

# Before the High Court

## Stare Decisis and Constitutional Guarantees: *Commonwealth v Yunupingu*

Ashleigh Barnes\*

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### Abstract

In *Commonwealth v Yunupingu*, the High Court of Australia will consider, inter alia, whether the requirement in s 51(xxxi) of the *Australian Constitution* that acquisitions of property must be on just terms applies to a Commonwealth law that is supported by the territories power in s 122 and no other head of power in s 51. Whether the just terms requirement applies to laws made under the territories power is a question of enormous significance. This question is in part answered by whether either *Wurridjal v Commonwealth* or *Teori Tau v Commonwealth* is good law, and whether either or both of those cases should be reopened and overruled. This column analyses this question in light of novel insights into the Court's current approach to *stare decisis* in the constitutional setting drawn from the Court's recent application of the doctrine in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, *Vanderstock v Victoria* and *Vunilagi v The Queen*.

## I Introduction

In *Commonwealth v Yunupingu* ('*Yunupingu*'),<sup>1</sup> the High Court of Australia will consider, inter alia, whether the requirement in s 51(xxxi) of the *Australian Constitution* that acquisitions of property must be on just terms applies to a Commonwealth law that is supported by the territories power in s 122 and no other head of power in s 51.<sup>2</sup> Whether the just terms requirement applies to laws made

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\* Lecturer, UNSW Sydney, New South Wales, Australia; Email: [ashleigh.barnes@unsw.edu.au](mailto:ashleigh.barnes@unsw.edu.au); ORCID iD: <https://orcid.org/0009-0007-6322-6452>.

I thank Professor Rosalind Dixon for her helpful comments on this piece and Jemimah Roberts for insightful conversations regarding this jurisprudence. Any errors are my own.

<sup>1</sup> *Commonwealth v Yunupingu* (High Court of Australia, Case No D5/2023).

<sup>2</sup> The Court will also consider whether a Commonwealth law that extinguishes or impairs native title rights in land is a law with respect to an acquisition of property within the meaning of s 51(xxxi) so

under the territories power is a question of enormous significance. This question is in part answered by whether either *Wurridjal v Commonwealth* or *Teori Tau v Commonwealth* is good law, and whether either or both of those cases should be reopened and overruled.<sup>3</sup>

In the final weeks of the 2023 term, the High Court had cause to focus on the doctrine of *stare decisis* as applied to constitutional cases. In three different cases, the Court had to consider whether it was appropriate to overrule constitutional precedent. In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,<sup>4</sup> the Court overruled its 2004 judgment in *Al-Kateb v Godwin*,<sup>5</sup> a precedent that had withstood various challenges for almost two decades. In *Vanderstock v Victoria*,<sup>6</sup> the Court divided on the question of whether to overturn *Dickenson's Arcade v Tasmania*,<sup>7</sup> a decision which had withheld challenge for 50 years, but unanimously denied leave to reopen *Capital Duplicators v Australian Capital Territory*<sup>8</sup> and *Ha v New South Wales*.<sup>9</sup> The Court was also asked in *Vunilagi v The Queen*<sup>10</sup> to reopen and re-explain or overrule *R v Bernasconi*.<sup>11</sup> Only Edelman J considered it appropriate to consider this aspect of the appeal. The three decisions offer new insights into when and how the High Court will overrule its previous decisions, and expose substantive and procedural questions which persist in this area of jurisprudence.<sup>12</sup> This column is limited to one such question: whether the protection of constitutional guarantees is relevant to the decision to reopen and overrule constitutional precedent.

It is 'now generally accepted that s 51(xxxi) is a constitutional guarantee';<sup>13</sup> this is the position advanced by some of the respondents in the pending appeal.<sup>14</sup> However, this has been doubted by some scholars;<sup>15</sup> this is the position advanced by

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as to attract the just terms requirement, and whether the grant of a pastoral lease by South Australia in 1903 that excepted and reserved timber, minerals and other substances extinguished a non-exclusive native title right to use the natural resources of the land insofar as that native title right relates to minerals. The appeal thus concerns the appropriate interpretation of the scope of s 51(xxxi), including touching on remedies and the content of the Commonwealth's constitutional obligation. This question is addressed in another column contribution: see Lael K. Weis and Rosalind Dixon, 'Rethinking "On Just Terms": *Commonwealth v Yunupingu*' (2024) 46(3) *Sydney Law Review* 363.

<sup>3</sup> *Wurridjal v Commonwealth* (2009) 237 CLR 309 ('*Wurridjal*'); *Teori Tau v Commonwealth* (1969) 119 CLR 564 ('*Teori Tau*').

<sup>4</sup> *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 415 ALR 254 ('*NZYQ*').

<sup>5</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*').

<sup>6</sup> *Vanderstock v Victoria* (2023) 98 ALJR 208 ('*Vanderstock*').

<sup>7</sup> *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

<sup>8</sup> *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561.

<sup>9</sup> *Ha v New South Wales* (1997) 189 CLR 465.

<sup>10</sup> *Vunilagi v The Queen* (2023) 411 ALR 224 ('*Vunilagi*').

<sup>11</sup> *R v Bernasconi* (1915) 19 CLR 629.

<sup>12</sup> My ongoing research with Jemimah Roberts probes these questions.

