NATIVE TITLE AS PROPERTY: *YUNUPINGU V COMMONWEALTH*

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ABSTRACT

In May 2023, a Full Federal Court in *Yunupingu v Commonwealth* decided unanimously that native title is 'property' within the terms of s 51(xxxi) of the *Constitution*. In its defence, the Commonwealth argued the native title recognised at common law in the landmark 1992 *Mabo [No 2]* decision was susceptible to an exercise of the radical title of the Crown without any duty to pay compensation. Special leave to appeal was sought by the Commonwealth and has been granted. This novel constitutional issue will now be conclusively determined by the High Court of Australia. Although a simple yes or no is all that is required to answer whether native title is property within s 51(xxxi), at another level it calls into question the still-unsettled terms of the legal relationship between the Crown and the Indigenous peoples of Australia.

I INTRODUCTION

It is commonplace in Australian law to depict native title as 'a bundle of rights', as inherently fragile and susceptible to extinguishment. A minority has argued that native title should be seen as proprietary in nature,[1] albeit that this customary title is sourced in the traditional laws and customs of an Indigenous society, not an interest granted by a non-Indigenous Crown. The prevalent view had potent authority, particularly from the High Court of Australia decision of *Western Australia v Ward* in 2002.[2] Now, a Full Federal Court decision in May of 2023 has thoroughly doused this view. In a unanimous judgment in *Yunupingu v Commonwealth,*[3] a Full Federal Court bench emphatically concluded that native title is 'property' within the terms of s 51(xxxi) of the *Australian Constitution*.

II THE FACTS

The applicant, the late Dr Yunupingu, brought two applications under s 61 of the *Native Title Act 1993* (Cth) on behalf of the Gumatj Clan of the Yolngu People in 2019. The first was a native title application seeking a determination in favour of the Gumatj over land on the Gove Peninsula in the Northern Territory. The second was a compensation application seeking redress for the impacts on the claimed native title of certain executive and legislative acts of the Commonwealth of Australia between 1911 and

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[1] See Janice Gray, 'Is native title a proprietary right?', *E Law: Murdoch University Electronic Journal of Law* (2002) 9, and Sean Brennan, 'Section 51(xxxi) and the Acquisition of Property under Commonwealth-State Arrangements: The relevance to Native Title Extinguishment on Just Terms', (2012) 15 *Australian Indigenous Law Review* 74.

[2] *Western Australia v Ward* (2002) 213 CLR 1.

[3] *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* (2023) 298 FCR 160 ('*Yunupingu*').

1978. In 1911, the Northern Territory became a territory of the Commonwealth, and then only became self-governing in 1978. Any executive and legislative acts during this intervening period thus rested solely with the Commonwealth.

The Gumatj submitted that, even though any exclusive native title may have been extinguished by grants of pastoral leases at the turn of the 20th century, their non-exclusive native rights and interests remained extant and were then affected by the grants of other interests, including a lease to allow the establishment of a religious mission and mining tenements which permitted the extraction of bauxite and ancillary activities. They submitted such grants or acts were invalid, unless otherwise validated under the 'past acts' regime of the *Native Title Act*, by reason of not providing just terms compensation as required by s 51(xxxi).

The native title determination application by the Gumatj Clan is yet to be determined. It is opposed by the Rirratjingu Clan of the Yolngu People presumably because they, too, assert they have complementary interests in the same land.[4] This claim will be determined in the ordinary course of events.

The compensation claim, however, poses several important issues of law – including a novel constitutional question – and the parties agreed to have these threshold questions determined by the Federal Court. Although the *Federal Court Rules 2011* (Cth) do not expressly provide for a demurrer that procedure was adopted and, due to the significance of the issues raised, former Chief Justice James Allsop gave a direction the notional demurrer be heard by a full bench. Active parties made written submissions, and oral argument was heard over five days in late October 2022. While the Commonwealth and other respondents opposed the applicant's submissions on the questions posed, the Rirratjingu representatives supported the Gumatj on the compensation issues.

