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Unfinished business

Truth-telling about Aboriginal land rights and native title in the ACT

Discussion paper

Ed Wensing

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Acknowledgement of Country

I acknowledge the Traditional Owners on whose Country I live, work and play.

I acknowledge that the Aboriginal and Torres Strait Islander peoples of Australia are the oldest living culture on Earth, have the oldest continuing land tenure and land use planning and management systems in the World. Your law, knowledge, culture and tradition is a gift to all Australians. I acknowledge that you have suffered the indignity of having your land taken from you without your free, prior and informed consent, without a treaty and without compensation on just terms.

I also acknowledge these matters are yet to be justly resolved.

Dr Ed Wensing (Life Fellow) FPIA FHEA

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I acknowledge the local Aboriginal peoples that call the ACT their ancestral lands. I have spoken with many of you over recent months and I acknowledge the difficult circumstances regarding your land rights and interests. This intention of this paper is to place some of the recent history of dispossession and alienation on the public record and to assist the process of recognition of the contemporary Traditional Owners[1] of the ACT.

I also wish to thank SGS Economics and Planning for use of their conference room for meetings with many of the Aboriginal families of the ACT. And to The Australia Institute for publishing this paper.

Last, but not least, I would also like to acknowledge and thank my wife, Kerry for her patience and constant support. And my dear sister, Veronica Wensing, for ensuring that the Parliamentary Agreement between ACT Labor and the ACT Greens for the 9th and 10th Legislative Assemblies for the ACT included commitments to continue working with the Aboriginal and Torres Strait Islander peoples in the ACT on a wide range of matters. And for the many amiable discussions about the need for a settlement in the ACT.

[1] See **Appendix A** for a discussion of the origin and current usage of the term 'Traditional Owner'. While the term **'Traditional Owner'** holds particular meaning in some legal contexts, it is used in this paper to recognise the connections to Country and culture of the First Nations Peoples of this land and waters that pre-date the colonisation of Australia by the British from 1788.

In my doctoral thesis, I explored the possibilities of supplanting the prevailing orthodoxy of the Crown always prevailing over the land and water rights of Aboriginal and Torres Strait Islander peoples with a framework for parity between two systems of land ownership, use and tenure based on mutual respect, reciprocity and justice. The research for this paper follows on from my doctoral research. There is no time like the present to search for the truth.

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Acronyms

ABC	Australian Broadcasting Corporation
ACAT	ACT Civil and Administrative Appeals Tribunal
AIATSIS	Australian Institute Aboriginal and Torres Strait Islander Studies
ATNS	Agreements Treaties and Negotiated Settlements
ATSIEB	Aboriginal and Torres Strait Islander Elected Body
ATSISJC	Aboriginal and Torres Strait Islander Social Justice Commissioner
CATSI Act	*Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)
COAG	Council of Australian Governments
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia Full Court
FPAV	First Peoples' Aboriginal Assembly of Victoria
ha	hectares
HCA	High Court of Australia
ILUA	Indigenous Land Use Agreement
LJG	Victorian Traditional Owner Land Justice Group
LUAA	Land Use Activity Agreement
LUAR	Land Use Activity Regime
MoAD	Museum of Australian Democracy
NAA	National Archives of Australia
NLA	National Library of Australia
NBT	Noongar Boodja Trust
NLE	Noongar Land Estate
NPA	National Parks Association (ACT) Incorporated
NSWALC	New South Wales Aboriginal Land Council
NTA	*Native Title Act 1993* (Cth)
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider

ORIC	Office of the Registrar of Indigenous Corporations
RNTBC	Registered Native Title Body Corporate
SOWG	Senior Officers Working Group of the Council of Australian Governments
SWALSC	South West Aboriginal Land and Sea Council
UCL	Unalienated Crown land
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VTAC	Victorian Treaty Advancement Commission

Contents

Summary

Successive ACT Governments have said they are committed to a respectful relationship with the Aboriginal and Torres Strait Islander peoples living in the ACT and to working closely with them.

The Parliamentary Agreement between ACT Labor and the ACT Greens commits the ACT Government to embarking on treaty discussions and rescinding certain restrictive clauses in the 2001 Namadgi National Park Agreement during the term of the 10th Legislative Assembly for the ACT.

If an ACT Government is to progress treaty discussions with the local Aboriginal peoples of the ACT, it cannot ignore the unfinished business of Aboriginal land rights and native title in the ACT. It is a matter of public record that they were dispossessed of their land. Taken from them without their free, prior and informed consent, without a treaty and without compensation for their losses. Therefore, a gaping void needs to be addressed in the truth about the ACT's past. The ACT can no longer ignore nor deny these issues of sovereignty, land rights, self-determination and the need for a settlement in the ACT.

There are many reasons why Aboriginal land rights and native title in the ACT have remained as unfinished business for so long. Including:

- The Aboriginal peoples of the ACT region were not consulted and their land rights and interests were not considered when the Territory was established in 1909 and when self-government was granted to the ACT in 1989.
- The assumption that the transfer of the land from NSW to the Commonwealth extinguished all native title in the ACT in 1911 or by previous land grants by NSW is questionable.
- The Federal Court of Australia has considered no native title claims over land in the ACT for a host of different reasons, not always relating to the merits of the claim.
- The genealogical studies that have been carried out by various parties over the years do not address the requirements of s.223(1) of the *Native Title Act 1993* (Cth).
- Restrictive clauses imposed on the Aboriginal parties that signed the Namadgi National Park Agreement in 2001 have prevented the preparation of any new native title claims.
- The lack of agreement amongst the Aboriginal families of the ACT about these matters.
- The overall lack of resources and commitment by successive Commonwealth and ACT Governments to address these matters in a comprehensive and meaningful way.

The ACT does not have the luxury of amending a constitution because the ACT does not have one. Nevertheless, the ACT Government can negotiate a settlement, can pass a statute giving recognition and stature to the contemporary Traditional Owners of the ACT, and can establish the rules for coexistence and power sharing. The ACT Government should want this as much as the Aboriginal peoples want it because it sets the basis of the relationships the ACT Government needs to have with the contemporary Traditional Owners of the ACT. A relationship based on mutual respect, parity and justice.

The ACT Government should not be afraid to follow the examples set by Victoria, Queensland and the Northern Territory in commencing treaty discussions about possible ways of resolving the matters of sovereignty and self-determination, including over land rights and native title.

Three possible options for resolving the unfinished business of Aboriginal land rights and native title in the ACT include:

- Establishing a statutory Aboriginal land rights scheme, similar to that in New South Wales or the Northern Territory;
- Developing a comprehensive settlement which is registered under the *Native Title Act 1993* (Cth), similar to the Noongar Native Title Settlement in SW Western Australia; or
- Developing an alternative native title settlement scheme, similar to the *Traditional Owner Settlement Act 2010* in Victoria.

These options are not without their attendant risks and opportunities. They will take considerable time, effort and good will by all concerned to achieve amicable and sustainable long-term outcomes. Especially if they involve the extinguishment of native title rights and interests and the consensus of all native title claimants or holders is required.

In terms of progressing these matters, the following steps are vitally important:

1. Acknowledging that Canberra is on the lands of the Traditional Owners or native title holders (whoever they may be), that the land was taken from them without their free, prior and informed consent, without a treaty, and that they have never been compensated for their losses.
2. Establishing a Truth and Healing Commission under the *Inquiries Act 1991* (ACT) to investigate both historical and ongoing injustices committed against the Aboriginal peoples of the ACT since colonisation by the state and non-state entities, across all areas of social, cultural, political and economic life, and with the clear intention of addressing past grievances by mutual agreement with all concerned.
3. Unilaterally withdrawing the restrictive clauses in the Namadgi National Park Agreement and providing NTSCORP Limited with sufficient resources to assist the

Aboriginal families with preparing their native title claim(s) and resolving internal conflicts.

4. Undertaking a thorough search and analysis of the historical land tenures and land transfers from NSW to the ACT in 1911, including identifying what was Crown land in 1911 and what has happened to that land through to the present.
5. Publicly releasing all previous legal opinions/advice on these matters so they can be on the public record.

The truth is that we have failed the Aboriginal peoples of this region in the past. We cannot erase the past, but we can change the future. We can, and should do better, because continuing failure in this space is no longer an option.

1. INTRODUCTION

1.1 Context

Elections for the 10th Legislative Assembly in the Australian Capital Territory (ACT) were held on 17 October 2020 and a Labor-Greens government has been returned. The Parties have signed a Parliamentary and Governing Agreement (Barr and Rattenbury, 2020) to which the two Parties have attached their respective Party Policy Platforms. The party platforms include further specific commitments to the First Nations peoples of the ACT.

- The ACT Labor Party's platform includes commitments to self-determination and Closing the Gap in outcomes for Aboriginal and Torres Strait Islander Canberrans and to the Uluru *Statement of the Heart*. The platform states that to progress these goals, the Government will work with the ACT's traditional custodians and its diverse Aboriginal and Torres Strait Islander community, to, among other things, 'Undertake discussions on Treaty with traditional owners, informed by Treaty processes underway around the nation' (Barr and Rattenbury, 2020:18).
- The ACT Green's Party platform includes commitments to 'Supporting First Nations families with claims to connection to country in the ACT to submit native title claims' and to 'Repealing and replacing the Namadgi Agreement (including provisions requiring parties to withdraw native title claims)' (Barr and Rattenbury, 2020:24).

The Aboriginal peoples of the ACT have had their land taken from them without their consent, without a treaty and without compensation.[2] If Labor and the Greens are to 'Undertake discussions on Treaty with traditional owners, informed by Treaty processes underway around the nation' in the term of the 10th Legislative Assembly for the ACT, then past injustices relating to Aboriginal lands rights cannot be ignored.

The Aboriginal and Torres Strait Islander peoples of Australia have long protested about their land rights. In response to those protests, through the 1960s, 1970s and 1980s various State and Commonwealth Governments have enacted statutory land rights grants or transfer schemes or maintained 'protection' style land trust arrangements for the benefit of Aboriginal and Torres Strait Islander peoples (Wensing, 2016:31-35; 2019:57-62). In 1992, the High Court of Australia's landmark decision in *Mabo v the State of Queensland (No. 2)*[3] recognised the pre-existing land rights and interests of the Aboriginal peoples of Australia under their system of law and custom, and which the High Court termed 'native title'. The Commonwealth subsequently negotiated and enacted the *Native Title Act 1993* (Cth) to provide a system for working with native title rights and interests. As a consequence of these actions, Indigenous peoples in Australia now hold rights to approximately 46 percent of terrestrial Australia (Arthur and Morphy, 2019:146), and the size of the 'Indigenous estate' is continuing to grow in every jurisdiction.

[2] Predominantly by the NSW Colonial Government prior to the establishment of the Territory in 1911.

[3] (1992) 175 CLR 1. Hereafter cited as *Mabo (No. 2)*.

In the ACT where no land rights statutes have been passed and no native title claims have been given serious consideration, land rights and native title remain as unfinished business. The fact that the two governing political parties in the current Legislative Assembly for the ACT have made separate, but related, commitments to 'treaty discussions' and to 'reviewing the Namadgi National Park Agreement', presents a very real opportunity for progressing toward a resolution of the outstanding Aboriginal land rights and native title matters in the ACT.

This paper therefore:

- Discusses the ACT Government's commitment to the Aboriginal peoples of the ACT.
- Explores the ACT Government's legislative and policy record on Aboriginal land rights and native title matters in the ACT.
- Examines how the establishment of the Territory that federation created and the establishment of self-government in the ACT ignored the Aboriginal peoples' land rights and interests and posits where native title may not have been extinguished and may still exist in parts of the ACT.
- Discusses the status of the Namadgi National Park Agreement and recent amendments to the *Native Title Act 1993* (Cth) that were passed by the Commonwealth Parliament in February 2021, which provides a strong case for setting the current Namadgi National Park Agreement aside and starting negotiations afresh about the future of Namadgi National Park.
- Explores three options for progressing the outstanding native title matters in the ACT.
- Explores the option of a treaty as a wider context within which the Aboriginal land rights matters could be progressed in the ACT.
- Discusses NTSCorp's role as the appointed Native Title Service Provider for NSW and the ACT in assisting Aboriginal peoples with native title matters; and
- Draws some conclusions and outlines the next steps.

1.2 About this Discussion Paper

This Discussion Paper investigates the historical circumstances of how the Australian Capital Territory (ACT) got into the predicament of not having recognised the local Aboriginal peoples' land rights and interests via a statutory land rights grants/transfer scheme similar to that in other jurisdictions around Australia. And how the resolution of native title matters under the *Native Title Act 1993* (Cth) in the ACT have been arbitrarily impeded by various factors.

The Discussion Paper is based on information in the public domain, including statutes, legal proceedings and judgements, historical records held by the National Archives of Australia, the National Library of Australia and ArchivesACT, government policy and program initiatives, various government reports and their findings, academic journal articles, PhD theses, research reports, working papers and discussion papers by reputable research institutions and newspaper reports. Some consultation and fact-checking was undertaken with some of the Aboriginal families of the ACT and key stakeholders about the findings,

especially where information was not available in the public domain or there was some ambiguity.

The *Freedom of Information Act 2016* (ACT) and the *Freedom of Information Act 1982* (Cth) were not utilised in undertaking this research. The primary aim of this research was to review the information available on the public record and assess what has transpired over the passage of time that has led to the current predicament. It is not the aim of this paper to critique the public policy failings of previous governments.

The analysis and suggestions for further action in this Discussion Paper have been put forward to assist with establishing a common understanding of the historical land rights and native title matters that need to be brought to the table in the context of treaty discussions with the Aboriginal families of the ACT.

No funding was received from any source to undertake this research. Any errors of fact or omission remain with the author.

2. THE ACT GOVERNMENT'S COMMITMENT TO THE ABORIGINAL PEOPLES OF THE ACT

Successive ACT Governments over the past two decades have shown a strong commitment to a respectful relationship with the Aboriginal and Torres Strait Islander peoples living in the ACT and to working closely with them to improve community outcomes. ACT Governments have done this by instigating several initiatives, including:

- the establishment of the United Ngunnawal Elders Council (UNEC) in 2003;
- the establishment of the Aboriginal and Torres Strait Islander Elected Body (ATSIEB) in 2008;
- the development of Aboriginal and Torres Strait Islander Engagement Protocols in 2015;
- the development of ACT Aboriginal and Torres Strait Islander Agreements in 2015 and again in 2019);
- the development of Reconciliation Action Plans by the ACT Directorates in 2015-16;
- the production of Closing the Gap reports in 2015;
- amendments to the *Human Rights Act 2004* (ACT) in 2016 which inserted Aboriginal and Torres Strait Islander cultural rights into the Act; and
- Reconciliation Day Public Holiday held in May each year from 2018.

While many of these actions are laudable, Aboriginal land rights and native title are missing elements that remain as unfinished business.

The ACT Government website formally recognises that Canberra is Ngunnawal Country (Ling, 2013:2).[4] The ACT Government also consistently '*acknowledges the Ngunnawal people as the traditional custodians of the Canberra region and that the region is also an important meeting place and significant to other Aboriginal groups.'* in its official documentation and statements (ACT Government, 2015a – emphasis added).

This has been interpreted as a de facto 'one tribe only' policy and has not been without criticism.

In 2011, Ms Ellen Mundy, a member of the Ngarigu people, took the ACT Government to the ACT Civil and Administrative Appeals Tribunal (ACAT) asserting that the 'one tribe' policy of the ACT Government treats the Ngarigu people 'unfavourably' because of their race (s. 8 *Discrimination Act 1991* (ACT)).[5] A member of the Ngambri clan, Paul House, more recently,

[4] See: https://www.act.gov.au/ngunnawal-country

[5] *Mundy & the Chief Minister of the ACT & Ors* (Discrimination Act 2011 (ACT), ACAT 86. The ACAT found the Applicant had demonstrated an arguable case on both law and fact and refused the strike out. Although there was some disclosure of information about this matter to ACAT through an FOI application in 2013 (See https://www.cmtedd.act.gov.au/open_government/foi/cmcd/foi-ngunnawal-protocol,-ngarigu-native-title-claim,-

took issue with the ACT Government's recognition of Ngunnawal Country as excluding any recognition of the Ngambri people's connections to the ACT. He argued that 'It is more convenient for the government to throw all of us under the linguistic name of "Ngunnawal" so we'll be easier to "govern"' (cited in Nohra, 2020:9).

There is a long history of several Aboriginal families claiming ancestral connections to the ACT (Jackson-Nakano, 2001a, 200b; ACT Government, 2012; Kwok, 2013). A 'one tribe only' policy potentially puts Aboriginal people in difficult situations where they may not be the right person to speak for a particular area or parcel of land, because there are strict rules in Aboriginal law and custom around speaking on, or for, someone else's country.

As the ACAT decision mentioned above states, by insisting that one Aboriginal tribe (the Ngunnawal people) are the 'Traditional Custodians' of the ACT imposes a position that ACAT has said is 'an entirely gratuitous executive undertaking' and that the ACT Government 'did not have to limit its recognition to one tribe only, it chose to do so'… 'to the exclusion of other tribes'.[6]

This matter needs to be explored in any treaty discussions with the Aboriginal peoples of the ACT.

The next part of this paper examines the ACT Government's legislative and policy record in relation to statutory Aboriginal land rights grants/transfers, and native title matters in the ACT.

ngarigu-and-ellen-mundy), there is nothing on the public record to show what happened following the publication of the ACAT's reasons for the decision not to dismiss Ms Mundy's appeal.

[6] *Mundy & the Chief Minister of the ACT & Ors* (Discrimination Act 2011 (ACT), ACAT 86: page 23, para 48.

3. STATUTORY LAND RIGHTS AND NATIVE TITLE IN THE ACT

Over the past 50 years, most jurisdictions around Australia have created some kind of statutory land rights grants or transfer scheme and they have had to navigate the native title system that was established by the Commonwealth following the High Court of Australia's landmark decision in *Mabo (No. 2)* in 1992 (Wensing, 2016). This part of the paper explores the ACT Government's record in relation to these matters.

3.1 Statutory land rights in the ACT

Unlike in most other jurisdictions around Australia, the land rights of the Aboriginal peoples of the ACT have not been a matter of government consideration. In the three decades leading up to self-government in the ACT in 1989, most other jurisdictions around Australia had created some kind of statutory land rights grants or transfer scheme.[7] Despite the many street marches and protests in Canberra and other capital cities around Australia during the 1960s, 70s and 80s and the presence of the Aboriginal Tent Embassy on the lawns outside Old Parliament House (Foley, Schaap and Howell, 2014), such a scheme was never considered for the ACT.

Except in relation to that part of the Booderee National Park that falls within the Jervis Bay portion of the ACT. Booderee National Park is a Commonwealth reserve under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The Wreck Bay Aboriginal Community Council owns Booderee National Park. The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) vested land in the Jervis Bay area in the Wreck Bay Aboriginal Community Council as inalienable freehold title and is under a joint management arrangement with the Commonwealth Director of National Parks based on the model successfully applied to Uluru-Kat Tjuta and Kakadu National Parks in the Northern Territory. The Commonwealth, not the ACT Government, administers these arrangements.[8]

3.2 The *Native Title Act 1993* (Cth) and its application in the ACT

In 1992, the High Court of Australia delivered its landmark decision in *Mabo v the State of Queensland (No. 2)* which recognised the pre-existing land rights and interests of the Aboriginal and Torres Strait Islander peoples of Australia under their system of law and custom, and which the High Court termed as native title. The Commonwealth subsequently negotiated and enacted the *Native Title Act 1993* (Cth) to provide a system for working with

[7] The option of creating such a scheme in the ACT is considered later in this paper.

[8] See http://regional.gov.au/territories/jervis_bay/enviro_herritage.aspx

native title rights and interests. The native title system is not a simple system because it had to deal with over 230 years of neglecting these realities, as well as creating a system for working with native title rights and interests into the future. Hence, any discussion about Aboriginal land rights in the ACT cannot ignore the native title system.

Native title is not a grant or right the government creates, nor is it dependent upon the government for its existence. Native title is the recognition in Australian law that the Aboriginal and Torres Strait Islander peoples had, and may still have, a system of law and custom relating to land that existed prior to the colonisation of Australia by the British (AIATSIS, 2016:3).

Section 223(1) of the *Native Title Act 1993* (Cth) defines 'native title or native title rights and interests' as the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- the rights and interests are recognised by the common law of Australia.[9]

This provision in the Act is crucial to the success of any native title determination application.

The primary purpose of the *Native Title Act 1993* (Cth), is to:

(a) provide for the recognition and protection of native title; and
(b) establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
(c) establish a mechanism for determining claims to native title; and
(d) provide for, or permit, the validation of past acts[10] invalidated because of the existence of native title (s.3).

The *Native Title Act 1993* (Cth) creates three critical time periods (past acts, intermediate period acts and future acts) and a compensation scheme (see **Appendix B** for details), each of which have some relevance to understanding the native title issues in the ACT. Their application to circumstances in the ACT is explained below.

[9] S.233(1)(a), (b) and (c).

[10] This provision was amended in 1998 to include intermediate period acts following the High Court of Australia's decision in *Wik Peoples v the State of Queensland ("Pastoral Leases case")* [1996] HCA 40; 187 CLR 1 (23 December 1996). Hereafter cited as *Wik*.

3.2.1 Native title claims in the ACT

Table 1 lists the native title claims that relate only to land within the ACT. **Table 2** lists the native title claims that include all or parts of the ACT and land outside the ACT.

There have been four native title claims made over land within the ACT between 1996 and 2002, but no determinations (see **Table 1**). Of the four claims in **Table 1**, two were discontinued, one was rejected, and the Federal Court of Australia dismissed one.

There are also a further nine claims in relation to land inside and outside the ACT between 1995 and 2009 (see **Table 2**). All of these claims have either been dismissed or discontinued by the Federal Court of Australia.

