National Native Title Council

Case note: *Commonwealth of Australia v Yunupingu [2025] HCA 6*

On 12 March 2025 the High Court of Australia handed down its judgment in *Commonwealth of Australia v **Yunupingu*** [2025] HCA 6. In summary:

- Native title is now not only recognised under Australian law but also clearly protected by the Constitution and can only be acquired "on just terms" - the same as any other ordinary land title or property.
- "On just terms" comes from a provision in the Constitution that requires 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.
- The Court recognised that native title holders' connection to Country is older than the Constitution itself.
- The Court made no decision regarding the amount of compensation that was due to be paid to the Gumatj Traditional Owners in the judgment. The question of the amount (quantum) of compensation will be referred back to the Federal Court to determine.
- The decision applies to areas within the Northern Territory and Australian Capital Territory where native title had been extinguished and property acquired by the Commonwealth, between 1911 and 1978.

Background

The case was brought by the **Gumatj Clan** or Estate Group of the Yolngu People in East Arnhem Land and seeks a determination of native title in the relevant claim area and compensation for a range of acts that extinguished their native title. This includes acts done by the Commonwealth when in control of the Northern Territory between 1911 and 1978, including the grant of large areas of land to the Swiss owned mining company Nabalco.

When the Gumatj Clan's case was started in the Federal Court, it was decided that there were preliminary questions to be answered about how native title should be treated under the Constitution. These questions were first answered by the Full Court of the Federal Court of Australia in 2023, which was appealed by the Commonwealth to the High Court.

The High Court unanimously found in favour of the Gumatj, denying the Commonwealth's appeal. The decision in *Yunupingu* is important because it is the first native title compensation claim using s 51(xxxi) of the Australian Constitution. Under s 51(xxxi), the Commonwealth can only acquire property on "just terms", which means that the Commonwealth must pay timely and adequate compensation when acquiring peoples' property.

Issues considered by the Court

The first Constitutional issue before the Court was about whether the requirement to pay compensation under s 51(xxxi) applied to laws made by the Commonwealth under what is called the “Territories Power” in s 122 of the Constitution, which is the power to make laws for the government of the territories. The Court found that the relevant laws made by the Commonwealth using the Territories Power are also subject to the obligation to provide just terms compensation under s 51(xxxi) of the Constitution.

The second Constitutional issue before the Court was whether acts done by the Commonwealth that affect native title are an “acquisition of property” within the meaning of s 51(xxxi) of the Constitution. The Commonwealth argued that native title was a "fragile" type of property and that acts done by the Commonwealth extinguished native title, without an acquisition occurring. The Court rejected this argument and found that where the Commonwealth has historically extinguished native title, native title rights and interests were protected under s 51(xxxi) of the Constitution, and that native title holders were entitled to make a claim for compensation.

The Court also considered a third issue about whether the grant of a pastoral lease extinguished the non-exclusive native title rights over minerals. The Court found that the pastoral lease did not extinguish those rights.

The Court made no decision regarding the amount of compensation that was due to be paid to the Gumatj Traditional Owners. Now that these questions are answered, the Gumatj Clan’s claim returns to the Federal Court for a determination of native title and compensation where the question of the amount (quantum) of compensation will be answered.

Strength of native title

In the *Yunupingu* decision, members of the Court commented on the strength of native title rights and interests and how the traditional laws sit within the Australian common law. Powerfully, Gordon J stated the following about the deep connection to Country within native title at [137]:

> Native title recognises that, according to their laws and customs, Indigenous Australians have a connection with country. 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.

Gordon J also stated the following about native title as a form of “property” at [143]:

> Native title is "property"; property which is enduring, substantial and significant. To hold otherwise would be contrary to the characterisation of native title in Mabo (No 2), which has been affirmed by many subsequent decisions of this Court… Indeed, failure to recognise native title as protected by s 51(xxxi) would be inconsistent with the central basis for recognition of native title in Mabo (No 2). In deciding to overrule the cases that had held that the Crown acquired full beneficial ownership of the land upon sovereignty, Brennan J said "[t]o maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land."

At [61], the majority of the High Court noted the following on what it means to have native title recognised at common law:

> Native title is "recognised" at common law in the sense that the common law "will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them". Thus, to say that native title rights and interests are "recognised" at common law is to mean that "[t]hose rights, although ascertained by reference to traditional laws and customs are enforceable as common law rights [and interests]". In other words, the concept of "recognition" "translates" native title rights and interests existing under traditional laws and customs into "a set of rights and interests existing at common law".

What does this mean for native title holders?

The *Yunupingu* decision confirms that claims for compensation can be made under the *Native Title Act 1993* (Cth) (**NTA**) for acts by the Commonwealth that extinguished native title without providing compensation on just terms.

Practically speaking, outside of the Northern Territory and the Australian Capital Territory, many of the acts that affected native title were done by the States, not the Commonwealth (for example, the grant of pastoral leases, mining licences and other land tenure). Acts by the states are not subject to the Constitutional requirement to provide just and fair compensation under s 51(xxxi).

Acts by the states (or the Commonwealth) that occurred after 31 October 1975 (when the *Racial Discrimination Act 1975* (Cth) came into effect), may give rise to an entitlement to compensation through the NTA. On the current case law, native title holders cannot make a claim for compensation for acts done by the states prior to 1975.

The Yunupingu decision does not apply to acts done after the introduction of the NTA on 1 January 1994, but certain acts done after that date are likely to be compensable as “future acts” under the NTA.

There are other important cases currently before the Courts that will shed further light on the way the NTA compensation laws work, including:

- Yindjibarndi Ngurra Aboriginal Corporation v State of Western Australia WAD 37 of 2022; and
- McArthur River Project Compensation Claim (NTD25/2020).

What are the next steps for the NNTC

The NNTC is developing a compensation settlement framework for native title holders to settle compensation claims outside of Court. The NNTC will be running consultations on the proposed framework with experts and groups in the first half of 2025.

If you would like further information on the framework, or if you wish to discuss the NNTC’s strategic direction in relation to native title compensation please contact Clinton Benjamin, Director of Native Title: clinton.benjamin@nntc.com.au

The NNTC will be holding information seminars that will further explore the consequences of the *Yunupingu* decision and opportunities for native title holders.

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Further information

Below are some useful resources for further information on the *Yunupingu* decision::

- Media release by the NNTC 12 March 2025;
- Sean Brennan, *Australia's Constitutional Guarantee for Property Rights Applies to Native Title*, Indigenous Constitutional Law, 18 March 2025;
- Anne Twomey – short video explainer;
- "*What does the High Court native title decision mean for Aboriginal people nationwide?"* by ABC Indigenous affairs, 15 March 2025;
- The Project, Explained: High Court Ruling in Favour Of Indigenous Land Rights; and
- *Commonwealth of Australia v Yunupingu* [2025] HCA 6.