III THE ISSUES

The issues, refined between the Court and the parties, centred on the extinguishing effects of various Crown grants over the claimed land, but the two principal constitutional issues contended by the defendant Commonwealth were:

(a) the just terms requirement contained in s 51(xxxi) does not apply to laws enacted pursuant to the power in s 122 of the *Constitution* (the Territories power); and

(b) the relevant grants and acts were not capable of amounting to an acquisition of 'property' within the meaning of s 51(xxxi) of the *Constitution* because native title is inherently defeasible and susceptible to extinguishment by a valid exercise of the Crown's sovereign power.

[4] Some Indigenous individuals are also respondents.

IV THE DECISION

The Full Federal Court, comprising Chief Justice Mortimer and Justices Moshinsky and Banks-Smith, unanimously answered 'No' to both contentions. The Court held the just terms obligation in s 51(xxxi) does apply to laws enacted pursuant to s 122 and that native title rights and interests do constitute property for the purposes of s 51(xxxi).

Each of these conclusions is not without controversy. On the former, an issue their Honours described as 'of the highest significance',[5] the Court determined that the 2009 High Court in *Wurridjal v Commonwealth*[6] overruled its earlier *Teori Tau* decision,[7] a unanimous full bench decision of 40 years earlier. On the latter issue, as noted above, the preponderance of legal opinion was that native title was 'fragile' and so susceptible to extinguishment by the Crown, but this opinion was decidedly rejected in favour of viewing the native title of Australian Indigenous peoples, exclusive or non-exclusive, as being property from a constitutional perspective. It is this latter issue which will now be discussed.

V DISCUSSION: NATIVE TITLE AS PROPERTY?

It is not unusual for the Commonwealth to oppose any application if it does not consider there has been an acquisition of 'property' within s 51(xxxi) and so avoid paying just terms compensation. There was no authority which held that native title is such 'property' and, in this instance, the compensation payable for the alleged impacts on the claimed native title is sizeable. Media reports put it $AUD700m,[8] not to mention the further compensation claims that would surely follow from other Indigenous peoples in the Northern Territory covering the same 1911-78 period if the claim was successful.

The Commonwealth's essential argument was that the common law recognition of the native title of Indigenous peoples accepted in *Mabo [No 2] v Queensland*[9] in 1992 was 'on the basis that it was susceptible to an exercise of the Crown's radical title in one or other of those ways *without any duty on the Crown to pay compensation*'.[10] At the heart of this proposition is that the British Crown was plenipotent against these Indigenous societies once it asserted territorial sovereignty and gained this 'radical title' over their traditional lands. The Crown could then exercise this radical title in any way it saw fit without any obligation to compensate Indigenous peoples for the loss of any of their traditional rights and interests in land, whether or not those rights and interests could

[5] *Yunupingu* (n 3) [257].
[6] (2009) 237 CLR 309.
[7] *Teori Tau v Commonwealth* (1969) 119 CLR 564. Some active respondent parties, notably the Northern Territory and Swiss Aluminium, did not support the Commonwealth on this issue. Queensland did not take a position. The Full Court did state it found the Commonwealth's argument 'somewhat surprising' in that the headnote for *Wurridjal* in the authorised Commonwealth Law Reports stated that *Teori Tau* was 'overruled'.
[8] Hannah Wotton, 'Late Yunupingu wins final court battle in landmark native title case', *Australian Financial Review*, 22 May 2023.
[9] (1992) 175 CLR 1. *('Mabo [No 2]')*
[10] Submissions of Commonwealth, quoted in *Yunupingu* (n 3) [287]. Emphasis added. This 'radical' or ultimate title was described in *Mabo [No 2]* as 'a postulate of the doctrine of tenure and a concomitant of sovereignty'; ibid 47 (Brennan J).

be classified as proprietary. In other words, the Crown could do as it pleased with these pre-existing customary rights and interests.

