxi) to an internal area merely because it becomes a territory for the purposes of s 122 produces "absurdities and incongruities". His Honour said (citations omitted):

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77 *Lamshed* (1958) 99 CLR 132, 148 (Dixon CJ, Webb, Kitto and Taylor JJ agreeing); *Spratt* (1965) 114 CLR 226, 247 (Barwick CJ).

78 *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 254 (Toohey J).

79 See, similarly, *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [116] (Gageler J), [168] (Keane J) concerning Ch III protections.

80 *Wurridjal* (2009) 237 CLR 309, [459]-[460] (Kiefel J)] and also [74] (French CJ). Further, in *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 286-287, 288-289, Gaudron J made observations about the distinction in a different constitutional context. Contra *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [167] (Keane J).

> First, a construction of the Constitution which treats s 122 as disjoined from par (xxxi) produces "absurdities and incongruities". This is so particularly with respect to a territory such as the Northern Territory, the area of which, at federation, was within a State. As is made clear in covering cl 6 of the Constitution, upon federation what was then identified as "the northern territory of South Australia" was included within an "Original State" and thus was part of the Commonwealth at its establishment. The Constitution, notably s 111, should not be readily construed as producing the result that the benefit of the constitutional guarantee with respect to the acquisition of property in what became the Northern Territory was lost.[81]

54. ***Argument***. The text and context of the Constitution provides support for the proposition that s 51(xxxi) is engaged by a law made under s 122 which acquires property from a State or a person in an internal territory.

55. The starting point is that, when the Constitution came into force, there were no territories in existence to which s 122 could apply and the Constitution did not contain any provision whereby a geographical area became a territory upon commencement on 1 January 1901. In particular, the Commonwealth accepted the Northern Territory in 1911 and the Australian Capital Territory and the Jervis Bay Territory in 1915.

56. Whilst s 125 required that an area in New South Wales would be granted to or acquired by the Commonwealth for the seat of government, the geographical areas occupied by the three current internal territories (the Australian Capital Territory, Northern Territory and Jervis Bay Territory) formed part of a State and an Original State when the Constitution was drafted and when it came into effect.

57. In particular, s 6 of the Constitution Act defined "The States" to mean "such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, *including the northern territory of South Australia*, as for the time being are parts of the Commonwealth … and each such parts of the Commonwealth shall be called "a State". It defined "Original States" to mean such States as are parts of the Commonwealth on its establishment, which included New South Wales and South Australia. The area of the Commonwealth at that time embraced the whole of the area of the States and the Constitution Act ensured that the area of the Commonwealth was coterminous with the aggregate of the areas of the Original States.[82]

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81 *Newcrest* (1997) 190 CLR 513, 600 (Gummow J, Gaudron J agreeing).

82 *Capital Duplicators (No 1)* (1992) 177 CLR 248, 274-275 (Brennan, Deane, Toohey JJ).

58. Further, save for where it appears in s 128, the term "territory" in the Constitution is used to describe a geographical area and it follows that when "territory" in s 122 is used in reference to a mainland territory, it means an area that has been surrendered by a State to, and accepted by, the Commonwealth or an area acquired by the Commonwealth.[83]

59. There can therefore be no doubt that the Constitution on commencement obliged the Commonwealth Parliament to adhere to the s 51(xxxi) guarantee if it wished to exercise legislative power to acquire property in respect of any part of mainland Australia, including in the geographical areas that were to become the internal territories. By extension, it is safe to infer that the framers of the Constitution intended that s 51(xxxi) would have that operation.

60. There is no indication in the Convention Debates or in the text of the Constitution that the application of the just terms guarantee should somehow be lost where control of the area is surrendered to and accepted by the very body politic to whom the guarantee applies. An outcome of this kind is sufficiently odd, if not absurd, to be required to be manifested in some way before being adopted as sound principle.[84]

61. The loss of the just terms guarantee upon an area becoming a territory may be contrasted with the loss of the right to vote in elections for Parliament upon an area becoming a territory. The two are different because, in the case of the loss of the right to vote, s 122 manifests a clear intention that the right will be lost by providing that Parliament "may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit". The manifestation of that intention in the constitutional text formed the basis for the decisions in *Western Australia v Commonwealth* and *Queensland v Commonwealth*.

62. Finally, it would not be the first time that the area of mainland Australia as it stood at the time of federation, and the fact that part of that area subsequently became an internal territory, have formed the basis for resolving tension between s 122 and another constitutional provision. In *Capital Duplicators (No 1)*, Brennan, Deane and Toohey JJ held that ss 90 and 92 were intended to create a free trade area regardless of whether any part of the area subsequently became a territory. Their Honours observed that:

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83 *Capital Duplicators (No 1)* (1992) 177 CLR 248, 275 (Brennan, Deane, Toohey JJ).

84 *Newcrest* (1997) 190 CLR 513, 600 (Gummow J, Gaudron J agreeing); *Wurridjal* (2009) 237 CLR 309, [80] (French CJ).

> It would be surprising if the surrender of part of a State to the Commonwealth and its acceptance by the Commonwealth pursuant to s 111, whilst leaving the territory as part of the Commonwealth, removed it from the operation of the constitutional provisions designed to create and maintain the free trade area.
>
> …
>
> The exclusivity provision of s 90 was incorporated in the Constitution not for the protection of the Parliament but *for the protection of the people of the Commonwealth, including those who resided in an area of a State which was subsequently to become an internal Territory*.

63. A practical effect of adopting this construction is that the Parliament will be able to make laws under s 122 to acquire property without providing just terms in external territories. Therefore, if full "flexibility" were necessary and if the Territory's primary construction unduly burdened that flexibility (which is denied), this alternative construction would give full "flexibility" to govern external territories which demonstrate a diversity of political and economic development. By contrast, the relative stability and gradual trend towards self-government in the Northern Territory and Australian Capital Territory, coupled with the inclusion in their self-governing legislation of a just terms guarantee, demonstrate their suitability to the application of s 51(xxxi).

64. It is accepted that the reasons in *Teori Tau* were expressed to apply to internal and external territories alike.[85] However, that went beyond what was necessary to decide. This alternative construction can be adopted without having to overrule *Teori Tau*, but by re-explaining that decision by reference to the facts of the case[86], concerning an external territory, namely the Territory of Papua and New Guinea.

65. Finally, the principle that s 51(xxxi) applies to internal territories is not inconsistent with the principle in the *Newcrest*. Each principle provides an independent basis upon which s 51(xxxi) will apply to an acquisition under s 122.

B.3 Wurridjal controls the proper construction of ss 51(xxxi) and 122

66. The last issue concerns the course of authority on this question and who bears the burden of seeking to reopen one or other of *Teori Tau* and *Wurridjal*. For the reasons which follow, *Wurridjal* controls the proper construction of ss 51(xxxi) and 122 and the burden is on the Commonwealth to have that decision re-opened and

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85 *Teori Tau* (1969) 119 CLR 564, 569, 570-571 (the Court).
86 *Vunilagi* (2023) 97 ALJR 627, [159], [165] (Edelman J).

overturned. Alternatively, if *Wurridjal* does not have that effect, *Teori Tau* ought to be re-opened and overturned or re-explained.