The reasons for the high attrition rate of native title claims through withdrawal, discontinuation, dismissal or rejection are many and varied (Wensing and Porter, 2015) and for a host of different reasons, not always relating to the merits of the claim.[11] It is important to understand that native title claims that have been rejected or either dismissed, discontinued or withdrawn, for whatever reasons, does not mean that native title may not exist in a claim area. What it does mean however, is that the Federal Court has not (yet) made a determination of whether or not native title exists in that claim area.

Most of these early claims over the whole or parts of the ACT were made over twenty years ago in the first decade of the native title system. It is twenty-seven years since the native title system was established, and as at 1 January 2021 there are over 510 native title determinations by the Courts, 1,900 registration decisions by the National Native Title Tribunal and over 1,360 registered Indigenous land use agreements (ILUAs). We have a much better understanding of the application of the common law and the *Native Title Act 1993* (Cth) across the country compared to when these earlier native title claims over the ACT were lodged.

The fact remains that native title matters in the ACT remain unresolved, and these matters ought to be explored in more detail in any treaty discussions with the Aboriginal peoples of the ACT.

[11] The exact reasons for their withdrawal, discontinuation, dismissal or rejection are not clear from the public record, apart from the fact that the signatories to the Namadgi National Park Agreement in 2001 were required to withdraw and discontinue all of their native title claims in the Federal Court. This is discussed in more detail in Part 5.1 of this paper.

Table 1: Native Title Determination Applications – Australian Capital Territory as at 31 December 2020

Application name	Date filed	Application Type	NNTT file no.	FCA file no.	Registration Status	Area Description	Area (Sq. Kms)	Status or Outcome
CANBERRA (Australian Capital Territory)								
Ngunawal People (ACT)	28/10/1996	Claimant	AC1996/002	ACD6001/1998	Registered from 28/10/1996 to 29/09/1999	Unalienated land in ACT	471.663	Discontinued
Ngunawal People (ACT)	21/07/1997	Claimant	AC1997/001	ACD6002/1998	Registered from 21/07/1997 to 29/09/1999	Unalienated land in ACT	1,178.79	Discontinued
Ngunawal	04/03/1998	Claimant	AC1998/001		Registered from 04/03/1998 to 07/07/1998	Canberra		Rejected
Ngunawal people (ACT)	24/05/2002	Claimant	AC2002/001	NSD6007/2002	Not Registered	ACT	2,357.82	Dismissed

Source: NNTT Registers.

Applications that have been discontinued, rejected, dismissed or withdrawn does not mean that native title does not exist in the claim area. It just means that the application was insufficient in some respect or other to progress to a final determination by the Federal Court of Australia at that time.

Table 2: Other Native Title Determination Applications impacting on the ACT as at 31 December 2020

Application name	Date filed	Application Type	NNTT file no.	FCA file no.	Registration Status	Area Description	Area (Sq. Kms)	Status or Outcome
Ngunawal People (NSW)	06/08/2009	Claimant	NC2009/003	NSD808/2009	Not Registered	South-east NSW	14437.1145	Dismissed
Ngarigu Dialect Boundary Application	19/12/2005	Claimant	NC2005/002	NSD2620/2005	Not Registered	Large area surrounding Cooma	24021.6291	Finalised/Discontinued
Ngunawal people (NSW)	02/03/2000	Claimant	NC2000/001	NSD6001/2000	Registered from 04/07/2000 to 03/12/2004	Central South-Eastern NSW	14437.1145	Finalised/Discontinued
Ngunawal People #7	13/03/1998	Claimant	NC1998/005	NSD6094/1998	Registered from 13/03/1998 to 27/07/1999	Queanbeyan	0.1774	Finalised/Discontinued
Monero/Ngarigo People	20/12/1996	Claimant	NC1996/042	NG6055/1998	Registered from 20/12/1996 to 22/04/1999	Cann River, VIC to Braidwood (EGP Line)	150.0164	Finalised/Discontinued
Ngunawal #4	30/05/1996	Claimant	NC1996/017	NSD6035/1998	Registered from 30/05/1996 to 27/07/1999	Mongarlowe	0.0079	Finalised/Discontinued
Ngunawal people #3	11/03/1996	Claimant	NC1996/009	NSD6028/1998	Registered from 11/03/1996 to 27/03/2000	Queanbeyan	0.0047	Finalised/Discontinued
Ngunawal people #1	30/01/1995	Claimant	NC1995/002	NSD6011/1998	Registered from 22/03/1995 to 09/09/1999	Murrumbateman	0.0150	Finalised/Discontinued
Ngunawal people #2	30/01/1995	Claimant	NC1995/003	NSD6012/1998	Registered from 03/04/1995 to 27/07/1999	Queanbeyan	51.7530	Finalised/Discontinued

Source: NNTT Registers.

Applications that have been discontinued, rejected, dismissed or withdrawn does not mean that native title does not exist in the claim area. It just means that the application was insufficient in some respect or other to progress to a final determination by the Federal Court of Australia at that time.

3.2.2 No Registered Native Title Body Corporate (RNTBC) in the ACT

Under ss.55-57 of the *Native Title Act 1993* (Cth), native title groups are required to nominate a prescribed body corporate (PBC) to help administer their native title rights and interests following a positive determination of native title by the Federal Court of Australia. The PBC is then entered on the National Native Title Register and the PBC becomes a registered native title body corporate (RNTBC). The RNTBC provides a practical and legal point of contact for those wishing to deal with native title holders in relation to a particular area of land or waters.

As there are no positive native title determinations over land in the ACT and no native title determination applications currently in train over land in the ACT, there are no RNTBCs in the ACT. In other words, there is no identified and registered native title entity in the ACT with which governments and third parties can consult or negotiate over acts or activities that may affect native title rights and interests.

3.2.3 Validation of past acts in the ACT

One of the immediate implications of *Mabo (No. 2)* was that Aboriginal people had been dispossessed of their land 'parcel by parcel'[12] from 1788 without consent or compensation. In the aftermath of *Mabo (No. 2)*, the States and Territories successfully negotiated the validation of all 'past acts' (Bartlett, 2015: 47) in exchange for more robust schemes for native title claims and validation of future acts. Past acts includes 'acts in relation to land or waters that took place before 1 July 1993 which consisted of the making, amendment or repeal of legislation; or any other act that took place at any time before 1 January 1994 when native title existed in relation to particular land or waters, and apart from the *Native Title Act 1993* (Cth) the act was invalid to any extent, but it would have been valid to that extent if the native title did not exist'.[13]

Some kinds of past acts[14] validated by the *Native Title Act 1993* (Cth) extinguish[15] native title (and may set up a right to compensation – discussed below). For other kinds of past acts,

[12] (1992) 175 CLR 1, per Brennan J at 69.

[13] S.228 *Native Title Act 1993* (Cth).

[14] S.23A of the *Native Title Act 1993* (Cth) divides past acts into *previous exclusive possession acts* (defined in s.23B) and *previous non-exclusive possession acts* (defined in s.23F).

[15] S.37A of the *Native Title Act 1993* (Cth) defines the term 'extinguish' as follows: 'The word ***extinguish***, in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.' There is no possibility of their revival after extinguishment occurs, even if the extinguishing act ceases to have effect, except in very limited circumstances. For example, see ss.47 (Pastoral leases held by native title claimants), 47A (Reserves etc. covered by claimant applications), 47B, (Vacant Crown land covered by claimant applications), 47C (National parks etc. covered by native title applications).

the non-extinguishment principle[16] applies and native title may continue to co-exist with other rights and interests.

The *Native Title Act 1993* (Cth) includes provisions (s.19) which enables the States and Territories to pass complementary legislation to complete the validation of past acts prior to 1 January 1994 which are attributable to them and which may have affected native title rights and interests.[17]

In 1994, the ACT Government therefore enacted the *Native Title Act 1994* (ACT)[18] which:

- validates past acts attributable to the Territory prior to 1 January 1994;
- confirms existing titles legislation and land management practices and usages to the maximum extent allowed under the *Native Title Act 1993* (Cth);
- confirms the extinguishment of native title on the land where the tenure concerned would otherwise extinguish native title;
- confirms the ownership of all natural resources (such as minerals), the Crown's existing right to use, control and regulate the flow of water (i.e. in the Cotter River Catchment), and existing fishing access rights;[19]
- confirms public access to waterways and their beds, banks and foreshores and to places that were public places on 31 December 1993 (i.e. the Murrumbidgee River and Namadgi National Park).[20]

Compensation for the validation of past acts is restricted only to those that occurred on or after 31 October 1975, the date on which the *Racial Discrimination Act 1975* (Cth) came into effect. This is an important point because the issue of compensation for dispossession and alienation of the Aboriginal peoples from their ancestral lands is one of the unresolved issues arising from the recognition debate (Wensing, 2019:68).

The Explanatory Memorandum to the *Native Title Bill 1994* (ACT) includes the ACT Government's position statement on native title in the ACT at that time (The Legislative Assembly for the ACT, 1994 – see **Appendix C**).

[16] The non-extinguishment principle means that an act done over an area where native title exists will not, either wholly or partly, extinguish native title. However, native title is suppressed by any acts to which the non-extinguishment principle applies that are inconsistent with the native title rights and interests, until the inconsistent act ceases to have effect. When the inconsistent act ceases to have effect or is removed, the native title rights and interests will again have full effect. (s238 *Native Title Act 1993* (Cth))

[17] S.19 of the *Native Title Act 1993* (Cth).

[18] Notified in the ACT Government Gazette No. S229 of 1 November 1994.

[19] As set out in s.212(3) of the *Native Title Act* 1993 (Cth), this provision does not extinguish or impair native title rights and interests (The Legislative Assembly for the ACT, 1994; AIATSIS, 2016:5). Subsequent jurisprudence by the HCA found that native title rights and interests also includes the taking of wildlife for non-commercial use (*Yanner v Eaton*, 1999] HCA 53).

[20] As set out in s.212(3) of the *Native Title Act* 1993 (Cth), this provision does not extinguish or impair native title rights and interests (The Legislative Assembly for the ACT, 1994; AIATSIS, 2016:5).

In relation to the validation of past acts in the ACT, the Explanatory Memorandum to the *Bill* explains how s.14 of the *Native Title Act 1993* (Cth) validates all past acts attributable to the Commonwealth. 'This would apply to actions of the Commonwealth prior to Self-Government Day [11 May 1989] and to any land management activity it has undertaken since that day' (The Legislative Assembly for the ACT, 1994:10). The Explanatory Memorandum also explains the consequences of the validation of past acts and the entitlement to compensation for the extinguishment of native title and for any loss, diminution, impairment or other effect on native title holders in the same way that ordinary title holders may be entitled to compensation, but only on the terms set out in the *Native Title Act 1993* (Cth) (The Legislative Assembly for the ACT, 1994:10-11).

What is particularly noteworthy is the ACT Government's comment about the effect of validation of past acts, namely that:

> '*The ACT Government is not aware that acts that occurred in the past in the ACT are invalid because of the existence of native title. For example, the extensive grants of freehold that were made during the 19th century are considered valid and in accordance with the Native Title Decision they are considered to have extinguished native title'* (The Legislative Assembly for the ACT, 1994:11).

There is no question over the validity of 19th century land grants. The issue is whether the grants were of a nature that at common law extinguished native title. In addition, some of those earlier grants did exactly that – extinguished native title permanently. However, as discussed later, not all of the land that was transferred to the Commonwealth was subject to previous land grants to third parties and therefore native title may not have been extinguished at that time.

More significantly, however, the Explanatory Memorandum states that:

> '*Non-Indigenous settlement of the area that is now the ACT commenced in the first half of the 19th century. This settlement was facilitated by the granting of freehold and leasehold interests over a large area. These grants covered very nearly all of what is now the city of Canberra and the surrounding rural areas of the ACT. In what is now the Namadgi National Park the grants were not that extensive. And in the part of the Park which is the Cotter River Catchment Area there were very few grants'* (Legislative Assembly for the ACT, 1994).[21]

The implication is that native title may not have been extinguished in significant portions of the ACT. Nevertheless, later statements by the ACT Government (Carnell, 1999a, 1999b; Legislative Assembly for the ACT, 1999a, 1999b, 1999c, 2001) reflect a rather bald assumption that all of the land that was transferred to the Commonwealth on 1 January 1911 was subject to 19th century land grants that were of a nature that at common law

[21] See **Appendix C** for more details.

extinguished native title. These assertions by political leaders have created the impression that native title had been extinguished throughout the whole of the ACT (including Namadgi National Park) when that may not be the case. This is explored in more detail in Part 4 below.

3.2.4 Compensation for loss or the extinguishment of native title after 31 October 1975

The irony is that in *Mabo (No. 2),* the common law was able to recognise the pre-existing rights of the Aboriginal and Torres Strait Islander peoples, but it could not undo what had already happened in the way of alienation of the Aboriginal and Torres Strait Islander peoples from their lands and waters. Nor did it provide compensation for those losses. Compensation therefore only arises from acts that occurred after 31 October 1975 when the *Racial Discrimination Act 1975* (Cth) came into effect. Prior to that date, Commonwealth, State and Territory governments could make grants or do acts that extinguished native title, without requiring these acts to be validated under the *Native Title Act 1993* (Cth) (Martin, 2016:8).

The recent Griffiths[22] case before the High Court of Australia is the first assessment of compensation for the compulsory acquisition and extinguishment of native title rights and interests under the 'just terms' provisions in the *Native Title Act 1993* (Cth) arising from acts that occurred after 31 October 1975 (AIATSIS, 2019). The case is significant, because as Jacki Huggins notes:

> *'While no amount of money can adequately compensate for cultural loss and its consequences, the High Court's recognition of the implications caused by incursions and infringements on the fundamentals of our cultures are of some comfort.'* (AIATSIS, 2019).

Compensation for the loss, diminution, impairment or extinguishment of native title arising from acts that occurred in the ACT after 31 October 1975 and prior to 1 January 1994 are among the many matters that also need to be explored in more detail in any treaty discussions with the Aboriginal peoples of the ACT.

[22] In *Griffiths v Northern Territory of Australia (No.3)* [2016] FCA 900, Justice John Mansfield of the Federal Court of Australia (FCA) determined the first-ever award of compensation for loss of native title rights. Mansfield J's decision was appealed to the full Federal Court of Australia (FCAFC) (*Northern Territory of Australia v Griffiths* [2017] FCAFC 106) and subsequently appealed to the High Court of Australia (HCA) (*Northern Territory v Mr A. Griffiths (deceased) and Lorraine Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7. In this case, the High Court of Australia (HCA) ratified but diluted Mansfield J's initial decision in the FCA on how to calculate monetary compensation with respect to the loss, diminution, impairment or extinguishment of native title rights and interests after 31 October 1975. The HCA determined that monetary compensation is payable for the economic and cultural loss caused by the compensable Crown acts and acts authorised by the Crown and by the effect of those acts. The HCA also determined that interest is payable on compensation for economic loss, calculated from the date of the loss.

3.2.5 Non-validation of intermediate period acts in the ACT

Between 1 January 1994 and the High Court of Australia's decision in *Wik Peoples v State of Queensland*[23] on 23 December 1996 many States and the Northern Territory were making decisions about land grants and lease extensions or renewals but were not observing the correct processes under the *Native Title Act 1993* (Cth) for future acts. These actions are identified in the amended *Native Title Act 1993* (Cth) as intermediate period acts. In the aftermath of the *Wik* case, the States and the Northern Territory demanded, and got, validation for those intermediate period acts and for the extinguishment of native title by several other forms of land tenure.

On 25 March 1999, the ACT Government tabled the *Native Title (Amendment Bill) 1999* (ACT) in the ACT Legislative Assembly (The ACT Legislative Assembly, 1999a) seeking to extend the Commonwealth's native title scheme to cover intermediate period acts that may have occurred in the ACT between the 1 January 1994 and 23 December 1996. The Explanatory Memorandum for the Bill stated that:

> *'It is considered extremely unlikely that the new validation or confirmation provisions will in fact affect any native title rights in the Territory that have not already been extinguished, so the amendments in the Bill are not expected to result in any additional liability for the Territory'* (The Legislative Assembly for the ACT, 1999b:iii).

On 20 April 1999, the Legislative Assembly's Standing Committee on Justice and Community Safety tabled its Scrutiny Report on the Bill. The Commiitee's report raised the question of whether there is any land in the ACT 'in respect of which native title may exist as a result of the *Wik* decision'. On the assumption that there is, 'the effect of the Bill will be to diminish or extinguish that native title'.

The public record shows that the *Native Title (Amendment) Bill 1999* (ACT) was not debated in the ACT Legislative Assembly and therefore lapsed at the close of the Fourth Legislative Assembly on 31 August 2001 (The Legislative Assembly for the ACT, 2001: 86). In effect, by not pursuing the Bill the ACT Government deemed that the legislation was not necessary, not for the reasons advanced by Wensing (1999a, b, c, d), but because the ACT Government believed that the nature and history of land tenure in the ACT meant that it was not necessary to do so (AIATSIS, 2016:5).

As the validation of intermediate period acts provisions in the *Native Title Act 1993* (Cth) were not enacted in complementary ACT legislation, native title holders in the ACT may be entitled to compensation for the loss, diminution, impairment or extinguishment of native title rights and interests arising from intermediate period acts that occurred between 1 January 1994 and to 23 December 1996. These matters should also be explored in more detail in any treaty discussions with the Aboriginal peoples of the ACT.

[23] HCA 40; 187 CLR 1 (23 December 1996)

3.2.6 Validating future acts in the ACT

The other immediate implication arising from the HCA's decision in *Mabo (No. 2)* was how activities could be carried out on land subject to native title rights and interests. Acts or activities affecting native title rights and interests are known as 'future acts' under the *Native Title Act 1993* (Cth). A future act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.[24]

The future act regime was considerably amended in 1998 to include a hierarchy of different procedures for dealing with situations where native title holders are known (by way of an Indigenous land use agreement), or if they are not known (by way of a non-claimant application) and differing procedural rights for various specified types of future acts. The hierarchy of future act provisions, their order of application and the procedural rights of registered native title holders/claimants are shown in **Appendix D**.

To the extent that a future act is covered by a particular provision in the future act hierarchy in the *Native Title Act 1993* (Cth), it will be made valid by that particular provision and will not be covered by any provisions relating to a category lower in the list. By checking the hierarchy and following the correct processes for the relevant category set out in the *Native Title Act 1993 (Cth)*, third parties can ensure that a proposed future act will be valid in so far as it affects native title rights and interests. It is also relevant to note that where a future act is covered by a registered ILUA, the other procedures for dealing with future acts lower in the hierarchy do not have to be considered.

If a particular future act is not covered by any of the provisions in the future act hierarchy, it can only be validly done by way of an Indigenous Land Use Agreement or ILUA, or in some cases, following compulsory acquisition of the native title rights and interests.

An ILUA is a voluntary agreement made under the *Native Title Act 1993* (Cth) between people who hold, or claim to hold, native title in an area and other people who have, or wish to gain, an interest in that area. An ILUA can be negotiated over areas where native title has been, or has yet to be, determined to exist. They can be part of a native title determination, or they can be settled separately from a native title claim. ILUAs may be made about any native title matters the parties want to have an agreement about, including validation of future acts as well as any other associated issues. They are negotiated agreements, and when registered they are binding on all persons who hold or may hold native title for the area covered by the agreement (NNTT, 2011a). For an ILUA to be registered under the *Native Title Act 1993* (Cth), it must deal with native title matters.

While the risk of invalidity for a future act in the ACT may be small, where native title exists or may exist registered native title claimants or native title holders are nevertheless entitled

[24] S.227 *Native Title Act 1993* (Cth).

to certain procedural rights for future acts under the *Native Title Act 1993* (Cth). Registered native title claimants or registered native title holders are also free to seek injunctive relief from the Federal Court of Australia for invalid future acts (Bartlett, 2015:591).

There are no ILUAs registered in the ACT. The reality is that the only significant agreement that has been negotiated with Aboriginal parties relating to land matters in the ACT since the *Native Title Act 1993* (Cth) came into effect, is the Namadgi National Park agreement and it is not an ILUA. The Namadgi National Park Agreement is discussed in more detail in Part 5.

3.3 Conclusions

The following conclusions can be drawn from the analysis above:

- There is no statutory land rights grants or transfer scheme in the ACT.[25]
- There are no active native title claims or native title determinations over land in the ACT.
- Several native title claims have been made in the past, but for various reasons, all those claims have either been withdrawn, discontinued, dismissed or rejected.
- There is no Registered Native Title Body Corporate in the ACT, which means there is no native title entity with which the ACT Government or third parties can consult about matters that may affect native title rights and interests where it continues to exist or may exist.
- There are no registered Indigenous land use agreements in the ACT.[26]
- There are outstanding questions about the effect of past acts and intermediate period acts on native title in the ACT.
- There are also questions about compensation for the loss, diminution, impairment or extinguishment of native title that may have occurred after 31 October 1975.

All of these matters need to be explored in more detail in any treaty discussions with the Aboriginal peoples of the ACT.

[25] Except Jervis Bay, as discussed in Part 3.1 above, which is administered by the Commonwealth, not the ACT Government.

[26] Or in the surrounding region.

