HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	C9/2023
File Title:	Government of the Russian Federation v. Commonwealth of A
Registry:	Canberra
Document filed:	Form 27D - Defendant's submissions
Filing party:	Defendant
Date filed:	30 May 2025

Important Information

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IN THE HIGH COURT OF AUSTRALIA **C9/2023**

CANBERRA REGISTRY

BETWEEN:

GOVERNMENT OF THE RUSSIAN FEDERATION

Plaintiff

and

COMMONWEALTH OF AUSTRALIA

Defendant

DEFENDANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. The first issue in this proceeding is whether the *Home Affairs Act 2023* (Cth) (the ***Home Affairs Act***) is supported by a Commonwealth head of power. Clearly it is. It is independently supported at least by s 122 and s 51(xxix) of the Constitution.

3. The second issue is whether the *Home Affairs Act* is properly characterised as a law with respect to the acquisition of property for the purposes of s 51(xxxi) of the Constitution, such that the Russian Federation is entitled to compensation under s 6(1) of that Act. The Commonwealth submits that it is not, including because it would be incongruous for the Commonwealth to be required to compensate the Russian Federation for terminating a lease over property in response to a risk that it would use that very property to harm Australia's national security.

4. It is not in dispute that, if the *Home Affairs Act* is a law to which s 51(xxxi) applies, then the requirement of just terms would be satisfied by the entitlement to compensation conferred by s 6 of the *Home Affairs Act*: Plaintiff's Submissions (**PS**) [31].

PART III: SECTION 78B NOTICE

5. Notice has been given pursuant to s 78B of the *Judiciary Act 1903* (Cth): Special Case Book (**SCB**) 25-29. Further notice will be given by the Commonwealth shortly.

PART IV: MATERIAL FACTS

6. The *Home Affairs Act* was enacted "to protect Australia's national security interests with regard to land within the area adjacent to Parliament House".[1] The Act terminated the Plaintiff's lease over land located in Yarralumla in the Australian Capital Territory.[2] At its closest point, that land is approximately 300 metres from the Parliament House building. That proximity can be seen in the aerial photograph at SCB 46, in which the relevant land is marked block "26" (in the top left-hand corner of the photograph).[3]

7. On 15 June 2023, the Prime Minister of Australia held a press conference during which he announced that "the Government has received very clear security advice as to the risk presented by a new Russian presence so close to Parliament House".[4] The Prime Minister said that legislation to address that risk would be introduced with the support of the opposition and the crossbench, "in the national security interests of Australia" and explained that he, "along with the security agencies, briefed the Coalition leadership last night".[5] The Prime Minister said that the proposed legislation was "based upon very specific advice … about the nature of the construction that's proposed for this site, about the location of the site, and about the capability that that would present in terms of potential interference with activity that occurs in this Parliament House".[6]

8. During the same press conference, the Minister for Home Affairs explained:[7]

> The Bill is straightforward – it identifies a specific piece of land in Canberra which currently has a lease agreement between the National Capital Authority and the Russian Federation, and the Bill terminates that lease agreement. The principal problem with the proposed second Russian Embassy in Canberra is its location. This location sits directly adjacent to Parliament House. The Government has received clear national security advice that this would be a threat to our national security...

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1 Explanatory Memorandum to the Home Affairs Bill 2023 (SC-15, SCB 74).
2 Special Case [2] (SCB 34).
3 Special Case [4] (SCB 35).
4 Extract of transcript of press conference on 15 June 2023, SCB 67.
5 Extract of transcript of press conference on 15 June 2023, SCB 67-68.
6 Extract of transcript of press conference on 15 June 2023, SCB 70.
7 Extract of transcript of press conference on 15 June 2023, SCB 68.

9. The Special Case records the Commonwealth's position that the advice referred to at the press conference was informed by highly classified information from the Australian Security Intelligence Organisation (**ASIO**), the disclosure of which would be expected to cause serious damage to the national interest.[8]

10. The Home Affairs Bill 2023 was introduced into the House of Representatives on the same day as the press conference. In the Second Reading Speech, the Minister for Home Affairs stated that the termination of the Plaintiff's lease was "absolutely necessary to protect Australia's national security interests" and that the Bill "demonstrate[d] the government's continued commitment to protecting our parliament and our national security".[9] The Member for Canning, a member of the opposition speaking in support of the Bill, who described the relevant land as "only a stone's throw away" from Parliament, stated that "there is a real risk to our national interest here, and the security advice is that this lease must be terminated".[10] Having passed the House of Representatives, the Bill was introduced into the Senate on an urgent basis on account of the "immediate national security risks associated with allowing the leaseholder to exercise its interests over the specific block of land."[11]

11. The connection between the security risk to Parliament and the location of the land was also made express in the explanatory memorandum to the Bill, which described its object as "to protect Australia's national security interests with regard to land within the area adjacent to Parliament House".[12]

12. The *Home Affairs Act* passed both Houses of Parliament on 15 June 2023, and came into force immediately upon receiving Royal Assent later that day.[13]

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8 SCB 40 [28].

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 June 2023, 4459 (Clare O'Neill, Minister for Home Affairs and Minister for Cyber Security).

