



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No D5 of 2023

B E T W E E N:

COMMONWEALTH OF AUSTRALIA
Appellant

AND

10

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

SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN
AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

- 20 2. The Attorney General for Western Australia intervenes pursuant to s 78A of the
Judiciary Act 1903 (Cth) in support of the appellant in relation to Ground 2.

PART III: REASONS WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: ARGUMENT

SUMMARY OF ARGUMENT

Ground 1

4. The Attorney General for Western Australia does not make submissions in relation to Ground 1.
5. This appeal concerns the nature and extent of the constitutional guarantee of just terms in s 51(xxxi) of the *Commonwealth Constitution* in relation to the extinguishment of native title by legislative and executive acts done by the Commonwealth before the commencement of the *Racial Discrimination Act 1975* (Cth).
- 30 6. That is not an issue of concern to Western Australia because its legislative power is not so limited: *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399. Further, the limits of the legislative power of the States did not form part of the justiciable controversy before the Full Court. However, the parties proceeded

on the basis that, unlike the Commonwealth, the States are not subject to the requirements of s 51(xxxi). The Full Court accepted that position (**CAB 149 [470]**). The appellant says “[i]t is without question that States are not constrained by the requirements of s 51(xxxi)”, citing *Durham Holdings Pty Ltd* (appellant’s submissions dated 28 March 2024 at [48]). It follows that, subject to anything raised by any other party or intervener, the limits of the legislative power of the States is not an issue in the appeal.

Ground 2

7. Ground 2 raises issues of substance for Western Australia because:

- 10 (a) it potentially involves re-consideration of settled authority to the effect that, at common law:
- i. on the acquisition of sovereignty, the Crown acquired power to both create rights in land and appropriate land to itself which when exercised, if inconsistent with the continued existence of native title, extinguished native title to the extent of the inconsistency;¹ and
 - ii. if the valid exercise of the Crown’s sovereign power resulted in the extinguishment of native title, that extinguishment was not wrongful and did not give rise to any entitlement to compensation;² and
- 20 (b) in relation to future acts attributable to the State, s 53 of the *Native Title Act 1993* (Cth) makes the State liable for compensation, or compensation in addition to that otherwise provided by the Act, as may be necessary to ensure that any acquisition of property within the meaning of s 51(xxxi) is on s 51(xxxi) just terms.

¹ *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (*Mabo (No 2)*), 63, 69–70 (Brennan J); 89–90, 110 (Deane and Gaudron JJ); 195–196 (Toohey J); *Western Australia v The Commonwealth (Native Title Act Case)* [1995] HCA 47; (1995) 183 CLR 373, 422, 452–453 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Wik Peoples v Queensland* [1996] HCA 40; (1996) 187 CLR 1, 84–85 (Brennan CJ); 122–123 (Toohey J).

² *Mabo (No 2)*, 15 (Mason CJ and McHugh J) (Brennan J agreeing).

Ground 3

8. The Attorney General for Western Australia does not make submissions in relation to Ground 3.
9. In Western Australia, *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1,³ (while strictly *obiter dicta*) settled that s 117 of the *Mining Act 1904* (WA) was valid and effective to extinguish any subsisting native title right or interest in relation to minerals.

STATEMENT OF ARGUMENT**Ground 2: Susceptibility to Extinguishment**

10. The Attorney General for Western Australia respectfully adopts the appellant's submissions at [57] to [129] (Part IV), as well as the summary at [2] to [4] (Part II).
11. The Attorney General for Western Australia also respectfully adopts the submissions of the Attorney-General for the State of Queensland (Thirty Fourth Respondent) at [5] to [18] (Part IV) in support of the appellant on Ground 2.

PART V: LENGTH OF ORAL ARGUMENT

12. It is estimated that the oral argument will take 5 minutes.

Dated: 15 April 2024

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C S Bydder SC
Solicitor-General for Western Australia

Email: c.bydder@sg.wa.gov.au

Ph: 08 9264 1806



A Sanchez-Lawson
State Solicitor's Office of Western
Australia

Email: a.sanchez-lawson@sso.wa.gov.au

Ph: 08 9264 1888

³ *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1, 185 [383] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

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**ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR
WESTERN AUSTRALIA (INTERVENING)**

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Western Australia sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

| | Description | Version | Provision |
|----------------------------------|---|----------------|------------------|
| Constitutional Provisions | | | |
| 1. | <i>Commonwealth Constitution</i> | Current | s.51(xxxi) |
| Statutory Provisions | | | |
| 2. | <i>Mining Act 1904 (WA)</i> | Current | s.117 |
| 3. | <i>Native Title Act 1993 (Cth)</i> | Current | s.53 |
| 4. | <i>Racial Discrimination Act 1975 (Cth)</i> | Current | |

Guwanbal Jason Gurruwiwi
Eighteenth Respondent

Gambarrak Kevin Mununggurr
Nineteenth Respondent

Dongga Mununggurritj
Twentieth Respondent

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Gawura John Wanambi
Twenty First Respondent

Mangutu Bruce Wangurra
Twenty Second Respondent

Gayili Banunydjji Julie Marika (nee Yunupingu)
Twenty Third Respondent

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Bakamumu Alan Marika
Twenty Fifth Respondent

Wanyubi Marika
Twenty Sixth Respondent

Wurrulnga Mandaka Gilngilngma Marika
Twenty Seventh Respondent

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Witiyana Matpupuyngu Marika
Twenty Eighth Respondent

Northern Land Council
Twenty Ninth Respondent

Swiss Aluminium Australia Limited (ACN 008 589 099)
Thirtieth Respondent

Telstra Corporation Limited (ABN 33 051 775 556)
Thirty First Respondent

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Arnhem Land Aboriginal Land Trust
Thirty Second Respondent

Amplitel Pty Ltd
Thirty Third Respondent

Attorney-General for the State of Queensland
Thirty Fourth Respondent