4. HAS NATIVE TITLE BEEN EXTINGUISHED IN THE WHOLE OF THE ACT?

In order to ascertain whether native title has not been extinguished throughout the ACT by valid past acts, it is first necessary to review the history of how the ACT came to be established, its land tenure history and to examine whether certain historical Crown-to-Crown grants are exempted from the previous exclusive possession acts provisions in the *Native Title Act 1993* (Cth).[27]

4.1 The Territory that Federation created

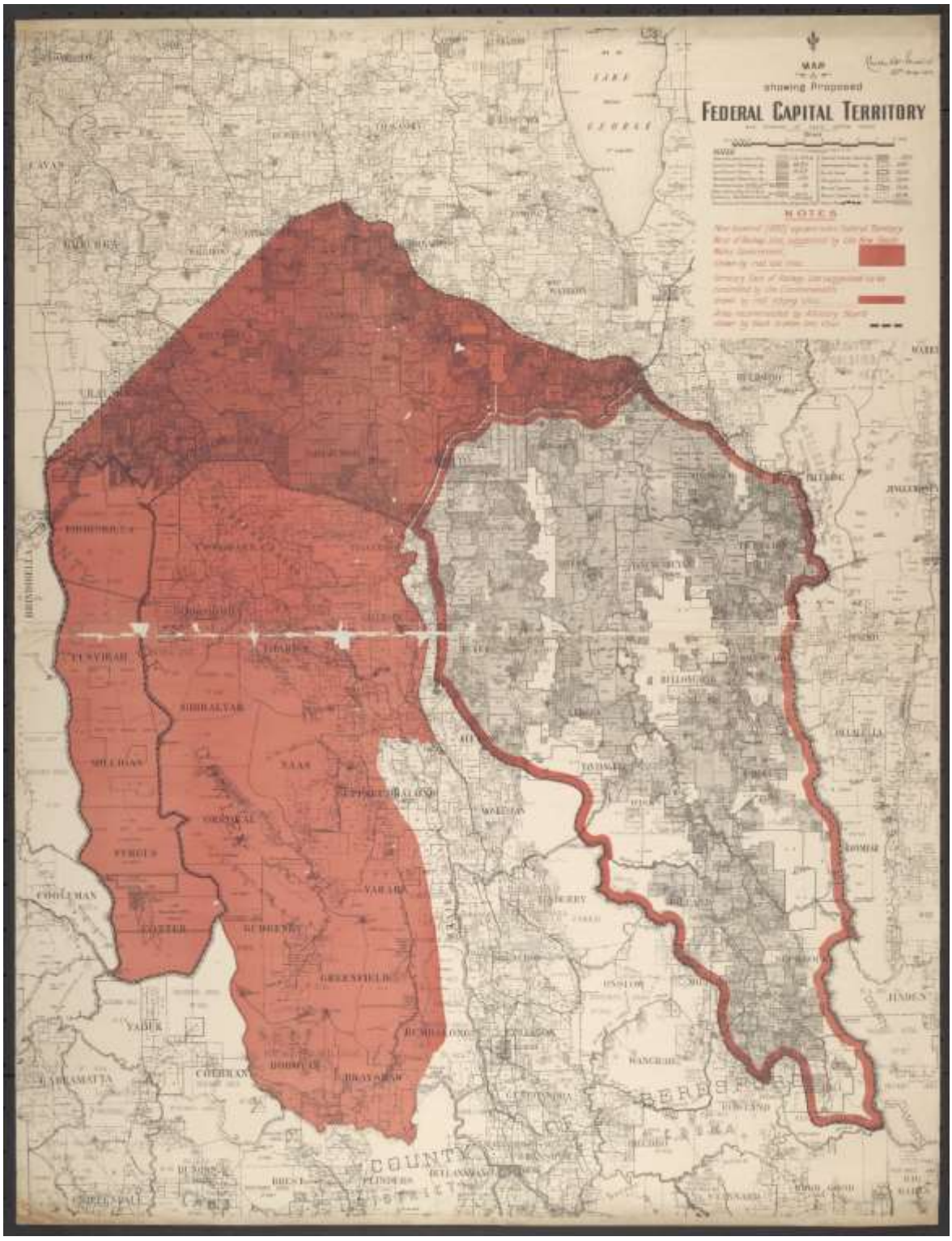
S.125 of the Australian Constitution required the new Commonwealth to select a site and create a Territory as the location of the nation's capital city. A decision was made in 1908 to locate the capital city in the Yass/Canberra district and is embodied in the *Seat of Government Acceptance Act 1909* (Cth). This Act provides that the national capital should comprise an area of not less than 'nine hundred square miles (2,330 square kilometres)' and that it should have access to the sea. The deal for New South Wales (NSW) to surrender this land for the national capital was settled by the enactment of two statutes, including: the *Seat of Government Acceptance Act 1909* (Cth) by the Commonwealth and the *Seat of Government (Surrender) Act 1909* (NSW) by NSW. The Territory officially came under the Commonwealth's control as the Federal Capital Territory on 1 January 1911. An additional area of 72.5 square kilometres was ceded to the Commonwealth at Jervis Bay in 1915 in order to provide the Commonwealth with a seaport (Ling, 2013:9).[28]

The Australian Capital Territory (ACT) comprises an area of 2,330 square kilometres. The boundaries are defined by the Goulburn to Cooma railway line to the east, the watershed of Naas Creek to the south, the watershed of the Cotter River to the west, and the watershed of the Molonglo River and the Ginninderra and Gungaderra Creek systems to the north-east. The mountainous areas of the Cotter and Gudgenby Rivers and their tributaries were deliberately included to provide the nation's capital with a reliable water supply (ACT Government, 2012:7). **Figure 1** shows the proposed boundaries of the ACT in May 1909 and the land tenures within the ACT.

[27] For the Federal Court of Australia to make a determination that native title continues to exist in the ACT, it will also be necessary for native title claimants to satisfy the conditions of s.223 of the *Native Title Act 1993* (Cth).

[28] The part of the ACT that comprises Jervis Bay is outside the scope of this paper.

Figure 1: Map showing proposed Federal Capital Territory and tenures of land within same signed by Charles Robt. Scrivener, 22nd May, 1909



Source: National Library of Australia. Bib Id: 133233.

Frank Brennan, in his landmark book *'Canberra in Crisis'* (Brennan, 1971:1), makes the observation that the Canberra leasehold system 'is a natural child of the history of Australian land settlement.' The story of land settlement in early Australia arises from

> '*the first principle of English land law … that all land of a British possession belongs to the Crown, and no-one except the Crown can have absolute ownership of land. … The country was sparsely populated by scattered and primitive aboriginal tribes and any concept they may have had of land ownership or possession was of no interest' to the settlers, and 'Thus there were no land laws to amend or repeal'* (Brennan, 1971: 1).[29]

Brennan (1971: 16) describes the story of land settlement in Australia from 1788 to 1900 as 'a dispiriting story of the lack of foresight, faulty legislation, poor administration, political corruption, dishonest practices, moral cowardice and human greed.'[30] As a consequence, land administration and land disposal were 'lively political issues' that gave rise to 'an almost universal demand that land within the area to be chosen for the federal capital should be owned by and forever remain the property of the nation' (Brennan, 1971: 16).

When the Territory was vested in the Commonwealth from 1 January 1911, it comprised 233,099 ha, of which approximately 101,313 ha was Crown lands which were, in accordance with s.125 of the Constitution, granted to the Commonwealth without any payment. The Commonwealth therefore was the 'absolute owner'[31] of about 44 per cent of the land, the rest being made up of freehold estates or one or other of the varied tenures which originated with the Crown Lands legislation of 19th Century NSW (Brennan, 1971: 37). Brennan (1971: 37) reports that the most frequent of the tenures in the Territory was 'undoubtedly the Conditional Purchase, a form of instalment purchase from the crown for which a fee simple title issues after all conditions, including payment of purchase money, have been fulfilled'. These rights were acknowledged in s.7 of the *Seat of Government Acceptance Act 1909* (Cth), which provides:

> *All estates and interests in any land in the Territory which are held by any person from the State immediately before the proclaimed day shall, subject to any law of the Commonwealth, continue to be held from the Commonwealth on the same terms and conditions as they were held from the State.*

There was no acknowledgement of the pre-existing land rights of the Aboriginal peoples of the ACT.

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[29] Noting that the High Court of Australia in *Mabo (No. 2)* overturned this position in 1992.

[30] That is without even acknowledging that the land was stolen from the Aboriginal peoples of the area without their consent, without a treaty and without compensation.

[31] The case put by the plaintiffs in *Mabo (No. 2)* meant that absolute ownership of all the land in Australia was a fiction, which created the need for another fiction – *terra nullius* (Edgeworth, 1994:431-432). Brennan J in *Mabo (No. 2)* found that 'The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.' (at 42).

The *Seat of Government (Administration) Act 1910* (Cth) established the provisional government of the Territory by the Commonwealth following the surrender of the land from NSW and which NSW laws would apply until such time as the federal Parliament makes laws for the Territory. S.9 of the *Seat of Government (Administration) Act 1910* (Cth) provides:

> *No Crown lands in the Territory shall be sold or disposed of for any estate of freehold, except in pursuance of some contract entered into, or the right to enter into which existed before the commencement of this Act.*

This clause, along with s.125 in the Constitution, are essentially, why the ACT has a leasehold system of land tenure with maximum 99-year terms, and not freehold tenure.

In 1989 the Commonwealth granted the ACT self-government under the *Australian Capital Territory (Self-Government) Act 1988* (Cth) over Territory Land as defined in the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth). It is important to note that shortly before Self-Government Day on 11 May 1989, all land in the ACT was divided into National Land (land that is the land is, or is intended to be, used by or on behalf of the Commonwealth (s.27 *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth)) or Territory Land (the remainder of the ACT).

On Self-Government Day, the ACT Government 'on behalf of the Commonwealth' became responsible for the management of Territory Land and 'subject to section 9 of *the Seat of Government (Administration) Act 1910*, may grant, dispose of, acquire, hold and administer estates in Territory Land.'. The term of an estate in Territory Land granted on or after Self-Government Day shall not exceed 99 years, but the estate may be renewed (s.29 *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth)). Hence, Canberra continues to have a leasehold system of land tenure, and not private freehold.

Again, there was no recognition of the pre-existing land rights of the Aboriginal peoples of the ACT at that time.

The reality is that when the Territory was created in 1911 and when self-government was established in the Territory in 1989, the rights and interests of the Aboriginal peoples of the ACT were not taken into consideration in any meaningful way on either of those occasions. Because of self-government in 1989, the ACT may have inherited these issues. However, there are still questions to be asked about which sphere of government is responsible for the consequences of not having considered the land rights of the Aboriginal peoples in 1911 and in 1989.

4.2 Crown-to-Crown grants

As noted above, 44 per cent of the land that was transferred by New South Wales to the Commonwealth in 1911 was Unalienated[32] Crown land (UCL).[33] As Unalienated Crown land it had never been subject to previous exclusive possession acts, such as freehold or conditional purchase leasehold. On the other hand, if some of that land had been alienated from the Crown prior to 1909, by 1911 it was back in Crown ownership. The transfer of Crown land from one jurisdiction to another is regarded as Crown-to-Crown grants.

It is not clear whether these Crown-to-Crown grants extinguished native title with respect to lands in the ACT.[34] Before *Western Australia v Ward* (2002)[35] it was thought that at common law a Crown-to-Crown grant did not extinguish native title because it lacked the clear and plain intention to do so (Bartlett, 2014:546). When the *Native Title Act 1993* (Cth) was amended in 1998, the federal Government accepted that the issue should 'be finally determined by the common law'[36]

S.23B(9C) was therefore included in the *Native Title Act 1993* (Cth) as part of the ten-point plan amendments to the Act in 1998 following the High Court of Australia's decision in *Wik*.[37] S.23B(9C) of the *Native Title Act 1993* (Cth) provides that the grant or vesting of an interest to or in the Crown or a statutory authority is not a previous exclusive possession act[38] unless, '*apart from the NTA 1993'* (emphasis added), the grant or vesting extinguishes native title, or the lands or waters are used in a way that extinguishes native title. The Explanatory Memorandum to the *Native Title Amendment Bill 1997 (No. 2)* (Cth) explains:

> *'If at common law a Crown to Crown grant extinguished native title, the Bill confirms the extinguishment. If at common law, it is the use of the land granted or vested, and not the grant or vesting itself that extinguishes native title, the [Native Title*

[32] To 'alienate' means to dispose of rights or interests in land. 'Alienation' occurs when the rights to land are transferred to another person. Alienation may be formal (such as by grant or conveyance), informal and involuntary (such as by compulsory acquisition by the state). Alienation can also be full (the sale of ownership of the land), or partial (the transfer of usage rights through a lease) (ATSISJC, 2005:179). The term 'unalienated land' means the rights and interests in the land have not been disposed of or transferred to another person.

[33] It is noted that the history of this land prior to the creation of the ACT needs to be thoroughly investigated.

[34] The original version of the *Native Title Act 1993* (Cth) applied the non-extinguishment principle to Crown-to-Crown grants.

[35] [2002] CLR 1. 191 ALR 1.

[36] Supplementary Explanatory Memorandum, *Native Title Amendment Bill 1997 (No. 2)* (Cth), p.6.

[37] The 10-point plan and the 1998 amendments to the NTA were not agreed between the parties, they were imposed by the Commonwealth. Many of the 1998 amendments to the NTA have therefore been consistently identified by the United Nations Committee on the Elimination of Racial Discrimination (UNCERD) as a breach of Australia's international obligations, which the Australian Government has ignored with some impunity (UNCERD, 1999:7; UNCERD 2017:5; Southalan, 2019:22A-13; Southalan, 2016: 902).

[38] Defined in s.23B of the *Native Title Act 1993* (Cth).

Amendment] Bill [1997 (No. 2) (Cth)] confirms that the native title is extinguished when the land is used.'[39]

Bartlett (2015:547) maintains that in *Western Australia v Ward* (2002):

> *'the vesting in the Crown or a statutory authority was not considered to have any different result,* apart from the NTA 1993*, than vesting in any other entity. The vesting resulted in extinguishment. On the reference to use in s.23B(9C)(b) in the NTA 1993, the High Court commented that it "presents some difficulty because, at first sight" it appears to proceed from the premise that the use of land, as distinct from the creation or assertion of rights or powers in respect of land, extinguish native title.'* (emphasis in original)

In *Daniel v Western Australia* [2003],[40] Nicholson J found that while the issue of Crown-to-Crown freehold grants was not directly addressed in the judgment of the majority in *WA v Ward.*[41] However, the majority held that the vesting of a reserve under the *Land Act 1933* (WA) transferred the legal estate in the land to the vestee and therefore wholly extinguished native title.[42] Nicholson J therefore held that 'the grants in question had an extinguishing effect as grants in fee simple so that s.23B(9C) has no excluding effect in their case.'[43]

In *Griffiths v Northern Territory* (2014),[44] Mansfield J also contended with s.23B(9C), noting that the operation of subclause (b) 'is troublesome as it refers to the potential extinguishment of native title "apart from this Act" by use, rather than right.' Mansfield J agreed with the majority in *WA v Ward* that 'native title is extinguished by inconsistency of right or power, and not by use'. Mansfield J held that 'This has the effect of rendering par (b) as inoperative, a finding consistent with the dicta in *Ward HC* quoted above, as well as the intention of parliament expressed through the Supplementary Explanatory Memorandum.'[45]

Bartlett (2015:547) contends that the expression 'apart from the NTA' has a larger significance after the *Racial Discrimination Act 1975* (Cth) came into effect on 31 October 1975.

> *'Apart from the NTA 1993, such a grant or vesting is likely to be invalid under the Racial Discrimination Act and ineffective to extinguish native title. In that event, the grant or vesting would not "apart from the NTA" extinguish native title, and*

[39] Supplementary Explanatory Memorandum, *Native Title Amendment Bill 1997 (No. 2)* (Cth), p.6.

[40] [2003] FCA 666, at [544].

[41] [2002] CLR 1. 191 ALR 1.

[42] [2002] CLR 1. 191 ALR 1, at 81, at [249].

[43] [2003] FCA 666, at [544].

[44] (2014) FCA 256 at [119]-[120].

[45] (2014) FCA 256 at [119]-[120].

accordingly, could not be an exclusive possession act being excluded by the operation of s.23B(9C) of the NTA' (Bartlett, 2015:547).

It is accepted that the building of the national capital and its associated public works prior to 1 January 1994 extinguished native title as that activity amounts to a Category A past act under s.229 *Native Title Act 1993* (Cth). Additionally, and in all probability, most of the land where the city of Canberra has been built was already subject to grants of exclusive possession of one kind or another under 19th century laws that applied before the land was transferred from NSW to the Commonwealth in 1911.[46]

However, as 44 per cent of the land transferred from NSW to the Commonwealth in 1911 was Crown land, it is arguable whether the Crown-to-Crown grants that took place in 1911 from NSW to the Commonwealth were in fact intended to have the same extinguishing effect as grants in fee simple from a State government to a local government or another person. The intention of the transfer was merely to create another Crown jurisdiction, and for the new Commonwealth to decide, later, exactly where it would build the national capital.

It was also noted above that s.7 of the *Seat of Government Acceptance Act 1909* (Cth), states that:

> '*All estates and interests in any land in the Territory which are held by any person from the State immediately before the proclaimed day shall, subject to any law of the Commonwealth, continue to be held from the Commonwealth on the same terms and conditions as they were held from the State.'*

While this clause did not include any reference to the pre-existing Aboriginal peoples' land rights, it was nevertheless intended to protect the land rights and interests of the people that had benefitted from grants or transfers of land by the Crown prior to 1911. A reasonable question to ask therefore is why would the Crown-to-Crown transfer of Crown land extinguish the Aboriginal people's native title rights and interests, when s.7 of the *Seat of Government Acceptance Act 1909* (Cth) explicitly protects the existing status of land grants and transfers made by the Crown to non-Indigenous people prior to 1909? It was not unlawful to discriminate based on race in Australia then, but it has been unlawful to do so since the enactment of the *Racial Discrimination Act* on 31 October 1975.

A search of the historical records of where that Crown land was, is likely to reveal that most of that Crown land was not suitable for urban development *per se*, but was necessary for the purposes of providing a secure water supply for the city. There are legitimate reasons to argue therefore that s.23B(9C) of the *Native Title Act 1993* (Cth) ought to apply to those Crown-to-Crown transfers and that native title was not extinguished because there was no

[46] As acknowledged in the Explanatory Memorandum to the *Native Title Bill 1994* (ACT), cited above, and validated by the *Native Title Act 1994* (ACT) and/or the *Native Title (New South Wales) Act 1994* (NSW).

clear and plain intention to do so. The intention for the inclusion of that land within the ACT was that it would become part of the city's water supply catchment.

One of the ways these matters can be resolved, at law, is to make a native title determination application to the Federal Court of Australia to test these matters. Any dispute over legal interpretations can then be appealed to the Full Federal Court and on to the High Court of Australia for clarification.

Again, these matters should be openly and honestly explored in more detail in any treaty discussions with the Aboriginal peoples of the ACT.

4.3 Conclusions

The historical records for the ACT show that 44 per cent of the land transferred from NSW to the Commonwealth on 1 January 1911 was Crown land, and in all likelihood, all of that land had not previously been subject to land grants that were of a nature that at common law would have extinguished native title. Furthermore, the bulk of that Crown land was for the purpose of providing the future capital city with a secure water supply and was not included for the site of the city itself. It is arguable that many of the Crown-to-Crown transfers that occurred in 1911 therefore did not extinguish native title because there was no clear and plain intention to do so.

These matters also give rise to several questions about what happened to that Crown land from 1 January 1911 through to the present. For example, has any of that land been subject to grants of exclusive possession since 1 January 1911? Did any of those grants occur after 31 October 1975 but before 23 December 1996? In addition, how much of that land is still Crown land? Moreover, how much of that land is included in Namadgi National Park or other conservation reserves? And many other questions, all of which should be explored in consultation with the Aboriginal peoples that have connections with the land and in the context of any treaty discussions with the Aboriginal families of the ACT.

The next part of this paper explores the terms of the Namadgi National Park Agreement signed in 2001.

5. NAMADGI NATIONAL PARK

5.1 The 2001 Namadgi National Park Agreement

In April 2001, the ACT Government entered into an agreement with several 'Aboriginal Parties' in the ACT over the ownership and management of Namadgi National Park.[47] The Agreement defines 'Aboriginal Parties' as 'those native title claim groups who are parties to this agreement, and their biological descendants' (ACT Government, 2001).

Under the Agreement, the ACT Government offered to grant a Special Aboriginal Lease over Namadgi National Park for a period of 99 years[48] and to establish a statutory board of management for the Park with responsibility for preparing and overseeing the implementation of a management plan for the Park. The offer by the ACT Government was subject to all native title claims in the ACT being either finally determined or withdrawn in a manner to be agreed between the parties (Clause 4.2). Clauses 10 and 11 in the Agreement went further.

Clause 10 under the sub-heading of 'Finalisation', states:

> 10.1 *In consideration of this agreement, the Aboriginal Parties agree to settle the native title claims over the Australian Capital Territory by withdrawing those claims under s.86F of the Native Title Act 1983[49] of the Commonwealth within one month of signing this agreement.*

Clause 11 under the sub-heading of 'Termination', states:

> 11.1 *This agreement will be automatically terminated in respect of an Aboriginal Party in the event that a new native title determination application over any part of the Australian Capital Territory is lodged with the Federal Court by or on behalf of any member of that native title claim group.*
>
> 11.2 *The Parties agree that the Territory may unilaterally terminate this agreement if the Aboriginal Parties do not, within one month of signing this*

[47] There is a long history to the origins of Namadgi National Park. The National Parks Association (ACT) Incorporated (NPA) spent over two decades lobbying and working with various Commonwealth departments and agencies to have Namadgi National Park gazetted in 1984. 'The name Namadgi is an Aboriginal name applied to the whole region of ranges south-west of Canberra now named individually as Brindabella, Bimberi, Tidbinbilla, Scabby and Booth Ranges. The name was recorded by the explorer John Lhotsky who had met the Aboriginals in the area.' (National Parks Association, 1992). See also House of Representatives Committee on Environment and Conservation, 1986.

[48] The maximum permissible period under the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth).

[49] The citation in the Agreement about the year in which the Native Title Act was promulgated is incorrect. It should read 1993.

