

University of New South Wales

University of New South Wales Faculty of Law Research Series
2011

Year 2011

Paper 17

The Northern Territory Intervention and Just Terms for the Acquisition of Property

Sean Brennan*

*University of New South Wales

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/unswwps-flrps11/art17>

Copyright ©2011 by the author.

The Northern Territory Intervention and Just Terms for the Acquisition of Property

Sean Brennan

Abstract

In *Wurridjal v Commonwealth* the High Court considered a constitutional challenge to one aspect of the federal intervention into remote Aboriginal communities in the Northern Territory. Plaintiffs from Maningrida argued that the imposition of a five year lease over Aboriginal land, in favour of the Commonwealth, was an ‘acquisition of property’ for the purposes of s 51(xxxi) of the Constitution and that the relevant legislation failed to provide just terms. A majority of judges rejected two aspects of the Commonwealth’s demurrer. They accepted that the constitutional guarantee of ‘just terms’ applies to acquisitions effected by the Territories power in s 122 of the Constitution. This has wider significance for Territory residents and overturns the Court’s 1969 decision in *Teori Tau v Commonwealth*. A majority also agreed that the involuntary lease amounted to an ‘acquisition of property’. This re-affirmed the strength of property rights held by Aboriginal groups over more than 40% of the Northern Territory. But the Commonwealth defeated the challenge due to majority acceptance of the third ground of the demurrer. The plaintiffs failed to establish an absence of just terms. However, the reasoning was case-specific and unanswered questions about ‘just terms’ for the culturally distinct property rights held by Aboriginal people.

CASE NOTE

WURRIDJAL v COMMONWEALTH*

**THE NORTHERN TERRITORY INTERVENTION AND
JUST TERMS FOR THE ACQUISITION OF PROPERTY**

SEAN BRENNAN†

[In Wurridjal v Commonwealth the High Court considered a constitutional challenge to one aspect of the federal intervention into remote Aboriginal communities in the Northern Territory. Plaintiffs from Maningrida argued that the imposition of a five-year lease over Aboriginal land in favour of the Commonwealth was an 'acquisition of property' for the purposes of s 51(xxxi) of the Constitution and that the relevant legislation failed to provide just terms. A majority of judges rejected two aspects of the Commonwealth's demurrer. They accepted that the constitutional guarantee of 'just terms' applies to acquisitions effected by the territories power in s 122 of the Constitution. This has wider significance for territory residents and overturns the Court's 1969 decision in Teori Tau v Commonwealth. A majority also agreed that the involuntary lease amounted to an acquisition of property. This reaffirmed the strength of property rights held by Aboriginal groups over more than 40 per cent of the Northern Territory. But the Commonwealth defeated the challenge due to majority acceptance of the third ground of the demurrer: the plaintiffs failed to establish an absence of just terms. However, the reasoning was case-specific and left unanswered questions about just terms for the culturally distinct property rights held by Aboriginal people.]

CONTENTS

I	Introduction.....	958
II	The Northern Territory Intervention and ALRA Land	959
	A The ALRA Prior to the Intervention	959
	1 The Fee Simple Interest and Section 71	959
	2 The Tripartite Structure for Land Holding and Decision-Making	960
	3 Controls on Entry: Sections 69, 70, 73 and the Permit Scheme....	960
	4 The General Power to Lease Aboriginal Land	961
	5 The Township Headlease Changes of 2006.....	961
	B The Legislative Intersection of the Intervention with the ALRA.....	962
	1 The Forced Creation of Five-Year Leases	962
	2 Changes to the Permit Scheme	963
	3 Rent and Compensation.....	964
III	The Constitutional Challenge	965

* (2009) 237 CLR 309.

† BA, LLB, LLM (ANU); Senior Lecturer, Faculty of Law, The University of New South Wales; Director of the Indigenous Legal Issues Project, Gilbert + Tobin Centre of Public Law, The University of New South Wales. I thank the referees and colleagues Keven Booker and Leon Terrill for comments on an earlier draft.



A	The Parties and Their Arguments	965
1	The Plaintiffs	965
	(a) The Section 122 Issue	965
	(b) The ‘Acquisition of Property’ Issue	966
	(c) The ‘Just Terms’ Issue	967
2	The Land Trust	967
3	The Commonwealth	969
	(a) The Section 122 Issue	969
	(b) The ‘Acquisition of Property’ Issue	970
	(c) The ‘Just Terms’ Issue	971
B	The Issues of Statutory Interpretation	971
1	Answers Provided by the Court	971
2	Issues Left Unresolved	971
C	Three Constitutional Questions: The Response by the Court	972
1	The Section 122 Issue	972
2	The ‘Acquisition of Property’ Issue	975
3	The ‘Just Terms’ Issue	978
IV	Conclusion	980

I INTRODUCTION

In *Wurridjal v Commonwealth* (*‘Wurridjal’*) three plaintiffs unsuccessfully sought to challenge, on constitutional grounds, one aspect of the Commonwealth government’s Northern Territory Emergency Response (*‘NTER’*).¹ The case saw an important authority of the High Court of Australia denying rights protection in Commonwealth territories overruled by four judges. It also reinforced, in statutory and constitutional terms, the strength of the property rights held by Aboriginal people under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*‘ALRA’*). The High Court’s treatment of s 51(xxxi) of the *Constitution*, dealing with the ‘acquisition of property’, however, largely maintained the mystery surrounding the concept of ‘just terms’.

The NTER is also known as the ‘Intervention’ and was implemented across Aboriginal communities in the Northern Territory. It was launched by the Howard Coalition government in June 2007² and maintained by the Rudd Labor government after it gained power at the November 2007 federal election.

The Intervention consists of many legal, administrative and financial measures. Some are intrusive and/or involuntary, involving significant incursions on the autonomous decision-making of Aboriginal people and organisations. The Commonwealth has justified the extraordinary nature of the measures on the basis that the levels of socioeconomic disadvantage and violence against women

¹ (2009) 237 CLR 309.

² Mal Brough, ‘National Emergency Response to Protect Aboriginal Children in the NT’ (Press Release, 21 June 2007) <http://www.formerministers.fahcsia.gov.au/malbrough/mediareleases/2007/Pages/emergency_21june07.aspx>.



and children in town camps and remote Aboriginal communities constitute a national emergency.³

The plaintiffs in *Wurridjal* challenged an aspect of the Intervention which involves Commonwealth incursions on the land rights of Aboriginal people. The statutory creation of a five-year lease in favour of the Commonwealth over the township of Maningrida on the north coast of Arnhem Land was said to involve an acquisition, on other than just terms, of the property held by traditional Aboriginal owners, in violation of the constitutional guarantee contained in s 51(xxxi) of the *Australian Constitution*.⁴ The plaintiffs alleged that amendments to provisions regulating entry onto Aboriginal land ('the permit system'), which widened public access, also resulted in an unjust acquisition of property.

An application for a declaration that the relevant parts of the Intervention legislation were constitutionally invalid was heard by the High Court in October 2008. The Commonwealth demurred to the plaintiffs' statement of claim, stating that, on the facts pleaded, it disclosed no cause of action. There were three grounds to the demurrer. Any one of these three alternatives, if established, constituted an absolute legal barrier to the success of the plaintiffs' claim.

In February 2009 a majority of the Court rejected both the first and second grounds of the Commonwealth demurrer. However, the Commonwealth succeeded on the third ground and costs were ordered against the plaintiffs. Five judges found, on an assumption or actual finding that there was an 'acquisition of property', that the Intervention legislation provided 'just terms'. Or, at least, that on the facts pleaded by the plaintiffs the argument for the absence of just terms was not made out.

II THE NORTHERN TERRITORY INTERVENTION AND *ALRA* LAND

A *The ALRA Prior to the Intervention*

1 *The Fee Simple Interest and Section 71*

The *ALRA* confers strong property rights on Aboriginal people over 'Aboriginal land'.⁵ An area deemed transferable or successfully claimed under the Act is granted in fee simple to a Land Trust, which holds the communal title for the benefit of those Aboriginal people who have a traditional entitlement to use or occupy the land. In July 2008 the High Court said that, despite some statutory

³ Ibid; Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 13–14 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

⁴ Section 51(xxxi) provides that the Commonwealth Parliament has the power to make laws 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'. The High Court has repeatedly recognised its dual character as a grant of power and as a constitutional restriction on power (or guarantee): see, eg, *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 232 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Creannan and Kiefel JJ) (a unanimous Court), quoting *Victoria v Commonwealth* (1996) 187 CLR 416, 559 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

⁵ See *ALRA* s 3(1) (definition of 'Aboriginal land').



restrictions on alienation, this form of Aboriginal communal freehold title is, 'for almost all practical purposes, ... the equivalent of full ownership' and includes a general right to exclude others from entering the area.⁶

The *ALRA* offers a further level of protection to Aboriginal individuals and groups with traditional interests in land. Section 71 gives statutory force to an entitlement under Aboriginal tradition to enter upon Aboriginal land and use or occupy it unless this would interfere with the use and enjoyment of a legal interest in the land held by someone else ('s 71 rights').⁷

2 *The Tripartite Structure for Land Holding and Decision-Making*

The Land Trust, which holds the title for Aboriginal land, is incapable of independent action. The *ALRA* makes the collective group of 'traditional Aboriginal owners'⁸ the key decision-makers for what happens on the land and gives other Aboriginal people who are affected by a proposal (for example, residents who are not traditional owners for the area) a voice but not a final say. The Land Council for the area has the responsibility for ascertaining these views and directing the Land Trust accordingly.

