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Commonwealth of Australia v Yunupingu [2025] HCA 6

The National Native Title Council (NNTC) welcomes the decision of the High Court of Australia in ***Commonwealth of Australia v Yunupingu [2025] HCA 6*** and congratulates the Yunupingu family and Gumatj Clan.

The High Court of Australia has delivered a landmark judgment on compensation for native title holders in the Northern Territory. The Court considered whether acts done by the Commonwealth of Australia in the Northern Territory, whilst subject to the control of the Commonwealth between 1911 and 1978, gives rise to the Constitutional requirement for the government to provide native title holders with just and fair compensation.

The decision is a confirmation of existing case law confirming the equal treatment of property rights of all Australians under the law. It determined that the extinguishment of native title under a law of the Commonwealth prior to the introduction of the *Native Title Ac*t constituted an acquisition of property within the meaning of s. 51(31) of the Constitution.

NNTC Chair, Kado Muir, congratulated the Gumatj Clan and paid respect to the Yunupingu family, saying,

> "This decision realises the vision of Mr Yunupingu and the Gumatj Clan who continue to fight for land and native title rights to be recognised and respected not just in the Northern Territory, but all across our various Countries. The Gumatj decision shows that when our sacred lands are taken away, we are entitled to receive compensation on just terms in accordance with s. 51(31) of the Constitution, in the same way as any other citizen of Australia."

The Court made no decision regarding the *amount* of compensation that was due to be paid to the Gumatj Traditional Owners in today's judgment. The question of the amount (quantum) of compensation will be referred back to the Federal Court to determine. Once the issue of quantum of compensation is determined the award arising from today's judgment, will support real economic empowerment for the Gumatj peoples.

NNTC CEO, Jamie Lowe, said,

> "The High Court's decision in Mabo recognised native title exists and dispelled the myth of "terra nullius", and this decision today confirms the strength of native title. Native title is now not only recognised under Australian law but also clearly protected by the Constitution - the same as any other ordinary land title or property."

Mr Lowe also said,

> "Where the Commonwealth, States or Territories have acted in a way that fails to respect Constitutional or other legal protections, then it is common sense that there will be redress. This ought to be seen as an opportunity to economically empower communities who have been historically dispossessed. It is not controversial that the communities impacted by projects on their Country should benefit from the wealth generated through those projects."

NNTC Director of Native Title, Clinton Benjamin, said,

> "We welcome the Court providing much needed clarity on how a right to native title compensation arises in practice. The case builds on the significant *Griffiths v Northern Territory (Timber Creek)* native title compensation decision. In today's decision the High Court has repeated and reinforced what was said in Mabo No 2 that the "fundamental consideration" was to bring the common law into conformity with "the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system".

Mr Benjamin concluded,

> "This is an important day for the protection of the fundamental human rights of all Australians. Today's decision further emphasises the strength of native title and our rights, interests and connections to Country. As Justice Gordon states, "It is a connection which existed and persisted before and beyond settlement, before and beyond the assertion of sovereignty and before and beyond Federation. It is older and deeper than the Constitution."

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BACKGROUND INFORMATION page 3

Background

The appeal to the High Court followed the 2023 decision of the Full Federal Court, which unanimously held that:

- the just terms requirement contained in s. 51(xxxi) of the Constitution applies to laws enacted pursuant to s 122 of the Constitution (the **Territories power**); and
- acts of the Commonwealth that extinguished or otherwise impacted the native title rights and interests of the Gumatj in the relevant time-period amounted to an acquisition of property and therefore protection under s. 51(xxxi) of the Constitution.

In August 2024, the High Court sat in Darwin for three days and heard submissions from the Commonwealth, the representatives of the Gumatj Clan, representatives of the Rirratjingu Clan, the Northern Territory and the Attorneys-General of the State of Western Australia, Queensland and the ACT.

In its submissions, the Commonwealth argued that native title was a "fragile" form of property rights and inherently susceptible to extinguishment by the Commonwealth, without an acquisition of property occurring. On that basis, the Commonwealth argued that where native title was extinguished within the Gumatj claim area, the Constitution did not provide protection and did not provide an entitlement to compensation for native title holders.

The majority of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ determined that

> "*…the common law rule by which native title rights and interests existing under traditional laws and customs are recognised at common law is and always has been a rule of unconditional recognition. Before the commencement of the Native Title Act on 1 January 1994, cessation of recognition of a native title right or interest previously recognised at common law was not the result of an inherent or innate susceptibility of that right or interest as recognised at common law to defeasance*."

The Commonwealth further argued that the Constitutional "just terms" guarantee did not apply to the acquisition of property made by laws enacted under the Territories power in the Constitution. In clear terms, the majority dismissed this submission stating:

> "*The time has come for it to be finally and authoritatively declared that the power conferred on the Commonwealth Parliament by s. 122 of the Constitution to make laws for the government of a territory does not extend to making a law with respect to an acquisition of property otherwise than on just terms within the meaning of s. 51(xxxi) of the Constitution.*"

Just terms provides a qualification on the power of the Commonwealth government to provide fair and timely compensation approximating as far as possible the market value of the property acquired, and reflecting a general notion of fairness in all circumstances.