10 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 June 2023, 4459 (Andrew Hastie, Member for Canning).

11 Commonwealth, *Parliamentary Debates*, Senate, 15 June 2023, 2283 (SCB 71-72).

12 Explanatory Memorandum to the Home Affairs Bill 2023 (SC-15, SCB 74).

13 Special Case [24] (SCB 39); *Home Affairs Act 2023* (Cth), s 2(1).

PART V: ARGUMENT

I. HEADS OF POWER

13. The Plaintiff's contention that the *Home Affairs Act* is not supported by a head of power is baseless.[14] That Act is supported at least by the territories power (s 122) and the external affairs power (s 51(xxix)).[15]

Section 122 – the territories power

14. Section 122 confers on the Commonwealth Parliament a "complete power to make laws for the peace, order and good government of [a] territory—an expression condensed in s 122 to 'for the government of the Territory'".[16] This is "as large and universal a power of legislation as can be granted".[17] All that needs to be shown in order to enliven s 122 is "a sufficient nexus or connection between the law and the Territory".[18]

15. The breadth of s 122 has been recognised by this Court in a longstanding series of cases.[19] Like any other head of power, it should be construed "with all the generality which the words used admit".[20] Section 122 has "never been doubted to enable the Parliament to enact a law that provides for the 'direct administration' of a territory"[21] by the Commonwealth. It clearly includes a power to regulate the ownership and occupancy of

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14 The submission was considered and rejected, albeit only on an interlocutory basis, in *Government of the Russian Federation v Commonwealth* (2023) 97 ALJR 545; [2023] HCA 20 at [28] (Jagot J).

15 As either of those heads of power is sufficient, it is not necessary to explore the extent to which the Act may also be supported by other heads of power such as the defence power, the implied nationhood power, the seat of government power or the executive power in combination with the express incidental power.

16 *Spratt v Hermes* (1965) 114 CLR 226 at 242 (Barwick CJ), applied in *Bennett v Commonwealth* (2007) 231 CLR 91 at [43] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 271 (Brennan, Deane and Toohey JJ).

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

18 *Commonwealth v* ***Yunupingu*** (2025) 99 ALJR 519 at [21] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), citing ***Berwick*** *Ltd v Gray* (1976) 133 CLR 603 at 607 (Mason J, Barwick CJ agreeing at 605, McTiernan J agreeing at 606, and Murphy J agreeing at 611).

19 See eg, *Kruger v Commonwealth* (1997) 190 CLR 1 at 41 (Brennan CJ); *New South Wales v Commonwealth* (***Work Choices*** **case**) (2006) 229 CLR 1 at [335]-[337] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Yunupingu* (2025) 99 ALJR 519 at [21] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

20 *Yunupingu* (2025) 99 ALJR 519 at [42] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); ***Grain Pool*** *of Western Australia v Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

21 *Yunupingu* (2025) 99 ALJR 519 at [22] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), citing *Berwick* (1976) 133 CLR 603 at 607 (Mason J, Barwick CJ, McTiernan, and Murphy JJ agreeing).

Territory land[22] and the carrying out of operations on such land.[23]

16. There is a direct connection between the subject matter of the *Home Affairs Act* and the Australian Capital Territory, because that Act terminates a lease in respect of a specific block of land that is located in the Territory. It is hard to see how the connection with the Territory could be any clearer.

17. In those circumstances, the Plaintiff's submission that the *Home Affairs Act* is not supported by s 122 is not tenable: cf PS [24(a)]. The fact that it is now clear that a law enacted pursuant to s 122 is capable of attracting the constitutional guarantee of "just terms" does not suggest otherwise:[24] cf PS [24(b)]. At most, that might mean that the Plaintiff is entitled to compensation, but it is incapable of leading to the conclusion that the *Home Affairs Act* is not supported by a head of power (because, as discussed below, s 51(xxxi) only abstracts from s 122 when s 51(xxxi) would itself apply).[25] If, as the Plaintiff contends, the *Home Affairs Act* is <u>not</u> supported by s 51(xxxi), then it follows that s 51(xxxi) does not abstract from s 122 so as to prevent it from supporting the Act.

Section 51(xxix) – the external affairs power

18. In the alternative, the *Home Affairs Act* is supported by the "external affairs" power. That follows because a law that affects or is likely to affect Australia's relations with other countries is a law with respect to "external affairs".[26]

19. The Plaintiff's submission that there is "no evidence that the law affects Australia's relationships with other countries"[27] ignores the obvious connection between the *Home Affairs Act* and Australia's diplomatic relations with the Russian Federation itself.

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22 ***Clunies-Ross*** *v Commonwealth* (1984) 155 CLR 193 at 201 (Gibbs CJ, Mason, Wilson, Brennan, Deane, Dawson JJ).

23 *Northern Land Council v Commonwealth* (1986) 161 CLR 1 at 6 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

24 *Yunupingu* (2025) 99 ALJR 519 at [2] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [114] and [202] (Gordon J), [242]-[243], (Edelman J) and [373] (Steward J).

