HIGH COURT OF AUSTRALIA

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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

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

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General of the Australian Capital Territory (**ACT**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth):

   (a) with respect to the first ground of appeal, in support of the position of the First Respondent; and

   (b) with respect to the second and third grounds of appeal, in support of the position of the Appellant (**Commonwealth**).

PART III: LEAVE TO INTERVENE

3. Not applicable.

PART IV: ARGUMENT

GROUND 1: SECTION 122 OF THE CONSTITUTION

A. Summary

4. A majority of this Court held in ***Wurridjal*** *v Commonwealth* (2009) 237 CLR 309 that s 51(xxxi) operates to qualify laws made under s 122, and that the decision to the contrary in ***Teori Tau*** *v Commonwealth* (1969) 119 CLR 564 should be overruled. In

so doing, the Court rejected each of the arguments that the Commonwealth seeks to resuscitate in this appeal, in compelling and carefully reasoned judgments.

5. The Full Court was therefore correct to find that *Wurridjal* provides a complete answer to the question of constitutional law underpinning ground 1 of this appeal: *Yunupingu v Commonwealth* (2023) 298 FCR 160 (**J**) (**CAB 22-169**). The Commonwealth advances no good reason for re-opening *Wurridjal*, and leave to do so should be refused.

6. Alternatively, if *Teori Tau* remains good law, then it should be re-opened and overruled. That was the conclusion reached in *Wurridjal* by French CJ, Gummow and Hayne JJ, and Kirby J; their Honours' conclusions were plainly correct. Previously, three members of the majority in ***Newcrest*** *Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 likewise held that *Teori Tau* should be overruled,[1] while the fourth member of the majority held that it should be substantially qualified.[2] For this Court now to "preserve the authority of *Teori Tau* would be to maintain what was an error in basic constitutional principle and to preserve what subsequent events have rendered an anomaly".[3]

7. Ground 1 should therefore be dismissed.

8. While the precedential status of *Wurridjal* is logically the threshold issue arising for consideration in respect of ground 1, it is convenient to deal first with the proper construction of ss 51(xxxi) and 122 *inter se* (at [9]-[45]) before addressing the *ratio* in *Wurridjal* (at [46]-[50]) and any re-opening of *Wurridjal* and *Teori Tau* (at [51]-[64]). That approach best avoids repetition, while serving to orient the reasoning and conclusions in *Wurridjal* within their jurisprudential framework.

B. The relationship between ss 51(xxxi) and 122

B.1 Principles of construction

9. Section 51(xxxi) of the Constitution provides that the Commonwealth Parliament has power to make laws with respect to "the acquisition of property on just terms from any

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1 *Newcrest* at 565 (Gaudron J), 614 (Gummow J) and 661 (Kirby J).

2 *Newcrest* at 561 (Toohey J).

3 *Wurridjal* at [189] (Gummow and Hayne JJ), [287] (Kirby J).

State or person for any purpose in respect of which the Parliament has power to make laws".

10. Section 51(xxxi) has a dual effect.[4] *First*, it confers power to acquire property from any State or person for any purpose for which the Parliament has power to make laws, and it conditions the exercise of that power by requiring that it be on just terms. *Secondly*, by an implication required to make the condition of just terms effective, it "abstracts" the power to support a law for the compulsory acquisition of property (without just terms) from any other legislative power reposed in the Parliament.

11. Section 122 reposes another legislative power in the Parliament. That section is headed "Government of territories", and provides that:

> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

12. Whether or not s 51(xxxi) "abstracts from" the power conferred by s 122 is a question of construction to be resolved by reference to the text and purpose of the Constitution as a whole;[5] so much is common ground (Appellant's submissions filed 28 March 2024 (**CS**) at **[32]**). Three overarching principles of interpretation assume particular significance in approaching that task.

13. *First*, s 122 cannot be segregated or disjoined from the balance of the Constitution by reason of its location in Chapter VI (or otherwise).[6] It "would be erroneous to construe s 122 as though it stood isolated from other provisions of the Constitution which might qualify its scope".[7] Rather, s 122 must be interpreted in a manner that treats the Constitution as one coherent instrument for the government of the federation, and not as *two* constitutions — one for the federation and the other for its territories.[8]

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4 ***Mutual Pools*** *and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 177 (Brennan J), 185 (Deane and Gaudron JJ), 200 (Dawson and Toohey JJ); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J).

5 ***Spratt*** *v Hermes* (1965) 114 CLR 226 at 242 (Barwick CJ).

6 *Spratt* at 246 (Barwick CJ); *Newcrest* at 606 (Gummow J; Gaudron J agreeing at 561, 565).

7 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 1]* (1992) 177 CLR 248 at 272 (Brennan, Deane and Toohey JJ), quoted with approval in *Newcrest* at 604 (Gummow J; Gaudron J agreeing at 561, 565) and *Wurridjal* at [58] (French CJ).

8 ***Lamshed*** *v Lake* (1958) 99 CLR 132 at 154 (Kitto J); *Spratt* at 278 (Windeyer J).

Statements in the authorities to the effect that s 122 embodies a "disparate and non-federal matter"[9] no longer reflect this Court's articulation of the operation of s 122 within the broader constitutional framework.[10] Though the Commonwealth purports to disclaim any reliance upon the "defunct disparate theory" of s 122 (**CS [32]**), in substance, that theory supplies the justification for much of the Commonwealth's argument on this ground.

14. *Secondly*, s 51(xxxi) has been described as "a provision of a fundamental character"[11] and "a very great constitutional safeguard"[12] bearing the status of a "constitutional guarantee".[13] In recognition of that particular status, s 51(xxxi) is to be construed "as liberally as [its] terms allow".[14] Conspicuously, neither the status of s 51(xxxi) nor the corresponding approach to construction finds expression in the submissions of the Commonwealth which, to the contrary, urge an approach that would afford pre-eminence — and a tendentious flexibility — to s 122 (e.g. **CS [33], [41]**).

