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.]

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† 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.
I  I N T R O D U C T I O N

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.

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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

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\(^4\) 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, Crennan 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.

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7 ALRA s 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’, 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. 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’.

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. Unless covered by a statutory exception, entry without a permit is illegal, 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.’ It is a defence if the person is performing functions in accordance with the ALRA or a law of the Northern Territory.

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. 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. 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. 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, 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)(b).
\[14\] 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) sch 1 pt 1.
operate in other parts of Australia.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{Northern Territory National Emergency Response Act 2007} (Cth) (‘\textit{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 \textit{Wurridjal}). Although commonly called ‘five-year leases’, all 64 leases end five years after the commencement of the \textit{NTNERA}, including the ‘second-round’ leases like the one at Maningrida.\textsuperscript{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.\textsuperscript{27}

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

\textsuperscript{23} Commonwealth, Parliamentary Debates, Senate, 8 August 2006, 93 (Gary Humphries).
\textsuperscript{25} \textit{Indigenous Affairs Legislation Amendment Act 2008} (Cth) sch 1 item 3, amending ALRA s 19A(4).
\textsuperscript{26} \textit{NTNERA} s 31(2)(b).
\textsuperscript{27} \textit{NTNERA} s 37(1)(a). Some exceptions apply: s 37(2).
\textsuperscript{28} \textit{NTNERA} ss 36(1)–(2).
and deal with its interest (including by sublease). A sublease or other dealing by the Commonwealth dispenses with the normal requirement for traditional owner consent under s 19(8) of the ALRA.

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.’

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. Several High Court judges concluded in Wurridjal that the leases were essentially about the assertion of Commonwealth control.

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. 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. 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.

29 NTNEA ss 35(4)-(5).
30 NTNEA 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).
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. The Minister’s words in his second reading speech in August 2007 were ambiguous and several observers at the time said that the Commonwealth had preserved a discretion as to whether rent would be paid.

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

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.

The Intervention legislation, however, expressly disapply the Lands Acquisition Act 1989 (Cth). 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.


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 terms — 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, 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 Dhukurrdi clan and traditional owners with common spiritual affiliations to four sacred sites on the Maningrida land subjected to a s 31 lease. 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, covers 89,872 square kilometres. 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.’ The area also included ‘sacred sites, an outstation, a sand quarry pit, a billabong and a ceremonial site.’

(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...
(‘Teori Tau’) 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. 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’). The content of these arguments is explored later.

(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;
- 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;
- allowed the Commonwealth to override the criminal offence in s 69 of the ALRA, preventing entry onto sacred sites; 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).

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(xxi).

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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’.
54 See below Part III(C)(1).
57 Ibid 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, 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.

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. 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. 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).
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).
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. 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. In the alternative (recognising the vulnerability of Teori Tau after the majority decision in

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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 Burnmester 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.

Newcrest), 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.

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. 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. 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. 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. 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).
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.

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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 Wurrindjal is that four judges of the High Court overruled the unanimous 1969 decision in Teori Tau. The other three judges in Wurrindjal declined the invitation to do so, though without endorsing its authority. 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.

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.’ 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. 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). The grant of legislative power in s 122 of the Constitution is ‘plenary in quality and unlimited and unqualified in point of subject matter.’

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. 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. 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.

Three judges accepted the authority of Teori Tau and applied it to reject Newcrest’s claim. In finding for Newcrest, three judges said that Teori Tau should be overruled (two of them subsequently sat on the Wurridjal hearing). 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. 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. 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

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88 Ibid 570–1 (Barwick CJ for Barwick CJ, McTiernan, Kitch, 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.\textsuperscript{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.\textsuperscript{98}

It is surprising that the Commonwealth should seek to fight on this constitutional turf in its defence of the Intervention legislation in \textit{Wurridjial}. The government could have refrained from instructing its lawyers to urge that the authority of \textit{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 \textit{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.\textsuperscript{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.\textsuperscript{100} The Commonwealth claimed compatibility with the characterisation principle enunciated by Mason CJ in \textit{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’.\textsuperscript{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.\textsuperscript{102} But for what compelling and independent reason should citizens of an

\begin{footnotesize}
\begin{enumerate}
  \item Ibid 560–1.
  \item Ibid 561.
  \item Ibid 5888–96 (H C Burmester QC).
  \item \textit{(1994) 179 CLR 155}, 169.
  \item 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 \textit{Theopha\-nous 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.
\end{enumerate}
\end{footnotesize}
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. Kirby J, likewise, maintained his view expressed in *Newcrest* that *Teori Tau* should be overruled. 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? In this context, *Teori Tau* sat uncomfortably with the unmistakeable 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’. The task for an appellate judge is not so much the identification of ‘error’ as the making of well-reasoned ‘constructional choices’. 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. 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.

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.


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, 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.

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.


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).


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.\footnote{Ibid 364.} This, after all, was an Act designed to promote justice and traditional ownership.\footnote{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 \textit{ALRA}; and (b) the objects of the Act itself.} 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 \textit{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’\footnote{\textit{Wurridjal} (2009) 237 CLR 309, 459.} 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.\footnote{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 \textit{Australian Constitution}’ (2004) 28 \textit{Melbourne University Law Review} 28, 53–9.} In contrast to French CJ, she interpreted the Intervention legislation as compatible with the purposes of the \textit{ALRA}\footnote{\textit{Wurridjal} (2009) 237 CLR 309, 449.} and downplayed its impact on existing property rights.\footnote{Ibid 390–1.}

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.\footnote{Ibid 460–1.} 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.\footnote{Ibid 463 (Crennan J), 467–8 (Kiefel J).}

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.\footnote{Ibid 365.} 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.\footnote{Ibid.} But he qualified that...
finding by saying it applied ‘while the lease remains in force.’ 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. 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.

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” accruing to the traditional

129 Ibid.
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
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 compen-
   satory 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 acknowl-
   edged 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
dissent and strongly preferred that the issue go to trial.138 Gummow, Hayne139

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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
137 Ibid 437.
and Kiefel JJ 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.’ But in reaching his conclusion on the ‘just terms’ issue, the Chief Justice expressly relied on the reasoning of Heydon J. 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’; ‘the present case does not afford an occasion on which it is appropriate to consider these issues raised by the plaintiffs’; ‘there are two difficulties with these contentions’) 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 proceedings — and he was not alone in acknowledging that certain such questions remained for another day.

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’ 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.

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
result, the result in *Wurridjal* certainly strengthens the idea that the Common-
wealth 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.\(^\text{150}\) 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*.\(^\text{151}\)

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.\(^\text{152}\) 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.\(^\text{153}\) 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.\(^\text{154}\) 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

Leslie Zines, ‘“Laws for the Government of Any Territory” : Section 122 of the Constitution’

\(\text{151}\) Gummow J has described the just terms provision in s 51(xxxi) as an individual right: *Newcrest*

\(\text{152}\) *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

\(\text{153}\) 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).

\(\text{154}\) 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’. The High Court has also repeatedly stated that traditional Aboriginal connection to land has a strongly spiritual dimension — 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 issue 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. 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.
question of what constitutes just terms when Indigenous property rights are compulsorily acquired.