<sup>13</sup> Lael K. Weis, "'On Just Terms", Revisited' (2017) 45(2) *Federal Law Review* 223, 223. See *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403 (Barwick CJ) ('a very great constitutional safeguard'); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 613 (Gummow J) ('an important provision ... which deals with individual rights'); 655, 661 (Kirby J) ('relevant to the fundamental rights of all persons', an 'express constitutional promise') ('*Newcrest*').

<sup>14</sup> See below Part IV. Note that some of the respondents did not make submissions on this point.

<sup>15</sup> Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power? Rethinking s51(xxxi) of the Constitution' (2005) 27(4) *Sydney Law Review* 639.

the Appellant.<sup>16</sup> It is beyond the scope of this column to defend the view that s 51(xxxi) is correctly understood as a constitutional guarantee. The aim of this column, rather, is to consider, assuming it is a constitutional guarantee, the relevance of that status to questions of *stare decisis*. However, it is also worth underscoring that *Yunupingu* provides the Court with an additional opportunity to clarify the scope and application of s 51(xxxi) and the ‘underlying constitutional values ... to be given expression or priority under s 51(xxxi)’.<sup>17</sup>

The principles of *stare decisis* as applied to constitutional precedent are a centrepiece of the submissions in *Yunupingu*. Part II briefly examines the relevant history of the case. Part III argues that the nature of the case — concerning a constitutional guarantee — is relevant to the application of *stare decisis*. Part IV applies this analysis to *Yunupingu*.

## II Background and Procedural History

The proceedings involve two applications made under s 61 of the *Native Title Act 1993* (Cth) by Dr Yunupingu AM (deceased), on behalf of the Gumatj Clan or Estate Group, related to the resource-rich Gove Peninsula, in north-east Arnhem Land in the Northern Territory. In the Full Court of the Federal Court of Australia the claimants sought a determination of native title over this land and compensation

for the alleged effects on native title of certain executive and legislative acts done after the Northern Territory became a territory of the Commonwealth in 1911, but prior to the coming into force of the *Northern Territory Self-Government Act 1978* (Cth).<sup>18</sup>

It was uncontested that the case was ‘the latest in a long campaign by Yolngu peoples for the recognition of their title’.<sup>19</sup>

The pending appeal raises several complex and constitutionally significant questions, including the following:

- (1) Does the just terms requirement in s 51(xxxi) of the *Constitution* apply to a Commonwealth law that is supported by the territories power in s 122 and no other head of power in s 51?
- (2) Is a Commonwealth law that grants or asserts interests in land, such as to extinguish or impair native title rights in that land, a law with respect to an acquisition of property within the meaning of s 51(xxxi) so as to attract the just terms requirement?
- (3) Did the grant of a pastoral lease by South Australia in 1903 that excepted and reserved timber, minerals and other substances extinguish a non-

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<sup>16</sup> Commonwealth, ‘Appellant’s Submissions’, Submission in *Commonwealth v Yunupingu*, Case No D5/2023, 28 March 2024, 16 [43] (‘Appellant’s Submissions’).

<sup>17</sup> Dixon (n 15) 640.

<sup>18</sup> *Yunupingu v Commonwealth* (2023) 298 FCR 160, 165–6 [1]–[2] (Mortimer CJ, Moshinsky and Banks-Smith JJ) (‘*Yunupingu FCAFC*’).

<sup>19</sup> *Ibid* 166 [3] (Mortimer CJ, Moshinsky and Banks-Smith JJ).

exclusive native title right to use the natural resources of the land insofar as that native title right relates to minerals?<sup>20</sup>

This column focuses on the background, reasoning and argumentation with respect to one aspect of the first question only. The first question broadly concerns the application of the just terms requirement in s 51(xxxi) to the territories power in s 122. In the Full Court of the Federal Court, this question was answered by applying the doctrine of precedent: *Wurridjal* had overruled *Teori Tau* and was binding law. According to *Wurridjal* the just terms requirement in s 51(xxxi) of the *Constitution* applies to laws supported by the territories power in s 122.<sup>21</sup>

*Teori Tau*, decided in 1969, concerned mineral rights ordinances passed with respect to the (then) Territory of Papua and New Guinea. The Court held that the territories power in s 122 of the *Constitution* does not attract the just terms requirement. This was on the basis that the territories power is ‘plenary in quality and unlimited and unqualified in point of subject matter’<sup>22</sup> and ‘akin to that possessed by the States ... to make laws for the compulsory acquisition of property without necessarily providing in those laws for terms of acquisition which can be seen in the circumstances to be just’.<sup>23</sup>

*Wurridjal*, decided in 2009, involved a proceeding, on demurrer, regarding the validity of two Acts of the Howard Government underpinning the Northern Territory National Emergency Response (or Intervention), passed under s 122 of the *Constitution*.<sup>24</sup> Each Act was impugned on the basis that it constituted an acquisition of property otherwise than on just terms, in contravention of s 51(xxxi). Allowing the demurrer, a majority of the Court observed that *Teori Tau* ought to be overruled. The Full Federal Court in *Yunupingu v Commonwealth* held that for four of the Justices in *Wurridjal*, ‘a necessary step in their reasoning was the proposition that s 51(xxxi) applies to an acquisition of property pursuant to a law made only under s 122’.<sup>25</sup>

In the appeal pending before the High Court, the legal battlefield shifts from the doctrine of precedent to the doctrine of *stare decisis*. If the Court accepts that *Wurridjal* overruled *Teori Tau*, a key question for all parties is whether either *Wurridjal* or *Teori Tau* should be reopened and overruled. The Commonwealth challenges the Full Federal Court decision as to the binding nature of *Wurridjal*. It

<sup>20</sup> Evidently, the case involves several grounds of appeal. This means that even if the Court finds for the respondents regarding the application of the just terms requirement to the territories power, the Court may find against them on either or both of the remaining grounds.