> *agreement, withdraw their native title claim over the Australian Capital Territory in accordance with clause 10.1 of this agreement.* (ACT Government, 2001)

In effect, Clauses 10 and 11 of the Agreement appear to have foreclosed the native title claims and any new native title claims or determination applications over the ACT. According to the Agreements, Treaties and Negotiated Settlements database, some of the Aboriginal Parties agreed to withdraw their native title claims.[50]

While the intention of terms of the Agreement may have been to provide a degree of certainty or durability, these terms can be interpreted as coercion or extortion. Indeed, one of the Aboriginal Parties with an active native title determination application at the time, refused to sign the Agreement because those terms were unacceptable to them. This did not invalidate the Agreement; it just meant that they could not be a beneficiary of the outcomes of the Agreement.

Clause 3 of the Agreement states:

> 3.1 *This agreement is not an agreement about native title but is made under section 86F of the Native Title Act 1993 of the Commonwealth, and the Parties have negotiated this agreement with a view to the withdrawal under that section of the native title determination application.*

Section 86F of the *Native Title Act 1993* (Cth) provides for native title parties to negotiate an agreement as a way of settling their native title claims. The Federal Court may order an adjournment of the proceedings or that the adjournment end, on its own motion or on application by a party or if the National Native Title Tribunal reports that the negotiations are unlikely to succeed. However, it is important to note that such an agreement is not a native title determination by the Court that native title exists or does not exist in the Agreement area.

It is also concerning that while the Agreement relates only to the Namadgi National Park, the native claim groups were required to withdraw or discontinue all of their native title determination applications over the whole of the ACT. They were also not able to initiate any new native title determination applications over any land anywhere in the ACT. There does not appear to have been any discussion about native title in the rest of the ACT and no discussion as to whether the agreement should have been an Indigenous Land Use Agreement (ILUA) under the *Native Title Act 1993* (Cth).

If native title continues to exist over any or all of Namadgi National Park, the issue of a new special lease, as promised in the Agreement, may have amounted to a future act. This raises questions as to why s.86F of the *Native Title Act 1993* (Cth) was relied upon as the basis for an agreement seeking the withdrawal or cessation of native title claims over the whole of

[50] See https://www.atns.net.au/agreement.asp?EntityID=1843.

the ACT (leaving aside the question of whether native title was extinguished by past acts throughout the whole of the ACT in 1911). Especially, as s.24CA provides for an Indigenous Land Use Agreement (ILUA) that can be registered under that Act and made binding on all native title holders.

From the available public record, it is not exactly clear what transpired, but the events raise several questions about the efficacy of the 1984 decision to dedicate Namadgi as a National Park. In particular, why was the ACT Government so keen to have the native title claimants in the ACT withdraw and discontinue their native title claims, or was the ACT Government trying to avoid any claims for compensation?

A report in *The Canberra Sunday Times* on 29 April 2001, stated that a historic agreement between the ACT Government and the Aboriginal people of the region 'extinguishes all native title claims in the ACT' was to be signed the following day. And that the Agreement would give Aboriginal people 'their first management role in the ACT as members of the new Namadgi Advisory Board'. The report in The Canberra Sunday Times also stated that 'a symbolic special Aboriginal lease with the Government would acknowledge their historical association with the region and recognise their dispossession' (Clack, 2001). Use of the term 'extinguish' in this context is both inaccurate and misleading. The Agreement does not provide for the extinguishment of all native title claims in the ACT. The Agreement merely provided for the withdrawal of existing native title claims from the Federal Court of Australia and precluded the Aboriginal Parties to the Agreement from initiating any new native title determination applications over any land in the ACT. This misreporting of the facts has contributed to widespread misunderstanding of native title matters in the ACT.

The signatories to the Agreement agreed to implement interim arrangements for the management of Namadgi National Park until the Special Lease commences.

An interim Namadgi Advisory Board operated from 2001 to August 2006 and the Aboriginal parties to the Agreement actively contributed to the development of a Management Plan for the Park. Under the interim arrangements, the Aboriginal parties to the Agreement have the right to:

(a) be acknowledged as people with an historical association with the area that is now Namadgi National Park (noting that it does not include acknowledgement as Traditional Owners or native title holders);
(b) participate in the management of Namadgi;
(c) be consulted on specific regional cultural issues; and
(d) be consulted on the development of any legislation that will affect Namadgi National Park. (ACT Government, 2010:21).

In the context of contributing to the preparation of the Plan of Management for the Park, the Aboriginal Parties to the Agreement developed a set of cultural protocols in relation to their traditional land. The Aboriginal signatories to the Agreement identified three matters

to be considered for future cooperative arrangements, including recognition of Aboriginal society—past, present and future; restoration of tradition and community identity; and community development (see **Appendix E**).

The Plan of Management for Namadgi National Park identifies records showing three Aboriginal language groups (Ngunnawal, Ngarigo and Walgalu) as having had access to the area (ACT Government, 2010: 86). The Plan of Management also acknowledges that the prevailing contemporary view is that most of Namadgi was part of Ngunnawal country and that other groups also had cultural connections to the mountain region. The discussion in the Plan centres on the archaeological history.

The Plan states that the *Heritage Act 2004* (ACT) protects all Aboriginal sites but they must be assessed for entry to the ACT Heritage Register (ACT Government, 2010:86). However, there is no discussion in the Management Plan of Aboriginal heritage as a living culture, although it is acknowledged through the discussion of Aboriginal protocols and matters for future cooperative arrangements for the Park.

The commitment to issue a 99-year lease that was included in the Agreement (Clause 4) has not been delivered. The reasons why are not clear. The Agreement did not include a time frame for delivery of the commitments entered into, but failure to deliver after 20 years would surely invalidate the Agreement.

However, in answer to Questions on Notice in the Legislative Assembly for the ACT from Ms Caroline Le Couteur MLA in the Select Committee on Estimates for 2018-19, the Minister for the Environment and Heritage, Mr Mick Gentleman, stated that the Planning and Environment Directorate had sought and obtained legal advice on the status of the Joint Management Agreement which confirmed that the Agreement was still valid. The Minister also stated that discussions had been held with the signatories to the Agreement about a review, and that agreement had been reached to establish a working group for this purpose (Gentleman, 2018).

The Minister also stated that the ACT Parks and Conservation Service has continued to manage the Park and that engagement with the Traditional Custodians has included:

- Convening the Namadgi Rock Art Working Group to advise on matters relating to rock art sites within the Park;
- Discussions on enhancing the recognition of Country and community knowledge to support visitor experiences;
- The use of fire to improve ecological and cultural outcomes; and
- The protocol for the relocation of a significant scar tree into the Park, which included engagement with Representative Aboriginal Organisations and the United Ngunnawal Elders Council (The Legislative Assembly for the ACT, 2018).

More recently, questions have been raised about the failure of the ACT Government to fulfil its commitments in the Agreement. In the *City News* of 5 August 2020, Paul House, representing two of the Aboriginal Parties that signed the Agreement in 2001, states that the Aboriginal Parties gave up their native title claims in order to be a part of the management of Namadgi National Park (Nohra, 2020). The *City News* report discloses that there has been an exchange of correspondence between Matilda House and the Chief Minister of the ACT revealing that the Chief Minister has stated 'the ACT Government is not in a position to determine who is, and is not, considered Ngunnawal' (Nohra, 2020).

There is an important observation to be made here. The Commonwealth appoints Representative Aboriginal or Torres Strait Islander bodies, called Native Title Representative Bodies (NTRB) or Native Title Service Providers (NTSP) under Part 11 of the *Native Title Act 1993* (Cth). Their role is to assist Aboriginal and Torres Strait Islander peoples with native title matters, including to resolve internal conflicts between potential native title parties and to assist them with the preparation, lodgement and pursuit of their native title claims. It is not therefore the role of governments at any level in Australia to determine who can or cannot be native title claimants for an area.

The ACT Environment, Planning and Sustainable Development Directorate has established a Dhawura Ngunnawal Caring for Country Committee,[51] giving its members input into the management of the Park. How this Committee was formed is not clear from the public record.

If the 2001 Agreement had been honoured, a permanent, statutory board of management consisting of six Aboriginal members and six non-Aboriginal members would have been established and the Aboriginal members of the board of management would have had the opportunity to contribute to the management of the Park, maintaining their law and custom and maintaining Country.

To date successive ACT Governments, for various reasons, have not delivered on the commitments it entered into in the 2001 Agreement. What is also clear is that the native title claimants at that time were required to withdraw or discontinue their native title determination applications over the whole of the ACT and not initiate any new native title determination applications over any land in the ACT as a condition of signing the Agreement. The Agreement only deals with matters relating to the management of Namadgi National Park and not land related matters outside of the Park.

However, there is a very new development, which provides a very strong basis for reviewing the 2001 Namadgi National Park Agreement. The *Native Title Act 1993* (Cth) was amended by the federal Parliament in February 2021 to include a new provision which will, with the agreement of the parties, extend the circumstances in which historical extinguishment can

[51] https://www.environment.act.gov.au/ACT-parks-conservation/bushfire_management/recovering-from-the-2020-bushfires/working-with-ngunnawal-traditional-custodians

be disregarded to include areas of national, state or territory parks or conservation reserves where native title has been extinguished (new s.47C) (Porter, 2019: 12). This is discussed in more detail below.

5.2 Legislative provisions for disregarding the extinguishment of native title in national, state or territory parks

Generally, once native title has been extinguished, it cannot be revived. However, there are provisions in the *Native Title Act 1993* (Cth) (ss.47, 47A and 47B) that enable prior extinguishment of native title to be disregarded in certain circumstances, including reserves set aside for Aboriginal and Torres Strait Islander peoples, pastoral leases held by Traditional Owners and unallocated Crown land. These provisions are increasingly being used as valid mechanisms for resolving the continuing existence of native title rights and interests where the circumstances warrant their application.

On 3 February 2021, the Parliament of Australia passed the *Native Title Legislation Amendment Bill 2021* (Cth).[52] The Bill amends the *Native Title Act 1993* (Cth) to extend the circumstances in which historical extinguishment can be disregarded with the agreement of the parties (new s.47C) (Porter, 2019: 12). A new s.47C enables historical extinguishment of native title to be disregarded over areas set aside for the preservation of the natural environment (national, state and territory) park areas, where the native title party and the relevant government (Commonwealth, state or territory) agree.

A 'park area' is defined as:

> '*an area (such as a national, State or Territory park): (a) that is set aside; or (b) over which an interest is granted or vested; by or under a law of the Commonwealth, a State or a Territory for the purpose of, or purposes that include, preserving the natural environment of the area, whether that setting aside, granting or vesting resulted from a dedication, reservation, proclamation, condition, declaration, vesting in trustees or otherwise*.'

[52] The Bill was informed by feedback from stakeholders following consultation on an options paper for native title reform released by the Commonwealth Attorney-General in November 2017 and exposure draft legislation released in October 2018. The options for reform were drawn from a number of native title reviews, including the Australian Law Reform Commission's report on '*Connection to Country: Review of the Native Title Act 1993 (Cth)*' (ALRC, 2015), the report to the Senior Officers Working Group of the Council of Australian Governments on the '*Investigation into Indigenous Land Administration and Use*' (SOWG of COAG, 2015), and the Office of the Registrar of Indigenous Corporation's (ORIC, 2017) Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act Review).

S.47C also provides that such agreements may include a statement by the Commonwealth, or the State or Territory concerned, that it agrees that the extinguishing effect of any of its relevant public works in the agreement area is to be disregarded.

What these provisions mean is that park areas and conservation reserves can be included in claims for native title (including an application for revised native title determination), provided that the relevant conditions are met, and that any previous acts which may have extinguished native title can be set aside for the purpose of determining the claim.

S.47C would differ from existing sections allowing historical extinguishment to be set aside, in that the relevant government responsible for the park would need to agree that extinguishment be disregarded. Once this agreement is reached, it would be open to the court to determine that native title exists in the area, provided it is established in the usual way (including by demonstrating connection with the land or waters concerned) (Senate Legal and Constitutional Affairs Legislation Committee 2019: 21).

Most of the Crown land in the ACT is dedicated to National Parks for nature conservation and public recreation or as water catchment areas and has been in Commonwealth or ACT Government ownership for more than 100 years. As such, the new s.47C therefore has direct relevance to the ACT. Especially as most of the land that currently constitutes Namadgi National Park was held by the Commonwealth as Crown land since the Territory was established in 1911. Namadgi National Park was established in 1984.[53] It is also worth noting that s.23B(9A) of the *Native Title Act 1993* (Cth) states that the grant or vesting of a national park for the purposes of preserving the natural environment of the area is not a previous exclusive possession act.

5.3 Conclusions

The Namadgi National Park Agreement is not a just settlement, because the evidence suggests that it was imposed on the native title holders and not negotiated with all likely Aboriginal interests. Nor was it negotiated in good faith in terms of resolving all native title claims in the ACT. Given the fact that the commitments entered into have not been delivered and the signatories to the agreement were not given the benefit of independent legal advice, the Agreement's legal status is also questionable.

Furthermore, the Namadgi National Park Agreement was signed when the native title system was still embryonic. Since that time, the Federal and High Courts have both made several decisions clarifying the application and interpretation of the *Native Title Act 1993* (Cth) and its interaction with the common law. The native title system is far more mature, and we have a much better appreciation of what can be negotiated in terms of outcomes

[53] Namadgi National Park – History. https://www.environment.act.gov.au/parks-conservation/parks-and-reserves/find-a-park/namadgi-national-park/namadgi-national-park. See also NPA 1992.

(such as comprehensive native title settlements, discussed in Part 6 below), rather than being contested through litigation.

The new s.47C in the *Native Title Act 1993* (Cth) is a serious potential game changer. It justifies re-opening the negotiations over the ownership and management of the Namadgi National Park, if not also over other parts of the ACT that are set aside as reserves for conservation purposes, perhaps including significant parts of the National Capital Open Space System, Hills, Ridges and Buffer Spaces, River Corridors and Mountains and Bushlands (NCA, 2016) in the ACT. The new s.47C provides a strong case for setting the current Namadgi National Park Agreement aside to enable the parties to explore ways in which native title rights and interests can be recognised by agreement in such areas within the ACT.

An agreement between the ACT Government and the contemporary Traditional Owners of the ACT setting aside any historical extinguishment would be a very positive development and would enable the ACT Government to show evidence of good will without threatening or displacing any existing interests in any way.

These matters should also be explored in more detail in any treaty discussions with the Aboriginal peoples of the ACT.

6. THREE OPTIONS FOR A BROADER SETTLEMENT OF ABORIGINAL LAND RIGHTS AND NATIVE TITLE IN THE ACT

This part of the paper explores three possible options for resolving the unfinished business of Aboriginal land rights and native title in the ACT. The three options include:

- Establishing a statutory Aboriginal land rights scheme, similar to that in other jurisdictions around Australia;
- Developing a comprehensive settlement which is registered under the *Native Title Act 1993* (Cth), similar to the Noongar Native Title Settlement in SW Western Australia; and
- Developing an alternative native title settlement scheme, similar to the *Traditional Owner Settlement Act 2010* in Victoria.

These options are discussed in more detail below and demonstrate that the processes for achieving these kinds of outcomes takes time and considerable effort, especially if extinguishment of native title rights and interests is involved and the consensus of native title claimants or holders is required.

6.1 A statutory land rights grants/transfer scheme similar to those in NSW or the NT

In response to the Aboriginal land rights campaigns of the 1960s, 70s and 80s (Foley and Anderson, 2006), several State Governments and the Commonwealth enacted statutory Aboriginal land rights grants or transfer schemes. Currently, there are 20 such schemes operating throughout Australia that pre-date the native title era (Wensing, 2016: 31-35; 2019:57-62). The forms of title under these schemes are generally inalienable freehold or leasehold titles, with significant differences within and between jurisdictions (Wensing, 2016; 2017a). In most cases, the land is inalienable and cannot be sold, transferred or otherwise dealt with, except in accordance with the provisions of the relevant legislation. The general intention was, and still is, that the land should remain in Aboriginal ownership in perpetuity.[54]

The various schemes are acts of 'statecraft' (Scott, 1998:77) or 'grace or favour' by the state (Wensing and Porter, 2015:4). In most cases, the state was grasping for a quick and easy

[54] Except in NSW. The *Aboriginal Land Rights Act 1983* (NSW) (ALRA) was amended in 2009 to insert and clarify land dealing provisions into the Act. In 2004, the then Minister for Aboriginal Affairs, Dr Andrew Refshauge, called for a review of the ALRA and established a ALRA Review Task Force. The Task Force identified a number of problems with the current ALRA and released two issues papers recommending changes to the ALRA. The 2009 land dealings amendments represented the implementation of the final phase of recommendations made by the Task Force (NSWALC 2009).

solution to the complex problem created by having ignored the pre-existing land rights and interests of the Aboriginal peoples at the time of colonisation (Wensing, 2019:58).

The success of these various schemes is highly debatable (Wensing, 2016:17). The essential problem is that they are unable to 'fix and stabilise' (Porter and Barry, 2016:23) the claims that Aboriginal peoples are making on the Settler state. The schemes fall well short of recognising the sovereignty and prior ownership of Australia by its Aboriginal peoples (McNeil, 2013:145) and the state is 'largely unable to deal with the inter-connected nature of the demands [by dispossessed Aboriginal people] for cultural recognition and economic redistribution' (Porter and Barry, 2016:23; Fraser, 1995:69)).

It is important to note that the one feature of the statutory land rights scheme established by the Commonwealth in the Northern Territory that distinguishes it from all of the other statutory land rights schemes elsewhere in Australia, is that under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), NT scheme grants an inalienable freehold title to an Aboriginal Land Trust held on behalf of the Traditional Owners. The Traditional Owners are identified in accordance with traditional laws and customs and are communal land holders of the land in question. Whereas, in NSW under the *Aboriginal land Rights Act 1984* (NSW), only Crown land is claimable and the land is granted as alienable freehold (or as perpetual lease if granted in the Western Division of NSW) to a Local Aboriginal Land Council (LALC) whose whose membership is based on residency in the LALC. In Queensland, South Australia, Tasmania and Victoria, the schemes involve the direct grant or transfer of lands in specific locations, including former Aboriginal or Torres Strait Islander missions or reserves (Wensing, 2016).

It is noteworthy that no such statutory Aboriginal land rights scheme was ever enacted in the ACT by the Commonwealth prior to self-government in 1989, or subsequently by the ACT Government.

Under s.22 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) the Legislative Assembly for the ACT 'has power to make laws for the peace, order and good government of the Territory'[55], but it has 'no power to make laws with respect to the acquisition of property otherwise than on just terms'.[56] [57] The ACT Legislative Assembly

[55] 'This is a familiar, time-honoured and useful statement of the capacity of the [Northern Territory] Assembly, from time to time, to affect legal norms and relations' (Walker, 2020:9).

[56] Walker (2020:8-9) maintains that this provision in the self-government Acts of the NT and the ACT denies legislative power to the Legislative Assemblies of the Territories in case of putative laws for the acquisition of property 'otherwise than on just terms'. *'Apart from the black letter understanding of this quasi-constitutional protection, there is an evident strand of historical cultural social justice conjured by this protection. It may be that, depending on the* [Treaty] *Commissioner's experience and the preferences of traditional owners, the process of negotiating a treaty or treaties will see this protection as a kind of institutional backstop*' (Walker, 2020:9, para 25).

[57] It is also noted that the majority of Justices in *Wurridjal and Others v The Commonwealth of Australia and Another* [2009] HCA 2 overruled a 1969 decision of the HCA, *Teori Tau v Commonwealth* [1969] HCA 62, which held that the just terms requirements in s.51(xxxi) of the Constitution did not apply to laws made by the Commonwealth for the governing

could establish a statutory land rights scheme similar to those in other jurisdictions around Australia.

However, under s.233(3) of the *Native Title Act 1993* (Cth), an Act of the Commonwealth applying to the ACT transferring lands or waters to or for the benefit of Aboriginal peoples in the ACT would not be a future act under s.233(3) of the *Native Title Act 1993* (Cth) and the non-extinguishment principle would apply, but compensation may still be payable by the Commonwealth (Bartlett, 2015:588), depending on who the beneficiary might be. Clarification needs to be sought from the Commonwealth as to whether s.233(3) of the *Native Title Act 1993* (Cth) and the 'just terms' provisions in s.51(xxxi) of the Australian Constitution would apply to an Act passed by the ACT Legislative Assembly.

In any event, the ACT Government would have to consider very carefully, who it might issue the land title(s) to, given the nature of the unsuccessful outcomes of the earlier native title claims in the ACT. The point being that in identifying the appropriate beneficiary, consideration must also be given as to whether the native title holders (whoever they may be) ought to be the beneficiaries or how the grant or transfer may affect their native title rights and interests. These matters should no longer be ignored and could be productively explored in any treaty discussions with the Aboriginal peoples of the ACT.

6.2 A comprehensive settlement under the *Native Title Act 1993* (Cth) similar to the Noongar Native Title Settlement in SW WA

When the *Native Title Act 1993* (Cth) was amended in 1998 the agreement making provisions in the Act were strengthened. Since that time, Indigenous land use agreements (ILUAs) have become an important feature of consent determinations between native title claimants and governments (and other third parties) as a way of reaching mutually agreeable outcomes.

The Noongar South West Native Title Settlement is one of many native title settlements, but it stands out as the most comprehensive settlement under the *Native Title Act 1993* (Cth) because it involves the 'full and final resolution of all native title claims' in south-west WA.[58] The Settlement's implementation required the registration of six ILUAs under the NTA to give legal effect to the extinguishment of native title in the agreement areas by consent between the parties.

of the territories. Therefore, s.122 of the Constitution is subject to the just terms requirements in s.51(xxxi) of the Constitution.

[58] Noting that British Columbia and Canadian governments are moving away from 'full and final' settlements. The NT Treaty Commissioner is not advocating 'full and final' settlments as a feature of treaty settlements in the Northern Territory.

