



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA  
DARWIN REGISTRY**

**No D5 of 2023**

**BETWEEN:**

**COMMONWEALTH OF AUSTRALIA**

Appellant

and

**YUNUPINGU ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP**

First Respondent and others named in the Schedule

**OUTLINE OF ORAL SUBMISSIONS OF  
THE ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY  
(INTERVENING)**

## **PART I: INTERNET PUBLICATION**

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1. This outline of oral submissions is in a form suitable for publication on the internet.

## **PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**

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### **Ground 1: Construction of s 51(xxxi) and s 122**

#### **(1) Application of s 51(xxxi) to the territories**

2. The absence of a reference to “any territory” in s 51(xxxi) is not inimical to the application of the provision to the territories (ACT [42]).

#### **(2) Flexibility in s 122 necessary to govern the territories**

3. The breadth of the power in s 122 is not an end in itself. This is evident by the fact that the scope of s 122 “may be qualified by other provisions in the Constitution”:

*Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 271-272, per Brennan, Deane and Toohey JJ: **JBA Vol 5 Tab 65**

4. The notion of just terms is not incompatible with the nature of the power arising under s 122, nor would the application of the constitutional guarantee in s 51(xxxi) render meaningless the use and operation of that power (ACT [15], [23]).

- a. This is demonstrated by the Commonwealth’s legislative practice in the territories (ACT [23]).

*Northern Territory (Self-Government) Act 1978* (Cth), s 50;  
*Australian Capital Territory (Self-Government) Act 1988* (Cth), s 23(1)(a):  
**JBA Vol 2 Tab 14; Vol 2 Tab 5**

- b. This legislative practice undermines the Commonwealth’s argument that the application of the constraint in s 51(xxxi) would be “to the detriment of the development of the territories” (CR [4]).
- c. Insofar as it chose to legislate with respect to the acquisition of property, the relevant power attracted the constitutional guarantee in s 51(xxxi). The Commonwealth was not otherwise required to legislate for just terms.

#### **(3) Distinction between internal and external territories**

5. There is no basis on which to distinguish between internal and external territories for the purposes of answering Ground 1 (CR [16]).

**(4) Application of s 51(xxix) to external territories: the result of *Newcrest***

6. The consequence of the decision in *Newcrest* (**JBA Vol 12 Tab 95**), which the Commonwealth embraces, is that laws supported by the heads of power in s 51 will be conditioned by the just terms requirement even if they are also supported by s 122.
7. Laws with respect to (at least some) external territories will fall within the ambit of the external affairs power in s 51(xxix), either as a matter of ‘geographic externality’ or otherwise (ACT [26]), e.g., *Antarctic Treaty Act 1960* (Cth).
8. The cases relied upon by the Commonwealth at CR [18] do not support the proposition that: (a) the external affairs power does not apply to laws made with respect to external territories *after* their acceptance or acquisition by the Commonwealth; or (b) external territories have been treated as part of the territory of the nation state of Australia for the purpose of the external affairs power.
9. The application of the external affairs power to external territories: (a) dilutes the purposive appeal of the Commonwealth’s proposition that the objective of the framers was to confer flexibility on Parliament under s 122 such as to exclude the constitutional guarantee in s 51(xxxi) (CR [2]); and (b) undermines the Commonwealth’s argument that it would be incongruous for s 51(xxxi) to apply to s 122 (CR [5]).

Dated: 9 August 2024



Peter Garrison

Houda Younan

Louise Coleman

**IN THE HIGH COURT OF AUSTRALIA  
DARWIN REGISTRY**

**No D5 of 2023**

**SCHEDULE**

**Northern Territory of Australia**  
Second Respondent

**East Arnhem Regional Council**  
Third Respondent

**Layilayi Burarrwanga**  
Fourth Respondent

**Milminyina Valerie Dhamarrandji**  
Fifth Respondent

**Lipaki Jenny Dhamarrandji (nee Burarrwanga)**  
Sixth Respondent

**Bandinga Wirrpanda (nee Gumana)**  
Seventh Respondent

**Genda Donald Malcolm Campbell**  
Eighth Respondent

**Naypirri Billy Gumana**  
Ninth Respondent

**Maratja Alan Dhamarrandji**  
Tenth Respondent

**Rilmuwurr Rosina Dhamarrandji**

Twelfth Respondent

**Wurawuy Jerome Dhamarrandji**

Thirteenth Respondent

**Manydjarri Wilson Ganambarr**

Fourteenth Respondent

**Wankal Djiniyini Gondarra**

Fifteenth Respondent

**Marrpalawuy Marika (nee Gumana)**

Sixteenth Respondent

**Guwanbal Jason Gurruwiwi**

Eighteenth Respondent

**Gambarrak Kevin Mununggurr**

Nineteenth Respondent

**Dongga Mununggurritj**

Twentieth Respondent

**Gawura John Wanambi**

Twenty First Respondent

**Mangutu Bruce Wangurra**

Twenty Second Respondent

**Gayili Banunyndji Julie Marika (nee Yunupingu)**

Twenty Third Respondent

**Bakamumu Alan Marika**

Twenty Fifth Respondent

**Wanyubi Marika**

Twenty Sixth Respondent

**Wurrulnga Mandaka Gilngilngma Marika**

Twenty Seventh Respondent

**Witiyana Matpupuyngu Marika**

Twenty Eighth Respondent

**Northern Land Council**

Twenty Ninth Respondent

**Swiss Aluminium Australia Limited (ACN 008 589 099)**

Thirtieth Respondent

**Telstra Corporation Limited (ABN 33 051 775 556)**

Thirty First Respondent

**Arnhem Land Aboriginal Land Trust**

Thirty Second Respondent

**Amplitel Pty Ltd**

Thirty Third Respondent

**Attorney-General for the State of Queensland**

Thirty Fourth Respondent