67. ***The course of authority.*** *Teori Tau* was not the first case to consider the Construction Issue. In 1943, Chief Justice Latham left open the question whether s 51(xxxi) conditioned s 122.[87] Twenty years later, the Supreme Court of the Northern Territory gave the first answer to that question, holding, by reference to the then recent decision in *Lamshed*, that s 122 was not disjoined from the rest of the Constitution and that there was no textual basis to disapply s 51(xxxi) from s 122.[88] Zines agreed, including because the result had "desirable" federal consequences.[89]

10 68. It was against that background that *Teori Tau* held, also for apparently federal reasons, that the power of the Commonwealth to acquire property under s 122 was not qualified by the requirement for just terms in s 51(xxxi).[90] The decision was delivered in *ex tempore* reasons, without any argument from the defendants and without reference to relevant authority. Zines later observed that those reasons were "totally at odds"[91] with the Court's emerging, integrationist, jurisprudence.

69. The digression in *Teori Tau* was corrected in two subsequent cases. The first was *Newcrest*, where three members of the Court would have overruled *Teori Tau* and held that s 51(xxxi) qualified s 122 in all its applications.[92] With Toohey J, their Honours also endorsed the narrower proposition that s 51(xxxi) would be engaged if a law was
20 supported under ss 51 and 122.[93] Toohey J's reasons suggest that he also considered *Teori Tau* was erroneous but that overruling it might create inconvenience.

70. The second correction came in *Wurridjal*, where a majority of the Court disapproved of *Teori Tau* in its entirety. French CJ said that *Teori Tau* should be overruled because the "ordinary principles of construction, the weight of authority, other than *Teori Tau*, and the inconvenience of the contrary position" supported the application of s 51(xxxi) to s 122: at [18], [86]. Gummow and Hayne JJ said that *Teori Tau* did not conform to the integrationist view of s 122 adopted since *Lamshed*, the accepted relationship

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87 *Johnston Fear & Kingham & The Offset Printing Co v Commonwealth* (1943) 67 CLR 314, 318.
88 *Kean v Commonwealth* (1963) 5 FLR 432, 439-440 (Bridge J).
89 L Zines, 'Laws for the Government of any Territory: Section 122 of the Constitution' (1966) 2 FLR 73, 91, 94. See also P H Lane, *Some Principles and Sources of Australian Constitutional Law* (1964), p 241; G S (*sic*), 'Recent Cases – Notes and Comments' (1963) 36 ALJ 458, 458.
90 *Teori Tau* (1969) 119 CLR 564, 570 (Barwick CJ for the Court).
91 L Zines, 'The Nature of the Commonwealth' (1998) 20 *Adelaide Law Review* 83, 83.
92 *Newcrest* (1997) 190 CLR 513, 568-589 (Gaudron J), 613 (Gummow J), 661 (Kirby J).
93 Ibid, 560-561 (Toohey J), 568-9 (Gaudron J), 614 (Gummow J), 661 (Kirby J).

between s 51(xxxi) and other heads of power, or the breadth of the just terms requirement: at [178], [189]. Kirby J agreed: at [209], [287].

71. It was strictly unnecessary for Heydon J to decide the issue because the legislation provided just terms: at [318], [342]. However, in response to an argument (summarised at [323]) that the legislation did not provide for just terms – because that right was contingent and would require a plaintiff first overturn *Teori Tau* – he said that "in consequence of the approach of the plurality in this case, *there will in future be no doubt as to the relationship between ss 51(xxxi) and 122 of the Constitution*": at [325].

72. Kiefel J adopted the principle from *Newcrest*: at [460]. Crennan J did not have to decide the issue because there was no acquisition of property: at [446].

73. In the result, it was a necessary step in the reasoning of a majority of the Court that *Teori Tau* had been overruled to resolve the demurrer. Four Justices (French CJ, Gummow, Kirby and Hayne JJ) expressly overruled *Teori Tau*, one Justice (Kiefel J) would have confined it consistent with *Newcrest*, one Justice (Heydon J) did not decide the issue but overruling *Teori Tau* was a premise in his reasons, and one Justice (Crennan J) expressed no view.

74. That conclusion is reflected in the headnote to *Wurridjal*, which records that *Teori Tau* was "overruled". It is also reflected in subsequent decisions of this Court. In the same year *Wurridjal* was decided, three members of the Court referred to the (failed) argument in *Wurridjal* that s 51(xxxi) does not abstract power from s 122 to criticise a similar argument concerning ss 51(xxxi) and 96.[94] Two years later, six Justices said that "it is *established* by subsequent authorities, *the most recent of which is Wurridjal*, that s 122 is not disjoined from the body of the Constitution" (emphasis added).[95] This is also the consistent view of lower courts[96] and constitutional scholars.[97]

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94 *ICM* (2009) 240 CLR 140, [135] (Hayne, Kiefel and Bell JJ).

95 *ACTEW* (2011) 244 CLR 430, [7] (French CJ, Gummow, Hayne, Crennan Kiefel and Bell JJ).

96 *Lewis v Chief Executive, Department of Justice and Community Safety* (2013) 280 FLR 118, [307] (Refshauge ACJ); *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2016] NSWCA 157, [246] (Basten JA); *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)* (2014) 286 FLR 355, [310] (Mossop M).

97 See G Williams et al, *Blackshield and Williams' Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018) [10.35]; D Meagher et al, *Hanks' Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 10th ed, 2016) [9.5.9], [9.7.8]; P Hanks et al, *Constitutional Law in Australia* (LexisNexis Butterworths, 4th ed, 2016) [10.21]; G Moens and J Trone, *Lumb, Moens and Trone: The Constitution of the Commonwealth of Australia* (LexisNexis Butterworths, 8th ed, 2012) 460; M Perry and S Lloyd, *Australian Native Title Law* (Thomson Reuters, 2nd ed, 2018) [ch2.150]; P Herzfeld and T Prince, *Interpretation* (Thomson Reuters, 2nd ed, 2020) [33.540] fn 281; S Brennan, 'Wurridjal v Commonwealth: The Northern Territory Intervention and just Terms for the Acquisition of Property' (2009) 33(3) *Melbourne*

B.4 The Commonwealth's ratio argument

75. The Commonwealth says that *Wurridjal* did not overrule *Teori Tau* because there was no majority in *Wurridjal* to that effect: **CS[50]-[52]**. There are two errors in that argument.

76. The first error is that the fact Kirby J was in dissent as to the ultimate order does not mean that the reasons of his Honour do not form part of the majority in resolving the first ground of the demurrer. As the Full Court identified below (**J [257]-[279] CAB 106-112**), *Wurridjal* proceeded by way of demurrer on a series of independent and alternative grounds, in the nature of preliminary legal questions[98], the first and "primary"[99] being whether s 122 was subject to the just terms requirement. A demurrer involves the determination of a question of law[100] and operates in a similar way to questions reserved or separate questions.[101] In the latter contexts, a *ratio* can be formed from a majority on a question[102], so that the resolution of a question or ground is the relevant "conclusion"[103] for which a *ratio* may be found. That is consistent with Kirby J's observation that, because he agreed with French CJ, Gummow and Hayne JJ, overruling *Teori Tau* was "the first holding of this Court."[104]

77. The second error is to exclude the reasoning of Heydon J. His Honour said that "[a]nalysis of the question whether … s 51(xxxi) applies to the acquisition, is unnecessary *if* the terms contained in the legislation for any acquisition are just terms".[105] However, his Honour went on to decide whether the legislation *did* provide just terms, and part of his Honour's reasoning for finding that it did was an express acknowledgment that "the approach of the plurality judgment in this case" leaves "no

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University Law Review 957, 972-5; S Brownhill, 'The long road to the constitutional guarantee of just terms for Territorians' (2010) 1 *Northern Territory Law Review* 252, 257, 260.

98 *Wurridjal* (2009) 237 CLR 309, [12] (French CJ).

