

Territory Exceptionalism and Indigenous Property Holders: Federalism, Rights Protection and the Australian Constitution

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Territory Exceptionalism and Indigenous Property Holders: Federalism, Rights Protection and the Australian Constitution

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*The guarantee of 'just terms' for the compulsory acquisition of property is a rare example of rights protection in the Australian Constitution. Residents of those parts of Australia categorised as Commonwealth Territories were long denied an entitlement to this and other constitutional limitations on governmental power. This resulted from the High Court's interpretation of Section 122 of the Australian Constitution, which is the provision conferring power on the Commonwealth to make laws about its Territories. A federalist focus to Australian judicial review, influenced by Diceyan perspectives on law and politics, overrode the equality of rights protection that might have been prioritised under a different form of constitutionalism. Slowly, over time, territorial exceptionalism has lost favour in the High Court and a more integrationist approach has taken hold. A High Court decision in 2009 about Aboriginal land rights in the Northern Territory, *Wurridjal v Commonwealth*, brought this integrationist perspective to bear on the property rights guarantee. *Wurridjal* overturned the 1969 decision in *Teori Tau v Commonwealth*, which had denied the 'just terms' protection to traditional landowners in the then Australian colony of Papua New Guinea. But Aboriginal property rights, and rights more generally in Australia, remain situated in a polity where utilitarianism, majoritarian politics and Diceyan legal ideas still hold powerful sway.*

I. A RARE RIGHTS GUARANTEE

There is a rights guarantee for property holders in the Australian Constitution (Constitution). This is unusual. The document which brought the federated Commonwealth of Australia into being in January 1901 — a statute of the Imperial Parliament at Westminster¹ — was focused on empowering government and allocating authority between federal and state institutions. There are few signs of a constitutionalism that puts the people at the centre and jealously patrols the capacity of the state to infringe fundamental rights and freedoms.

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¹ Commonwealth of Australia Constitution Act 1900 (Imperial).

For example, the recently retired Chief Justice of the High Court of Australia, Murray Gleeson, wrote in one of his last constitutional judgments:

The Australian Constitution was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies.²

The property guarantee is found in Section 51 of the Constitution. Section 51 is a constitutional centrepiece, because it allocates to the national parliament most of the finite powers it possesses under Australia's federal system — there are only a few sections conferring legislative power on the Commonwealth that are located outside the 40 itemised grants of power in Section 51. This section commences with the words 'subject to this Constitution.' These words are important because they emphasise that even if a law can be attributed to one of the 40 heads of power in Section 51, it may yet lack constitutional validity. The phrase 'subject to this Constitution' is seen as confirming that express and implied limitations on power elsewhere in the Constitution can operate to deny validity to a law that otherwise appears within power. Two prominent examples of such judicially enforceable limits on power arise by implication from the existence of a federal system,³ and the structural separation of the judiciary from the other arms of government in Chapter III of the Constitution.⁴

Towards the end of that list of 40 subject matters in Section 51, paragraph (xxxi) of the Constitution confers on the federal parliament the power to make laws with respect to the

² *Roach v Electoral Commissioner* (2007) 233 CLR 162, 172. He then quoted (again at 172) the following observation by Barwick CJ in *Attorney-General (Commonwealth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 24: 'Because [the] Constitution was federal in nature, there was necessarily a distribution of governmental powers as between the Commonwealth and the constituent States with consequential limitation on the sovereignty of the Parliament and of that of the legislatures of the States. All were subject to the Constitution. But otherwise there was no antipathy amongst the colonists to the notion of the sovereignty of Parliament in the scheme of government.'

³ The so-called 'Melbourne Corporation principle', identified in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. The present Chief Justice of the High Court, Robert French, recently said that it means that 'the Commonwealth cannot, by the exercise of its legislative power, significantly impair, curtail or weaken the capacity of the States to exercise their constitutional powers and functions (be they legislative, executive or judicial) or significantly impair, curtail or weaken the actual exercise of those powers or functions.' *Clarke v Commissioner of Taxation* (2009) 258 ALR 623, 634–635.

⁴ The implied limits on power arising from Chapter III — which were affirmed in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 — have been elaborated in many cases since and were most recently developed by the High Court in *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1 [91]–[100] (French CJ, Gummow J, Hayne J, Crennan J, Kiefel J and Bell J).

acquisition of property ‘on just terms’.⁵ Though styled as a power, the paragraph has long been recognised as possessing a dual character.⁶ As a grant of legislative power, it confirms what is often treated as implicit in like constitutional systems, as an inherent attribute of sovereignty: the Commonwealth possesses the power of eminent domain or compulsory acquisition. At the same time, the requirement of ‘just terms’ operates as a *restriction* on Commonwealth power of quite sweeping effect. If a Commonwealth ‘acquisition of property’ fails to accord ‘just terms’ to the divestee, the relevant law is unconstitutional.

The comprehensive nature of the guarantee is achieved interpretively by ascribing exercises of eminent domain solely to the power in Section 51(xxxi) where the constraining phrase ‘just terms’ appears.⁷ Ordinary principles of constitutional interpretation in Australia might otherwise recognise an embedded capacity for compulsory acquisition in several other grants of power.⁸

In passing, it should be noted that although compensation is ordinarily payable for the acquisition of property by state parliaments as a matter of statutory law, there is no constitutionally guaranteed right to ‘just terms’ at the state level.⁹

The series of legal hurdles in front of a plaintiff seeking to establish the constitutional entitlement under federal law is not to be underestimated.¹⁰ Nonetheless, the guarantee of ‘just terms’ has been held to protect a range of valuable legal interests well beyond real

⁵ 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.’

⁶ The High Court has repeatedly recognised its dual character as a grant of power and as a constitutional restriction on power, or guarantee. See, for example, the Full Court in *Telstra v Commonwealth* (2008) 234 CLR 210, 232 quoting *Victoria v Commonwealth* (1996) 187 CLR 416, 559 (Brennan CJ, Toohey J, Gaudron J, McHugh J and Gummow J).