The Noongar people are the Traditional Owners of the south-west corner of WA. Noongar country extends from Jurien Bay (220 km north of Perth and 195 km south of Geraldton) to the southern coast and Ravensthorpe (541 km south-east of Perth) and east of Meriden (260 kilometres east of state capital Perth on the Great Eastern Highway). There are six different subgroups of Noongar people over this area of over 200,000 square kilometres.[59]

The single Noongar claim commenced in 2003 by the amalgamation of several native title claims over south-west WA. Following decisions by the Federal Court of Australia in 2006 and 2008,[60] the six native title claimant groups in south-west Western Australia (WA) that identify as Noongar people authorised SWALSC to negotiate with the WA State Government with a view to reaching agreement on an alternative settlement. They had decided it was in their best interests to pursue a negotiated outcome under the *Native Title Act 1993* (Cth) instead of continuing with litigation through the courts.

In December 2009, the WA Government and SWALSC entered into a Heads of Agreement for such a settlement (Department of the Premier and Cabinet, 2009). In July 2013, the WA Government presented the SWALSC with a final offer to resolve native title claims across the south west of WA. In June 2015, the State executed six Indigenous land use agreements (ILUAs) in compliance with the *Native Title Act 1993* (Cth). The content and function of all six Agreements is the same, except each Agreement is between the WA Government and the specific Noongar Agreement Group and refers to the relevant geographic area of the South West.

Following a lengthy negotiation and registration process, the six ILUAs were due to be registered on 18 October 2018. However, the registration of the ILUAs was appealed to the Full Court of the Federal Court of Australia in 2019 under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act). This appeal was dismissed in December 2019.[61] The matter was then further appealed to the High Court of Australia. The basis of the appeals was that there had not been consensus of all the native title holders to the registration of the ILUAs.[62] On 26 November 2020, the High Court of Australia's dismissed all special leave applications objecting to the registration of the ILUAs. The Court's decision upholds the previous decisions by the Federal Court and Native Title Registrar and confirms that the six ILUAs can now be 'conclusively registered' (McGowan, 2020) and no further legal proceedings can delay the commencement of the Settlement.

[59] The Ballardong, Yued, Whadjuk, Wardandi, Pinjarup, Bibbulmun, Wilman and Mineng. See *Bennell v Western Australia* (2006) 153 FCR 120, 192-3 [273]-[276].

[60] *Bennell v State of Western Australia* [2006] FCA 1243, 19 September 2006, and *Bodney v Bennell* [2008] FCAFC 63, 23 April 2008.

[61] *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238.

[62] There is a point of distinction here between the registration of Noongar ILUAs in WA and the Namadgi National Park Agreement in the ACT. In the Namadgi National Park Agreement, all of the signatories were required to withdraw all current native title claims at that time and not proceed with any new native title claims.

The six ILUAs came into effect on 25 February 2021 when the National Native Title Tribunal registered them. Their registration paves the way for the implementation of the South West Native Title Settlement to begin (Department of the Premier and Cabinet, 2015a; 2016c; 2016d, 2021).

The Noongar Native Title Settlement comprises 'the full and final resolution of all native title claims in the south west of WA… in exchange for a comprehensive settlement package' (Barnett, 2015). The negotiated settlement therefore required the Noongar claimants to agree that no native title continues to exist in the agreement areas in the entire area of south west WA, including metropolitan Perth, in exchange for the agreed package of benefits (Bradfield, 2012) and that once the six ILUAs are registered the future act regime under the *Native Title Act 1993* (Cth) will cease to operate in the south west area of Western Australia (Department of the Premier and Cabinet 2016c:3; 2016d:30).

Under the Settlement package, native title is exchanged for the range of negotiated benefits (listed below) from the WA Government over a twelve-year period as compensation for the surrender, loss, or impairment of any native title rights and interests in relation to land and water in the south west of Western Australia. The settlement is worth an estimated $1.3 billion to the Noongar people.

The Settlement package includes several components. Including a recognition Act of the Noongar people as the Traditional Owners of the South West; the establishment of a Trust into which the WAQ Government will make funding instalments of $50 million yearly for 12 years; the establishment of regional corporations for each of the six agreement area; the creation of a Noongar Land Estate. The settlement also includes: joint management of the South West conservation estate; land and water access; a Noongar Heritage Agreement about processes for heritage preservation; a Noongar Heritage Partnership Agreement for identifying, recording, protecting and managing heritage values. In addition, a housing program; an economic development framework; a community development framework, a capital work program and a land fund (see **Appendix F** for details).

The scope and significance of the South West Native Title Settlement cannot be underestimated. There is widespread acknowledgement in the native title system that the Noongar Settlement is a significant milestone (Hobbs and Williams, 2018:34) and certainly for Western Australia (Western Australia, 2015). Others argue that the Settlement is breaking new ground and reflects new developments in native title dispute resolution (Young, 2013; Bradfield, 2012; Kelly and Bradfield, 2015:250).

Notwithstanding its significance in the native title context, two legal academics from the University of New South Wales argue that the Settlement constitutes the first treaty signed between Indigenous Australians and the State (Hobbs and Williams, 2018:35). Aboriginal leader, Michael Mansell (2016:121-123) maintains that the Settlement 'has some elements of treaty making', but 'does not include empowerment or independent long-term funding or deal with Aboriginal sovereignty'. Nor is it a political settlement, because it does not lead to self-determination.

What is significant about the Settlement is that it 'comprises the full and final resolution of all native title claims in south-west Western Australia including Perth, in exchange for a comprehensive settlement package' (Barnett, 2015). The final settlement is enshrined as ILUAs because their registration is required under the *Native Title Act 1993* (Cth) to validate the surrender and extinguishment of all native title in south-west WA.

What this Settlement shows is that there is enormous scope for resolving native title matters by negotiation between the parties, noting that the final Agreement was not achieved without significant and extensive opposition by McGlade and others (McGlade, 2017).[63] On balance, it can be argued that the outcome is a good settlement, largely because the terms of this native title settlement reach well beyond what the Federal Court of Australia would have determined if the matter had been left to the Court to decide the final details. However, while it took 17 years to reach the point of implementation there is divided opinion about whether the Settlement provides a precedent, largely because it involves the permanent extinguishment of native title throughout the entire agreement areas. There is also no scope for reviewing the agreements, especially in relation to their impact on future generations.

6.3 An alternative native title settlement scheme similar to that in Victoria

To its credit, the Victorian Government was open to acknowledging that even after 'winning' the *Yorta Yorta*[64] case, the State needed and wanted a basis upon which it could engage with contemporary Traditional Owners in Victoria. Hence, in 2005 the Victorian Traditional Owner Land Justice Group (LJG) and the Victorian Government initiated talks about the native title system and the resolution of historic grievances (Steering Committee, 2008; ATSISJC 2010: 47-51). The LJG asserted that native title as it was applied in Victoria was 'cumbersome, complex, costly and litigious and was delivering only ad hoc and limited outcomes' (Steering Committee, 2008: 9). Subsequent meetings between the LJG, the Attorney-General, the Minister for Environment and the Minister for Aboriginal Affairs determined that there was broad agreement that 'a better process for resolving native title and land justice in Victoria needed to be explored' (Steering Committee, 2008: 9).

In 2006, the LJG provided the government with a proposal in the form of a discussion paper entitled *Towards a Framework Agreement between the State of Victoria and the Victorian Traditional Owner Land Justice Group* (Victorian Traditional Owner Land Justice Group, 2006). In March 2008, the Victorian Government announced the establishment of the Steering Committee to develop Victorian native title settlement framework. The Steering Committee was chaired by Professor Mick Dodson and included representatives of the LJG,

[63] See also *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238.

[64] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58 and 214 CLR 422.

Native Title Services Victoria, and senior officers from the Departments of Justice, Sustainability and Environment, Aboriginal Affairs and Planning and Community Development. (Steering Committee, 2008: 9). All decisions of the Committee were made by consensus and the Steering Committee delivered its Report in December 2008. In February 2009, the LJG endorsed the Steering Committee's Report (Department of Justice, 2010).

The Steering Committee's report provided a draft settlement framework and discussion of the policies and core principles to underpin the key elements of the framework. In determining the key elements of the framework, priority was given to entry points for negotiations, threshold requirements and the content of settlements. The determination of the content of settlements was to include consideration of recognition, access to land, speaking for country, access to natural resources, strengthening culture, and claims resolution (Steering Committee, 2008: 72).

The Native Title Settlement Framework was designed to enable individual groups to negotiate their agreements with government to achieve the following:

- Rights and protocols for Speaking for country, including how traditional owners can be involved in management of State lands and have rights to be consulted on development or future use of land;
- Recognition of traditional owners and their boundaries through native title determinations and/or alternative settlements;
- Access to land for traditional owner groups, ranging from management of national parks through to transferring land for economic development or cultural purposes;
- Access to natural resources including customary use of resources such as animals, plants and fisheries;
- Strengthening culture including signage on country and cultural keeping places; and
- Claims resolution including reparation, funding and the terms of agreements. (Victorian Traditional Owner Land Justice Group, n.d.)

Arguably, these elements would be a welcome inclusion in a similar arrangement in the ACT.

On 4 June 2009, the Victorian Government announced that it had accepted the recommendations of the Steering Committee Report and agreed to the adoption of a new settlement framework as the Government's preferred method for negotiating native title (Hulls *et al*, 2009). The *Traditional Owner Settlement Act 2010* (Vic) came into operation on 23 September 2010 and gave effect to the Victorian Native Title Settlement Framework (Yarrow and Marshall 2010: 1).

The *Traditional Owner Settlement Act 2010* (Vic) provides a framework for the State and a traditional owner group to agree to a comprehensive settlement that may include:

- an overarching Recognition and Settlement Agreement which recognises the named traditional owner group and their traditional owner rights over certain public lands;

- a Land Agreement, regarding land transfers and grants of Aboriginal title;
- a Land Use Activity Agreement, regarding procedures for future use of public land that take account of traditional owner interests;
- a Natural Resource Agreement, regarding use of natural resources and traditional owner group participation in natural resource management;
- a Funding Agreement, regarding payments into the Victorian Traditional Owners Trust and/or payments for economic development and other purposes;
- an Indigenous Land Use Agreement, that must be registered under the *Native Title Act 1993*, which binds all native title holders to the agreement and validates future acts; and
- a Traditional Owner Land Management Agreement, regarding joint management of certain parks and reserves. (Department of Justice, 2013:3).

The *Traditional Owner Settlement Act 2010* (Vic) provides for a voluntary[65] out-of-court settlement of native title claims in Victoria. In also enables the Victorian Government to recognise traditional owners and certain rights in Crown land in return for traditional owners agreeing to withdraw their native title claim under the NTA and make no future native title claims (State Government of Victoria, 2018).

Unlike the *Native Title Act* 1993 (Cth), the *Traditional Owner Settlement Act 2010* (Vic) does not of itself set out an application process for traditional owner groups who seek a recognition and settlement agreement. Nor does it provide a legal test for establishing who the traditional owners for a given area are. This is because the *Traditional Owner Settlement Act 2010* (Vic) forms a framework for voluntary, out-of-court agreement-making, as an alternative to the court processes and technical requirements that may lead to a native title determination (Department of Justice, 2013:5).

The Victorian Government has developed Threshold Guidelines for Victorian traditional owner groups who want to seek a settlement under the Act (Department of Justice, 2013). The Guidelines provide a comprehensive description of the processes and requirements that a traditional owner group will need to follow if they wish to seek a settlement under this Act. The Guidelines apply to:

- traditional owner groups who already have a native title application on foot before the Federal Court;
- traditional owner groups who do not have any native title applications before the Federal Court but who may consider making such applications in future; and
- traditional owner groups who already have a native title determination made by the Federal Court, who wish to seek some or all of the agreements offered by the Traditional Owner Settlement Act. (Department of Justice, 2013:6).

[65] The claimants may also elect to file a native title determination application pursuant to the NTA in the FCA as an additional or alternative process (Keon-Cohen, 2017:21).

Having either a native title application on foot before the Federal Court or having been determined as native title holders, are not pre-conditions to seeking settlement negotiations.

The Guidelines include a process for the 'identification of traditional owner groups' or establishing the 'right people for country' as a matter of negotiation and agreement between the state and a traditional owner group. In relation to the term 'right people for country', the Department's Guidelines states that:

> 'There is not only the question of "right people" in a broad cultural sense, but also a question about "all the right people", given that a settlement agreement binds all the persons who may collectively hold native title and must be authorised by the full group.' (Department of Justice, 2013:5 and 57).

Traditional owner groups seeking a settlement under the *Traditional Owner Settlement Act 2010* (Vic) are therefore required to provide the Department of Justice with a threshold statement. The threshold statement will reflect the agreed and collective views, aspirations and intentions of the group membership as a whole, and the basis upon which traditional ownership is being asserted. The whole traditional owner group must endorse the statement, and the means of that endorsement – that is, the full group decision-making needs to be described.

A settlement package can include:

- a Recognition and Settlement Agreement to recognise a traditional owner group and certain traditional owner rights over Crown land;
- a Land Agreement which provides for grants of land in freehold title for cultural or economic purposes, or as Aboriginal title to be jointly managed in partnership with the state;
- a Land Use Activity Agreement (LUAA) which allows traditional owners to comment on or consent to certain activities on public land;
- a Funding Agreement to enable traditional owner corporations to manage their obligations and undertake economic development activities; and
- a Natural Resource Agreement to recognise traditional owners' rights to take and use specific natural resources and provide input into the management of land and natural resources.

When a settlement is reached, an Indigenous Land Use Agreement (ILUA) is registered under the *Native Title Act 1993* (Cth) to make the agreement legally binding. However, as part of any agreement, the traditional owners must agree to withdraw any native title claim pursuant to the *Native Title Act 1993* (Cth) and not to make any future native title claims (State Government of Victoria, 2018).

The element of particular relevance is the Land Use Activity Regime (LUAR), a simplified alternative to the future acts regime in the NTA which is given effect through a LUAA. The LUAA effectively enables activities to proceed on public land, accommodating third-party interests and respecting the rights of traditional owners attached to the public land and enables the non-extinguishment principle[66] to apply to all activities, unless otherwise agreed (State Government of Victoria, 2012:1).

The alternative scheme was deliberately designed to get around the determination that native title rights and interests could not be established in the *Yorta Yorta*[67] case. That case found that the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs, that there was no evidence that they continued to acknowledge and observe those laws and customs and therefore the Yorta Yorta People's native title claim should fail. The *Traditional Owner Settlement Act 2010* (Vic) focusses on outcomes rather than adhering to the native title processes under the NTA and provides a reasonable alternative to the NTA in Victoria. The scheme has many laudable features including for example, transfer of land title, natural resource benefit sharing, commercial rights, cultural heritage management and recurrent funding and other support measures (Steering Committee, 2008:10).

However, the scheme also has several limitations.[68] For example, the State Government decides whether to enter into a settlement with a particular group. The settlement only applies to Crown land in the claim area. Traditional owner rights are rights that are taken to have no greater effect than is consistent with Victorian law. Any native title applications lodged under the *Native Title Act 1993* (Cth) must be withdrawn and no further native title claims can be made. And the scope of the settlement binds the traditional owners into a joint management arrangement with the State over Crown lands (State Government of Victoria, 2012:3; 2018).[69] The resulting arrangement is not based on recognition of the Aboriginal peoples' prior sovereignty and right to self-determination as per the UN *Declaration on the Rights of Indigenous Peoples* (UN, 2007).

What this alternative scheme demonstrates is that it is possible to tailor the Commonwealth's native title system to suit the circumstances of a particular jurisdiction. Despite the negative outcomes in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002),[70] the starting point of Victoria's alternative approach accepted a few realities about the existence of native title on most Crown land in Victoria. The scheme's development was undertaken with the full collaboration of those it was intended to benefit.

[66] Section 238 NTA.

[67] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58 and 214 CLR 422.

[68] For a short critique of the alternative scheme in Victoria, see Keon-Cohen (2017:21-24).

[69] Including in relation to water, see O'Bryan (2016).

[70] HCA 58 and 214 CLR 422.

If the ACT is to adopt a similar alternative scheme, then several matters will require careful consideration. For example, the ACT is a much smaller jurisdiction than Victoria with far fewer numbers of Traditional Owner groups and without the supporting network of organisations and institutions that contributed to the development of Victoria's alternative framework. The change to the definition of 'traditional owner' will also need to be given careful consideration, as the term is already defined in Commonwealth laws which already apply to the ACT (see **Appendix A**).

6.4 Risks and Opportunities

Each of the three options discussed above have taken considerable time and effort to achieve but are not without their attendant risks and opportunities, especially if they involve the extinguishment of native title rights and interests and the consensus of all native title claimants or holders.

The option of a statutory Aboriginal land rights grants/transfer scheme in the ACT has limited application given the ACT is only a small jurisdiction when compared to the States and the NT. The ACT does not face anywhere near the kinds of complexities and historical legacies that the other jurisdictions have had to contend with. That is not to say that a statutory land rights scheme is not a possible solution. A statutory Aboriginal land rights grants or transfer scheme may be one way of overcoming some of the current differences among the Aboriginal families with claims to historical and genealogical connections to the ACT and as a way of making grants or transfers to different Aboriginal organisations for different purposes. However, for longer term certainty, it would be advisable to ascertain whether native title continues to exist in some circumstances, as well as determining whether s.233(3) of the *Native Title Act 1993* (Cth) and the 'just terms' provisions in s.51(xxxi) of the Australian Constitution would apply to a statutory Aboriginal land rights grants/transfer scheme in the ACT.

The option of a comprehensive native title settlement similar to the Noongar Settlement in SW WA would be necessary if the relevant parties want to agree to a 'full and final resolution of all native title claims' in the ACT that also includes the permanent extinguishment of native title in the agreement areas in exchange for a wide range of other benefits. In the Noongar case, the settlement required the registration of six ILUAs to achieve the permanent extinguishment of native title in the agreement areas in accordance with the *Native Title Act 1993* (Cth). If a similar solution were to be achieved in the ACT, then a native title claim (or claims) would need to be lodged in the Federal Court of Australia, with the Court determining who the native title holders are, as the Federal Court did in the Noongar case. Any lingering doubt about who is, or is not, a native title holder in the ACT could potentially undermine the legitimacy of any outcomes of this option. As discussed in Part 8, NTS Corp Limited as the appointed Native Title Service Provider (NTSP) for NSW and the ACT, has a clear role to play here in assisting all native title claimants with

preparing their native title determination application(s). What the Noongar Native Title Settlement also demonstrates, and NTS Corp has advised,[71] is that a single native title determination application has a much better chance of successfully negotiating a settlement.

An alternative native title settlement scheme tailoring the Commonwealth's native title system similar to that in the *Traditional Owner Settlement Act 2010* (Vic) would enable potential 'traditional owners' to pursue a negotiated 'recognition and settlement agreement' with the ACT Government. Such an approach would also enable the ACT to recognise 'traditional owners' and certain rights in Crown land in return for 'traditional owners' agreeing to withdraw their native title claim under the *Native Title Act 1993* (Cth) and make no future native title claims. If the ACT Government was to adopt this kind of scheme, it would have to adopt the definitions of the terms 'traditional owner' in the *Aboriginal Heritage Act 2006* (Vic) and 'Traditional owner group' in the *Traditional Owner Settlement Act 2010* (Vic) (see **Appendix A**). Or variations thereof, depending on what can be agreed with the Aboriginal families that claim connections with the land in the ACT, and depending on what can be negotiated with the Commonwealth if the definitions need to differ from those included in Commonwealth statutes. A scheme similar to the *Traditional Owner Settlement Act 2010* (Vic) in the ACT would also require a determination of the native title holders to overcome any lingering doubts about who the native title holders are for the ACT. Preferably, by the Federal Court of Australia in the context of a native title application or applications prepared with the assistance of NTS Corp Limited (discussed in Part 8).

Each of these options could be considered in more detail as part of wider treaty discussions (or some other kind of settlement) with the Aboriginal peoples of the ACT. The next part of this paper explores the rationale for a treaty, treaty developments currently underway in Victoria, Queensland and the Northern Territory, and issues peculiar to the ACT.

[71] NTSCorp, private communication, October 2020.

7. TREATY DISCUSSIONS

This part of the paper outlines the broader context for a treaty or treaties in Australia, the rationale for a treaty or treaty developments, a brief overview of treaty developments to date in Victoria, Queensland and the Northern Territory, and issues for the ACT.

7.1 Treaty Context

Calls for a treaty in Australia are not new. There are at least eleven (11) declarations of land rights and redress for past injustices from 1937 to the present, including by way of a treaty (Wensing, 2019:100-110). Each of these declarations includes demands for the recognition of Aboriginal peoples' prior ownership, continued occupation and sovereignty, and affirming their human rights and freedoms, including over their ancestral lands and waters. These declarations also draw attention to the fact that the Aboriginal peoples of Australia have been openly stating for several decades the need to sit down and negotiate these matters through a treaty or treaties in a civil and peaceful way.

Unlike Canada, New Zealand and the United States of America,[72] Australia has never formally negotiated a treaty or treaties with its Indigenous peoples. What recent history is now telling us is that the deep-seated issues of sovereignty, self-determination and the need for a treaty can no longer be ignored or denied. That said, the challenge that lies ahead is that treaty negotiations be based on sovereign-to-sovereign and not on terms predicated by the state/State.[73]

The instructions to both Lt. James Cook and Lt. Governor Arthur Phillip were to make an agreement with the Aboriginal peoples on their contact with the locals (Wensing, 2019:36, 43). The historical fact remains that Australia ignored the existence of hundreds of Indigenous polities and Australia as a nation was built on top of those nations (Williams and Hobbs, 2020:18), without their consent and without compensation for the losses they have endured (Wensing, 2019:286, 327).

It was not until the *Mabo (No. 2)* case in 1992 that the High Court of Australia provided a clear legal basis for the recognition to the pre-existing land rights of the Aboriginal and Torres Strait Islander peoples of Australia.[74] While *Mabo (No. 2)* discredited the notion of *terra nullius* as the basis of British sovereignty over Australia, it failed to recognise the pre-

[72] The British and colonial governments made many treaties with Indigenous peoples in Canada (up to 1920), New Zealand (in 1840) and the United States (up to 1871) (Aboriginal Victoria, 2017).