25 *Attorney-General (Cth) v* ***Schmidt*** (1961) 105 CLR 361 at 372 (Dixon CJ, Fullagar, Kitto, Taylor and Windeyer JJ agreeing at 373, 377), stating "[i]t must be borne in mind that s 51(xxxi) confers a legislative power and it is that power only which is subject to the condition that the acquisitions provided for must be on just terms". See also *Yunupingu* (2025) 99 ALJR 519 at [17] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

26 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 223 (Mason J) and 258 (Brennan J); *Thomas v Mowbray* (2007) 233 CLR 307 at [151] (Gummow and Crennan JJ, Gleeson CJ agreeing at [6]).

27 PS [29](c).

20. As to the Act's legal operation, it is clear from the terms of s 7 that Parliament intended the *Home Affairs Act* to prevail over a series of statutes that regulate Australia's relations with foreign states. Specifically, s 7(1) provides that the Act is to have effect despite any other law of the Commonwealth or of a State or Territory, while s 7(2) specifically provides that it prevails over a list of Acts many of which regulate the rights and immunities of foreign states and their representatives in Australia.[28] By modifying the operation of those Acts, the *Home Affairs Act* has a sufficient connection with Australia's foreign relations with the Russian Federation.

21. In addition, the *Home Affairs Act* solely concerns rights and interests held in connection with a lease over land that has had only one lessee since April 2008: the Government of the Russian Federation. That land was leased on condition that it be used "only for any diplomatic consular or official purpose of the Government of the Russian Federation or for the purpose of an official residence for any accredited agent of that Government".[29] Indeed, the Plaintiff acknowledges that the land was designated "for use as a Diplomatic Mission": PS [28]. These matters provide an ample basis for the Act to be characterised as one that is likely to bear upon Australia's foreign relations, given that the "practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power."[30] Accordingly, while the point should not be reached (having regard to s 122), if necessary the Court should hold that the *Home Affairs Act* is wholly supported by s 51(xxix) of the Constitution.

The Plaintiff's submission about s 51(xxxi)

22. It is agreed in these proceedings that the Commonwealth's purpose in terminating the Lease by enacting the *Home Affairs Act* was <u>not</u> to put the land to any particular proposed use or application.[31] Instead, its sole purpose was to alleviate the national security risk to which the Prime Minister and Minister for Home Affairs referred in announcing the Act by preventing the Russian Federation from occupying the land. In those circumstances, the Plaintiff contends that the *Home Affairs Act* is not supported by

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28 *Consular Privileges and Immunities Act 1972* (Cth), the *Diplomatic Privileges and Immunities Act 1967* (Cth) and the *Foreign States Immunities Act 1985* (Cth).

29 SCB 62, clause 3(b). Indeed, the land is part of a larger area that has been designated, under the National Capital Plan prepared under the *ACT Planning and Land Management Act 1988* (Cth), as land for diplomatic missions: Special Case [11(b)] (SCB 37).

30 *Grain Pool* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

31 Special Case [26] (SCB 40).

s 51(xxxi) of the Constitution because that power is confined to the making of laws with respect to the acquisition of property for some particular proposed use or application of the property to be acquired: PS [26]-[27].

23. The Plaintiff cites *Clunies-Ross v Commonwealth*[32] in support of that submission. In that case, six Justices said that the question whether s 51(xxxi) "should be construed as including the power to acquire property not for a purpose related to any need for or desired use of the property but for the purpose of depriving the owner of it and thereby indirectly achieving some purpose in respect of which the Parliament has power to make laws" was "not without difficulty".[33] The Court noted statements in earlier cases which understood s 51(xxxi) to be "confined to the making of laws with respect to acquisition of property for some purpose related to a need for or proposed use or application of the property to be acquired".[34] Ultimately, however, the Court found it unnecessary to express any concluded view on the scope of s 51(xxxi), because it held that the Act in question did not authorise the acquisition that had occurred for reasons independent of the scope of s 51(xxxi).[35]

24. While the Plaintiff's submissions do not engage with them, authorities decided after *Clunies-Ross* recognise that an "acquisition" for the purposes of s 51(xxxi) extends to obtaining "some identifiable benefit or advantage relating to the ownership or use of property"[36] which need not correspond precisely with what was taken.[37] Those authorities should be reconciled with *Clunies-Ross* (a case in which the Commonwealth

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32 (1984) 155 CLR 193.

33 *Clunies-Ross* (1984) 155 CLR 193 at 200 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

34 *Clunies-Ross* (1984) 155 CLR 193 at 200-201 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ), citing *Andrews v Howell* (1941) 65 CLR 255 at 281-282 (Dixon J); *Jones v Commonwealth* (1963) 109 CLR 475 at 483 (Dixon J); *Schmidt* (1961) 105 CLR 361 at 372 (where Dixon CJ considered it unnecessary to determine "[h]ow much further" s 51(xxxi) goes than to support "laws with respect to the acquisition of real or personal property for the intended use of any department or officer of the Executive Government of the Commonwealth in the course of administering laws"). See also *W H Blakeley & Co Pty Ltd v Commonwealth* (1953) 87 CLR 501 at 518-519, where the Court said "It seems to be plain enough that [s 51(xxxi) of] the Constitution, in using the word 'purpose', is speaking of the object for which the land is needed." (emphasis added)

35 *Clunies-Ross* (1984) 155 CLR 193 at 201 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

36 *Yunupingu* (2025) 99 ALJR 519 at [172] (Gordon J), citing ***Mutual Pools*** *& Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ); ***ICM Agriculture*** *Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [82] (French CJ, Gummow and Crennan JJ); ***JT International*** *SA v Commonwealth* (2012) 250 CLR 1 at [152]-[153] (Gummow J), [173] (Hayne and Bell JJ), [198] (Heydon J).