<sup>21</sup> *Yunupingu FCAFC* (n 18) 221–6 [257]–[279] (Mortimer CJ, Moshinsky and Banks-Smith JJ).

<sup>22</sup> *Teori Tau* (n 3) 570 (Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ).

<sup>23</sup> *Ibid* 569 (Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ).

<sup>24</sup> *Northern Territory National Emergency Response Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

<sup>25</sup> *Yunupingu FCAFC* (n 18) 223 [266] (Mortimer CJ, Moshinsky and Banks-Smith JJ). For a helpful summary of *Yunupingu FCAFC*, see Aaron Moss, ‘The Constitutional Relationships between “Just Terms” Acquisition, Territories, and Native Title: Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia’, *AUSPUBLAW* (Blog Post, 16 June 2023) <<https://www.auspublaw.org/blog/2023/6/the-constitutional-relationships-between-just-terms-acquisition-territories-and-native-title-yunupingu-on-behalf-of-the-gumatj-clan-or-estate-group-v-commonwealth-of-australia-2023-fcafc-75>>.

argues that *Teori Tau* is binding (that is, that *Wurridjal* did not overrule *Teori Tau*). In the alternative, it submits the Court should reopen and overrule *Wurridjal*. The Respondents maintain that *Wurridjal* is binding. If not, they submit the Court should reopen and overrule *Teori Tau*.

### III Stare Decisis in the Constitutional Setting: The Role of Constitutional Guarantees

#### A The Sui Generis Nature of Stare Decisis in the Constitutional Setting

It is well recognised that the decision to overrule constitutional precedent is governed by different considerations than the decision to overturn precedent concerning statutory construction or the common law.<sup>26</sup> This is because the ‘sworn loyalty’ of the High Court is to the ‘*Constitution* first of all’ rather than the doctrine of *stare decisis*.<sup>27</sup> In constitutional cases *especially*, it is ‘not ... better that the Court should be persistently wrong than that it should be ultimately right’.<sup>28</sup> The reasoning of the Court in an earlier judgment on a constitutional question ‘may not be used as a substitute for the *Constitution*’.<sup>29</sup> This is at least partly because ‘[e]rrors in constitutional interpretation are not remediable by the legislature’.<sup>30</sup> The Court has noted that outside the referendum procedure, the only way a question of constitutional interpretation can be altered is by the Court reopening and overruling precedent.<sup>31</sup> This means the threshold for reopening and overruling constitutional precedent is lower than in other matters.<sup>32</sup>

<sup>26</sup> Anthony Mason, ‘The Use and Abuse of Precedent’ (1988) 4(2) *Australian Bar Review* 93, 94; Gian Boeddu and Richard Haigh, ‘Terms of Convenience: Examining Constitutional Overrulings by the High Court’ (2003) 31(1) *Federal Law Review* 167, 169; Michael Kirby, ‘Precedent Law, Practice and Trends in Australia’ (2007) 28(3) *Australian Bar Review* 243, 247; Joshua Thomson and Madeleine Durand, ‘Overruling Constitutional Precedent’ (2021) 95(2) *Australian Law Journal* 139, 139. See also *Street v Queensland Bar Association* (1989) 168 CLR 461, 489 (Mason CJ), 518–19 (Brennan J), 549 (Dawson J), 588 (McHugh J) (*‘Street’*); *Re Tyler*; *Ex parte Foley* (1994) 181 CLR 18, 38 (McHugh J) (*‘Re Tyler’*). For an overview of the relevant principles regarding decisions to overrule common law precedents, see Matthew Harding and Ian Malkin, ‘Overruling in the High Court of Australia in Common Law Cases’ (2010) 34(2) *Melbourne University Law Review* 519. For an overview of the relevant principles regarding decisions to overrule statutory precedents, see Lisa Burton Crawford and Dan Meagher, ‘Statutory Precedents under the “Modern Approach” to Statutory Interpretation’ (2020) 42(2) *Sydney Law Review* 209.

<sup>27</sup> *Australian Agricultural Co v Federated Engine-Drivers and Firemen’s Association of Australasia* (1913) 17 CLR 261, 278 (Isaacs J).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 396 (Barwick CJ).

<sup>30</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted) (*‘Lange’*). See also *Queensland v Commonwealth* (1997) 139 CLR 585, 598–9 (Gibbs J), 630 (Aickin J) (*‘Territory Representation Case [No 2]’*); *Re Tyler* (n 26) 38 (McHugh J).

<sup>31</sup> *Cole v Whitfield* (1988) 165 CLR 360, 400; *Lange* (n 30) 400 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted). See also *Territory Representation Case [No 2]* (n 30); *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 72 (Aickin J) (*‘Hospital Contribution Fund’*).