⁷ There are recognised exceptions which permit expropriations without compensation but these are not material to the discussion here.

⁸ ‘The decisions of this Court show that if par. (xxxi) had been absent from the Constitution many of the paragraphs of s. 51... would have been interpreted as extending to legislation for the acquisition of land or other property for use in carrying out or giving effect to legislation enacted under such powers. The same decisions, however, show that in the presence in s. 51 of par. (xxxi) those paragraphs should not be so interpreted but should be read as depending for the acquisition of property for such a purpose upon the legislative power conferred by par. (xxxi) subject, as it is, to the condition that the acquisition must be on just terms.’ *Attorney-General (Commonwealth) v Schmidt* (1961) 105 CLR 361, 371 (Dixon CJ).

⁹ *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

¹⁰ A plaintiff must show loss of her ‘property’ and a corresponding gain or benefit acquired by the Commonwealth or third party — mere extinguishment of rights is not sufficient. The law must escape alternative characterisation, that is, as a law with respect to some subject matter other than the acquisition of property (e.g., a law about tax, or the regulation of competing interests in a given field of economic activity). The right cannot be one which is ‘inherently defeasible’, that is, innately susceptible to legislative diminution in a way that makes compensation inappropriate when it is so diminished. Further, there must of course be an absence of ‘just terms.’

estate¹¹ and Section 51(xxxi) bucks the trend in Australian constitutional law — it offers a judicially enforceable guarantee of rights for members of the community who hold property.

However, not everyone subject to the authority of the Commonwealth parliament has enjoyed this right. More than half a million Australians live in what is constitutionally described as a Territory of the Commonwealth, that is, a sub-national unit of the Australian polity that is not a state. A significant proportion of those people are the first Australians — Aboriginal people — who, in the jurisdiction of the Northern Territory, constitute about 30 per cent of the population and hold about 45 per cent of the land in communal ownership.

This article focuses on a constitutional case about Aboriginal property rights that was decided in 2009 by the nation's ultimate judicial authority, the High Court of Australia. In *Wurridjal v Commonwealth*,¹² some Aboriginal land owners sought to rely on the 'just terms' guarantee when the Commonwealth government took control of their township land in circumstances described below. The traditional land owners lived in the Northern Territory and, as we will see, constitutionally this presented them with a problem. Part II of the article explains the legislative interference with Aboriginal property rights that gave rise to the *Wurridjal* litigation, while Part III outlines the rise and fall of territorial exceptionalism in the High Court's interpretation of the 'just terms' guarantee. Part IV examines the judicial rationale for treating the Territories in this constitutionally disparate fashion and Part V explains how the decline of this view coincided with a greater rights-consciousness amongst members of the Mason High Court in the 1990s. Despite these developments, Aboriginal property rights, long vulnerable to uncompensated expropriation under Australian law, remain vulnerable on this and other fronts, as Parts VI and VII point out.

II. THE NORTHERN TERRITORY INTERVENTION

In June 2007, the then Prime Minister John Howard held a joint press conference with his Minister for Indigenous Affairs, Mal Brough. They announced the Northern Territory Emergency Response — a range of sweeping legal, policy and administrative measures, several of which had an involuntary and intrusive impact on the daily lives of Aboriginal

¹¹ Some notable examples include the sterilisation of the right to mine sub-surface minerals through the creation of a national park where mining was banned: *Newcrest Mining (Western Australia) Ltd v Commonwealth* (1997) 190 CLR 513; the removal of a vested cause of action to sue in negligence when a new workers' compensation regime was introduced: *Georgiadis v Australian and Overseas Telecommunication Corporation* (1994) 179 CLR 297; and the acquisition of control of private banks by replacement of directors with government nominees under a policy of industry nationalisation that effectively deprived the company and its shareholders of 'the reality of proprietorship': *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349.

¹² (2009) 237 CLR 309.

people on Aboriginal-owned land in the Northern Territory.¹³ The measures — which have also come to be known simply as ‘the Intervention’ — included removal of individual discretionary control over welfare income, the insertion of resident Government Business Managers in Aboriginal townships and the compulsory five-year leases discussed below.¹⁴ The Intervention measures were generally imposed by reference to geographical area, and thus effectively by reference to land tenure. The Commonwealth has justified the extraordinary nature of the measures on the basis that the levels of socio-economic disadvantage and violence against women and children in town camps and remote Aboriginal communities constitute a national emergency.¹⁵ Political opinion has been divided about the merits of the Intervention, both amongst Aboriginal individuals and organisations and across the wider Australian community.

The case of *Wurridjal v Commonwealth*¹⁶ involved a constitutional challenge to one aspect of the Intervention by two Aboriginal landowners and an Aboriginal corporation from a small coastal settlement called Maningrida. The Commonwealth compulsorily acquired control of the Maningrida township, and 63 other Aboriginal communities in the Northern Territory for a five-year period. It did so by the involuntary and statutory creation of a lease from the traditional owners to the Commonwealth. Although the resident population was left in place, in legal terms the lease conferred exclusive possession and quiet enjoyment on the Commonwealth for five years. The payment of rent was discretionary rather than obligatory and various terms of the lease could be unilaterally changed by the Commonwealth, but not by the traditional owners.¹⁷

When Mr Brough announced the Intervention, he said that ‘just terms’ compensation would be paid for imposing the leases.¹⁸ However, the law passed by Parliament made the payment of ‘reasonable compensation’ dependent on traditional owners establishing that a constitutionally defined ‘acquisition of property’ had occurred.¹⁹ When the Aboriginal plaintiffs mounted a constitutional challenge to the validity of this measure in the High

¹³ The Hon John Howard MP (former Prime Minister of Australia), Joint Press Conference with the Hon Mal Brough, Minister for Families, Community Services and Indigenous Affairs, Canberra, 21 June 2007 <pandora.nla.gov.au/pan/10052/20070823-1732/www.pm.gov.au/media/Interview/2007/Interview24380.html> accessed 7 June 2010.