37 *Yunupingu* (2025) 99 ALJR 519 at [172] (Gordon J), citing ***Georgiadis*** *v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304-305 (Mason CJ, Deane and Gaudron JJ).

clearly would have acquired a proprietary interest) by recognising that, in order to be supported by s 51(xxxi), a law must have the effect of conferring a benefit of a proprietary character on someone[38] and the taking must be for a purpose related to a need for, or proposed use or application of, the property that has been acquired. Such a purpose will exist at least when property is taken so that it can be used or reserved to achieve some other purpose.[39] But it will not exist if a law "acquire[s] property not for a purpose related to any need for or desired use of the property but for the purpose of depriving the owner of it".[40] As Deane and Gaudron JJ said in *Mutual Pools*, "the fact remains that s 51(xxxi) is directed to 'acquisition' as distinct from 'deprivation'".[41] And, as the words of s 51(xxxi) itself make clear, it applies only where an acquisition is for a "purpose in respect of which the Parliament has the power to make laws". If property is taken without any need for, or proposed use or application of, that property, then there is no affirmative purpose of the kind s 51(xxxi) requires in order for there to be an "acquisition". At most, there is a negative taking or deprivation of property, which does not enliven s 51(xxxi).

25. A similar, albeit not precisely analogous, distinction was drawn in the pre-federation United States authorities between taking land for public purposes, and the police power to regulate or even destroy property in order to prevent noxious use, with only the former regulated by the "takings clause" of the Fifth Amendment.[42]

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38 *JT International* (2012) 250 CLR 1 at [42] (French CJ), [144]-[154] (Gummow J) and [180]-[189] (Hayne and Bell JJ); *Commonwealth v Tasmanian (Tasmanian Dam Case)* (1983) 158 CLR 1 at 145 (Mason J) and 248 (Brennan J).

39 That purpose is clear in the early s 51(xxxi) cases, which concerned acquisitions of things for the war effort. The things acquired included land (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261, ***Grace Brothers*** *Pty Ltd v Commonwealth* (1946) 72 CLR 269, *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382), a printing press (*Johnston Fear & Kingham & The Offset Printing Company Proprietary Limited v Commonwealth* (1943) 67 CLR 314), a ship (*Minister of State for the Navy v Rae* (1945) 70 CLR 339) or wheat (*Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495), all of which it could be inferred were needed for, or in relation to, the war effort. The purpose is less clear, but still apparent, in *Georgiadis* (1994) 179 CLR 297 at 306, where Mason CJ, Deane and Gaudron JJ said the purpose of the law imposing a statute bar was to "confer a distinct financial benefit on the Commonwealth". That financial benefit was "proprietary in nature" for s 51(xxxi) purposes because it was, as Brennan J said at 311, in the nature of a "release". It also existed in *Newcrest Mining (WA Ltd) v Commonwealth* (1997) 190 CLR 513, where the Commonwealth's proposed use of land as a national park required it to be unencumbered by Newcrest's rights to conduct mining activities: see at 530 (Brennan CJ), 634 (Gummow J, Gaudron and Toohey JJ relevantly agreeing at 560 and 561 respectively) and 639 (Kirby J).

40 *Clunies-Ross* (1984) 155 CLR 193 at 200 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

41 (1994) 179 CLR 155 at 185.

42 See, eg, *Mugler v Kansas* 123 US 623 (1887) at 668-669.

26. The purpose of the *Home Affairs Act* was to protect Parliament from the risk to national security that had been identified as arising from the Russian Federation's occupation of land in close proximity to Parliament House. The means adopted to achieve that purpose was the termination of the lease (regulation of the use of a diplomatic site being impracticable[43]). But the lease was not terminated because of a need for, or proposed use or application of, the land the subject of the lease. That being so, *Clunies-Ross* suggests (consistently with a similar analysis in the pre-federation US authorities) that the proper characterisation of the Act is that it "takes" property without "acquiring" it for any purpose (let alone "a purpose in respect of which the Parliament has power to make laws").[44] For that reason, the *Home Affairs Act* is not properly characterised as a law with respect to s 51(xxxi).

27. That conclusion – for which the Plaintiff also contends – does not produce the result that the Plaintiff seeks. In fact, it produces the opposite result. The legal significance of the *Home Affairs Act* not being a law with respect to s 51(xxxi) is <u>not</u> that the Act is invalid. It is that s 51(xxxi) does not "abstract" from the two heads of power discussed above that do support the *Home Affairs Act*, because the abstraction principle "does not apply except with respect to the ground actually governed by par. (xxxi) of s 51".[45]

II. JUST TERMS

28. The Plaintiff submits, in the alternative, that if the *Home Affairs Act* is supported by a Commonwealth head of power then the Commonwealth is obliged to pay it a reasonable amount of compensation pursuant to s 6(1) of that Act: PS [30]-[32].