99 Ibid, [209] (Kirby J).

100 *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117, 125-126 (Barwick CJ), 135 (Gibbs J), 140 (Stephen J).

101 *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135, [32] (the Court), As to the equivalence in the Federal Court following the removal of the demurrer procedure, see *Direct Factory Outlets Homebush Pty Ltd v Property Council of Australia Ltd* [2005] FCA 1002, [26]-[37] (Sackville J); *Alcock v Commonwealth* (2012) 203 FCR 114, [6] (Tracey J).

102 See Herzfeld and Prince, *Interpretation* (2nd ed., 2020), [34.120] referring to *Hepples v Commissioner of Taxation* (Cth) (1992) 173 CLR 492.

103 *Vanderstock v Victoria* (2023) 98 ALJR 208, [430] (Gordon J), quoting R Cross and JW Harris, *Precedent in English Law* (Clarendon Press, 4th ed, 1991), 72.

104 *Wurridjal* (2009) 237 CLR 309, [287] and also [209].

105 Ibid, [318].

doubt as to the relationship between ss 51(xxxi) and 122 of the Constitution".[106] It was thus a necessary step in his Honour's reasoning that *Teori Tau* had been overruled.

B.5 Wurridjal should not be re-opened or, alternatively, should be confirmed

78. *Wurridjal* should not be re-opened or, alternatively, should be confirmed: contra **CS[53]-[56]**.[107] It was correctly decided, for the reasons in Part B.1 above. It brought the construction of ss 51(xxxi) and 122 in line with the Court's integrationist jurisprudence[108] and has not been overtaken by developments in the law over the past 15 years. It avoids incongruities created by the Commonwealth's construction (see [23], [39] above) and has produced no inconvenience. The Commonwealth legislated in conformity with the principle established by *Wurridjal* both before[109] and after[110] that decision, including through the grants of self-government to the Northern Territory and the Australian Capital Territory.[111]

B.6 Alternatively, *Teori Tau* should be re-opened and overruled

79. If *Wurridjal* did not overrule *Teori Tau*, the Territory seeks leave to reopen it for the following reasons.

80. *Teori Tau* fundamentally rested on the notion that s 51(xxxi) is part of the exclusively *federal* distribution of powers, and s 122 is an exclusively *non-federal* power to make laws for the territories, so that the former could not constrain the latter.[112] As such, s 122 was said to confer a power "plenary in quality and unlimited and unqualified in point of subject matter".[113]

81. As was observed by three members of the Court in *Newcrest* and at least four members in *Wurridjal*, each step in that reasoning is erroneous: see [70]-[73] above. It asked the wrong question, by setting ss 51(xxxi) and 122 up as alternative sources of power, rather than asking whether the government of a territory answered the description in

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106 Ibid, [325] and see also [317], [325], [329], [339].
107 Ibid, [69]-[71] (French CJ) and the authorities therein.
108 As to the position beforehand, see generally C Horan, 'Section 122 of the Constitution: A 'Disparate and non-federal' power?' (1997) 25 FLR 97. As to subsequent decisions, see, *Kruger v Commonwealth* (1997) 190 CLR 1, 80-85 (Toohey J), 104-112, 120-123 (Gaudron J); *Northern Territory v GPAO* (1999) 196 CLR 553, [124]-[125] (Gaudron J); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [80]-[81] (Gaudron J); *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, [25]-[29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
109 E.g. *Northern Territory Emergency Response Act 2007* (Cth), s 60(2), at issue in *Wurridjal*.
110 E.g. *Home Affairs Act 2023* (Cth), s 6(1).
111 *Northern Territory (Self-Government) Act 1978* (Cth), s 50(2); *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 23(1)(a); *Norfolk Island Act 1979* (Cth), s 19(2)(a).
112 *Teori Tau* (1969) 119 CLR 564, 570 (Barwick CJ for the Court).
113 Ibid, 569.

s 51(xxxi) as a purpose in respect of which the Parliament may make laws.[114] However, it is now accepted a law may have several characters and be supported by several heads of power[115], so that ss 51 and 122 need not be mutually exclusive.[116]

82. The Commonwealth did not resist re-opening *Teori Tau* in *Wurridjal*[117] and does not resist that course here: **CS[14]**. *Teori Tau* was inconsistent with prior authority when it was decided[118], it has not been referred to authoritatively in subsequent cases[119], and there have been developments in constitutional principle and amendment which have overtaken its reasoning (e.g. the conferral of self-government and the 1997 referendum). The Commonwealth has not relied on that decision since it was made: see [78] above. Its historical reliance was at most inconsistent, as any acquisition of property under the *Northern Territory (Administration) Act 1910* (Cth) was required to be on just terms: see s 9. Further, *Teori Tau* was not handed down until 9 December 1969 and there had been observations from at least two courts prior to that indicating that any assumption that s 51(xxxi) did not quality s 122 may not be warranted.

83. On either alternative basis, ground 1 should be dismissed.

C. GROUND 3: THE RESERVATION ISSUE

84. Ground 3 arises from the Commonwealth's demurrer to the first respondent's claim for compensation in respect of the asserted extinguishment, by s 107 of the *Mining Ordinance 1939* (NT), of a claimed non-exclusive native title right to take minerals.[120] The Northern Territory submits, consistently with the Commonwealth, that the Full Court erred in failing to find the claimed native title right,[121] if it existed at sovereignty, was extinguished by the earlier grant of pastoral lease no 2229 dated

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114 The Court framed the question in *Teori Tau* as whether s 122 conferred a power "akin to that possessed by the States" to acquire property without just terms or whether s 51(xxxi) was "the only source of power to make laws for the acquisition of property": at 569.

115 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 188 (Deane and Gaudron JJ); *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 193 (Stephen J); *Wurridjal* (2009) 237 CLR 309, [187] (Gummow and Hayne JJ).

116 *Newcrest* (1997) 190 CLR 513, 561 (Toohey J), 568-9 (Gaudron J), 614 (Gummow J), 661 (Kirby J).

117 *Wurridjal* (2009) 237 CLR 309, 327 (Mr Burmester QC, *arguendo*).

118 *Newcrest* (1997) 190 CLR 513, 609-610, 613 (Gummow J, Gaudron J agreeing), 656 (Kirby J); *Wurridjal* (2009) 237 CLR 309, [85] (French CJ), [178] (Gummow and Hayne JJ).

119 *Wurridjal* (2009) 237 CLR 309, [55]-[64], [82]-[84] (French CJ).

120 **ABFM 38 [195], 381 [2(a)]**; **CAB 46 [33], 48 [43]-[44], 51 [51(a)], 57 [76]-[77], 58 [82]**.

121 The Territory does not contend the claimed right to access, take and use for any purpose the resources of the claim area was extinguished in its entirety, only insofar as it relates to minerals: cf **CAB 58 [80]-[81]**.

21 September 1903 (**Pastoral Lease**) under *The Northern Territory Land Act 1899* (SA) (**1899 Land Act**).[122]

85. Ground 3 turns on two questions. The first is whether by the grant of the Pastoral Lease containing the Reservation, the Crown asserted rights or interests in the minerals of the claim area, or whether the Reservation merely had the effect that no rights to minerals in or upon the land that was the subject of the lease were conferred upon the lessee.[123] The second question is whether any rights or interests so asserted by the Crown amounted to a right of exclusive possession of the minerals which was inconsistent with and extinguished any native title right to take those same minerals.