Such a contention is extraordinary for the Commonwealth of Australia to advance in Australian jurisprudence in the 2020s. Firstly, there is a chain of Imperial constitutional law authority to the contrary. The Australian courts are, of course, no longer bound by superior Imperial courts but it would be unusual common law methodology to ignore such jurisprudence. The Judicial Committee of the Privy Council precedent is that the Crown, as Sovereign, can acquire land for public purposes but that Indigenous inhabitants who have an interest in such land by their traditional laws and customs – even interests unknown to English law – must be respected and be awarded proper compensation.[11] If such a precedent is not to be followed, then it must be distinguished or at least explained. Secondly, it challenges the general principle that the Crown should act honourably and lawfully in its dealings with its subjects. In the context of the customary land rights, the Commonwealth is arguing the Crown can assert sovereignty over Indigenous peoples, theoretically making those persons subjects of the Crown, and then, by exercise of the entirely gratuitous radical title it acquired by the assertion of sovereignty, extinguish any pre-colonial individual or other group rights and interests in their lands without any compensation payable to these subjects.

What is interesting in this unanimous decision by the Full Federal Court is the decisiveness with which the principal contention of the Commonwealth was rejected. The submission as to the fragility of the native title of Australian Indigenous peoples to extinguishment by an all-powerful Crown exercising its radical title was dismissed with seeming incredulity. Yet it was not contrary colonial-era precedent or conventions around ensuring honourable conduct by the Crown in relation to indigenous populations which guided the Full Court conclusion; t was more a growing contemporary legal understanding of these ancient pre-colonial rights which Australian Indigenous peoples assert.

> Even putting to one side the obvious distinction that these [native title] rights pre-date colonisation, and have not been created by the Australian Parliament, and no Parliament has decided what the content of the rights should be, how the rights described so clearly by Mansfield J can be said to fall into the same category for the purposes of s 51(xxxi) as a medicare benefit, a pension entitlement or a mining exploration permit is difficult to understand.[12]

Quoting from the plurality judges in the 2002 High Court *Yorta Yorta* decision, the Court issued a reminder that native title 'is not a creature of the common law, whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it exists today.'[13] The description mentioned by their Honours, that of Mansfield J in the *Griffiths* trial determination, stated native title rights and interests involve:

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[11] *Oyekan v Adele* [1957] 1 WLR 876 (JCPC). This case is discussed below.
[12] *Yunupingu* (n 3) [451].
[13] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2003) 214 CLR 422, [75]-[76].

> a perception of socially constituted fact, an important aspect of which is the spiritual, cultural and social connection with the land under laws and customs that define the Aboriginal community concerned [being the Ngaliwurru and Nungali Peoples] and their relationship with country'.[14]

Native title is a communal title held by an Indigenous people and not something, the judges emphasised, that can or should be compared with non-Indigenous real property interests. They quoted from the Full Federal Court *Yindjibarndi* appeal decision, that 'it is to misunderstand the concept of native title rights and interests to require them to fit into non-Aboriginal concepts of property, the exercise of proprietary rights and the enforcement of property rights.'[15]

It is notable that the colonial-era chain of authority in the Imperial constitutional law, reaching its zenith in the 1957 Privy Council decision in *Oyekan v Adele*,[16] was not referenced. That decision held that even if the real property rights of Indigenous peoples in British colonies are not as common law lawyers might conceive, those rights are nonetheless to be seen as property and the appropriation of any such rights by the Crown is compensable. The Privy Council stated that there is 'one guiding principle' in recognising what are existing traditional rights to real property. 'It is this', their Lordships wrote, '[t]he Courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected.'[17] As to the acquisition of such rights and matters of compensation, Earl Jowett, and Lords Cohen and Denning, stated:

> Whilst, therefore, the British Crown, as Sovereign can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to everyone of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.[18]

Their Lordships were adamant that such an acquisition be done according to law, presumably with an appropriate process to authorise the acquisition of any of their interests and with an entitlement to proper compensation for their loss.[19]

What is remarkable is that in 2023, a full bench of the Federal Court of Australia arrived at an almost identical conclusion to that of the Privy Council without any seeming reference in argument to earlier Imperial law authorities,[20] instead relying on its own deepening jurisprudence over the 30 years of the Australian native title era.