29. Section 6(1) of the *Home Affairs Act* requires the Commonwealth to pay a reasonable amount of compensation only "[i]f the operation of this Act 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 submits that this condition is not

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43 Including by reason of immunities in the *Diplomatic Privileges and Immunities Act 1967* (Cth) and the *Foreign States Immunities Act 1985* (Cth).

44 *JT International* (2012) 250 CLR 1 at [42] (French CJ) and [278]-[279] (Crennan J), both quoting Mason J from *Commonwealth v Tasmania* (1983) 158 CLR 1 at 145, and noting the many authorities endorsing that passage.

45 *Schmidt* (1961) 105 CLR 361 at 372 (Dixon CJ, Fullagar, Kitto, Taylor and Windeyer JJ agreeing at 373, 377). As Dixon CJ went on to say, "[i]t must be borne in mind that s 51(xxxi) confers a legislative power and it is that power only which is subject to the condition that the acquisitions provided for must be on just terms". See also *JT International* (2012) 250 CLR 1 at [167] (Hayne and Bell JJ).

satisfied because the *Home Affairs Act* is not a law with respect to the acquisition of property for the purposes of s 51(xxxi). That is, the Home Affairs Act is not a law with respect to s 51(xxxi)'s "compound conception, namely, 'acquisition-on-just-terms'"[46]. That is so for two independent reasons.

30. The first reason is that advanced by the Plaintiff and discussed in paragraphs 23 to 27 above, to the effect that s 51(xxxi) is confined to the making of laws with respect to the acquisition of property for a purpose related to a need for, or proposed use or application of, the property to be acquired. It is agreed that the *Home Affairs Act* did not terminate the Plaintiff's lease to facilitate any such use or application of the land. That being so, the obligation to pay "a reasonable amount of compensation" under s 6(1) of the *Home Affairs Act* is not enlivened, because s 6(1) applies only if the Act "would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies". On the Plaintiff's own argument, that condition is not satisfied.

31. The second reason is that, having regard to the purpose and operation of the *Home Affairs Act*, it would be incongruous to apply the notion of "just terms" to the termination of the Plaintiff's lease over the land. That argument is developed below.

A requirement to provide just terms would be incongruous

General principles

32. Section 51(xxxi) is, "first and foremost, a grant of power".[47] The purpose of the provision, as conceived of by the framers, was to ensure that Parliament would have the power to acquire property compulsorily for public use.[48] Its function was to put beyond doubt the Commonwealth's "right of eminent domain for federal purposes".[49] It has since been recognised that the provision also serves an important purpose as a constitutional guarantee. Thus, where s 51(xxxi) applies, it abstracts from other heads of power the power to acquire property,[50] meaning that the Commonwealth's only power to

46 *Grace Brothers* (1946) 72 CLR 269 at 290 (Dixon J)

47 *Mutual Pools* (1994) 179 CLR 155 at 187 (Deane and Gaudron JJ).

48 *Grace Brothers* (1946) 72 CLR 269 at 290-291 (Dixon J).

49 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p 640, quoted in *Newcrest Mining* (1997) 190 CLR 513 at 649 (Kirby J).

50 *Schmidt* (1961) 105 CLR 361 at 370-372 (Dixon CJ); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 526 (Dawson and Toohey JJ); *Mutual Pools* (1994) 179 CLR 155 at 177, 179, 185, 188, 193 (Deane and Gaudron JJ); *Re Director of Public Prosecutions; Ex parte* ***Lawler*** (1994) 179 CLR 270 at 283 (Deane and Gaudron JJ); *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160, 166 (Dawson J); ***Theophanous*** *v Commonwealth* (2006) 225 CLR 101 at [55]

acquire property is a power that requires the provision of just terms.

33. The abstraction analysis should not be applied "in a too sweeping and undiscriminating way".[51] In particular, it should not be elevated "to a level which would so fetter [a power] as to reduce the capacity of the Parliament to exercise [it] effectively".[52] That is why, notwithstanding its significance as a constitutional "guarantee", it is well-established that s 51(xxxi) is not an exhaustive statement of Parliament's powers to acquire property compulsorily.[53] There are some laws which, although they effect an acquisition of property, are "altogether outside the scope of s 51(xxxi)".[54] The reason for that has been variously described. Thus, justices of this Court have said that some laws that acquire property "are of their nature antithetical to"[55] or "inconsistent"[56] with the notion of just terms, or that they are of a kind to which that notion is "irrelevant"[57] or that they divest property "in circumstances in which no question of just terms could sensibly arise".[58]

34. For laws of the above kind, it would be "incongruous"[59] to require the provision of just terms and, as such, those laws have been held not to engage the guarantee in s 51(xxxi).[60] Examples include laws imposing taxation;[61] laws requiring the payment of provisional

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(Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [186] (Gummow and Hayne JJ); *ICM Agriculture* (2009) 240 CLR 140 at [135] (Hayne, Kiefel and Bell JJ); *JT International* (2012) 250 CLR 1 at [167] (Hayne and Bell JJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [107] (Gageler J); *Cunningham v Commonwealth* (2016) 259 CLR 536 at [61] (Gageler J), [271] (Gordon J); *Yunupingu* (2025) 99 ALJR 519 at [15] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [182] (Gordon J) .