15. *Thirdly*, it is a well-accepted principle of interpretation that, where a power is conferred and some safeguard, qualification or restriction is attached to its exercise (such as, here, the "just terms" requirement), other powers should be construed — absent an indication of contrary intention — so as *not* to authorise an exercise of the power free from its attendant qualification or restriction.[15] A contrary intention may be discerned in the express terms of the relevant power, or in its subject-matter.[16] For instance, laws for the levying of taxation, imposition of fines, exaction of penalties or forfeitures, or

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9 *Newcrest* at 538 (Brennan CJ), 550 (Dawson J).

10 *Lamshed* at 154 (Kitto J); CS [31]; ***Vunilagi*** *v The Queen* (2023) 97 ALJR 627 at [96]-[97] (Gordon and Steward JJ), [177] (Edelman J).

11 *Mutual Pools* at 168 (Mason CJ).

12 *Wurridjal* at [178] (Gummow and Hayne JJ).

13 *Mutual Pools* at 168, 172 (Mason CJ), 180 (Brennan J), 184 (Deane and Gaudron JJ), 223 (McHugh J); *Newcrest* at 568 (Gaudron J), 595 (Gummow J; Gaudron J agreeing at 561, 565); *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

14 *Newcrest* at 568 (Gaudron J).

15 *Mutual Pools* at 169 (Mason CJ), citing *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-372 (Dixon CJ, with whom the other members of the Court agreed); *Wurridjal* at [75] (French CJ); ***Nintendo*** *Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

16 *Mutual Pools* at 169-170 (Mason CJ); *Nintendo* at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Newcrest* at 519 (Gummow J; Gaudron J agreeing at 561, 565).

enforcement of a statutory lien are typically said to be "inconsistent" or "incongruous" with the notion of just terms so as to manifest the requisite contrary intention.[17]

16. The principle of construction identified at [15] is the very medium through which s 51(xxxi) operates indirectly to reduce the content of other grants of legislative power;[18] it necessarily informs the interaction between ss 51(xxxi) and 122.[19] Again, the Commonwealth pays little heed to it (cf. **CS [45]**).

17. The consequence of those principles is that, subject to any indication of a contrary intention, s 122 does not authorise the making of a law with respect to the acquisition of property for any relevant purpose otherwise than on just terms. It is wrong to proceed from the analytical premise that s 122 prevails unless and until a contrary intention can be identified (cf. **CS [33]**). The question crystallised by the above principles is whether the *prima facie* application of s 51(xxxi) yields to a contrary intention manifest in the Constitution; or, as Gummow J put it in *Newcrest*, "whether there is either expressed or made manifest by the words or content of the grant of power in s 122 sufficient reason to deny the operation of the constitutional guarantee in par (xxxi)" (at 600). In short, "[t]here is none" (ibid).

B.2 Section 51(xxxi) is not contraindicated

18. The Commonwealth's approach to the relationship between ss 51(xxxi) and 122 rests on what it describes as "three clear indications in the scheme of the Constitution that s 51(xxxi) does not abstract from s 122": **CS [45]**. None of the three matters relied upon by the Commonwealth warrants that description, individually or cumulatively. The three purported contraindications underpinning the Commonwealth's case are addressed in turn below, before dealing with the broader constructional considerations which stand firmly against the Commonwealth's preferred interpretation.

(a) "subject to this Constitution"

19. The *first* asserted indication upon which the Commonwealth relies is the presence of the words "subject to this Constitution" in the chapeau to s 51, and their absence from

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[17] *Theophanous v Commonwealth* (2006) 225 CLR 101 at [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ), quoted in *Attorney-General (NT) v* ***Emmerson*** (2014) 253 CLR 393 at [77] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[18] *Nintendo* at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[19] *Wurridjal* at [75] (French CJ), [185] (Gummow and Hayne JJ).

s 122: **CS [46]**. For present purposes, this textual feature is of little consequence. As Gummow J explained in *Newcrest*, s 51 would operate "subject to" the other prohibitions in the Constitution without the "confirmatory warning" in the chapeau itself.[20] That explanation draws attention to the limitations on power operating in other provisions of the Constitution. It is not apparent why the specific stipulation in s 51(xxxi) should cede to s 122, when it is beyond doubt that s 122 is in fact "subject to" other aspects of the Constitution even without the inclusion of an express phrase to that effect; thus, s 122 is itself subject to limitations arising from s 90, s 92, Ch III and the implied freedom of political communication: see Second Respondent's submissions dated 15 April 2024 (**NTS**) at **[26]**. Section 122 is no less susceptible to the operation of s 51(xxxi). The operation of s 96 is illustrative; that provision is not expressed to be "subject to this Constitution", but it has nonetheless been held to be subject to s 51(xxxi).[21] The presence or absence of the expression upon which the Commonwealth relies is therefore "superfluous"[22] in view of the "basic proposition"[23] accepted by all parties to this proceeding, namely, that s 122 must be read with other provisions in the Constitution.

(b) Nature of the s 122 power, and potential burdens

20. The *second* asserted indication is said by the Commonwealth to lie in the "wide and complete" character of the power conferred by s 122, the absence of concurrent State legislative power (in contrast to the s 51 heads of power), and the "financial and practical burden" that a just terms requirement would place on the Commonwealth: **CS [47]**. While the breadth of s 122 may be accepted, the import of that consideration loses any real force once it is recognised that s 122 is "not without limits upon the laws it authorises".[24] Some of those limits are canvassed at [19] above. As Barwick CJ explained in *Spratt*, s 122 is "as large and universal a power of legislation as can be granted … But this does not mean that the power is not controlled in any respect by other parts of the Constitution".[25]

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[20] *Newcrest* at 606 (Gummow J; Gaudron J agreeing at 561, 565).