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[14] *Griffiths v Northern Territory of Australia (No 3)* (2016) 337 ALR 362, [294] ('*Griffiths (No 3)*').
[15] *Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* (2019) 273 FCR 350, [281] (Mortimer and Jagot JJ).
[16] *Oyekan v Adele* (n 11).
[17] Ibid 880.
[18] Ibid.
[19] This statement was made at a time when all Australian courts were bound by the opinions of the Judicial Committee of the Privy Council.
[20] There are no decisions of the Judicial Committee of Privy Council mentioned in the 'Cases cited' even though these similar issues have been canvassed in other colonial jurisdictions.

VI SPECIAL LEAVE TO APPEAL

Given the importance of the legal issues, not unexpectedly the Commonwealth sought special leave to appeal this decision to the High Court of Australia, the Attorney-General stating the compensation issues in the context of native title represent the first time these constitutional issues have been judicially determined and the law in this area required clarity and certainty.[21]

On 19 October 2023, Gageler and Gleeson JJ granted special leave and the appeal will be heard in Darwin over three days in August 2024.

VII INDIGENOUS PEOPLES IN THE CONSTITUTIONAL FRAMEWORK?

It is expected that all seven members of the High Court will sit on such an important constitutional decision.[22] At face value, it is a straightforward question the court is required to answer: is native title property within s 51(xxxi) of the *Constitution*? On a black-letter textual approach, it calls for a simple yes or no answer. Yet at another level that simple question traverses some difficult terrain because it raises the still-unfurling terms of the legal relationship between the Crown and the Indigenous peoples of Australia.

This relationship is a particularly awkward one and, in recent years, the question of situating Australia's Indigenous peoples within our constitutional framework has been judicially divisive.[23] In 2020, in *Love v Commonwealth*,[24] the seven Justices of the High Court wrote seven judgments, the matter being decided by a bare majority that persons indigenous to Australia could not be defined as 'aliens' by the Australian Parliament. Such was the difficulty in finding a resulting *ratio decidendi* the majority judges asked the most senior puisne judge, Justice Bell, to state: 'although we express our reasoning differently, we agree that Aboriginal Australians (understood according to the tripartite test in *Mabo*) are not within the reach of the "aliens" power conferred by s 51(xix) of the *Constitution*.'[25]

The reasoning expressed by the majority judges on foundational issues was indeed different. Justice Nettle, for example, found in the Imperial constitutional law a fundamental duty on the Australian Crown to protect Indigenous societies, referring to a 'unique obligation of protection to Australian Aboriginal societies and their members'.[26] And Gordon J stated:

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[21] Mark Dreyfus MP, 'High Court special leave application – Gumatj claim', (Media Release, Tuesday, 20 June 2023).
[22] In April 2022, prior to her appointment to the High Court, Jagot J was involved in issuing orders to incorporate the notional demurrer into current processes using separate questions procedures of the *Federal Court Rules*. It is unlikely that any party would seek her recusal based on such scant prior procedural involvement.
[23] Daniel Lavery, 'Judicial Distancing in the High Court: *Love/Thoms v Commonwealth*', (2020) 26 *James Cook University Law Review* 159.
[24] (2020) 270 CLR 152 ('*Love*').
[25] Ibid 192.
[26] Ibid 256.

> The fundamental premise from which the decision in *Mabo v Queensland* proceeds – the deeper truth – is that the Indigenous peoples of Australia are the first peoples of this country, and the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was not severed or extinguished by European "settlement".[27]

Her Honour also stated:

> Native title is one legal consequence flowing from common law recognition of the connection between Aboriginal Australians and the land and waters that now make up Australia. That Aboriginal Australians are not ''aliens'' within the meaning of that constitutional term in s 51(xix) is another.[28]

Justice Edelman spoke in terms of indigeneity, forsaking discredited notions of race and of 'the Aborigines', adopting the notion of connection to *country*,[29] and was far-ranging in his discussion of the principal issues, concluding that 'an Aboriginal person cannot be an alien to Australia. Aboriginal people belong to Australia and are essential members of the "community which constitutes the body politic of the nation state"'.[30]

In the minority, Justice Keane completely rejected any *sui generis* duty to protect 'Australian Aboriginal societies and their members' proposed by Nettle J, stating:

> Aboriginal persons in Australia were not subjects of the Crown with a special claim to the protection of the Crown that differentiated them from other inhabitants of the continent; nor were they subject to some special obligation to the Crown as a reciprocal of such "special protection".[31]

Chief Justice Susan Kiefel, also in the minority, took it further and asked where the principles adopted by the majority judges might be found. If they were not to be found in the common law, she stated, then 'it might be understood to bear the characteristics of a higher principle of which natural law might conceive'. She dismissed this possibility, taking aim at the sources of the majority opinions, stating 'such conceptions are generally not regarded as consistent with constitutional theory. And they are regarded by some as antithetical to the judicial function since they involve an appeal to the personal philosophy or preferences of judges.'[32]

In dismissing natural law and the common law as not consistent with 'constitutional theory', Kiefel CJ avoided any reference to the Imperial constitutional law, commonly called the Colonial Law. The eminent Canadian jurisprudent, Emeritus Professor Brian Slattery, noted many years ago that the legal principles concerning aboriginal peoples in the British Empire was developed at the same time as other doctrines of the Imperial constitutional law.

> Just as the eighteenth century colonial law harboured rules governing such matters as the constitutional status of colonies, the relative powers of the Imperial Parliament and local

[27] Ibid 260. Footnotes omitted.
[28] Ibid 280.
[29] Ibid 287.
[30] Ibid 290.
[31] Ibid 216.
[32] Ibid 182.

> assemblies, and the reception of English law, it also contained rules concerning the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions. These rules form a body of unwritten law known collectively as the doctrine of aboriginal rights.[33]

It is in this body of Imperial law where the answers to these issues are most likely to be found. The Imperial Crown did not only have a prior relationship with the Indigenous peoples of Australia, it had many other aboriginal peoples under its aegis throughout its global Empire, and it developed a body of principles to govern those relationships. The majority judges in *Love* were not dipping into any ancient natural law font or their personal philosophies, they are merely turning to the largely-common law colonial law principles and seeking there – sensibly, one might venture – contemporary answers to ancient questions.

Despite the messiness for commentators of seven judgments in a single decision, the conclusion in *Love* was historic. A majority of the High Court of Australia accepted the habitation of the Indigenous peoples of Australia in their respective territories – their connection to *country* – as a *constitutional* fact. Behind the fading black-letter curtain that is the *Australian Constitution* are these Indigenous peoples and that out-dated colonial document is no longer the be-all and end-all of Australian constitutional law, the place where Australian constitutional theory begins and ends. That these Indigenous peoples are the first peoples of Australia is that 'deeper truth' spoken of by Justice Gordon, long pre-dating any Anglo-Australian constitution. This irrebuttable constitutional fact has any number of consequences, many of which are still not visible to a jurisprudence which wilfully blinded itself for generations.

The complement of the High Court of Australia, however, has changed considerably since the *Love* decision. In the intervening years, Chief Justice Kiefel and Justices Bell, Nettle and Keane have retired and Gageler J, the third member of the *Love* minority, has been elevated to Chief Justice. The new appointees to the High Court, Steward, Gleeson, Jagot and Beech-Jones JJ have varied exposure to native title jurisprudence. Justice Jagot, most certainly, and Justices Gleeson and Steward have had exposure to such jurisprudence from their time on the Federal Court of Australia. Justice Beech-Jones, promoted from the NSW Supreme Court, may be coming fresh to native title litigation.

One of the features of the High Court membership since the recognition of native title in 1992 is that many appointees from the Federal Court are well versed in the complexities and nuance of native title litigation. These judges bring some 'understandings' to our highest court which were not present in earlier generations. They understand that the colonial notion of an 'Aboriginal people', spoken of so often in public discourse and in the law, is no real thing. Rather these supposedly homogenous 'Aborigines' are – and always have been – a diverse grouping of Indigenous peoples on the Australian continent and in present-day Tasmania.

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[33] Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 *Canadian Bar Review* 727, 737.