¹⁴ The Intervention was implemented through a series of administrative and legislative changes. The introduction of ‘income management’ of welfare payments was made in the Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Commonwealth). Compulsory five-year leases were imposed by the Northern Territory National Emergency Response Act 2007 (Commonwealth) and that Act also supported the activities of Government Business Managers.

¹⁵ The Howard Government was defeated at the November 2007 general election. The Labor Government led by Kevin Rudd has continued the Intervention with minor modifications.

¹⁶ *Wurridjal v Commonwealth* (n 12).

¹⁷ Northern Territory National Emergency Response Act 2007 (Commonwealth) (NTNERA) ss 31, 35, 36 and 62.

¹⁸ The Hon Mal Brough MP, ‘National emergency response to protect Aboriginal children in the NT’ (Media Release, 21 June 2007).

¹⁹ NTNERA s 60(2).

Court, the Commonwealth denied that the ‘just terms’ guarantee for property rights in Section 51(xxxi) applied to land in the Northern Territory.²⁰

The seizure of control over freehold land for government policy purposes by way of federal law is the paradigm example of an ‘acquisition of property’ to which the constitutional guarantee applies.²¹ Why, then, did it matter that these particular landowners lived in a Commonwealth Territory?

III. THE DISPARATE TREATMENT OF TERRITORIES AND THEIR RESIDENTS

A. *Teori Tau*: The ‘Disparate Power’ Theory

To answer that question, we need to go back four decades to 1969 when traditional landowners in another Australian Territory also challenged the seizure of their property rights by force of Commonwealth law. In that case, *Teori Tau v Commonwealth*,²² villagers from the island of Bougainville in Papua New Guinea objected to a local ordinance made under Commonwealth law that vested subsurface minerals in the colonial administration. At the time, Papua New Guinea was still an Australian Territory subject to laws enacted with the authority of the Australian parliament.²³

Teori Tau was a villager from the area near the deposit that later became the huge Panguna copper mine. On behalf of local traditional owners, he asserted communal ownership of subsurface minerals and invoked the constitutional entitlement of ‘just terms’ against the various mining ordinances made under Commonwealth legislation vesting ownership in the Crown and the colonial administration. After hearing argument from the plaintiff’s lawyer, the High Court brought the case to a halt on the first morning of the case, without calling on the lawyers for the Commonwealth, the administration and the mining company. ‘The Judges left the Bench for a short time to consult’²⁴ and

²⁰ As well as challenging the five-year lease, 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.

²¹ For example, even during the Second World War, when the defence threat to Australia in the Pacific encouraged a utilitarian approach to judicial review by the High Court, the seizure of a city car park for an indefinite period by military authorities was deemed an ‘acquisition of property’ necessitating ‘just terms’—despite the plaintiff holding no more than a week-to-week tenancy and the formal interest being left unaltered (albeit effectively suspended). *Minister for State for the Army v Dalziel* (1944) 68 CLR 261.

²² (1969) 119 CLR 564.

²³ Papua New Guinea became an independent sovereign state on 16 September 1975. The area was colonised by Britain and Germany in the nineteenth century. The Commonwealth of Australia accepted control of the Territory of Papua (formerly British New Guinea) in 1905. The former German colony of New Guinea was placed under Australian administration as a Mandate by the League of Nations in 1920. After the Second World War, the two territories were jointly administered by Australia until independence.

²⁴ *Teori Tau v Commonwealth* (n 22) 568.

returned the same day to deliver a judgment of barely more than 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 Section 51(xxxi), regardless of whether the Territory was internal (such as the Northern Territory) or external (such as Papua New Guinea).

The Court was referring to laws enacted pursuant to the grant of legislative power in Section 122 of the Constitution, which empowers the Commonwealth to make laws for the government of any territory. Aside from its inherent geographical constraint, it is one of the broadest powers available to the federal government. It is also one of those few legislative grants located outside the main catalogue of powers in Section 51 of the Constitution.

In *Teori Tau*, the High Court said that Section 51 was concerned with the distribution of legislative power between the Commonwealth and the constituent states. However, Section 122 was located elsewhere in the Constitution, and thus stood outside the federal compact between the states. The territories power in Section 122 was a ‘disparate and non-federal matter,’ as the Privy Council called it in 1957.²⁵ Because the ‘just terms’ guarantee was embedded in Section 51(xxxi), it absorbed this section’s federalist character and applied in the states, but not in other geographical areas of the Commonwealth. The federalist focus to Australian judicial review trumped the equality of rights protection that might have been prioritised under a different form of constitutionalism:

It has been held with respect to the heads of legislative power granted by s. 51 of the Constitution that by reason of the presence in that section of par. (xxx) none of the other heads of power, either of itself or aided by the incidental power, embraces a power to make laws for the acquisition of property. It is submitted by counsel that because it has been so held and because the power given by s. 51 (xxx) is so ample as the decisions of this Court show, s. 122 should not be construed as conferring a power to make laws for the acquisition of property. That is to say, it is said, in substance, that s. 122 is subject to s. 51 (xxx) and that s. 51 (xxx) is the only source of power to make laws for the acquisition of property to operate in or in connexion with the government of any territory of the Commonwealth.

In our opinion, this submission is clearly insupportable. Section 51 is concerned with what may be called federal legislative powers as part of the distribution of legislative power between the Commonwealth and the constituent States. Section 122 is concerned with the legislative power for the government of Commonwealth territories in respect of which there is no such division of legislative power. The grant of legislative power by s. 122 is plenary in quality and unlimited and unqualified in point of subject matter.

²⁵ *Attorney-General (Commonwealth) v The Queen* (1957) 95 CLR 529, 545 (PC).