Legally, this tripartite structure works as follows. The Land Trust cannot exercise its functions in relation to land 'except in accordance with a direction given to it by the Land Council for the area'.⁹ The Land Council in turn can direct action only when satisfied that the traditional Aboriginal owners understand the proposed action and consent to it (and any other affected Aboriginal community or group has been consulted and has had an adequate opportunity to express its view).¹⁰ In other words, the informed consent of traditional owners is central to decisions that have an impact on Aboriginal land.

There are some situations where, in addition, the view of the Commonwealth Minister with responsibility for Indigenous affairs is relevant. For example, where the term of a lease of Aboriginal land to be granted by a Land Trust exceeds 40 years, the Minister's consent is also required.¹¹

3 *Controls on Entry: Sections 69, 70, 73 and the Permit Scheme*

Consistent with the view of Aboriginal land title as full ownership, the *ALRA* provides strong controls over entry by others upon Aboriginal land.

⁶ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 63–4 (Gleeson CJ, Gummow, Hayne and Crennan JJ) ('*Blue Mud Bay*'), quoting *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635, 656 (Deane, Dawson and Gaudron JJ).

⁷ *ALRA* ss 71(1), (2).

⁸ They are defined in *ALRA* s 3(1) as:

a local descent group of Aboriginals who:

- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- (b) are entitled by Aboriginal tradition to forage as of right over that land.

⁹ *ALRA* s 5(2)(a).

¹⁰ *ALRA* s 23(3).

¹¹ *ALRA* s 19(7).



The power of exclusion inherent to fee simple is reinforced by a ‘criminal trespass’ provision in s 70, which states that a ‘person shall not enter or remain on Aboriginal land’,¹² subject to defined exceptions. It is a defence to a prosecution under s 70 if the person enters in accordance with the *ALRA* ‘or a law of the Northern Territory.’¹³ Section 73 of the *ALRA* authorises the Legislative Assembly of the Northern Territory to make ‘laws regulating or authorizing the entry of persons on Aboriginal land’.¹⁴

The Legislative Assembly has enacted such a law — the *Aboriginal Land Act 1978* (NT) — which enables the traditional owners or the relevant Land Council to issue a permit for entry onto Aboriginal land.¹⁵ Unless covered by a statutory exception, entry without a permit is illegal,¹⁶ echoing the effect of s 70 of the *ALRA*.

Sacred sites — areas of particular cultural and spiritual significance — enjoy strong legal protection in the Northern Territory, both on and beyond Aboriginal land. One such form of protection is s 69 of the *ALRA*, which makes it an offence to ‘enter or remain on land in the Northern Territory that is a sacred site.’¹⁷ It is a defence if the person is performing functions in accordance with the *ALRA* or a law of the Northern Territory.¹⁸

4 *The General Power to Lease Aboriginal Land*

A Land Trust can dispose of its *entire* interest only to another Aboriginal Land Trust or by surrender to the Crown.¹⁹ Under s 19, the Land Trust may, however, under prescribed conditions, create a lease (or other interest) over Aboriginal land in favour of third parties.²⁰ The informed consent of traditional owners is the key requirement and the Land Council must be satisfied that the terms of the lease are reasonable.²¹ As noted earlier, in some circumstances leases also require the consent of the Minister.

5 *The Township Headlease Changes of 2006*

One year before the Intervention the Commonwealth government, led by John Howard, made a major change to the *ALRA*,²² designed to encourage the creation of headleases over township areas. The government said that headleases over Aboriginal townships, with the capacity for subleasing township blocks, would ‘make it easier for Aboriginal people to own their own homes and for businesses to operate in the Northern Territory on Aboriginal land in the way that they

¹² *ALRA* s 70(1).

¹³ *ALRA* s 70(2A)(h).

¹⁴ *ALRA* s 73(1)(b).

¹⁵ *Aboriginal Land Act 1978* (NT) s 5.

¹⁶ *Aboriginal Land Act 1978* (NT) s 4.

¹⁷ *ALRA* s 69(1).

¹⁸ *ALRA* s 69(2A).

¹⁹ *ALRA* ss 19(4)(b), (12).

²⁰ *ALRA* ss 19(4A)–(7).

²¹ *ALRA* s 19(5).

²² See *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth) sch1 pt 1.



operate in other parts of Australia.²³ Although the idea was not entirely novel, the model was contentious. It involved the creation of a headlease in favour of a government entity, which would then make subleasing and other decisions for the following 99 years with limited further reference to the views of traditional owners.²⁴

The Rudd Labor government, elected in November 2007, maintained support for township headleases, although it amended the legislation to provide for the possibility of shorter terms, between 40 and 99 years.²⁵

B *The Legislative Intersection of the Intervention with the ALRA*

The controversy generated by the 2006 amendments to the *ALRA* was dwarfed by that surrounding the Commonwealth Intervention a year later. The focus below is on the subset of Intervention measures that involved a direct impact on the *ALRA* itself and that were relevant to the plaintiffs' constitutional challenge in *Wurridjal*.

1 *The Forced Creation of Five-Year Leases*

The Intervention involved the involuntary creation of leases in favour of the Commonwealth over township areas on Aboriginal land. Section 31 of the *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNERA*') granted the Commonwealth 64 such leases — over 26 communities on 18 August 2007 and a further 38 communities on 17 February 2008 (including the town of Maningrida, the subject of the challenge in *Wurridjal*). Although commonly called 'five-year leases', all 64 leases end five years after the commencement of the *NTNERA*, including the 'second-round' leases like the one at Maningrida.²⁶

The breadth and unilateral nature of the Commonwealth's interest under s 31 leases corresponds with the involuntary nature of their creation. The Commonwealth obtained 'exclusive possession and quiet enjoyment', subject to certain statutory exceptions. One such exception was for existing rights and interests in the land, which were preserved by s 34. However, 'preserved rights' were made terminable at the will of the Commonwealth Minister.²⁷

The terms and conditions of a five-year lease can be set and later varied at the Minister's discretion.²⁸ While traditional owners cannot terminate or vary such a lease, the Commonwealth lessee may add or remove land, terminate the lease

²³ Commonwealth, *Parliamentary Debates*, Senate, 8 August 2006, 93 (Gary Humphries).

²⁴ For a detailed examination of the 2006 amendments and the surrounding controversy, see Sean Brennan, 'Economic Development and Land Council Power: Modernising the *Land Rights Act* or Same Old Same Old?' (2006) 10(4) *Australian Indigenous Law Reporter* 1, 10–19. For a more recent analysis of the 2006 changes, see Leon Terrill, 'The Days of the Failed Collective: Communal Ownership, Individual Ownership and Township Leasing in Aboriginal Communities in the Northern Territory' (2009) 32 *University of New South Wales Law Journal* 814.

²⁵ *Indigenous Affairs Legislation Amendment Act 2008* (Cth) sch 1 item 3, amending *ALRA* s 19A(4).

²⁶ *NTNERA* s 31(2)(b).

²⁷ *NTNERA* s 37(1)(a). Some exceptions apply: s 37(2).

²⁸ *NTNERA* ss 36(1)–(2).



and deal with its interest (including by sublease).²⁹ A sublease or other dealing by the Commonwealth dispenses with the normal requirement for traditional owner consent under s 19(8) of the *ALRA*.³⁰

The government rationale for five-year leases has shifted over time. The reason provided to Parliament was to ensure ‘unconditional access to land and assets ... to facilitate the early repair of buildings and infrastructure.’³¹ Government websites subsequently referred to the promotion of ‘security of tenure’, and the imposition of five-year leases also became entangled with the pre-existing public debate over long-term township headleases, promoted by government as a precondition for the investment of new public money in housing and infrastructure.³² Several High Court judges concluded in *Wurridjal* that the leases were essentially about the assertion of Commonwealth control.³³

2 Changes to the Permit Scheme

The Intervention also involved major changes to the rules governing entry onto Aboriginal land. The permit scheme under Northern Territory legislation remained intact, but amendments to Commonwealth law had an overriding effect and also diminished the exclusionary effect of s 70 of the *ALRA*.³⁴ The key provision was a new s 70F of the *ALRA*, which authorised entry without a permit by any member of the public ‘on a common area that is within community land’ if their purpose is not unlawful.³⁵ The definition of ‘community land’ was applied to Maningrida and dozens of other Aboriginal communities. A ‘common area’ was defined as an area ‘generally used by members of the community concerned’, with the exception of buildings and sacred sites.³⁶

²⁹ *NTNERA* ss 35(4)–(5).

³⁰ *NTNERA* s 52(7).

³¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 14 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

³² For example, the government website on the Intervention at one point said that the ‘leases will assist in establishing reformed tenancy arrangements for better housing’: quoted in Central Land Council, Submission No 37 to Northern Territory Emergency Response Review, 25 August 2008, ‘NTER Measures’ (‘5 Year Leases’) <http://www.nterreview.gov.au/subs/nter_review_report/37_clc/37_CLC_5.htm>. *NTNERA* ss 37(6)–(9) permit a Land Trust to bring a five-year Intervention lease to an end by entering into an *ALRA* s 19A headlease; see Sean Brennan, ‘Submission to NTER Review’, Submission No 183 to Northern Territory Emergency Response Review, August 2008, 22 <http://www.gtcentre.unsw.edu.au/news/docs/Submission_NTER_Review_Board.pdf>.

³³ See *Wurridjal* (2009) 237 CLR 309, 364 (French CJ), 400–2 (Kirby J), 466 (Kiefel J). The Commonwealth’s current explanation blends a number of these rationales together: see Department of Families, Housing, Community Services and Indigenous Affairs, *Five-Year Leases on Aboriginal Townships* (2009) <http://www.facsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/housing_land_reform/Pages/five_year_leases_aboriginal_townships.aspx>.