Another of these fundamental understandings of native title law – consistent with the statutory definition – is that the recognised native title rights and interests are sourced in the traditional laws and customs of a particular Indigenous society.[34] That society is not any single Australia-wide 'Aboriginal' society but is localised, confined to a distinct territory – their *country* – to which they have a spiritual, cultural and social connection, with these connections unaffected by the British assertions of sovereignty.

Further, as the High Court emphasised in *Yorta Yorta*, the laws and customs which generate their native title must be traditional, in the sense that these customary laws existed prior to the assertions of British sovereignty yet must still be vital and normative to that Indigenous society into the present day for their native title to be recognised and, indeed, survive.

Critically, the judges in the Full Court in *Yunupingu* collectively stressed the conceptual difference between what is native title and how non-Indigenous lawyers conceive of proprietary interests in our Anglo-European jurisprudence. It was Justice Mansfield who again captured the essence of this difference and the indigenous sense of connectedness with their *country* by stressing 'one cannot understand hurt feelings in relation to a boxed quarter acre block'. 'Rather', he wrote, 'the effects of acts have to be understood in terms of the pervasiveness of Dreaming.'[35] Although not explicitly stating it, the Full Court refused to view the concept of native title through any real property lens but seemed to see it as something more than 'property', as an appellation which captures this ancient multi-layered 'connectedness' to *country*.

There is also the growing historical awareness by members of the Federal Court bench of what the annexation of the British-Australian colonial territories entailed. In every native title determination application, it is customary for the applicant Indigenous people to file a 'Connection Report'. This report addresses the elements which may lead to a consent determination and by the means of these reports many Federal Court judges are intimately exposed to the history of the applicant People.

Reading these historical and anthropological materials can be a very sobering exercise, in a close examination of the brutal manner in which these peoples were treated at the frontier and in the wake of the European colonisation of the Australian territories. After Justices Deane and Gaudron wrote in the *Mabo [No 2]* decision of the 'conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame',[36] it became impolitic to reference this dictum. It was seen as not the province of the judiciary to enter such a contested arena – utterable by historians and anthropologists perhaps, but not by superior court judges. That reluctance seems now to have passed and it may be that insurmountable evidence of the

[34] For an interesting argument on how the Anglo-Australian 'law' views these other 'laws', see Diana Margaret Anderssen, 'The Construct of Indigenous Australian "Traditional Laws and Customs" in Contemporary Australian Law: A Conceptual Analysis' (PhD Thesis, Australian National University, 2021).
[35] *Griffiths (No 3)* (n 14) [325].
[36] *Mabo [No 2]* (n 9) 104 (Deane and Gaudron JJ).

extent to which the Australian Indigenous peoples were dispossessed, degraded and devastated could become a matter of judicial notice in the federal courts.

While the historical record may be being clarified, there remains the often-referenced notion that the Australian territories were acquired by 'settlement'. Despite being popular, it is contradicted by the High Court of Australia in the *Mabo [No 2]* decision. In speaking to the Australian colonies, Brennan J stated:

> To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was terra nullius. They recognized the sovereignty of the respective European nations over the territory of 'backward peoples' and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest.[37]

His Honour defined these 'backward peoples' as 'indigenous inhabitants' who 'were not organized in a society that was united permanently for political action'.[38] The *countries* of the Indigenous peoples of Australia, being 'backward peoples', were thus *deemed* terra nullius and so 'sovereign'-less under this engorged notion of terra nullius and so could be annexed as if first discovered and first occupied by Great Britain. It is not thus any settlement doctrine by which the Australian territories were annexed by the British Crown but under an Occupation of Backward Peoples doctrine.

The new sovereignty was perceived as an original sovereignty, not derived, and whatever sovereignties the original peoples possessed over their *countries* seems to have been consumed by the all-powerful British Crown. It seized for itself a 'radical' or ultimate title over all the Indigenous territories seemingly unburdened by any conditions. The orthodox theory remains that an original, plenipotent British sovereignty swept in three stages across the vast 7.5 million square kilometres of mainland New Holland and Van Diemen's Land, meeting no other 'sovereigns', or even other forms of some lesser autonomy, in its path. And in what must be one of the most curious pieces of Anglosphere jurisprudence, the Indigenous populations of Australia purportedly become subjects of the Imperial Crown at these moments in time yet their property, real, personal and communal, could be stripped from them by that Crown without any lawful process or compensation. They may have become British subjects *in theory* but these Indigenous persons were not treated as rights-bearing subjects. Again, it was Justice Brennan in *Mabo [No 2]* who spoke directly of this allodial connection to their traditional lands of these Indigenous peoples and of the total disregard by the Crown of that connection. He wrote:

> The common law itself took from Indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the

[37] Ibid 29.