In particular, it is not limited or qualified by s. 51 (xxxi) or, for that matter, by any other paragraph of that section.²⁶

There is a line of cases supporting this ‘disparate power’ theory²⁷ of Section 122. The right to trial by jury in Section 80 of the Constitution has been confined to Commonwealth laws operating in the states and held incapable of limiting the scope of the Territories power.²⁸ Likewise, the High Court said that the ‘anti-tacking’ provision in Section 55 of the Constitution, which prevents the Commonwealth burying unpopular revenue measures inside other more palatable legislation and thus putting them beyond upper house amendment, does not limit Section 122.²⁹ As mentioned earlier, the separation of judicial power from the other arms of government is a structural feature of the Australian Constitution that has given rise to a number of express and implied limitations on power. Some of these have been treated as inapplicable to the Territories power as well.³⁰ In several cases, the High Court’s reasoning effectively denied that the Territories are part of the Commonwealth, or as one early case put it, ‘the Commonwealth proper.’³¹

B. The Rejection of *Teori Tau*

However, legal action in the Northern Territory in the mid-1990s, notably enough by a mining company, unsettled the intellectual foundations of *Teori Tau* and the view that the Commonwealth could exercise the Territories power unencumbered by the ‘just terms’ guarantee in Section 51(xxxi).

The case in question was *Newcrest Mining (Western Australia) Ltd v Commonwealth*.³² Commonwealth law forbids mining in national parks. In 1989 and 1991, areas subject to mining leases held by Newcrest were added to Kakadu National Park in the Northern Territory. The mining leases persisted, in formal terms, but practically they were useless — the Commonwealth law extending the park ‘sterilised the benefits which Newcrest might otherwise have derived from possession of those leases.’³³ Newcrest argued that the loss of its valuable mining rights was an acquisition of property on other than ‘just terms’. Standing in its way was the unanimous finding of the High Court in 1969 that exercises of the Territories power in Section 122 are not constrained by the property rights guarantee in Section 51(xxxi).

²⁶ *Teori Tau v Commonwealth* (n 22) 570.

²⁷ The term ‘disparate power theory’ is from Leslie Zines, “‘Laws for the Government of Any Territory’: Section 122 of the Constitution” (1966) 2 *Federal Law Review* 72, 73.

²⁸ *R v Bernasconi* (1915) 19 CLR 629.

²⁹ *Buchanan v Commonwealth* (1913) 16 CLR 315.

³⁰ See, for example, *Spratt v Hermes* (1965) 114 CLR 226 and *Capital TV and Appliances v Falconer* (1971) 125 CLR 591.

³¹ *Buchanan v Commonwealth* (1913) 16 CLR 315, 335 (Isaacs J).

³² (1997) 190 CLR 513.

³³ *Ibid* 530 (Brennan CJ).

In the end, three judges said that *Teori Tau* was wrong and should be overruled. A full bench of the High Court, however, comprises seven judges, so three judges were not sufficient to secure a majority. Instead, these three judges found an alternative ‘common denominator’ position with a fourth member of the bench (Toohey J). The effect was to leave the ruling in *Teori Tau* wounded but still standing, with reduced effect.

Toohey J had misgivings about *Teori Tau* but declined to overrule it. Instead he agreed with Gaudron J that the national park proclamations were simultaneously referable to another head of legislative power — the ‘external affairs’ power — because the declaration of Kakadu National Park was made in fulfilment of Australia’s international obligations under the World Heritage Convention.³⁴ The ‘external affairs’ power is located within the 40 enumerated heads of power in Section 51 — thus neutralising the ‘federalist’ objections to the supervening application of the ‘just terms’ guarantee.³⁵

It was more than a decade before the High Court was invited to revisit this act of judicial compromise, with the *Wurridjal* litigation. In defending the constitutionality of its compulsory five-year lease over Aboriginal land under the Northern Territory Intervention, the Commonwealth not only sought to bring itself within the more confined categories of immunity permitted by *Newcrest*. It invited the Court, if necessary, to overrule *Newcrest* and turn the clock fully back to the position provided under *Teori Tau*.

However, the Commonwealth appears to have lost the battle for territorial exceptionalism, at least in relation to the protection of property rights. In the *Wurridjal* decision, in February 2009, four judges of the High Court overruled *Teori Tau*³⁶ — going one step beyond the intermediate, ‘common denominator’ position in *Newcrest*. The other three members of the bench in *Wurridjal* did not overrule *Teori Tau*, but did not endorse its authority either.³⁷

Two of the three judges who rejected the authority of *Teori Tau* in 1997 — Gummow J and Kirby J — were still on the bench when *Wurridjal* was decided in 2009. They reiterated their view that the decision in *Teori Tau* was untenable and should be overruled. This time they were joined by Hayne J and the recently appointed Chief Justice of the High Court, Robert French.

In their joint opinion, Gummow J and Hayne J said that Barwick CJ’s judgment in *Teori Tau* does not sit well with his later statement that ‘s 51(xxxi) is “a very great constitutional

³⁴ The Convention for the Protection of the World Cultural and Natural Heritage, adopted on 16 November 1972, entered into force on 17 December 1975, 1037 UNTS 151.

³⁵ (1997) 190 CLR 513, 560–561. Gummow J and Kirby J also accepted Gaudron J’s alternative basis for finding that the sterilisation of *Newcrest*’s mining interests was an acquisition of property necessitating ‘just terms’.

³⁶ *Wurridjal v Commonwealth* (n 12) 359 (French CJ), 388 (Gummow J and Hayne J), 419 (Kirby J).

³⁷ Heydon J and Crennan J resolved the litigation by other means. Kiefel J applied the ‘common denominator’ position in *Newcrest* and in her comments on *Teori Tau* did not commit herself on its tenability. Ibid 468–469.

safeguard” whose “constitutional purpose is to ensure that in no circumstances will a law of the Commonwealth provide for the acquisition of property except upon just terms”.³⁸ Chief Justice French concluded that even the ‘cautionary principle’ in favour of existing authority could not save *Teori Tau* from more persuasive arguments to the contrary.³⁹ Kirby J said that nothing submitted in the *Wurridjal* case had caused him to change his opinion that the 1969 precedent should be overruled, and that in fact he now saw several additional reasons to do so.⁴⁰

Thus, a majority of the Court in 2009 accepted that ‘just terms’ are required if a Commonwealth law effects an acquisition of property in a Territory, even if there is no head of power to which the law can be attributed beyond Section 122. If the High Court maintains the view expressed by four judges in *Wurridjal*,⁴¹ then not only is the precedent of *Teori Tau* consigned to legal history, but the intermediate position adopted by four judges in *Newcrest* also becomes irrelevant.

