The relevance of the Federal Court's decision in *Yunupingu v Commonwealth* [2023] FCAFC 75 and Commonwealth of Australia v. Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors [2023] HCA Case No. D5/2023 and s.47C in the *Native Title Act 1993* (Cth) to the ACT

Dr Ed Wensing (Life Fellow) FPIA, FHEA ©[1]

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This paper is based on a presentation that was given to ACT Land Rights and Native Title Symposium which was hosted by the ANU College of Law and held at the ACT Supreme Court on 9 March 2024, and has been updated inlight of recent developments.

Aboriginal and Torres Strait Islander people are advised that this presentation contains the names of persons no longer with us. The names used in this presentation are in accordance with family instructions.

Figure 1: ***Sovereignty sign outside Old Parliament House as part of the Aboriginal Tent Embassy, Canberra.*** Photo: Ed Wensing 2019.

Acknowledgement of Country

As is my practice at public events, I acknowledge the Traditional Owners on whose land I live, work, study, rest and play, whoever they may be.

I acknowledge they have suffered the indignity of having their lands and waters taken from them without their consent, without a treaty and without compensation, and that these matters are yet to be resolved.

I pay my respects to elders past and present.

[1] This paper was prepared for the ANU College of Law's Symposium on ACT Land Rights held at the ACT Supreme Court on 9 March 2024. All due care was taken in the preparation of this presentation. All views expressed are Dr Wensing's and not any of the institutions or organisations he is affiliated with. Dr Wensing nor any of the institutions or organisations he is affiliated with are liable to any person or entity taking or not taking action in respect of any representation, statement, opinion or advice referred to herein.

As a land use planner and urban geographer, I also recognise that the Aboriginal and Torres Strait Islander Peoples of Australia are among the World's oldest continuing cultures, and that their continuing land ownership and tenures, land use planning and management are among the World's oldest of such practices.

Introduction and Background

I am an Associate and Special Adviser at SGS Economics and Planning, an employee-owned Certified B Corporation specialising in urban and regional economics and planning. I am also a Research Fellow at the City Futures Research Centre at the University of New South Wales and an Honorary Research Fellow at the Centre for Indigenous Policy Research at the Australian National University.

For the purposes of transparency, in 2024 I provided the NT Government with specialist advice on local government reforms to improve local connections between remote Aboriginal communities and the Regional Aboriginal Shire Councils in the NT. Also in 2024, I provided the Gove Peninsula Futures Reference Group and the NT Government with specialist advice on land tenure options for the township of Nhulunbuy following the closure of Rio Tinto's bauxite mine on the Gove Peninsula which Rio Tinto has indicated will occur by the end of this decade.

As a Research Fellow at the City Futures Research Centre at UNSW, I was part of an Investigative Panel Research project with my colleagues Professor Libby Porter and Ani Landau-Ward from RMIT, Professor Donald McNeil and Elle Davidson from the University of Sydney, and Matt Kelly from UNSW, titled *Voicing First Nations Country, community and culture in urban policy* with a particular focus on the greater metropolitan cities of Sydney and Melbourne. The research project was funded by the Australian Housing and Urban Research Institute (AHURI) (Project 430).

For 30 years, I have had the privilege of working with Aboriginal and Torres Strait Islander peoples and communities on land rights and native title related matters, all over Australia except in the ACT.

While I was undertaking my PhD research at the National Centre for Indigenous Studies at ANU between 2013 and 2019, my principal supervisor, Professor Mick Dodson AM, queried why my case study communities were in Western Australia and why I was not working with the local Aboriginal people of the Canberra district, my hometown. Mick extracted from me a commitment that I would turn my attention to the 'unfinished business' of Aboriginal land rights and native title in the ACT after I completed my PhD. And sure enough, when I handed in my PhD or examination in 2018, he reminded me of that commitment and held me to it.

By this stage in my career, I was not a newcomer to research on Aboriginal and Torres Strait Islander land rights and native title rights and interests. Nor was I a newcomer to land tenure matters in the ACT. I had spent most of the early years of my career working in Canberra's unique planning and leasehold systems, and for over 25 years as a local resident and member of the public I actively campaigned for better administration of the leasehold system.

When it came time to focus my attention on the unfinished business of land rights and native title in the ACT, the ACT Government had committed to 'treaty discussions' with the local Aboriginal people, despite the fact that it was still sticking to its oft stated policy that all native title no longer existed in the ACT.

The obvious starting point for me was to take a closer look at the ACT's land tenure history. And with the following two questions:

- Why is there no statutory land rights scheme in the ACT (despite all the protests and street marches of the 1960s, 70s and 80s)?

And:

- Why have there been no native title determinations or Indigenous Land Use Agreements in the ACT since the *Mabo (No. 2)* decision by the High Court of Australia in 1992 and the enactment of the *Native Title Act* by the Commonwealth in 1993?

By 2021, I had gathered enough information and wrote a Discussion Paper titled: *Unfinished Business: Truth-telling about Aboriginal land rights and native title in the ACT*. This Discussion Paper was published by The Australia Institute in March 2021.

https://australiainstitute.org.au/wp-content/uploads/2021/03/P1053-Unfinished-Business-in-the-ACT-Wensing-2021.pdf

Some of the information in this paper is drawn from that Discussion Paper.