[38] The author has argued elsewhere that the principle stated by Brennan J is wrong because the citation given as the source (Sir Frank Lindley's 1926 thesis) does not support the conclusion reached by his Honour. See Daniel Lavery, 'No Decorous Veil: The Continuing Reliance on an enlarged terra nullius notion in *Mabo [No 2]*' 2019 43 (1) *Melbourne University Law Review* 233, 247-52.

> imperial authorities without any right to compensation and made the Indigenous inhabitants intruders in their own homes and mendicants for a place to live.[39]

Yet, with respect, it was not the common law which permitted the injustices and outrages against Australian Indigenous peoples, but the British colonists under the aegis of an acquisitive Imperial Crown and a local judiciary compliant to the desires of Empire.

As an example, as late as 1970, in the Northern Territory Supreme Court decision of *Milirrpum v Nabalco*, *Oyekan v Adele* was cited to Judge Blackburn as an authority which was wholly binding on his court, their Lordships accepting a post-British sovereignty common law recognition of pre-existing customary rights in land and compensation for their acquisition. One of the grounds upon which Blackburn J distinguished this decision was that he found it 'impossible to believe' that compulsory acquisition of land 'from natives' vested a right in those natives to receive compensation from the Crown.[40] Despite the utmost clarity of their Lordships' language, Judge Blackburn would not accept that a right of compensation payable to 'every one of the inhabitants who has by native law an interest in it' applied to 'natives'!

Despite numerous assertions that Judge Blackburn in *Milirrpum* was overruled in the landmark *Mabo [No 2]* decision, this compensation point was not. And, although a landmark decision in Australian legal history, it is tenuous on this particular point. It may be recalled that the sole dissentient in *Mabo [No 2]*, Justice Daryl Dawson, joined with Mason CJ, and McHugh and Brennan JJ to determine this compensation issue 4:3. Three members of the 6:1 majority, Justices Deane, Toohey and Gaudron, held that the extinguishment of native title *was* compensable at common law.

It is this thread of the present theory of territorial sovereignty, that the acquisition of the native title of the Indigenous peoples is not compensable, that is now being laboured. If, as the Commonwealth of Australia contends, the native title of the Yolngu People was vulnerable to an exercise of radical title without any duty on the Crown to pay compensation at common law, the orthodox theory will prevail. The exercise of the radical title the Crown acquired – still begging the question from whom it was acquired – is, in theory, free and unconditional.

Yet, there is a real danger in the manner in which the Commonwealth has framed its principal argument. Relying on the bare 4:3 majority in *Mabo [No 2]* to deny Indigenous Australians any right at common law for the historical pre-1975 extinguishment of their native titles has risk. Within days of him assuming the Chief Justiceship, the Gageler Court delivered the Commonwealth a 'fabulous yellow Roman candle' moment when, in the *NZYQ* decision,[41] it reversed an earlier 4:3 decision of nearly 20 years standing on the indefinite detention of immigration detainees. It is over

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[39] *Mabo [No 2]* (n 9) 29.
[40] See John Hookey, 'The Gove Rights Land Case: A Judicial Dispensation for the Taking of Aboriginal Land in Australia' (1972) 5 *Federal Law Review* 83. Dr Hookey argued Blackburn J misconstrued a number of Privy Council decisions.
[41] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005.

30 years since *Mabo [No 2]* determined by the slimmest of majorities that native title was not compensable at common law but the coupling of the majority/dissenting positions on this point, as noted, was complex.