³⁴ For a discussion of *ALRA* s 70, see above Part (II)(A)(3).

³⁵ *ALRA* s 70F(1). This was introduced by another part of the Intervention package: *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) sch 4 item 12.

³⁶ *ALRA* s 70F(20).



3 *Rent and Compensation*

It remains unclear whether the Commonwealth is obliged by statute to pay rent to the traditional owners for the lease imposed on them by the statutory force of s 31 of the *NTNERA*. The circuitous drafting of the provisions dealing with rent was much debated during the *Wurridjal* hearing.³⁷ The Minister's words in his second reading speech in August 2007 were ambiguous³⁸ and several observers at the time said that the Commonwealth had preserved a discretion as to whether rent would be paid.³⁹

In the High Court, the Commonwealth submitted that there was indeed no binding legal obligation on it to pay rent.⁴⁰ Amendments made in 2008 facilitated the negotiation of rent or other payments to traditional owners, but did not remove the textual ambiguity.⁴¹

There were similar departures from customary practice in relation to property rights when it came to the question of compensation. Ordinarily, the holder of a fee simple subjected to the temporary expropriation of control over their land, in pursuit of Commonwealth government policy objectives, would have an unambiguous and upfront *statutory* entitlement to compensation. That entitlement, under the *Lands Acquisition Act 1989* (Cth), does not depend on establishing that they have suffered what the *Australian Constitution* regards as an acquisition of property but simply on the factual demonstration that their property has been acquired by compulsory process.⁴²

The Intervention legislation, however, expressly disappplied the *Lands Acquisition Act 1989* (Cth).⁴³ Instead, the Commonwealth was made 'liable to pay a reasonable amount of compensation' only if the operation of the relevant parts of the *NTNERA* 'would result in an acquisition of property to which

³⁷ See, eg, *Wurridjal v Commonwealth* [2008] HCATrans 348 (2 October 2008) 1096–185 (French CJ, Gummow, Hayne, Crennan JJ and R Merkel QC). *NTNERA* s 62(1) says that the Commonwealth Minister 'may, from time to time', ask the Northern Territory Valuer-General to determine a reasonable amount of rent for a s 31 lease. *NTNERA* s 62(5) says that the Commonwealth 'must' pay the amount determined by the Valuer-General.

³⁸ See Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 13–14 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

³⁹ See, eg, Sean Brennan, Talia Epstein and Edwina MacDonald, 'Inquiry into NT National Emergency Response Package 2007 — Supplementary Submission', Submission No 40a to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Northern Territory National Emergency Response Bill 2007 and Related Bills*, 11 August 2007, 2; Law Council of Australia, 'Northern Territory National Emergency Response Legislation', Submission No 52 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Northern Territory National Emergency Response Bill 2007 and Related Bills*, 9 August 2007, [69]–[70]; Jennifer Clarke, 'Who'd Be a Traditional Landowner?', Submission No 54 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Northern Territory National Emergency Response Bill 2007 and Related Bills*, 10 August 2007, 1.

⁴⁰ *Wurridjal v Commonwealth* [2008] HCATrans 349 (3 October 2008) 6644–65 (H C Burmester QC).

⁴¹ *Indigenous Affairs Legislation Amendment Act 2008* (Cth) sch 2 item 10, amending *NTNERA* s 62.

⁴² *Lands Acquisition Act 1989* (Cth) s 52.

⁴³ *NTNERA* s 50(2).



paragraph 51(xxxi) of the *Constitution* applies from a person otherwise than on just terms⁴⁴ — a markedly higher legal standard for divestees to satisfy.

There are questions about the good faith of the Commonwealth government's approach to compensation. Minister Brough offered a public reassurance that just terms would be paid,⁴⁵ but in fact the legislation removed statutory compensation rights that would otherwise have applied. Compensation was made contingent on the satisfaction of several demanding constitutional requirements, but the Commonwealth has repeatedly argued in the High Court that there is no constitutional guarantee of just terms in any territory, and did so again in *Wurridjal*. It is difficult to imagine federal politicians adopting the same approach to suburban freehold blocks held by non-Indigenous Australians in pursuit of Commonwealth public policy objectives.

III THE CONSTITUTIONAL CHALLENGE

A *The Parties and Their Arguments*

1 *The Plaintiffs*

The first and second plaintiffs in the *Wurridjal* litigation, Reggie Wurridjal and Joy Garlbin, are senior members of the Dhukurrdji clan and traditional owners with common spiritual affiliations to four sacred sites on the Maningrida land subjected to a s 31 lease.⁴⁶ Maningrida is a coastal settlement located on a large area of Aboriginal land. The Arnhem Land Aboriginal Land Trust, also the subject of the *Blue Mud Bay* litigation in the High Court in 2008,⁴⁷ covers 89 872 square kilometres.⁴⁸ The s 31 lease disputed in *Wurridjal* relates to 10 square kilometres extending well beyond a built-up township area and including 'approximately 160 houses for occupation by Aboriginal people, numerous commercial premises, land works, an airstrip, a school, a health clinic, a police station and other infrastructure supporting the community occupying the land.'⁴⁹ The area also included 'sacred sites, an outstation, a sand quarry pit, a billabong and a ceremonial site.'⁵⁰

(a) *The Section 122 Issue*

In order to defeat the first ground in the Commonwealth's demurrer, the plaintiffs asked the Court to overrule the decision in *Teori Tau v Commonwealth*

⁴⁴ *NTNERA* s 60(2).

⁴⁵ The Minister's media release announcing the Intervention included the following statement: 'The measures include: ... Acquiring townships prescribed by the Australian Government through five year leases including payment of just terms compensation': Brough, 'National Emergency Response', above n 2.

⁴⁶ *Wurridjal* (2009) 237 CLR 309, 371 (Gummow and Hayne JJ). The third plaintiff was the Bawinanga Aboriginal Corporation, an Aboriginal enterprise and outstation resource agency that does business on Maningrida land: at 397 (Kirby J).

⁴⁷ *Blue Mud Bay* (2008) 236 CLR 24.

⁴⁸ *Wurridjal* (2009) 237 CLR 309, 370 (Gummow and Hayne JJ).

⁴⁹ *Ibid* 460 (Crennan J).

⁵⁰ *Ibid* 435 (citations omitted).



(‘*Teori Tau*’)⁵¹ and find that the just terms guarantee applied to a Commonwealth law directed at the Northern Territory and reliant on s 122 of the *Constitution*.⁵² In the alternative, they said that their case came within a substantial exception to the ruling in *Teori Tau* that was accepted by a majority of judges in *Newcrest Mining (WA) Ltd v Commonwealth* (‘*Newcrest*’).⁵³ The content of these arguments is explored later.⁵⁴

(b) *The ‘Acquisition of Property’ Issue*

The plaintiffs argued that the Intervention legislation had three adverse impacts which were intertwined: on the *property* interests themselves (in particular, the fee simple and s 71 rights), on the *economic* interests of traditional owners (such as income allegedly lost that would otherwise be due to them) and on the *governance* arrangements in the *ALRA* under which the landowners enjoyed valuable decision-making rights (over leasing and so on) based on informed consent.

In the course of oral argument and written submissions, the plaintiffs alleged that the s 31 lease conferring exclusive possession on the Commonwealth:

- diminished the *fee simple interest* held by the Land Trust, said to include or be accompanied by the legal interests held by individual Aboriginal beneficiaries of the land grant;⁵⁵
- reduced *s 71 rights* by making them ‘preserved rights’ terminable at will by the Minister or, alternatively, by subordinating them to the Commonwealth’s right of exclusive possession;⁵⁶
- allowed the Commonwealth to override the criminal offence in s 69 of the *ALRA*, preventing entry onto *sacred sites*;⁵⁷ and
- put the Commonwealth in the shoes of the traditional owners as far as *rental income* from leases to third parties on township land is concerned (due to s 34(4) of the *NTNERA*).⁵⁸

The plaintiffs said that collectively the five-year lease provisions and the changes to the permit scheme reducing the power of traditional owners to exclude third parties from Aboriginal land effected an acquisition of property that attracted the operation of s 51(xxxi).

⁵¹ (1969) 119 CLR 564.

⁵² The relevant words of s 122 provide that the Commonwealth Parliament ‘may make laws for the government of any territory’.

⁵³ (1997) 190 CLR 513.

⁵⁴ See below Part III(C)(1).

⁵⁵ *Wurridjal v Commonwealth* [2008] HCATrans 348 (2 October 2008) 2521–690 (French CJ, Kirby, Hayne, Crennan, Kiefel JJ and R Merkel QC).

⁵⁶ *Ibid* 2781–801, 2988–98 (R Merkel QC).

⁵⁷ *Ibid* 2392–410.

⁵⁸ *Ibid* 800–36 (French CJ and R Merkel QC), 957–1004 (French CJ, Hayne J and R Merkel QC), 3756–63 (R Merkel QC).



(c) *The 'Just Terms' Issue*

By providing only a right to recover a 'reasonable amount of compensation', ultimately determined, if necessary, by a court,⁵⁹ the plaintiffs said that the property was acquired in a way that did not discharge the Commonwealth's obligation of 'just terms'.