The ACT's land tenure history and the Territory that Federation created in 1911

Through my work at the former National Capital Development Commission (NCDC) for 13 years, I had become very familiar with Canberra's early tenure history and why Canberra had a leasehold system of tenure and not freehold as the case in most of the other jurisdictions around Australia. My research for the Discussion Paper that was published in March 2021 began by going back over that history to see what extinguishing events might have occurred prior to and after the land that now comprises the ACT was handed over to the Commonwealth on 1 January 1911. The following dot points are a summary of that history.

- S.125 of the Australian Constitution required the new Commonwealth to select a site for the new nation's capital city. S.125 required that it shall be vested in and belong to the Commonwealth, it shall be in NSW, not less than 100 miles from Sydney, not less than 100 square miles in area, and that it shall consist of Crown lands to be granted to the Commonwealth without payment.
- A decision was made in 1908 to locate the capital city in the Yass/Canberra district.
- When the Territory was vested in the Commonwealth from 1 January 1911, it comprised 233,099 ha in accordance with s.125 of the Constitution and was granted to the Commonwealth without any payment (**Figure 2**).
- In 1911 the Commonwealth became the outright owner of approximately 101,313 ha of Crown lands, about 44% of the total ACT land area. The rest being made up of freehold or conditional purchase freehold under 19th century legislation from NSW.
- The existing freehold titles 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.*

- This clause was inserted into the Act to protect the land rights and interests of the people that already held freehold or conditional purchase land titles issued by NSW before the ACT was created and handed over to the Commonwealth in 1911.

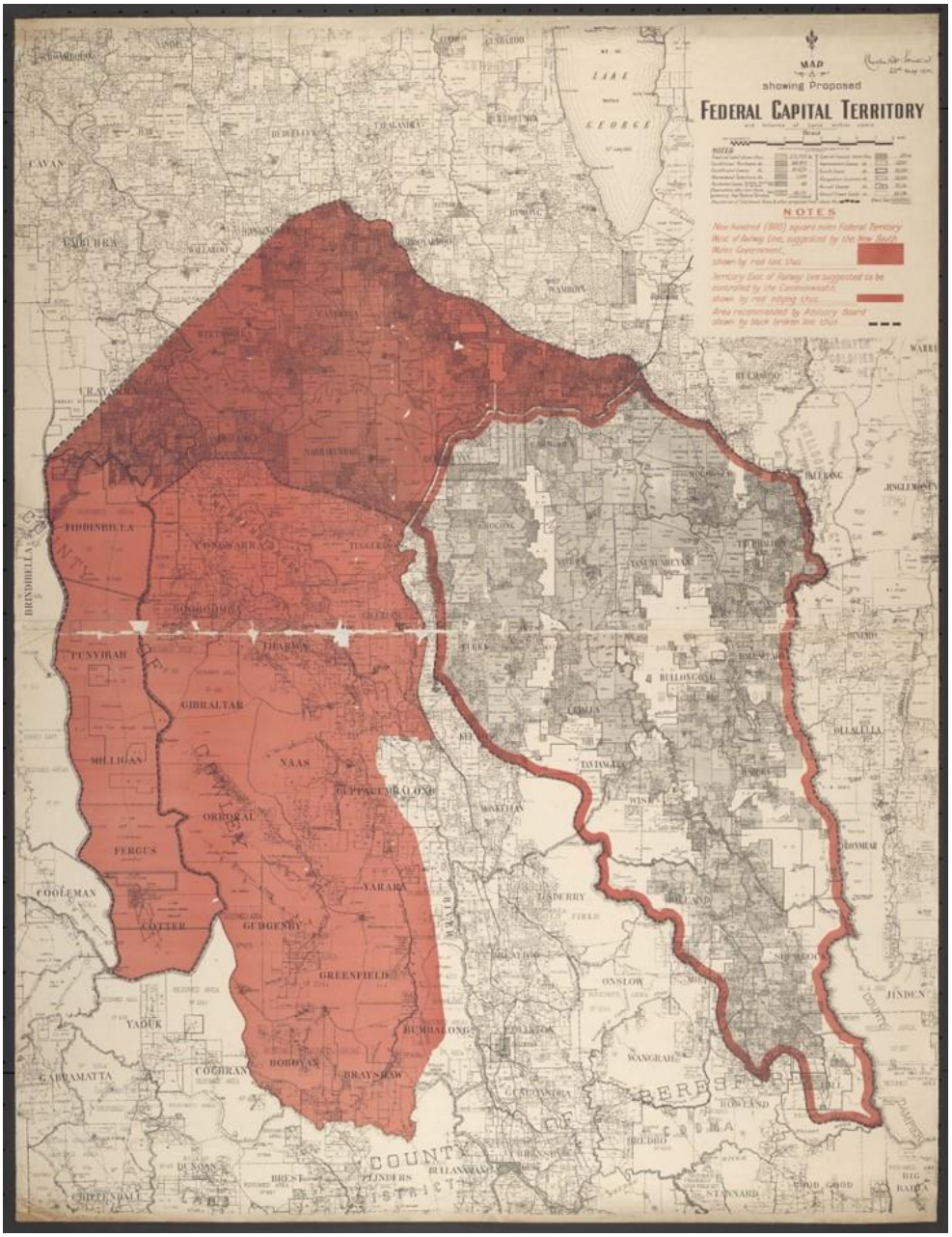

Figure 2: ***Map showing Federal Capital Territory 23 May 1909, Charles Scrivener.*** Source: National Archives of Australia.