IV. THE TENABILITY OF THE DISPARATE POWER VIEW

There is an arguable basis in the Australian Constitution for the differential treatment of Section 122 when it comes to constitutionally enforceable limits on power. When the Constitution was drafted in the 1890s, Section 51 did have the function of distributing powers between the original six states and the new national parliament. Professor Leslie Zines has said that under the ‘disparate power’ theory, the Constitution was treated as a sort of ‘social contract’ between the people of the states that requires ‘delicate adjustments of power’ under a dual system of government.⁴² This binary view had no place for the Territories and on this reasoning ‘the provisions and doctrines relating to such things as the separation of powers, free trade, religious freedom, compensation for acquisition of property, jury trials and life appointments for judges are “not applicable to the Territories”’.⁴³ It is also true that Territories are and have been diverse in terms of population, economic development and cultural background and they have come to be within Commonwealth control by various paths (indeed to some extent they reflect

³⁸ Ibid 385, quoting Barwick CJ from *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403.

³⁹ *Wurridjal v Commonwealth* (n 12) 359.

⁴⁰ Ibid 418–419.

⁴¹ The reason for tentativeness on this front is that despite the majority rejection of *Teori Tau* and finding on the applicability of s 51(xxxi) in the Territories, the *Wurridjal* litigation was ultimately resolved adversely to the plaintiffs in a proceeding known as a demurrer, involving less than a full trial of the facts. Strictly speaking, these circumstances diminish the precedential effect of the finding on *Teori Tau*.

⁴² Zines (1966) (n 27) 72, 73.

⁴³ Ibid 73–74.

Australia's own transition from colony to colonial power).⁴⁴ There is a textual difference also in the Constitution: while Section 51 is expressed to be 'subject to this Constitution', offering a ready interpretive justification for judges to bring in constitutional limitations located elsewhere, Section 122 does not contain the same phrase.

A. An Expression of Faith in Responsible Government

The differential treatment of Territorians has also been justified in the courts on two other grounds. One is a familiar theme to Australian ears — it featured recently, for example, in arguments against a national Human Rights Act during the National Consultation on Human Rights in 2009.⁴⁵ It is the Diceyan idea that rights are better protected by preserving flexibility and room for governmental manoeuvre than by codifying them in a legally enforceable document.⁴⁶ The courts may have a role in deploying rebuttable presumptions of statutory interpretation in a rights-favourable way. But to a significant extent this orthodoxy relies on majoritarian politics, rather than the law, to curb the abuse of power. It depends on investing faith in that British institution of 'responsible government', a perhaps heroic level of faith given the degree to which party discipline long ago captured and tamed parliament's capacity to hold the executive accountable in any systematic way. Isaacs J uttered this faith in one of the early cases on the Territories power, when he said of Australia's Pacific Island Territories 'Parliament's sense of justice and fair dealing is sufficient to protect them.'⁴⁷

For racial minorities, the belief that electoral and parliamentary processes in Australia will ensure fair treatment is hard enough to sustain at the best of times. But it takes on an almost absurdist flavour once it is appreciated that for much of the twentieth century, even mainland Territorians could not elect a member to the federal parliament with full voting rights in the house, and to this day lack a 'constitutional' (as opposed to statutory) right to parliamentary representation.⁴⁸

⁴⁴ For an overview of Australia's Territories, including the legal basis for their creation as constituent parts of the Commonwealth of Australia, see Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks' Australian Constitutional Law: Materials and Commentary* (8th edn LexisNexis Butterworths, Chatswood 2009) 457–460.

⁴⁵ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 281–289, 293–294.

⁴⁶ AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn Macmillan Education Basingstoke, 1959) 203.

⁴⁷ *R v Bernasconi* (1915) 19 CLR 629, 638.

⁴⁸ Clarke, Keyzer and Stellios (n 44) 476. In 1997, Gaudron J noted the orthodox Australian constitutional argument that powers should be construed without reference to possible abuse, but said it was inapplicable in the Territories where residents had no constitutionally guaranteed share in political power through electoral processes: *Kruger v Commonwealth* (1997) 190 CLR 1, 105–107.

B. A Dual Characterisation as National and Local Legislature

A second defence is that immunising the Territories power against constitutional limitations merely puts Territorians in the same position as residents of states when faced by laws from their 'local' legislature.⁴⁹ As noted earlier, there is, for example, no entrenched 'just terms' restriction on state governments' powers of compulsory acquisition.⁵⁰ This argument, however, is an artifice. The Commonwealth's powers are defined and limited by a Constitution that makes no reference to the federal parliament having a dual character of local and national legislature, and the distinction is highly unstable.

This was well illustrated in *Wurridjal* itself. The federal government sought to persuade the Court that in enacting the Intervention legislation, the Commonwealth parliament was acting in its role as a 'local' legislature and was thus, like a state parliament, unencumbered by the 'just terms' guarantee. The flaw in this argument was apparent on the face of the statute. The impugned legislation was entitled the Northern Territory *National* Emergency Response Act 2007.⁵¹ It is difficult enough to see any basis in the Constitution for attributing a dual character to the federal parliament, in order to circumvent the 'just terms' guarantee. It is even harder to understand why a national parliament enacting 'national emergency' legislation was acting not as a national legislature, but as a local one.

In any case, the High Court long ago recognised that laws made under Section 122 can operate with extraterritorial effect, that is, across the border of an internal Territory in a neighbouring state.⁵² This undermined the idea of a purely 'local' Territory law enacted by the Commonwealth under Section 122, i.e., a 'non-federal' law totally divorced from situations where Commonwealth and state legislative power may mix and where state residents are regulated by Commonwealth law.⁵³

V. SHIFTING GROUND

It would be reductionist and wrong to suggest that the Diceyan approach to law, politics and rights protection is the only brand of constitutionalism on offer in Australia. The majoritarian account of democracy has dominated for most of the twentieth century,

⁴⁹ The unanimous full court judgment in *Teori Tau v Commonwealth* (n 22), in framing the question to be answered in that litigation, referred to 'a power akin to that possessed by the States of the Commonwealth to make laws for the compulsory acquisition of property without necessarily providing in those laws for terms of acquisition which can be seen in the circumstances to be just' (at 569). See also the dissenting judgment of McHugh J and Callinan J in *Northern Territory v GPAO* (1999) 196 CLR 553, 617.