In an aspect of the case that clearly troubled members of the Court during oral argument, the plaintiffs' case sought to identify the loss as something broader and more amorphous than the legal impacts listed above in Part III(A)(1)(b). Drawing on the spiritual or non-material origins of the property entitlements in Aboriginal tradition, as well as the suite of statutory rights, powers, functions and procedures spelt out in the *ALRA*, the plaintiffs sought to magnify the loss, framing it as damage to the 'underlying interest' of traditional owners.⁶⁰

The plaintiffs argued that the failure, in the process of acquiring exclusive possession, to take into account the special nature of the property spelled the absence of just terms. But counsel for the plaintiff disavowed an argument that certain property is unacquirable by the Commonwealth.⁶¹ It appears the plaintiffs' case assumed that Aboriginal property rights are always capable of acquisition under Commonwealth law but that the statutory details of the process may need attention beyond provision of reasonable monetary compensation in order to meet the obligation of providing just terms.

This aspect of the argument appeared to combine two propositions about the particular spiritual, cultural and statutory features of Aboriginal property rights:

- 'just terms' for their acquisition may necessitate non-monetary forms of compensation; and
- 'just terms' for their acquisition may necessitate the imposition of procedural requirements to take account of their special character and value to the people concerned.

2 *The Land Trust*

A Land Trust embodies the collective interests of many individual traditional owners. Commonly, land rights litigation with the government involves the Land Trust taking action against it on behalf of the communal owners, with the regional Land Council acting as the instructing solicitors.⁶² That was not the case in *Wurridjal*. The organisations responsible for the collective interests of the traditional owners of the region as a whole, the Arnhem Land Aboriginal Land

⁵⁹ See below Part III(C)(3).

⁶⁰ See, eg, *Wurridjal v Commonwealth* [2008] HCATrans 348 (2 October 2008) 2769–76 (R Merkel QC), where counsel for the plaintiffs said it is

not just the physical land and exclusive possession of it, but it is a physical possession that gives [the Commonwealth] the right to disregard the interests that exist under [the *ALRA*] in favour of the beneficial owners to have that land used, employed in their interest and in accordance with their wishes. We say that is something more than just the loss of the fee simple estate, but it is hard to precisely identify in terms of analysis of legal interests ...

⁶¹ *Ibid* 3490–1.

⁶² The plaintiffs in *Blue Mud Bay* (2008) 236 CLR 24 and associated litigation were the Land Trust, the Land Council and named individuals acting on behalf of traditional land-owning groups.



Trust and the Northern Land Council, were not plaintiffs but respondent and respondent's solicitors respectively. There is always the possibility that individuals within the group may take a view that diverges from that expressed collectively through the institutions recognised under the *ALRA* and here, with independent legal representation, that view was expressed in a statement of claim lodged with the High Court.

The Land Trust, said by the Aboriginal plaintiffs to have been dispossessed of property interests by Commonwealth law, itself refuted much of that claim. Appearing in the case awkwardly as a respondent, not a plaintiff, the Land Trust played a dead bat on some issues in the case and clearly held positions on others that were diametrically opposed to the main respondent, the Commonwealth. But it also adopted positions contrary to the plaintiffs.

The Land Trust agreed with the plaintiffs that the rights asserted in the case constitute 'property' and that 'acquisitions' in the constitutional sense of the word had occurred contrary to the Commonwealth's denial. While generally abstaining from the argument over whether the Intervention legislation provided just terms, counsel for the Land Trust said he unequivocally had no argument with the plaintiffs' proposition that just terms for the loss of spiritual or cultural assets may require something other than purely monetary compensation.⁶³

The differences from the plaintiffs — very important ones in the context of this case and future litigation — were twofold. First, as a matter of statutory interpretation, the Land Trust did not share some of the plaintiffs' pessimism about the legal interaction of the Intervention legislation with the *ALRA*. 'In a nutshell', counsel for the Land Trust said, 'things are not as bad under this legislation as the plaintiffs fear.'⁶⁴ The payment of rent by the Commonwealth for a five-year lease was obligatory not discretionary.⁶⁵ The Commonwealth did not stand in the shoes of the traditional owners to receive rental income from lessees as a result of s 34(4) of the *NTNERA*,⁶⁶ nor did the Commonwealth's right of exclusive possession cancel out the criminal penalty for entering a sacred site in s 69 of the *ALRA*.⁶⁷ In particular, the five-year lease did not wipe out the ability of individual Aboriginal people and groups to exercise their s 71 rights. Those rights were instead preserved and (unlike other 'preserved rights') were not terminable at will by the Minister.⁶⁸

Secondly, on the constitutional front, the Land Trust insisted that the question of just terms was hypothetical and the litigation at best premature. Either the facts necessary to put the constitutional question of just terms in issue were not

⁶³ *Wurridjal v Commonwealth* [2008] HCATrans 349 (3 October 2008) 4599–627 (Kirby J and B W Walker SC).

⁶⁴ *Wurridjal v Commonwealth* [2008] HCATrans 348 (2 October 2008) 4056–7 (B W Walker SC).

⁶⁵ *Ibid* 4317–420 (Hayne, Heydon JJ and B W Walker SC).

⁶⁶ *Ibid* 4102–308 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel JJ and B W Walker SC).

⁶⁷ *Wurridjal v Commonwealth* [2008] HCATrans 349 (3 October 2008) 4687–745 (Gummow, Hayne JJ and B W Walker SC).

⁶⁸ *Wurridjal v Commonwealth* [2008] HCATrans 348 (2 October 2008) 4090–3 (B W Walker SC); *ibid* 4856–61 (B W Walker SC).



adequately pleaded or the conduct of the Commonwealth had not reached a point where the issue arose for judicial determination.⁶⁹

3 *The Commonwealth*

The Commonwealth demurred to the entire statement of claim, essentially saying that legally there was no case to answer on the facts pleaded by the plaintiffs. On questions of statutory interpretation, it agreed with the plaintiffs that the payment of rent for the five-year lease was discretionary not obligatory. It advocated a deceptively harsh interpretation of the impact on s 71 rights — while nominally categorising them as ‘preserved rights’, the Commonwealth’s interpretation emptied that proposition of significant practical content, allowing them to be easily overridden.⁷⁰ However, even the Commonwealth rejected the plaintiffs’ interpretation that a five-year lease nullified the criminal penalty for entry onto a sacred site.

On the constitutional front, the Commonwealth chose to fight the s 51(xxxi) issues tooth and nail.

(a) *The Section 122 Issue*

The first ground of the Commonwealth’s demurrer concerned s 122 of the *Constitution*. The Commonwealth’s starting point was that *Teori Tau* was both correctly decided and remained authoritative: if a law could be shown to rely on the territories power in s 122 (and indisputably this one could) then s 51(xxxi) and its guarantee of just terms simply did not apply.⁷¹ In the alternative (recognising the vulnerability of *Teori Tau* after the majority decision in

⁶⁹ Counsel for the Land Trust argued that the question of just terms was hypothetical (*Wurridjal v Commonwealth* [2008] HCATrans 349 (3 October 2008) 4561–6 (B W Walker SC)), stating: ‘You need facts, we do not have them’ (at 4566). Several members of the Court also raised questions about the factual basis upon which the plaintiffs asserted that an unjust acquisition of their property had occurred. Gummow and Hayne JJ said that, although the question of the Commonwealth’s obligations to pay rent was ‘debated at some length during the oral hearing’, ‘[n]o complaint is made of a wrongful refusal by the Commonwealth to do so, or of the inadequacy of any rent that has been fixed under s 62’: *Wurridjal* (2009) 237 CLR 309, 388–9. Kirby J (perhaps advocating from the bench a pleading based on native title rights) said repeatedly, in his dissent, that the plaintiffs’ claims could be further refined or rendered legally arguable at trial and that this was a reason to dismiss the demurrer: at 391–5, 405. Crennan J observed that ‘the plaintiffs’ case was largely based on construing the challenged provisions’ and the statement of claim did not plead material facts in relation to particular issues: at 454–5; see also at 460. Counsel for the plaintiffs conceded that the rights of traditional owners had not been pleaded as the property of the two plaintiffs (as distinguished from the Land Trust): *Wurridjal v Commonwealth* [2008] HCATrans 348 (2 October 2008) 2586–9 (R Merkel QC). He also conceded that facts were not pleaded in support of a claim that the Commonwealth acquired the right to rents and other incomes from Aboriginal land: at 1012–15 (Hayne J and R Merkel QC), 2341–4 (R Merkel QC), 4293–4 (Hayne J).

⁷⁰ See *Wurridjal v Commonwealth* [2008] HCATrans 349 (3 October 2008) 6891–906 (H C Burmester QC), where the Commonwealth said that the legal creation of the five-year lease itself did not destroy s 71 rights. They were ‘preserved’ in that sense. But the s 71 rights could be overridden as soon as the Commonwealth chose to exercise any of its rights under the five-year lease. This was apart from the proposition that they were also terminable at the will of the Commonwealth Minister under s 37.

⁷¹ The Northern Territory government intervened in the case and argued that the High Court should overrule *Teori Tau* (1969) 119 CLR 564: *Wurridjal* (2009) 237 CLR 309, 325–6 (M P Grant QC).



Newcrest),⁷² the Commonwealth said that the decision in *Newcrest* should be reopened and overruled. In its place, it proposed that if a Commonwealth law can be shown to be essentially a territory law rather than a 'national' law, then the just terms requirement does not apply.⁷³

It was said that if the Commonwealth acts like a local, not a national, government then it should not be surprising to find that no just terms guarantee applied, as it would look just like a state government, which is also free of the guarantee.⁷⁴ A glaring problem for the Commonwealth in this respect was that the Intervention (including the title of some of the impugned legislation itself) referred to a '*national* emergency'. Perhaps it was the equivalent of subliminal advertising that, in support of the Commonwealth's argument, counsel for the Commonwealth throughout the hearing (with the exception of the first reference) referred to the legislation in shorthand form as the '*Emergency Response Act*', omitting the constitutionally inconvenient word 'national'.