- It is fair to conclude therefore that the Crown was certainly interested in protecting the rights of existing land title holders. But there was no acknowledgement of the pre-existing land rights of the Aboriginal peoples of the ACT.

- The transfer of the land from NSW to the Commonwealth is regarded as a Crown-to-Crown grant. At common law, Crown-to-Crown grants (i.e. from government to government) do not extinguish native title.

- While the High Court of Australia has found in several landmark cases that certain Crown-to-Crown grants do extinguish native title because there was a clear and plain intention to do so under particular State or Territory legislation, the ACT's historical circumstances have not been tested in a court of law in Australia. Without testing that assumption in a court of law, it is not a foregone conclusion.

- A reasonable question to ask therefore is: Why were the existing freehold and conditional purchase titles protected by the transfer between NSW and the Commonwealth, when the land rights of the local Aboriginal peoples were not similarly recognised and protected?

- There is one simple answer to that question. At that time it was still lawful to discriminate on the basis of race in Australia. But it has been unlawful to do so since the enactment of the *Racial Discrimination Act 1975* (Cth) on 31 October 1975.

- There are also questions to be asked about what happened to that Crown land since 1911. Such as:

  - What parts of the ACT were Crown land in 1911?
  - How much of that land is still Crown land?
  - What has happened to that Crown land since 1911 through to the present?
  - How much of that Crown land was 'affected' prior to self-government for the Territory in 1989, and how much of it was 'affected' prior to 31 October 1975?
  - And, how much of that land is included in Namadgi National Park or other conservation reserves?
  - And what is the status of those reserves with respect to native title rights and interests?

These questions require careful consideration.

Self-Government in the ACT in 1989

In 1989 the Commonwealth granted self-government to the people of the ACT under the *Australian Capital Territory (Self-Government) Act 1988* (Cth). Shortly before Self-Government Day on 11 May 1989, all land in the ACT was divided into National Land and Territory Land.

- National Land is land that is, or is intended to be, used by or on behalf of the Commonwealth (This includes the Parliamentary Triangle, The foreshores of Lake Burley Griffin, the Russell Defence Complex, the ANU and other key areas.); and
- Territory Land is the remainder of the ACT.

On Self-Government Day, the ACT Government became responsible for the management of all Territory Land in the ACT 'for and on behalf of the Commonwealth'.

Again, at this time there was no recognition of the pre-existing land rights of the Aboriginal peoples of the ACT, and their rights and interests were not taken into consideration in any meaningful way.

Because of self-government in 1989 and the Territory becoming fully responsible for 'Territory Land' in the ACT, the ACT may have inherited these issues. There are questions which need 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 the ACT in 1911 and again in 1989, when these significant decisions were made by governments.

No statutory land rights scheme in the ACT

Despite all of the street marches about Aboriginal land rights in the nation's capital during the 1960s, '70s and '80s, there is no statutory land rights grants or transfer scheme in the ACT.

Except in Jervis Bay, which is administered by the Commonwealth, not the ACT Government.

The Northern Territory has had a statutory land rights scheme since 1976. Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Aboriginal traditional owners were able to apply for grants of land. The Traditional Owners are identified in accordance with traditional laws and customs and are communal land holders of the land in question. Grants are then made as inalienable (not able to be sold) freehold title to an Aboriginal Land Trust and held on behalf of the Traditional Owners.

NSW has had a statutory land rights grants scheme since 1983. Under the *Aboriginal Land Rights Act 1983* (NSW), only Crown land is claimable and the land is granted as alienable (able to be sold) freehold (or as perpetual lease if granted in the Western Division of NSW) to a Local Aboriginal Land Council (LALC) whose membership is based on residency within the LALC's boundary, and not necessarily traditional connections to the area. To date, over 13,350 Aboriginal Land Claims have been reviewed and resolved in accordance with the provisions of the ALR Act. However, there are currently about 39,000 outstanding land claims under this Act. At current rates of clearance this will take several years to resolve.

In Queensland, South Australia, Tasmania and Victoria, the Aboriginal land rights schemes involve the direct grant or transfer of lands in specific locations, including former Aboriginal or Torres Strait Islander missions or reserves. These schemes do not operate over the whole of the State, and predominantly only in relation to former missions or reserves or sites of significance.

South Australia and Western Australia have maintained 19th century 'protection' style land trust arrangements for the benefit of Aboriginal and Torres Strait Islander peoples. Although the SA Aboriginal Land Trust was 'modernised' in 2013 to make it more at arms-length from government.

Whether a statutory Aboriginal land rights scheme might work in the ACT needs to be explored in more detail. I have described these land rights schemes as 'acts of grace or favour' by the state because in most cases the state was grasping for a quick and easy solution to a complex problem for not having recognised the pre-existing land rights and interests of the Aboriginal peoples at the time of colonisation.

My view is that the horse has already bolted on such a scheme in the ACT and that it's now too late to try and create such a scheme. Principally because such schemes had good intentions, but they never fully recognised the pre-existing rights of the Aboriginal and Torres Strait Islander peoples, except in the case of the Northern Territory.