[21] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [46] (French CJ, Gummow and Crennan JJ), [174] (Heydon J).

[22] *Newcrest* at 653 (Kirby J).

[23] *Newcrest* at 597 (Gummow J; Gaudron J agreeing at 561, 565).

[24] *Newcrest* at 605 (Gummow J; Gaudron J agreeing at 561, 565).

[25] *Spratt* at 242 (Barwick CJ).

21. For the same reason, recourse to the so-called "plenary" nature of s 122 (**CS [15]**, **[31]**) does not answer the question of construction: the grants in s 51 are "plenary" in a confined way despite being subject to the limitation arising from s 51(xxxi), and there is no logical reason why s 122 should be considered any the less "plenary" in nature if the constitutional guarantee is also applicable to laws made under that head of power.[26] Further, s 122 is not the sole source of power to legislate with respect to a territory,[27] so to brand the power "complete" is apt to mislead: **CS [30]**, **[47]**. The width of the power conferred by s 122 therefore does not of itself contra-indicate the operation of s 51(xxxi).

22. In that respect, the Commonwealth places considerable reliance upon the flexibility that s 122 seeks to afford it in the "governance of a diverse range of territories", and contends (albeit in vague terms) that this flexibility would be "significantly reduce[d]" by the application of the just terms requirement: **CS [19], [23], [25], [27], [33], [41], [47]**. Those concerns are misplaced. In truth, the Commonwealth has (and will have) the same power to acquire property, notwithstanding the operation of s 51(xxxi) upon laws made under s 122. However, that power will be conditioned by the constitutional guarantee of just terms: see also **NTS [41]**; submissions of the Twenty-Fifth to Twenty-Eighth Respondents (the **Rirratjingu Parties**) dated 27 May 2024 (**RPS**) at **[114]-[116]**. Whether the application of the constitutional guarantee will have a significant impact on the Commonwealth's exercise of that power, and one rising beyond inconvenience, is a matter of speculation. In any event, it does not suffice as a contraindication to s 51(xxxi).

23. The Commonwealth does not contend (nor could it) that the notion of just terms is incompatible with, or antithetical to, the nature of the power arising under s 122 so as to manifest the requisite intention to displace the operation of s 51(xxxi) (cf. **CS [16], [19], [41]**). It does not contend (nor could it) that the application of s 51(xxxi) would "render meaningless the legitimate use and operation of" the power conferred by s 122.[28] Any contentions to that effect are belied by the Commonwealth's legislative practice. Thus, upon its acceptance of the Northern Territory in 1911, Parliament made express provision for compensation to any person from whom the Commonwealth

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[26] *Newcrest* at 605 (Gummow J; Gaudron J agreeing at 561, 565); *Wurridjal* at [55] (French CJ).

[27] *Newcrest* at 610-611 (Gummow J; Gaudron J agreeing at 561, 565).

[28] *Mutual Pools* at 219 (McHugh J); see also 180 (Brennan J).

acquired land in the Territory.[29] It later conferred self-government on the Northern Territory with a just terms guarantee analogous to s 51(xxxi).[30] The same approach was taken in the conferral of self-government upon the ACT.[31] Plainly, there is nothing inherent in the nature of the power conferred by s 122 that is inconsistent with the provision of just terms.

24. Complaints regarding the asserted "financial and practical burden" that this would place on the Commonwealth (**CS [47]**) must be evaluated by reference to the status of s 51(xxxi) as a constitutional guarantee, and in accordance with the liberal construction that is appropriate to that status: see [14] above. The Commonwealth does not explain the manner in which this guarantee "may deter development of the territories" (**CS [47]**). There is nothing to support such an extravagant assertion. If, upon its proper construction, that constitutional guarantee protects individuals within the territories from being deprived involuntarily of their property without just compensation, the asserted "burden" is the constitutional price for that deprivation, and an intentional deterrent. It does not rise to the level of inconsistency, incompatibility or denuding of meaningful content with respect to s 122 so as to contra-indicate the operation of s 51(xxxi).

25. So much is underscored by the position in respect of *external* territories as a result of the decision in *Newcrest*, which decision the Commonwealth embraces: **CS [18]**. The result of *Newcrest* is that s 51(xxxi) limits the legislative power of the Commonwealth where property is compulsorily acquired under a law which has two purposes, *one* of which falls within a head of power in s 51 and the *other* of which falls within s 122.[32] Many of the powers in s 51 are susceptible of exercise in respect of matters and things in or connected with the territories, and s 51(xxxi) will apply to those powers.[33] Thus, Toohey J considered it "almost inevitable" that any acquisition of property would attract the operation of s 51(xxxi) following *Newcrest*.[34]

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29 *Northern Territory (Administration) Act 1910* (Cth) s 9.

30 *Northern Territory (Self-Government) Act 1978* (Cth) s 50(2); see **NTS [45]**.

31 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a), (2); see *Newcrest* at 594 (Gummow J; Gaudron J agreeing at 561, 565).

32 *Newcrest* at 560-561 (Toohey J), 568-569 (Gaudron J), 614 (Gummow J), 661 (Kirby J).

33 *Newcrest* at 601 (Gummow J; Gaudron J agreeing at 561, 565).

34 *Newcrest* at 561 (Toohey J).

26. Significantly for present purposes, laws with respect to at least some external territories will fall within the ambit of the external affairs power in s 51(xxix) on the basis that those laws concern matters that are geographically external to Australia.[35] The consequence of *Newcrest* is that such laws will be conditioned by the just terms requirement in s 51(xxxi). The Commonwealth's core contention with respect to ground 1 is that the objective of the framers, to confer flexibility on Parliament to "accommodate the potentially diverse group of territories under its control", would be undermined if the constitutional guarantee applied to laws made under s 122 (e.g. **CS [19], [25], [41]**). The purposive appeal of that proposition is substantially diluted once it is recognised that the constitutional guarantee *does* apply to those territories where the greatest need for such flexibility might be thought to arise.