10 86. The Full Court determined the issue solely by reference to the first question. It held that the Reservation constituted a "mere holding back" or "withholding or keeping back" of any rights that may exist in relation to minerals (**CAB 67 [107], [109]**), and thus effected no extinguishment: **CAB 66-70 [106]-[117]**. It did not decide the second question: **CAB 70 [118]**.[124]

C.1 The Reservation was more than a mere holding back

87. It is common ground that the grant of earlier pastoral leases extinguished any native title right to control access in the claim area: **CAB 37 [8]**. In order to determine whether the grant of the Pastoral Lease additionally extinguished the claimed non-exclusive native title right in relation to minerals, the first step is to construe the
20 Pastoral Lease to ascertain what rights were created.[125] Unlike *Wik v Queensland* (1996) 187 CLR 1 (***Wik HCA***), *Ward HCA* and *Brown HCA*, the relevant inquiry in this case is not whether the grant conferred upon the lessee a right of exclusive possession. Here, the relevant inquiry is, in addition to granting rights to the lessee, what rights or interests, if any, were asserted by the Crown?

88. That is because the starting point is that, at sovereignty, the Crown acquired a bare radical title to the claim area[126], which included a radical title to the minerals under the

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122 Read with the *Northern Territory Crown Lands Act 1890* (SA) (**1890 Crown Lands Act**).

123 As pleaded by the first respondent: **ABFM 33 [159]**.

124 There has been no notice of contention filed in relation to the second question: *High Court Rules 2004* (Cth), r 42.08.5.

125 *Western Australia v Ward* (2002) 213 CLR 1 (***Ward HCA***), [186] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Western Australia v Brown* (2014) 253 CLR 507 (***Brown HCA***), [33]-[34], [43] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

126 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (***Mabo No.2***), 69 (Brennan J, Mason CJ and McHugh J agreeing).

soil.[127] That radical title conferred no beneficial interest in the minerals themselves, save for the royal metals (gold and silver), but merely enabled the Crown to grant to others or to assert for itself rights and interests in the minerals, expanding its radical title to a beneficial interest.[128] Native title existed as a burden on that radical title but, to the extent that the Crown asserted rights in the minerals ("whether by dedication, setting aside, *reservation* or other valid means"[129]) which were inconsistent with that native title, the latter was extinguished to the extent of the inconsistency.[130]

89. The exception in relation to royal metals arises because, from at least the *Case of Mines* (1567) 1 Plowd 310, the common law recognised the Crown as the owner of all mines of gold and silver.[131] That "exceptional right", which "partakes of the nature of property"[132], also entitled the Crown to enter onto any private land to search for, mine and take away those minerals[133], but did not extend to base-metals.[134] The prerogative was part of the common law received into the claim area at sovereignty.[135] It follows that, from that time, the common law could not recognise any native title right to take and use any gold and silver within the claim area.[136]

90. The 1890 Crown Lands Act and the 1899 Land Act were "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".[137] The construction of the Pastoral Lease is to be undertaken objectively and in light of the common law as declared in *Mabo No.2*,

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127 *Ward HCA* (2002) 213 CLR 1, [384] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Wik Peoples v Queensland* (1996) 63 FCR 450 (***Wik FC***), 500G (Drummond J).

128 *Mabo No.2* (1992) 175 CLR 1, 50 (Brennan J, Mason CJ and McHugh J agreeing), 81 (Deane and Gaudron JJ); *Wik HCA* (1996) 187 CLR 1, 127 (Toohey J), 186 (Gummow J).

129 *Mabo No.2* (1992) 175 CLR 1, 69-70 (Brennan J, Mason CJ and McHugh J agreeing) and see also 50 and 68.

130 Ibid, 69 (Brennan J, Mason CJ and McHugh J agreeing); *Ward HCA* (2002) 213 CLR 1, [26], [151], [468(5)] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also *Akiba v Commonwealth* (2013) 250 CLR 209, [61] (Hayne, Kiefel and Bell JJ) cited by the Full Court at **CAB 64 [100]**, and the other cases cited by the Full Court at **CAB 65 [103]**.

131 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 (***Cadia Holdings***), [80] (Gummow, Hayne, Heydon and Crennan JJ).

132 Ibid, [75] (Gummow, Hayne, Heydon and Crennan JJ).

133 Ibid, [80] and [102]-[103] (Gummow, Hayne, Heydon and Crennan JJ); *Payne v Dwyer* (2013) 46 WAR 128 (***Payne***), [5] (Pritchard J).

134 *Cadia Holdings* (2010) 242 CLR 195, [17] (Gummow, Hayne, Heydon and Crennan JJ).

135 Ibid, [4] (French CJ); *Wooley v Attorney-General (Vic)* (1877) 2 App Cas 163, 166 (the Court); *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 (***Wade***), 186 (Windeyer J); *Payne* (2013) 46 WAR 128, [5] (Pritchard J).

136 See, by analogy, *Commonwealth v Yarmirr* (2001) 208 CLR 1, [94]-[100] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Ward HCA* (2002) 213 CLR 1, [388] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

137 *Wik HCA* (1996) 187 CLR 1, 184 (Gummow J), quoted in *Akiba v Commonwealth* (2013) 250 CLR 209, [31] (French CJ and Crennan J); *Queensland v Congoo* (2015) 256 CLR 239, [139] (Bell J); *Wilson v Anderson* (2002) 213 CLR 401, [6] (Gleeson CJ).

including the implications thereof referred to in [88] and [89] above, regardless of the subjective understanding (or lack thereof) on the part of the legislature and executive at the relevant time as to the nature and extent of the Crown's underlying title to the claim area.[138] What may have been historically construed as a mere "holding back" must now be characterised in light of *Mabo No.2* to identify what rights or interests the Crown objectively intended to assert through the Reservation.

91. ***The Reservation*:** The Pastoral Lease was granted pursuant to s 7 of the 1899 Land Act. Subject to that Act, its terms were determined by the Governor and the Minister responsible for the Act.[139] The instrument of grant (**ABFM 148-153**) conferred a "lease" on the grantee and contained the Reservation in the following terms (**CAB 62 [98]**) (emphasis added):

> "… **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 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 (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 thereon as may be required…"

92. In construing the opening words of the Reservation, the Full Court (**CAB 67 [107]**) referred to *Wade* (1969) 121 CLR 177 at 194 and *Wik HCA* (1996) 187 CLR 1 at 200-201. In *Wade*, Windeyer J observed that, in strict legal usage, a "reservation" is not equivalent to an "exception", an exception being the holding back of part of the thing granted and a reservation being a thing newly created out of the thing granted. His Honour nevertheless noted that the words "reservation", "reserving" etc have been used in Australia to mean a "keeping back" of a physical part of a thing otherwise granted. In *Wik HCA* at 200-201, Gummow J made similar observations to those of Windeyer J in *Wade* and concluded that, in the pastoral leases in that case, "reservation" was apt to identify that which was withheld or kept back. [140]

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138 *Ward HCA* (2002) 213 CLR 1, [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 (***NSWALC***), [112], [136] (Gageler J).

139 1899 Land Act, s 24 and Schedule A Item (s).

140 Toohey J at 122 similarly referred to reservations of rights of entry to which the lessee's right to possession must yield. And see Gaudron J at 154 and Kirby J at 246.