⁵⁰ The same goes for other rights protections at a State level. State Constitutions are merely statutes of the local legislature and thus highly flexible, that is, amenable to amendment by simple parliamentary majority.

⁵¹ Emphasis added.

⁵² *Lamshed v Lake* (1958) 99 CLR 132.

⁵³ Gummow J and Hayne J noted *Lamshed v Lake* (n 52) and some of its implications in *Wurridjal v Commonwealth* (n 12) 386. See also Zines (1966) (n 27) 72, 92 and Leslie Zines, 'The Nature of the Commonwealth' (1998) 20 *Adelaide Law Review* 83, 84.

keeping judicial review on a relatively tight leash, consigning the resolution of most rights questions to the political realm. But different expectations were raised by what has so far proved to be a brief and atypical phase in the history of the High Court. Led by Sir Anthony Mason as Chief Justice from 1987–1995, the court spent the first half of the 1990s revising some assumptions about Australia’s basic legal text, how it should be interpreted, and the appropriate role for the judiciary in questions of rights and freedoms.

A. The Emergence of ‘Popular Sovereignty’ as Constitutional Foundation

The prominent jurist Sir Owen Dixon famously wrote in 1935 that the Australian Constitution is ‘not a supreme law purporting to obtain its force from the direct expression of a people’s inherent authority to constitute a government.’⁵⁴ However, members of the Mason Court suggested that rather than, or in addition to, the overriding authority of the Imperial Parliament at Westminster, a new grundnorm for Australian constitutionalism had emerged by the late twentieth century: popular sovereignty. Citing the influential work of Professor Geoffrey Lindell,⁵⁵ Chief Justice Mason observed the following in *Australian Capital Television Pty Ltd v Commonwealth*:

Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people... And, most recently, the *Australia Act 1986* (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people. The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people.⁵⁶

This conceptual shift brought the people and their entitlements closer to the centre of constitutional analysis and coalesced with a more rights-oriented approach to constitutional interpretation in Australia. For example, an implied freedom of political communication was discovered to be embedded in the Constitution.⁵⁷ Other ideas were

⁵⁴ Owen Dixon, ‘The Law and the Constitution’ (1935) 51 *Law Quarterly Review* 590, 597.

⁵⁵ Geoffrey Lindell, ‘Why is Australia’s Constitution Binding?: The Answers in 1900 and Now, and the Effect of Independence’ (1996) 16 *Federal Law Review* 29.

⁵⁶ (1992) 177 CLR 106, 138.

⁵⁷ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

ventured by members of the Mason Court, such as an implied doctrine of legal equality⁵⁸ and an implied freedom of association,⁵⁹ though with less lasting influence.⁶⁰

B. Erosion of the ‘Disparate Power’ Theory by the ‘Integration’ Theory

This suggested shift in the constitutional paradigm — towards common enjoyment of certain fundamental rights and freedom — had something to work with, in doctrinal terms, when it came to the Territories power. Although the ‘disparate power’ theory dominated early interpretations of Section 122, it has been slowly eroded over decades by a contrary stream of authority, which seeks to integrate the Territories with the rest of the Commonwealth, not divorce them from it. Clarke, Keyzer and Stellios argue that external factors have exerted an influence on the High Court across these decades, including the racial composition of various Territories, the inception and peopling of the national capital Canberra inside the Australian Capital Territory, the establishment of better transport links to the Northern Territory and the advent of self-government for those two internal Territories as well as for Norfolk Island.⁶¹

As far back as 1958, Chief Justice Owen Dixon had disparaged the idea that the Northern Territory could be governed ‘as a quasi foreign country remote from and unconnected with Australia except for owing obedience to the sovereignty of the same Parliament.’⁶² Similarly, in 1965, Menzies J said that ‘it seems inescapable that territories of the Commonwealth are parts of the Commonwealth of Australia and I find myself unable to grasp how what is part of the Commonwealth is not part of “the Federal System”.’⁶³ By 1966, Professor Zines identified that a ‘full integration’ theory, where no distinctions are made between the Territories and the federal system, and a ‘modified integration’ theory, which favours equality of treatment but might depart from it in specific circumstances, had set up in competition with the disparate power theory of Section 122.⁶⁴

C. The Application of the ‘Integration’ Theory

A majority of High Court judges in *ACTV v Commonwealth* — the landmark 1992

⁵⁸ *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane J and Toohey J).

⁵⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J), 232 (McHugh J).

⁶⁰ An argument for a general doctrine of legal equality derived from the judgment of Deane J and Toohey J in *Leeth v Commonwealth* (n 58) was rejected by a majority of the High Court in *Kruger v Commonwealth* (1997) 190 CLR 1. The idea of an implied freedom of association in the Constitution was not dismissed by the High Court in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 but neither in that case nor elsewhere has it formed the basis of a successful constitutional challenge to legislative or executive action.

⁶¹ Clarke, Keyzer and Stellios (n 44) 486–487, 491, 493

⁶² *Lamshed v Lake* (n 52) 144.

⁶³ *Spratt v Hermes* (1965) 114 CLR 226, 270.