27. The Commonwealth is wrong to contend that both the reasoning and the result in *Newcrest* left undisturbed the authority of *Teori Tau* with respect to a law supported only by s 122 (**CS [39]**). *Teori Tau* did not purport to rest on any distinction between laws that were supported solely or concurrently by s 122. The central reasoning in *Teori Tau* was that s 122 is "plenary in quality" and cannot be limited or qualified by s 51(xxxi) "or, for that matter, any other paragraph of that section".[36] The *ratio* of *Newcrest* (identified at [25] above) is irreconcilable with that core reasoning. The effect of the *ratio* in *Newcrest* is to overrule both the logic *and* the result in *Teori Tau*. Thus, *Teori Tau* concerned acquisitions of property pursuant to a Commonwealth law with respect to an external territory, which law could be supported not only by s 122 but by the external affairs power in s 51(xxix). The consequence of *Newcrest* is that such a law is properly conditioned by the just terms requirement.

28. The position arising from *Newcrest* (which the Commonwealth adopts in this proceeding) is now superseded by the majority reasons in *Wurridjal*. Nevertheless, it substantially undermines the Commonwealth's position that a law supported by s 122, with its flexibility and plenary character, does not engage s 51(xxxi). That is because, in light of *Newcrest*, the just terms requirement is not disengaged by the mere circumstance that s 122 is engaged: see [25] above.

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[35] See **RPS [88]-[89]**; Submissions of the Twenty-Ninth and Thirty-Second Respondents (**NLCS**) at [24].

[36] *Teori Tau* at 570 (the Court) (emphasis added).

29. To that end, the express predicate for the Commonwealth's argument with respect to ground 1 is that the impugned laws in this proceeding were enacted "wholly" or "solely" under s 122: e.g. **CS [4], [22], [44]**. That premise is indispensable to the logic of the Commonwealth's argument in light of its endorsement of *Newcrest*, but the Commonwealth has made no attempt to substantiate it. The Full Court did not need to rule on that issue (**J [49], [279]; CAB 50, 112**), but it is — at the very least — a predicate that is open to serious doubt: see **RPS [122]-[126]**; **NLCS [30]-[39]**.

(c) Asserted anomalies

30. The *third* asserted indication that s 51(xxxi) does not abstract from s 122 is said by the Commonwealth to be the "anomalous" result that this produces, in circumstances where there is no equivalent constraint upon the legislative power of the States: **CS [48]**. But there is no anomaly at all in the posited result. The Commonwealth's submission depends upon the flawed premise that when the Parliament "acts solely as the legislature for a territory, s 51(xxxi) has no role" because Parliament in that circumstance stands in an equivalent position to a State Parliament (**CS [17], [29], [48]**). That characterisation of the power conferred by s 122 was emphatically rejected in *Lamshed*.[37]

31. The "Commonwealth" to which s 122 makes reference is the polity established by the Constitution, and the "authority" invoked by that provision is the full legal authority it possesses under the Constitution.[38] The Parliament takes the power conferred by s 122 "in its character as the legislature of the Commonwealth, established in accordance with the Constitution as the national legislature of Australia, so that the territory may be governed not as a *quasi* foreign country remote from and unconnected with Australia … but as a territory of Australia about the government of which the Parliament may make every proper provision as part of its legislative power operating throughout its jurisdiction".[39] Section 122 "cannot fairly be read" to mean that the national Parliament "shall shed its major character and take on the lesser role of a local legislature for the territory".[40] Yet that is the very role to which the Parliament is reduced on the

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[37] *Lamshed* at 141 (Dixon CJ; Webb, Kitto and Taylor JJ agreeing); *Wurridjal* at [48], [76] (French CJ).

[38] *Lamshed* at 141-142 (Dixon CJ; Webb, Kitto and Taylor JJ agreeing).

[39] *Lamshed* at 143-144 (Dixon CJ; Webb, Kitto and Taylor JJ agreeing).

[40] *Lamshed* at 154 (Kitto J).

Commonwealth's argument (e.g. **CS [17]**: "Commonwealth *qua* the Commonwealth, not the Commonwealth *qua* a territory").

32. The Commonwealth's attempt to dilute the protection afforded by s 51(xxxi) on the basis of the comparative position of the States also introduces a false equivalence. Section 122 is a power conferred upon the national legislature of Australia.[41] It empowers the Parliament to legislate with effect outside the geographical limits of a territory and within the area of the whole of the Commonwealth.[42] Further, s 109 renders laws of the Commonwealth made in the exercise of the power conferred by s 122 paramount over any inconsistent laws of the States.[43] The short point is that the power conferred on the Parliament by s 122 is different in nature and quality from the legislative power of any State,[44] and the coherence or otherwise of s 51(xxxi) is not tested by a comparison of the two.

33. The anomaly presaged by the Commonwealth appears wrongly to assume that the chapeau to s 51 (with its reference to "laws for the peace, order, and good government of the Commonwealth") does not embrace the territories (**CS [48]**). In fact, the "government" there referred to is that of "the body politic wherein and for which the laws made by the Parliament have the binding force specified in covering cl 5".[45] The "body politic", in turn, comprises "the courts, judges, and the people of every State and of every part of the Commonwealth", including the territories.[46] The assertion that s 51(xxxi) "has no role to play" when legislating with respect to a territory (**CS [48]**) cannot be reconciled with the constitutional text. It is redolent of the discarded "disparate power" theory of s 122, which the Commonwealth purports to eschew.[47]

34. The final plank of the Commonwealth's argument is that its propounded construction "achieves equality of treatment for people wherever they live" whereas the contrary construction would "place Territorians in a superior position to persons from States":

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41 *Wurridjal* at [184] (Gummow and Hayne JJ).

