Australian High Court ruling could trigger compensation payments to some indigenous “native title” holders

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By a six-to-one majority, Australia’s supreme court last week ruled that a clan group of indigenous “native title” holders may be entitled to compensation for the federal government’s seizure of control over mining rights on the Northern Territory’s Gove Peninsula and approval of a major bauxite mine there.

The March 12 High Court judgement in *Commonwealth of Australia v Yunupingu* triggered media claims that it could lead to a wave of native title cases against the federal government worth hundreds of millions, if not billions, of dollars. Some commentators hailed it as the most significant decision since the High Court recognised a new form of property, labelled native title, in its *Mabo* ruling of 1992.

In reality, the ruling is a limited and conditional one in favour of the Gumatj Clan of the Yolngu People, in a case first filed by the late Dr Yunupingu in 2019 on behalf of the clan. Depending on whether any financial payments eventually flow from the verdict—which the lower Federal Court must still determine—it may give rise to similar claims in other parts of the Northern Territory (NT).

How much monetary compensation could result remains unclear, and it is likely to take decades of complex and expensive litigation to determine that.

More fundamentally, any such payouts will be designed, in line with the *Mabo* decision itself, to benefit a privileged layer of indigenous land claimants and their business enterprises. They use native title rights to facilitate lucrative deals with mining and pastoral companies, while most indigenous people are left living in impoverished conditions.

The High Court majority ruled that native title is “property” within the meaning of section 51(31) of the 1901 Australian Constitution, which specifies that any federal government acquisition of property must be on “just terms.” In previous cases, the courts have generally interpreted “just terms” to mean the “market value” of the property at the time of acquisition.

The judges decided that any native title rights held by the Gumatj Clan survived a 1939 decree, via a NT Mining Ordinance, that “all ... minerals and metals on or below the surface of any land in the Territory” were “deemed to be the property of the Crown” and a mineral lease granted by the federal government in 1969, under a 1968 Mining (Gove Peninsula Nabalco Agreement) Ordinance.

The majority also held that a 1903 pastoral lease granted over the land by the South Australian government, before it ceded the NT to the federal government in 1911, had not extinguished non-exclusive native title rights over minerals situated on or beneath the land.

That was only because the relevant wording in the pastoral lease did not amount to an “appropriation” of mineral rights by the government but merely withheld those rights from the leaseholder.

This means that courts could rule in other cases that native title rights to minerals were extinguished, depending on the language of any leases.

The Federal Court must still determine if the Gumatj Clan has a valid native title claim, as there are competing claims from other clans from the region. If the Gumatj leaders eventually prevail, the compensation could reach $700 million.

That figure is based on the reported value of a 42-year deal struck in 2011 between the clan leaders and Rio Tinto, the mining conglomerate that has run the Gove mining and processing operation for decades, extracting massive profits.

Beyond that, the case may expose the federal government to further compensation claims from when it directly controlled the NT from 1911 to 1978, and possibly the Canberra-based Australian Capital Territory, which the federal government directly ruled from 1911 until 1988.

The ruling does not apply to the state governments, however. They are not bound by section 51(31) of the Constitution. Nor does it cover land grants already made by the states, as British colonies, before Federation in 1901. It does not apply to the companies that have profited from the handover of land and mining rights, nor does it invalidate any of the freehold titles or leases involved.

Compensation has previously only been granted in cases relating to federal government actions after 1975, when the federal *Racial Discrimination Act* was introduced. Within the political and legal establishment, that was generally believed to be the limit of potential government liability for the seizure of land.

Native title

Native title, as defined by the Mabo ruling and subsequent legislation, only survives where indigenous clan groups can prove a continuous connection to areas of land, despite more than two centuries of dispossession, and it can be overridden by freehold, leasehold or mining rights.

In practice, as intended by the *Mabo* decision, native title claims result in clan representatives negotiating access to land to businesses for fees or royalties. Almost half of the NT, for instance, is subject to

such arrangements, which have led to the enrichment of a small minority of indigenous people.