Previous native title claims over the ACT/and surrounds

Several native title claims were made in the past, but for various reasons, all those claims have either been withdrawn, discontinued, dismissed or rejected. Not always relating to the merits of the claim. 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. (See Tables 1 and 2 in **Appendix A.)**

There are currently no active native title claims or native title determinations over land in the ACT, although NTCSORP is currently undertaking research for a potential native title claim over the ACT and surrounds.[2]

It is thirty years since the native title system was established. At 9 March 2025 there are over 647 native title determinations that have been made by the Courts and there are over 1,506 registered Indigenous land use agreements (ILUAs). None of these relate to the ACT.

We have a much better understanding of the application of the common law and the *Native Title Act 1993* (Cth) across the country now, compared to when these earlier native title claims over the ACT were made but never pursued.

Native title matters in the ACT therefore remain unresolved.

Namadgi National Park Agreement 2001

Namadgi National Park was established in 1984.

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. The Agreement defines 'Aboriginal Parties' as 'those native title claim groups who are parties to this agreement, and their biological descendants'.

Under the Agreement, the ACT Government offered to grant a Special Aboriginal Lease over Namadgi National Park for a period of 99 years[3] 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 was also subject to all native title claims in the ACT being either finally determined or withdrawn in a manner to be agreed between the parties.

While the intention of the terms of the Agreement may have been to provide a degree of certainty or durability, these terms can also 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.

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

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.

The commitments entered into in the Agreement 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 therefore questionable.

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[2] NTSCORP and Comhar (2021) ACT-NSW Research Project, Winter Newsletter

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

As stated earlier, the native title system was still in its first decade when the Namadgi National Park Agreement was signed. Since that time, we have learnt a great deal more about what is possible under the native title system and we have a much better appreciation of what can be negotiated in terms of outcomes. And the *Native Title Act 1993* (Cth) has been amened to deal more specifically, by agreement, with how native title rights and interests can be recognised in National Parks and conservation reserves (discussed below).

Current situation in the ACT

The current situation in the ACT can therefore be summarised as follows:

- There is no statutory land rights grants or transfer scheme in the ACT.[4]
- 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, and not always relating to the merits of the claim.
- The Federal Court of Australia has not made any native title determinations over land in the ACT.
- This does not mean that native title may not exist in the ACT.
- What it does mean however, is that the Federal Court is yet to make a determination of whether or not native title exists in the ACT.
- There is no Registered Native Title Body Corporate in the ACT. In other words, there is no Aboriginal entity that the ACT Government or any other people/organisations can consult with about matters that may affect the native title rights and interests of the native title holders in the ACT (where it continues to exist or where it may exist).
- There are no registered Indigenous land use agreements in the ACT.[5]

There are many reasons for this. 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 1909-1911.
- And they were not consulted when self-government was granted to the people of the ACT by the Commonwealth in 1989.
- NSW transferred the land that is now the ACT to the Commonwealth in 1911. Since *Mabo (No. 2)* the ACT Government has assumed that all native title in the ACT was extinguished by that transfer or by earlier land grants by the NSW Government to other (non-Indigenous) people and entities. But this history needs to be fully investigated in the context of a native title claim(s) over the ACT.
- The various genealogical and historical 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).
- An overall lack of commitment and adequate resources by successive Commonwealth and ACT Governments and the relevant Native Title Service Provider to address these matters in

[4] Except Jervis Bay, which is administered by the Commonwealth, not the ACT Government.

[5] Or in the surrounding region.

a comprehensive and meaningful way, and in accordance with the *Native Title Act 1993* (Cth).

Two recent native title developments have caught my attention as potentially having particular relevance to the ACT. And they are:

- The Full Federal Court of Australia's decision in *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia [2023] FCAFC 75* and the High Court of Australia's pending decision in *Commonwealth of Australia v. Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors*, Case No. D5/2023; and
- the insertion of Section 47C into the *Native Title Act 1993* (Cth) by the Parliament in 2021.

***Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia [2023] FCAFC 75* and *Commonwealth of Australia v. Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors*, Case No. D5/2023**

In May 2023, the Full Court of the Federal Court of Australia delivered its judgement in the *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75. Also known as the Gove Compensation Claim. I would like to acknowledge that Mr Yunupingu was Chair of the Northern Land Council for about 25 years, and chaired the Yothu Yindi Foundation, which runs the annual Garma Festival.

This case is relevant to the ACT because there are several similarities in the historical circumstances between the Northern Territory and the ACT.

In November 2019, Mr Yunupingu lodged a native title claim and a compensation claim on behalf of the Gumatj Clan or Estate Group over a significant portion of the Gove Peninsula in north-east Arnhem Land in the Northern Territory (**Figure 3**). The claims include areas covered by the Special Minerals Lease over the mine, its operations, the refinery, and the port, and some parts of the Special Purpose Lease over the town of Nhulunbuy and the nearby Nhulunbuy Industrial Estate.

The claimants are seeking a determination of native title over the land in question and compensation 'for the alleged effects on native title of certain executive and legislative acts done after the Northern Territory became a territory of the Commonwealth in 1911, but prior to the coming into force of the *Northern Territory Self-Government Act 1978* (Cth)' (*Yunupingu,* [1]-[2]). All the alleged acts took place before the entry into force of the *Racial Discrimination Act 1975* (Cth) and were thus alleged to be 'past acts' as that term is employed in the *Native Title Act 1993* (Cth) (*Yunupingu,* [8], [40]).