42 *Lamshed* at 141-142, 145-146 (Dixon CJ; Webb, Kitto and Taylor JJ agreeing); *Newcrest* at 599, 501 (Gummow J; Gaudron J agreeing at 561, 565); *Wurridjal* at [50], [74] (French CJ), [175] (Gummow and Hayne JJ).

43 *Lamshed* at 148 (Dixon CJ; Webb, Kitto and Taylor JJ agreeing); *Spratt* at 245 (Barwick CJ).

44 *Newcrest* at 611 (Gummow J; Gaudron J agreeing at 561, 565).

45 *Newcrest* at 597 (Gummow J; Gaudron J agreeing at 561, 565).

46 *Newcrest* at 597 (Gummow J; Gaudron J agreeing at 561, 565); *Wurridjal* at [74] (French CJ).

47 *Wurridjal* at [46], [79] (French CJ); *Newcrest* at 655 (Kirby J).

CS [49]. That assertion distorts the analysis. The constitutional purpose of s 51(xxxi) is "to ensure that in no circumstances will a law of the Commonwealth provide for the acquisition of property except upon just terms".[48] It represents a guarantee "that the property of a State or an individual citizen will not be sacrificed for the public welfare of the Commonwealth".[49] In particular, the condition — "on just terms" — was "included to prevent arbitrary exercises of power [i.e. *Commonwealth* power] at the expense of a State or the subject".[50] The consistency or otherwise of s 51(xxxi)'s operation throughout the polity is therefore measured from the point of view of the legislative power of the Commonwealth.

10 35. The result of applying s 51(xxxi) to s 122 is that no person anywhere within the Commonwealth of Australia can be subjected to a law of the Commonwealth acquiring the property of that person other than on just terms.[51] By contrast, the consequence of the Commonwealth's preferred construction is to place (at least) individuals within the territories at a *disadvantage* vis-à-vis those in the States in relation to the exercise of the Commonwealth Parliament's legislative power compulsorily to acquire property. Whether or not State parliaments are constrained by analogues to s 51(xxxi) can have no bearing on the proper construction of the powers of the Commonwealth under the Constitution: see also **NTS [47], [50]**.

36. Indeed, it is the Commonwealth's proposed construction, treating s 122 as disjoined
20 from s 51(xxxi), that produces "absurdities and incongruities".[52] At the time of federation, the area which now comprises the Northern Territory fell within the State of South Australia (see covering cl 6 of the Constitution), and was therefore captured by the text of s 51(xxxi); so too, the ACT, which formed part of the State of New South Wales as at 1901, was subsequently surrendered to, and accepted by, the Commonwealth.[53] The Constitution "should not readily be construed as producing the result that the benefit of the constitutional guarantee with respect to the acquisition of

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48 *Trade Practices Commission (Cth) v Tooth & Co Ltd* (1979) 142 CLR 397 at 403 (Barwick CJ) (emphasis added), quoted in *Wurridjal* at [178] (Gummow and Hayne JJ).

49 *Mutual Pools* at 219 (McHugh J).

50 *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 291 (Dixon J), quoted in *Emmerson* at [109] (Gageler J).

51 *Wurridjal* at [79] (French CJ).

52 *Wurridjal* at [80] (French CJ); *Newcrest* at 600-601 (Gummow J; Gaudron J agreeing at 561, 565).

53 *Spratt* at 258 (Kitto J), 269 (Menzies J).

property in what became the Northern Territory was lost".[54] Yet that is precisely the result of the Commonwealth's propounded construction.

37. In sum, none of the three "indications" underpinning the Commonwealth's argument in support of this ground supplies the necessary contrary intention to displace the operation of s 51(xxxi) upon laws made for the government of a territory.[55]

B.3 Section 51(xxxi) applies to laws supported by s 122

38. That the limitation in s 51(xxxi) operates upon laws made for the government of the Northern Territory is reinforced by an holistic textual analysis of the relevant provisions.

39. Section 51(xxxi) concerns "laws for the peace, order, and good government of the Commonwealth with respect to … the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". By its very terms, s 51(xxxi) draws in "all powers of the Parliament to make laws, from whatever source in the Constitution they are derived".[56]

40. The Parliament has power to make laws under s 122, and to do so for a nominated purpose: "for the government of any territory". The term "for" in this context "speaks of the purpose of the law in terms of the end to be achieved, namely the government of the territory in question".[57] That purpose, in turn, readily answers the description of a "purpose in respect of which the Parliament has power to make laws" within the meaning of s 51(xxxi).[58] Section 122 therefore comfortably falls within the ambit of s 51(xxxi) by conferring upon the Parliament the power to make laws for a nominated purpose.

41. The Commonwealth makes little attempt to grapple with this aspect of the text of s 51(xxxi), beyond asserting that s 51(xxxi) is confined to laws whose purpose is "directed to the Commonwealth as a whole": **CS [44]**. But that assertion assumes the correctness of its own conclusions. The Parliament takes the power conferred by s 122

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[54] *Newcrest* at 601 (Gummow J; Gaudron J agreeing at 561, 565); see also *Wurridjal* at [80] (French CJ). The same principle logically applies with respect to the ACT.

[55] *Newcrest* at 607 (Gummow J; Gaudron J agreeing at 561, 565).

[56] *Newcrest* at 594 (Gummow J; Gaudron J agreeing at 561, 565).

[57] *Newcrest* at 597 (Gummow J; Gaudron J agreeing at 561, 565).

[58] *Newcrest* at 597 (Gummow J; Gaudron J agreeing at 561, 565); *Wurridjal* at [77] (French CJ).

"in its character as the legislature of the Commonwealth" and "as the national legislature of Australia".[59] Laws made under s 122 are indeed laws made by the Parliament in its capacity as the legislature of the nation as a whole and "have the force of law throughout Australia".[60] Meanwhile, "the Commonwealth" in the chapeau to s 51(xxxi) embraces the territories.[61] The Commonwealth's argument again proceeds on the tacit premise that laws made under s 122 have the character of local as distinct from national laws. That premise is a manifestation of the disfavoured "disparate power" theory, and it runs directly counter to this Court's reasons in *Lamshed*.