[73] It is noted that the Commonwealth has the power under the Australian Constitution to pass laws to 'recognise' the status of Aboriginal law and sovereignty, and this is what the Referendum Council (2017b:2) has recommended in its final report to the Australian Government, but that is not the same as a treaty developed on the basis of sovereign-to-sovereign negotiations.

[74] Acknowledging that High Court of Australia had already indicated the potential for this in *Coe v Commonwealth [1979]* HCA 68.

existing and ongoing sovereignty of the Aboriginal peoples of Australia. In fact, the High Court said it could not challenge the foundations of Australia's present-day sovereignty because the matter was not justiciable in an Australian Court (M. Dodson, 2020:xii). Prior to *Mabo (No. 2)*, the Crown asserted its sovereignty over Australia without recognising the legitimate jurisdictions of Indigenous nations over their respective territories, and the Aboriginal peoples of Australia are arguing they were not conquered and that they remain sovereign. Without a treaty, and because we have not reconciled the establishment of the nation state on the stolen lands and sovereignty of the Aboriginal peoples, these issues remain unresolved (Wensing, 2019:327).

It is no coincidence therefore that Indigenous Australians have, over the past 80 years, been pressing the case for a treaty or treaties to resolve the 'unfinished business' of past legacies and realigning of relationships between Aboriginal peoples and governments (M. Dodson, 2003:31; Wensing, 2019:102-110), including over land. It comes as no surprise therefore that the Referendum Council (2017a) in its final report to the Australian Government noted that Agreement-making through Treaty was among the reforms that emerged from the Dialogues with the highest level of support across the country. Indeed, the Uluru *Statement from the Heart* included another call for a treaty or Makarrata[75] (Referendum Council, 2017b).

Of course, a treaty between any State or Territory and Indigenous Australians would not fall within the meaning given to 'treaty' by international law (Walker, 2020:3). The Indigenous peoples of Australia did not cede their sovereignty and, as Walker (2020:40) observes, 'they have also never conceded an insulting supposed lack of sufficient social organisation to have been properly regarded as self-governing and traditional owners from ancient times'. While the *Vienna Convention on the Law of Treaties* (UN, 1969:3) connotes a treaty as 'an international agreement concluded between States in written form and governed by international law', Williams and Hobbs (2020:4) argue that the term 'treaty' is a label that is used in many different contexts. In the Australian context, the term refers to 'a formal, legally binding instrument reached through a process of respectful political negotiation in which both sides settle outstanding claims' (Williams and Hobbs, 2020:4). This is consistent with the way many Indigenous Australians also understand a treaty (Mansell, 2016:114; Mundine, 2016:128, 134).

[75] 'Makarrata' is a Yolngu word from north-eastern Arnhem Land sometimes translated as 'things are alright again after a conflict' or 'coming together after a struggle' (Hiatt, 1987:140). Hiatt (1987:140) discusses the origins of the use of the term 'Makaratta' as a form of agreement making and argues that perhaps 'garma' may have been a better choice because it means 'getting together of minds in order to reach complete accord'.

7.2 The rationale for a Treaty or Treaties

Hobbs and Williams (2019:217-221) highlight some important legal and political rationales for treaty negotiations at the state level in Australia.[76] It is important to note in the case of the two mainland Territories, that under s.122 of the Constitution the Commonwealth Parliament can always override Territory legislation or governmental action (Walker, 2020). This situation for the ACT is explored in more detail in Part 7.4 below. Nevertheless, the following points raised by Hobbs and Williams (2019:217-221) still have some relevance in general terms as to why the States are currently leading the way on treaty discussions. They include:

- The allocation of responsibilities within the Australian federation suggests that States should be central to any treaty settlement. Since the amendments to the Australian Constitution in 1967, there is a concurrent responsibility between the Commonwealth and the States on Indigenous matters. However, there are many matters which the States still have sole responsibility for, so a national treaty alone may lack the capacity to have a meaningful impact upon matters that are the province of the States – such as health, education, housing and statutory land rights grants or transfers, as distinct from native title rights and interests.
- In the formation of the Australian Federation in 1901, the States did not cede any responsibility for land and related matters. While the *Native Title Act 1993* (Cth) legally vests native title rights and interests with particular legal entities and are therefore able to assert their connection to Country, there are many others who may not be able to do so, and land will be a key element of any treaty negotiations for them.
- State constitutions are more flexible than the Australian Constitution, and that means the States will have greater flexibility with respect to addressing matters that Indigenous peoples will put on the table for negotiation.
- It may also be more politically appropriate for treaties to be negotiated at the State or even regional level because Aboriginal and Torres Strait Islander peoples and communities are quite diverse in culture and circumstances and will have different needs and aspirations from place to place. The States have much greater flexibility to recognise and accommodate these differences, whereas a national or Commonwealth-based treaty may tend towards uniformity and may constrain opportunities for accommodating such distinctions (Hobbs and Williams, 2019: 220).

Hobbs and Williams (2019:182) also argue that a Treaty is a special kind of agreement that must satisfy three conditions:

[76] The two mainland Territories are in a somewhat different position given s.122 of the Constitution. This is discussed in more detail in Part 7.4.

- Firstly, a treaty must recognise Indigenous peoples as a distinct polity based on their status as prior self-governing communities who owned and occupied the land now claimed by the state.
- Secondly, a treaty is a political agreement reached by way of a fair process of negotiation in good faith and in a manner respectful of each other's equal standing.
- Thirdly, a treaty requires both sides to accept a series of responsibilities so that the agreement can bind the parties in an enduring relationship based on mutual respect and obligation (2019:182).

While the content of treaty negotiations will vary depending on local and contextual circumstances, it must nevertheless recognise that the Aboriginal and Torres Strait Islander peoples of Australia retain an inherent right to sovereignty and self-determination over their own affairs, including their ancestral lands and waters. This is a reflection of international human rights norms and standards as affirmed in the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN 2007; Hobbs and Williams, 2019:182-83; Williams and Hobbs, 2020: 1-17; Hohmann and Weller, 2018).

If an agreement between Indigenous peoples and governments does not recognise their right to self-determination over their affairs, then Hobbs and Williams (2019:184) argue that it is not considered to be a treaty. Macdonald (2018) also maintains that without addressing the issue of sovereignty, Indigenous treaties are meaningless. More importantly, as Hoehn (2016:145) argues, just settlements cannot be imposed, they can only be negotiated between parties and the relationship must be based on 'mutual recognition as equals' (Hoehn, 2016:125). Hence, this is why each of the three jurisdictions that are currently pursuing treaty developments in Australia have been taking careful steps to ensure that negotiations are going to be held between parties on the basis of equal status. Whether their proposals will result in mutually agreeable outcomes and a resolution of past grievances between the parties, including in relation to land rights matters, remains to be seen.

7.3 Treaty developments in Victoria, Queensland and the Northern Territory

The Commonwealth's lacklustre response to the *Uluru Statement from the Heart* (Referendum Council, 2017b) hasprompted, in part, three jurisdictions in Australia (Victoria, Queensland and the Northern Territory) to commit to meaningful recognition and embark on treaty developments. A brief summary of the current situation in each of those jurisdictions is included in **Appendix G**. These developments provide some guidance in terms of the similarities with which they are embarking on the process.

In Victoria, the Victorian Parliament has enacted Australia's first-ever statute to establish the First Peoples' Assembly of Victoria (FPAV) as an elected voice for the Aboriginal people

of Victoria to participate in future treaty discussions. One of the FPAV's first motions was to vote for a truth and justice process (Williams, 2020). In July 2020, the Victorian Government committed to establishing a truth and justice process to formally recognise historic wrongs and address ongoing injustices for Aboriginal Victorians (Williams, 2020). In March 2021, the Victorian Government called for expressions of interest for five candidates for appointment as Yoo-rrook Justice Commissioners. Yoo-rrook is the Wemba Wemba / Wamba Wamba word for truth (Aboriginal Victoria, 2021). The Victorian Government has also announced that the Commission will have the powers of a royal commission under the *Inquiries Act 2014* (Vic). Victoria is the first and only jurisdiction in Australia to have begun to action the Voice, Treaty and Truth elements of the *Uluru Statement from the Heart*.

In Queensland, the process is still in its early days, but the Queensland Government has committed to reframing its relationships with First Nations peoples in Queensland, including via a treaty-making process and exploring options for establishing an independent body through legislation to lead the process, including truth-telling and healing, and to supporting First Nations peoples to engage in the process. It is worth noting however that an Eminent Panel has recommended that the path to Treaty be conducted using a rights-based approach consistent with both the *Human Rights Act 2019* (Qld) and the United Nations *Declaration on the Rights of Indigenous Peoples* (UN 2007).

In the Northern Territory, in 2018 the NT Government and the four statutory Aboriginal Land Councils created under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) have signed a Memorandum of Understanding. The MoU paves the way for consultations to inform the development of a treaty or treaties in the NT.[77] An independent Treaty Commissioner has been appointed and an Interim Report and Discussion Paper have been released. The Discussion Paper canvasses a range of issues, including background information on Treaties, the legal context, national and international best practice, and proposals for the NT including a possible framework and a model for treaty-making. The framework deals with the structures and institutions that need to be established for treaty-making, while the model describes the process for the negotiations.

It is indeed notable that the first stage of work that has been undertaken in each of the jurisdictions has focused largely on representation and process matters. In particular, who the jurisdiction ought to be negotiating with and how the negotiations ought to be undertaken in order to arrive at amicable outcomes.

Whether any of these treaty developments will deal with land rights matters specifically is yet to emerge, but land rights matters have not been categorically excluded from the discussions or developments so far.

[77] It is worth noting that Aboriginal people are the major land owners in the NT because about 50 per cent of the NT is subject to land grants made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and a further 20 per cent is subject to native title determinations, mainly non-exclusive possession.

The ACT can also draw from the lead shown by Victoria, including in relation to truth-telling. Truth-telling processes in other countries (such as South Africa, Canada and New Zealand) have played an important role in reconciliation by uncovering and acknowledging past human rights violations and ongoing injustices towards First Peoples (Hobbs 2021a). Truth-telling also recognises the incredible strength and survival of Aboriginal peoples, ensuring their voices are heard and respected (Williams, 2020).

The reforms that emerged from the Indigenous Dialogues with the highest level of support across the country were the Voice to Parliament, Agreement-making through Treaty and Truth-telling. The Referendum Council (2017a:26) noted in its final report that the *United Nations Declaration on the Rights of Indigenous Peoples* (UN, 2007) enshrines the importance of truth-telling.[78] As does the United Nations General Assembly resolution on the basic principles on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (UN, 2006). The fact that some states and territories are embarking on treaty developments and truth-telling commissions increases the pressure on the Commonwealth to do the same (Hobbs, 2021b).

7.4 Issues for the ACT

The key issues for the ACT are how to formulate a streamlined process that reflects the relatively limited scope for action on the one hand. And on the other hand, dealing expeditiously but thoroughly with the complications arising from the ACT being a small Territory with numerous issues that overlap its boundaries, notably the identification of traditional owners and their wider land interests stretching into NSW.

However, the ACT is in a very different and difficult constitutional position compared to the States. Its status as a Territory leaves its legislative and executive authority vulnerable to override by the Commonwealth, by virtue of s.122 of the Constitution, which provides the Commonwealth with powers to govern the Territories.

As the NT Treaty Commissioner notes, there is no constitutional barrier to the Commonwealth playing a positive role through passing a law or laws supporting a treaty process in a Territory (NT Treaty Commission, 2020:49), but s.122 of the Constitution means that the Commonwealth can overrule any treaty enacted in legislation by a Territory Legislative Assembly. As Brett Walker SC put it in his Legal Opinion to the NT Treaty Commissioner, the possibility of direct rule by the Commonwealth 'remains as a constant means by which legislative action under the system of self-government for the Northern

[78] Preambular paragraphs 3, 4, 8, 15 and 21, and Articles 5, 15, 37 and 40.

Territory, …, can be completely nullified by subsequent and contrary Commonwealth legislation' (Walker, 2020:6). The same applies to the ACT.[79]

Because the Commonwealth can override any Territory legislation or governmental action, Walker (2020:15) advises therefore that 'the support or acquiescence of the Commonwealth Executive and the Parliament would be useful reassurance throughout and after the process of negotiating a treaty or treaties'. Walker hastens to add not necessarily as a party, 'but rather to keep it appropriately informed of the negotiations' between the Territory and its First Nations peoples (2020:15, para 42).

The Commonwealth can, and should, play a constructive role by, for example, setting (through negotiation with the Aboriginal peoples of Australia) national minimum standards for truth-telling and treaty negotiations. In any case, the NT Treaty Commissioner's (2020b:49) advice regarding the situation with respect to s.122 of the Constitution, that the support – or, at least, acquiescence – of the Commonwealth Executive and Parliament would be useful reassurance for the ACT throughout and after the process of negotiating a treaty or treaties in the ACT.

Furthermore, a treaty process in the ACT could usefully provide a framework within which the three options discussed in Part 6 above, could be given further consideration and selection as a way of resolving the unfinished business of Aboriginal land rights and native title in the ACT.

The challenge for the ACT is working out who the ACT should be negotiating with. This is discussed in the next Part of this paper.

[79] Several precedents already exist, including the enactment of legislation by the Commonwealth Parliament to override the NT's *Rights of the Terminally Ill Act 1995* (NT) (euthanasia laws) by amending the *Northern Territory (Self-Government) Act 1978* (Cth). The same is true of the ACT, should it also decide to pursue a treaty or settlement with the Aboriginal owners of the ACT.

8. THE ROLE OF NTSCORP LIMITED – THE NATIVE TITLE SERVICE PROVIDER FOR NSW AND THE ACT

Research for this paper has located several genealogical, anthropological and historical studies that have been undertaken into the history of the Aboriginal families of the ACT and surrounding region, including by academic researchers, the families themselves and those commissioned by the ACT Government (Jackson-Nakano, 2001a, 200b; ACT Government, 2012; Kwok, 2013). These and other studies (Blay,2015; Colloff, 2020; Kabaila, 2005) show that there is a long history of several Aboriginal families claiming ancestral connections to the ACT, and this needs to be acknowledged from the outset of any treaty discussions.

The history of European settlement of the region and the establishment of Canberra as the nation's capital city has been well documented (Pegrum, 1989). While many research reports have been written about the Aboriginal history of the ACT and surrounding region, the triangular relationship between Indigenous people and non-Indigenous people and the land has been evolving in this region since the early 19th century (Colloff, 2020:133, 292).

What is not clear, is how much of the research on the genealogy of the Aboriginal peoples of the ACT was undertaken independently and in accordance with the necessary requirements to satisfy the provisions of s.223(1) of the *Native Title Act 1993* (Cth). All of this research will need to be revisited and further genealogical, anthropological and historical research may be necessary for any native title claims in the ACT to be successful before the Federal Court of Australia.

As stated in Part 5.1 above, the Commonwealth appoints NTRBs or NTSPs under Part 11 of the *Native Title Act 1993* (Cth) to assist all Aboriginal and Torres Strait Islander peoples with native title matters, including to resolve internal conflicts between potential native title parties and with the preparation, lodgement and pursuit of their native title claims. Native title parties still have the discretion to use their own legal advisers if they so wish, but they may not be eligible for the legal assistance that is available through the NTSP.

NTSCORP Limited is the appointed Native Title Service Provider (NTSP) for NSW and the ACT. Its website states that its research team is responsible for collecting, organising and presenting anthropological, historical and genealogical evidence relevant to native title claims in NSW and the ACT.[80] The NTSCORP Research Unit undertakes genealogical research upon request from a member of a community that the Federal Government has funded NTSCORP to assist. NTSCORP also offers facilitation services to support Aboriginal people with preparing their native title claim. NTSCORP's legal team assists with:

- Preparing claims in anticipation of satisfying the registration test of the National Native Title Tribunal (NNTT)

[80] http://www.ntscorp.com.au/our-services/research/

- Working with facilitators and researchers to take affidavits from Traditional Owners;
- Assisting in the establishment of corporations including Indigenous Corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth);
- Assisting Traditional Owners in negotiating consent determinations and agreements, such as Indigenous Land Use Agreements (ILUAs), with the NSW State Government, private interests and mining companies; and
- Attending mediation and case management conferences with a view to reaching a negotiated outcome and where necessary undertaking Court hearings on behalf of Traditional Owners.

These are the support services the Aboriginal families of the ACT have been constrained from accessing since 2001 because of the restrictive clauses in the Namadgi National Park Agreement as discussed in Part 5.

Potential native title claimants should not be arbitrarily constrained from pursuing their native title rights and interests through the native title system, nor should they be arbitrarily penalised for doing so. It is time therefore for the ACT Government to unconditionally terminate the Namadgi National Park Agreement and provide NTS Corp with the necessary resources to assist all of the Aboriginal families of the ACT to prepare their native title claim or claims under the *Native Title Act 1993* (Cth).

What happens from there should be a matter of dialogue and negotiation between the ACT Government and the native title claimants, and if necessary, arbitrated by the Federal Court of Australia, as happened in the case of the single Noongar claim over SW Western Australia.

9. CONCLUSION AND NEXT STEPS

9.1 The imperatives for a settlement

This paper has identified several reasons why the Aboriginal land rights and native title matters in the ACT have remained as unfinished business. Those reasons include:

- the convenient assumption that all native title in the ACT was extinguished by the transfer of the land from NSW to the Commonwealth in 1911 or by previous land grants by NSW;
- for a host of different reasons no native title claims have been able to progress to serious consideration by the Federal Court of Australia;
- restrictive clauses imposed on the Aboriginal parties that signed the Namadgi National Park Agreement in 2001 have prevented the preparation of any new native title claims in the ACT;
- the lack of agreement amongst the Aboriginal families of the ACT about these matters; and
- the overall lack of resources and commitment by successive Commonwealth and ACT Governments to resolving these issues in a respectful manner between the parties concerned.

The ACT Government should not be afraid to follow the examples set by the other jurisdictions, including the possibility of developing a treaty or treaties, or any other kind of settlement.

The ACT does not have the luxury of amending a constitution because the ACT does not have one. Nevertheless, the ACT Government can negotiate a settlement, it can pass a statute giving recognition and stature to the contemporary Traditional Owners of the ACT, and it can establish the rules for coexistence and power sharing (Mansell, 2016:146). The ACT Government and the people of the ACT should want this as much as the Aboriginal peoples of the ACT want it, because it sets the basis of the relationships the ACT Government needs to have with the contemporary Traditional Owners of the ACT. A relationship based on mutual respect, parity and justice.

The settlement could be a treaty or some other kind of negotiated agreement between the Aboriginal peoples on whose ancestral lands the ACT is situated, and the people of the ACT represented by the ACT Government. There is no set form for what a settlement or treaty could or should contain.

A settlement must not only be seen as an outcome between the parties, but also as a process of reconciling longstanding grievances and injustices and rebuilding the relationship based on mutual respect, parity and justice. A settlement should be a product of the peoples of the area, their collective histories, the social and political environments, the nature of the issues or grievances between the parties and the outcomes of negotiations between the parties, in good faith. The parties must come to the negotiating table on equal terms. Such an approach will also provide a firm basis for transitioning the relationship between the parties from dependency and disrespect to trust and mutual respect based on parity.

It is time to move away from the prevailing orthodoxy that governments can continue imposing its expectations and worldviews on the Aboriginal peoples of the ACT. For example, the expectation that the Aboriginal peoples come to the table with a united voice while there continues to be political argument about the merits of recognition and reconciliation for cheap political point-scoring between rival political interests. The onus is on all the parties to come to the negotiating table with a united commitment to addressing the issues and a genuine commitment to mutually beneficial outcomes for all concerned.

As Hoehn (2016:145) notes in the Canadian context, parties cannot impose a just settlement, it must be amicably negotiated between the parties.

It is time to shrug off our inheritance of denial and dispossession, our lack of political will and refusal to make a long-lasting commitment to justice for the Aboriginal peoples of the ACT. The truth is that successive governments have failed the Aboriginal peoples of this region in the past. We cannot erase the past, but we can change the future. We can, and should do better, because continuing failure in this space is no longer an option.

9.2 Next steps

The two political parties governing in partnership in the current Legislative Assembly for the ACT have made separate, but related, commitments to 'treaty discussions with the traditional owners' and to reviewing the Namadgi National Park Agreement. There is therefore a very real opportunity for progressing toward a resolution of the outstanding Aboriginal land rights and native title matters in the ACT.

The following steps are crucial to progressing these outstanding matters:

1. Acknowledging that Canberra is on the lands of the Traditional Owners or native title holders (whoever they may be), that the land was taken from them without their free, prior and informed consent, without a treaty, and that they have never been compensated for their losses.
2. Establishing a Truth and Healing Commission under the *Inquiries Act 1991* (ACT) to investigate both historical and ongoing injustices committed against the Aboriginal peoples of the ACT since colonisation by the state and non-state entities, across all areas of social, cultural, political and economic life, and with the clear intention of addressing past grievances by mutual agreement with all concerned.
3. Unilaterally withdrawing the restrictive clauses in the Namadgi National Park Agreement and providing NTSCORP Limited with sufficient resources to assist the Aboriginal families with preparing their native title claim(s) and resolving internal conflicts.
4. Undertaking a thorough search and analysis of the historical land tenures and land transfers from NSW to the ACT in 1911, including identifying what was Crown land in 1911 and what has happened to that land through to the present.

5. Publicly releasing all previous legal opinions/advice on these matters so they can be on the public record.

APPENDIX A: DEFINITION OF THE TERM 'TRADITIONAL OWNER'

The term 'Traditional Owner' came into common usage in the mid-1970s following the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which established mechanisms through which Aboriginal people could claim unalientated Crown Land in the Northern Territory on the basis that they are the 'traditional Aboriginal owners' of the land Edelman, 2009).