Given the combined nature of these claims, they were considered by the Full Court of the Federal Court of Australia and a determination was made in May 2023 (*Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75).

The judgement reflects the arguments put by the parties and is highly technical and complex. I don't propose to provide a detailed summary, but I will draw out some of the points that I think will have implications for the ACT.

The matter is on appeal to the High Court of Australia (*Commonwealth of Australia v Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors* [2023]), and the High Court of Australia is due to bring down its judgement on 12 March 2025.

Court documents reveal that the ACT joined the appeal.

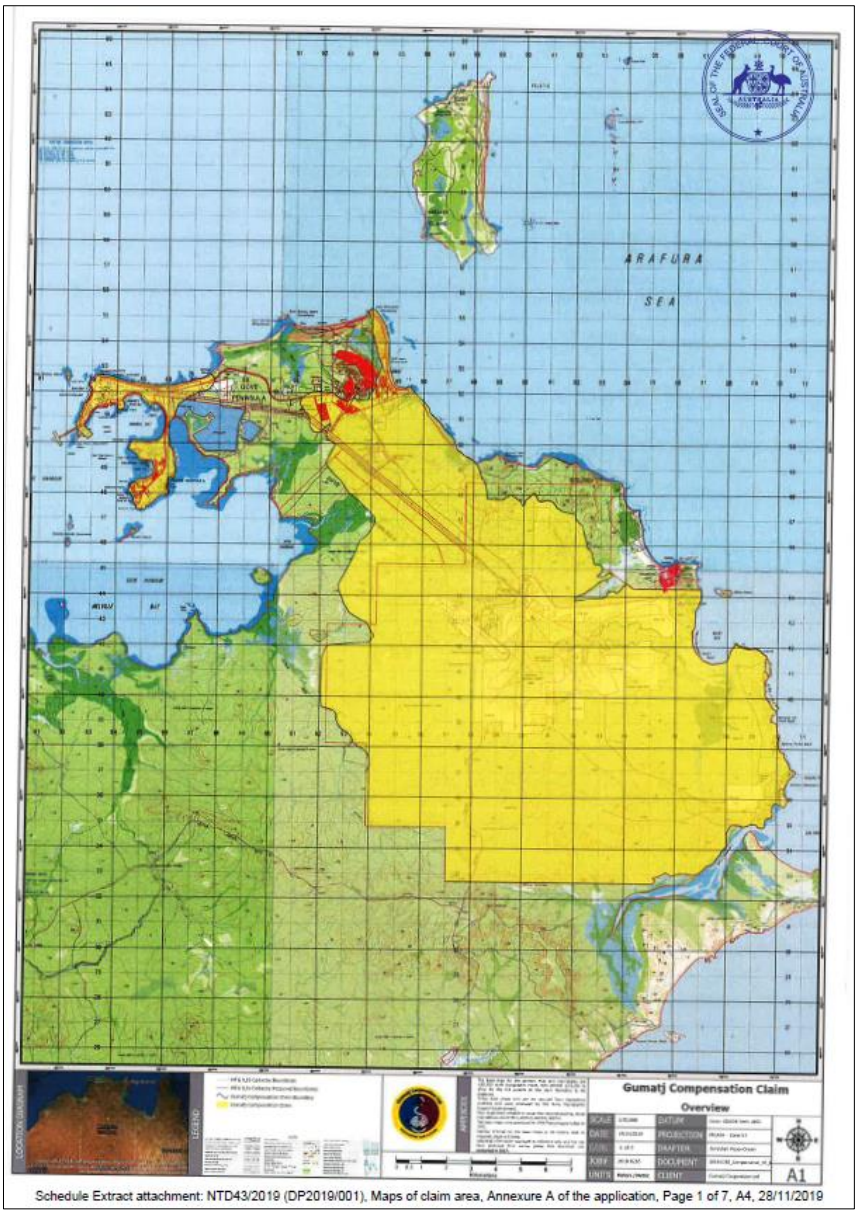

Figure 3: ***Galarrwuy Yunupingu (on behalf of the Gumatj Clan or Estate Group) v Commonwealth of Australia & Anor (Gove Compensation Claim) Schedule Extract attachment: Maps of claim area, Annexure A of the application, Page 1 of 7, A4, 28/11/2019 FCA: NTD43/2019. NNTT: DP2019/001.*** Source: NNTT Register of Native Title Claims.

The case focuses on the actions of the Commonwealth between 1911 when it took over responsibility from South Australia, and 1978 when the Commonwealth granted the people of the Northern Territory a form of self-government. This was the period when the Northern Territory was administered solely by the Commonwealth.

Mr Yunupingu, on behalf of Gumatj Clan, contended that, in the period from 1911 to 1978, a number of grants or legislative acts took place in the Territory which, if valid, would have been inconsistent with the continued existence of the claimants' non-exclusive native title rights, and would have extinguished those rights at common law – where the Mr Yunupingu contended that the grants or acts purported to effect an acquisition of property within the meaning of s 51(xxxi) of the Constitution, and that they did not provide just terms within the meaning of that provision.

The Commonwealth argued to the contrary and that the claim should fail on a number of bases. However, the Full Federal Court found in Mr Yunupingu's favour.