42. In its terms, s 51(xxxi) is not geographically confined to States or to the acquisition of property within State borders; it extends to the acquisition of property "from any … person", irrespective of their location.[62] That language naturally accommodates the acquisition of property from a person situated in the Northern Territory: see also **NTS [22]-[23]**. The Commonwealth does not contend otherwise. The absence of a reference to "any territory" in s 51(xxxi) is readily explained in circumstances where there were no territories at the time of federation with a legal existence separate from either the States or the Commonwealth, and, as evident by the title of Ch VI, it was envisaged that separate bodies politic may emerge as new "States". The terms of s 51(xxxi) therefore acknowledge the (extant and potentially emerging) separate body politic of the State, and (by omission of any "territory") reflect the obvious proposition that the Commonwealth does not acquire property from itself.

43. The accepted position that s 122 empowers the Parliament to make laws with extraterritorial operation exposes the arbitrary operation of s 51(xxxi) on the Commonwealth's proposed construction. The constitutional guarantee in s 51(xxxi) is enlivened, among other things, where property is acquired "from any State". It "would be a curious result if just terms were constitutionally unnecessary for the compulsory acquisition of land in a city in one of the States for the purposes of a tourist bureau for a territory",[63] or for the establishment of a transport terminal.[64] But that is the result of

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[59] *Lamshed* at 143-144 (Dixon CJ; Webb, Kitto and Taylor JJ agreeing); *Wurridjal* at [184] (Gummow and Hayne JJ).

[60] *Lamshed* at 142 (Dixon CJ; Webb, Kitto and Taylor JJ agreeing).

[61] *Wurridjal* at [74] (French CJ); *Newcrest* at 597 (Gummow J; Gaudron J agreeing at 561, 565).

[62] *Wurridjal* at [79] (French CJ).

[63] *Newcrest* at 602 (Gummow J; Gaudron J agreeing at 561, 565).

[64] *Wurridjal* at [80(2)] (French CJ).

the Commonwealth's approach. That approach allows the federal Parliament to achieve indirectly what the Constitution forbids directly under s 51(xxxi), contrary to orthodox principle.[65] It also leaves open the prospect of certain residents of a State being the beneficiary of the just terms guarantee, when other residents within that same State may not be afforded the same protection.

44. The curiosity inherent in that consequence is reinforced by the comprehensive nature of the concept of "property" that lies at the heart of s 51(xxxi).[66] It includes choses in action and other incorporeal interests whose situs may be neither fixed nor readily susceptible of identification; it captures incorporeal property such as a registered trade mark, which "cannot be regarded as locally situate in any particular State or territory of the Commonwealth" but is, instead, "locally situate in Australia".[67] It follows that s 51(xxxi) "cannot be coherently construed in a universe of legal discourse which contains a dichotomy between situation of property in a State and situation of property in a territory".[68] A dichotomy of that character is implicit in the Commonwealth's position.

45. The question then arising is whether the words or content of the grant of power in s 122 manifest sufficient reason to deny the operation of the constitutional guarantee in s 51(xxxi). For the reasons developed at [18]-[37] above, none of the three matters upon which the Commonwealth relies suffices to displace the constitutional guarantee. To the contrary, and as French CJ remarked in *Wurridjal*, the "factors weighing in favour of the application of the just terms limitation to s 122 are powerful" (at [78], [86]).[69]

C. The status of *Wurridjal*

46. Against that backdrop, it is convenient to address the precedential status of *Wurridjal*, and the competing applications to re-open *Wurridjal* and *Teori Tau*.

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[65] *Mutual Pools* at 173 (Mason CJ), 223 (McHugh J).
[66] *Newcrest* at 602 (Gummow J; Gaudron J agreeing at 561, 565).
[67] *Newcrest* at 602 (Gummow J; Gaudron J agreeing at 561, 565).
[68] *Newcrest* at 602 (Gummow J; Gaudron J agreeing at 561, 565).
[69] See also *Wurridjal* at [189] (Gummow and Hayne JJ), [287] (Kirby J).

C.1 Wurridjal *overruled* Teori Tau

47. The Full Court was correct to find that *Wurridjal* did in fact overrule *Teori Tau* for the reasons that it gave: **J [257]-[278] (CAB 106-112)**.

48. In *Wurridjal*, the Court was invited to overrule *Teori Tau* and four members of the Court expressly concluded that it should be so overruled (French CJ, Gummow and Hayne JJ, and Kirby J). Together with Kiefel J, those four members of the Court comprised the majority on the first of three questions of law crystallised in the Commonwealth's demurrer: namely, whether the impugned statutes were relevantly subject to the just terms requirement contained in s 51(xxxi).[70] It was a "necessary step"[71] in the reasoning of French CJ, Gummow and Hayne JJ, and Kirby J with respect to the first ground of the demurrer that *Teori Tau* should be overruled.[72] That majority reasoning no doubt underpinned the observation of Heydon J in *Wurridjal* that "there will in future be no doubt as to the relationship between ss 51(xxxi) and 122" (at [325]), and the observation of Kirby J in *Wurridjal* that overruling *Teori Tau* was "the first holding of this Court" (at [287]; see also [209]). It is reflected in the subsequent treatment of that decision by this Court.[73]

49. The Commonwealth's argument to the contrary rests on the suggestion that the reasons of Kirby J must be disregarded when locating the *ratio decidendi* of *Wurridjal* because his Honour's reasons did not contribute to the ultimate orders of the Court, in that Kirby J would have dismissed the demurrer: **CS [51]**. That argument should be rejected, for the reasons given by the Rirratjingu Parties: **RPS [63]-[73]**. In short, it fails to recognise the substantive effect of a demurrer and its analogy with the determination of separate questions, where a *ratio* may be extracted from the reasoning of those judges who constitute the majority on a particular question: **J [264]-[265] (CAB 108)**; **RPS [71]**. The Commonwealth advances no reason in logic or principle why the *ratio* may not likewise be discerned in the reasoning of the four judges who comprised the majority on ground 1 of the demurrer in *Wurridjal*.