<sup>32</sup> *Territory Representation Case [No 2]* (n 30) 620 (Aickin J); *Street* (n 26) 620 (Aickin J); *Re Tyler* (n 26) 38 (McHugh J); *NZYQ* (n 4) 264 [36] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

Notwithstanding this, the question of whether to reopen and overrule constitutional cases is still subject to ‘a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law’.<sup>33</sup> Exceptional circumstances will be required to overrule a constitutional holding and caution should be exercised in so doing.<sup>34</sup> An error in constitutional interpretation alone is usually not sufficient and would need to be supported by other factors before *stare decisis* will be lifted.<sup>35</sup>

The four factors set out in *John v Federal Commissioner of Taxation* are typically cited as matters that may justify departure from earlier decisions.<sup>36</sup> These factors include:

- (1) whether the earlier case rested upon ‘a principle carefully worked out in a significant succession of cases’;
- (2) whether there were differences between the justices in the reasoning in the earlier case;
- (3) whether the earlier case had ‘achieved no useful result but ... led to considerable inconvenience’; and
- (4) whether the earlier case ‘had not been independently acted on in a manner which militated against reconsideration’.<sup>37</sup>

However, the following doctrinal examination of overruling in constitutional cases suggests this list of factors is incomplete.

## **B *Is the Protection of Constitutional Guarantees Relevant to the Application of Stare Decisis Principles?***

Another factor that has been historically *expressly* relevant to the Court’s decision whether or not to overrule is the impact of the constitutional precedent on the constitutional guarantees or individual rights protected by the *Constitution*.<sup>38</sup> Assuming the just terms requirement is one such individual right,<sup>39</sup> *Yunupingu* provides an important opportunity for the Court to clarify the relevance and weight of this factor when applying *stare decisis* to constitutional precedent.

The factor was relied on in *Street v Queensland Bar Association*.<sup>40</sup> The case was brought by a New South Wales barrister who was refused admission by the Queensland Bar unless he guaranteed he would practise principally in Queensland.

<sup>33</sup> *Wurridjal* (n 3) 352 [70] (French CJ). See also at 353 [71] (French CJ); *NZYQ* (n 4) 259–60 [18] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) (referring to the ‘strongly conservative cautionary principle’); *Vanderstock* (n 6) 315 [426] (Gordon J, citing Kitto J in *Hughes & Vale Pty Ltd v New South Wales* (1952) 87 CLR 49, 102) (‘[e]ven in constitutional cases ... it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason’).

<sup>34</sup> *Territory Representation Case [No 2]* (n 30) 599 (Gibbs CJ), 602 (Stephen J), 620 (Aickin J).

<sup>35</sup> For an overview and critique of the Court’s approach, see Boeddu and Haigh (n 26); Thomson and Durand (n 26).

<sup>36</sup> *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 (‘*John*’).

<sup>37</sup> *Ibid* 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

<sup>38</sup> This section draws on the helpful analysis in Boeddu and Haigh (n 26) 172.

<sup>39</sup> See above nn 13–15 and accompanying text.

<sup>40</sup> *Street* (n 26).

He argued that this infringed s 117 of the *Constitution*, a provision which prohibits discrimination on the basis of state residency. This argument required the High Court to overrule *Davies v Western Australia*<sup>41</sup> and *Henry v Boehm*, cases which had held that the challenged requirements were constitutional as they applied equally to all persons.<sup>42</sup> Mason CJ decided to overrule the two precedents as they supported an incorrect interpretation of ‘an important provision in the *Constitution* dealing with *individual rights central to federation*’.<sup>43</sup> Brennan J stated that ‘the doctrine of stare decisis ... is *least cogent* in its application to those few provisions which are calculated to protect human rights and fundamental freedoms’.<sup>44</sup> In addition, McHugh J stated that ‘*most importantly*, the decision, if followed, will greatly reduce the scope of a great constitutional protection for the residents of this country’.<sup>45</sup> Boeddu and Haigh note that their Honours did not simply rely on disagreement with the prior precedents as sufficient to overrule these decisions. Instead, the emphasis on s 117 as an individual right acted as ‘a short qualifier’<sup>46</sup> supporting the decision to overrule.

Similar reasoning was used by Gummow J in *Newcrest*, and this is of particular relevance to *Yunupingu*.<sup>47</sup> In *Newcrest* the Court considered whether to overturn *Teori Tau*. Gummow J held that when an issue before the Court relates to ‘an important provision of the *Constitution* which deals with *individual rights* ... the “Court has a responsibility to set the matter right”’.<sup>48</sup> Thus, Gummow J relied on rights-based reasoning as part of his decision to overrule *Teori Tau*.<sup>49</sup>

Conversely, but relatedly, that no rights would be adversely affected in the precedent being challenged was a factor contributing to the decision to overrule in *Commonwealth v Hospital Contribution Fund of Australia*.<sup>50</sup> Writing in 2003, Boeddu and Haigh argued that, together, these statements from *Street* and *Newcrest* suggest that

once the Court is asked to consider an individual right granted or protected by a constitutional provision, then deciding upon the ‘correct’ interpretation for that section, rather than one supported by precedent, becomes the overriding aim. ...

In these decisions the need to adhere to precedent has been inversely related to the importance of the constitutional subject matter involved. In particular, constitutionally enshrined individual rights have been categorised as being

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<sup>41</sup> *Davies v Western Australia* (1904) 2 CLR 29.

<sup>42</sup> *Henry v Boehm* (1973) 128 CLR 482.