(b) *The 'Acquisition of Property' Issue*

The Commonwealth's second ground of opposition in constitutional terms was a denial that an 'acquisition of property' had taken place. It claimed that, although the *ALRA* granted traditional owners a fee simple interest, the Commonwealth 'continues to have a significant controlling role' over decision-making and outcomes on Aboriginal land.⁷⁵ The Intervention, with its creation of a five-year lease, was just a statutory readjustment of the controls exercised by the Commonwealth on Aboriginal land.

This might seem an extraordinary interpretation to place on a forced lease over a fee simple interest, the strength of which had received such a ringing endorsement from the High Court little more than two months before the hearing in *Wurridjal*.⁷⁶ The 'shared control' argument was framed in order to pick up an aspect of s 51(xxxi) doctrine which has delivered victory for the Commonwealth in many acquisition of property cases since 1993, including the most recent s 51(xxxi) challenge before *Wurridjal*.⁷⁷ The idea is that a right, while (at least potentially) answering the description of 'property', may be 'inherently defeasible', most commonly because it owes its existence to statute. Therefore, when inherently foreseeable changes occur at the hands of the Commonwealth Parliament, an expectation of compensation is illogical or unreasonable. Viewed in their statutory context, the rights said to be at stake in *Wurridjal* belong in this category of inherent defeasibility, the Commonwealth claimed.

⁷² For examination of this point, see below Part III(C)(1).

⁷³ *Wurridjal v Commonwealth* [2008] HCATrans 349 (3 October 2008) 5801–57 (French CJ, Gummow J and H C Burmester QC).

⁷⁴ *Ibid* 5435–54 (Kirby J and H C Burmester QC).

⁷⁵ *Ibid* 6075–6 (H C Burmester QC).

⁷⁶ See above n 6 and accompanying text.

⁷⁷ *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210. See also *A-G (NT) v Chaffey* (2007) 231 CLR 651, where the appellant was the Northern Territory, not the Commonwealth.



(c) *The 'Just Terms' Issue*

The third and final ground of the Commonwealth's demurrer was that, even if s 51(xxxi) applies to Commonwealth legislation addressed to a territory and even if the Intervention legislation did effect an 'acquisition of property', the ability of affected parties to recover a 'reasonable amount of compensation' from the Commonwealth through court proceedings was sufficient to meet the obligation of 'just terms'.

B *The Issues of Statutory Interpretation*

Before addressing the High Court's conclusions on these three important questions of constitutional law — the s 122 issue, the 'acquisition of property' issue and the 'just terms' issue — the matters of statutory interpretation which shaped so much of the argument in *Wurridjal* will be briefly addressed.

1 *Answers Provided by the Court*

The clearest point to emerge from the case on this front was that the s 71 rights held by Aboriginal people under the *ALRA* trump the exclusive possession conferred on the Commonwealth by a five-year lease created by the Intervention legislation.⁷⁸ Hence, fences put up in townships by the Commonwealth that impede the exercise of s 71 rights are legally problematic.⁷⁹ Although treated as 'preserved rights', s 71 rights, interestingly, are not terminable at will, as other preserved rights are under s 37 of the *NTNERA*.⁸⁰

2 *Issues Left Unresolved*

Kirby and Crennan JJ indicated that payment of rent by the Commonwealth on a five-year lease was obligatory, not discretionary, but other judges avoided committing themselves.⁸¹ French CJ and Crennan J refuted the plaintiffs' claim that the Commonwealth could succeed to rental outcome from Aboriginal land by standing in the shoes of traditional owners under s 34(4).⁸² The answer to the question whether the Commonwealth's right of exclusive possession under the five-year lease nullified the criminal sanction for entry on a sacred site contained in s 69 of the *ALRA* is unclear from the reasons of the Court.

⁷⁸ See *Wurridjal* (2009) 237 CLR 309, 366–7 (French CJ), 379–80 (Gummow and Hayne JJ), 456–7 (Crennan J), 468 (Kiefel J).

⁷⁹ *Ibid* 379 (Gummow and Hayne JJ).

⁸⁰ This is explicit in the judgments of French CJ (*ibid* 366–7), Gummow and Hayne JJ (at 379) and Crennan J (at 456) and may be implicit in that of Kiefel J (at 467–8). French CJ noted the possibility that the Commonwealth's legislative drafting in this area could not be given an entirely coherent operation: at 367.

⁸¹ *Ibid* 424 (Kirby J), 462–3 (Crennan J); cf at 342 (French CJ), 389 (Gummow and Hayne JJ).

⁸² *Ibid* 340–1 (French CJ), 461–2 (Crennan J); cf at 388 (Gummow and Hayne JJ), saying that relevant facts were not pleaded.



C *Three Constitutional Questions: The Response by the Court*

1 *The Section 122 Issue*

One of the most significant outcomes in *Wurridjal* is that four judges of the High Court overruled the unanimous 1969 decision in *Teori Tau*.⁸³ The other three judges in *Wurridjal* declined the invitation to do so, though without endorsing its authority.⁸⁴ A majority of the current Court accepts that just terms are required if a Commonwealth law effects an acquisition of property in a territory, even if (setting aside s 51(xxxi) itself) there is no head of power to which the law can be attributed beyond s 122.

Read from a vantage point 40 years on, the decision in *Teori Tau* is unsatisfactory, with a subtext that prompts unease. A subsidiary of the mining giant that was later to become Rio Tinto found copper on the island of Bougainville in Papua New Guinea in the mid-1960s. Villagers in the area were unhappy with colonial rule by Australia and concerned about the looming construction of the massive Panguna copper mine. One of them, Teori Tau, sued the Commonwealth in the High Court of Australia on behalf of his kin. He alleged that ordinances made under Commonwealth law that vested the minerals of Papua New Guinea in the Crown or in the colonial Administration of the Territory of Papua and New Guinea were invalid because they involved an acquisition of property on other than just terms in contravention of s 51(xxxi) of the *Constitution*.⁸⁵ The parties agreed that the Court should consider and answer a case stated on the legal question whether the just terms guarantee applied to Commonwealth laws about Papua New Guinea.⁸⁶

On 9 December 1969 a full bench of the High Court heard argument from the plaintiff's lawyer and then brought the case to a halt without calling on the lawyers for the Commonwealth, the Administration or the mining company. 'The Judges left the Bench for a short time to consult.'⁸⁷ They returned the same day and delivered a judgment of just over two pages in length. The unanimous decision of the Court, delivered by Barwick CJ, said that Commonwealth laws for the government of the territories were free from the constraint of just terms for the acquisition of property contained in s 51(xxxi), regardless of whether the

⁸³ Ibid 357–9 (French CJ), 385–8 (Gummow and Hayne JJ), 418–19 (Kirby J).

⁸⁴ Heydon J declined to address the issue, preferring to resolve the case on the third ground in the Commonwealth's demurrer (the 'just terms' issue): ibid 427. He also said that 'in consequence of the approach of the plurality judgment in this case, there will in future be no doubt as to the relationship between ss 51(xxxi) and 122 of the *Constitution*': at 429. Crennan J assumed, without deciding, that *Teori Tau* could be overruled in order to resolve the litigation by reference to the second ground in the demurrer (the 'acquisition of property' issue): at 437. Kiefel J decided that the just terms guarantee was potentially applicable because, applying the 'common denominator' position in *Newcrest*, the Intervention relied on powers beyond s 122. Her brief comments on *Teori Tau* did not commit her Honour to a view about its viability as a constitutional precedent: see at 469. For an explanation of the 'common denominator' finding in *Newcrest*, see below nn 93–8 and accompanying text.

⁸⁵ *Teori Tau* (1969) 119 CLR 564, 569 (Barwick CJ for Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ).

⁸⁶ Ibid.

⁸⁷ Ibid 568.



territory was internal (such as the Northern Territory) or external (such as Papua New Guinea).⁸⁸ The grant of legislative power in s 122 of the *Constitution* is ‘plenary in quality and unlimited and unqualified in point of subject matter.’⁸⁹

If the logic of the decision was obvious and compelling, that might have deflected concerns about the highest court of a colonial power dispatching with such alacrity a constitutional case pitting indigenous owners against a multinational mining company. But members of the Court, most conspicuously Barwick CJ himself, adhered to a school of constitutional thought that regarded the territories as integrated with, not disjoined from, the rest of the Commonwealth.⁹⁰ *Teori Tau* did not sit well with that developing line of cases.

Interestingly, it was a multinational mining company that persuaded the High Court to break with the constitutional dogma of *Teori Tau* in 1997.⁹¹ But it was only a partial break. The expansion of Kakadu National Park in the Northern Territory in 1989 and 1991 over former Crown land meant that mining could no longer take place there, even though Newcrest Mining (WA) (‘Newcrest’) held mining leases in the area. Newcrest argued that the sterilisation of its mining leases amounted to an acquisition of property on other than just terms. The Commonwealth relied on the unanimous full bench decision in *Teori Tau* to argue that s 51(xxxi) had no application to a Commonwealth law about land in the Northern Territory.⁹²

Three judges accepted the authority of *Teori Tau* and applied it to reject Newcrest’s claim.⁹³ In finding for Newcrest, three judges said that *Teori Tau* should be overruled (two of them subsequently sat on the *Wurridjal* hearing).⁹⁴ The mining company succeeded because the other judge involved in *Newcrest*, Toohey J, located a constitutional middle ground from which he found in their favour. That alternative argument, shared with the three judges who rejected the authority of *Teori Tau*, proved to be the common denominator sufficient to justify a court order in favour of Newcrest.