⁶⁴ Zines (1966) (n 27) 72, 74.

case recognising an implied freedom of political communication — said that the Commonwealth’s attempt to ban electronic political advertising during Territory elections was invalid, though technical issues meant they could postpone direct consideration of the interplay between the implied freedom and Section 122.⁶⁵ In the course of that decision, Gaudron J said that it does not follow from the early cases about Section 122 that the Territories power ‘stands apart from other provisions of the Constitution with its meaning and operation uninfluenced by them.’⁶⁶ Deane and Toohey JJ were well-disposed to the idea that the implied freedom restricted the scope of Section 122, but said it was unnecessary to reach a firm conclusion.⁶⁷

In the same year, in *Capital Duplicators Pty Ltd v Australian Capital Territory*⁶⁸ the attempt by the legislature of the Australian Capital Territory to impose an excise duty ‘was held to be forbidden by [Section] 90 of the Constitution despite the amplitude of the territories power in [Section] 122.’⁶⁹ Although the prohibition in Section 90 on any legislature except the Commonwealth Parliament levying an excise duty is not really an issue of rights and freedoms, the relevance of the decision is that it further reinforced the integrationist tendency in cases concerning Section 122: ‘The Court read the Constitution as a unity. Doing so, it found that [Section] 122 was subject to [Section] 90.’⁷⁰

Since Sir Anthony Mason retired as Chief Justice in 1995, the High Court has retreated from robust, rights-oriented judicial development of constitutional law. In the past decade or so, the Court has, with the conspicuous exception of Kirby J, favoured a more legalistic approach to the Constitution that shows greater deference to the political arms of government.⁷¹

Nevertheless, the advocates and opponents of Territory integration have continued to battle it out in recent years, with the advocates apparently gaining the upper hand. The so-called plenary nature of Section 122 has been qualified with the recognition (or flagging) of further constitutional limitations on the power. That has correspondingly enhanced the

⁶⁵ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 147 (Mason CJ), 215–216 (Gaudron J).

⁶⁶ *Ibid* 222.

⁶⁷ *Ibid* 176–177.

⁶⁸ (1992) 177 CLR 248.

⁶⁹ *Newcrest Mining (Western Australia) Ltd v Commonwealth* (1997) 190 CLR 513, 656 (Kirby J).

⁷⁰ *Ibid* 657 (Kirby J). As Brennan, Deane J and Toohey J put it in *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 272: ‘It would be... erroneous to construe s 122 as though it stood isolated from other provisions of the Constitution which might qualify its scope.’

⁷¹ The majority decision in *Roach v Commonwealth* (2007) 233 CLR 162, recognising the existence of an implied right to vote at federal elections, stands as a notable exception. For a discussion of the (at least partial) retreat from implied rights doctrines and the return to a more traditional form of legalism, see, in particular, Chapter 7 of Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, Durham NC 2006), a book based upon anonymous interviews with more than 80 senior appellate judges in Australia. See also Leslie Zines, *The High Court and the Constitution* (5th edn The Federation Press, Annandale 2008) xii, 606–608, 616–618.

enjoyment (or at least potential enjoyment) by Territorians of constitutional rights and freedoms held by other Australians. Three areas deserve particular attention.

First, though it is still unclear whether the guarantee of four religious rights and freedoms in Section 116 of the Constitution affects the scope of the Territories power, a number of High Court judges have indicated that it could or should.⁷² In *Kruger v Commonwealth*, a case decided in 1997, Toohey J, Gaudron J and Gummow J all endorsed the idea.⁷³

Secondly, the relationship between Section 122 and the various limitations on power (including individual rights protections) expressed or implied by the constitutional separation of judicial power in Chapter III, has generated a complex body of case law. Again, recent cases have tended to point away from the earlier ‘disparate power’ theory and towards a more integrationist approach.⁷⁴

Finally, the application of the ‘just terms’ limitation to Commonwealth acquisitions of property in the Territories — the focus of this article — is the strongest illustration of how the integrationist trajectory of the High Court on Section 122 has coalesced with individual rights protection under the Australian Constitution. As Gummow J and Hayne J said in *Wurridjal* in 2009, ‘the tenor of decisions since *Teori Tau* indicates a retreat from the “disjunction” seen in that case between [Section] 122 and the remainder of the structure of government established and maintained by the Constitution.’⁷⁵

VI. A SECOND FORM OF CONSTITUTIONAL EXCLUSION

Of course, Aboriginal people are familiar with the constitutional exclusion zone in Australia, whether they live in the Northern Territory or not. The affluent nation of today was built on the uncompensated dispossession of distinct Aboriginal societies across the continent through the late 18th, 19th, and 20th centuries. The drafters of the Commonwealth Constitution in the 1890s made a point of excluding Aboriginal people from the new national narrative, going so far as to insert Section 127, which said that in the counting of the Australian people they would be disregarded.⁷⁶

A power for the Commonwealth to make laws explicitly on the basis of race was also inserted in the Constitution that took effect in 1901, to license the kind of discriminatory laws that enjoyed consensus support at the time. Aboriginal people were explicitly excluded from the scope of this ‘races’ power in Section 51(xxvi). This was only so as to leave them almost exclusively to the jurisdiction of the states, which proceeded anyway

⁷² These include Dixon CJ in *Lamshed v Lake* (n 52) 143 and Murphy J and Wilson J in *Attorney-General (Victoria) v Ex rel Black v Commonwealth* (1981) 146 CLR 559, at 621 and 649, respectively.

⁷³ *Kruger v Commonwealth* (1997) 190 CLR 1, 85–86 (Toohey J), 122–123 (Gaudron J) and 162 (Gummow J).

⁷⁴ Clarke, Keyzer and Stellios (n 44) 497–506.

⁷⁵ *Wurridjal v Commonwealth* (n 12) 387.

⁷⁶ Section 127 read as follows: ‘In reckoning the numbers of the people of the Commonwealth, or of the State or other part of the Commonwealth, aboriginal natives shall not be counted.’

to enact a whole range of intrusive and discriminatory laws controlling movement, labour and income. In 1967, a successful referendum of the people removed Section 127 from the Constitution. It also brought Aboriginal people within the scope of the Commonwealth races power, by deleting the words that had excluded them since 1901. This has proved a mixed blessing, authorising adverse as well as beneficial legislation, in the absence of any constitutional prohibition against racial discrimination.⁷⁷

On the property front, from the late 1960s traditional rights to land started to gain legal force, first in various parliaments through statutory land rights schemes⁷⁸ and later, in the *Mabo* decision,⁷⁹ by common law recognition of what is called ‘native title.’ In 1992, in *Mabo*, the High Court belatedly recognised that, at common law, the pre-existing property rights of Australia’s first peoples survived the assertion of sovereignty by the British Crown.

