Submissions of Arthur Moses SC for Gumatj Clan in *Commonwealth of Australia v Yunupingu (on behalf of the Gumatj Clan OR Estate Group) & Ors* [2024] HCATrans 49 (8 August 2024)

Mr Moses: May it please the Court. The Gumatj Clan leader, Mr Yunupingu, passed away on 3 April 2023 before the Full Court of the Federal Court delivered its judgment in this matter. For the best part of half a century, he was the senior landowner of the Gumatj Clan, and Dalkarra, the senior ceremonial leader.

What brings us to this Court is the application that was filed in the Federal Court by Mr Yunupingu on behalf of the Gumatj Clan in 2019. It is a claim for the redress of past wrongs. **Today, Mr Yunupingu is laying in rest at Gunyangara on a rise where his body and spirit is with his ancestors. He lies in rest on the land from near where he was born and from which his identity and wellbeing derived.** It forms part of the claim area which is defined in the statement of claim at paragraphs 2 and 3.

From the rise where he chose to be laid to rest at Gunyangara, there is a view over the community of Ski Beach and beyond that to the Gove Refinery, which is the source of gut-wrenching pain and much devastation to his people. The refinery is two kilometres from his resting place and standing at the spot, it is visible.

The application before the Federal Court is a final reckoning of issues that has been caused by past actions. These are the same issues that gave rise to the Bark Petition to the Australian Parliament in 1963, the *Milirrpum Land Rights Case* in 1970, which led to the *Aboriginal Land Rights Act 1976* and, ultimately, to the decision of this Court in *Mabo (No 2)*.

To adapt the words from a famous quote, the arc of High Court judgments dealing with the rights of First Nations people has been long, but as we have seen in *Mabo (No 2)*, the *Wik* decision in 1996, the *Timber Creek* decision in 2019 and the *Love and Thoms* decision in 2020, these decisions have been bending towards justice, not because they have altered what native title is – it has always been the same – but they have altered what our understanding of native title is and through that our understanding of the law to adopt the words used by Justice Gordon in her 2019 Toohey Oration.

With each case, there has been a progressive step in recognising the rights and interests of First Nations people within the contours of the *Constitution*. With each step, there has been a recognition of undeniable truths from which the law has been derived and, in turn, the prism through which the common law views native title has been developed.

It is important to recall that most of us in this court room, except perhaps your Honours' associates and the younger practitioners, lived in times when terra nullius was the legal orthodoxy in fact taught in our schools and used as a blunt instrument by the law to deny rights to First Nations people. Just as First Nations people are not so low on the social scale as to have no concept of ownership of land, we have come to understand because of the work of this Court that their native title rights are property rights and, we will contend, are protected by the great constitutional safeguard that protects the property rights of all other Australians.

Now, this Court has grappled with the special nature of native title in a number of cases, which I will touch upon when addressing ground 2 of the appeal. In grappling with the issues in this case, it is apt to hold a mirror up to the substance of the contentions of the Commonwealth as to defeasibility and susceptibility. Our contentions are based on a simple proposition: that **native title is both more, and different to what common lawyers identify as property.** It is a theme that runs through a number of decisions of this Court, including *Timber Creek*, and in *Love and Thoms*, at paragraph 339 of Justice Gordon's reasoning.

We need to remind ourselves of the nature and force of native title, because words matter when dealing with the characteristics of native title. Those words echo into the future. Some of the words used to describe native title in the hearing yesterday are jarring to First Nations people. It is not weak, it is not inferior, nor does it suffer from a congenital impairment, which was the language used in submissions before the Full Court. This is not to criticise counsel who advanced the submissions, as they have a duty to present their argument, leaning on words that have come from decisions, which, of course, do not reflect our understanding of native title, as it is being developed, of course, through decisions of this Court. That is our understanding of native title, not changing what native title is. **We are dealing with a form of title that reflects the social, cultural, economic, and religious framework of the society of indigenous Australians, who occupied this country tens of thousands of years before the arrival of the sovereign Crown. It is not transient.**

It has been said that this case has legal and historical significance, which has been the subject of much academic writing since the Full Court. But **for the Gumatj clan and its members, it is a case that is intensely personal. In 1969, mining leases were granted on Gove Peninsula, against the express wishes of the clan groups, including the Gumatj and Rirratjingu clans.** The grant of those mining leases followed the enactment of Northern Territory ordinances in 1939 and 1953 which vested all minerals on the Gove Peninsula as property of the Commonwealth.

The collective effect of these Acts at law was to extinguish and impair the rights of these peoples and others to their land, but **these Acts also had the effect, in practical terms, of causing immense upheaval to their society and their way of life. The impact of these Acts continues into the present, and the respondent clans in this case continue to experience high levels of disadvantage, stress, and loss of opportunity.**

First Nations people have always listened respectfully to others who identify their native title and interests, including members of this Court. So, it is important we repeat the words of Mr Yunupingu, as I did in the proceedings before the Full Court, in which he identifies his characterisation of the native title and interests of the Gumatj clan, which equally applies to the other great clan nations of the Gove Peninsula, as well as the impact that the grant of the mining leases had on his people.

Your Honours do not need to go to this but you will find this passage in the introduction to the book edited by Mr Yunupingu and published by the University of Queensland Press in 1997 entitled, "Our Land is Our Life: Land Rights: Past, Present and Future"; it is at tab 1 of the

additional materials provided to the Court this morning and at page 8 of the paginated version, where Mr Yunupingu said this:

> ***This is not a history story. This is my story, this is what happened to my country, and to my father's country, and my father's father's country . . .***
>
> ***In the early 1960s, I saw bulldozers rip through our Gumatj country in northeast Arnhem land. I watched my father stand in front of them to stop them clearing sacred trees and saw him chase away the drivers with an axe. I watched him cry when our sacred water hole was bulldozed. It was one of our Dreamings and a source of our water.***
>
> ***I saw a township wreck our beautiful homeland forever. I saw my father suffering physically when this was happening. I can never forget that.***
>
> ***This land is something that is always yours; it does not matter what nature or politics do to change it. We believe the land is all life. So it comes to us that we are part of the land and the land is part of us. It cannot be one or the other. We cannot be separated by anything or anybody.***

Much the same as what judges of this Court said in *Love and Thoms*. Why start from these passages from Mr Yunupingu? Because, as has been said on a number of occasions, law is derived from a fact and by means of a fact we recognise or we know the law. Native title is not flotsam or jetsam able to be discarded to some netherworld of the *Constitution* or treated as if there is no consequence when it is extinguished when dealing with the application of section 51(xxxi) of the *Constitution*. That is the prism through which this case has to be seen, not diverting it through some other way because, as I think it was Justice Gordon raised with one of the counsel acting for the Commonwealth – the Solicitor-General – one has to deal with the prism through which this application has to be dealt with, not through some abject theory.

Now, native title and the strong basis of it is a historical fact that cannot be diminished by giving it a label that is inherently defeasible or comparing it to statutory rights. A survey of the cases – which I will come to – demonstrates that the concept of inherent defeasibility in section 51(xxxi) jurisprudence has always been limited to statutory rights. But the Commonwealth seeks to extend it far beyond its existing contours to native title for reasons which remain elusive, but no doubt because it is anchored in the reasoning of Justice Gummow in *Newcrest*, which itself is elusive in terms of why native title is said to be inherently defeasible.

When property is acquired by the Commonwealth, it is required to do justice by paying compensation on just terms. That is a guarantee that applies equally to any citizen, regardless of whether they live in a State or Territory. It also applies to native title.