The term has been replicated, in full or in part, in other statutes in the other jurisdictions around the country ever since. An examination of various statutes reveals that the definition of 'traditional owners' or 'Aboriginal owners' varies significantly, depending on the legislative context. Invariably, the term does encompass ownership of land via either statutory land rights grants/transfer schemes or Trust arrangements, or via recognition of native title rights and interests under the *Native Title Act 1993* (Cth).

The text below includes the statutory definitions of 'Traditional Owner' and related terms in Commonwealth and Victorian statutes.

A.1 Commonwealth

'Traditional Owner' when used in the context of the Northern Territory, is as defined in s.3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth):

> "traditional Aboriginal owners", in relation to land, means a local descent group of Aboriginals who:
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> (b) are entitled by Aboriginal tradition to forage as of right over that land.

The term 'indigenous people's land' is defined in s.368(4)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), as follows:

> (3) Land is ***indigenous people's land*** if:
>
> (a) a body corporate holds an estate that allows the body to lease the land to the Commonwealth or the Director; and
>
> (b) the body corporate was established by or under an Act for the purpose of holding for the benefit of indigenous persons title to land vested in it by or under that Act.

The term 'indigenous person' is defined in s.363(4) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) as follows:

(4) A person is an ***indigenous person*** if he or she is:

(a) a member of the Aboriginal race of Australia; or

(b) a descendant of an indigenous inhabitant of the Torres Strait Islands.

The term 'traditional owners of indigenous people's land' is defined in s.368(4)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) as follows:

(4) The traditional owners of indigenous people's land are:

(a) a local descent group of indigenous persons who:

(i) have common spiritual affiliations to a site on the land under a primary spiritual responsibility for that site and for the land; and

(ii) are entitled by indigenous tradition to forage as of right over the land.

The terms 'Aboriginal person' and 'Torres Strait Islander' are defined in s.4 of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) as follows:

Aboriginal person means a person of the Aboriginal race of Australia.

Torres Strait Islander means a descendant of an indigenous inhabitant of the Torres Strait Islands.

The term 'traditional owner' does not appear in the *Native Title Act 1993* (Cth). However, the term 'native title holder' is defined in that Act as follows:

224 Native title holder

The expression ***native title holder***, in relation to native title, means:

(a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust—the prescribed body corporate; or

(b) in any other case—the person or persons who hold the native title.

While the term 'Traditional Owner' holds particular meaning in some legal contexts and there are varying opinions and feelings about the term, it is used in this Discussion paper to recognise the connections to Country and culture of the Aboriginal and Torres Strait islander peoples of Australia under statutory land rights grants/transfer schemes or native title rights and interests recognised under the *Native Title Act 1993* (Cth).

A.2 Victoria

The term 'Traditional owners' is defined in s.7 of the *Aboriginal Heritage Act 2006* (Vic) as follows:

7 Traditional owners

(1) For the purposes of this Act, a person is a traditional owner of an area if—

(a) the person is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area; and

(b) the person—

(i) has responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, the area; or

(ii) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, the area.

(2) For the purposes of this Act, a person is a traditional owner of Aboriginal ancestral remains if the person is an Aboriginal person who—

(a) has responsibility under Aboriginal tradition for the remains; and

(b) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for the remains.

(3) For the purposes of this Act, a person is a traditional owner of a secret or sacred object if the person is an Aboriginal person who—

(a) has responsibility under Aboriginal tradition for the object; and

(b) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for the object.

The term 'Traditional owner group' is defined in s.3 of the *Traditional Owner Settlement Act 2010* (Vic) as follows:

'**traditional owner group** in relation to an area of public land, means—

(a) a group of Aboriginal persons who may authorise (within the meaning in section 251A of the Native Title Act) the making of an indigenous land use agreement with the Minister, on behalf of the State—

(i) for the purposes of the settlement of any application of a kind listed in the Table to section 61 of the Native Title Act or in which the group agrees not to make an application of that kind; and

(ii) that is capable of being registered under section 24CK or 24CL of the Native Title Act; or

(b) if there are native title holders (within the meaning of the Native Title Act) in relation to the area, the native title holders; or

(c) in any other case, a group of persons who are recognised by the Attorney-General, by notice published in the Government Gazette as the traditional owners of the land, based on Aboriginal traditional and cultural associations with the land;'

And:

'traditional owner group entity, in relation to an area of public land, means—

(a) a corporation within the meaning of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 of the Commonwealth; or

(b) a company limited by guarantee that is registered under the Corporations Act; or

(c) a body corporate—

that a traditional owner group for the area of public land has appointed to represent them in relation to that area, for the purposes of this Act;'

And:

'**traditional owner rights**, in relation to a recognition and settlement agreement, means the traditional owner rights recognised in the agreement;'

S.3 of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) defines Traditional Owner as follows:

traditional owner, in relation to an area in Victoria, has the same meaning as in ***Aboriginal Heritage Act 2006*** **(Vic)**.

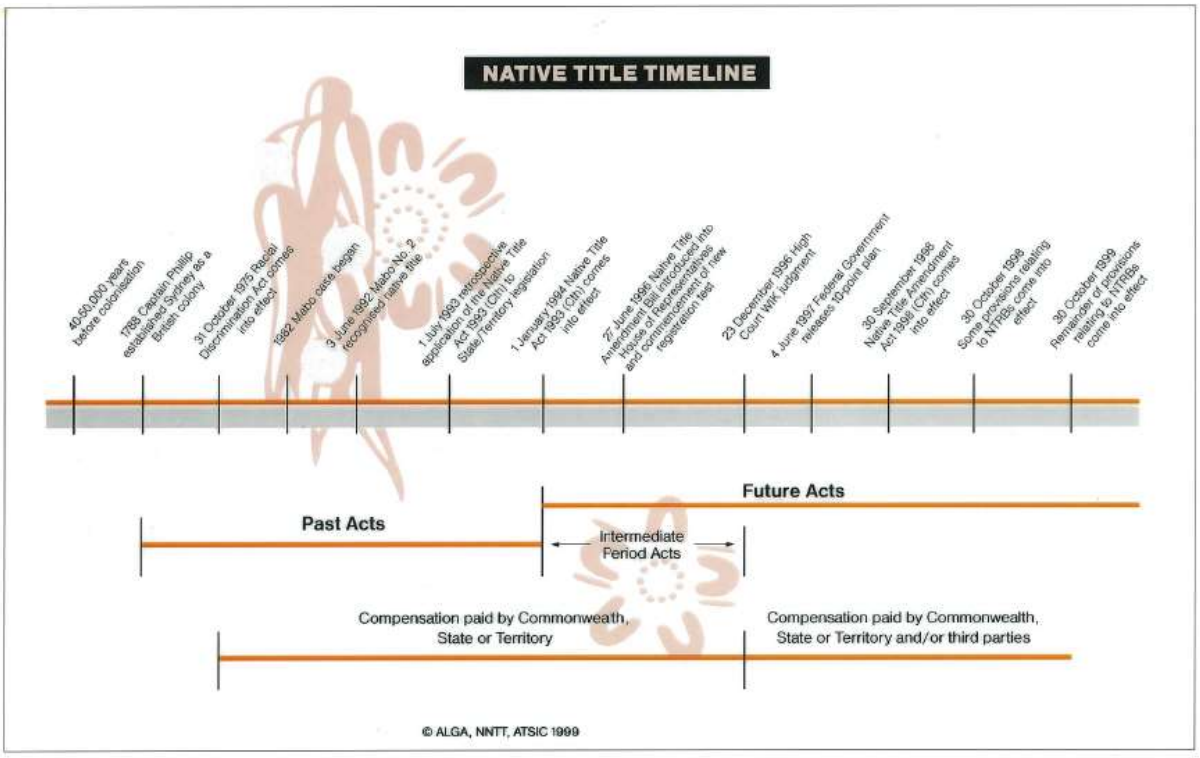
APPENDIX B: CRITICAL TIME PERIODS IN THE *NATIVE TITLE ACT 1993* (CTH)

The *Native Title Act 1993* (Cth) creates three critical time periods, each of which has some relevance to understanding the current situation in the ACT. The time periods are:

- Past acts for actions that occurred prior to 1 July 1993 for the making, amendment or repeal of legislation or any other actions that occurred prior to 1 January 1994;
- Intermediate period acts for actions that occurred between 1 January 1994 and 23 December 1996; and
- Future acts for how activities can be carried out on land subject to native title rights and interests.

These time periods are depicted in **Figure B1** below.

Figure 2: Native Title Timeline



Source: ALGA, ATSIC and NNTT, 1999:15.

The key dates and time periods are as follows:

- 1 January 1994 is the date when the *Native Title Act 1993* (Cth) came into effect, but it is also the date at which 'Past Acts' period ceases, and the 'Future Acts' period comes into effect.
- The period between 1 January 1994 and 23 December 1996 is the period where 'Intermediate Period Acts' occurred. Governments carried out a number of 'future

acts' after 1 January 1994 but before the Wik decision was handed down by the High Court of Australia and did not follow the correct processes for future acts. These acts were identified as 'Intermediate Period Acts' and were validated by amendments to the *Native Title Act 1993* (Cth) in 1998 as part of the Howard Government's ten point plan to amend the Act following the Wik Peoples v State of Queensland.

- 31 October 1975 is the date when the *Racial Discrimination Act 1975* (Cth) came into effect, but it is also the date after which compensation is claimable from the Commonwealth or the States or Territories for loss of native title rights and interests. What this means is that no compensation is paid for loss of native title rights and interests prior to this date, noting that the taking of land and waters from Aboriginal peoples commenced in 1788.

APPENDIX C: THE ACT GOVERNMENT'S POSITION ON NATIVE TITLE (AS AT 1994)

Extinguishment

Non-Indigenous settlement of the area that is now the ACT commenced in the first half of the 19th century. This settlement was facilitated by the granting of freehold and leasehold interests over large area. These grants covered very nearly all of what is now the city of Canberra and the surrounding rural areas of the ACT. In what is now the Namadgi National Park the grants were not that extensive. And in the part of the Park which is the Cotter River Catchment Area there were very few grants.

Large areas of the ACT have been appropriated for public purposes. These purposes include:

- Environment protection, Namadgi National Park;
- Water catchment, Cotter River Catchment Area;
- Scientific research. Orroral Valley Tracking Station, Honeysuckle Creek, Mount Stromlo;
- Public recreation, parks and lakes;
- Roads;
- Water storage and reticulation, sewage treatment and stormwater;
- Electricity transmission; and
- Legislative, executive and judicial functions.

The effect of these appropriations on native title is not always easy to establish. Building an office block would seem to extinguish native title, but using the Cotter River Catchment Areas as Canberra's water supply may not extinguish all aspects of the title.

It is also necessary to examine the operation of legislation which applies in the ACT. Some of this legislation could have the effect of extinguishing or at least affecting native title. Any suggestion that the legislation did operate in this way would have to be examined against the common law presumption that legislation does not affect existing rights unless it does so in clear terms. For example:

- *Cotter River Act 1914* makes it an offence to fish in the Cotter catchment. It also makes it an offence to camp or picnic without permission in the area. These offences are said not to affect the rights of any person who holds a Crown Grant, Conditional Purchase, Lease, Licence or Permissive Occupancy.
- *Trespass on Territory Land 1932,* formerly the *Trespass on Commonwealth Land Ordinance 1932* makes it an offence to camp in an area that is not designated as a camping area.
- *Careless use of Fire Act 1936* makes it an offence to light fires in certain areas and at certain times of the year.

Summary of land that has not been alienated

The land that has not been alienated by freehold or leasehold grants includes:

- The more significant watercourses and river flats. These include the Murrumbidgee River, Molonglo River, Naas River and the Gudgenby River.
- Land that was reserved for purposes associated with grazing activities. This includes land reserved for travelling stock reserves, water reserves, camping reserves and the like. The land may have been resumed form previous freehold and leasehold grants.
- Trig stations on the region's more prominent peaks and hill tops.
- The more inaccessible land in what is now Namadgi National Park.

Maintenance by indigenous people of links with the land

This is a matter the ACT Government has no special knowledge of. However, it seems likely the links will be strongest in areas that have not been alienated or appropriated for non-indigenous uses.

***Racial Discrimination Act 1975* (Cth)**

The Racial Discrimination Act came into force on 31 October 1975. The High court examined the relevance of this legislation to the extinguishment of native title rights in litigation that preceded the Native Title Decision [*Mabo v State of Queensland (No. 1)* (1988) 166 CLR 186]. The Act has the effect that title to land may not dealt with in a way that discriminates on the basis of race. For example, if titles generally may be extinguished only after a notification process is completed and compensation paid then native title can be extinguished only after these requirements are met. Also native title cannot be extinguished merely because it is native title or because it is enjoyed by the members of a particular race.

SUMMARY OF A.C.T. POSITION

Based on the above the ACT Government has been advised that:

- **It is very unlikely a Native Title Decision style claim for the ACT's residential, commercial and rural leases will succeed.**[81]
  To succeed the claim would have to relate to a lease that has been granted or a government appropriation that occurred since 31 October 1975, the date on which the Racial Discrimination Act commenced. The land subject to the lease or appropriation would have to be land that was not included in any of the freehold or leasehold grants or the appropriations that were made prior to that date or where native title was not otherwise extinguished. Leasehold or freehold grants covered nearly all of the area that is now Canberra and the surrounding land. And the claimant would have to be able to demonstrate continuity of traditional links with the land.

[81] Bold text in original.

- Areas such as Namadgi National Park are subject to different considerations. Some of the land in these areas was alienated by New South Wales in the years prior to the ACT being established. Other areas have been appropriated for public purposes, the Cotter River Catchment being the most important example. The entire area is the subject of legislation which seems inconsistent with at least some aspects of indigenous use of the area.
  The effect, if any, on native title of the appropriateness and relevant legislation is difficult to assess.

  Source: The Legislative Assembly for the ACT (1994) *Native Title Bill 1994, Explanatory Memorandum*, Circulated by authority of Rosemary Follett MLA, Chief Minister.

APPENDIX D: FUTURE ACT HIERARCHY AND PROCEDURAL RIGHTS IN THE *NATIVE TITLE ACT 1993* (CTH)

Future act category and Section of the *NTA 1993* (Cth)	**Procedural rights of registered native title holders/claimants**
s.24AA(2)	*Basically, this Division provides that, to the extent that a future act affects native title, it will be valid if covered by certain provisions of the Division, and invalid if not.*
s.24AA(3)	*A future act will be valid if the parties to certain agreements (called indigenous land use agreements—see Subdivisions B, C and D) consent to it being done and, at the time it is done, details of the agreement are on the Register of Indigenous Land Use Agreements. An indigenous land use agreement, details of which are on the Register, may also validate a future act (other than an intermediate period act) that has already been invalidly done.*
1. Indigenous Land Use Agreements (ILUA). (**S24BA-24EC**)	Does the proponent of a future act want to enter into an ILUA to validate a future act instead of using the other processes under the Act? Where relevant, ILUAs may provide for future act(s) to be done, or the surrender of native title, or to validate future acts that have already been done invalidly. In some circumstances it may not be possible to use an ILUA. For example, where there are competing claimants and there may not be sufficient time to negotiate an ILUA where the different claimant communities cannot agree on the carrying out of a future act.
2. Non-claimant applications. (**S24FA**) (unopposed)	Does the proponent of a future act want to lodge a non-claimant application in the Federal Court to find out whether or not native title exists in a particular area over which it has a non-native title interest? If no potential native title holders respond within a prescribed period there is automatic s24FA protection for future acts. If potential native title holders make a claim within the relevant period which is subsequently registered then the proponent may be able to negotiate an agreement or will have to use other relevant future act processes. **Note:** This process has **no utility** where there already are registered native title claimants for the area or if there is a determination that native title exists for the area.
3. Primary production and diversification and off-farm activities directly connected to primary production. (**S24GB** and **S24GD**)	The **opportunity to comment** applies. The upgrade of a pastoral lease to freehold requires a compulsory acquisition, which attracts the right to negotiate. **Note**: Local governments generally do not carry out or authorise these kinds of activities.
4. Management of water and airspace. (**S24HA**)	Does the future act involve the regulation or management of water and airspace? If so, the **opportunity to comment** applies.
5. Renewals and extensions of leases and licences and grants of titles under pre-23 December 1996 agreements or commitments. (**S24IA**)	Does the future act authorise the renewal or extension of leases and licences that arise from agreements or commitments made on or before 23 December 1996? If so, the **opportunity to comment** applies. **Note:** in limited circumstances, the **right to negotiate** may apply (s24ID(4) in relation to mining.
6. Provision of public housing and other public facilities (such as public health, education, police, emergency facilities,	Does the future act involve the provision of public housing and other public facilities (such as public health, education, police, emergency facilities, staff housing and related infrastructure) being provided for

staff housing and related infrastructure) being provided for Aboriginal or Torres Strait Islander people living in or in the vicinity of the area (**s.24JAA**) (this provision only operates for ten years from 2009)	Aboriginal or Torres Strait Islander people living in or in the vicinity of the area? If so, the **opportunity to comment** applies.
7. Use of reserved land. Activities and dealings regarding pre-23 December 1996 reserve land consistent with purpose and leases to statutory authorities. (**S24JA**)	In the case of land reserved, proclaimed, dedicated, or conferred by some permission or authority for particular purposes on or before 23 December 1996, is the proponent involved in authorising or undertaking activities on the land that are consistent with the purposes for which it was reserved, proclaimed, dedicated, or conferred? If so, the **opportunity to comment** may apply.
8. Facilities for services to the public. (**S24KA**)	The *Native Title Act 1993* (Cth) specifies what constitutes a 'facility for services to the public'. Does the proposed activity constitute a facility for services to the public? If so, the **same procedural rights** apply as an ordinary title holder would be entitled to. If over a pastoral lease, then the **same rights** as pastoral lessees. **Note:** This provision does **not** apply if the future act is or requires the compulsory acquisition of native title rights and interests.
9. Low impact future acts. (**S24LA**)	There are no procedural rights. **Note:** This provision applies only if the act is of low impact and takes place before and does not continue after a determination is made that native title exists in a particular area.
10. Acts that pass the freehold test. (**S24MD**)	Freehold test: if act could have been done had the native title holders instead had freehold and if legislation is in place to protect areas of Indigenous significance: • the **right to negotiate** may apply; • the **right to be consulted** may apply; or • ordinary title rights apply. **Note:** The *Native Title Act 1993* (Cth) specifies a number of circumstances where the freehold test applies. Refer to the Act for details.
11. Acts affecting offshore places. (**S24NA**)	Procedural rights for native title holders are the same as if they hold non-native title rights, that is, ordinary title rights. **Note:** Local governments generally do not carry out or authorise these kinds of activities.
s.24OA	*Unless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title.*

The term 'future act' is defined in s.233(1) NTA 1993 (Cth). A future act is an act in relation to land or waters that either:

- consists of the making, amendment or repeal of legislation and takes place after 1 July 1993; or
- is any other act that takes place after 1 January 1994;

and

- is not a past act nor an intermediate period act; and
- either validly or invalidly affects native title.

To be a future act the act must affect native title. That is, the act must either validly or invalidly occur in an area where native title exists and it must affect native title in that area. For example, native title may exist in relation to unallocated Crown land or a National Park,

even where there are no native title holders or registered native title claimants. An act affects native title if it extinguishes native title rights and interests or impairs native title rights and interests because it is wholly or partly inconsistent with their continued existence, enjoyment or exercise.

The term 'affects' is defined in s.227 NTA 1993 (Cth). All acts can affect or be affected by native title. An act 'affects' native title if it extinguishes native title rights and interests. An act also affects native title if it impairs native title rights and interests because it is wholly or partly inconsistent with their continued existence, enjoyment or exercise.

Some acts that affect native title are classified according to certain dates that correspond with particular High Court judgments or the enactment of native title legislation.

Source: NNTT 2009 and updated by the author and Wensing, 2019.

APPENDIX E: EXTRACT FROM THE NAMADGI NATIONAL PARK PLAN OF MANAGEMENT 2010

Ngunnawal Cultural Protocols

The Ngunnawal people have developed the following cultural protocols in relation to their traditional land:

- The Ngunnawal people are the traditional peoples of the clans of all land and waters of the Ngunnawal nation.
- Aboriginal law requires respect for their cultural authority as the traditional peoples.
- Ngunnawal people speak for all Ngunnawal country—other traditional peoples speak for their traditional lands.
- We all have a mutual obligation to care for our country with our neighbours.
- Ngunnawal people expect visitors to be aware of Ngunnawal cultural traditions and to respect and acknowledge Ngunnawal laws and customs when they visit Ngunnawal country.
- Visitors have the right to be treated with respect and understanding.
- All visitors are responsible for their behaviour and should respect Ngunnawal country.

Cooperative management of Namadgi into the future

The Aboriginal signatories to the Agreement identified the following matters to be considered for future cooperative arrangements:

Recognition of Aboriginal society—past, present and future

- Acknowledgement by government of the occupation and land use of the region by Aboriginal peoples before and after colonisation.
- Enhanced community awareness of and respect for Aboriginal culture.
- Cross-cultural awareness training for non-Indigenous people working in cooperative management.
- Empowerment of Aboriginal people in decision-making that affects their culture and their community.

Restoration of tradition and community identity

- Social and archaeological research into Aboriginal land use and culture to restore knowledge lost over the last 150 years.
- Re-connection of Aboriginal people to their country through work, events and recreation.
- Establishment of sites within Namadgi for Aboriginal cultural camps, including development of protocols for the operation of the camps.
- Traditional use of parts of Namadgi for hunting, food gathering and ceremonial purposes as part of cultural camps, including development of protocols that address

issues such as public safety, impact on threatened species and water supply protection.

- Re-introduction of Aboriginal place names and language into park interpretation.
- Ownership and control of Ngunnawal cultural and intellectual property.