Others have discussed the many legal aspects of the case, but the one paragraph in the FCAFC's judgement is pertinent. Para 471 states:

> *"[471] Further, we do not accept the Commonwealth's contention that when it exercised sovereign power in the Northern Territory it did so not as a national government in a federal system; rather it was "essentially performing the role of a State (as is illustrated by the fact that, in the case of the Northern Territory, the Commonwealth "stepped into the shoes" of the South Australian government)". The NT Administration Act was an exercise of power under s 122 of the Constitution. It was subject to s 51(xxxi). There is a clear distinction between the kind of legislative power exercised over the Northern Territory as between the Commonwealth and South Australia."*

As Aaron Moss concludes in his commentary on the case (AusPubLaw 16 June 2023), the judgement raises serious issues of complex jurisprudence about the relationship between s.51(xxxi) and s.122 of the Constitution and 'also represents a full-throated defence of the sui generis' and 'enduring nature of native title rights and interests (Yunupingu [257]).

- s.51(xxxi) of the Constitution is about the acquisition of property on just terms by the Commonwealth.
- s.122 of the Constitution is about the government of the Territories by the Commonwealth.

In para 257 of the decision, the FCAFC notes that:

> "*the issues to be determined is whether it is a ratio decidendi of Wurridjal that s 51(xxxi) applies to acquisitions of property pursuant to laws made under s 122 of the Constitution. Specifically, the issue is whether Wurridjal overruled Teori Tau on that point. This is an issue of constitutional law of the highest significance*."

It is noted that the Full Federal Court upheld the decision in *Wurridjal v Commonwealth* (2009) HCA 2 that property in the Northern Territory, including First Nation interests in land, cannot be compulsory acquired without compensation on just terms.

A majority of the Justices in *Wurridjal v Commonwealth* [2009] HCA 2 overruled a previous decision of the High Court, *Teori Tau v The Commonwealth* [1969] HCA 62 which held that the just terms requirement in section 51(xxxi) did not apply to laws made by the Commonwealth for the governing of the territories.

Therefore, section 122 of the Constitution is subject to the just terms requirement in section 51(xxxi).

The Commonwealth and the Northern Territory appealed the Full Federal Court's decision to the High Court of Australia (HCA), and judgement in the case is scheduled to be delivered by the HCA on Wednesday 12 March 2025.[6]

The Commonwealth's primary concern is that the Full Federal Court's ruling, if it stands, extends back (in the case of the NT) the period for which compensation for extinguishment of native title by the grant of inconsistent interests would be payable from 1975 (when the RDA was passed) to 1911

[6] For Court papers, see https://www.hcourt.gov.au/cases/case_d5-2023

when the NT was transferred to the Commonwealth from South Australia. As the Commonwealth notes Para 3 of its submission:

> *"If the Full Court is correct, then for almost seven decades a vast but indeterminate number of grants of interests in land in the Territory would have been invalid. Further, upon the validation of those grants by the Native Title Act 1993 (Cth) (NTA), the Commonwealth would have become liable to pay compensation of a vast but presently unquantifiable amount (including interest, potentially going back to 1911). "*

The Commonwealth's three lines of argument are that:[7]

- First, the scope of S.51(xxxi) does not extend to laws solely supported by S.122 because the text and context of S.51(xxxi) shows it applies only to laws made by the Commonwealth when acting as the Commonwealth, not the Commonwealth acting as a territory (paras 12-19).
- Second, compensation does not attach to native title property rights *per se* but is only required due to the application of the *Racial Discrimination Act 1975* (Cth) enacted on 31 October that year (paras 57 to 59). The Commonwealth is relying on Justice Gummow's judgement in the *Newcrest* Case[8] (supported by Justices Toohey, Gaudron and Kirby):

  > *"that native title was inherently defeasible to the Crown granting new rights that were inconsistent with native title. When that occurred, there was no acquisition of property within the meaning of s 51(xxxi) because the extinguishment of native title upon that occurrence was something inherent in, and integral to, the property itself."*

- Third, that the Full Court erred in failing to find that the minerals reservation in the 1903 Lease issued under the *Northern Territory Crown Land Act 1890* (SA) constituted an assertion by the Crown of a right of exclusive possession in the minerals, which extinguished any native title mineral rights (paras 130-132). The Commonwealth argues (para 132), citing Justice Gageler AC (who is now the Chief Justice) in a 2016 case, that the reservation of minerals in the Crown Land Act:

  > *"had the consequence of creating rights of ownership in respect of the land in question, in the Crown" so that the Attorney General "would still have had the possession necessary to found an action for intrusion".*

While the legal arguments are indeed very technical and complex, I agree with Mike Dillon's assessment that these may be legitimate public policy positions for the Commonwealth to argue as they may be central to the overall 'grand bargain' that underlies the High Court's landmark decision in *Mabo (No. 2)*. But rather than ensuring public discussion of these important matters, the Commonwealth has framed its argument 'entirely as technical legal issues'. I also agree with Mike Dillon's observation that the Prime Minister may state that treaties are a matter for the States and Territories, the Prime Minister is 'seemingly oblivious to the fact that his Government is arguing against the recognition and compensation for Indigenous rights extinguished by Commonwealth executive action.'