<sup>43</sup> *Street* (n 26) 489 (emphasis added).

<sup>44</sup> *Ibid* 518–19 (emphasis added).

<sup>45</sup> *Ibid* 588 (emphasis added).

<sup>46</sup> Boeddu and Haigh (n 26) 172.

<sup>47</sup> *Newcrest* (n 13).

<sup>48</sup> *Ibid* 613 (emphasis added) (citations omitted).

<sup>49</sup> His Honour also relied on other factors, such as that *Teori Tau* had not ‘been significantly acted upon by the Parliament or territorial legislatures’: *ibid* 614.

<sup>50</sup> *Hospital Contribution Fund* (n 31) 58 (Gibbs J) (emphasising ‘[n]o one will be adversely affected if the decisions are overruled’, in express comparison to *Western Australia v Commonwealth* (1975) 134 CLR 201 (*‘Territory Representation Case [No 1]*)).

more important than some ‘other’ constitutional principles and thus more likely to outweigh the need to preserve precedents.<sup>51</sup>

The 2023 jurisprudence provides some support for this claim.

## 1 *Vunilagi*

The majority of the Court in *Vunilagi* denied leave to reopen *Bernasconi* and did not engage in a detailed application of the *John* factors or other discussion of *stare decisis* in the constitutional setting. Notwithstanding this, Edelman J, in dissent, impliedly endorsed the claim that the subject matter of the impugned case (and, relatedly, whether the case causes injustice) is a relevant factor to the application of *stare decisis*. His Honour observed:

There may even be cases that are so fundamentally contrary to basic principle, involving reasoning that is so *abhorrent* or involving such significant and manifest error or *injustice*, that the result or reasoning should never be permitted to stand even if the decision might be thought to have become structurally embedded and even if overruling would lead to large consequences. Such cases are likely to be extremely rare. But, if and when those cases arise, a judge’s ethical duty precludes timorous acceptance of grave injustice even if the price of that duty is perpetual dissent.<sup>52</sup>

This passage suggests that *stare decisis* is weaker where the impugned constitutional precedent is ‘contrary to basic principle’ and involves ‘significant and manifest ... injustice’. While Edelman J did not expressly invoke the language of individual rights, safeguards or guarantees, his Honour’s reasoning possibly captures both constitutional precedents concerning express constitutional safeguards alongside a broader category of constitutional precedents that generate injustice. This could possibly also include constitutional precedents concerning structural implications drawn from the *Constitution* and having rights-protecting ramifications.

## 2 *NZYQ*

In *NZYQ*, the Court unanimously overturned *Al-Kateb*. This line of jurisprudence does not concern an express constitutional guarantee; instead, it concerns the constitutionally guaranteed separation of judicial powers. This doctrine, sourced in the text and structure of the *Constitution*, arguably has rights-protecting ramifications for individuals the subject of judicial and executive power in Australia. In particular, *NZYQ* concerned the constitutional immunity drawn in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* that

the involuntary detention of a citizen in custody by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.<sup>53</sup>

<sup>51</sup> Boeddu and Haigh (n 26) 172.

<sup>52</sup> *Vunilagi* (n 10) 263 [164] (emphasis added).

<sup>53</sup> *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27–8 (Brennan, Deane and Dawson JJ) (*‘Lim’*).



*NZYQ* concerned the application of this constitutional immunity to indefinite immigration detention of non-citizens in Australia by the executive. In *Al-Kateb* the High Court had upheld as constitutionally valid the indefinite immigration detention of a stateless Palestinian man.

In *NZYQ*, the identification of ‘error’ in or ‘incompatibility’ of *Al-Kateb*, revealed by conflict with ‘a stream of authority’,<sup>54</sup> was the basis for granting leave to reopen and for overruling. The lack of ‘consistency and continuity’<sup>55</sup> of *Al-Kateb* in light of subsequent jurisprudence appears to be the Court’s predominant consideration in favour of overruling. This factor was (briefly) weighed against one countervailing factor:

Having regard to the importance of continuity and consistency in the application of *fundamental constitutional principle*, the legislative reliance and implicit legislative endorsement which weighed in favour of not reopening the statutory construction holding in *Al-Kateb* necessarily assumes less significance in considering reopening of its constitutional holding. The same is true of administrative inconvenience.<sup>56</sup>

In short, the inconsistency of *Al-Kateb* with the immunity stated in *Lim* and subsequently understood and applied was the reason for overturning *Al-Kateb*.

While the Court did not *expressly* consider the impact of the impugned precedent on the liberty of the individual or the rights-protecting ramifications of the scope of the *Lim* principle, the above passage does refer to ‘the importance of consistency and continuity in the application of fundamental constitutional principle’. This possibly indicates the relevance of the importance of the constitutional subject matter in *Lim*. Moreover, the substantive differences between *Al-Kateb* and *Lim* were arguably averted to by the Court in the following statement:

The *Lim* principle would be devoid of substance were it enough to justify detention, other than through the exercise of judicial power in the adjudgment and punishment of guilt, that the detention be designed to achieve an identified legislative objective that there is no real prospect of achieving in the reasonably foreseeable future.<sup>57</sup>

It is clear that the substantive differences between the *Lim* principle as articulated in *Al-Kateb* (the ‘outlier’<sup>58</sup>) and the remaining stream of authority that the Court is referring to lie in the different articulations of the scope of executive and judicial power, which result in different protections of the liberty of the individual.<sup>59</sup>

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<sup>54</sup> *NZYQ* (n 4) 264 [35] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

<sup>55</sup> *Ibid* 259 [17], 264 [36]–[38], [41] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

<sup>56</sup> *Ibid* 264 [36] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) (emphasis added).