Community development

- Education of Aboriginal youth in their tradition and culture.
- Building the capacity of the Ngunnawal community to work in partnership with government agencies.
- Employment and training within the park for Aboriginal people and in related environmental management disciplines.
- Pursuing commercial and self-employment opportunities—research, art and entertainment, cultural tourism (interpretation, recreation, hospitality services).

Source: ACT Government, 2010: 22-13.

APPENDIX F: SUMMARY OF THE ELEMENTS THAT COMPRISE THE NOONGAR NATIVE TITLE SETTLEMENT

The Noongar Native Title Settlement package comprises:

- **Recognition through an Act of Parliament** - recognising the Noongar people as the Traditional Owners of the South West through the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA). This Act was proclaimed on 6 June 2016, and establishes the Noongar people as the traditional owners of the land in south-west Western Australia (Department of the Premier and Cabinet 2016e:2).
- **Noongar Boodja Trust (NBT)** - the establishment of a perpetual trust into which the WA Government would make funding instalments of $50 million yearly for 12 years. A professional Trustee will be appointed and will manage the WA Government's financial contribution and the Noongar Land Estate. The formal selection process for the initial Noongar Boodja Trustee has been undertaken by the Western Australian Government and SWALSC and Perpetual Trustee Company Limited has been selected to be the initial Trustee (Department of the Premier and Cabinet 2016e:4).
- **Noongar Regional Corporations** - the establishment of six Noongar Regional Corporations and one Central Services Corporation, with funding support of $10 million yearly for 12 years. The Regional Corporations are to be established and maintained principally for the purposes of benefiting, advancing and promoting the Agreement Groups and their communities within the Region and managing and caring for the Cultural Land in the Region. The establishment of these corporations is underway (Department of the Premier and Cabinet 2016e: 6).
- **Noongar Land Estate** - the creation of a Noongar Land Estate through the transfer of a maximum of 320,000 hectares of Crown land into the Noongar Boodja Trust over five years (a maximum of 300,000 hectares as reserve land and a maximum of 20,000 hectares as freehold title). This includes the transfer of ALT properties in the region comprising 26 freehold properties and 34 Crown reserves (DAA-WA: 2016: 19). All transfers will be coordinated by the Department of Lands (DoL) and are subject to statutory clearances and consultation with any affected WA Government or local government interest. The processes for these land transfers are set out in Annexures J and K in each of the six ILUAs.
- **Joint Management of the South West Conservation Estate** - the establishment of joint management arrangements across the State's South West Conservation Estate between the State and the Noongar community. Joint management plans will be initially developed for select parks with an option for joint management to extend to other areas of the Conservation Estate.
- **Land and Water Access** - Regional Corporation Land Access Licence allowing access to Crown land for customary purposes and inclusions in the *Metropolitan Water*

Supply Sewerage and Drainage Amendments By-Laws 2014 (WA), and the *Country Areas Water Supply Amendments By-Laws 2014* (WA) regarding Noongar customary activities in public drinking water source areas.

- **Noongar Standard Heritage Agreement** - improved processes for the preservation of heritage and a standard Noongar heritage agreement applying to land development and related activities.
- **Noongar Heritage Partnership Agreement** - provides a framework through which the Department of Aboriginal Affairs and the Regional Corporation can work in partnership in the areas of identifying, recording, protecting and managing Noongar Heritage values and sites within the agreement area.
- **Noongar Housing Program** - transfer and refurbishment of 121 properties to the Noongar Boodja Trust by the WA Housing Authority.
- **Noongar Economic Participation Framework** - A Noongar Economic Participation Steering Group will be established with the goal to improve economic participation outcomes for Noongar people in the South West. An agreed key deliverable is intensive capacity building in year one of the implementation of the Settlement, and ongoing support thereafter, in government tendering and contracting policies as well as the development and submission of tender documentation.
- **Community Development Framework** - with the establishment of six Noongar Regional Corporations in different parts of the South West, one key objective is to provide WA Government human service agencies with greater scope for direct communication with the Noongar community. Initially the main interface will be via the Regional Managers Forums which already involve the Departments of Health, Education, Child Support and Family Support, local and regional government representatives, and other government and non-government interest holders. A number of priorities have already been identified.
- **Capital Works Program** - Office Accommodation: The State has committed $6.5 million indexed for two years to establish offices for the Central Services Corporation and six Regional Corporations. This commitment will extend to fitting out or leasing of existing buildings for the administrative purposes of each corporation across the South West including two properties in the Metropolitan Area. Noongar Cultural Centre: The Settlement includes $5 million indexed for two years to support the development and construction of a Noongar Cultural Centre. This funding is contingent on the Noongar community obtaining the remaining funding from other sources (i.e. Commonwealth and private sector), as well as demonstration of a financially viable Cultural Centre management plan. Up to two hectares of Crown land is also to be provided in the Metropolitan Area as part of the WA Government's offer.
- **Land Fund** - A WA Government-managed Land Fund will be established to achieve objectives related to land management, Noongar land ownership and Aboriginal heritage protection. The Fund will resource programs facilitated by partnerships

between various State land agencies and the Regional Noongar Corporations but which are beyond the existing remit of mainstream services. These programs will include enhancing Noongar land capacity, Noongar heritage site protection programs, targeted conservation programs, and remediation of certain Crown land parcels included in the land transfer process. The partnerships will also encourage Noongar employment and economic participation within the State's land agencies. (Department of the Premier and Cabinet 2016a)

APPENDIX G: OVERVIEW OF TREATY DEVELOPMENTS IN VICTORIA, QUEENSLAND AND THE NORTHERN TERRITORY

Since the Uluru *Statement from the Heart* in 2017 (Referendum Council, 2017b), three jurisdictions in Australia have initiated treaty developments. The jurisdictions include Victoria, Queensland and the Northern Territory. The following provides a brief overview of the state of play as at the end of 2020.

It is noted that South Australia also commenced Treaty negotiations with South Australian Aboriginal nations in 2017. A state election was held in in SA in March 2018 and the Labor Government was replaced with a Liberal Government. The Liberal Government in SA subsequently decided to 'pause the treaty negotiations in favour of other priorities on Aboriginal peoples' matters' (Walquist, 2018).

G.1 Treaty-Making in Victoria

In 2018, the Victorian Parliament passed Australia's first-ever treaty law, the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), which established the First Peoples' Assembly of Victoria (FPAV)[82] as the elected voice for Aboriginal people and communities in future Treaty discussions. The role of the FPAV is not to negotiate a Treaty or Treaties with the State Government, but rather to work with State government to create the Treaty Negotiation Framework for negotiations and the rules and processes by which a Treaty/or Treaties can be agreed in Victoria. The Act requires the FPAV and the Victorian State Government to work together to establish four elements to support future treaty negotiations: Treaty Authority; Treaty Negotiation Framework; Self Determination Fund; and Ethics Council.

To reinforce its independence from the Victorian Government, the FPAV is a company limited by guarantee. The FPAV was initially designed to comprise 33 seats: 21 determined through a popular voting process, and 12 reserved for formally recognised Traditional Owner groups. However, two seats reserved for Traditional Owner Groups were declined, reducing FPAV to its current 31 seats. The Act allows the number of recognised Traditional Owner groups on the FPAV to increase if more are established.

The Victorian Treaty Advancement Commission (VTAC)[83] facilitated the creation of an Aboriginal electoral roll to elect the 21 elected FPAV members, and voting took place in

[82] https://www.firstpeoplesvic.org/about/

[83] http://www.victreatyadvancement.org.au/

September-October 2019. Aboriginal people aged 16 years and over were eligible to enroll in the election and votes were able to be cast online, by post or in person.

Low enrolment levels meant that there was a very low voter turnout, with only 7 per cent of eligible Aboriginal Victorians casting votes. Several reasons have been canvassed for the low voter turnout, including: distrust of Government; that the process was rushed and dictated by Government timeframes; disappointment with recent Government decisions including removal of sacred trees and land sales that appeared not to align with Treaty intentions and therefore undermined the Government's credibility; disappointment with the composition of the FPAV, especially the imbalance between residents as distinct from Traditional Owners and the disparity about speaking on or for someone else's Country; and a sense that the Victorian Government has compromised its message about Aboriginal-led processes by legislating a process before the FPAV was established.[84]

In one of the first formal motions in June 2020, the FPAV voted for the State Government of Victoria to establish a truth and justice process. In July 2020, the Victorian Government committed to establishing a truth and justice process to formally recognise historic wrongs and address ongoing injustices for Aboriginal Victorians (Williams, 2020). In March 2021, following months of work in partnership with the FPAV, the Victorian Government called for expressions of interest for five candidates for appointment as Yoo-rrook Justice Commissioners. Yoo-rrook is the Wemba Wemba / Wamba Wamba word for truth (Aboriginal Victoria, 2021). The Yoo-rrook Justice Commission is expected to begin in July 2021 following the issuing of letters patent under *the Inquiries Act 2014* (Vic), with its final report due three years after establishment. Establishing the Justice Commission under the *Inquiries Act 2014* (Vic) means that it will have the powers of a royal commission.

The Victorian Government anticipates that the Yoo-rrook Justice Commission will investigate both historical and ongoing injustices committed against Aboriginal Victorians since colonisation by the State and non-State entities, across all areas of social, political and economic life. In doing so, the Yoo-rrook Justice Commission will engage Victoria's Aboriginal and non-Aboriginal community to achieve its aims of truth-telling and truth listening (Aboriginal Victoria, 2021).

G.2 Treaty-Making in Queensland

In 2019, the Queensland Government committed to a reframed relationship with First Nations peoples, issuing a Statement of Commitment (Queensland Government, 2019). An Eminent Panel of experts was also appointed to report on the way forward to treaty. A Treaty Working Group, working to the direction of the Eminent Panel, undertook community consultations around Queensland in 2019 and provided a report to the Eminent

[84] Maddison and Wandin 2019 and various free to air news reports.

Panel to inform their advice to government (Queensland Government, 2020a). The Treaty Working Group concluded that there is broad support within the Queensland community for a treaty process to begin. The Treaty Working Group's report therefore outlines a number of proposals to advance Queenslander aspirations for a treaty or treaties, including truth-telling models, building public support, and the establishment of mechanisms to maintain momentum and provide oversight to a treaty-making process. This includes discussion about how to resource a treaty process, on the understanding that such a commitment will be longstanding, not overnight, and that much work remains to be done to prepare the groundwork for a treaty or treaties to be negotiated.

The Eminent Panel gave their advice and recommendations to the Queensland Government in February 2020 (Queensland Government, 2020b) which was followed with supplementary advice in May 2020 to include COVID-19 considerations (Queensland Government, 2020c). The matters which required amendment were those concerning the timing of the implementation of the recommendations.

Accordingly, the Panel believes that the Government should proceed with the preparation of a response to the Panel's advice and Working Group Report (Queensland Government, 2020a) and place before the Parliament a bill to establish the First Nations Treaty Institute and First Nations Treaty Future Fund.

Specifically, the Panel's (Queensland Government, 2020b) primary recommendations are that:

- Queensland should proceed on a Path to Treaty with the ultimate aim of reaching a treaty or treaties with the First Nations of Queensland.
- The Path to Treaty be conducted using a rights-based approach consistent with both the *Human Rights Act 2019* (Qld) and the United Nations *Declaration on the Rights of Indigenous Peoples.*
- In order to progress the Path to Treaty the Queensland Government make a Treaty Statement of Commitment to express the Government's intention to further lasting reconciliation with First Nations through the actions detailed in the recommendations below, involving:
    - the establishment of the First Nations Treaty Institute as an independent body to lead the Path to Treaty process
    - the facilitation of a process of truth-telling and healing
    - the building of capacity for First Nations to actively participate in the treaty process
    - deepening the understanding and engagement of the wider Queensland community in the Path to Treaty
    - the adequate resourcing of these actions through the establishment of a First Nations Treaty Future Fund

- the placing before Parliament a bill to further the Path to Treaty, establish the First Nations Treaty Institute, and the First Nations Treaty Future Fund.

The Panel also made several further recommendations with details as to how these matters can be advanced.

In August 2020, the Queensland Government released a statement of commitment (Palaszczuk, and Crawford, 2020) and its response to the Expert Panel's recommendations. The Expert Panel made eight recommendations in total, and many with several sub-points – over 66 recommendations in total. Only four recommendations have been accepted, while the remainder have all been accepted-in-principle; none of the recommendations have been rejected.

> "The Queensland Government has committed to reframing the relationship with First Nations peoples and accepts or accepts in principle the Eminent Panel recommendations and is committed to:
>
> - a treaty-making process with First Nations peoples in Queensland;
> - exploring options to establish an independent body through legislation to lead the Path to Treaty process including a truth-telling and healing process and supporting First Nations peoples to engage in the treaty making process,
>
> as recommended by the Eminent Panel" (Palaszczuk and Crawford, 2020).

In relation to advancing the treaty process, the Queensland Government has committed to appointing a Treaty Advancement Committee which will provide it with expert advice and guidance on options for implementing the Path to Treaty recommendations. The Committee will also seek to maintain momentum for Path to Treaty discussions across Queensland, including overseeing community and stakeholder engagement, research initiatives, and seek partnerships opportunities. Following this engagement process and the work of the Treaty Advancement Committee, the Queensland Government (2020d) will consider options (in 2021) to establish an independent legislated body to lead the Path to Treaty, as recommended by the Eminent Panel.

G.3 Treaty-Making in the Northern Territory

In 2018 the Northern Territory (NT) Government and the four Aboriginal Land Councils[85] signed a Memorandum of Understanding, also known as the "Barunga Agreement", paving the way for consultations to begin with Aboriginal people of the NT about a Treaty (Northern Territory Government and Northern, Central, Anindilyakwa and Tiwi Land

[85] The Northern Land Council, the Central Land Council, the Anindilyakwa Land Council and the Tiwi Land Council are independent statutory bodies established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to express the wishes and protect the interests of traditional owners throughout the Northern Territory.

Councils, 2018), to agree on a consultation process to inform the development of an agreed framework to negotiate a Northern Territory Treaty or Treaties.

The treaty development process initiated by the *Barunga Agreement 2018* rests on the Northern Territory Government's express acceptance of three foundational propositions for the treaty consultation process, that:

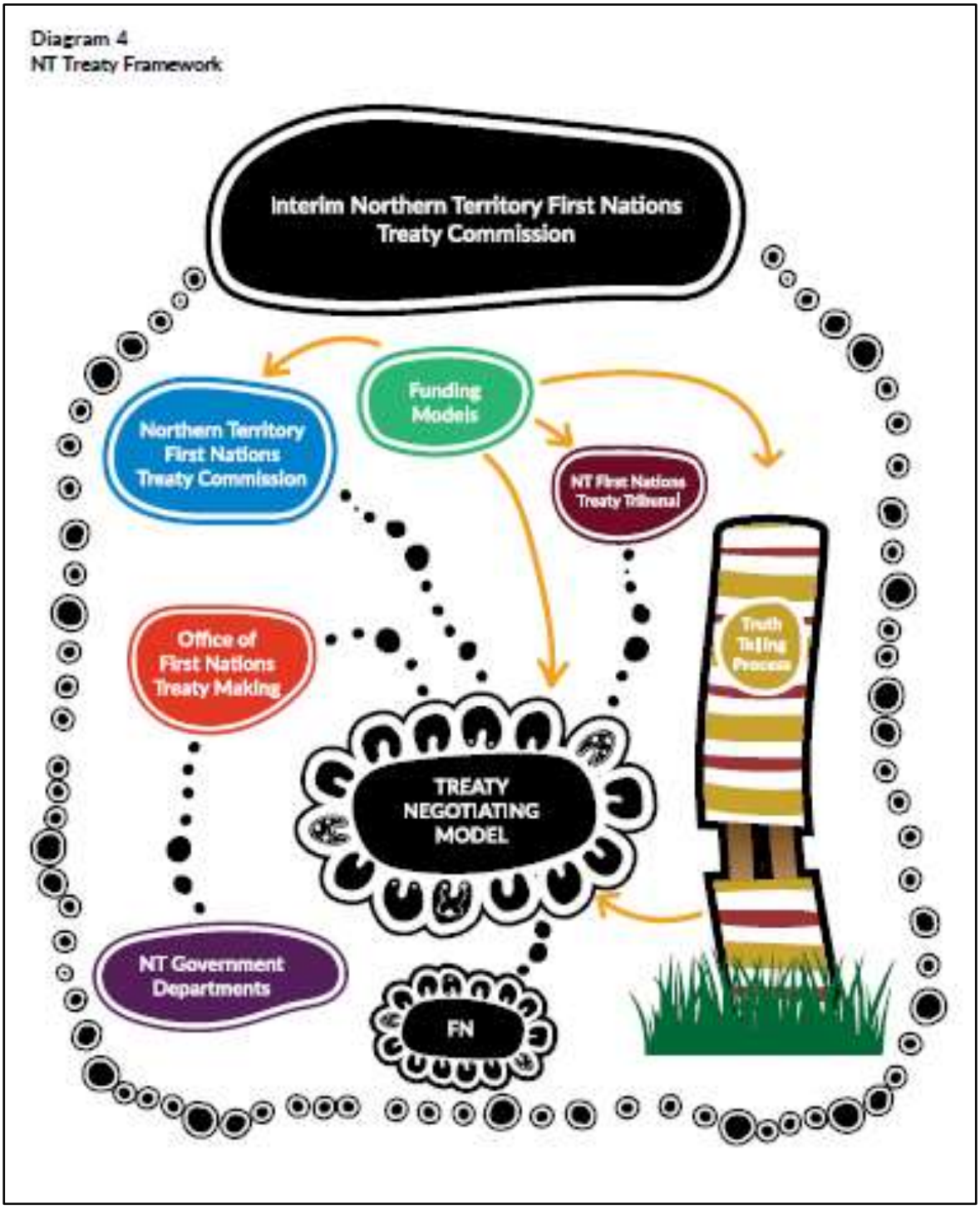
- Aboriginal people, as First Nations people, were the prior owners and occupiers of the land, seas and waters that are now called the Northern Territory of Australia;
- the First Nations of the Northern Territory were self-governing in accordance with their traditional laws and custom;
- First Nations peoples of the Northern Territory never ceded sovereignty of their land, seas and waters (NT Government and Northern, Central, Anindilyakwa and Tiwi Land Councils, 2018).

As the Treaty Commissioner notes (2020b:9), the fact that these things are already agreed, provides a great starting point for treaty discussions.

In March 2020, the Treaty Commissioner released his Interim Report on Stage One to the NT Government. Audio recordings in local Aboriginal languages are also available on the Treaty Commission website (Northern Territory Treaty Commissioner, 2020a). The Interim Report provides an update on the Treaty Commissioner's progress with implementing the *Barunga Agreement*, including regular newsletters, publication of articles and interviews in relevant newsletters and newspapers circulating in the NT; appearances on numerous radio and television programs in the NT; and the conduct of initial consultations across the NT to introduce, educate and raise awareness about the work and purpose of the Treaty Commission. The Treaty Commissioner reported that participants were keen to explore Treaty issues and ask questions and that several key themes emerged from these meetings (Northern Territory Treaty Commissioner, 2020a).

In July 2020, the Treaty Commissioner released a Treaty Discussion Paper (Northern Territory Treaty Commissioner, 2020b) The Discussion Paper provides a wealth of information, including background information on Treaties, the legal context, national and international best practice, and proposals for the NT. There are also several appendices with supporting information. Most importantly, Chapter 6 outlies a possible framework and a model for treaty-making in the NT. The framework deals with the structure and institutions that need to be established for treaty-making. The model describes the process for the negotiations. The framework and model apply learnings from British Columbia in Canada and Victoria, and have been adapted to suit the circumstances of the NT. The proposed framework for the NT is shown in the **Figure G1** below.

Figure G1: Northern Territory Treaty Framework



Source: Northern Territory Treaty Commissioner, 2020b:66.

It is worth noting that the Northern Territory is in a very different and difficult constitutional position compared to the States. Its status as a Territory leaves its legislative and executive authority vulnerable to override by the Commonwealth, by virtue of s.122 of the Constitution (which provides the Commonwealth with powers to govern the Territories). As the NT Treaty Commissioner notes, there is no constitutional barrier to the Commonwealth

playing a positive role through passing a law or laws supporting a treaty process in a Territory (NT Treaty Commission, 2020:49), but s.122 of the Constitution means that the Commonwealth can overrule any treaty enacted in legislation by the NT Legislative Assembly. As Brett Walker SC put it in his Legal Opinion to the NT Treaty Commissioner, the possibility of direct rule by the Commonwealth 'remains as a constant means by which legislative action under the system of self-government for the Northern Territory, …, can be completely nullified by subsequent and contrary Commonwealth legislation' (Walker, 2020:6).[86] Because the Commonwealth can override any NT legislation or governmental action, Walker (2020:15) advises therefore that 'the support or acquiescence of the Commonwealth Executive and the Parliament would be useful reassurance throughout and after the process of negotiating a treaty or treaties'. Walker hastens to add not necessarily as a party, 'but rather to keep it appropriately informed of the negotiations between the Northern Territory and its First Nations' (2020:15, para 42).

The NT Treaty Commissioner suggest that the Commonwealth can still play a constructive role by, for example, setting (through negotiation with Aboriginal peoples of Australia) national minimum standards for truth-telling and treaty negotiations. In any case, given the above, The Treaty Commissioner states that the support – or, at least, acquiescence – of the Commonwealth Executive and Parliament would be useful reassurance throughout and after the process of negotiating a treaty or treaties in the NT (NT Treaty Commission, 2020b: 49).

[86] Several precedents already exist, including the enactment of legislation by the Commonwealth Parliament to override the NT's *Rights of the Terminally Ill Act 1995* (NT) (euthanasia laws) by amending the *Northern Territory (Self-Government) Act 1978* (Cth). The same is true of the ACT, should it also decide to pursue a treaty or settlement with the Aboriginal owners of the ACT.

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