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[7] As summarised by Dillon, M. (2024) 'The cult of forgetfulness: the Commonwealth submission in Yunupingu.' https://refragabledelusions.blogspot.com/2024/04/the-cult-of-forgetfulness-commonwealth.html

[8] *Newcrest Mining (WA) Ltd v BHP Minerals Ltd & Commonwealth* [1997] HCA 38; 190 CLR 513.

Dillon concludes:

> *"The Commonwealth submission in Yunupingu, and its presentation, reflects more than it intends: it is simultaneously a sophisticated legal argument, a study in bureaucratic caution and conservatism, a reflection of political timorousness and timidity, not to mention short-sightedness, and irrefutable proof that the nation's cult of forgetfulness continues to permeate our public policymaking and our political institutions."*

As the Commonwealth was solely responsible for the administration of the ACT from 2011 to 1989, the outcome of *Commonwealth of Australia v. Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors*, Case No. D5/2023 by the High Court could have significant ramifications for the ACT.

That's why I asked the questions earlier about what happened to the Crown land from 1911 to the present:

- What parts of the ACT were Crown land in 1911?
- How much of that land is still Crown land?
- If it is no longer Crown land, what forms of tenure have been issued over the land and when were they issued?
- How much of that Crown land was 'affected'[9] prior to self-government for the Territory in 1989, and how much of it was 'affected' prior to 31 October 1975?
- And, how much of that land is included in Namadgi National Park or other conservation reserves?

These questions will need to be explored further if the High Court of Australia upholds the FCAFC's decision in *Yunupingu v the Commonwealth* [2023].

What is concerning is that the ACT Government joined with the Commonwealth in appealing the Full Federal Court's decision. While it did not support the Commonwealth on the first ground, it did join with the Commonwealth on grounds two and three.

Successive ACT Governments have long held the view that native title no longer exists in the ACT, largely due to its tenure history. As I stated in my Discussion Paper of March 2021, this position is highly contestable on many grounds.

The question arises therefore, why did the ACT Government join the Commonwealth and the Northern Territory Governments in appealing the Full Federal Court's decision in *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75?

It is also fair and reasonable to ask whether the ACT Government's hypocrisy is on full display, given its stated policy of reconciliation and healing?

The relevance of s.47C of the *Native Title Act 1993* (Cth) to the ACT disregarding prior extinguishment in National Parks and conservation reserves

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)[10] that enable prior extinguishment

[9] The term 'affect' is defined in s.227 of the *Native Title Act 1993* (Cth) as follows: 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.

[10] S.47 relates to pastoral leases held by native title claimants. S.47A relates to reserves etc. expressly held for the benefit of, or is held on trust, or reserved, expressly for the benefit of Aboriginal peoples or Torres Strait Islanders and when the claim is made, one or more members of the native title claim group occupy the area. S.47B relates to

of native title to be disregarded in certain circumstances, including over reserves set aside for Aboriginal and Torres Strait Islander peoples, pastoral leases held by Traditional Owners and unallocated Crown land. These provisions apply automatically, they do not have to be agreed between the parties to a native title claim.

In February 2021, the Parliament of Australia passed the *Native Title Legislation Amendment Bill 2021* (Cth).

A new s.47C was inserted which 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 or reservation areas, by agreement between the native title party and the relevant government (Commonwealth, state or territory).

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.

The Explanatory Memorandum comments as follows:

> *The insertion of new section 47C recognises the cultural significance that national parks and reserves hold for many native title holders and is strongly supported by Indigenous stakeholders. Many native title holders maintain traditional connections to areas covered by national, state and territory parks, and the exercise of native title rights would generally not interfere or be inconsistent with the protection of these areas – for example, rights to carry out ceremonies or to be buried on country*.

Unlike other provisions providing for the disregarding of historical extinguishment, the government concerned and the native title [parties must come to an agreement, in writing, that s.47C should operate in re4lation to the area, and notice of the proposed agreement must have been given in the local area, and interested persons must have been given at least three months to comment.

There is a precedent here. In *Ward, on behalf of the Pila Nature Reserve Traditional Owners v State of Western Australia* [2022] FCA 689, a consent determination was reached recognising native title to the Pila (Gibson Desert) Nature Reserve, where previously an application for compensation had been discontinued on account of extinguishment by a prior interest.

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.

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 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.

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vacant Crown land and when the claim is made one or more members of the claim group occupy the area. These three provisions apply automatically of the circumstances are in accordance with the relevant provision.

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 – the Hills, Ridges and Buffer Spaces, River Corridors and Mountains and Bushlands in the ACT as defined in the National Capital Plan. Potentially somewhere between 60-70% of the ACT.

Of course, this requires an agreement between the relevant parties before a native title claim for a consent determination can be made to the Federal Court. The scope is there in the NTA, it just requires the good will of the parties to reach such an agreement.

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.

But as Kevin Smith, the President of the National Native Title Tribunal, stated in his presentation to the Symposium, it depends on a number of factors falling into place. And for which there is still a very long way to go. I think such an outcome is achievable, it just needs some leadership. Leadership that is sadly lacking in the ACT at the present time.

Figure 4: Aboriginal Tent Embassy, Canberra. Photo: Ed Wensing 2019.

Concluding Remarks

The current land rights / native title situation in the ACT is untenable.

After all, Canberra is the Nation's Capital. The site of many of the protests and street marches of the 1960s, 70s and 80s that resulted in the various statutory Aboriginal and Torres Strait Islander land rights schemes in most of the other jurisdictions in Australia. Canberra is also the site of the Aboriginal Tent Embassy, the longest continuing protest for Indigenous land rights, sovereignty and self-determination in the World (52 years).