If this thread is laboured enough, the orthodox theory of territorial sovereignty may begin to unravel. This is not to say that the present-day Australian sovereignty (being an Act of State) can be challenged in the High Court or any domestic court. That is impermissible. But the *means* by which the acquisition of Indigenous territories in Australia was purportedly achieved and the *consequences* of such acquisition for those Indigenous peoples and the acquiring Crown are certainly justiciable.

Justice Nettle alone in *Love* spoke of the fundamental duty of protection owed to Indigenous peoples but he was not alone in naming other consequences. Justice Gordon wrote that 'the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was not severed or extinguished by colonisation'. Even in the minority, then-Justice Gageler was most sympathetic to the applicants but just could not find any 'common law antecedents of the *Constitution*' to support their argument.[42] Nonetheless he acknowledged the preamble of the *Native Title Act* which states that our Indigenous peoples have become 'the most disadvantaged in Australian society'.[43] Curiously he also wrote, '[t]he body politic of the Commonwealth of Australia is uniquely responsible for that consequence, and it is uniquely placed to redress that consequence.'[44]

Likewise, it is the High Court of Australia which is uniquely placed to state the means and determine the consequences of the acquisition of territorial sovereignty over the Australian territories in the late 18th and early 19th centuries. As Justice Gordon stated in *Love,* channelling the embryonic United States Supreme Court in *Marbury v Madison* from that very same epoch, it 'is emphatically the province and duty of the judicial department to say what the law is'.[45] And while, in the opinion of the present Chief Justice, there were no common law antecedents of the *Constitution* which could be found to support the appellants in *Love*, in this *Yunupingu* appeal there is arguably a very persuasive chain of Imperial precedent. Surely if the British Crown acquired this potent radical title over the territories of Indigenous peoples it must, minimally, extend its aegis over these peoples and, as new subjects of that Crown, have their pre-existing customary rights upheld.

VIII CONCLUSION

The *Yunupingu* judgment in the Full Federal Court, with special leave already granted, presents the High Court of Australia with a unique opportunity to state the law as to whether native title constitutes property within s 51(xxxi) of the *Constitution*. Unlike the *Love* decision, there is, to date, little political heat is this matter, but there are

[42] *Love* (n 24) 209.
[43] Ibid 207.
[44] Ibid,
[45] 5 US 137 (1803), 177.

financial implications. The Full Federal Court *Yunupingu* decision featured in the financial press, and no doubt Australian governments will be paying close attention to the hearing in August 2024 from a budgetary perspective. But it is not a matter such as in the *Love* decision where the outcome will privilege Indigenous Australians over non-Indigenous Australians. Rather it is to place Indigenous peoples in a similar situation in respect of their pre-existing native title to that of other Australians whose property is acquired.

Yet the question of how the Australian jurisprudence regards the traditional 'native' title of its Indigenous peoples – as compensable property under the *Constitution* or at common law – has broad societal ramifications and it presents an open window into the orthodox theory of territorial sovereignty. The language of the majority justices in the *Love* decision hinted that the membership of the High Court is not as cautious at leaving the judicial safety of the text and structure of the *Constitution* in seeking answers to constitutional questions or examining constitutional theory, and particularly so when discussing the legal relationship between the Crown and the Indigenous peoples of Australia.

To ignore these original peoples and to treat their customary rights as irrelevant to constitutional law and theory has been very convenient for an Anglo-based jurisprudence because it struggles to situate them in its Anglo-Australian black-letter constitutional framework. Peering clear-eyed at the historical record and the unfortunate colonial constitutional legacies and – *perhaps* – interrogating the many false hypotheses upon which the orthodox theory of territorial sovereignty resides in Australian jurisprudence is no easy task. But a creditable jurisprudence needs sensible foundations, not the manifold imaginings of the present theory.

It would be too much to expect common law judges to abandon common law methodologies and manufacture some novel theory to replace the present nonsensical orthodox theory of territorial sovereignty. But the signs suggest that these 21st century jurists are not as accepting of the historical and legal fictions as previous generations of judges raised under the imperial aegis of the Anglo-Australian Crown. Suggesting the 'natives' became subjects of the Crown yet from whom that Crown can acquire their traditional rights and interests without paying those subjects compensation may be one colonial legacy a modern judiciary can no longer accept.