By one estimate, less than 9 percent of Aboriginal and Torres Strait Islander people are members of a native title corporation. Most indigenous people are living in urban areas, often in poor conditions, among the most exploited and vulnerable members of the working class.

Significantly, the lead four judges in the *Yunupingu* case, headed by Chief Justice Stephen Gageler, said their decision was necessary to maintain the appearance of equality before the law. Citing the *Mabo* ruling, they said that to recognise a weaker interpretation of native title would "destroy that equality ['of all Australian citizens before the law'] and perpetuate its own form of injustice."

The truth is that equality before the law is a myth in capitalist society. Social and economic inequality is at staggering levels and widening at a rapid pace. That is personified by the domination of billionaire oligarchs internationally and in Australia, including mining magnates such as Gina Rinehart, Andrew Forrest and Clive Palmer.

Moreover, this inequality is increasingly stark among Aboriginal and Torres Strait Islander people. Dr Yunupingu was, in fact a key figure in the drive to accumulate wealth by an elite, often on the back of business operations based on land deals like the one signed with Rio Tinto in 2011.

Yunupingu was, until 2005, head of the Northern Land Council. In that position, he was reported to handle up to $50 million in annual royalties, especially from mining. Yunupingu lived in luxury, with multiple houses, maids, cars and helicopters, and was feted by corporate and government leaders.

At last August's annual Garma Festival, hosted by the Gumatj Clan, Labor Prime Minister Anthony Albanese delivered a right-wing, pro-business speech in which he paid tribute to Yunupingu as a man of vision. Albanese falsely depicted expanded corporate investment as the means of overcoming the poor social conditions afflicting many indigenous people, when in fact it has only intensified the exploitation of workers, indigenous and non-indigenous alike.

Among the sponsors of the gathering was the same Rio Tinto, the giant British-Australian mining corporation. Other sponsors were Qantas, Australia's largest airline, and Telstra, the biggest telecommunications company, both of which have inflicted mass sackings in recent years.

Albanese's speech again underscored the right-wing character of Labor's unsuccessful referendum in October 2023 to insert an indigenous Voice to parliament in the Constitution. The Voice institution would have been a means of further integrating the indigenous elite into the state structure to further the pro-business program Albanese outlined at the Garma Festival, as well as US-led plans for a war against China, which have turned large parts of the NT, including Aboriginal native title areas, into war platforms.

The Albanese government went all the way to the High Court to oppose the Gumatj claim. It argued that federal governments did not have to pay "just terms" compensation for taking away native title rights because those rights were "inherently defeasible"—which means they can be cancelled—and therefore not property able to be "acquired."

Nevertheless, Attorney-General Mark Dreyfus embraced the outcome. He said the government "recognises the significant contribution that the late Dr Yunupingu made in initiating this case." Dreyfus said the government appealed to the High Court "to settle critical constitutional issues in this case."

History

As the Socialist Equality Party explained in its *International Foundations* document:

> The granting of certain "land rights" became the vehicle for major resource companies to do deals with relatively privileged sections of the Aboriginal community at the expense of the vast majority who continued to suffer appalling disadvantage. The *Mabo* decision of 1992, in which the High Court recognised "native title," was seized on as a means of promoting the illusion that the crimes committed against the Aboriginal people could be overcome within the framework of the capitalist state.

That document cited the analysis made by Nick Beams, from which he concluded:

> The Aboriginal people will never advance through the creation of another capitalist property form, based on the very legal principles and doctrine that provided the framework for their dispossession in the first place. Rather, they can only go forward to the extent that capitalist property in the land and means of production is abolished.

Yabu Bilyana, an indigenous worker who was a candidate for the Socialist Labour League (the forerunner to the SEP) in the 1996 Australian federal elections, delivered a speech to the party's election rally in which he explained:

> The land rights legislation was never to secure justice. Its aim has always been to establish a legal mechanism for the exploitation of land for mining and other purposes without the danger of long legal challenges.

Bilyana drew this essential conclusion:

> There can be no social justice, secure living standards or democratic rights of any section of working people within the framework of the profit system. Aboriginal people can only advance their struggle as part of the struggle of the international working class to put an end to the profit system and for the socialist transformation of society.