Australia has signed a number of United Nations conventions, covenants and declarations that commits Australia to protecting and promoting all human rights, including the UN *Declaration on the Rights of Indigenous Peoples*.

Australia has a suite of equal opportunity and anti-discrimination laws in place at both Commonwealth and State/Territory levels. Our human rights are not protected through one or two particular statutes. It is a patchwork legal framework of human rights protections. Rights that are protected, are scattered in different pieces of legislation, the Constitution and the common law. It is piecemeal and incoherent. Often, they overlap and prohibit the same kinds of discrimination, or there are gaps, exemptions or exceptions which are not always uniform. In practice, it is a complex miasma to navigate, and careful due diligence is required to ensure full compliance with both Commonwealth and State or Territory laws.

Three jurisdictions have enacted a Human Rights Act. They are the Australian Capital Territory (ACT), Victoria and Queensland. And they each contain particular provisions for the protection of the human rights the Aboriginal and Torres Strait Islander peoples of Australia.

The *Human Rights Act 2004* (ACT) (ACT Human Rights Act) was introduced first, setting out key rights from the *International Covenant on Civil and Political Rights* (ICCPR, adopted by the United Nations in 1966). The ACT's Human Rights Act influenced the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Charter), and the *Human Rights Act 2019* (Qld) (Queensland Human Rights Act) was influenced by both ACT and Victorian models.

The ACT's *Human Rights Act* recognises a range of civil, political, economic, social, and cultural rights; it requires that all legislation be assessed for compatibility with those rights; and that all public authorities have obligations to give them proper consideration when making decisions.

The ACT Human Rights Act was reviewed and amended in 2014 to insert additional provisions to protect the distinct cultural rights of Aboriginal and Torres Strait Islander peoples. The Act includes specific references to Articles 25 and 31 of the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) which Australia endorsed in 2009. The Human Rights Act in Victoria and Queensland do not cite the Articles in UNDRIP.

The 2014 amendments to the Act also included a change to the Preamble to change the reference to the special significance of rights from 'indigenous people' to 'Aboriginal and Torres Strait Islander peoples'. This subtle change was important because it recognised that Aboriginal and Torres Strait Islander peoples should not be represented as a homogenous group with a uniform cultural heritage and identity, but rather should be acknowledged and recognised as being a diverse group of peoples with differing histories, aspirations and relationships.

What makes the ACT *Human Rights Act 2004* (ACT) interesting is section 31. Under s.31 of the Act, international law and the judgments of foreign and international courts and tribunals relevant to a human right may be considered in interpreting a human right in the ACT.

The definition of 'international law' in the Dictionary in the ACT *Human Rights Act 2004*, states that it includes:

a) the *International Covenant on Civil and Political Rights* and other human rights treaties to which Australia is a party; and
b) general comments and views of the UN human rights treaty monitoring bodies; and
c) declarations and standards adopted by the UN General Assembly that are relevant to human rights (including the UN *Declaration on the Rights of Indigenous Peoples*).

In doing so, the following matters must be taken into account:

a) the desirability of being able to rely on the ordinary meaning of the *Human Rights Act 2004* (ACT), having regard to its purpose and its provisions read in the context of the Act as a whole;
b) the undesirability of prolonging proceedings without compensating advantage;
c) the accessibility of the material to the public.

Similar provisions exist in the Victorian and Queensland statutes, but not stated as eloquently as in the ACT statute.

If I may be permitted to express a few final words of advice, it is this:

- All interested parties in the Aboriginal land rights/native title matters need to stop bringing longstanding prejudices to the table. It is unhelpful. It is incumbent on the parties to bring a more positive and conciliatory frame of mind to the table.

- What would be more helpful, is for governments to make a clear distinction between:

  A) dealing with the Aboriginal Traditional Owners of the ACT as having inherent and custodial responsibilities arising from their connections to, and responsibilities for their ancestral Country under their law and custom, and

  B) the need to work harder on closing the gap in Indigenous disadvantage that is endured by most if not all Aboriginal and Torres Strait Islander peoples in the ACT, regardless of where they are from.

- These are two very different responsibilities that must be addressed separately.

- And finally, there must be unanimous agreement between the different political parties that these issues are not a football for cheap political point scoring at any time in the ACT's political cycle. Such practices are nothing but destructive and distracting from better outcomes.

Some final thoughts:

- What are we trying to do here?

- We are trying to recognise the fact that the Aboriginal peoples were here before us and that they are still here now. They will always be here. Afterall, this is their Country.

- The Aboriginal peoples of Australia have been saying for some time, they never ceded their sovereignty, as the sign on the back of the former Redfern Gym makes so obvious.

- Aboriginal people are not only citizens of Australia, they are also citizens of their own communities and their Nation.

- The key challenge is how we recognise their citizenship, their political authority over their own affairs, including over their land and waters.

The concepts of recognition, sovereignty and citizenship are deeply intertwined. Perhaps these issues could be explored in more detail in a future symposium.

Figure 5: 'Sovereignty Never Ceded' Redfern Gym. Photo: Ed Wensing, 2014.

APPENDIX A: Details of previous native title determination applications over the ACT and Surrounds

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.