Toohey J decided not to overrule the key proposition in *Teori Tau*, though he acknowledged the force of the criticisms made of it in Gummow J’s judgment.⁹⁵ The Commonwealth’s legislative power in s 122 of the *Constitution* was, he said, still unconstrained by s 51(xxxi) and the requirement for just terms.⁹⁶ Instead (agreeing, as Gummow and Kirby JJ did, with reasoning found in the judgment of Gaudron J), Toohey J said that, if a law was referable to both s 122 and

⁸⁸ Ibid 570–1 (Barwick CJ for Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ).

⁸⁹ Ibid 570.

⁹⁰ This idea was expressed both prior to *Teori Tau* (see, eg, *Spratt v Hermes* (1965) 114 CLR 226, 246–7 (Barwick CJ), 270 (Menzies J)) as well as subsequently (see, eg, *Berwick Ltd v Gray* (1976) 133 CLR 603, 608–9 (Mason J); Barwick CJ agreed: at 605).

⁹¹ *Newcrest* (1997) 190 CLR 513.

⁹² See *ibid* 522–3 (B J Shaw QC).

⁹³ Ibid 544–5 (Brennan CJ), 552, 558–60 (Dawson J), 575–6 (McHugh J).

⁹⁴ Ibid 565 (Gaudron J), 612–13 (Gummow J), 661 (Kirby J).

⁹⁵ Ibid 560.

⁹⁶ *Ibid*.



another head of power that *was* so constrained, then just terms would apply.⁹⁷ He maintained that, in the era of Northern Territory self-government, it was almost inevitable that Commonwealth laws bearing on the Territory would have an additional (s 51) character beyond direct government of the Territory.⁹⁸

It is surprising that the Commonwealth should seek to fight on this constitutional turf in its defence of the Intervention legislation in *Wurridjal*. The government could have refrained from instructing its lawyers to urge that the authority of *Teori Tau* be maintained, particularly after it was substantially undermined in 1997. In fact, the Commonwealth went further and sought to reopen the ‘common denominator’ decision in *Newcrest*. It went further still, (remarkably) by denying that the Intervention legislation was additionally supported by the race power, rather than by the power in s 122 alone, though it backed down somewhat in oral argument on this point.⁹⁹

The Commonwealth claimed that s 122 authorised Parliament to act as a national legislature and as a local one analogous to a state Parliament. Its basic argument was that, in enacting the Intervention legislation, the Commonwealth was acting in its role as a local legislature. The power in s 122 was being exercised for local, Territory, purposes and in that guise, like a state, the Commonwealth was not bound by a just terms guarantee — this is part of the ‘proper content’ of s 122.¹⁰⁰ The Commonwealth claimed compatibility with the characterisation principle enunciated by Mason CJ in *Mutual Pools & Staff Pty Ltd v Commonwealth*: that the just terms guarantee in s 51(xxxi) applies to laws reliant on other heads of power ‘in the absence of any indication of contrary intention’.¹⁰¹ The proper content of s 122 includes this capacity to act like a state legislature unencumbered by a just terms guarantee. Therefore the requirement of contrary intention was satisfied.

The problem with the Commonwealth’s characterisation argument was its circularity: ultimately it returned to a dogmatic assertion that the Commonwealth should be free to legislate for the government of a territory without reference to just terms for the acquisition of property. The concept of contrary intention works in cases where it can be justified by arguments based, for example, on logic.¹⁰² But for what compelling and independent reason should citizens of an

⁹⁷ Ibid 560–1.

⁹⁸ Ibid 561.

⁹⁹ *Wurridjal v Commonwealth* [2008] HCATrans 349 (3 October 2008) 5797–801 (French CJ and H C Burmester QC), 5984–6005 (H C Burmester QC).

¹⁰⁰ Ibid 5888–96 (H C Burmester QC).

¹⁰¹ (1994) 179 CLR 155, 169.

¹⁰² For example, powers over taxation and bankruptcy necessarily entail expropriations which will go uncompensated. Labels like ‘tax’ are not conclusive and there is room for reasonable judicial disagreement over the appropriate characterisation of an exaction at the margin — see *Theophanous v Commonwealth* (2006) 225 CLR 101, 126 (Gummow, Kirby, Hayne, Heydon and Crennan JJ) — but logically the legal category ‘tax’ has no content unless it can ultimately be divorced from the coverage of the just terms guarantee — see *ibid* 170–1 (Mason CJ), 187–8 (Deane and Gaudron JJ), 197–8 (Dawson and Toohey JJ). The same appeal to logic cannot be made on behalf of the Commonwealth’s argument that it be permitted to act on occasions as a ‘local’ legislature, like a state Parliament, free of the guarantee.



Australian territory be denied a level of protection against *Commonwealth* legislative power available to citizens of an Australian state?

In *Wurridjal*, Gummow J (writing jointly with Hayne J) adhered to his exhaustively argued position in *Newcrest* that *Teori Tau* was untenable.¹⁰³ Kirby J, likewise, maintained his view expressed in *Newcrest* that *Teori Tau* should be overruled.¹⁰⁴

French CJ devoted a large proportion of his judgment to this first ground of the Commonwealth's demurrer. With textbook clarity, balanced analysis and persuasive force — signalling a preference for the carefully calibrated legal realism of a kind practised by former Chief Justice Sir Anthony Mason — he too arrived at the conclusion that *Teori Tau* should be abandoned. He began by placing the debate over *Teori Tau* in the context of a wider constitutional question: are the territories an integral or a disparate part of the Australian Commonwealth?¹⁰⁵ In this context, *Teori Tau* sat uncomfortably with the unmistakable trajectory of High Court decisions in the last 50 years towards greater integration.

The Chief Justice reviewed the accepted grounds for overturning High Court decisions and concluded that it called for a factor-based approach as well as 'a strongly conservative cautionary principle'.¹⁰⁶ The task for an appellate judge is not so much the identification of 'error' as the making of well-reasoned 'constructional choices'.¹⁰⁷ French CJ assembled a wide range of interpretive principles that encouraged a construction of s 122 that subjected it to the restriction contained in s 51(xxxi). An examination of the cases that might be thought to offer support for *Teori Tau* revealed that virtually every reference to it was peripheral, perfunctory or appeared in a dissenting judgment.¹⁰⁸ He concluded that *Teori Tau* was so isolated and marginalised by modern constitutional developments that even the 'cautionary principle' in favour of existing authority could not save it from the persuasive constructional arguments to the contrary.¹⁰⁹

2 *The 'Acquisition of Property' Issue*

Long ago, the High Court found that when the Commonwealth took possession and control (rather than title) of an area of land it was an 'acquisition of property', even when it was for defence purposes in the middle of a war and

¹⁰³ '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. It should be overruled': *Wurridjal* (2009) 237 CLR 309, 388.

¹⁰⁴ *Ibid* 418–19.

¹⁰⁵ See *ibid* 344–6.

¹⁰⁶ *Ibid* 352.

¹⁰⁷ *Ibid* 353.

¹⁰⁸ *Ibid* 348–50. This examination included those cases relied on by Brennan CJ, Dawson and McHugh JJ in *Newcrest* (1997) 190 CLR 513, namely, *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, *Northern Land Council v Commonwealth* (1986) 161 CLR 1, *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155.

¹⁰⁹ *Wurridjal* (2009) 237 CLR 309, 359.



even though the property right of the divestee was no more than a week-to-week tenancy.¹¹⁰ Here the Intervention legislation forcibly imposed a lease in favour of the Commonwealth, granting it ‘exclusive possession and quiet enjoyment’ for five years plus the capacity to sublease the land without reference to its owners.¹¹¹ The subject land was held by Aboriginal people under a fee simple title that the High Court says is the equivalent of full ownership.¹¹²

It is surprising, then, that in *Wurridjal* the Commonwealth denied, in the second ground of its demurrer, that a s 31 lease on Aboriginal land involved an acquisition of property¹¹³ and that the argument attracted the support of a member of the High Court.¹¹⁴ The Commonwealth’s denial was based on a ‘shared control’ interpretation of land ownership under the *ALRA*, outlined earlier:¹¹⁵ the role reserved by statute for the Commonwealth Minister, in relation to leasing approvals, showed the fee simple interest of a Land Trust to be qualified from the start by the potential for executive intervention (that is, ‘inherently defeasible’). In that context, a forced lease in favour of the Commonwealth, in pursuit of its social policy objectives, did not involve an acquisition of property.

The Commonwealth’s argument was rejected by a majority of the Court, who found that the five-year lease did effect an acquisition of the Land Trust’s property.¹¹⁶ Gummow and Hayne JJ said that rights previously recognised as inherently defeasible — such as workers’ compensation entitlements and offshore petroleum exploration licences — were qualitatively different from the fee simple title to Aboriginal land under the *ALRA*.¹¹⁷ The ongoing role for the Minister was little different from the range of statutory controls applied to other fee simple titles around Australia.¹¹⁸

¹¹⁰ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261. In another pertinent and much-quoted authority, Dixon J said that s 51(xxxi)

is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but ... extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property.

Bank of New South Wales v Commonwealth (1948) 76 CLR 1, 349.

¹¹¹ *NTNERA* ss 35(1), (5).

¹¹² See above n 6 and accompanying text.