<sup>57</sup> *Ibid* 265–6 [45] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) (emphasis added).

<sup>58</sup> *Ibid* 264 [35] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

<sup>59</sup> Indeed, in the course of explaining the authoritative background principles that are drawn from *Lim*, the Court observed that ‘Ch III is concerned with substance and not mere form, and ... it is the involuntary deprivation of liberty itself that ordinarily constitutes punishment’: *ibid* 262 [28] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

Responding to the case, Sanderson and Malone considered that [t]he choice not to avert to the dire human consequences of the holding in *Al-Kateb* may have helped to clearly position *NZYQ* as a decision based in law, in anticipation of the kind of political backlash against activism which has followed several High Court decisions giving rise to constitutional developments.<sup>60</sup>

It is certainly plausible that the Court did not resort to such express reasoning because it was prioritising other defensible stylistic choices (such as publishing a short, unanimous judgment)<sup>61</sup> or because the ‘consistency and continuity’ ground was *sufficient* to warrant reopening and overruling. However, this does not necessarily mean that rights-based reasoning is not a valid consideration in the application of *stare decisis* to constitutional precedent, or that the subject matter of the case (concerning a structural limitation with liberty-protecting ramifications) was not relevant to the Court’s decision to overrule.

### C *Alternatively, Is There a Category of Constitutional Cases of ‘Vital Importance’ That Have Particular Weight in Stare Decisis Questions?*

Part III(B) illustrated that there is evidence *at least* for a weaker application of *stare decisis* to precedent that concerns constitutional guarantees or individual rights. However, Part III(C) suggests that there is also an argument, on a careful reading of the jurisprudence, for a broader set of constitutional cases where the doctrine of *stare decisis* is weakened. Building on the previous section, it could be argued that *NZYQ* provides support for the understanding that a weaker application of *stare decisis* is warranted for certain constitutional cases in particular (albeit not only those that touch an express individual right). Historically, Australian commentators have limited the identification of this factor — that the protection of constitutional guarantees is relevant to the application of *stare decisis* principles — to the individual rights cases explored above, citing *Street* (concerning s 117) or *Newcrest* (concerning s 51(xxxi)). However, early jurisprudence may also support a more capacious framing of this category. It is suggested here that the factor could be broadened beyond express constitutional safeguards and instead be based, in broad terms, on the ‘importance’ of the subject matter of the constitutional case. It may be equally relevant to the application of *stare decisis* whether the impugned precedent touches on an express constitutional guarantee, a freedom secured by a constitutional implication, or another constitutional doctrine of ‘vital importance’.<sup>62</sup>

There is some support for this framing in the jurisprudence. In *Lange v Australian Broadcasting Corporation*, for example, a unanimous Court held that

<sup>60</sup> Harry Sanderson and Meghan Malone, ‘NZYQ: Consistency, Continuity, and Human Rights’, *AUSPUBLAW* (Blog Post, 5 February 2024) <<https://www.auspublaw.org/blog/2024/2/nzyq-consistency-continuity-and-human-rights>>.

<sup>61</sup> See Stephen McDonald, ‘NZYQ: A New Style of Unanimous Judgment for the High Court of Australia’, *AUSPUBLAW* (Blog Post, 31 January 2024) <<https://www.auspublaw.org/blog/2024/1/nzyq-a-new-style-of-unanimous-judgment-for-the-high-court-of-australia>>.

<sup>62</sup> This suggestion does not cure any concern as to the ‘ill-defined’ nature of the latter category in particular: Boeddu and Haigh (n 26) 171.

*stare decisis* is weaker (that is, ‘the Court will re-examine a decision’) ‘if it involves a question of “vital constitutional importance” and is “manifestly wrong”’.<sup>63</sup> Questions persist as to whether these terms are or can be ‘satisfactorily defined’.<sup>64</sup> In an arguably similar vein, in *HC Sleigh Ltd v South Australia*, Jacobs J said the Court needed to be ‘convinced’ of both the decision’s wrongness *and* its causing of intolerable ‘social, economic or political consequences’.<sup>65</sup> Boeddu and Haigh understand this as the Court proposing different tests in cases concerning fiscal arrangements than those it fashioned for overruling individual rights cases, comparing this reasoning to that in *Street* and *Newcrest*.<sup>66</sup> However, the reference to intolerable *social* consequences could also be understood as recognising that cases touching on certain subject matter are to be treated differently (while also accepting that the broader comment invokes the third *John* factor).