With the legal recognition of Aboriginal property rights, for the first time a price was also potentially attached to their extinguishment or infringement by Commonwealth government action. In other words, the apparently race-neutral guarantee of ‘just terms’ in Section 51(xxxi) — one of those few rights provisions found in the Australian constitution — became potentially available to Aboriginal people.

However, the forces of exclusion and discrimination are not finished with. When the plaintiffs in *Wurridjal*, whose property rights were abridged by a compulsory five-year lease in favour of the Commonwealth, took their constitutional challenge to the High Court, the Commonwealth did not stop at relying on *Teori Tau* and the plaintiff’s residence in a Territory. It went further and said that Aboriginal property rights were lesser rights. The government argued for a ‘shared control’ model, which said that Aboriginal ownership was qualified by an ongoing capacity for the Commonwealth to step in and reconfigure those rights without triggering the ‘acquisition of property’ provision.⁸⁰ This argument, like the Commonwealth’s reliance on *Teori Tau*, was rejected by a majority of the High Court.⁸¹

But having succeeded on two fronts, the plaintiffs fell at the final hurdle. They sought to argue that the unique cultural and spiritual characteristics of Aboriginal connection to land took this form of property outside the ordinary real estate paradigm when it came to the question of ‘just terms.’ They argued that:

⁷⁷ The plaintiffs in *Kartinyeri v Commonwealth* (1998) 195 CLR 337 failed to persuade a majority of the High Court that the races power in the amended form it took on after the 1967 referendum could only authorise laws for the benefit of Aboriginal people.

⁷⁸ See, for example, the Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth) which gave rise to the Aboriginal property rights at stake in *Wurridjal*.

⁷⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁸⁰ *Wurridjal v Commonwealth* [2008] HCA Trans 349 (3 October 2008) 6073–6076, 6339–6350 (H C Burmester QC).

⁸¹ *Wurridjal v Commonwealth* (n 12) 364 (French CJ), 383 (Gummow J and Hayne J), 466, 467 (Kiefel). 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).

- ‘just terms’ for the acquisition of such property rights 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.

On this question, the outcome in *Wurridjal* was ultimately negative, though the case is complicated by the fact that it concerned communal title but was run by two individuals operating outside the relevant collective land-owning institutions and also by the way the High Court majority judges presented their reasoning.

Native title — the inherent rights to property recognised in *Mabo* and the subsequent Native Title Act 1993 (Commonwealth) — shares some important similarities and differences with the statutory Crown grants of freehold title made to Aboriginal groups under land rights regimes, such as the Northern Territory legislation involved in *Wurridjal*. Native title also invites attention to Section 51(xxxi). It is widely assumed that the ‘just terms’ guarantee applies to Commonwealth laws that authorise its extinguishment. Yet a present member of the High Court has suggested that the just terms guarantee might not apply in the Northern Territory to the most common form of Aboriginal dispossession, the creation of a freehold grant over the top of native title land pursuant to statutory authority.⁸² This is due to a technical reading of the law which would have a discriminatory impact on Aboriginal property holders compared to other Australian landholders.⁸³

VII. CONCLUSION

The legal proposition that Section 122 is different from the Section 51 powers of the Commonwealth when it comes to constitutionally enforceable limitations on power is not devoid of justification. But the durability of *Teori Tau* and the ‘disparate power’ theory of Section 122 does illustrate the deeply utilitarian attitude that has long dominated Australian constitutional thinking. Privileging federalism and text to the extent they were in *Teori Tau* shows a technical fixation in the approach to judicial review in Australia bordering on the pedantic, and perhaps a ruthless pragmatism as well. That technocratic and utilitarian spirit has enabled Australian judges to lose sight of, or overlook, the rights inequality that results from their preferred interpretation.

By finally overthrowing the idea that the ‘just terms’ guarantee can be denied to Territorians, the decision in *Wurridjal* is another sign that a more ‘integrationist’ view has history on its side, glacial though the pace of progress may be. But the arguments deployed in the High Court by the Commonwealth in 2009 — seeking not only to maintain

⁸² *Newcrest Mining (Western Australia) Ltd v Commonwealth* (1997) 190 CLR 513, 613 (Gummow J).

⁸³ For arguments as to why that interpretation of s 51(xxxi) and its impact on native title should be rejected, see Sean Brennan, ‘Native Title and the “Acquisition of Property” under the *Australian Constitution*’ (2004) 28 *Melbourne University Law Review* 28.

Newcrest but to go further and resurrect *Teori Tau* — show that the contrary forces of exclusion remain strong in Australian law and politics. With three judges refraining from committing themselves on *Teori Tau* and many of the old cases on Section 122 still intact, *Wurridjal* perhaps reflects a continuing state of constitutional indecision over what kind of liberal democracy Australia should be and, in particular, what balance we wish to strike between the judicial and political arms of government in determining the position and rights of individuals and groups.⁸⁴ Territorial integrationists have apparently secured a significant victory in *Wurridjal*. However, on a broader front, the ascendancy seemingly remains with Australians who argue that, aside from disputes over the allocation of power between the Commonwealth and the states, and the separation of judicial power from the other arms of government, the remedies for excess in the use of power lie in the realm of politics, not law.

⁸⁴ In 2010, even the mild form of statutory human rights protection recommended by the recent National Human Rights Consultation chaired by Frank Brennan SJ — based on the ‘dialogue’ model, which gives parliamentarians the last say — was rejected by the Commonwealth government (or at least put on hold until 2014). A statutory charter was rejected, the government said, because ‘advancing the cause of human rights in Australia would not be served by an approach that is divisive or creates an atmosphere of uncertainty or suspicion in the community.’ Commonwealth of Australia, *Australia’s National Human Rights Framework* (2010) 1 <<http://www.ag.gov.au/humanrightsframework>> accessed 7 June 2010.