¹¹³ The Commonwealth even pleaded the possibility that the fee simple held by the Land Trust was not ‘property’ for the purposes of s 51(xxxi), despite the long, unbroken line of High Court authority giving the term a very wide interpretation: see *Wurridjal* (2009) 237 CLR 309, 362 (French CJ). For a recent discussion of the breadth of ‘property’ by a unanimous full bench, see *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 230–2 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

¹¹⁴ For discussion of the judgment of Crennan J, see below nn 121–4 and accompanying text.

¹¹⁵ See above Part III(A)(3)(b).

¹¹⁶ *Wurridjal* (2009) 237 CLR 309, 364 (French CJ), 383 (Gummow and Hayne JJ), 467 (Kiefel J). Kirby J found that the s 31 lease effected an acquisition of the Land Trust’s property (at 420) and said that the claim by the first and second plaintiffs that they too had suffered an acquisition of property was arguable (at 423); cf at 430 (Heydon J).

¹¹⁷ *Ibid* 382–3, citing *A-G (NT) v Chaffey* (2007) 231 CLR 651; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1.

¹¹⁸ *Wurridjal* (2009) 237 CLR 309, 382 (Gummow and Hayne JJ).



French CJ acknowledged that the fee simple was subjected to close statutory regulation, but he said that was mainly to protect, not dilute, the interests of traditional owners.¹¹⁹ This, after all, was an Act designed to promote justice and traditional ownership.¹²⁰ While the stated aims of s 31 leases might relate to improved housing for communities, for French CJ there was no denying the abridgment of ownership rights involved.

Crennan J (effectively in dissent on this issue) resolved the *Wurridjal* litigation in favour of the Commonwealth on this second ground in the demurrer. She accepted that the fee simple interest was a ‘formidable property interest’¹²¹ but held that no acquisition of property took place with the grant of the five-year lease at Maningrida. She accepted the shared control model, blending an inherent defeasibility analysis with a characterisation approach.¹²² In contrast to French CJ, she interpreted the Intervention legislation as compatible with the purposes of the *ALRA*¹²³ and downplayed its impact on existing property rights.¹²⁴

On the additional question of changes to the permit scheme, Gummow and Hayne JJ refrained from determining whether they amounted to a separate acquisition of property, finding simply that the formula used in the legislation took care of any just terms obligations that might arise.¹²⁵ Crennan and Kiefel JJ both found that there was no acquisition of property above and beyond that already effected by the creation of the five-year lease granting exclusive possession to the Commonwealth.¹²⁶

French CJ found that the changes to the permit scheme did effect an acquisition of property. He treated the permit scheme as protective of the legal right to exclude already embedded in the fee simple interest.¹²⁷ The importance of that link to the exclusivity of possession evidently outweighed the statutory basis to the permit scheme for the purposes of s 51(xxxi) and the doctrine of inherent defeasibility. The Chief Justice too, however, found that the acquisition was not one above and beyond that already effected by the lease.¹²⁸ But he qualified that

¹¹⁹ Ibid 364.

¹²⁰ Ibid 363–4. The Chief Justice referred to: (a) the aims of land rights stated by the Woodward Royal Commission, the body which provided the statutory blueprint for the *ALRA*; and (b) the objects of the Act itself.

¹²¹ *Wurridjal* (2009) 237 CLR 309, 459.

¹²² Crennan J said that the fee simple ‘was always susceptible to an adjustment of the kind effected by the challenged provisions, in circumstances such as the existence of the present problems’: *ibid* 464; see also at 450–3. She also indicated that the kind of impact occasioned by the lease was not properly characterised as a law with respect to the acquisition of property: at 465. As to the imprecise doctrinal foundations of the inherent defeasibility concept, see Sean Brennan, ‘Native Title and the “Acquisition of Property” under the *Australian Constitution*’ (2004) 28 *Melbourne University Law Review* 28, 53–9.

¹²³ *Wurridjal* (2009) 237 CLR 309, 449.

¹²⁴ Ibid 460–1.

¹²⁵ Ibid 390–1.

¹²⁶ Ibid 463 (Crennan J), 467–8 (Kiefel J).

¹²⁷ Ibid 365.

¹²⁸ Ibid.



finding by saying it applied ‘while the lease remains in force.’¹²⁹ The implication is that if the permit changes remain when the five-year lease expires there is an embedded acquisition of property in the Intervention legislation which will take on stand-alone constitutional significance at that point.

3 *The ‘Just Terms’ Issue*

The third ground of the Commonwealth’s demurrer asserted that ‘just terms’ were provided by s 60 of the *NTNERA* for any ‘acquisition of property’ effected by the five-year lease and by sch 4 item 18 of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) for any acquisition resulting from changes to the permit scheme. The provisions in each Act were expressed in essentially the same terms. The relevant parts of s 60 were as follows:

- (2) ... if the operation of this Part, or an act referred to in paragraph (1)(b) or (c), would result in an acquisition of property to which paragraph 51(xxxi) of the *Constitution* applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.
- (3) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

Although the interest held by the Land Trust was expressed in the language of Anglo-Australian property law, it found its origins in the common spiritual affiliations and spiritual responsibilities of the titleholders. Likewise, s 71 rights originate in Aboriginal tradition. When some form of expropriation of such landed interests occurs, the notion of ‘compensation’ raises complex cross-cultural questions.¹³⁰ In addition, when the *ALRA* is examined closely, it reveals specially protective procedures and constraints. The plaintiffs in *Wurridjal* drew attention, for example, to the obligations to consult and obtain informed consent imposed on the Land Council in favour of traditional owners and other affected Aboriginal groups under the *ALRA*.¹³¹

These cultural and statutory features take Aboriginal property rights under the *ALRA* to some extent beyond the category of conventional fee simple interests. Translating that distinctiveness into legally meaningful propositions in constitutional litigation is not straightforward. The plaintiffs had difficulty crystallising the ‘non-financial disadvantages’¹³² accruing to the traditional

¹²⁹ *Ibid.*

¹³⁰ For a discussion of incommensurability and inevitability in the judicial valuation of Indigenous property rights, see Paul Burke, ‘How Can Judges Calculate Native Title Compensation?’ (Discussion Paper, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002) <<http://www.aiatsis.gov.au/ntru/compensation.html>>.

¹³¹ *Wurridjal v Commonwealth* [2008] HCATrans 348 (2 October 2008) 2599–610 (R Merkel QC). The Commonwealth was not required to assume these obligations in gaining possession and discretionary control over the land subject to a five-year lease.

¹³² See *ibid* 3284–5.



owners as a consequence of the acquisition of property in a way that was comprehensible to the Court.¹³³ These complexities appear to have been compounded by the way in which facts were pleaded in the plaintiffs' statement of claim and by the reality that most of their arguments were ultimately ones of statutory construction.¹³⁴ It is also difficult to discern from the judgment and the transcript of oral argument what form a provision such as s 60 should take, in the view of the plaintiffs, in order for the just terms guarantee to be satisfied when Aboriginal property rights are acquired.¹³⁵

It was these complexities which drove Kirby J, in his dissent, to conclude that a demurrer proceeding was an inappropriate context in which to resolve the question of just terms in *Wurridjal* and that the matter should proceed to trial, where arguable claims could be further refined and clarified.¹³⁶ The majority of judges took a different view and rejected the plaintiffs' argument as to the absence of just terms in the Intervention legislation, based on the facts pleaded in the statement of claim. In this respect the adoption of a demurrer proceeding does not seem to have served the interests of the plaintiffs.

As noted earlier, the distinctiveness of Aboriginal property rights gave rise to three discrete questions during oral argument:

- 1 Are some of the jeopardised interests simply uncompensable; and if so, are they thus unacquirable by the Commonwealth? (The plaintiffs' counsel expressly disavowed such a submission as to lack of power.)
- 2 Do just terms for the acquisition of some interests necessarily entail some kind of non-monetary compensation, at least as an element of the compensatory package?
- 3 Do just terms imply a procedural element, and more specifically, in regard to Aboriginal property rights, do they require that the interests be acknowledged in some way through the procedure by which the property is acquired?

Ultimately, however, these issues received far less attention and analysis in the judgment in *Wurridjal* than they did during the oral hearings, and some doubt surrounds the precise implications of the High Court decision on the 'just terms' issue. The plaintiffs clearly failed to establish that, on the facts pleaded, there was an absence of just terms in the framing of s 60 by reference to 'reasonable compensation'. Whether any stronger statement can be made about the precedential value of *Wurridjal* is doubtful.

Crennan J abstained from determining the 'just terms' issue.¹³⁷ Kirby J dissented and strongly preferred that the issue go to trial.¹³⁸ Gummow, Hayne¹³⁹

¹³³ See above Part III(A)(1)(c).

¹³⁴ See above n 69.

¹³⁵ One suggestion made by counsel for the plaintiffs and noted in Heydon J's judgment is 'a provision guaranteeing a continuation of access by the traditional owners to the land for traditional purposes "side-by-side with the acquisition"': *Wurridjal* (2009) 237 CLR 309, 433–4.

¹³⁶ *Ibid* 394–5.

¹³⁷ *Ibid* 437.