An additional example is drawn from the more recent case of *Re Day (No 2)*.<sup>67</sup> This case, which has not been analysed from the perspective of *stare decisis*, concerned the interpretation of s 44(v) of the *Constitution*. That provision renders certain persons incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives if they have any direct or indirect pecuniary interest in any agreement with the Commonwealth Public Service. The case concerned whether *Re Webster*, the only decision of the Court concerning s 44(v), should be reopened and overruled.<sup>68</sup> Nettle and Gordon JJ acknowledged that the impugned precedent was ‘of a special kind’ because it involved ‘constitutional provisions respecting Parliament and its members’.<sup>69</sup> This is arguably also reminiscent of Edelman J’s comments in *Vunilagi* set out above.<sup>70</sup>

The brief review of the case law possible within the scope of this column suggests that there is a set of cases — a broader category than previously understood — where the Court has been prepared to treat the importance of the subject matter as weighing against the application of *stare decisis*. It may be that the critical issue is not whether a provision, principle or implication can be characterised as a constitutional guarantee or individual right. Rather, it is that certain provisions, principles or implications raise such fundamental consequences or questions of justice that *stare decisis* is more likely to give way and that questions impacting individual rights are more likely to be of such a nature.

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<sup>63</sup> *Lange* (n 30) 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted) (emphasis added).

<sup>64</sup> Boeddu and Haigh (n 26) 171

<sup>65</sup> *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475, 513.

<sup>66</sup> Boeddu and Haigh (n 26) 176

<sup>67</sup> *Re Day (No 2)* (2017) 263 CLR 201.

<sup>68</sup> *Re Webster* (1975) 132 CLR 270.

<sup>69</sup> *Re Day (No 2)* (n 67) 220 [45] (‘There is the consideration that persons may have ordered their affairs on the basis of that decision, and may have to act promptly to regularise them. In any event the decision is of a special kind, involving as it does constitutional provisions respecting Parliament and its members. If the construction adopted in *Webster* is affected by error, it should not be allowed to stand.’)

<sup>70</sup> See above n 52 and accompanying text.

## IV Application to *Yunupingu*

The pending appeal presents an important opportunity for the Court to explain the relevance of the protection of constitutional guarantees to *stare decisis* reasoning, and to articulate the scope of this factor — that is, does it apply only to express constitutional guarantees or to a broader sub-category of constitutional precedent. Several of the respondents emphasise the status of the just terms requirement as a constitutional safeguard. The submissions made on behalf of Dr Yunupingu (the First Respondent) indicate that the ‘heart’ of the present appeal

involves a consideration as to whether Indigenous people should be denied the protection of a *constitutional safeguard* that applies to property owned by other Australians, based on a discriminatory denigration of native title as ‘inherently defeasible’ for the purposes of s 51(xxxi).<sup>71</sup>

The First Respondent emphasises that

this Court would not be intimidated by the prospect that its function of interpreting and applying the *Constitution* ... may occasion fiscal inconvenience to the Commonwealth. That is *especially so in the case of the ‘great constitutional safeguard’* that s 51(xxxi) represents.<sup>72</sup>

Moreover, the First Respondent observes:

If it be the case that a ‘vast’ Commonwealth liability would arise under the Full Court’s orthodox approach to ss 51(xxxi) and 122 of the *Constitution*, that could only be on account of a ‘vast’ number of Indigenous peoples of the Northern Territory having been historically and unjustly dispossessed of their property, to the Commonwealth’s countervailing benefit, in contravention of the limits on Commonwealth power under the *Constitution*. ... Insofar as the scale of such unconstitutional acquisition of property on other than just terms is ‘vast’, that would only underscore the importance of the Court recognising the specific constitutional wrong underlying the present case.<sup>73</sup>

In numerous important cases in this Court’s history, the application of the *Constitution* in accordance with legal principle has occasioned substantial inconvenience, whether financial, administrative, or other. The Commonwealth has occasionally sought to sustain a position on the basis of what it urged would be the intolerable consequences of a contrary decision.<sup>74</sup>

In each such case, this Court has not eschewed its responsibility to enforce the *Constitution*, but has instead embraced it. No less would be true in the present appeal which at its heart involves a consideration as to whether Indigenous people should be denied the protection of a constitutional safeguard that applies to property owned by other Australians, based on a discriminatory denigration of native title as ‘inherently defeasible’ for the purposes of s 51(xxxi).<sup>75</sup>

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<sup>71</sup> Yunupingu on behalf of the Gumatj Clan or Estate Group, ‘First Respondent’s Submissions’, Submission in *Commonwealth v Yunupingu*, Case No D5/2023, 27 May 2024, 6 [10] (emphasis added).

<sup>72</sup> *Ibid* [7].

<sup>73</sup> *Ibid* [8].

<sup>74</sup> *Ibid* [9] (citations omitted).

<sup>75</sup> *Ibid* [10].

In response to the Commonwealth submission that *Teori Tau* is good law, the Rirratjingu Parties (the Twenty-Fifth to Twenty-Eighth Respondents) seek leave for *Teori Tau* to be reopened and overruled. The Rirratjingu Parties also expressly cite the relevance of the application of *stare decisis* principles to cases where the ‘constitutional question is of “vital” importance’ such as where it concerns a ‘constitutional guarantee’.<sup>76</sup> Likewise, the Northern Land Council and the Arnhem Land Aboriginal Land Trust (the Twenty-Ninth Respondent and the Thirty-Second Respondent, respectively) — together, the NLC Parties — submit that ‘inconvenience does not overcome principle’<sup>77</sup> in an argument reminiscent of the First Respondent’s argument and which raises, albeit in different [or more oblique] language, the significance of the constitutional question in the pending appeal.