51 *Schmidt* (1961) 105 CLR 361 at 372 (Dixon CJ).

52 *Mutual Pools* (1994) 179 CLR 155 at 180 (Brennan J).

53 *Mutual Pools* (1994) 179 CLR 155 at 169 (Mason CJ).

54 *Schmidt* (1961) 105 CLR 361 at 373 (Dixon CJ, Fullagar, Kitto, Taylor and Windeyer JJ agreeing at 373, 377).

55 *Mutual Pools* (1994) 179 CLR 155 at 187 (Deane and Gaudron JJ).

56 *Theophanous* (2006) 225 CLR 101 at [56] (Gummow, Kirby, Hayne, Heydon and Crennan JJ), quoting *Lawler* (1994) 179 CLR 270 at 285 (Deane and Gaudron JJ).

57 *Mutual Pools* (1994) 179 CLR 155 at 220 (McHugh J).

58 *Trade Practices Commission v* ***Tooth*** *& Co Ltd* (1979) 142 CLR 397 at 408 (Gibbs J). See also Stephen J at 414, where his Honour quotes the dissenting opinion of Brandeis J in *Pennsylvania Coal v Mahon*, 260 US 393 (1922) to the effect that the "takings clause" is not engaged by a "restriction imposed to protect the public health, safety or morals from dangers threatened" because that is "merely the prohibition of a noxious use".

59 *Theophanous* (2006) 225 CLR 101 at [56]-[57] and [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Lawler* (1994) 179 CLR 270 at 285 (Deane and Gaudron JJ); *Airservices Australia v Canadian Airlines* (2000) 202 CLR 133 at [345] (McHugh J) and [494] (Gummow J).

60 See, further, *Yunupingu* (2025) 99 ALJR 519 at [189] (Gordon J) and the authorities cited therein.

61 *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 508 (Mason CJ, Brennan, Deane and Gaudron JJ).

tax;[62] laws for the forfeiture of property owned by a person who has committed an offence, or of property that was used in the commission of an offence;[63] laws for the forfeiture of illegally imported goods in the hands of an innocent third party;[64] laws imposing civil penalties;[65] laws for the forfeiture of superannuation benefits by parliamentarians found to have engaged in corruption;[66] laws for the acquisition of property of subjects of a former enemy State, to be applied to reparations payable by that State;[67] and laws vesting a bankrupt's estate in an official receiver or trustee.[68]

35. In some of those examples, the payment of compensation would necessarily frustrate the legislative purpose. For example, if the Commonwealth were required to provide just terms for the levying of a tax, or for the imposition of a criminal or civil penalty, the operation of the law would be directly undermined by a requirement that monies paid to the Commonwealth must be reimbursed to the payer.

36. Importantly, however, the circumstances in which it would be incongruous to require the provision of just terms are not limited to the obvious examples given above. They extend to situations where to require just terms to be provided would weaken or undermine the "normative effect"[69] of a law that is within the legislative power of the Commonwealth. For example, a law that provides for the forfeiture to the Commonwealth of illegally imported goods serves the legitimate purpose of vindicating customs laws. To facilitate that purpose, such a law is not subject to a "just terms" requirement even insofar as it requires forfeiture of the property of a third party who acquired that property for value without notice.[70] Another example is a law which extinguishes the superannuation entitlements of a member of Parliament who is found to have engaged in corrupt conduct. Such a law reflects Parliament's judgement that a parliamentarian should only receive such benefits "for the honest discharge of the duties of office", for the purpose of

62 *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263 (Dixon CJ) and 270 (Webb J).

63 *Lawler* (1994) 179 CLR 270 at 276 (Mason CJ), 281 (Brennan J), 285 (Deane and Gaudron JJ), 291 (Dawson J), 292 (Toohey J), 293 (McHugh). See also *Tooth* (1979) 142 CLR 397 at 408 (Gibbs J).

64 *Burton v Honan* (1952) 86 CLR 169 at 180-181 (Dixon CJ).

65 *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 487-489 (the Court).

66 *Theophanous* (2006) 225 CLR 101 at [64] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

67 *Schmidt* (1961) 105 CLR 361 at 373 (Dixon CJ).

68 *Schmidt* (1961) 105 CLR 361 at 372 (Dixon CJ).

69 *Theophanous* (2006) 225 CLR 101 at [14] (Gleeson CJ); *Lawler* (1994) 179 CLR 270 at 180-181 (Brennan J).