¹³⁸ *Ibid* 394–5.



and Kiefel JJ¹⁴⁰ endorsed the formula adopted in s 60. French CJ also stated that s 60 ‘afforded just terms for the acquisition of the Land Trust property.’¹⁴¹ But in reaching his conclusion on the ‘just terms’ issue, the Chief Justice expressly relied on the reasoning of Heydon J.¹⁴² On a close reading, Heydon J’s judgment appears to be quite fact-dependent and case-specific. The negatory form of much of the judgment (it includes statements such as ‘there is no point in examining that contention’;¹⁴³ ‘[t]he present case does not afford an occasion on which it is appropriate to consider these issues raised by the plaintiffs’;¹⁴⁴ ‘[t]here are two difficulties with these contentions’)¹⁴⁵ restricts its capacity to have binding legal consequence beyond the present case. Heydon J also acknowledged the complex cross-cultural questions raised by the concept of just terms and that resolving some of these questions was not necessary given the way the case was pleaded in the demurrer proceedings¹⁴⁶ — and he was not alone in acknowledging that certain such questions remained for another day.¹⁴⁷

In short, the implications for the future on the question of just terms for culturally distinct property rights are clouded by considerable uncertainty. The restricted and somewhat artificial nature of demurrer proceedings, the facts pleaded (and not pleaded), the legal case argued and the way the reasoning was couched in individual judgments all contribute to this uncertainty. Even if the ‘historic shipwrecks formula’¹⁴⁸ used in the Intervention legislation can be considered, in general, as a formula sufficient to achieve just terms, the decision in *Wurridjal* left unexplored the potential latitude of its wording.¹⁴⁹

It cannot confidently be said that any particular argument regarding just terms by an Aboriginal group dispossessed of their property rights is precluded by the finding in *Wurridjal*.

IV CONCLUSION

The significance of the *Wurridjal* decision begins with the fact that four judges of the High Court overruled the unanimous decision in *Teori Tau* and no judge raised their voice to defend it. Though one of the four was in dissent on the

¹³⁹ ‘The provision for payment of “reasonable compensation” determined, in the absence of agreement, by exercise of the judicial power of the Commonwealth, satisfies the requirement of “just terms” with respect to the Maningrida Five Year Lease’: *ibid* 389.

¹⁴⁰ *Ibid* 466.

¹⁴¹ *Ibid* 364–5.

¹⁴² *Ibid* 365.

¹⁴³ *Ibid* 427.

¹⁴⁴ *Ibid* 434.

¹⁴⁵ *Ibid* 433.

¹⁴⁶ *Ibid* 432–5; see also at 426–7.

¹⁴⁷ *Ibid* 390 (Gummow and Hayne JJ), 470–2 (Kiefel J).

¹⁴⁸ The phrase ‘historic shipwrecks formula’ is commonly used to describe such ‘insurance clauses’ against s 51(xxxi) invalidity as that contained in *NTNERA* ss 60(1)–(2). The phrase harks back to the use of such a clause in *Historic Shipwrecks Act 1976* (Cth) s 21.

¹⁴⁹ For example, the phrase ‘recovery from the Commonwealth of such reasonable amount of compensation as the court determines’ (*NTNERA* ss 60(3), 134(3)) does not rule out a conclusion by that court that a non-monetary form of compensation is necessary in order to meet the underlying constitutional requirement of just terms.



result, the result in *Wurridjal* certainly strengthens the idea that the Commonwealth legislative power to make laws for the government of a territory in s 122 is constrained by the requirement of just terms for the acquisition of property contained in s 51(xxxi). In that sense *Wurridjal* continues a glacial move towards fuller constitutional integration of the territories in the Commonwealth of Australia.¹⁵⁰ The many hundreds of thousands of Australians who live in a territory perhaps now share in full with their fellow Australians interstate one of the few rights protected by the *Constitution*.¹⁵¹

The second point concerns the evident strength of Aboriginal property rights under the federal land rights regime in the Northern Territory. The High Court decision in the *Blue Mud Bay* litigation in July 2008 indicated that a fee simple interest under the *ALRA* was reinforced by strong statutory protections and carried with it a powerful right to exclude others.¹⁵² The decision six months later in *Wurridjal* confirms that Aboriginal land rights in the Northern Territory attract constitutional protection under s 51(xxxi) and the beneficial operation of the canons of statutory interpretation which have long guarded property rights in the English and Australian courts.¹⁵³ The fee simple title to Aboriginal land is far from the policy plaything of the Commonwealth government, and the rights based in tradition that are enjoyed by individual Aboriginal people under s 71 of the *ALRA* are not easily abridged by legislation. The Chief Justice, and possibly others in *Wurridjal*, regarded the permit scheme as within the sphere of protection offered by s 51(xxxi).

Thirdly, the case perpetuates the mystery surrounding the constitutional concept of just terms.¹⁵⁴ A particular potential significance of the litigation in *Wurridjal* was the light the High Court might have shed on the concept of just terms when applied to the expropriation of Aboriginal property rights. More than once the Court has said that the belated recognition of traditional rights to land in

¹⁵⁰ See Leslie Zines, 'The Nature of the Commonwealth' (1998) 20 *Adelaide Law Review* 83, 83–8; Leslie Zines, "'Laws for the Government of Any Territory': Section 122 of the *Constitution*" (1966) 2 *Federal Law Review* 72. Cf Christopher Horan, 'Section 122 of the *Constitution*: A "Disparate and Non-Federal" Power?' (1997) 25 *Federal Law Review* 97.

¹⁵¹ Gummow J has described the just terms provision in s 51(xxxi) as an individual right: *Newcrest* (1997) 190 CLR 513, 613.

¹⁵² *Blue Mud Bay* (2008) 236 CLR 24. The decision is analysed in Sean Brennan, 'Wet or Dry, It's Aboriginal Land: The *Blue Mud Bay* Decision on the Intertidal Zone' (2008) 7(7) *Indigenous Law Bulletin* 6.

¹⁵³ For example, four judges invoked the requirement for clear and plain language before a statute could be taken to diminish the property rights established under the *ALRA*, either generally or, at least, specifically in relation to s 71 rights: *Wurridjal* (2009) 237 CLR 309, 367 (French CJ), 379 (Gummow and Hayne JJ), 406–7 (Kirby J).

¹⁵⁴ Gummow J's observation that s 51(xxxi) contains an individual right (see above n 151) is surely significant for the question of how the elusive concept of just terms should be interpreted. The utilitarian interpretation of 'just terms' in cases decided around World War II, which is where much of the High Court's analysis of the term is to be found, would not survive the (appropriate) categorisation of s 51(xxxi) as an 'individual right'. Compare, for example, the focus on the divestee in *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297, 310–11 (Brennan J), with the preparedness to offset this against the 'interests of the community' in *Grace Brothers Pty Ltd v Commonwealth* (1946) 79 CLR 269, 280 (Latham CJ). The utilitarian considerations in favour of government power are already well catered for in the numerous doctrinal obstacles to establishing that an acquisition of property has occurred.



Australian law demands that we ‘adjust ingrained habits of thought and understanding’.¹⁵⁵ The High Court has also repeatedly stated that traditional Aboriginal connection to land has a strongly spiritual dimension¹⁵⁶ — as the statutory wording of the *ALRA* also emphasises. One might expect that at least in the area of fair dealing and just terms for compulsory acquisition the Court would give due weight to its past emphasis on the spiritual dimension to Aboriginal property rights and, also, consider whether the notion of just terms might conceivably extend beyond a focus on purely monetary compensation. The Land Trust, while abstaining from an active contribution to the oral argument in *Wurridjal* over the content of ‘just terms’, signalled its recognition that deep cross-cultural questions are involved — as did several members of the Court during the hearing in October 2008.

In the judgment delivered in February 2009, Heydon J devoted the most sustained attention to the issue of what might constitute just terms in such circumstances. His reasoning, however, did not concern itself with propositional clarity about the outer boundaries of the just terms concept. It was more tightly (and negatively) focused on the legal arguments put forward and facts pleaded by the plaintiffs in this particular demurrer proceeding. It is interesting that French CJ deferred to another member of the bench on an issue that is of such constitutional importance to someone with French CJ’s evident interest in Aboriginal affairs. Ultimately, the brevity of analysis in the Court’s reasons for judgment regarding the wording in s 60 is one of the most noticeable features of the case.

What explains the apparent reluctance to spend time analysing the precise wording of the statutory provisions on ‘reasonable compensation’ and ‘just terms’ and assessing them against the admittedly sketchy and inconsistent case law on this issue¹⁵⁷ in light of the particular race-specific and culturally distinct property rights at stake? Perhaps the paucity of analysis on this front lends some weight to Kirby J’s dissenting view that arguable questions raised by the plaintiffs’ case on this issue should have been liberated from the artificiality and constraints of the demurrer proceeding and left to a trial where the full factual matrix could have been considered.¹⁵⁸ But the plaintiffs’ lawyers had actively pursued a hearing on demurrer and, more broadly, this case may simply not have been the appropriate vehicle, or not the appropriate vehicle at the time it was run, for the agitation of these issues. One can assume that this will not be the last time that the Court will be asked to consider the very important constitutional

¹⁵⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1, 177 (Gummow J). See also *Yanner v Eaton* (1999) 201 CLR 351, 383 (Gummow J).

¹⁵⁶ See, eg, *Western Australia v Ward* (2002) 213 CLR 1, 64 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁵⁷ ‘There is little judicial elaboration of what the phrase means’: *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 102–3 (Kirby J).

¹⁵⁸ This would also have had the consequence of relieving the plaintiffs of the costs order made against them and in favour of the Commonwealth. That order was harsh for a party that had secured both the overturning of a unanimous High Court authority in *Teori Tau* and a finding that an acquisition of property had occurred, a defeat on both counts for the Commonwealth.



2009]

Wurridjal v Commonwealth

983

question of what constitutes just terms when Indigenous property rights are compulsorily acquired.



berpress Legal Repository