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[70] *Wurridjal* at [12] (French CJ).

[71] Adopting the definition of the *ratio decidendi* in R Cross and JW Harris, *Precedent in English Law* (4th ed, 1991) at 72.

[72] *Wurridjal* at [86] (French CJ), [189] (Gummow and Hayne JJ), [287] (Kirby J).

[73] See *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530 at [7] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

50. If *Wurridjal* did in fact overrule *Teori Tau*, then ground 1 of the Commonwealth's appeal is resolved by an application of precedent and must be dismissed at the threshold. The debate is otherwise of significance principally for the purpose of identifying whether it is the Commonwealth that bears the onus of seeking leave for this Court to re-open and overturn *Wurridjal* (as the ACT submits), or alternatively whether leave must be sought for this Court to re-open and overturn *Teori Tau*. Each scenario is addressed in turn below.

C.2 Leave to re-open Wurridjal *should be refused*

51. The Commonwealth relies upon four matters in support of its application for leave to re-open *Wurridjal*.

52. The *first* is the "divergence in opinion" between *Teori Tau*, *Newcrest* and *Wurridjal* which is said by the Commonwealth to demonstrate the existence of "an unsettled question about the relationship between ss 51(xxxi) and 122": **CS [53]**. That assertion is misconceived. The very premise for the Commonwealth's application is that *Wurridjal* is binding as a matter of precedent so that it *settled* the relationship between ss 51(xxxi) and 122; that is the universe in which the Commonwealth's application to re-open arises for consideration. The first factor therefore falls away.

53. The *second* matter relied upon by the Commonwealth concerns an aspect of the reasons of Gummow J in *Newcrest* at 613: **CS [54]**. For the reasons developed by the Commonwealth with respect to ground 2, that aspect of the reasons of Gummow J in *Newcrest* was correct. But it is far from apparent that what his Honour there said about native title in connection with s 51(xxxi) was, in and of itself, decisive of the outcome — either for Gummow J, or for those who referred to or relied upon his Honour's reasons (in *Newcrest* and in *Wurridjal*). Indeed, French CJ, Gummow and Hayne JJ all determined in *Wurridjal* that *Teori Tau* should be overruled, without making any reference to this part of the reasons of Gummow J in *Newcrest*. Those reasons therefore cannot be said to form the "premise" for the approach taken in *Wurridjal* (cf. **CS [54]**).

54. The *third* matter relied upon by the Commonwealth is that "the reasoning in *Wurridjal* is unpersuasive": **CS [55]**. That contention should be rejected. To the contrary, the reasoning of each of French CJ, Gummow and Hayne JJ, and Kirby J in *Wurridjal* is

both compelling and uniform[74] for substantially the reasons advanced in section B above. By contrast, it is the brief reasoning in *Teori Tau* that is both unpersuasive and ultimately incompatible with the stream of constitutional jurisprudence (see [59], [61] below), and it is *that* authority which the Commonwealth seeks to resurrect by this application.

55. The *fourth* matter relied upon by the Commonwealth is that *Wurridjal* has not been relied upon in the determination of any justiciable controversy on the relationship between s 51(xxxi) and s 122: **CS [56]**. So much is not in dispute. But nor has *Teori Tau*, as explored at [59] and [61] below, so that the importance of re-opening *Wurridjal* so as to revive *Teori Tau* is materially reduced. In those circumstances, the fourth matter upon which the Commonwealth places reliance in support of its application for leave is properly viewed as neutral.

56. As against that, the first of the *John* factors invites an affirmative answer. That is, the majority's conclusion in *Wurridjal* rested upon principles carefully worked out in a significant succession of cases with respect to the operation of ss 51(xxxi) and 122, alone and in combination. That factor weighs heavily against a grant of leave to re-open *Wurridjal*.

57. Accordingly, leave to re-open *Wurridjal* should be refused.

C.3 Alternatively, the Court should re-open and overrule Teori Tau

58. If *Wurridjal* did not overrule *Teori Tau*, then that decision should be re-opened and overruled for the following reasons.[75]

59. *First*, *Teori Tau* did not rest upon a principle carefully worked out in a significant succession of cases.[76] To the contrary, the decision in *Teori Tau* did not accord with a pre-existing stream of authority, resting as it did upon a disjunctive view of s 122 which is "totally at odds" with *Lamshed*,[77] and standing in tension with the accepted understanding of s 51(xxxi) expressed by this Court in *Schmidt* "which underpins all

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[74] Noting that the second factor in ***John*** *v Commissioner of Taxation (Cth)* (1989) 166 CLR 417 that might justify departure from an earlier decision of the Court invites consideration of whether there was a difference between the reasons of the majority in *Wurridjal* for overruling *Teori Tau*: see *John* at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[75] By reference to the factors in *John* at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[76] *Newcrest* at 613 (Gummow J; Gaudron J agreeing at 561, 565).