93. The Full Court erred in relying on those earlier observations as being "apt" in construing the Reservation in this case. First, *Wade* was decided before *Mabo No.2* and on the assumption that the Crown already held a full beneficial interest in the minerals, so that continuing to assert that ownership was achieved by no more than a holding back. Thus, at 189, Windeyer J said that the effect of a mineral reservation was that subsequent dealings in the minerals did not deprive the landowner of "any property which was his" but affected minerals which "*belonged*, not to the landowner, *but to the Crown*".[141] In reaching that conclusion, Windeyer J referred (at 194) to *Attorney-General v Brown* (1847) 1 Legge 312 (***AG v Brown***), where the Crown enforced a reservation of minerals and coal in the grant of an estate in fee simple through an information in intrusion. In that case, Stephen CJ said at 323 that, because of the reservation, the coal was "part of the land, and severable from the land; and, as a corporeal hereditament, remaining in the Crown, was properly the subject of an information for intrusion." As was explained in *Mabo No.*2, this was (mistakenly) premised on the Crown already having "absolute ownership"[142] of all land.

94. Secondly, in *Wik HCA* there was no issue as to the effect of the grant of the pastoral lease on any claimed native title right to minerals, such a right having been found by Drummond J to have been extinguished by earlier legislation.[143] The proper characterisation of the mineral reservation was not material to the issue of whether the pastoral leases conferred on the grantees a right of exclusive possession.[144] Further, the mineral reservations in the pastoral leases in *Wik HCA* were in different terms to those in this case.[145]

95. While a "reservation" is generally understood in Australia to function as an exception, that is not universally the case.[146] In English law, there are many cases where an "exception" has been found to create a reservation, and *vice versa*[147] so that there is

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141 See, similarly, *Colon Peaks Mining Co. v Council of Wollondilly* (1911) 13 CLR 438, 444, 447 (Griffiths CJ, Barton J agreeing at 450) and 454 (O'Connor J); *Duke of Hamilton v Graham* [1872] LR 2 Sc & Div 166, 168, 171, 178.

142 *Mabo No. 2* (1992) 175 CLR 1, 66 (Brennan J, Mason CJ and McHugh J agreeing).

143 *Wik FC* (1996) 63 FCR 450, 491-504; *Wik HCA* (1996) 187 CLR 1, 65, 67 (Brennan CJ).

144 Demonstrated by the fact that Brennan CJ at *Wik HCA* (1996) 187 CLR 1, 75 (fn 294) and 91 (fn 362) construed the reservations similarly to Gummow J but came to the opposite conclusion as to whether the pastoral leases conferred upon the lessee a right of exclusive possession.

145 *Wik HCA* (1996) 187 CLR 1, 68; and see *The Mining on Private Land Act 1909* (Qld) s 6(1) (declaring minerals property of the Crown) and s 6(2) (requiring a reservation of minerals in all Crown grants and leases).

146 *Payne* (2013) 46 WAR 128, [77] (Pritchard J).

147 *ARC Aggregates Ltd v Branston Properties Ltd* [2020] EWHC 1976, [26] (Zacaroli J).

"no magic in the words" used.[148] The effect of the term is always a question of construction.[149] Further, when those words are used together, they are apt to assert a positive right on the part of the grantor.[150]

96. The Reservation in this case cannot be construed as a mere holding back from the lessee of rights in relation to minerals. First, the Reservation cannot be a true exception because, as explained at [88] above, at that time the Crown had only a radical title to the minerals (other than gold and silver) in the claim area. Secondly, s 25 of the 1899 Land Act already provided that no pastoral lease granted under that Act authorised the lessee to carry on mining operations of any description whatsoever upon the land leased. Thirdly, the Reservation conferred rights on the Minister and persons authorised by him "to dig try search for and work" the minerals "and to take the same" from the land. Even if the words "excepting and reserving out of this lease… all minerals" merely withheld those substances from the grant (which is denied), the subsequent words must go beyond this if they are to be given meaning[151], asserting additional (positive) rights.[152]

97. Furthermore, construing the Pastoral Lease instrument as a whole, it is apparent the term "reserving" had a different meaning to "excepting". The instrument "excepted" out of the Pastoral Lease: to Aboriginal Inhabitants certain rights and entitlements[153]; and such rights of any person to cross the lease with travelling stock; and roads paths and ways. Those exceptions may be construed as holding back any rights from the pastoral lessee to that extent. The instrument then "reserved" unto the Minister and persons authorised by him a right of access to the leased land. It then contained the Reservation; and "excepted" and "reserved" unto the Crown all such parts of the leased land as it may be necessary or convenient to resume possession. Thus, the word

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148 Ibid, [26]-[28] (Zacaroli J), quoting from *Duke of Hamilton v Graham* (1871) 9 (M), (HL) 98 at 102.

149 *Payne* (2013) 46 WAR 128, [79] (Pritchard J).

150 62 Halsbury's *Laws of England* (5th ed, 2022), [180]. Also *Ward HCA* (2002) 213 CLR 1, [704] fn 893 (Callinan J), quoting *Boyle v Olpherts* (1841) 4 I Eq R 241 and *Quinn v Shields* (1877) 11 IR CL 254.

151 See the authorities in Herzfeld and Prince, *Interpretation* (2nd ed., 2020), [22.50] fn 14.

152 *Ellis v Noakes* [1932] 2 Ch 98, 101-102 (Hanworth J), 105 (Romer J), referring with approval to *Cardigan v Armitage* (1823) 2 B & C 208.

153 The source of the rights and entitlements is not identified, but such an exception is consistent with the *Letters Patent under the Great Seal of the United Kingdom erecting and establishing the Province of South Australia and fixing the boundaries thereof* dated 19 February 1836 which stated: "Provided Always that nothing in those our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives." See *Walker v State of South Australia (No 2)* (2013) 215 FCR 254, [9], [19]-[24] (Mansfield J).

"excepting" was used on its own in relation to the rights of third parties to access the leased land, while "reservation" was used when rights were asserted by the Crown.

98. The reference in the Reservation to "excepting and reserving out of this lease" is consistent with the submission above in that the Reservation was expressed to be in favour of His Majesty in respect of minerals, and in favour of both the Minister and persons authorised by him, and "all other persons authorised by …. other lawful authority", as regards access etc.

99. ***The statutory context*:** Construing the Reservation as an assertion of rights by the Crown is consistent with the broader statutory scheme. First, by s 24 of the 1899 Land Act, a pastoral lease could be granted if it contained "the covenants, exceptions, reservations and provisions mentioned in Schedule A" to that Act. Item (1) of that Schedule required a lease to include an (emphasis added):

> "exception or reservation **in favour 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**…"

100. The words "in favour of the Crown" are consistent with the Crown asserting a beneficial interest. That is reinforced by the requirement that the Crown have "all necessary *rights*" and "incidental *rights and powers*" to access and take those minerals. In the absence of those words, a reservation of minerals at common law nevertheless implies a right to work the minerals.[154] Item (l) ensured those rights were explicitly asserted in any reservation.

101. Secondly, the 1899 Land Act was incorporated into and was to be read with the 1890 Crown Lands Act.[155] Section 8 of the 1890 Crown Lands Act required a reservation of minerals in grants of estates in fee simple and leases under Part II (which did not include pastoral leases). That reservation had relevantly four parts. The first provided that the grants "shall not be construed to include or convey any property in any" minerals. That prevented any title to those substances passing to the grantee. The second part of the reservation provided that "the same" (i.e. the minerals) were

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154 *Payne* (2013) 46 WAR 128, [79] (Pritchard J), referring to *Dand v Kingscote* (1840) 6 M and W 174 (reservation of a colliery), *Cardigan v Armitage* (1823) 2 B and C 197 (exception of coal mines), and *Goold v Great Western Deep Coal Co* (1865) 2 De GJ and S 600.