70 *Burton v Honan* (1952) 86 CLR 169 at 180-181 (Dixon CJ).

encouraging the maintenance of "high standards of probity in the conduct of public affairs".[71] It would be incongruous for laws of this kind to be subject to s 51(xxxi) because that would "weaken… the normative effect of the principle of probity".[72]

37. This understanding of the operation of s 51(xxxi) finds some support in the pre-federation authorities on s 51(xxxi) of the "takings clause" of the Fifth Amendment to the United States Constitution. Even in the context of the takings clause (which is a prohibition, rather than a grant of power[73]), it was well accepted in US law at the time of federation that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking";[74] and that government cannot be "burdened with the condition that [it] must compensate … individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community".[75] A law for such a purpose did not amount to a "taking" even if it entirely destroyed the property concerned.[76] Although there was no discussion of the US authorities during the Convention Debates, some of them were known at least to Quick and Garran.[77]

The purpose of the *Home Affairs Act*

38. The purpose of the *Home Affairs Act* was to address the "very clear security advice as to the risk presented by a new Russian presence so close to Parliament House".[78] At a press conference held on the day the legislation was introduced, the Prime Minister explained that the decision to introduce the legislation was "taken in the national security interests of Australia" and "based upon very specific advice" about the nature of the construction proposed, the location of the site, and "the capacity that would present in terms of

71 *Theophanous* (2006) 225 CLR 101 at [10] (Gleeson CJ).

72 *Theophanous* (2006) 225 CLR 101 at [14] (Gleeson CJ); see also [63] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

73 As to which see *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 289-290 (Dixon J).

74 See, most relevantly, *Mugler v Kansas* 123 US 623 (1887) at 668. As to the significance of the use of property being "declared" to be injurious, see also the post-federation decision in *Reinman v Little Rock* 237 US 171 at 176 (1915).

75 *Mugler v Kansas* 123 US 623 (1887) at 669.

76 *Mugler v Kansas* 123 US 623 (1887) at 669.

77 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) pp 641-642 § 217.

78 Special Case [27] (SCB 40, 67); Explanatory Memorandum for the Home Affairs Bill 2023 (Cth), [13].

potential interference with activity that occurs in this Parliament House".[79] That advice was informed by information provided by ASIO, being the organisation tasked with obtaining, correlating and evaluating intelligence relevant to national security and advising government on matters relating to security.[80]

39. It is true that the advice in question is not before the Court, as public interest immunity prevents it from being put into evidence:[81] cf PS [29(g) and (h)]. Nevertheless, there is no question of Parliament "recit[ing] itself into power" (cf PS [20(a)]),[82] because the constitutional basis for the *Home Affairs Act* – which as explained above rests on s 122 and/or s 51(xxix) of the Constitution – does not depend upon any fact that is not before the Court or upon the opinion of any law-maker: cf PS [29(i)]. In particular, the connection between the *Home Affairs Act* and the heads of power that support it does not depend upon the existence or content of the relevant advice, or whether as a matter of objective fact the Russian Federation's presence on the land created a risk to security (as might be relevant if the constitutional basis for the Act was the defence power).[83] For the purposes of the incongruity argument, what matters is that the Special Case provides ample foundation for inferring, *first*, that advice informed by highly classified information provided by ASIO was provided to both the government and the opposition about "the risk presented by a new Russian presence so close to Parliament House"[84] and, *second*, that Parliament enacted the Home Affairs Act in response to that advice.[85]

40. Parliament's power is at its zenith when it legislates to protect its own security, because if Parliament cannot ensure the security of the very place where it meets then it cannot

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79 Special Case [27] (SCB 40, 68, 70).

80 *Australian Security Intelligence Organisation Act 1979* (Cth), s 17(1)(a)-(c).

81 See, eg, *HT v The Queen* (2019) 269 CLR 403 at [32] (Kiefel CJ, Bell and Keane JJ), [71]-[72] (Gordon J); *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61. The advice has a "very high security classification" because ASIO has assessed that its disclosure "would be expected to cause serious damage to the national interest": Special Case [28] (SCB 40).

82 Cf *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 258, where Fullagar J famously observed that "[a] power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse."

83 This Court has described the principle in the *Communist Party* (as expounded by Williams J at 222) as being that "it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation": see *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [59] (the Court); *Unions NSW v New South Wales* (2019) 264 CLR 595 at [67], [94] (Gageler J); *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127 at 165 (Dixon CJ, McTiernan and Webb JJ).

84 Extract of transcript of press conference on 15 June 2023, SCB 67.

85 See paragraphs 7 to 10 above. See *Unions NSW v New South Wales* (2019) 264 CLR 595 at [94] (Gageler J); *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 (Dixon CJ).

ensure a practical precondition to the exercise of Commonwealth legislative power.[86] The significance of Parliament being empowered to ensure its own security was recognised in the Convention Debates. For example, the provision that was to become s 125 was amended to direct that the seat of government be within Commonwealth territory, so that "wherever the seat of government may be fixed, the federal authority shall have absolute control over it".[87] That section was modelled on a United States equivalent,[88] which was adopted because it would not "be possible to have a Federal Parliament unless it be situated on some territory over which it would have control", and where the federal army and police would be located.[89]

41. The constitutional conception of "just terms" does not extend to requiring a foreign state to be compensated for actions taken in order to address the risk of that foreign state interfering with Australia's democratic institutions.[90] Here, the relevant lease permitted the land the subject of the lease to be used "only for any diplomatic consular or official purpose of the Government of the Russian Federation".[91] The government seemingly having been advised, and the Parliament having accepted, that the Russian Federation's proposed use of the land went beyond those purposes and posed a risk to the Parliament, it is difficult to conceive of circumstances in which it would be more incongruous – or less "just" – to require the payment of compensation. Were it otherwise, Australian taxpayers would be required to compensate the Russian Federation for action taken to address a risk that emanates from the Russian Federation itself. The situation is

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86 See, eg Constitution ss 22 and 39.