[77] *Wurridjal* at [85] (French CJ), [188] (Gummow and Hayne JJ).

that has subsequently been written about the relationship between s 51(xxxi) and other heads of legislative power".[78]

60. *Secondly*, though the decision in *Teori Tau* represented a unanimous joint judgment of the Court, the circumstances in which it was made "indicate that it was not informed by extended reflection upon the constructional issues thrown up by ss 51(xxxi) and 122".[79] The decision was given *ex tempore* at the conclusion of oral argument for the plaintiff, and without calling upon counsel for the defendants. It consists of a total of two pages of reasoning, and cites not a single authority.[80]

61. *Thirdly*, it has achieved no useful result and has been "little relied upon for the precise question which it decided".[81] *Teori Tau* has not been relied upon by any member of a majority of this Court for the proposition that s 51(xxxi) does not constrain the power under s 122.[82] It has "not entered the mainstream of constitutional jurisprudence nor formed the basis for subsequent decisions" of any court in any relevant respect.[83] Indeed, it has expressly been held to have been wrongly decided after careful consideration by Gaudron, Gummow and Kirby JJ (in *Newcrest*) and by French CJ, Gummow and Hayne JJ, and Kirby J (in *Wurridjal*). Given the "isolation of the decision from the stream of prior and subsequent jurisprudence, its overruling would not effect any significant disruption to the law as it stands".[84]

62. Moreover, it gives rise to "potential absurdities and inconveniences",[85] as already canvassed. To that end, if it be the case that there is (as the Commonwealth portends) some real spectre of liability for "a vast but presently unquantifiable amount" of compensation in the Northern Territory as a result of overruling *Teori Tau* (**CS [3]**), that can only be because of a correspondingly significant number of persons dispossessed of their property without the provision of just terms.[86] Viewed in that

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78 *Wurridjal* at [178] (Gummow and Hayne JJ); see also *Newcrest* at 613 (Gummow J; Gaudron J agreeing at 561, 565).

79 *Wurridjal* at [85] (French CJ).

80 See *Newcrest* at 610 (Gummow J; Gaudron J agreeing at 561, 565).

81 *Wurridjal* at [85] (French CJ).

82 See *Wurridjal* at [56]-[64], [82]-[86] (French CJ).

83 *Wurridjal* at [84] (French CJ); see also *Newcrest* at 608-610, 612, 614 (Gummow J; Gaudron J agreeing at 561, 565).

84 *Wurridjal* at [86] (French CJ), [287] (Kirby J).

85 *Wurridjal* at [85] (French CJ).

86 *Newcrest* at 576 (McHugh J).

light, the Commonwealth's *in terrorem* submission militates conversely (if anything) in favour of re-opening and overruling *Teori Tau*.

63. In relation to the *fourth* of the *John* factors, there is no evidence that *Teori Tau* has been independently acted on in any legislative or administrative capacity so as to militate against reconsideration. The Commonwealth has made provision in respect of both the Northern Territory and the ACT for acquisitions of property to be on just terms since their respective transitions to self-government.[87] The conclusion that s 51(xxxi) reduces the content of s 122 will therefore have no significant ramifications in either the Northern Territory or the ACT from those respective points in time.

10 64. Recognising that it is a course not lightly taken,[88] the above factors — taken together — weigh heavily in favour of re-opening and overruling *Teori Tau*.[89] Where the question at issue relates to a fundamental constitutional guarantee (as with s 51(xxxi)), the "Court has a responsibility to set the matter right".[90]

GROUNDS 2 AND 3

65. The ACT adopts the Commonwealth's submissions in respect of Grounds 2 and 3: CS [57]-[129] (Ground 2), [130]-[157] (Ground 3).

PART V: ESTIMATED TIME

66. The ACT estimates that it will require up to 35 minutes to present its oral argument.

Dated: 11 June 2024

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Peter Garrisson
Solicitor-General for the
Australian Capital Territory
T: (02) 6207 0654
peter.garrisson@act.gov.au

Houda Younan
Sixth Floor Selborne
Wentworth Chambers
T: (02) 9231 6546
hyounan@sixthfloor.com.au

Louise Coleman
Sixth Floor Selborne
Wentworth Chambers
T: (02) 8915 2617
lcoleman@sixthfloor.com.au

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87 *Northern Territory (Self-Government) Act 1978* (Cth) s 50(2); *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a), (2).

88 *Wurridjal* at [70] (French CJ).

89 See also **NTS [80]-[82]**; **RPS [91]-[97]**.

90 *Newcrest* at 613 (Gummow J; Gaudron J agreeing at 561, 565).

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

10 First Respondent and others named in the Schedule

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY

Pursuant to Practice Direction No. 1 of 2019, the ACT sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provision(s)
Commonwealth			
1.	Commonwealth Constitution	Current	Covering clauses 5 and 6, ss 51 (chapeau), 51(xxix), 51(xxxi), 90, 92, 96, 122
2.	*Australian Capital Territory (Self-Government) Act 1988* (Cth)	Current	s 23(1)(a), (2)
3.	*Northern Territory (Administration) Act 1910* (Cth)	No. 27 of 1910, as at 1 January 1911	s 9
4.	*Northern Territory (Self-Government) Act 1978* (Cth)	Current	s 50(2)
State and Territory			
	N/A		

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

Rilmuwmurr Rosina Dhamarrandji
Twelfth Respondent

Wurawuy Jerome Dhamarrandji

Thirteenth Respondent

Manydjarri Wilson Ganambarr

Fourteenth Respondent

Wankal Djiniyini Gondarra

Fifteenth Respondent

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Marrpalawuy Marika (nee Gumana)

Sixteenth Respondent

Guwanbal Jason Gurruwiwi

Eighteenth Respondent

Gambarrak Kevin Mununggurr

Nineteenth Respondent

20 **Dongga Mununggurritj**

Twentieth Respondent

Gawura John Wanambi

Twenty First Respondent

Mangutu Bruce Wangurra

Twenty Second Respondent

Gayili Banunydji Julie Marika (nee Yunupingu)

30 Twenty Third Respondent

Bakamumu Alan Marika

Twenty Fifth Respondent

Wanyubi Marika

Twenty Sixth Respondent

Wurrulnga Mandaka Gilnggilngma Marika

Twenty Seventh Respondent

Witiyana Matpupuyngu Marika

Twenty Eighth Respondent

10 **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

20 Thirty Second Respondent

Amplitel Pty Ltd

Thirty Third Respondent

Attorney-General for the State of Queensland

Thirty Fourth Respondent