155 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [10] (Brennan CJ and McHugh J). As such words within them should be given a consistent meaning: *Regional Express Holding Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456, [21] (the Court).

"reserved by the Crown". To give those words work to do[156], they must have involved an assertion by the Crown of an interest in the minerals. That is consistent with the third part of the reservation, which (like the Reservation) authorised the Minister to enter the land and remove the minerals. The fourth part provided that the grantee had a right to compensation for any damage caused by the Minister or other persons authorised by the Crown to take the minerals, but not for the value of any minerals taken. That is consistent with the effect of such reservation being to ensure that the Crown's subsequent dealing or sale of the mineral was of a substance owned by the Crown.[157]

10 102. The effect of the second part of s 8 referred to above was reinforced by s 31 of the 1890 Crown Lands Act (within Part II, to which s 8 applied), which required every lease under that part to contain "a reservation to the Crown of all" minerals.

103. ***Errors in the Full Court's reasoning*:** The Full Court erred in its first and second reasons for finding the Reservation merely held back rights from the lessee (**CAB 67 [107], [109]**), because it failed to properly construe the Reservation in the context of the common law, the Pastoral Lease instrument, and the statutory scheme, as submitted above.

104. The Full Court was also wrong to regard the operation of the Reservation contended for by the Commonwealth and the Northern Territory as "paradoxical" (**CAB 67**
20 **[108]**). As submitted above (at [87]), the issue in *Wik HCA* (1996) 187 CLR 1 and *Ward HCA* (2002) 213 CLR 1 was whether pastoral leases in those cases conferred on the lessee a right of exclusive possession. In those cases "reservations", however construed, negatived such an implication.[158] No issue of that kind arises here, it being common ground the Pastoral Lease did not confer upon the grantee a right of exclusive possession. And in both those cases, the extent of extinguishment of non-exclusive native title rights was not addressed.[159]

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156 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [71] (McHugh, Gummow, Kirby and Hayne JJ).

157 *Wade* (1969) 121 CLR 177, 192 (Windeyer J).

158 *Ward HCA* (2002) 213 CLR 1, [178], [185] referred to reservations permitting entry not only on behalf of the Crown but also by others. At [184] the plurality referred to "extensive reservations and exceptions permitting entry". Reservations in Northern Territory pastoral leases (subsequent to the Pastoral Lease in this case) were referred to at [405]-[415].

159 *Wik HCA* (1996) 187 CLR 1, 133 (Toohey J, with whose postscript Gaudron, Gummow and Kirby JJ concurred); *Ward HCA* (2002) 213 CLR 1, [194]-[196], noting there was no native title right to take minerals: [382]-[383] (Gleeson CJ, Gaudron, Gummow, Hayne JJ).

105. That persons (other than the Minister and those authorised by him) with "other lawful authority" (e.g. the holder of a mining lease) could also access the land and take the minerals does not deny that, through the Reservation, the Crown asserted an interest in the minerals: **cf CAB 67 [109]** last sentence. While it may to that extent be characterised as an exception, the Reservation plainly did not merely preserve whatever right the Minister had to access and dig etc for minerals, because the Crown's radical title did not of itself confer any such right.

106. The Full Court's third reason (**CAB 67-70 [110]-[114]**) does not support its conclusion. The Full Court thought it significant that the 1890 Crown Lands Act was "a statute directed at the grant of interests in land *to third parties*", was not "directed at the appropriating of land by the Crown generally", and was "not a statute directed at mining generally": **CAB 69 [112]**. Even if that characterisation were correct, it would neither support nor negative a conclusion that the Reservation merely kept back rights in relation to minerals from the lessee.

107. That aside, the statutory scheme provided for *both* the alienation of land and for the assertion by the Crown of rights in land. By s 6 of the 1890 Crown Lands Act, the Crown was empowered to alienate land, but it was also able to assert interests in land for itself through exchange (s 6(b)(i) and (ii)), resumption (ss 6(b)(ii), (e)-(f)), and reservation or dedication (ss 6(d), (f)). In addition, the Crown could resume leased land for certain purposes, including for mining: ss 33 and 63(I); and see also 1899 Land Act, s 54(I). Dedication and resumption, like reservation, are recognised categories of acts through which the Crown may assert rights or interests inconsistent with the continued existence of native title.[160] The effect of ss 8 and 31 of the 1890 Crown Lands Act (referred to at **CAB 68 [111(b) and (c)]** and at [101] and [102] above) negatives the Full Court's proposition that the sole purpose of the legislation was to confer rights on third parties.

108. Mining and mineral interests were also not foreign to the statutory scheme. Leaving reservations aside, the 1890 Crown Lands Act and 1899 Land Act dealt with that subject matter in several places.[161] That is unsurprising given that the colonial policy

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160 *Mabo No.2* (1992) 175 CLR 1, 50, 68-70 (Brennan J, Mason CJ and McHugh J agreeing). As to resumption, see *Ward HCA* (2002) 213 CLR 1, [204], [278]-[280] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [832]-[833] (Callinan J).

161 See, for example, 1890 Crown Lands Act, ss 6(f)(iv), 33, 63, 88, 90 and 106. Note s 90 provided that land under the surface of any street, road, highway or reserve shall "*for the purpose of mining* [all minerals], *and for the purpose of* all Acts relating to mining, be deemed to be Crown lands…" (emphasis added); cf **CAB 69 [113]**.

at the time was to reserve minerals for the public good[162] and that, without any provision to the contrary, the statutory grant of Crown land would ordinarily convey title to non-royal minerals.[163] By 1890, separate mining legislation regulated the alienation of those minerals from the Crown to third parties, and the incidents of those extractive rights,[164] but it remained necessary for the 1890 and 1899 Acts to deal with the ownership of minerals to delineate the respective interests of the grantee and the Crown upon the alienation of land.

109. The Full Court also thought it was significant that s 24 of the 1899 Land Act was "expressed as a statutory requirement that pastoral leases contain particular terms, rather than a statutory prescription of the legal consequences of such leases": **CAB 70 [115]**. The dichotomy is false because the terms of the Pastoral Lease were consistent with the requirements of s 24 and Schedule A. In any event, the statutory context demonstrates the Reservation had more than a merely private effect. Schedule A distinguished between "covenants" on the one hand, and "reservations" and "exceptions" on the other. Consistent with its ordinary meaning,[165] the "covenants" dealt with *obligations* owed by the grantee to the grantor (e.g. to pay rent) (Items (a)-(k)), the breach of which might result in forfeiture of the lease (Item (o)). By contrast, the Schedule dealt separately with "exceptions" and "reservations" in ways which suggest the Crown was asserting or conferring positive rights. Consistently with the Pastoral Lease instrument, Item (l) required a reservation and exception in favour of the Crown, "and all persons authorised", of minerals together with all necessary rights of access, search, procuration and removal. Item (q) permitted the Minister to prescribe other "exceptions and reservations" in favour of the Crown, Aboriginal people and all other person necessary to give effect to any Act or regulation for the time being in force.

110. Finally, while the Full Court recognised that Gageler J's judgment in *NSWALC* (2016) 260 CLR 232 at [112] was "supportive of the Commonwealth's submission" (**CAB 66 [105(f)], 70 [117]**), their Honours did not address its potential relevance to the construction of the Reservation. Gageler J implicitly recognised that the Crown grant in *AG v Brown* created a right of ownership (exclusive possession) of the land in the

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162 *Wik FC* (1996) 63 FCR 450, 502 (Drummond J).

163 *Wade* (1969) 121 CLR 177, 185 (Windeyer J).