Notably, the Commonwealth (the Appellant) denies the status of the just terms requirement as an individual right.<sup>78</sup> Moreover, in the context of the submission that *Wurridjal* did not overturn *Teori Tau*, the Commonwealth submits:

That said, given the stark differences of opinion expressed in [the impugned precedent] ... in this Court the answer to the above question [of whether the territories power is subject to the just terms requirement] is *more appropriately resolved by reference to constitutional principle than by arguments about the ratio of those cases*.<sup>79</sup>

The Rirratjingu Parties contest this submission, arguing that it seeks to ‘skip over’ issues of precedent:

The Court should pause before taking that approach. Constitutional principle does not exist in a vacuum, disconnected from precedent. The pages of the law reports are not ‘blank’; they record the judgments in *Teori Tau*, *Newcrest* and *Wurridjal*.<sup>80</sup>

Interestingly, the Commonwealth submission is not framed in the language of *stare decisis*; nor does it seek to argue that the case should *not* be determined by the doctrine of precedent because it concerns a constitutional safeguard or some other special category of constitutional questions of fundamental importance or with rights-protecting ramifications. Instead, this submission is more akin to the general claim identified at the outset of this column: that *stare decisis* is weaker in the constitutional setting.

It thus appears there are at least three possibilities with respect to *stare decisis* in the constitutional setting:

- (1) *Stare decisis* is weaker in the constitutional setting generally (the Commonwealth position).

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<sup>76</sup> The Rirratjingu Parties, ‘Submissions of the Twenty-Fifth to Twenty-Eighth Respondents (The Rirratjingu Parties)’, Submission in *Commonwealth v Yunupingu*, Case No D5/2023, 27 May 2024, 28–9 [92] (citations omitted) (‘Submissions of the Twenty-Fifth to Twenty-Eighth Respondents’).

<sup>77</sup> The Northern Land Council and the Arnhem Land Aboriginal Land Trust, ‘Submissions of the NLC Parties (Twenty-Ninth Respondent, Northern Land Council, Thirty-Second Respondent, Arnhem Land Aboriginal Land Trust)’, Submission in *Commonwealth v Yunupingu*, Case No D5/2023, 27 May 2024, 11 [28] (citations omitted).

<sup>78</sup> Appellant’s Submissions (n 16) 16 [43].

<sup>79</sup> *Ibid* [14].

<sup>80</sup> The Rirratjingu Parties, ‘Submissions of the Twenty-Fifth to Twenty-Eighth Respondents (n 76) 19 [56].

- (2) *Stare decisis* is weaker in the constitutional setting generally *and* especially so when assessing precedent that concerns an express constitutional guarantee (the position of Dr Yunupingu, the Rirratjingu Parties and the NLC Parties).
- (3) *Stare decisis* is weaker in the constitutional setting generally *and* especially so when assessing precedent that concerns constitutional principles of fundamental importance, whether these be express constitutional guarantees or requirements or implications drawn from other provisions (the alternative explored in Part III(C) of this column).

## V Conclusion

If the role of express constitutional guarantees is relevant to the application of *stare decisis*, a further question arises. This question is relevant to *Yunupingu*, though beyond the scope of this short column:

[I]s overruling only more appropriate where it will increase an individual right or does the same higher standard apply where it would restrict it? In other words, is *stare decisis* less important to incorrect interpretations of constitutional rights that had previously expanded such a right or should it be treated the same?<sup>81</sup>

Reflecting on the historic applications of this factor in *stare decisis* reasoning, Boeddu and Haigh initially note: ‘It is not clear in either *Street* or *Newcrest* whether their Honours’ readiness to overrule was influenced by the fact that the constitutional right involved in each case had been *restricted* by precedent.’<sup>82</sup> However:

[T]he tenor of these decisions suggest[s] that the Court would be less inclined to take away rights than to ensure protection of rights. This is especially true where individual rights are vying against collective or governmental rights — the Court’s past attitude appears to have been driven by a need to prevent restricting rights.<sup>83</sup>

Applying the narrower formulation (that reopening is only more appropriate where it will increase an individual right) supports both of the claims by Dr Yunupingu, the Rirratjingu Parties and the NLC Parties that *Wurridjal* should not be reopened and, alternatively, that *Teori Tau* should be reopened. Applying the broader formulation (that reopening is more appropriate wherever the impugned precedent touches upon an individual right) *also* supports the Commonwealth’s argument that *Wurridjal* should be reopened (although this was not an argument made in the Commonwealth’s written submissions).

Within the scope permitted by this column, I have also considered whether the category of cases of special relevance is broader than the category of cases that concern an express constitutional guarantee. I have suggested that the ‘importance’ of the subject matter of the impugned constitutional case generally may be a relevant consideration for the application of *stare decisis*. This may include cases where the impugned precedent touches on an express constitutional guarantee, concerns a

<sup>81</sup> Boeddu and Haigh (n 26) 173.

<sup>82</sup> *Ibid* (emphasis in original).

<sup>83</sup> *Ibid*.

freedom secured by a constitutional implication or touches some other ‘vital’ or ‘fundamental’ constitutional provision or principle. However, this possibility provokes further questions, including most importantly how this broader category is to be defined. It is hoped the Court takes the opportunity in *Yunupingu* to clarify the relevance of the rights-protecting factor and the scope of its operation.<sup>84</sup>

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<sup>84</sup> This echoes earlier calls for more express reasoning in this regard: *ibid* 173–4.