87 Official Record of the Convention Debates, Third Session (Government Printer, 1898) (**Convention Debates**), 3 March 1898, pp 1802 (Sir George Turner), proposing an amendment to the effect that the seat of government "shall be within federal territory". Supporting the amendment, Mr Bernard Wise referred to the example of Parliament House in Toronto, which was not "in the old days of the Union" located in federal territory and was "burnt down because the state and the municipality both refused to render any assistance": p 1805.

88 Compare cl 53(ii) of the draft Bill adopted by the National Australasian Convention on 9 April 1891 and US Constitution, Art I, § 8.

89 Convention Debates, 3 March 1898, pp 1813-14 (Sir John Forrest). See also Publius (J Madison), *Federalist No. 43*, where Madison argued that "complete authority at the seat of government" was of "indispensable necessity" because, without it, "the public authority might be insulted and its proceedings interrupted with impunity", and members of the federal government made dependent on the states "for protection in the exercise of their duty". *Federalist No. 43* influenced the framers: see R Garran, *The Coming Commonwealth* (Angus & Robertson, 1897) at 181; S Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (Government Printer, 1896) at 21-22.

90 That may be but a particular application of a general principled basis for identifying incongruity, being that the constitutional conception of "just terms" does not extend to paying compensation to anyone whose property is taken in order to prevent it from being used in a way that is harmful to others. However, that more general proposition does not require determination in this case.

91 Special Case [17(c)] (SCB 38).

analogous to, but even stronger than, that considered in *Schmidt*, where Taylor J (with whom Windeyer J agreed) observed that to hold that "enemy property could validly be seized only under legislation which provided compensation to the expropriated owners would … be the height of absurdity".[92] As Dixon CJ put it, "[t]he whole subject is altogether outside the scope of s 51(xxxi)".[93]

42. The termination of the Russian Federation's lease is far removed from an acquisition of property belonging to an individual or an Australian State, those being the paradigm cases to which s 51(xxix) is directed. In the unusual circumstances of this case, the ramifications of the termination of the lease are properly left to be resolved through diplomatic negotiations between States, rather than through domestic compensation proceedings. Justice Dixon's observation in *Grace Brothers* that "what is just as between the Commonwealth and a State, two Governments, may depend on special considerations not applicable to an individual"[94] is even more apt as between the Commonwealth and a foreign State.

PART VI: ORDERS SOUGHT

43. The questions in the Special Case should be answered:

(1) No;

(2) No;

(3) If question 2 is answered "No", unnecessary to answer. Otherwise, Yes;

(4) The Plaintiff.

PART VII: ESTIMATE OF TIME

44. The Commonwealth estimates that up to 2 hours will be required for its oral argument.

Dated 30 May 2025

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92 *Schmidt* (1961) 105 CLR 361 at 377.
93 *Schmidt* (1961) 105 CLR 361 at 373.
94 *Grace Brothers* (1946) 72 CLR 269 at 290 (Dixon J).

ANNEXURE TO DEFENDANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
			Constitutional provisions		
1	*Commonwealth Constitution*	Current	ss 1, 22, 39, 51(xxix), 51 (xxxi), 122, 125	In force at all relevant times.	All relevant times.
2	*United States Constitution*	Current	Art 1 § 8, Amend V	For illustrative purposes only.	All relevant times.
			Statutory provisions		
3	*Australian Security Intelligence Organisation Act 1979* (Cth)	Version 68 (2 April 2022 to 30 June 2023)	s 17(1)(a)-(c)	In force when *Home Affairs Act* enacted.	In force when *Home Affairs Act* enacted.
6	*Consular Privileges and Immunities Act 1972* (Cth)	Version 13 (21 October 2016 to current)	Entirety	In force when *Home Affairs Act* enacted to present.	All relevant times.
7	*Diplomatic Privileges and Immunities Act 1967* (Cth)	Version 15 (21 October 2016 to current)	Entirety	In force when *Home Affairs Act enacted* to present.	All relevant times.
8	*Foreign States Immunities Act 1985* (Cth)	Version 5 (18 February 2022 to current)	Entirety	In force when *Home Affairs Act enacted* to present	All relevant times.
9	*Home Affairs Act 2023* (Cth)	As made (15 June 2023 to current)	ss 2, 4, 5, 6, 7	In force at all relevant times.	All relevant times.

10	*Judiciary Act 1903* (Cth)	Version 49 (18 February 2022 to 11 June 2024)	s 78B	In force when s 78B notice serviced and no material difference.	All relevant times.