164 *The Northern Territory Mineral Act 1888* (SA). Section 2 of that Act repealed Part V of the *Northern Territory Crown Lands Consolidation Act 1882* (SA) headed "Provisions respecting mining". That is, prior to 1888, the statutory provisions regarding mining were contained in the general land legislation.

165 *In re Jarvis and Burgess's Contract* [1932] VLR 1, 3 (Lowe J).

grantee, as well as, and subject to, creating a right of ownership (exclusive possession) of the minerals in the Crown. The Full Court was correct that the same result does not necessarily follow from Gageler J's judgment in *NSWALC* in respect of the Pastoral Lease and Reservation in this case, but that judgment does demonstrate that post-*Mabo No.2* a mineral reservation can be construed as having that effect.

C.2 Crown asserted full beneficial ownership of minerals

111. Once it is accepted that the Reservation involved an assertion of rights or interests by the Crown in minerals, it is necessary to identify the nature and extent of the rights or interests asserted. The Northern Territory submits it was full beneficial ownership of the minerals.

112. First, that is the ordinary and natural meaning of references in the contemporary South Australian legislation and instruments to reserving minerals to the Crown. That follows from the history of South Australian laws and policies regarding minerals.[166] Early grants of land in the colony of South Australia contained no reservation of minerals. Then in 1877, grants in fee simple were expressly declared to convey all minerals, including Royal metals.[167] That legislative declaration was repealed by the *Crown Lands Consolidation Act 1886* (SA) which, by s 9, declared grants of fee simple did not include gold "the same being reserved by the Crown", and granted the Crown a right of entry to search for and remove gold. That Act was in turn repealed by the *Crown Lands Act 1888* (SA) which by s 9 extended a similar provision to all minerals. Relevantly similar language was used in the legislation applicable to the Pastoral Lease, as discussed at [99]-[102] above.

113. The evident purpose of the reservation of minerals in this way was to secure an asset the exploitation of which should be under public rather than private control and exploited for public rather than private benefit.[168] A reservation of minerals enabled the Crown to deal with minerals separately from the land and to grant separate rights

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166 Discussed in Veatch, *Mining Laws of Australia and New Zealand* (United States Geological Survey, 1911) Bulletin 505, pp 53-55; and C O'Hare, '*A History of Mining Law in Australia*' (1971) 41 ALJ 281, 285 and 288. Both were cited by French CJ in *Cadia Holdings* (2010) 242 CLR 195, fn 113 and following; and see *Wik FC* (1996) 63 FCR 450, 491 (Drummond J).

167 *An Act for declaring that all Grants in Fee-simple of Land in the Province of South Australia heretofore made, or hereafter to be made, shall be construed to include all Minerals and Metals, including Gold and Silver on or under such lands* (Act 88 of 1877), s 1.

168 *Wik FC* (1996) 63 FCR 450, 502 (Drummond J).

to search for and recover them.[169] That included by way of a mining lease, which is "a sale… of minerals *reserved to the Crown*".[170]

114. Crown ownership of minerals underpinned their sale by way of grant of a right to mine in return for payment of a royalty.[171] The *Northern Territory Mineral Act 1888* (SA) provided the lessee of a mining lease was entitled to mine for and dispose of for his own benefit all metals and minerals upon the leased land (s 10), and required payment of rent calculated by reference to the net profit obtained from the sale of all metals and minerals obtained from the land (s 13). That Act was replaced by the *Northern Territory Mining Act 1903* (SA).[172] It similarly provided that the holder of a miner's right or mining lease could mine for and dispose of for his own benefit all metals and minerals mined (ss 20, 40), and provided for payment of a royalty (s 41).

115. Secondly, the grant of a right to and for the Minister and others authorised by him, to "dig try search for and work" "all minerals metals (including Royal metals) ores and substances containing metals …" within the leased land and to take the same from the land, is necessarily inconsistent with a non-exclusive native title right to take those minerals. That is because minerals are a finite resource. That right necessarily implies the non-existence of a right on the part of the first respondent and their predecessors to take all or some of the minerals pursuant to the claimed native title right.[173]

116. The status of minerals in that regard is different to a non-exclusive right of access to land, in that two persons can have such a right for different purposes without logical contradiction.[174] Minerals are also different to wild animals,[175] and aquatic resources in the sea.[176]

117. Two further points warrant comment. First, while it is unnecessary to decide, the different nature of minerals compared to trees and wood may also have given the Reservation a different legal effect as it related to any native title right to take those things. There was also no statutory requirement for such an exception and reservation. Schedule A to the 1899 Land Act merely required the lessee to *covenant* not to cut

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169 See by analogy *Ward HCA* (2002) 213 CLR 1, [384] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
170 *Wade* (1969) 121 CLR 177, 192-3 (Windeyer J), cited in *TEC Desert Pty Ltd v Commissioner of State Revenue* (2010) 241 CLR 576, [32] (French CJ, Gummow , Heydon , Crennan and Kiefel JJ).
171 *Yanner v Eaton* (1999) 201 CLR 351 (***Yanner***), [27] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).
172 Which applied from 1 Jan 1904: s 3.
173 *Brown HCA* (2014) 253 CLR 507, [38], [51] (French CJ, Hayne, Kiefel, Gageler, Keane JJ).
174 Ibid, [55]-[57] (French CJ, Hayne, Kiefel, Gageler, Keane JJ).
175 *Yanner* (1999) 201 CLR 351, [21]-[30] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Ward HCA* (2002) 213 CLR 1, [384] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
176 *Akiba v Queensland (No.3)* (2010) 204 FCR 1, [752] (Finn J).

timber, except for erections, fencing, or firewood, without the licence of the Minister (Item (g)); and the Pastoral Lease did contain a covenant that the lessee "will not during the said term without the licence in writing of the said Minister first obtained fell or cut down any timber or timber-like trees which are now or hereafter shall be growing upon the said lands *except for* erections fencing or firewood to be made or used on the said land" (emphasis added). In any event, construing the Pastoral Lease as a whole, any consideration of the effect of the Reservation in relation to trees and wood on the claimed native title right to take natural resources, would need to take into account the terms of the exception in the Pastoral Lease in favour of Aboriginal Inhabitants.

10 118. Secondly, the reference in the Reservation to full and free liberty of access etc to all persons authorised by the Minister "or other lawful authority" to dig try search for and work the minerals cannot be construed as extending to native title holders exercising a native title right to take minerals. That would be inconsistent with the Reservation excepting and reserving the minerals, including Royal metals (in respect of which there was never a native title right to take), "out of this lease *under His Majesty His Heirs and Successors*" (emphasis added). In that context, it is implicit that the "other lawful authority" in respect of such minerals is a lawful authority conferred by statute.[177] That is reinforced by the covenant in the Pastoral Lease that the lessee "will not obstruct or hinder the holder of any mineral … lease or licence granted by or on behalf of the
20 Crown nor any other person lawfully authorised in that behalf in the exercise of the rights or powers conferred by such lease or licence"; and by s 138 of the *Northern Territory Mining Act 1903* (SA)[178] which created an offence of mining or prospecting unless authorised to do so under that Act "or some other enactment heretofore in force".

119. For the above reasons, by the grant of the Pastoral Lease containing the Reservation the Crown asserted beneficial ownership of minerals in the area of the Pastoral Lease. It is common ground in this case that Crown beneficial ownership of minerals is

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177 And see *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, 455–6 (Isaacs J); *Wik HCA* (1996) 187 CLR 1, 173 (Gummow J); *Ward HCA* (2002) 213 CLR 1, [383]-[384] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Fejo v Northern Territory* (1998) 195 CLR 96, [10] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) referring to the *Northern Territory Land Act 1872* (SA).

178 Which applied from 1 January 1904: s 3.

inconsistent with and extinguished any native title right or interest to take those same minerals;[179] and there is no reason to doubt the existing authorities to that effect.[180]

120. It follows that the Ground 3 should be allowed and the Full Court's answer to separate question (2)(a) set aside and substituted with the answer "yes".[181]

Part VI: Not Applicable

Part VII: Estimated Time

121. The Northern Territory estimates that it will require 1 hour and 45 minutes to present oral argument.

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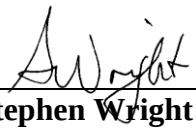
Dated: 15 April 2024

		
Nikolai Christrup SC	**Stephen Wright SC**	**Lachlan Spargo-Peattie**
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179 **ABFM 38 [195]**.

180 *Ward HCA* (2002) 213 CLR 1, [383] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Wik FC* (1996) 63 FCR 450, 500-503 (Drummond J); *Yarmirr v Northern Territory* (1998) 82 FCR 533, 601 (Olney J); *Banjima People v Western Australia (No. 2)* (2013) 305 ALR 1, [1749]-[1757] (Barker J).

181 **CAB 18, 171**.

IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY No. D5 of 2023

BETWEEN: **COMMONWEALTH OF AUSTRALIA**

Appellant

and

YUNUPINGU (ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP) AND OTHERS NAMED IN THE SCHEDULE

Respondents

ANNEXURE TO THE SECOND RESPONDENT'S SUBMISSIONS

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

No.	Description	Version	Provision(s)
Commonwealth			
1.	Commonwealth Constitution	Current	ss 6, 7, 13, 15, 24, 25, 51(vi), 51(xxxi), 52(i), 55, 57, 61, 73(ii), 75(iv), 85(iii), 90, 92, 95, 96, 100, 105, 105A(6), 111, 117, 122, 125, 128
2.	*Australian Capital Territory (Self-Government) Act 1988* (Cth)	Current (compilation No. 25, 13 December 2022 to present)	s 23(1)(a)
3.	*High Court Rules 2004* (Cth)	Current (compilation No. 28, 1 January 2024 to present)	r 42.08.5
4.	*Home Affairs Act 2023* (Cth)	Current (No. 19 of 2023, as at 15 June 2023)	s 6(1)
5.	*Norfolk Island Act 1979* (Cth)	Current (compilation No. 20, 18 December 2020 to present)	s 19(2)(a)
6.	*Northern Territory Acceptance Act 1910* (Cth)	No. 20 of 1910, as at 1 January 1922	s 5, Schedule
7.	*Northern Territory (Administration) Act 1910* (Cth)	No. 27 of 1910, as at 1 January 1911	s 9
8.	*Northern Territory National Emergency Response Act 2007* (Cth)	No. 129 of 2007, as at 17 August 2007	s 60(2)
9.	*Northern Territory (Self-Government) Act 1978* (Cth)	Current (compilation No. 14, as at 13 December 2022)	s 50(2)
10.	*Seat of Government Acceptance Act 1909* (Cth)	Current (compilation as at 13 November 2000)	s 3, First Schedule

State and Territory			
11.	*Constitution Act 1867* (Qld)	Current	s 2
12.	*Constitution At 1889* (WA)	Current	s 2(2)
13.	*Constitution Act 1902* (NSW)	Current	s 5
14.	*Constitution Act 1934* (SA)	Current	s 5
15.	*Constitution Act 1975* (Vic)	Current	s 16
16.	*The Crown Lands Act 1888* (SA)	No. 444 of 51 and 52 Vic, 1888, as at 8 December 1888	s 9
17.	*The Crown Lands Consolidation Act 1886* (SA)	No. 393 of 49 and 50 Vic, 1886, as at 17 November 1886	s 9
18.	*Grants in Fee Simple Act 1877* (SA)	No. 88 of 40 and 41 Vic, 1877, as at 21 December 1877	s 1
19.	*Mining on Private Land Act 1909* (Qld)	9 Edw, VII, No. 15, 1909, as at 19 December 1909.	s 6
20.	*Mining Ordinance 1939* (NT)	No. 9 of 1939, as at 18 May 1939	s 107
21.	*The Northern Territory Crown Lands Act 1890* (SA)	No. 501 of 53 and 54 Vic, 1890, as at 23 December 1890	ss 6, 8, 31, 33, 63, 88, 90, 106
22.	*The Northern Territory Crown Lands Consolidation Act 1882* (SA)	No. 271 of 45 and 46 Vic, 1882, as at 17 November 1882	
23.	*The Northern Territory Land Act 1899* (SA)	No. 722 of 62 and 63 Vic, 1899, as at 22 December 1899	ss 7, 24, 25, 54, Schedule A
24.	*The Northern Territory Mineral Act 1888* (SA)	No. 445 of 51 and 52 Vic, 1888, as at 8 December 1888	ss 2, 10, 13
25.	*The Northern Territory Mining Act 1903* (SA)	No. 839 of 1903, as at 30 October 1903	ss 20, 40, 41, 138
26.	*The Northern Territory Surrender Act 1907* (SA)	No. 946 of 1907, as at 14 May 1908	s 6, Schedule
27.	*Seat of Government Surrender Act 1909* (NSW)	Current (compilation as at 7 December 2007)	s 5, First Schedule

IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY No. D5 of 2023

Schedule

Northern Territory of Australia

Second Respondent

East Arnhem Regional Council

Third Respondent

Layilayi Burarrwanga

Fourth Respondent

Milminyina Valerie Dhamarrandji

Fifth Respondent

Lipaki Jenny Dhamarrandji (nee Burarrwanga)

Sixth Respondent

Bandinga Wirrpanda (nee Gumana)

Seventh Respondent

Genda Donald Malcolm Campbell

Eighth Respondent

Naypirri Billy Gumana

Ninth Respondent

Maratja Alan Dhamarrandji

Tenth Respondent

Rilmuwmurr Rosina Dhamarrandji

Twelfth Respondent

Wurawuy Jerome Dhamarrandji

Thirteenth Respondent

Manydjarri Wilson Ganambarr

Fourteenth Respondent

Wankal Djiniyini Gondarra

Fifteenth Respondent

Marrpalawuy Marika (nee Gumana)

Sixteenth Respondent

Guwanbal Jason Gurruwiwi

Eighteenth Respondent

Gambarrak Kevin Mununggur

Nineteenth Respondent

Dongga Mununggurritj

Twentieth Respondent

Gawura John Wanambi

Twenty First Respondent

Mangutu Bruce Wangurra

Twenty Second Respondent

Gayili Banunydji Julie Marika (nee Yunupingu)

Twenty Third Respondent

Bakamumu Alan Marika

Twenty Fifth Respondent

Wanyubi Marika

Twenty Sixth Respondent

Wurrulnga Mandaka Gilnggilngma Marika

Twenty Seventh Respondent

Wityana Matpupuyngu Marika

Twenty Eighth Respondent

Northern Land Council

Twenty Ninth Respondent

Swiss Aluminium Australia Limited (ACN 008 589 099)

Thirtieth Respondent

Telstra Corporation Limited (ABN 33 051 775 556)

Thirty First Respondent

Arnhem Land Aboriginal Land Trust

Thirty Second Respondent

Amplitel Pty Ltd

Thirty Third Respondent

Attorney-General for the State of Queensland

Thirty Fourth Respondent